A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina

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A "MEANINGFUL" BASIS FOR THE DEATH PENALTY: THE PRACTICE, CONSTITUTIONALITY, AND JUSTICE OF CAPITAL PUNISHMENT IN SOUTH CAROLINA

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Over one hundred murder cases have been tried since 1977 when the South Carolina legislature adopted a new scheme for imposing capital punishment for murder. This article considers the imposition of the penalty in terms of practice, constitutionality, and philosophical justification. Two points are clearly indicated by this consideration. First, capital punishment is consistent with the United States Constitution and with the requirements of just punishment only if fundamental prerequisites such as the prohibition of racial discrimination are respected and only if there is a meaningful basis for selecting the persons to be sentenced to death. A meaningful basis exists if the death penalty is imposed in accordance with standards and procedures which adequately insure that the crime plausibly could have been deterred by execution but not by life imprisonment and that the particular crime and defendant are so wrongful that the death penalty is clearly proportional to the wrongfulness. Second, while the South Carolina statutory scheme generally complies with these requirements, there are several areas where it does not, or where, on the basis of current data, a determination cannot be made whether it is consistent. Because of these shortcomings, this article goes beyond description and analysis to suggest areas for further research and to propose reforms. The authors of this article hope that these reforms will be adopted in order to preserve South Carolina's approach to capital punishment from constitutional or philosophical objections. However, it is not clear that they will be adopted; and some of the flaws in the South Carolina system may not be amenable to any reforms short of abandoning the death penalty.

The article is divided into three parts: (1) a discussion of South Carolina law, both in terms of statutes and cases and in terms of practice and procedures used in implementing the statutes and case law; (2) a brief analysis of the constitutionality of the South Carolina scheme in light of recent United States Supreme Court cases; and (3) a philosophical analysis of the justice of capital punishment in South Carolina. The discussion in each part is limited in the sense that it focuses on such narrow ques-

1. S.C. Code ANN. §§ 16-3-20 through -28 (Supp. 1981). Unless otherwise indicated, all code section references in this article are to the South Carolina Code Annotated. For an indication of the number of murder cases see infra notes 323-352 and accompanying text.
tions as: How does South Carolina decide whether a person should be executed for murder rather than imprisoned for life? Is this approach to capital punishment constitutional? How can it be improved?

On the other hand, the article adopts a broad perspective on these narrow issues and not only discusses statutory and case law, but also considers empirical and philosophical perspectives on the death penalty in South Carolina. In addition, the article has a broad audience in mind and is designed to assist not only lawyers and judges, but also legislators, administrators, and citizens as they work to improve the criminal justice system in South Carolina.

I. THE SOUTH CAROLINA SCHEME FOR IMPOSING THE DEATH PENALTY

A. Introduction and Summary

The present South Carolina capital punishment statute became effective on June 8, 1977. The previous statute had been declared unconstitutional in State v. Rumsey. In order to avoid such constitutional challenges, the 1977 statute was patterned after the death penalty statute of Georgia, which had been up-

3. 267 S.C. 236, 226 S.E.2d 894 (1976). A brief history of the recent legislation enacted in this area in response to decisions by the U.S. Supreme Court is found in State v. Rogers, 270 S.C. 285, 287-88, 242 S.E.2d 215, 216 (1978). Persons who committed murder in the period after Rumsey was decided and before the effective date of the current act cannot be sentenced to death because there was no capital punishment statute in effect at the time of their crimes. State v. Logan, ___ S.C. ___, 286 S.E.2d 125, 127 (1982). Persons tried under the 1974 statute, which was stricken down in Rumsey, could not be resented and subjected to the possible imposition of capital punishment because they could not be granted the required procedural safeguards. Rodgers, 270 S.C. at 293, 242 S.E.2d at 217-18. Since the emphasis of Logan is on the notice to defendant that murder is subject to death and the emphasis of Rodgers is on procedural safeguards, it is not clear whether a person could be tried and sentenced under the current South Carolina statute for a murder committed prior to June 8, 1977. Such retrospectivity under the Florida statute was upheld in Dobbert v. Florida, 432 U.S. 282 (1977), and one South Carolina trial court has ruled that such persons can be tried under the current statute. State v. Deveaux, No. 81-GS-10-1086, (Ct. Gen. Sess. Charleston Co. S.C. Feb. 22, 1982)(order denying motion to quash notice of intent to seek the death penalty).

held as constitutional by the United States Supreme Court in *Gregg v. Georgia.*\(^5\) The underlying theory of *Gregg,* and a line of related cases beginning in 1972 with *Furman v. Georgia,*\(^6\) is that states may impose capital punishment for murder without violating the prohibition against cruel and unusual punishment or the rights of due process and equal protection if the scheme insures a meaningful basis for imposing the death penalty and avoids an arbitrary and capricious imposition of the death penalty.\(^7\) Thus, the South Carolina scheme can be viewed as a complex set of substantive and procedural rules designed to structure and limit the discretionary decisions which are necessarily involved at each stage of the determination of whether to impose the death penalty.

The first step in this long process is the decision by the solicitor to seek the death penalty. The statute does not attempt to limit this exercise of prosecutorial discretion. However, the solicitor's decision to seek the death penalty triggers a number of special pretrial protections for the defendant including rights to certain types of notice and to special legal and other assistance.

The trial proceedings are different from ordinary criminal cases in several respects. The voir dire is influenced by the special nature of the punishment. In addition, the trial itself is divided into two parts. In the first phase of the trial, the issue is whether the defendant is guilty of murder. If he is guilty, a second hearing is conducted to determine whether he will be sentenced to life imprisonment or to death. This sentencing decision is largely based upon a consideration of a statutory list of aggravating and mitigating factors. In jury trials, the jury will make the initial sentencing decision, and the death penalty can only be imposed if the jurors unanimously recommend death. Prior to sentencing on such a recommendation, the trial judge must review the jury's decision in order to insure that it has not abused its discretion.

Whenever the death penalty is imposed, the sentence is au-

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7. *See infra* notes 108-32 and accompanying text.

tomatically reviewed by the South Carolina Supreme Court. In addition to other alleged errors raised by the defendant, this review must address the questions of whether the imposition of the death sentence is arbitrary, whether it is supported by a statutory aggravating circumstance, and whether the penalty is "proportional."

This statutory scheme has been upheld by the South Carolina Supreme Court against a variety of constitutional attacks, including allegations that it violates the rights to due process, to equal protection, and to freedom from cruel and unusual punishment granted by the United States Constitution, as well as the South Carolina constitutional prohibition of cruel, corporal, and unusual punishment.

B. Pretrial Proceedings

1. Prosecutorial Discretion

The South Carolina statute makes no attempt to guide or restrict the solicitor's exercise of discretion in making decisions to press murder charges, to seek the death penalty, or to plea bargain with a defendant or his defense counsel. Thus, the initial decisionmaking and negotiation process which determines the route an alleged murderer will travel through the criminal justice system is often completed before any statutory provisions come into effect.

In *State v. Shaw*, the two defendants argued that the solicitor's unbridled discretion rendered the statute per se invalid and that the discretion was arbitrarily applied in their case. The court summarily rejected the per se claim because such claims had been rejected by the United States Supreme Court. The court then noted that the prosecutor had not abused his discretion when he failed to seek the death penalty against a third participant in the defendants' crime because there were three

11. Id. at 204, 255 S.E.2d at 804. Similar claims were rejected in State v. Thompson, ___ S.C. ___, ___, 292 S.E.2d 581, 584 (1982). For a discussion of the United States Supreme Court cases on this issue see *infra* notes 396, 404-05, 413, 508-30 and accompanying text.
factors distinguishing the defendants from the other participant: (1) the two defendants were the actual triggermen; (2) the state needed to secure eyewitness testimony from the other participant since there were no other living witnesses to the murder; and (3) there was less likelihood that a judge or jury would impose the death sentence on the other participant if the solicitor decided to seek it.\(^\text{12}\)

The court has not required solicitors to undertake any sort of proportionality review of similar defendants and crimes in order to compare decisions of whether to seek the death penalty in their own or other circuits. Nor has the court made any attempt to monitor these decisions on its own in order to determine whether prosecutorial discretion is exercised fairly.\(^\text{13}\) The importance of this lack of comparison is indicated by the fact that there are at least three instances in which solicitors did not seek the death penalty in return for a plea, even though the aggravating circumstances in these cases were similar to cases in which the death penalty was imposed at trial and upheld by the supreme court.\(^\text{14}\) The solicitor's decision not to seek death in these three cases could not have been based on the first two factors in

\[\text{12. Shaw, 273 S.C. at 204, 255 S.E.2d at 804.}\]

\[\text{13. See infra notes 277-82, 303-08, 395-563 and accompanying text.}\]

\[\text{14. Information in the South Carolina Supreme Court files, see infra notes 303-05, 323-26, 333-37 and accompanying text, indicates that the death penalty was not sought by the solicitor for the defendants appearing in the table below:}\]

<table>
<thead>
<tr>
<th>Case</th>
<th>Trial Date</th>
<th>County</th>
<th>Plea</th>
<th>Sentence Sought</th>
<th>Sentence Re’d</th>
<th>Aggravating Circumstances Established</th>
</tr>
</thead>
<tbody>
<tr>
<td>Franklin DeWitt Morgan</td>
<td>June, 1979</td>
<td>Richland</td>
<td>Guilty</td>
<td>Death (withdrawn in return for plea)</td>
<td>Life (by Judge)</td>
<td>Prior murder Convictions</td>
</tr>
<tr>
<td>Joe Stinson</td>
<td>Feb., 1980</td>
<td>York</td>
<td>Guilty</td>
<td>Death (withdrawn in return for plea)</td>
<td>Life (by Judge)</td>
<td>Housebreaking, armed robbery</td>
</tr>
</tbody>
</table>

In addition to the death sentence for the two defendants in Shaw, the death sentences of the defendants appearing in the following table have been upheld by the South Carolina Supreme Court:
Shaw because there were apparently no co-defendants,\textsuperscript{15} therefore, it must have been based on some other consideration. However, it is impossible to tell what that consideration may have been from the records available to the South Carolina Supreme Court.\textsuperscript{16} As a result, it is only possible to speculate about the reasons for the prosecutor's decision. Consequently, it is not clear whether the death penalty is being applied as fairly as it might be or whether the threat of the death penalty has an adverse impact on the plea bargaining process.\textsuperscript{17}

2. Special Procedural Rights of Capital Defendants

The capital defendant is provided special procedural protections under the death penalty statute. The solicitor must notify the defendant's attorney of his intent to seek the death penalty at least thirty days prior to trial\textsuperscript{18} and provide the defendant with a copy of the indictment at least three days before trial.\textsuperscript{19} The defense must also be informed in writing, before trial, of the evidence that the state will use to show that some aggravating circumstance exists.\textsuperscript{20} The solicitor need not designate each aggravating factor if he adequately apprises the defendant of the evidence by allowing defense counsel access to his case file.\textsuperscript{21}

In addition, the defendant is provided special protection to increase the likelihood that he will have adequate counsel. Since the solicitor must inform the defendant's counsel of his intent to seek the death penalty thirty days prior to trial, the defendant

<table>
<thead>
<tr>
<th>Case</th>
<th>Aggravating Circumstances Established</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horace Butler</td>
<td>Rape</td>
</tr>
<tr>
<td>Larry Gilbert</td>
<td>Armed robbery, larceny with a deadly weapon</td>
</tr>
<tr>
<td>J.D. Gleaton</td>
<td>Armed robbery, larceny with a deadly weapon</td>
</tr>
<tr>
<td>William Gibbs Hyman</td>
<td>Armed robbery</td>
</tr>
<tr>
<td>Albert Thompson</td>
<td>Armed robbery</td>
</tr>
</tbody>
</table>

\textsuperscript{15} No co-defendants were listed with the names of the three defendants listed, supra note 14.

\textsuperscript{16} See infra notes 303-05, 323-26, 333-36 and accompanying text.

\textsuperscript{17} Cf. State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982).

\textsuperscript{18} § 16-3-26(A)(Supp. 1981).

\textsuperscript{19} § 17-19-80 (1976).

\textsuperscript{20} § 16-3-20(B)(Supp. 1981).

\textsuperscript{21} State v. Plath, ___ S.C. ___, ___, 284 S.E.2d 221, 226 (1981). Plath indicates that the State is not required to provide the file, but it may elect to do so in order to satisfy the statute if the file is adequate for this purpose.
has an implied right to counsel at least thirty days prior to trial. The statute also explicitly provides that, where requested, the defense attorney is excused from other trial duties ten days prior to the term of court in which the trial is to be held. Indigents are entitled to appointed counsel, only one of whom can be a public defender. At least one of the appointed counsel must have a minimum of five years experience as an attorney and three years of experience in the actual trial of felony cases. Indigents are also entitled to State payment for "investigative experts or other services . . . reasonably necessary for the representation of the defendant. . . ." The impact of the right to these services is severely constrained by the low statutory maximums on the amount of money that may be awarded for indigents. No more than fifteen hundred dollars may be paid for attorney fees and costs, and no more than two thousand dollars can be paid for "investigative expenses or other services."

C. The Trial Proceedings

All criminal trials can be divided into two stages: a first stage, in which the question of guilt is determined, and a second stage in which the sentence is imposed. The South Carolina capital punishment scheme goes beyond this usual division and grants the jury a central role in the sentencing phase as well as in the determination of guilt. The requirement of such a bifurcated hearing is set forth in the first part of section 16-3-20(B) of the South Carolina Code of Laws, which provides:

Upon conviction, or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to

24. Id.
25. § 16-3-26(C)(Supp. 1981). See also State v. Woomer, [hereinafter cited as Woomer (1)], 276 S.C. 258, 277 S.E.2d 696, 698-99 (1981). In Woomer (1), the defendant was charged with a murder in Horry County. In State v. Woomer, [hereinafter cited as Woomer (2)], ___ S.C. ___, 284 S.E.2d 357 (1981), the same defendant was charged with a different murder in Colleton County. See infra note 129.
death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial judge as soon as practicable after the lapse of twenty-four hours unless waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court.28

As indicated below, the statutory scheme focuses on the sentencing portion of the trial.

1. Voir Dire

When a criminal defendant exercises his right to trial by jury, he is entitled to a fair and unbiased jury representative of the community. Voter registration lists are used for the selection of jurors to insure fair representation.29 Impartiality is the primary responsibility of the trial judge, who is required to examine prospective jurors to insure that they are unbiased. In noncapital cases, the judge has the discretion to allow the parties to conduct the voir dire,30 but this practice is disfavored.31 Prospective jurors must be excluded from duty if they are related to a party, have a personal interest in the outcome, have a preconceived opinion or bias as to the facts of the case, or are otherwise prejudiced toward either side.32 In serious cases, the defense may preemptorily exclude up to ten prospective jurors and the State may exclude up to five.33

The voir dire procedure is altered in death penalty cases.34 The defense has the right to examine prospective jurors35 and

32. § 14-7-1020 (1976).
33. § 14-7-1110 (1976). Where there is more than one defendant, the defense is entitled to twenty challenges and the State ten. Where there is one defendant, the defense is limited to ten preemptory challenges. State v. Goolsby, 275 S.C. 110, 117, 268 S.E.2d 31, 35 (1980).
34. For a discussion of voir dire in capital cases from a defendant's point of view, see SOUTHERN POVERTY LAW CENTER, VOIR DIRE FOR CAPITAL CASES (1979).
35. § 16-3-20(D)(Supp. 1981). However, the method and scope of this examination is
the supreme court has approved the practice of allowing the solicitor to conduct voir dire.\textsuperscript{38}

In addition, the trial judge's discretion is guided by section 16-3-20(E) which provides the following:

In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his belief or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.\textsuperscript{37}

Although this section speaks in terms of the determination of guilt, the primary application of the provision has been to guide the trial judge in the use of his discretion to provide a balance between two concerns in the sentencing phase of trial: (1) to insure that the jury reflects community views concerning the propriety of imposing the death penalty on a particular defendant for a particular crime,\textsuperscript{38} and (2) to insure that a juror's views do not interfere with the proper discharge of his duties under a constitutionally valid statute.\textsuperscript{39} The South Carolina Supreme Court has held that the best way to balance these concerns in accordance with the statutory provisions is to treat the juror's beliefs about the death penalty as a ground for exclusion only if these beliefs interfere with the proper exercise of sentencing discretion.\textsuperscript{40} For example, if a juror would not consider a particular

subject to the discretion of the trial judge. State v. Thompson, ___ S.C. ___, 292 S.E.2d 581, 586 (1982); State v. Tyner, [hereinafter cited as Tyner I], 273 S.C. 646, 651, 258 S.E.2d 559, 562 (1979). Tyner I was an appeal of the defendant's initial conviction and death sentence. State v. Tyner, [hereinafter cited as Tyner II], ___ S.C. ___, ___ S.E.2d ___ (argued Oct. 6, 1981), was an appeal of the defendant's second death sentence resulting from the sentencing remand order of Tyner I. Tyner II is now pending before the South Carolina Supreme Court.

38. See infra notes 108-112 and accompanying text.
39. See infra notes 40-42 and accompanying text.
40. See State v. Thompson, ___ S.C. at ___, 292 S.E.2d at 585; State v. Horace Butler, ___ S.C. ___, 290 S.E.2d 1, 2 (1982); State v. Hyman, ___ S.C. ___, 281 S.E.2d 209, 211 (1981); State v. Goolsby, 275 S.C. 110, 116-17, 268 S.E.2d 31, 35 (1980). Unfortunately, the court has not always followed this approach. For example, in State v. Gilbert, [hereinafter cited as Gilbert III], ___ S.C. ___, 283 S.E.2d 179 (1981), the court held that a juror was properly excluded because she had talked with her priest about the Catholic Church's views on capital punishment, thereby introducing an outside influence.
mitigating circumstance\textsuperscript{41} or would not sentence to death under any circumstances, he may be excluded.\textsuperscript{42}

The South Carolina Supreme Court has also considered and rejected various challenges to the composition of the jury in capital cases. The court has held that there is no constitutional objection to the selection process resulting in a disproportionately small number of persons of a certain age\textsuperscript{43} or to the provision excusing women with children under the age of seven.\textsuperscript{44} The court has also rejected the argument that persons of a particular race are systematically excluded.\textsuperscript{45} As will be discussed later, some evidence suggests that the voir dire concerning sentencing may affect the composition of the jury, making it more prone to convict and sentence to death. The court, however, has not addressed this issue.

2. The Adjudication of Guilt

a. Murder and Malice Aforethought

The South Carolina statute focuses on the sentencing proceeding and provides virtually no explicit guidance concerning the elements of the crime of murder. The South Carolina Code simply provides that murder is "the killing of any person with malice aforethought, either express or implied."\textsuperscript{46} Except for provisions declaring that poisoning constitutes malice aforethought\textsuperscript{47} and that stabbing without provocation will be treated as murder,\textsuperscript{48} the code provides no definition of malice aforethought. As a result, the common law is the source for determin-
ing what constitutes malice aforethought.

"Malice" is a legal term of art which has been refined over many years. In common usage, "malice" suggests hatred, ill-will, or hostility. The legal concept, however, is much broader and is used to describe an extreme antisocial attitude and lack of concern for the physical well-being of other persons. An obvious example of "malice" is the intentional killing of another without a just cause, such as self-defense, or an excuse, such as extreme provocation. In South Carolina, malice is also evidenced under three other circumstances: (1) the use of a deadly weapon in an assault where there is no legal justification or excuse; (2) the commission of a dangerous felony; and (3) the outrageously reckless endangerment of the life of another.

"Aforethought" is also a term of art and does not require premeditation, design, or a period of reflection prior to the act of killing. Indeed, the term may be mere surplusage today because malice "may be conceived at the very moment the fatal blow is given."

b. The Burden of Proof

The State must prove beyond a reasonable doubt that the defendant killed with malice aforethought because it is one of the elements of the crime of murder. In cases involving an intentional killing or an assault with a deadly weapon, malice is defined in part by the absence of justification or excuse. When a

50. Id. at 514-15, 68 S.E.2d at 412.
52. Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973). It is likely that the felony-murder rule will only be applied in circumstances where the felony is inherently dangerous to life. See id. at 316-17, 199 S.E.2d at 758-59. It is interesting to note that only one case, State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1890), involved a set of facts such that malice could only be based upon the application of the felony-murder rule. W. MCANINCH & W. FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 65 (S.C. Bar, CLE Div. 1982).
56. See supra notes 46-54 and accompanying text.
justification such as self defense exists, the defendant is not guilty of any criminal homicide.\(^{57}\) When the defendant kills because of a legally adequate provocation, he is guilty of manslaughter rather than murder because the killing results from the heat of passion, not from malice.\(^{58}\) Many cases suggest that lack of excuse or justification is an integral part of the definition of malice and thus an element of the crime of murder.\(^{59}\) However, whether the State must prove the absence of some justification or excuse, or whether the defendant must show their existence is unclear.

In *State v. Bolton*,\(^{60}\) the defendant appealed a manslaughter conviction. One ground of appeal was that the trial court required him to prove the elements of self-defense by a preponderance of the evidence.\(^{61}\) The defendant argued that since lack of justification was part of the definition of malice, the State was constitutionally required to grant him due process by proving the existence of this element beyond a reasonable doubt.\(^{62}\) The South Carolina Supreme Court held that the trial court had not erred in treating self defense as an affirmative defense and requiring the defendant to prove its existence.\(^{63}\)

There are several reasons why it is not clear whether *Bolton* can be viewed as authority for the proposition that the State need not prove absence of justification in order to show malice. First, the defendant was convicted of manslaughter, not murder. Consequently, the jury did not find malice, and the court's discussion is dictum to this extent. Second, the South Carolina Supreme Court appears to have held that the State must prove lack of adequate provocation;\(^{64}\) it would be inconsistent to treat the absence of provocation differently from lack of justification. Finally, unless South Carolina clearly determines that the absence of justification is not part of the definition of malice—one of the elements of the crime of murder—*Bolton* may be

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59. See supra notes 49-58 and accompanying text.
60. 266 S.C. 444, 223 S.E.2d 863 (1976).
61. *Id.* at 449, 223 S.E.2d at 865-66.
62. *Id.*
63. *Id.*
64. See infra notes 69-75 and accompanying text.
unconstitutional.65

The issue of the burden of proof of self-defense was raised again in State v. Linder.66 Linder, convicted of murdering a police officer, asserted at trial that the killing was either in self-defense or the result of the provocation of excessive force in arresting him. On appeal, the defendant requested the court to reconsider Bolton, but the court indicated it would "adhere to [its] reasoning as expressed in Bolton."67 Since Linder was convicted of murder, it is tempting to assume that if the State can show an intentional killing, then the defendant has the burden of showing that there was justification for the killing. Linder, however, does not resolve the uncertainty underlying this issue because Linder's murder conviction was reversed, and the case was remanded on the ground that the jury had not been instructed that he should be found guilty of voluntary manslaughter if there was legally adequate provocation.68

The South Carolina Supreme Court has considered the question of burden of proof concerning provocation in several cases and apparently has concluded that the State must show lack of provocation.69 For example, in State v. Crocker,70 the defendant stabbed and killed his wife. The State argued at trial that malice was present because the killing was intentional and without cause or because a deadly weapon was used without cause.71 The defendant was convicted of murder. On appeal, he argued, inter alia, that the homicide was committed in the heat of passion resulting from provocation and that the trial court erred in refusing to instruct the jury that the State must prove the absence of heat of passion beyond a reasonable doubt.72 The supreme court concluded that the denial of such an instruction was not error because the charge as a whole indicated that the state had the burden of proving the defendant's guilt beyond a

65. See infra notes 755-62 and accompanying text.
67. Id. at 313, 278 S.E.2d at 340.
68. Id. at 306, 278 S.E.2d at 337. The court did not say anything about the burden of proof concerning provocation.
71. Id. at 345-46, 251 S.E.2d at 765-66.
72. Id. at 345, 251 S.E.2d at 765.
reasonable doubt and did not shift any of the burden of proof to the defendant.\textsuperscript{73} Although \textit{Crocker} suggests that the State must prove lack of excuse, the cases are not particularly clear on this point.\textsuperscript{74} In addition, the trial court’s charge in \textit{Crocker} was extremely ambiguous. The trial court not only refused to state expressly that the State had the burden of showing absence of provocation, it also explicitly charged that the “use of a deadly weapon presumes malice but the presumption may be rebutted. . . .”\textsuperscript{75} The supreme court’s approval of this reference to rebuttal suggests that the burden of persuasion had shifted to the defendant.

When the killing occurs during the perpetration of a felony inherently dangerous to life, then malice aforethought exists as a matter of substantive law.\textsuperscript{76} In other words, one definition of malice aforethought is the intentional commission of such a felony. Consequently, the problems of burden of proof do not arise because commission of the felony itself defines malice aforethought rather than serving merely as a presumption that it existed at the time of the homicide.\textsuperscript{77}

c. Capital Murder

The South Carolina statute does not distinguish among the various types of malice aforethought and declares that only certain murders—\textit{e.g.}, intentional killings—are capital murders. Because of its statutory power and duty to determine when a death sentence is disproportionate to the crime and the charac-

\footnotesize

\textsuperscript{73} Id. at 345-46, 251 S.E.2d at 765-66.

\textsuperscript{74} \textit{E.g.}, State v. Plath, ___ S.C. ___, 294 S.E.2d 221 (1981). The court interpreted \textit{Crocker} as holding that the trial judge need not charge that absence of heat of passion must be proved beyond a reasonable doubt as long as the jury is charged that the State must prove murder beyond a reasonable doubt. \textit{Id.} at ___, 284 S.E.2d at 229. However, the court then added, “heat of passion is not one of the elements of murder.” \textit{Id.} at ___, 284 S.E.2d at 229. The import of this sentence is unclear. Perhaps there has been a typographical error and it should refer to lack of heat of passion. But, if this were done, it would contradict the court’s interpretation of \textit{Crocker} that the instructions were not erroneous because the jury was charged that the State must prove all the elements (including lack of provocation) beyond a reasonable doubt.

\textsuperscript{75} Record at 93, \textit{Crocker}.

\textsuperscript{76} \textit{E.g.}, Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973).

\textsuperscript{77} \textit{Id.} at 316-17, 199 S.E.2d at 757. The constitutionality of this approach is supported by the reasoning in Patterson v. New York, 432 U.S. 197 (1977). See \textit{infra} notes 755-62 and accompanying text.
teristics of the defendant, the South Carolina Supreme Court could develop such distinctions judicially. The court, however, has not addressed this issue.

Insofar as unintentional killings are involved, the statute implicitly indicates that such persons can be sentenced to death. In addition, dicta in at least two cases suggest that the South Carolina Supreme Court would not only hold a defendant vicariously liable for killings by co-felons but would also uphold the death sentence even when the defendant did not intend that a homicide occur. These cases were decided before the United States Supreme Court determined that capital punishment cannot be imposed for certain unintentional killings, however. Thus, it is likely that future cases will hold that such killings are not capital murders in South Carolina. However, as later discussion will indicate, it is not clear how capital murder will be defined.

d. Other Issues

(1) Traditional Role of Trial Judge and Jury

The South Carolina Supreme Court has consistently emphasized that the traditional judge-jury relationship should be followed in the guilt phase of a capital trial. Thus, the following are committed to the trial judge: (1) motions for change of venue, severence, sequestering of witnesses, directed verdict, and mistrial; (2) evidentiary matters (including rulings on the admissibility of confessions, photographs and physical evidence); (3)
scope of examination of witnesses; and (4) jury instructions.

(2) Coordinating the Two Phases of the Trial

(a) Questioning of Defendant

In State v. Adams, the defendant elected to testify during the guilt phase of his trial. The South Carolina Supreme Court held that a defendant who makes such an election waives his fifth amendment right against self-incrimination only as to issues relating to his innocence or guilt and may still exercise his privilege in the sentencing phase. Thus, it was error for the prosecution to explore sentencing issues in cross-examination of the defendant during the guilt stage. Moreover, the particular line of questioning involved in Adams not only involved fifth amendment problems but also violated fundamental fairness because the solicitor was allowed to question the defendant as to his thoughts on the just deserts of murder and to browbeat him into admitting that one who committed the acts alleged against him deserved to die. This line of questioning resulted in the introduction of an "arbitrary factor" intolerable in capital cases.

(b) Instructions to the Jury

In giving the jury instructions at the conclusion of the guilt phase, the trial court must keep the guilt issue separate from the sentencing issue. Thus, it is error for the jury charge at the close of the guilt phase to include portions of the sentencing sections of the statute.

(c) Separate Trials

The South Carolina statute grants the defense the right to

86. See Goolsby, 275 S.C. at 119, 268 S.E.2d at 36.
87. See Plath, ____ S.C. at ____, 284 S.E.2d at 230.
89. Id. at ____, 283 S.E.2d at 585.
90. In Goolsby, the court held that the error was cured by a subsequent instruction. Id. at 124, 268 S.E.2d at 39. In State v. Adams, ____ S.C. ____ , 283 S.E.2d 582 (1981), the trial court charged the jury with the previously repealed 1974 death penalty statute and this was held to be reversible error. Id. at ____, 283 S.E.2d at 585.
make the last argument in the sentencing phase of the trial. In *State v. Plath,* the defendants argued that this provision required that each be tried separately so that each would have the last argument. The court rejected this argument because it would "preclude co-defendants from ever being tried together" and concluded that the decision to grant separate trials rested within the discretion of the trial judge.

(d) **Waiver of the Right to Trial by Jury or Sentencing by Jury**

The sentencing portion of the South Carolina statute provides:

The sentencing proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceedings shall be conducted before the court.

The italicized language suggests that there is no way for the jury to determine only guilt or only sentencing. As a result, the statute is generally interpreted as requiring that, when a defendant waives his right to trial by jury by pleading guilty or by electing to be tried by the judge, he must be sentenced by the judge. Similarly, when he elects to be tried by the jury, he must be sentenced by the jury.

However, this interpretation was challenged in *State v. Patterson* and *State v. Truesdale.* In each case, the defendant agreed to plead guilty after the jury was impaneled if the trial judge would allow the jury to determine the sentence. The

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92. Id. at ___, 284 S.E.2d at 226.
94. See, e.g., McAninch, *Legal Status of the Death Penalty in South Carolina,* in *The Death Penalty in South Carolina* 60, 71 (B. Pearson ed. 1981). The lack of cases involving this issue suggests that this interpretation has been followed by trial courts.
97. Patterson initially offered to plead guilty in return for the solicitor's recommendation of mercy, but his offer was rejected. Record at 773 (Patterson). His attorneys then offered to submit a guilty plea if the trial judge would allow Patterson to be sentenced by
judge agreed to this procedure and the pleas were entered. The juries recommended death in both cases and both defendants were sentenced to death by the trial judge. On appeal, the issue of the jury sentencing was raised in both cases.

This sentencing procedure raises two different issues: (1) whether it was improper to allow the defendant the option of jury sentencing and (2) if it is improper, whether it is a ground for a reversal when the defendant elected to be sentenced by the jury. The answer to the first question is not clear. The statutory language apparently forbids such a sentencing process, and there is good reason to believe that the statutory prohibition is consti-

the jury, which had already been impaneled and which would decide the guilt or innocence of his two co-defendants who had pleaded not guilty. Id. The solicitor argued that such a procedure was contrary to what he regarded as the literal meaning of the statute and should not be allowed because it would taint the entire proceedings. Id. at 779. Defense counsel argued that the statute was open to interpretation and could be read as allowing a defendant the option of pleading guilty without waiving jury sentencing. Id. at 780. Counsel stressed that any other interpretation would raise constitutional difficulties. Id. at 784. The trial judge discussed the divergent interpretations of the "waiver provisions" of § 163-20(B) with the attorneys at length, and after noting the inefficiency involved in forcing the defendant to have a jury trial in order to have jury sentencing, he ruled that such a procedure was acceptable. Id. at 792-93.

Truesdale pleaded guilty to murder and armed robbery after the jury had been impaneled. Record at 934 (Truesdale). This plea was based on an agreement with the solicitor that Truesdale would be sentenced by the jury rather than the judge. Id. at 957.

98. Patterson pleaded guilty to murder and armed robbery. Record at Statement, Patterson. Truesdale pleaded guilty to murder, kidnapping and rape. Record at Statement, Truesdale.

99. Patterson's two co-defendants were convicted of murder in the first phase of the trial, and the jury recommended life imprisonment sentences for the co-defendants. Record at Statement, Patterson.

100. In Patterson, the defendant did not raise the sentencing process as a ground for appeal. The South Carolina Supreme Court raised the issue sua sponte at the oral argument of the appeal. Reply Brief for Appellant to Respondent's Supplemental Brief at 6, Truesdale. Truesdale's appellate defense counsel raised the issue and argued that the jury sentencing violated § 16-3-20(B) (Supp. 1981), and that the death sentence was, therefore, invalid. Brief for Appellant at 2-6, Truesdale. The State initially conceded the point and agreed that a reversal and remand was in order. Brief for Respondent at 2-4, Truesdale. However, after oral argument the State submitted a supplemental brief in which it reversed its previous position and argued that allowing Truesdale to be sentenced by the jury was harmless error since Truesdale had been accorded a greater right than he was entitled to under the statute. Supplemental Brief for Respondent at 1-2 Truesdale. The State also maintained that a defendant should not be allowed to profit from error resulting from his own trial strategy. Id. at 2. The State argued further that, where the defendant pleaded guilty, there was no constitutional or statutory right to jury sentencing. Id. at 1.
tional.\textsuperscript{101} However, there is room for interpretation\textsuperscript{102} and the South Carolina Supreme Court has shown a very flexible approach to interpretation of the statute in other contexts.\textsuperscript{103} Moreover, granting the defendants an additional option in the proceedings would be consistent with the goal of providing every feasible procedural protection to a capital defendant.\textsuperscript{104} Finally, granting the option would avoid potential constitutional challenges.\textsuperscript{105} Even if the proceeding was improper, such impropriety may not require reversal in these cases for several reasons. First, there are other possible grounds for such a reversal.\textsuperscript{106} Second, a defendant seems unharmed by being granted an additional option to that granted by a narrow, literal interpretation of the statute. Finally, granting reversal would allow the defendants to take advantage of an error resulting from their own efforts.\textsuperscript{107}

In \textit{Patterson}, the South Carolina Supreme Court held that the statute prohibited sentencing by the jury in cases in which the defendant pleads guilty to murder and that this prohibition is constitutional.\textsuperscript{107.1} Since jury sentencing is an inducement for the plea, the court also held that both the plea and the sentence must be vacated.\textsuperscript{107.2} Although \textit{Truesdale} is currently pending, there is no reason to expect its outcome to differ from \textit{Patterson}.

\textsuperscript{101} See infra notes 743-50 and accompanying text.
\textsuperscript{102} See, e.g., supra note 97 for an argument that the mandatory language is not meant to bind the defendant, who still has an option. These arguments are perhaps buttressed by § 16-3-25(E)(2)(Supp. 1981), which provides that when the South Carolina Supreme Court remands a case for resentencing, "the new jury, if the defendant does not waive the right of a trial jury for the resentencing hearing, shall hear" certain evidence (emphasis added). This provision arguably gives the defendant a right to sentencing by a judge even though he was convicted by a jury. If interpreted in this way, the section indicates two things. First, the statutory scheme is ambiguous even though § 16-3-20(B)(Supp. 1981), may not appear so when read alone, and such ambiguity results in the need for interpretation. Second, § 16-3-25(E)(2)(Supp. 1981), indicates a legislative choice to grant the defendant an option, at least where he was tried and sentenced by a jury in the first trial. This legislative policy would support an interpretation of the scheme granting defendant an option.
\textsuperscript{103} See, e.g., supra notes 37-42 and accompanying text, and infra notes 941-46 and accompanying text for instances where the literal wording of a statutory section is not followed.
\textsuperscript{104} See infra notes 884-885 and accompanying text.
\textsuperscript{105} See infra notes 743-50 and accompanying text.
\textsuperscript{106} See generally, Brief for Appellant \textit{Patterson}; Brief for Appellant \textit{Truesdale}.
\textsuperscript{107} In addition, the proceeding was resisted by the solicitor in \textit{Patterson}, supra note 97.
\textsuperscript{107.1} State v. \textit{Patterson}, No. 21788, slip. op. at 3-4 (S.C. Sept. 13, 1982).
\textsuperscript{107.2} Id. at 4.
3. The Sentencing Proceedings

a. Introduction—Structuring Sentencing Discretion

The sentencing phase of a capital case involves an awesome decision: the determination of when the State should deliberately take the life of a particular human being. This decision should not be made mechanically because we must determine whether a particular defendant deserves the death penalty for a particular crime. Due to the serious nature of such a discretionary decision, South Carolina has long had the policy of providing every possible safeguard to insure that the death penalty is not imposed improperly. In accordance with this tradition and with the requirements of the United States Constitution, the present statutory scheme utilizes three different approaches to insure that the death penalty is only imposed when there is a meaningful basis for concluding that the defendant clearly deserves such punishment.

First, to insure that the choice between life imprisonment and death is fully informed, the statute provides that the jury (or the judge in a nonjury case) shall consider the evidence from

108. There are no other sentencing choices because the statute provides simply that murder "shall be punished by death or by imprisonment for life." § 16-3-20(A)(Supp. 1981).
109. See, e.g., State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), wherein the court stated that: "[t]he purpose here is to assure that each sentence rendered in a capital case results from the attention of the sentencing authority having been drawn to the particularized circumstances of each case." Id. at 311, 278 S.E.2d at 339. In State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979), the court stressed the need to determine whether death is the appropriate punishment in a specific case and noted that the statutory procedures "focus on the sentencing authorities' attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 203, 255 S.E.2d at 804.
110. This policy was clearly stated in State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), as follows:

The power of law to take the life of human beings for a violation thereof is one which should be and is exercised with extreme caution. The frailties of human nature are so manifest and manifold until the law should and does place around the defendant, whose life would be taken for a violation of the law, every safeguard to enable such defendant to secure a fair and impartial trial.

Id. at 274, 122 S.E.2d at 630.
111. See infra notes 436-80, 467-507 and accompanying text.
112. For a discussion of these approaches as ways of improving discretion in general, see K. Davis, DISCRETIONARY JUSTICE (1909).
the guilt stage as well as "additional evidence in extenuation, mitigation or aggravation of the punishment." The purpose of this provision is to allow the introduction of evidence which would normally be irrelevant in determining guilt. When the defendant pleads guilty, evidence which might have been introduced in the guilt phase of the trial is admissible in the sentencing stage. Similarly, if the case is remanded by the supreme court for resentencing, evidence from the guilt stage is admissible in the new sentencing proceeding. Full development of the evidence is also assured by the statutory right of the defendant to fully qualified counsel, experts, and other necessary services. In addition, the supreme court has approved a detailed form to be filled out for the purpose of assisting the trial court in its sentencing decision and to assist the supreme court in its review.

A second way of preventing abuse of discretion is to impose procedural and substantive safeguards to guide and limit the way decisions are made and thus insure that rational and consistent decisions are made and that there will be a meaningful basis for the review of discretionary decisions. The statute and cases have explicitly structured the introduction and consideration of evidence in the sentencing phase in a variety of ways. First, as indicated above in the discussion of the pretrial proceedings, evidence concerning a statutory aggravating factor is not admissible unless the state notified the defendant of the evidence in writing prior to the trial. Second, the evidence must not have been secured in violation of federal or state law. Third, the State and the defense may make arguments concerning the sentence. The defendant and his counsel are entitled to the closing argument, but only if these arguments are fairly

115. See Shaw, 273 S.C. at 208-09, 255 S.E.2d at 806.
117. § 16-3-26 (Supp. 1981).
118. Shaw, 273 S.C. at 201, 209, Appendix B, Appendix C, 255 S.E.2d at 803, 806, Appendix B, Appendix C.
119. Id. at 202-03, 255 S.E.2d at 803-04.
121. Id.
122. Id.
related to the sentencing issue.\textsuperscript{123} Fourth, certain considerations are irrelevant to the sentencing decision and the jury cannot consider them.\textsuperscript{124} Finally, the statute lists specific aggravating and mitigating circumstances which must be given to the jury in writing if supported by the evidence.\textsuperscript{125}

To prevent the arbitrary imposition of the death penalty, the consideration of these circumstances is biased toward life imprisonment in two ways. First, the jury (or judge in a nonjury case) cannot impose the death penalty unless at least one aggravating circumstance is proved beyond a reasonable doubt.\textsuperscript{126} Second, the jury is given broad discretion concerning the imposition of life imprisonment. The jury or judge may consider mitigating circumstances not listed in the statute;\textsuperscript{127} and there is no requirement of an affirmative finding of any specific mitigating circumstances in order to impose life imprisonment,\textsuperscript{128} even if an

\textsuperscript{123} See infra notes 258-61 and accompanying text.
\textsuperscript{124} See infra notes 244-46, 252-54 and accompanying text.
\textsuperscript{125} § 16-3-20(C)(Supp. 1981). The statutory requirement is satisfied by simply charging the circumstances as set forth in the statute. State v. Adams, ___ S.C. ___, 283 S.E.2d 582, 587 (1981). Where the evidence supports an aggravating or mitigating circumstance, it must be submitted to the jury and the judge must not comment on the weight of the evidence. E.g., Horace Butler, ___ S.C. at ___, 290 S.E.2d at 4. See infra notes 255-57 and accompanying text. The statutory system of aggravating and mitigating factors was upheld in Shaw, 273 S.C. 194, 255 S.E.2d 799, which was the first case to consider the constitutionality of the new death penalty scheme. The court found the lists of circumstances to be relevant for evaluating the particularized circumstances of the defendant and the crime. Id. at 205, 255 S.E.2d at 804. The failure of the statute to assign numerical values to the enumerated circumstances to enable the jury to determine whether mitigation "outweighs" aggravation did not render the statute constitutionally defective. Id.

\textsuperscript{126} § 16-3-20(C)(Supp. 1981). The relevant portion of this section provides:

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor.

\textsuperscript{127} § 16-3-20(C)(Supp. 1981); Shaw, 273 S.C. at 200, 255 S.E.2d at 802.
\textsuperscript{128} § 16-3-20(C)(Supp. 1981).
aggravating circumstance is present.\textsuperscript{129}

The third way the statute prevents possible abuse of the discretion to sentence to death is by imposing checks or "vetoes" on the imposition of the death penalty. The first such check is the requirement that the death penalty only be imposed if the jury recommends it by a unanimous verdict. If the jury cannot agree, the jury is dismissed and the defendant is sentenced to life imprisonment.\textsuperscript{130} Thus, if a single juror is in doubt concerning the propriety of the death penalty in a particular case, it will not be imposed. A further check on jury discretion is the requirement that the trial judge not impose the death penalty unless he affirmatively finds that the jury recommendation of death was warranted and not the "result of prejudice, passion, or any other existing factor."\textsuperscript{131} A final check on discretion is the requirement of appellate review whenever the death penalty is imposed.\textsuperscript{132}

\textbf{b. Aggravating Circumstances}

\textbf{(1) The Statutory Circumstances}

The statute lists seven aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be haz-

\textsuperscript{129} Woomer (2), S.C. at 284 S.E.2d at 359; Woomer (1), 276 S.C. at 267, 277 S.E.2d at 701; State v. Goolsby, 275 S.C. 110, 128, 268 S.E.2d 31, 41 (1980); Tyner I, 273 S.C. at 660, 268 S.E.2d at 566.

\textsuperscript{130} § 16-3-20(C)(Supp. 1981). The trial judge has discretion to determine whether to conduct a poll to see if the verdict is unanimous in fact. However, if a request is made, a poll must be taken. State v. Linder, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981).

\textsuperscript{131} § 16-3-20(C)(Supp. 1981).

\textsuperscript{132} § 16-3-25 (Supp. 1981). For a more detailed discussion, see infra notes 262-308 and accompanying text.
ardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.\(^\text{133}\)

(2) Aggravating Circumstances not Listed in the Statutory Scheme

The statute provides that the death penalty should not be imposed unless there is at least one statutory aggravating circumstance.\(^\text{134}\) In addition, it provides that the jury shall be instructed to consider the list of aggravating factors while also providing that the jury should consider not only the statutory mitigating factors but also additional mitigating factors otherwise authorized or allowed by law.\(^\text{135}\) When read together, these provisions indicate first, that only the statutory factors should be considered as aggravating circumstances and second, that evidence should not be admissible to show aggravation unless it is relevant to one of these factors.

The South Carolina Supreme Court appeared to adopt this position in *State v. Shaw*,\(^\text{136}\) by asserting that the statute "makes no provision for the consideration . . . of any nonstatutory aggravating circumstances."\(^\text{137}\) However, *Shaw* also held that photographs showing post mortem mutilation of the victim's body were admissible. "The evidence . . . was . . . admissible not only as a circumstance of the crime, but also as evidence of Shaw's character. The acts of *post-mortem* abuse were

\(^{134}\) § 16-3-20(C)(Supp. 1981).
\(^{135}\) Id.
\(^{137}\) Id. at 201, 255 S.E.2d at 802.
of a violent sexual nature and bore a logical connection to the earlier rape of . . . [the victim].”

Because of this broad interpretation of the “circumstances” of the crime and the character of the defendant, it appears that South Carolina does not require that evidence in aggravation of the sentence be relevant to the statutory factors. Instead, Shaw, and other cases, suggest that the statutory circumstances function as a “threshold” requirement. In other words, if the State can show that the defendant has exceeded a basic threshold of wrongfulness by proving that at least one statutory circumstance exists, the jury may consider other aggravating circumstances in deciding to impose the death sentence.

A review of the transcripts of the trials reveals an even broader approach to aggravating circumstances. For example, in State v. Tyner, two expert witnesses testified that the defendant was the type of “criminal” who would continue to commit crimes. In addition, one of these experts testified that the defendant had the same criminal profile as Charles Manson. No objection was raised concerning this testimony, so the jury may have considered it in deciding to recommend the death penalty for the defendant. This penalty was reversed and remanded for resentencing on other grounds and the testimony was excluded at the second hearing. Nevertheless, it is still important to note that the defense attorneys, the trial judge, and the South Carolina Supreme Court seemed unconcerned with such testimony at the first sentencing hearing.

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138. Id. at 209, 255 S.E.2d at 806.
139. In Gilbert II, S.C., 283 S.E.2d 179, the court upheld the admission of allegedly irrelevant photographs because they were demonstrative of the circumstances of the crime. Id. at 283 S.E.2d at 181. In addition, the court seemed to hold that after one aggravating circumstance has been established, the others are merely cumulative. See infra notes 194-204 and accompanying text, for further discussion of Gilbert II. In Woomer (1), 276 S.C. 258, 277 S.E.2d 696, evidence of aggravating acts of a co-conspirator was held admissible. Id. at 265, 277 S.E.2d at 699. See infra notes 190-93 and accompanying text for discussion of Woomer (1).
141. Record at 1108, 1184, Tyner I.
142. Id. at 1108.
143. Tyner I, 273 S.C. at 659-60, 258 S.E.2d at 566.
144. Record at 885-90, Tyner II.
145. Recidivism has been implicitly approved as an aggravating circumstance by the United States Supreme Court. See infra note 470 and accompanying text. However, the consideration of recidivism offends the proportionality test used in many United States
This broad approach to aggravation is questionable for several reasons. First, it appears to conflict with the statute, which explicitly limits the aggravating circumstances sufficient to support the death penalty to those listed.\textsuperscript{146} Second, it may not be possible to satisfy the policy underlying the right to notice of statutory aggravating circumstances\textsuperscript{147} if other circumstances can be shown. Third, this approach makes it difficult to determine what role the nonstatutory aggravating factors played in the sentencing decision. It may provide inadequate structure and checks on sentencing decisions, and this inadequacy is contrary to the basic policy of the statute and raises potential constitutional problems.\textsuperscript{148} The lack of limitation on statutory considerations also raises doubts about the justice of the scheme because it is not possible to be confident that the sentencing authority made a careful, individualized consideration.\textsuperscript{149} Finally, the adoption of the threshold approach apparently influences the South Carolina Supreme Court in related areas and results in questionable decisions.\textsuperscript{150}

(3) Overlapping Aggravating Circumstances

The first statutory aggravating factor is that the murder was committed while in the commission of one of nine serious crimes or acts,\textsuperscript{151} which considerably overlap with the crime of murder. For example, when an unintentional homicide occurs during an armed robbery, the armed robbery has two roles. First, the unintended killing is murder—referred to as “felony-murder”—because malice aforethought is implied in law when a death results

\textsuperscript{146} See supra notes 134-39 and accompanying text.
\textsuperscript{147} See supra notes 20-21 and accompanying text.
\textsuperscript{148} See supra notes 112-32 and accompanying text, and infra notes 201, 397-411, 436-50, 487-506, 622-54, 769-73 and accompanying text.
\textsuperscript{149} See infra notes 884-935 and accompanying text.
\textsuperscript{150} See infra notes 203-04, 296-302 and accompanying text.
while such a dangerous felony is committed. 152 Second, the armed robbery is an aggravating circumstance. 153 In State v. Thompson, 154 the supreme court considered the overlap between aggravating circumstances and felony-murder and concluded that “a statutory aggravating circumstance would remain a circumstance of the murder in a death penalty case regardless of whether the crime charged is murder or felony-murder.” 155 Because the jury was not given a felony-murder charge in Thompson, this language is mere dictum. The murder was an intentional homicide and the finding of malice was based on this intent. 156 Future cases will likely narrow this approach to some extent 157 because a subsequent United States Supreme Court case has clearly indicated that the death penalty cannot be imposed in cases where the defendant was not present at the killing and the death was not intended. 158

A second type of overlap is inherent in the first aggravating factor because some of the nine listed crimes are similar to one another. 159 Moreover, the theft crimes listed in the first factor all involve a killing for pecuniary gain, 160 which is the fourth aggravating factor listed in the statute. 161 Such overlaps were involved in State v. Woomer [hereinafter cited as Woomer (2)]. 162 Woomer was sentenced to death for a murder committed while carrying out the theft of the victim’s coin collection. The trial

152. See supra notes 51-52 and accompanying text, and infra notes 656, 676 and accompanying text.
155. Id. at ___, 292 S.E.2d at 585.
156. Id.
157. The exact nature of future developments on this issue is not clear. See infra notes 676-679, 706-738 and accompanying text.
159. The statute lists armed robbery with a deadly weapon and larceny with a deadly weapon as aggravating circumstances. § 16-3-20(C)(a)(1)(e),(f)(Supp. 1981). The court recognized the overlap between these two crimes in Gilbert II, ___ S.C. ___, 283 S.E.2d 179 and noted that robbery is defined as larceny by force. Id. at ___, 283 S.E.2d at 182. Burglary and housebreaking are also listed as aggravating factors, § 16-3-20(C)(a)(1)(d),(g) (Supp. 1981), and these could overlap with robbery and larceny.
160. § 16-3-20(C)(a)(1)(e),(f)(Supp. 1981), Theft offenses are also potentially involved in burglary and housebreaking, which are also listed in the first factor. § 16-3-20(C)(a)(1)(d), (g) (Supp. 1981).
judge submitted and the jury found three aggravating circumstances: (1) robbery with a deadly weapon; (2) larceny with a deadly weapon; and (3) murder for the purpose of pecuniary gain. Because of the overlap and redundancy in the instruction and finding, the defendant argued that the jury may have considered him as having three aggravating circumstances even though there was only one theft. With a disappointing lack of discussion and analysis, the supreme court simply concluded that there was no error since “all three circumstances are included in . . . [the statute] and thus are proper as determined by the general assembly.”

The court's lack of analysis is unfortunate because there were two important points to consider. First, the defendant argued that the fourth aggravating circumstance—murder for pecuniary gain—should be limited to “murder-for-hire situations.” Second, even if the fourth circumstance should be interpreted more broadly, it is plausible to assume that the reason the legislature included multiple theft-type crimes was to eliminate any gaps in its listing of aggravating circumstances, rather than to increase artificially the number of aggravating circumstances in a particular case and thus increase the likelihood of an unconstitutional and unjust abuse of discretion. If this is the legislative concern, then theft should only function once as an aggravating circumstance. Unfortunately, these concerns are not addressed in the Woomer (2) opinion even though they were raised in the defendant's brief.

163. Id. at __, 284 S.E.2d at 358.

164. Brief for Appellant at 27, Woomer (2). The statute is arguably broader than murder-for-hire situations because it includes situations where the murderer commits “the offense of murder for himself or another. . . .” § 16-3-20(C)(a)(4) (Supp. 1981)(emphasis added). In addition, the sixth aggravating circumstance, § 16-3-20(C)(a)(b)(Supp. 1981), also could be viewed as addressed to murder for hire since it addresses killing as “an agent or employee of another person.” The concern is not that the Woomer (2) interpretation is necessarily wrong but that arguments for a narrow reading are simply ignored in the court's opinion even though raised in the defendant's brief.

165. See, e.g., State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which the North Carolina Supreme Court held that the trial court should have instructed the jury as to only one aggravating circumstance when two circumstances overlapped. The court noted that an instruction as to both “amounted to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant.” Id. at 29, 257 S.E.2d at 587. Accord, e.g., Provence v. Florida, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977).

166. Brief for Appellant at 25-30, Woomer (2).
The court's superficial treatment of the problem of overlap is important because armed theft is the most common aggravating circumstance, and viewing it as multiple circumstances will likely affect sentencing. Some solicitors, juries, and judges may occasionally place undue weight on the number of factors involved. It is interesting to note that the empirical study conducted as part of this article indicates that the decision of the solicitor to seek the death penalty is related to the treatment of armed theft as more than one circumstance. Juries' decisions, however, do not seem affected by this treatment of armed theft. (Judges sentence to death so rarely that it is impossible to make any generalizations concerning the effect of the treatment of armed theft on their sentencing.) While these statistics are subject to considerable skepticism because of the underlying problem with the data used in completing the study, the statistics clearly indicate that persons may be wrongfully sentenced to death because of the court's treatment of overlapping theft circumstances. The lack of reliable data only serves to reinforce a lack of confidence in those sentences.

(4) Construction of "Robbery," "Larceny With a Deadly Weapon," and "While in the Commission of the Following Crimes on Acts"

In State v. Hyman, the court construed the statutory aggravating circumstance of robbery with a deadly weapon, stating that: (1) a gun used in a robbery is a deadly weapon even if it is not operable; and (2) intent to steal need not have existed at the time the defendant obtained possession of the stolen goods. These statements may be valid in terms of the substantive crimes in South Carolina. However, they raise serious doubts

167. See infra notes 335-37 and accompanying text.
168. Id.
169. See infra Tables III, IV and V following note 347.
170. See infra Table III and text accompanying notes 341-46.
171. See infra notes 326-27 and accompanying text.
173. Id. at ___, 281 S.E.2d at 213.
about the wisdom\textsuperscript{175} and constitutionality\textsuperscript{176} of the scheme of aggravating circumstances because it is questionable whether the use of an empty gun or the formation of an intent to steal after the murder constitutes sufficiently serious additional wrongdoing to justify the death penalty.

Because of conflicting jury decisions on robbery and larceny, these problems were raised more explicitly in \textit{State v. Smart} [hereinafter cited as \textit{Smart II}].\textsuperscript{177} Robbery and larceny with a deadly weapon were given as aggravating circumstances in the jury instructions, and the jury found only larceny as an aggravating circumstance.\textsuperscript{178} The jury recommended the death penalty, and the defendant was so sentenced.\textsuperscript{179} On appeal, the defendant argued that the failure to find robbery indicated that there was no intimidation and that, therefore, the jury impliedly found that the taking and the intent to steal occurred after the homicide since the victims would have been intimidated had the theft occurred prior to their death.\textsuperscript{180} The defendant further argued that these statutory aggravating circumstances should not be interpreted to include situations where the intent to steal was formed after the homicides because this \textit{subsequent} act did not form a meaningful basis for sentencing this particular defendant to death.\textsuperscript{181}

Although the court has not yet ruled on this appeal, it should hold in the defendant's favor and rule that a murder does not occur "while in the commission of" a crime unless that aggravating crime was meaningfully related to the murder rather than to a subsequent act such as destruction of evidence or facilitation of escape.\textsuperscript{182} Such a ruling would be consistent with the statutory purpose of insuring that only persons who clearly deserve execution should be sentenced to death.\textsuperscript{183} Moreover, a de-

\footnotesize{which criticizes the reasoning of \textit{Craig}.
\textsuperscript{175} \textit{See infra} notes 887-89, 918-23 and accompanying text.
\textsuperscript{176} \textit{See infra} note 767 and accompanying text.
\textsuperscript{177} No. 21812 slip op. (S.C. Nov. 23, 1982), Brief for Appellant at 70-86.
\textsuperscript{178} Record at 2480-83 \textit{Smart II}.
\textsuperscript{179} \textit{Id}.
\textsuperscript{180} Brief for Appellant at 74-75 \textit{Smart II}.
\textsuperscript{181} \textit{Id} at 75-82.
\textsuperscript{182} \textit{See, e.g.}, People v. Green, 27 Cal. 3d 1, 59-62, 609 P.2d 460, 504-506, 164 Cal. Rptr. 1, 37-39 (1980).
\textsuperscript{183} \textit{See supra} notes 108-32, 136-38 and accompanying text. For a discussion of the role that these aggravating circumstances play in determining which persons might justly
cision on this issue favorable to Smart would avoid serious questions about the constitutionality and justice of the South Carolina scheme.

(5) Vicarious Liability for the Aggravating Conduct of Others

There are a variety of doctrines that make a person vicariously liable for the acts of another—for example, a conspirator is liable for the foreseeable acts of a co-conspirator committed in furtherance of the conspiracy. The South Carolina Supreme Court has never determined whether such doctrines can be used to establish a statutory aggravating circumstance. Since the purpose of the sentencing phase is to focus on the characteristics of the particular defendant, using such doctrines in the sentencing phase is questionable from the perspectives of basic policies, constitutional law, and justice.

Nevertheless, the South Carolina Supreme Court approved an approach that came very close to imposing such vicarious liability in State v. Woomer [hereinafter cited as Woomer (1)]. During the guilt phase of the trial in this case, the judge admitted evidence of conduct by a co-conspirator despite defendant's objection that this evidence was highly inflammatory and prejudicial. The South Carolina Supreme Court ruled that this was not error because it was relevant to proof of the kidnapping of the rape victim and because the defendant was "liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." However, the opin-
ion does not indicate how the commission of this rape relates to the elements of kidnapping. As a result, although the rape was not one of the statutory aggravating circumstances found by the jury in sentencing Woomer to death, it may have had some influence on the sentencing decision while making no contribution to the guilt determination.

(6) Resentencing and the Prohibition of Double Jeopardy

In State v. Gilbert [hereinafter cited as Gilbert I], the jury was directed to consider whether one or more of the following aggravating circumstances were supported by the evidence: (1) armed robbery while armed with a deadly weapon; and (2) larceny with use of a deadly weapon. The jury found that armed robbery had occurred and indicated this pursuant to the statutory requirement that it “designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt.”

The sentencing decision was reversed on an unrelated ground and the case was remanded for resentencing. At the resentencing trial, the jury was once again asked to consider both aggravating circumstances. This time the jury specifically found that both existed and sentenced the defendant to death. The defendant appealed and argued that the jury’s failure to designate larceny as an aggravating circumstance in the first trial constituted an implicit finding that the circumstance did not exist. The defendant argued that the resubmission of larceny with use of a deadly weapon as an aggravating circumstance constituted double jeopardy.

In State v. Gilbert [hereinafter cited as Gilbert II] the supreme court rejected this argument for three reasons. First, the larceny finding was merely cumulative since the death penalty could have been supported by only a finding of armed robbery. Second, since robbery is essentially the commission of larceny by force, the first jury’s decision necessarily involved a finding of

193. Id. at 260, 277 S.E.2d at 697.
197. Gilbert II, --- S.C. at ----, 283 S.E.2d at 182.
198. Id. at ----, 283 S.E.2d at 181.
larceny with use of a deadly weapon even though they designated robbery alone as an aggravating circumstance. Third, the interpretation and application of the double jeopardy clause should be undertaken with a concern both for the rights of the accused and for the social interest in punishing wrongdoers.199

Justice Harwell dissented and criticized the majority's reasoning on two points. First, he argued that the failure to designate larceny in the first trial necessarily indicated an acquittal on that issue.200 (His argument on this point does not address the position that larceny is a lesser included offense in robbery.) Second, he pointed out that additional aggravating circumstances are not simply redundant or cumulative because the jury is given considerable discretion under the South Carolina punishment scheme. As a result, the contention that the error is harmless since one other aggravating circumstance was found to exist beyond reasonable doubt is without merit. The jury can recommend life even if an aggravating circumstance is properly established. Thus, we can only speculate as to whether this jury would have recommended death had only the armed robbery circumstance been submitted to it for consideration. This speculation is the sort of arbitrary factor which is intolerable in a case of this nature.201

Justice Harwell's position is preferable to the majority opinion for two reasons. First, it is a more accurate reflection of the underlying statutory policy of insuring that the death penalty is only imposed where it is clearly justified.202 Second, the majority opinion reflects the view that the statutory aggravating circumstances function as a "threshold" requirement—i.e., if one circumstance exists, then the death penalty is valid regardless of whether other, perhaps improper, aggravating factors were considered.203 This view is subject to serious objections in terms of the requirements of the statute, the constitution, and justice.204

199. Id. at __, 283 S.E.2d at 182.
200. Id. at __, 283 S.E.2d at 182-83 (Harwell, J., dissenting).
201. Id. at __, 283 S.E.2d at 184, n.3.
202. See supra notes 108-32 and accompanying text.
203. See supra notes 139-50 and accompanying text.
204. See supra notes 146-49 and accompanying text, and infra notes 397-411, 436-56, 487-506, 622-54, 766, 887, 918-23 and accompanying text.
c. Mitigating Circumstances

(1) The Statutory Circumstances and the Broad Discretion of the Sentencing Authority

The statute lists nine mitigating circumstances which must be submitted to the jury if they are supported by the evidence:

(1) The defendant had no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant’s conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

These mitigating circumstances function differently than aggravating circumstances because the trial court is given broader discretion where mitigation is concerned.

This broad discretion is reflected in two ways. First, the statute provides that the jury (or the trial judge in a nonjury case) shall consider not only the statutory mitigating circumstances but also "any mitigating circumstances otherwise authorized or allowed by law." The South Carolina Supreme Court has interpreted the quoted language to mean a consideration of "any aspect of defendant’s character or record and any

circumstances of the offense proffered as a basis for a sentence less than death which are supported by competent evidence."^{208} To implement this broad interpretation, the judge's instructions must clearly indicate that the jury has such discretion and his instructions concerning the statutory mitigating circumstances must not imply that only these factors may be considered. However, nonstatutory mitigating factors need not be specifically charged^{209} or submitted to the jury in writing as the statutory circumstances must be. Second, in addition to its wide discretion in finding mitigating circumstances, the jury must also be instructed that it can recommend a life sentence even if no mitigating circumstances are found and even if aggravating circumstances exist.^{211}

(2) Circumstances Relating to the Mental, Psychological, or Emotional Condition of the Defendant

Three of the statutory factors refer to the diminished capacity of the defendant resulting from some mental, psychological, or emotional condition.^{212} Since a person cannot be convicted of murder if he satisfies the M'Naghten test of legal insanity,^{213} these circumstances apparently refer to some diminished capacity rather than to the total lack of capacity referred to in the M'Naghten test. In State v. Goolsby,^{214} this distinction was apparently followed because the trial court refused to instruct the jury on the defense of insanity^{215} but did instruct the jury on the second and sixth statutory mitigating circumstances. The distinction is also supported by State v. Shaw,^{217} which implied that mental incapacity short of legal insanity is relevant to

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210. Linder, 276 S.C. at 312, 278 S.E.2d at 339.
211. Woomer (2), ___ S.C. at ___, 284 S.E.2d at 359; Woomer (1), 276 S.C. at 267, 277 S.E.2d at 702; Tyner I, 273 S.C. at 660, 258 S.E.2d at 566.
These subsections are quoted in the text accompanying note 133 supra.
215. Id. at 125, 268 S.E.2d at 39.
216. Record at 1794 Goolsby.
sentencing.\textsuperscript{218}

Unfortunately, however, the sentencing phase of capital cases does not always reflect an appreciation of the distinction. For example, in \textit{Tyner I},\textsuperscript{219} there was evidence that the defendant's capacity to appreciate the criminality of his act or to conform his conduct to law was substantially impaired.\textsuperscript{220} However, testimony on this question was phrased in terms of an all-or-none knowledge of right and wrong or ability to obey the law.\textsuperscript{221} In addition, the trial court refused to charge the jury on substantial impairment\textsuperscript{222} and this refusal was upheld on appeal.\textsuperscript{223} Despite these rulings, the precise impact of \textit{Tyner} is not clear because the case was remanded for resentencing on other grounds. At the second sentencing trial, the jury charge included an instruction on impairment,\textsuperscript{224} but the testimony was still phrased in all-or-none terms.\textsuperscript{225}

Another unsettled issue is whether the reason for an impairment or disturbance is relevant to these mitigating factors. In particular, it is not clear whether two South Carolina rules have been changed in capital sentencing. The first rule is that insanity is a defense only if the defendant was suffering from a mental disease or defect.\textsuperscript{226} If a person has an impairment but it is not the result of a disease or defect, could this be charged as a mitigating circumstance? The second rule is that voluntary intoxication is irrelevant to the determination of guilt of a crime.\textsuperscript{227} If voluntary intoxication resulted in an impairment or disturbance, would this be sufficient to require that the jury be charged concerning the impairment or disturbance? The form attached as an appendix to \textit{State v. Shaw} suggests that a broad interpretation will be used in both circumstances.\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 219 (Item A-8), 225 (Items D-4, -5), 231 (Item A-8), 237 (Items D-4, -5), 255 S.E.2d at 811 (Item A-8), 815 (Items D-4, -5), 820 (Item A-8), 824 (Items D-4, -5).
\item \textsuperscript{219} 273 S.C. 646, 258 S.E.2d 559 (1979).
\item \textsuperscript{220} Record at 1146-47, 1170-89 \textit{Tyner I}.
\item \textsuperscript{221} \textit{Id.} at 1170-89, 1190-92.
\item \textsuperscript{222} \textit{Id.} at 1190-92.
\item \textsuperscript{223} 273 S.C. at 657-58, 258 S.E.2d at 565. The jury was charged as to the seventh statutory circumstances. Record at 1190-92 \textit{Tyner I}.
\item \textsuperscript{224} Record at 1074 \textit{Tyner II}.
\item \textsuperscript{225} \textit{E.g., id.} at 880-81, 883.
\item \textsuperscript{226} State v. Bundy, 24 S.C. 439 (1885).
\item \textsuperscript{228} The form used in \textit{State v. Shaw}, 273 S.C. 194, 219 (Item A-8), 231 (Item A-8),
\end{itemize}
terpretation is clearly the best approach to satisfy the requirements of policy, the constitution, and justice that the death penalty only be imposed where it is appropriate.\(^{229}\)

\(3\) **Vicarious Liability**

The fourth mitigating circumstance addresses circumstances where an accomplice is vicariously liable for a murder committed by another.\(^{230}\) Although this factor is obviously relevant to sentencing, it should be remembered that even if a jury is charged with this circumstance, it could still impose the death penalty. As a result, the inclusion of this circumstance can be viewed as a legislative indication that a person can be sentenced to death even if he did not commit the murder or even if he did not intend the death of another. This result is clearly unjust\(^{231}\) and probably unconstitutional.\(^{232}\) Consequently, this circumstance would either have to be stricken or construed very narrowly.

\(4\) **Burden of Proof**

The South Carolina Supreme Court has never decided whether the prosecution or the defense has the burden of showing the absence or presence of mitigating circumstances.\(^{233}\) Since the statute explicitly provides that the State must prove aggravating circumstances beyond a reasonable doubt,\(^{234}\) the lack of such a provision for mitigating circumstances arguably indicates

\(^{229}\) See supra notes 108-32 and accompanying text, and infra notes 395-421, 436-80, 487-507, 582-609, 774, 886, 911 and accompanying text.


\(^{231}\) See infra notes 736, 888-93, 922 and accompanying text.

\(^{232}\) See infra notes 706-36 and accompanying text.

\(^{233}\) In State v. Linder, 276 S.C. 304, 276 S.E.2d 335 (1981), the court stated that the “burden is upon the jury to weigh the evidence submitted and determine whether the mitigating factor exists and, if so, the significance to be accorded it.” Id. at 311, 278 S.E.2d at 339.

an intent to place the burden as to these factors on the defense. Moreover, the defendant will be presenting evidence as to mitigation and urging the jury to consider the mitigating circumstances. It makes sense, therefore, to at least place the burden of going forward with the evidence on him. Imposing the burden of going forward or of persuasion on the defense does not raise constitutional problems because the lack of mitigating circumstances is not an element of the crime of murder. Consequently, they are relevant only to sentencing and, like true "affirmative" defenses, due process rights are not denied by requiring the defense to prove their existence. 235 Based on these considerations, the North Carolina Supreme Court has held that the defense has the burden of proving the existence of mitigating circumstances by a preponderance of the evidence. 236

Two problems arise with the approach adopted by North Carolina. First, it could result in the jury adopting an overly mechanical approach to the exercise of its discretion. For example, an instruction that the defendant must prove the existence of some mitigating circumstance might confuse the jury and cause it to lose sight of the fact that it can recommend life imprisonment even if no mitigating circumstances exist. The likelihood of such confusion is increased by the fact that the trial judge need not explicitly instruct the jury as to nonstatutory mitigating circumstances. 237 Consequently, the only way to instruct as to the burden of proof will be by a general charge, which is likely to result in confusion. Second, one fundamental concern underlying the South Carolina statute is to insure that the death penalty is imposed only when the defendant clearly deserves this punishment. 238 This concern is best served by imposing life imprisonment when there is doubt as to the existence of mitigating circumstances. Because of these problems, the best instruction would include the following:

You should always remember that you may consider any mitigating circumstances, even if they have not been specifically mentioned in this charge, so long as the mitigating cir-

235. See supra notes 55-77 and accompanying text, and infra note 758 and accompanying text.
238. See supra notes 108-32 and accompanying text.
cumstances seem relevant to you. You should also remember that you can recommend life imprisonment even if there are no mitigating circumstances. If, however, your verdict will be affected by a mitigating circumstance and if you are not sure whether that circumstance was in fact present, then you should consider it to be present unless the evidence clearly indicates otherwise.

d. Relationship Between Aggravating and Mitigating Circumstances

The South Carolina statute does not indicate how aggravating and mitigating circumstances are to function in the jury's sentencing decision. No guidelines exist for weighing circumstances or for comparing mitigating circumstances with aggravating circumstances. This lack has been challenged on the ground that it provides the jury with an unconstitutionally large amount of untrammelled discretion, but the supreme court has rejected these attacks.239

This rejection and the court's failure to articulate such guidelines on its own, are consistent with the basic model of sentencing in South Carolina. One underlying concern of this model is that the sentencing authority be given broad discretion to impose life imprisonment to insure that the defendant clearly deserves death.240 This concern would be frustrated by some guideline such as: "The State must show that the aggravating circumstances outweigh mitigating circumstances." Such an instruction provides less protection than the present South Carolina rule that life imprisonment can be imposed despite the presence of aggravating circumstances and the absence of mitigating circumstances.241

e. The Burden of Proof on the Ultimate Issue: Is the Death Penalty Appropriate?

The statutory scheme and the cases do not discuss the bur-
den of proof on the ultimate issue of whether the defendant deserves the death penalty. In order to avoid possible questions of justice and comply with South Carolina’s basic policy of assuring that no person is sentenced to death unless he clearly deserves it, the State should be required to show beyond a reasonable doubt that the defendant be sentenced to death.

f. The Role of the Jury

The sole task of the jury is to consider the relevant aggravating and mitigating circumstances in determining whether the defendant should be sentenced to death or life imprisonment. The need to limit the jury’s consideration to this question while also granting it the information and latitude necessary to make an individualized decision has resulted in a number of issues.

(1) Effects of Decision

Several cases have addressed questions concerning whether the jury should be informed concerning the effects of its decision and all have held that the jury should not be so informed. For example, the jury is not to be told life imprisonment will be imposed if it fails to reach a unanimous verdict. Such concerns are for the trial judge, not the jury. Similarly, the jury should be told nothing concerning eligibility for parole when the defendant is sentenced to life imprisonment. Finally, the jury should never be told that its decision can be set aside by the trial judge or the South Carolina Supreme Court because this may cause it to place insufficient weight on the enormity of its task.

242. See infra note 929 and accompanying text.
243. See supra notes 103-32 and accompanying text.
(2) The Propriety of Capital Punishment

The trial judge and jury must decide, based upon the evidence relevant to the crime and the particular defendant, whether the death penalty is appropriate in the specific case before them.\(^{247}\) This discretionary decision should be based on cultural and philosophical views concerning the circumstances when capital punishment is appropriate.\(^{248}\) Consequently, if the evidence is not merely cumulative, persons who have studied the question, such as ministers and professors of philosophy, should be allowed to share their expertise. Social scientists should also be allowed to testify regarding statistically reliable polls concerning public opinion and studies of whether the death penalty has a significant deterrent impact. To provide the jury with a fuller understanding of the nature of its task, testimony concerning executions and aspects associated with prisoners serving life sentences should be admissible. The purpose of this evidence is not to help the jury decide whether capital punishment is legitimate, but to assist them in deciding whether this particular defendant should be sentenced to death.

Only a few South Carolina cases contain any reference to the admissibility of this type of evidence, and they do not reflect a consistent pattern. Some suggestions have been made that such evidence is irrelevant,\(^{249}\) but it is not clear whether these

\(^{247}\) See supra notes 108-12 and accompanying text.

\(^{248}\) One of the principal concerns in a line of Supreme Court cases considering the constitutionality of the death penalty is the role of the jury in reflecting social attitudes toward the death penalty both in general and in the circumstances of a particular case. See, e.g., infra notes 483, 487-89, 513, 522, 661, 669 and accompanying text. As a result of this concern, it is unconstitutional to exclude a juror on the basis of his beliefs unless they would affect the juror's impartiality. See infra note 752 and accompanying text.

\(^{249}\) See State v. Thompson, 7 S.C. 414, 228 S.E.2d 581 (1982); Gilbert II, 7 S.C. 458, 283 S.E.2d 179. There are two ways in which Gilbert II suggests a lack of concern for the role of philosophical attitudes in making the individual sentencing decision. First, the court held that a juror was properly excluded because she had spoken with her priest about the Catholic Church's views on capital punishment. This exclusion was held not to be an abuse of the trial court's discretion because the "possible seating of this person would have introduced an outside influence into the deliberations of this jury." Id. at 456. Second, although the record did not indicate an offer of witnesses to testify as to the propriety of the death penalty, the court held that such testimony would have been irrelevant. To do so would be to "sacrifice judicial resources in considering the philosophical correctness of capital punishment since it has been legislatively approved in a statutory complex we have previously examined and found to be constitutional." Id. at 456. Unfortunately, Gilbert II does not consider the role...
indications are addressed to the use of the evidence in making an individual decision or in making an improper decision concerning the propriety of the death penalty. In general, as indicated above, such expert evidence should be admitted to assist in making the individual decision. On the other hand, questions about the death penalty as a general matter are not within the discretion of the trial judge and jury. So long as the scheme is constitutional, this broad question is for the legislature. Evidence concerning the abstract propriety of the death penalty

that the cultural views of the church and other "experts" should play in deciding whether a particular individual should be sentenced to death. As a result, the rule underlying the Gilbert holding is so broadly based that it is probably unconstitutional. See infra note 752 and accompanying text.

In Thompson, the court held that the trial judge did not err in quashing a subpoena duces tecum directing the Director of the South Carolina Department of Corrections to bring the electric chair into the courtroom. The court stated that "the manner or nature of capital punishment has been removed from consideration of juries." Thompson, --- S.C. at ----, 292 S.E.2d at 587. This statement is correct so long as it is limited to the general question of the method of execution. However, the jury should be informed concerning the manner of execution if the evidence is not too inflammatory and if the jury is clearly instructed that the information is only to be used to determine whether this particular defendant should be executed in this manner.


250. See supra note 248. Numerous problems can arise if such evidence is ruled inadmissible. For example, if evidence concerning the deterrent impact of the death penalty is irrelevant, the trial judge will have to be extremely careful to insure that the penalty is irrelevant, the trial judge will have to be extremely careful to insure that the State is not allowed to refer to deterrence; and this could be impossible if such references occurred during voir dire or during the closing arguments in the guilt stage. See Southern Poverty Law Center, Trial of the Penalty Phase 26 (1981). Similarly, if evidence of the "brutality" of the murder is introduced and if the prosecutor stresses this "brutality," it seems only fair that the jury should also be aware of the possibly "brutal" nature of the executions so that the jury can determine whether the particular defendant deserves such a death.

251. See, e.g., State v. Plath, --- S.C. ----, 284 S.E.2d 221, 228-29 (1981). For cases in other jurisdictions, see supra note 249.

252. Gilbert II, --- S.C. ----, 283 S.E.2d 179, 181. The distinction between the individualized decision to sentence a particular defendant to death and the general decision as to the propriety of any defendant being sentenced to death is reflected in § 16-3-20(E)(Supp. 1981), which has been interpreted to mean that a prospective juror's views on the death penalty are not a ground for exclusion unless they constitute a general decision to reject the death penalty that will prevent him from following the statutory scheme of sentencing. See supra notes 37-42 and accompanying text.
or electrocution\textsuperscript{253} is irrelevant, and jurors should be dismissed if they cannot vote in accordance with the statute.\textsuperscript{254}

(3) Commenting on the Evidence

If there is sufficient evidence to support the finding of aggravating or mitigating circumstances, the judge must submit this evidence to the jury,\textsuperscript{255} but he may not comment on the weight of the evidence.\textsuperscript{256} However, where there is no doubt about whether a mitigating circumstance is present, the judge must find the existence of that factor as a matter of law.\textsuperscript{257}

\textit{g. Closing Arguments}

A basic principle of the criminal system is that, although the solicitor should prosecute vigorously, his goal is not to convict a particular defendant, but to accomplish justice. Thus, his conduct during the trial and his closing arguments in particular, must not mislead or confuse the jury or appeal to personal passions or prejudices. The trial judge is given broad discretion to insure that the solicitor does not violate this standard. If the trial judge upholds the solicitor's argument, then the defendant on appeal has the burden of showing that, based on the record as a whole, he was denied a fair hearing because of the solicitor's closing argument.\textsuperscript{258}

The South Carolina Supreme Court has held that the closing argument in the sentencing phase denies the defendant a fair hearing if:


\textsuperscript{254} See supra notes 37-42 and accompanying text.


\textsuperscript{256} Plath, ___ S.C. at ___, 284 S.E.2d at 228; State v. Adams, ___ S.C. at ___, 283 S.E.2d at 587; State v. Linder, 276 S.C. at 311-12 S.E.2d at 339.

\textsuperscript{257} State v. Gill, 273 S.C. 190, 193, 255 S.E.2d 455, 457 (1979). The defendant in Gill had an earlier conviction for statutory rape, and the court held that it was error for the trial judge to refuse to find as a matter of law that this was not a crime involving the use of violence against another so that the first mitigating circumstance would exist as a matter of law.

\textsuperscript{258} Linder, 276 S.C. at 312, 278 S.E.2d at 339.
(1) The solicitor informs the jury that the trial judge can impose life imprisonment even if the jury recommends the death penalty.269
(2) The solicitor asserts that he will never again seek the death penalty if the jury does not impose it in this case.260
(3) The solicitor injects his personal opinion into the jury’s deliberation by arguing that in seeking the death penalty, he is only asking the jury to reach the same decision that he has already made.261

D. Appellate Review

1. The Framework for Review of Capital Cases

When the death penalty is imposed, the normal appellate process is altered in two ways.262 First, the review of a capital case is not limited to errors preserved or asserted by the appellant. Instead, the South Carolina Supreme Court has adopted the doctrine of in favorem vitae and reviews the entire record to determine whether any substantial error has been committed.263 This preference for life does not mean that errors cannot be

261. Woomer (2), — S.C. at __, 284 S.E.2d at 359-60.
262. Another significant difference in death sentence cases is that the South Carolina Commission on Appellate Defense is often involved formally as counsel for the appellant or as amicus curiae or informally. In this way, appellants in capital cases often have the advantage of institutional experience in preparing their appeal.
[n]ormally, this Court will not consider on appeal any issue not raised and preserved in the record of the court below . . . . However, in view of the doctrine of in favorem vitae which pervades this Court’s review of all capital cases, we have considered appellant’s argument on this question [even though it was not raised in the trial]. . . .
Id. at 125, 268 S.E.2d at 39. In addition, the court stated that:
[t]wo of the nineteen exceptions raised by the appellant were abandoned. We have nevertheless considered the points and issues presented by them, and concluded no error is present . . . . The transcript of proceedings in this case exceeds 1800 pages. We have carefully reviewed the entire record for prejudicial error apparent, but overlooked by counsel, and find none.
Id. at 128, 268 S.E.2d at 41.
cured\textsuperscript{264} or that the defendant may "create" errors by failing to object at the trial level.\textsuperscript{265} Nor does it alter the usual rules that discretionary rulings by the trial court are presumed correct,\textsuperscript{266} and that evidence of factual issues resolved in favor of the State will be viewed in the light most favorable to the state.\textsuperscript{267} In other words, \textit{in favorem vitae} does not reflect a requirement that the defendant be given a perfect hearing since it is always possible to discover shortcomings after any trial. Rather, the goal is to effectuate South Carolina's basic policy of taking every step to insure that no person is sentenced to death without a hearing that satisfies basic standards of fairness and rationality.

Despite the laudable goals of \textit{in favorem vitae}, it presents serious problems. For example, if a point might have been raised on appeal but was not, does the affirmance of a death penalty mean that the court has ruled adversely to the defendant on this issue?\textsuperscript{268} Another problem is that courts should not rule on an issue without giving the parties notice that the issue will be decided and an opportunity to brief the issue. These omissions raise problems of both fairness and the reliability of judicial decisionmaking.

The second difference in capital cases is that, although the South Carolina Supreme Court normally reviews convictions and sentences only when an appeal is filed, the sentence in all capital punishment cases must be reviewed and this review must address the concerns and follow the procedures set forth in the statute.\textsuperscript{269} While this mandatory sentence review is in addition

\textsuperscript{264} See, e.g., Goolsby, 275 S.C. at 125, 126, 268 S.E.2d at 39, 40.
\textsuperscript{265} See, e.g., Plath, — S.C. at —, 284 S.E.2d at 228; Gilbert I, 273 S.C. at 69697, 258 S.E.2d at 894.
\textsuperscript{266} E.g., Linder, 276 S.C. at 312, 278 S.E.2d at 339.
\textsuperscript{267} E.g., State v. Horace Butler, — S.C. —, 290 S.E.2d 1, 4 (1982).
\textsuperscript{268} An example of this type of problem is indicated by Tyner I and Tyner II. At the first sentencing hearing, evidence concerning the defendant's "criminal character" was admitted without objection, see supra notes 140-45 and accompanying text, but was not discussed as a ground for reversal. See Tyner I, 273 S.C. 646, 258 S.E.2d 559. Thus, it can be argued that the court approved the admission of such evidence. However, at the second sentencing hearing, the trial judge refused to allow such testimony to be admitted. Record at 890 Tyner II. Consequently, it is not clear what the law is on the issue of evidence concerning recidivism and "psychopathic personalities."
\textsuperscript{269} § 16-3-25(A)(Supp. 1981) provides:

Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days
to review by direct appeal, both reviews are consolidated if the defendant appeals.\textsuperscript{270}

This mandatory review of the death sentence is structured by the statute in several ways. First, both the defendant and the State are entitled to submit briefs and present oral arguments in connection with this review.\textsuperscript{271} Second, the supreme court is authorized to affirm the death penalty or to remand for resentencing. When a case is remanded, certain procedures are specified.\textsuperscript{272} Finally, the statute provides that in addition to the correction of other errors,\textsuperscript{273} the court must determine the following:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's findings of a statutory aggravating circumstance as enumerated in § 16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.\textsuperscript{274}

In fulfilling its responsibility to consider proportionality under subsection (3) above, the court must "include in its decision a reference to those similar cases which it took into consideration."\textsuperscript{275}

\textsuperscript{270} after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina. § 16-3-25(B),(F)(Supp. 1981) provides:

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

\textsuperscript{271} (F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence. § 16-3-25(D)(Supp. 1981).

\textsuperscript{272} § 16-3-25(E)(Supp. 1981).

\textsuperscript{273} Id.

\textsuperscript{274} § 16-3-25(C)(Supp. 1981).

\textsuperscript{275} § 16-3-25(E)(Supp. 1981). This section also provides that when the court sets a sentence aside and remands for resentencing: "The records of those similar cases re-
There are two possible views of the court's responsibility to determine whether the death penalty is disproportionate in a particular case. First, it could mean that the court should adopt a "relative" model of proportionality and insure that like cases are treated alike. Under this view, a death sentence would be disproportionate if other murderers similar to the defendant were not sentenced to death. Second, it could mean that the court should use an "objective" model and insure that the crime and the criminal are sufficiently offensive so death is appropriate. From this perspective, it does not matter that similar murderers are not sentenced to death so long as the defendant and his conduct are sufficiently wrongful in some "objective" or "absolute" sense. However, it is important to consider cases when death has been imposed and affirmed because they provide examples of cases in which the death penalty is deserved in this objective sense.

Several reasons indicate that South Carolina has adopted the second model of proportionality review. First, in complying with its duty to refer to similar cases which it took into consideration, the court only cites cases in which the death penalty was imposed and affirmed on appeal. In addition, the court has shown little concern with monitoring decisions of prosecutors or juries in favor of life imprisonment. Thus, the court appa-

ferred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration." The meaning of the phrase "extracts prepared as hereinafter provided for" is somewhat unclear since there is no later provision for such extracts. The phrase was apparently left inadvertently when the Georgia statute was modified for use in South Carolina. See GA. CODE ANN. § 27-2537 (Supp. 1975).

276. See infra notes 936-52 and accompanying text for further discussion of proportionality.

277. State v. Thompson, ___ S.C. at ___, 292 S.E.2d at 584 n.1. See State v. Horace Butler, ___ S.C. at ___, 290 S.E.2d at 4; Gilbert II, ___ S.C. at ___, 283 S.E.2d at 182; State v. Hyman, ___ S.C. at ___, 281 S.E.2d at 213. The imposition of the death penalty was also upheld in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979), but no comparisons were made because Shaw was the first case to be decided by the court under the new statute. Id. at 211, 255 S.E.2d at 807. In Thompson, the court held that this focus on death penalty cases for proportionality review is constitutional. ___ S.C. at ___, 292 S.E.2d at 584.

278. See supra notes 10-17 and accompanying text for a discussion of prosecutorial discretion. The court's lack of concern with life imprisonment cases is reflected both in its failure to consider these cases in its proportionality review, see cases cited in notes 279-81 infra, and in its possible failure to adopt administrative mechanisms for such review. See infra notes 305-06 and accompanying text. It should be noted that the stat-
ently does not compare death penalty cases with cases in which the death penalty was not imposed.279 Second, the approach of the court’s opinions reflects a focus on the objective wrongfulness of the defendant and his act. For example, in State v. Hyman,280 the court simply states: “The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.”281 Third, when the court considered an argument that the death penalty was not imposed in a manner that reflected relative proportionality, it rejected the challenge because there was no showing of purposeful discrimination.282

While there are valid reasons for the adoption of the second model of proportionality review,283 there are nevertheless several problems involved in the way the court applies this model. First, the South Carolina Supreme Court has never reversed a conviction for lack of proportionality, and its decisions upholding the death penalty contain only brief, conclusory discussions of pro-
Consequently, it is impossible to determine how such decisions are made. Furthermore, it is unclear what, if any, theory of objective proportionality was used. Second, the South Carolina Supreme Court, unfortunately, has no way of knowing whether offensive patterns that reflect improper relative disproportionality are developing—for example, patterns based on race. Finally, since the court does not fully monitor all murder cases, it has no systematic way of learning prosecutors’ and jurors’ views concerning these crimes and criminals which are not sufficiently wrongful to warrant the death penalty. This lack of data on cultural views of proportionality raises questions about the constitutionality and justice of the South Carolina scheme, particularly since the South Carolina Supreme Court seems to lack a noncultural model of objective proportionality and has indicated disinterest in philosophical views of proportionality.

The inadequacy of the court’s approach to objective proportionality review is also reflected in cases where the death sentence was reversed on grounds unrelated to proportionality and the case was remanded for resentencing. For example, in *State v. Tyner* the court implicitly approved the death penalty for an eighteen year old black youth who was mentally retarded and whose ability to appreciate the wrongfulness of his act was impaired. This inability distinguishes him from the serious

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284. See *supra* notes 280-81 and accompanying text.


286. See *infra* notes 305-06 and accompanying text.

287. See *infra* notes 780-85, 864-69, 931-32, 947-49 and accompanying text.

288. *Gilbert* II, ___ S.C. at ___, 283 S.E.2d at 181. See *supra* note 249. While the *Gilbert* II opinion refers to the philosophical and constitutional validity of the scheme as opposed to the validity of an individual decision, proportionality review cannot be done justly without an underlying view as to the purposes of capital punishment. See *infra* notes 820-949 and accompanying text. Thus, the court’s rejection of the need to consider why capital punishment is just results in the lack of a philosophical framework to guide proportionality review.


290. See *supra* notes 219-25 and accompanying text for a discussion of these handicaps. On September 12, 1982, Tyner was killed in prison by a bomb. Six persons have been indicted for his murder. The State (Columbia, S.C.), Oct. 6, 1982, at 1-A. At the second sentencing, Tyner was again sentenced to death. His appeal from this sentence was pending at the time of his death.
wrongdoer without such an impairment.\textsuperscript{291} He cannot be deterred more by the threat of death than by life imprisonment because he lacks the mental capacity to make such distinctions.\textsuperscript{292} His inability to appreciate his wrongdoing may indicate a need to restrain him for life in order to protect society,\textsuperscript{293} but this goal could be accomplished by life imprisonment. Consequently, there is good reason to say that the death penalty is disproportionate in his case. The court’s failure to even consider this problem in its remand decision strongly suggests that the court either has no model of objective proportionality or that its model is inadequate to satisfy the requirements of justice\textsuperscript{294} and, perhaps, the Constitution.\textsuperscript{295}

The significance of these problems becomes clear upon considering the facts of the cases in which the South Carolina Supreme Court has upheld the imposition of the death penalty. Three defendants committed crimes that involved brutality and rape,\textsuperscript{296} while the four defendants in the remaining cases were guilty of a murder committed with armed theft as the only aggravating circumstance.\textsuperscript{297} Perhaps good reason exists to adopt the view that murderers who commit brutal rapes are the kind of “bad” criminals who “should” be sentenced to death.\textsuperscript{298} However, murderers who commit armed robbery do not so clearly appear to deserve death.\textsuperscript{299} The doubt about the propriety of death in these circumstances is supported by the large number of

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 878-83, 894-935 and accompanying text, for a discussion of the importance of a person’s wrong-doing.
\item See infra notes 820-77 and accompanying text, for a discussion of the importance of such a deterrent impact.
\item See supra note 141 and accompanying text.
\item See supra notes 291, 293 and accompanying text.
\item See infra notes 774, 780-85, 936-49 and accompanying text. The constitutional problem results primarily from the lack of a retributive or a deterrent rationale to justify the death penalty in such a case. See supra notes 291, 293 and accompanying text, and e.g., infra notes 495, 515, 522-24, 664-68 and accompanying text.
\item State v. Horace Butler, ___ S.C. ___, 290 S.E.2d 1 (1982); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). Armed robbery was also involved. Since Shaw involved two defendants, three such death sentences have been upheld.
\item See infra note 668 and accompanying text.
\end{enumerate}
\end{footnotesize}
South Carolina cases where persons who commit murder while engaged in an armed robbery have not been sentenced to death. The sheer number of these cases suggests a cultural view that the death penalty is proper only in particular types of armed robbery situations. Consequently, even if the South Carolina Supreme Court is not concerned with relative proportionality, it should at least articulate reasons for holding that capital punishment is proper for only a small proportion of those murderers who commit armed robbery. However, only one of these decisions contains even a slight indication of the reason for viewing the murder committed during an armed robbery as particularly wrongful.

As a result, the court appears to have adopted a mechanical approach to proportionality review—i.e., so long as the facts reveal that one statutory aggravating circumstance was shown, the defendant’s sentence is not disproportionate. Such a “threshold” type approach to review of sentencing is clearly inadequate.

### 2. Administrative Mechanisms for Monitoring Sentencing Patterns

In addition to considering cases pursuant to the statutory review process, the South Carolina Supreme Court has adopted administrative procedures for monitoring capital cases. When the solicitor thinks he may seek the death penalty, he must fill out a form and send it to the South Carolina Court Administra-

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300. See infra notes 337, 348 and accompanying text.

301. In the proportionality review portion of State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982), the court noted that: “[u]pon entering Mr. Toubia’s store to rob him, appellant immediately shot him once. Before leaving the store with the fruits of the crime, appellant shot him again.” Id. at ___, 292 S.E.2d at 584. In State v. Hyman, ___ S.C. ___, 281 S.E.2d 209 (1981), the court referred to a “brutal crime for the purpose of obtaining money,” id. at ___, 281 S.E.2d at 215, but it is not clear whether the term “brutal” adds something to the armed robbery and if so, what renders an armed robbery brutal is not clear. In Gilbert II, ___ S.C. ___, 283 S.E.2d 179 (1981), the court simply states that the death penalty is proportionate to a crime of this nature. Id. at ___, 283 S.E.2d at 182.

302. See supra notes 146-50, 203-04 and accompanying text.

303. The information about monitoring of cases by the South Carolina Supreme Court staff is based on interviews with staff attorneys of the court and on a review of reports concerning that monitoring. In addition to the summary sheets and the case summaries discussed in the text, the staff at one time began to develop a file based on aggravating circumstances to determine if sentencing patterns were developing.
tor advising of this fact. A copy of each form card is then forwarded to the South Carolina Supreme Court. The court staff monitors these cases and periodically prepares summary sheets indicating the following information for all the cases that have been tried: (1) the case name; (2) the trial date; (3) the trial judge; (4) the plea; (5) the sentence sought; (6) the sentence received; (7) the aggravating circumstances established; (8) the appeal taken, if any; and (9) the post conviction relief sought. These summaries are available to the public, but individual case summaries, also prepared by the staff, are for the exclusive use of the court.

The role of these administrative mechanisms in the court's review process is not clear, but two conclusions seem logical. First, the court is not monitoring cases in which life imprisonment is sought since the form cards and the summary sheets do not address such cases. Second, the court's administrative review process focuses on whether aggravating circumstances were established; mitigating circumstances are not stressed.

It is tempting to criticize these administrative procedures because of the apparent lack of interest in all noncapital murder cases and mitigating circumstances. However, while this lack of

304. These forms are usually sent in as required.

305. Attempts to subpoena these summaries or to question the Chief Staff Attorney of the Court concerning their compilation or use have been unsuccessful. See, e.g., Roach v. Martin, No. 81-1907-1 (D.S.C. May 7, 1982)(order denying deposition of ClydeDavis, Staff attorney to South Carolina Supreme Court). Because of this resistance to produce the reports, it is not clear whether summaries are prepared for cases in which the defendant was sentenced to life imprisonment.

306. There are two reasons for this uncertainty. First, the court has successfully resisted attempts to use discovery procedures to investigate its decision processes. See supra note 305. Second, the decisions have not provided any meaningful guidance. For example, in State v. Thompson, S.C. at 292 S.E.2d 581 (1982), the court held that the defendant's death penalty was proportional to similar cases and cited State v. Shaw, 273 S.C. 194, 265 S.E.2d 799, cert. denied, 444 U.S. 957 (1979) and State v. Hyman, S.C. at 281 S.E.2d 229 (1981). The court then noted: "The transcripts, briefs and opinions in those cases used for comparison purposes are public records; thus the defendant in fact has access to the same information available to the Court." Thompson, S.C. at 292 S.E.2d at 584 n.1. This note suggests that these administrative mechanisms are not used. However, at another point in Thompson, the court rejected the defendant's assertion that he had "a right of access to the cases with which the Supreme Court compares each death sentence." Id. at 292 S.E.2d at 584. This rejection seems unnecessary if the defendant does indeed have the same access. Moreover, it seems unlikely that the court has directed its staff to collect data which it never uses.
interest is unfortunate, it can be defended on several grounds. First, the focus on established aggravating circumstances is understandable since the statute requires an explicit finding that one of these circumstances be found by the sentencing authority. Second, the model of proportionality review used by the South Carolina Supreme Court focuses on very bad defendants, not on relative proportionality, so it is not surprising that the administrative procedures focus primarily on cases in which the death penalty is imposed. Third, the statute does not require such administrative efforts, so these efforts indicate the court's willingness to look more deeply into death penalty cases. Finally, the supreme court and its staff lack the resources to undertake the kind of statistical analysis necessary for a meaningful survey of the patterns in all murder cases.

E. Certiorari, Post Conviction Relief, and the Lengthy Nature of Capital Proceedings

Although all convicted criminals are entitled to petition for certiorari to the United States Supreme Court and to petition for post conviction relief, the availability of this right is particularly important in capital cases for two reasons. First, because the death penalty is so extreme and irrevocable, post conviction remedies are virtually always pursued and stays of execution are virtually automatic during these post conviction

307. See supra notes 283-88 and accompanying text.
308. See supra notes 278-82 and accompanying text.
309. See, e.g., U.S. Const. art. III, § 2.
310. Post conviction relief may be pursued both in the South Carolina state courts, see §§ 17-27-10 to -120 (1976), and in the federal courts through a petition for habeas corpus, see 28 U.S.C. §§ 2241 to 2255 (1971). For general discussions of post conviction relief, see, e.g., R. Popper, Post-Conviction Remedies (1978); L. Yackle, Post-Conviction Remedies (1981); Note, Administering the Death Penalty, 39 Wash. & Lee L. Rev. 101 (1982). Although there are limits on successive collateral attacks, see, e.g., R. Popper, supra at §§ 10.1-10.6, a single unsuccessful use of post-conviction proceedings would involve at least the following six steps: (1) Petition to South Carolina circuit court for post-conviction relief; (2) appeal to the South Carolina Supreme Court; (3) petition for certiorari to the United States Supreme Court; (4) petition for writ of habeas corpus to the United States District Court (which is usually referred to a magistrate for an initial review before consideration by the court); (5) appeal to the Federal Court of Appeals; and (6) petition for writ of certiorari to the United States Supreme Court. For any claim, steps (4), (5), and (6) cannot precede steps (1), (2), and (3) because the federal court will not consider a decision until state remedies are exhausted. Rose v. Lundy, 102 S. Ct. 1198 (1982).
proceedings.\textsuperscript{311} Second, given this pattern of stays and the length of time involved in completing these proceedings,\textsuperscript{312} the execution \textit{usually} cannot occur until at least several years after the murder. If any of the petitions are successful, then a retrial may be necessary, and it could take even more years to complete the process of conviction, appeal, post conviction proceedings, and finally, execution.

The time involved is important because it is relevant to several considerations raised in discussing the death penalty. First, to the extent we are concerned with the "badness" of the defendant,\textsuperscript{313} the person who is executed is very likely to have changed considerably since the crime.\textsuperscript{314} Second, despite its lack of legitimacy as a justification, community outrage has been given as a reason for the death penalty.\textsuperscript{315} Such outrage is likely to have dissipated considerably by the time of execution. Finally, the death penalty is surprisingly expensive, considering the cost of the proceedings and the accompanying incarceration pending those proceedings. Thus, even if it were legitimate to justify the death penalty on the ground that it is cheaper than life imprisonment,\textsuperscript{316} it appears the death penalty may be comparatively more expensive than life imprisonment.\textsuperscript{317}

\textsuperscript{311} See, e.g., Shaw v. Martin, 613 F.2d 487, 490-92 (4th Cir. 1980).
\textsuperscript{312} See supra note 310 for a discussion of the steps involved. Each step will involve time tables, for example, time tables for filing notices of appeal and briefing. Consequently, even unsuccessful proceedings are lengthy. For an example of the delay involved and criticism of the length of this delay, see Coleman v. Balkcom, 451 U.S. 949, 956-64 (1982) (Rehnquist, J., dissenting); see also Note, Administering the Death Penalty, 39 Wash. & Lee L. Rev. 101 (1982).
\textsuperscript{313} See supra notes 276-302 and accompanying text, and infra notes 894-910, 941-49 and accompanying text.
\textsuperscript{314} See infra notes 901, 904 and accompanying text.
\textsuperscript{316} See, e.g., Furman v. Georgia, 408 U.S. 238, 355, 357-58 (1972) (Marshall, J. concurring), for a consideration and rejection of this justification. The basic problem with the justification is that it does not grant persons the respect to which they are entitled. See infra notes 862-63, 872 and accompanying text.
F. Executive Clemency

A full consideration of the death penalty in South Carolina includes the Governor's authority "to grant reprieves and to commute a sentence of death to that of life imprisonment." Petitions for a reprieve may be referred by the Governor to the Probation, Parole, and Pardon Board for recommendations. The Governor need not refer the petition to the Board or follow its recommendation. However, when he does not follow its recommendation, he must submit his reasons to the General Assembly. Due to the absence of petitions for clemency in recent years, it is not possible to say anything about the practice of commutation in South Carolina.

G. Patterns of Sentencing — An Empirical Study

1. The Data Base

Murder cases are administratively monitored in two ways in South Carolina. First, as indicated above, solicitors submit a form when they expect to seek the death penalty and send a copy of the forms to the supreme court. The supreme court's staff updates these cards to indicate the trial date, judge, plea, sentence received, aggravating circumstances established at trial, and status of the case on the appellate level. Second, the South Carolina Attorney General's Office periodically generates a computer printout updating the status of all indictments, including murder indictments, issued in the State during a designated time period. Although this printout contains basically the same

320. Id.
321. Id.
322. For a recommendation concerning the possible future exercise of this power, see infra note 904 and accompanying text.
323. The data for this study was compiled exclusively by Brent Burry. A copy of the data sources and of various tabulations by Mr. Burry is on file with the South Carolina Law Review.
323.1. See supra notes 303-08 and accompanying text.
324. See supra notes 303-08 and accompanying text.
information as the South Carolina Supreme Court records, it
does not contain information on aggravating circumstances.

During the fall of 1981, the form cards on file at the South
Carolina Supreme Court were reviewed to determine the pat-
terns of sentencing that might be developing in the state.325 The
forms on file during this time contained data on 128 cases and
this information formed the initial data base for this study. The
information on the forms was verified by cross-referencing each
case with the information available from the Attorney General's
Office and with published opinions of the South Carolina Su-
preme Court.

Comparisons based on the forms for these cases are subject
to a number of problems. First, the number of cases involved is
small, particularly when subcategories are considered. Second,
murder cases in which the death penalty was not considered are
not included because the solicitor would not be required to send
in a card. Third, the form cards do not list the mitigating cir-
cumstances offered by defendants. Consequently, all compari-
sions are based solely on statutory aggravating circumstances.
Fourth, data concerning prosecutorial decisions not to seek the
death penalty after submitting the forms is often inadequate.326
Finally, because of limitations of time and resources, trial court
records were not consulted to augment or verify the information
contained in the Attorney General’s computer records or the
South Carolina Supreme Court files. This lack of further inves-
tigation had two results. First, thirty-one cases were eliminated
because there were insufficient data to include them in a valid
comparison.327 Second, in some of the remaining ninety-seven
cases, it was necessary to assume that the form cards were a
complete and reliable indication of the relevant data.

2. Summary of Data

The data base contains ninety-seven cases in which the
death penalty was considered.328 The following illustration indi-

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325. See supra note 323.
326. See, e.g. infra notes 333, 336 and accompanying text.
327. Seventeen cases lacked sufficient data because they were decided so recently or
because no report was filed. In the remaining fourteen cases, the report failed to indicate
the sentence received or the aggravating circumstances established at trial.
328. See infra note 331, for a discussion of the method of counting “cases” for this
survey.
cates the disposition of these cases:

**ILLUSTRATION I—SUMMARY OF DISPOSITION OF CAPITAL CASES**

- **97 cases in the data base**
  - **30 cases**—death not sought
  - **67 cases**—death sought
    - **56 cases**—guilty of murder
    - **11 cases**—not guilty of murder
      - **22 cases**—death sentence
      - **34 cases**—life imprisonment
        - **7 cases**—sentence affirmed
        - **7 cases**—reversed and remanded for retrial on sentence
        - **5 cases**—reversed and remanded for retrial on guilt
        - **3 cases**—pending

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329. The disposition of these eleven cases was as follows:

(1) Eight defendants were convicted of lesser offenses:

   (a) Jasper Buchanan; Darlington Co./Feb. 1978; voluntary manslaughter, armed robbery.
(b) Timothy Brown; Anderson Co./Apr. 1980; voluntary manslaughter.
(c) Debby Dover; Spartanburg Co./Aug. 1980; accessory after the fact to murder.
(d) Joseph Geter; Lee Co./Oct. 1978; voluntary manslaughter, armed robbery.
(e) John Hoffman, Jr.; Georgetown Co./Nov. 1977; accessory before the fact to murder.
(f) Isiah James, Jr.; Sumter Co./June 1979; voluntary manslaughter, armed robbery.
(g) Joseph Moultrie; Beaufort Co./Mar. 1978; voluntary manslaughter.
(h) Melvin West; Edgefield Co./Feb. 1978; accessory after the fact to murder, armed robbery.
(2) Two defendants' trials ended in a mistrial:
(a) Washie Allen; Dorchester Co./Oct. 1980
(b) Roosevelt Bryan; Aiken Co./Mar. 1980
(3) One defendant was acquitted on retrial:
(a) Michael Linder; Colleton Co./Nov. 1981

330. The seven persons whose death sentence have been affirmed are: (1) Shaw, (2) Roach, (3) Butler, (4) Hyman, (5) Gilbert, (6) Gleeton, and (7) Thompson. See supra notes 277, 296-97 and accompanying text.

331. Because of the time span involved in the study, some of the same persons and crimes are treated as more than one case. For example, two defendants, Gilbert and Gleeton, are counted in both the "reversed and remanded for retrial and sentencing" category and in the "affirmed" category. They are also counted twice in cases in which the death penalty is sought. The study treats these defendants as separate cases because all of these proceedings involved prosecutorial and jury discretion and because this treatment is necessary for a consistent tabulation of cases.


332. The three pending cases are: Woomer (1), No. ______ (S.C. filed March 9, 1982); Smart II, No. 21812 slip op. (S.C. Nov. 23, 1982); Tyner II, No. ______ (S.C. argued Oct. 6, 1981). Tyner II will soon be dismissed because of Rudolph Tyner's death. See supra note 290.
3. Prosecutorial Discretion

Because no forms were submitted for cases in which the prosecution never seriously considered seeking the death penalty, precise conclusions about the exercise of prosecutorial discretion are not possible. In addition, when the solicitor submits a card, the form contains no indication of the factors that might affect a subsequent decision not to seek the death penalty.333 With these limitations in mind, the ninety-seven cases in the data pool can be considered to determine whether they indicate possible patterns of prosecutorial discretion.

The solicitor considered but did not seek the death penalty in thirty of the ninety-seven cases in the data base. The following illustration indicates the disposition of these cases.

**ILLUSTRATION II — DISPOSITION OF CASES WHERE DEATH CONSIDERED BUT NOT SOUGHT**

```
30 Cases — death not sought

22 cases — defendant pled guilty to murder
2 cases — defendant tried for murder
5 cases — defendant pled guilty to lesser homicide charge
1 case — defendant granted immunity

1 case — guilty of murder
1 case — not guilty of murder
```

The forms indicate that a plea bargain was involved in fourteen

---

333. See *infra* text accompanying note 336, for an indication of similar problems concerning the initial decision to seek the death penalty.
of the twenty-two cases in which the defendant pled guilty to murder.

Solicitors sought the death penalty in sixty-seven of the ninety-seven cases in which the death penalty was initially considered. The table below suggests the relationship between the number of aggravating factors and the exercise of prosecutorial discretion in these ninety-seven cases.

**TABLE I — PROSECUTORIAL DISCRETION AND NUMBER OF AGGRAVATING CIRCUMSTANCES**

<table>
<thead>
<tr>
<th>Number of aggravating circumstances</th>
<th>Death sought</th>
<th>Death not sought</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>5</td>
<td>1<strong>334</strong></td>
<td>6</td>
</tr>
<tr>
<td>2</td>
<td>15</td>
<td>4</td>
<td>19</td>
</tr>
<tr>
<td>1</td>
<td>46</td>
<td>23</td>
<td>69</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>No information available</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>67</strong></td>
<td><strong>30</strong></td>
<td><strong>97</strong></td>
</tr>
</tbody>
</table>

Because the data base is subject to the basic flaws listed above, these tabulations should be viewed with considerable skepticism.

The following table indicates the possible relationship between the South Carolina Supreme Court’s treatment of overlapping circumstances**335** and prosecutorial discretion.

---

334. This case is the result of a plea bargain in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). For a discussion of this exercise of prosecutorial discretion, see supra notes 10-12 and accompanying text.

335. See supra notes 159-71 and accompanying text.
<table>
<thead>
<tr>
<th>NUMBER OF CIRCUMSTANCES THAT THEFT CONSIDERED TO CONSTITUTE</th>
<th>DEATH SOUGHT</th>
<th></th>
<th>DEATH NOT SOUGHT</th>
<th></th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>No additional</td>
<td>Additional</td>
<td>Total</td>
<td>No additional</td>
</tr>
<tr>
<td></td>
<td></td>
<td>aggravating circumstances</td>
<td>aggravating</td>
<td></td>
<td>aggravating</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>circumstances</td>
<td></td>
<td>circumstances</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2</td>
<td>9</td>
<td>7</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1</td>
<td>39</td>
<td>33</td>
<td>6</td>
<td>20</td>
<td>15</td>
</tr>
<tr>
<td>Totals</td>
<td>49</td>
<td>41</td>
<td>8</td>
<td>20</td>
<td>15</td>
</tr>
</tbody>
</table>
The above table suggests that the treatment of armed robbery and larceny with a deadly weapon as different circumstances may be related to the exercise of prosecutorial discretion. When they are treated as two circumstances, the death penalty always has been sought regardless of whether other aggravating circumstances exist. When they are treated as one circumstance and there are no non-theft aggravating circumstances, the death penalty is sought in only 55 percent of these cases. However, the forms provide the only data for some cases, and they may not provide accurate and complete data on this question. Moreover, given the limitations of the data base, it is not possible to determine whether the decision to seek the death penalty results in the treatment of the theft offense as two circumstances, whether the causal basis of the correlation is reversed, or whether some unrelated factors cause the relationship. In any event, the correlation is so substantial that it may be important to the system of capital punishment, because armed robbery is the most common aggravating circumstances in death penalty cases. Table II also indicates three other points concerning the ninety-seven cases in the data base: (1) theft was involved in sixty-nine of the cases in which solicitors considered the death penalty (71 percent of the total); (2) theft was the only aggravating circumstance in fifty-six of the cases (59 percent of the total); and (3) prosecutors sought the death penalty in forty-one of the fifth-six cases in which theft crimes were the only statutory aggravating circumstance (73 percent). Despite the flaws in the data base, these tabulations indicate both the important role that armed theft plays in deciding who is sentenced to death in South Carolina and the need for care in treating overlapping circumstances.

336. See supra text accompanying note 333. For an indication of similar problems concerning the decision not to seek the death penalty after it was initially considered. See supra note 297 and accompanying text. The study based the percentage of cases in which the State sought the death penalty when a theft crime was treated as one circumstance and no non-theft aggravating circumstances were present on the comparison of the following figures: (1) The 33 cases in which theft was considered to be one circumstance, no other aggravating circumstances were indicated, and death was sought; and (2), the 59 cases in which theft was considered as only one circumstance. If these 33 cases are compared with all cases in which theft was regarded as one circumstance and no additional circumstances existed, then the percentage would be 69%.

337. This role is indicated also by the seven cases in which the death penalty was upheld, because four involved only armed theft as one or more aggravating

https://scholarcommons.sc.edu/sclr/vol34/iss2/5
4. **Sentencing Discretion**

The defendant was convicted of murder in fifty-six of the sixty-seven cases in which solicitors sought the death penalty. The following table indicates the relationship between the number of aggravating circumstances and sentencing in these fifty-six cases.

**TABLE III — SENTENCING DISCRETION AND NUMBER OF AGGRAVATING CIRCUMSTANCES**

<table>
<thead>
<tr>
<th>Number of Aggravating Circumstances</th>
<th>Death Penalty</th>
<th>Life Imprisonment</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Judge</td>
<td>Jury</td>
<td>Total</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>0</td>
<td>7</td>
<td>7</td>
</tr>
</tbody>
</table>
| 1                                   | 0     | 12   | 12    | 12°  | 24   | 36
| Totals                              | 2     | 20   | 22    | 15°  | 19   | 34    | 17    | 39   | 56    |

No relationship appears to exist between the number of circumstances and sentencing. Once again, however, due to the small number of cases and the lack of complete, reliable data on this and other factors, it is difficult to determine whether a relationship exists.

Table III also suggests that juries are far more likely to impose the death penalty than are judges. Judges imposed the death penalty in only two of seventeen cases considered. Juries, on the other hand, imposed death in twenty of thirty-nine cases. This disparity is even more pronounced in light of the fact that the judge-imposed death sentences occurred in the shocking circumstances.

338. In one of these cases, the jury was unable to reach a unanimous verdict. This case is included in this total because it was in effect a jury decision against the death penalty.

339. In three of these cases, the jury was unable to reach a unanimous verdict. These cases are included in this total since they were in effect a jury decision against the death penalty.

340. In nine of these cases, the defendant pleaded guilty and no trial was held on guilt. In four cases, the defendant pleaded guilty after the start of the trial. Thus, only two of these life imprisonment sentences were imposed after a full trial on guilt. The two death sentences imposed by judges were also imposed without a trial on guilt because they involved guilty pleas made prior to trial. State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).
circumstances set forth in State v. Shaw.\textsuperscript{341}

It is difficult to conclude from these patterns of sentencing whether the death penalty is acceptable to South Carolina society.\textsuperscript{342} One problem is that it is not clear what would constitute an acceptable percentage of cases in which death is imposed.\textsuperscript{343} Another problem is that the pattern of sentencing by judges could reflect only a lenient response to guilty pleas\textsuperscript{344} and a careful limiting of the death penalty to extreme cases like Shaw.\textsuperscript{345} On the other hand, the jury sentencing patterns do not necessarily reflect acceptance of the death penalty. Instead, the patterns may indicate only that South Carolina juries do their best to implement the statutory scheme even if they personally disagree with it. The voir dire is certainly designed to insure such a result.\textsuperscript{346}

The following tables indicate the relationship between sentencing decisions and the treatment of armed theft as more than one aggravating circumstance. The two variables do not appear to be correlated; however, skepticism is in order because of the problems with the data base.

\textsuperscript{341} Id. The facts of Shaw indicated a premeditated plan to rob, murder, and rape that was cold bloodedly executed, resulting in robbery, two deaths, rape and other sexual assaults, torture, and postmortem mutilation.

\textsuperscript{342} See supra notes 338-40 and accompanying text.

\textsuperscript{343} Compare, e.g., infra note 483 with infra note 485 and infra note 661 with infra note 669.

\textsuperscript{344} See supra note 340.

\textsuperscript{345} See supra notes 10-12, 136-38, and accompanying text and infra notes 541-42, 669 and accompanying text.

\textsuperscript{346} See supra notes 37-42 and accompanying text.
### TABLE IV — SENTENCING DISCRETION BY BOTH JUDGE AND JURY
AND OVERLAPPING CIRCUMSTANCES

<table>
<thead>
<tr>
<th>NUMBER OF CIRCUMSTANCES THAT THEFT CONSIDERED TO CONSTITUTE</th>
<th>DEATH PENALTY</th>
<th>LIFE IMPRISONMENT</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>No additional aggravating circumstances</td>
<td>Additional aggravating circumstances</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>1</td>
<td>10</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Totals</td>
<td>15</td>
<td>13</td>
<td>2</td>
</tr>
</tbody>
</table>

347. Table II indicates that theft crimes were involved in 49 of the 67 cases in which the death penalty was sought. In 5 of these 49 cases, the defendant was convicted of a lesser crime; in 2 of these 49 cases, a mistrial resulted. Thus, Table IV involves only 42 cases.
### Table V — Sentencing Discretion by Jury and Overlapping Circumstances

| Number of Circumstances That Theft Considered to Constitute | Death Penalty | | | Life Imprisonment | | | Totals | | |  
|---|---|---|---|---|---|---|---|---|
| | Total | No additional aggravating circumstances | Additional aggravating circumstances | Total | No additional aggravating circumstances | Additional aggravating circumstances | | | | |  
| 3 | 1 | 1 | 0 | 0 | 0 | 0 | 1 | | | |  
| 2 | 4 | 4 | 0 | 3 | 3 | 0 | 7 | | | |  
| 1 | 8 | 8 | 0 | 12 | 9 | 3 | 20 | | | |  
| Totals | 13 | 13 | 0 | 15 | 12 | 3 | 28 | | | |  

### Table VI — Sentencing Discretion by Judge and Overlapping Circumstances

<table>
<thead>
<tr>
<th>Number of Circumstances That Theft Considered to Constitute</th>
<th>Death Penalty</th>
<th></th>
<th></th>
<th>Life Imprisonment</th>
<th></th>
<th></th>
<th>Totals</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>No additional aggravating circumstances</td>
<td>Additional aggravating circumstances</td>
<td>Total</td>
<td>No additional aggravating circumstances</td>
<td>Additional aggravating circumstances</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>10</td>
<td>9</td>
<td>1</td>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>12</td>
<td>9</td>
<td>3</td>
<td>14</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
5. The Need for Further Empirical Study

The data base for this study has so many shortcomings that the information presented above is not sufficiently reliable to help us understand the system. Nevertheless, the study is important for two reasons. First, it provides at least a rough view of the patterns of sentencing, and this rough tabulation casts doubt on several factual assumptions that are implicit in opinions of the South Carolina Supreme Court. For example, this study suggests either that a cultural reluctance to view simple armed theft as an aggravating circumstance exists or that some unknown (and perhaps improper) factor is involved in determining which armed robbers should be executed.348 The South Carolina Supreme Court, however, has not considered either of these alternatives in its opinions.349 Second, the shortcomings themselves are important because they indicate how little is known about the system. As a result, further empirical study clearly is needed to insure that the sentencing process provides a meaningful basis for imposing the death penalty. This need is also evidenced by other empirical studies, both in South Carolina350 and other states.351 In particular, it is important to determine

348. The study indicates the following pattern concerning cases in which armed theft was the only aggravating circumstances:

<table>
<thead>
<tr>
<th>Cases</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>56</td>
<td>in which death considered</td>
</tr>
<tr>
<td>15</td>
<td>in which death not sought</td>
</tr>
<tr>
<td>41</td>
<td>in which death sought</td>
</tr>
<tr>
<td>7</td>
<td>in which defendant not found guilty of murder</td>
</tr>
<tr>
<td>34</td>
<td>in which defendant guilty of murder and armed theft</td>
</tr>
<tr>
<td>21</td>
<td>in which defendant sentenced to life imprisonment</td>
</tr>
<tr>
<td>13</td>
<td>in which defendant sentenced to death</td>
</tr>
</tbody>
</table>

By eliminating the seven cases in which the defendant was not convicted of murder, 49 cases remain in which the defendant might have been sentenced to death because of the presence of the single aggravating circumstance of armed theft. Yet, only about one-fourth of these defendants were sentenced to death. This percentage becomes even more striking upon including the eleven cases in which theft was only one of the aggravating circumstances and death was either not sought or not imposed. (See Tables II and IV). When these cases are included, a total of sixty cases in which theft was an aggravating circumstance results, and death was ultimately imposed in only 22% of these cases.

349. See supra notes 159-71, 299-302 and accompanying text.


the extent, if any, to which racial discrimination is involved in the system.\textsuperscript{352}

\textbf{H. Summary and Conclusion — The Emerging South Carolina Model of Procedural Fairness in Imposing the Death Penalty}

The basic structure for imposing the death penalty in South Carolina is established by statute, but the development of this statutory framework has proceeded in a common-law fashion. Typically, such development proceeds on a case by case basis and this approach has several effects: (1) the underlying theoretical model in the area emerges slowly and haltingly; (2) some decisions are made, particularly in the early stages of this process, that do not comport with the basic principles; and (3) these anomalous decisions are gradually eroded and eliminated so the law is consistent.\textsuperscript{353} Where the initial sentencing decisions are concerned, the first two effects are clearly evidenced in the cases, while the third stage has not yet begun. In the case of appellate review, however, the underlying theoretical model is much less clear. Nonetheless, when sentencing and review are considered together, it is clear that South Carolina has adopted a model which can be summarized as follows: The death penalty will be imposed only in those cases in which there is no doubt that the defendant deserves the death penalty.

\textbf{1. Sentencing Discretion}

Building on the statute and on the United States Supreme Court opinions in this area, the South Carolina Supreme Court has developed an approach to sentencing that balances the need for flexibility and discretion in individualizing sentencing with the need to limit, guide, and check discretion to insure the death penalty is clearly deserved.\textsuperscript{354} When the complexity of the sentencing decision necessitates choices between these competing needs, doubts are resolved in favor of life imprisonment. Thus, for example, the prosecutor's discretion to seek life imprison-
ment is virtually unlimited, but his decision to seek the death penalty is subject to all the limitations of the statutory scheme. Similarly the jury has very broad discretion to impose life imprisonment, but its discretion to impose death is much more constrained.

There are, however, a number of decisions on particular issues that contradict this underlying model of procedural fairness and bias toward life imprisonment and show little, if any, concern for the complexity of the sentencing decision. Some cases appear excessively mechanical and unconcerned with limiting and guiding the jury's discretion to impose the death penalty— for example, cases which treat the same facts as constituting several aggravating circumstances.

Hopefully, the development of the South Carolina common law of death sentencing will evidence the third effect of case by case decision making, and the decisions which are inconsistent with the emerging model will be construed narrowly, distinguished, or overruled. In this way, the cases will first, consistently reflect a sentencing model that is based on the statutory scheme and the policies underlying capital punishment in South Carolina, and second, avoid serious questions about the constitutionality and justice of the death penalty in South Carolina.

2. Appellate Review

The South Carolina Supreme Court's view of appellate review is much less developed than its model of the initial sentencing decision. This may be partly due to the fact that the United States Supreme Court opinions and the South Carolina statute say very little about the details of appellate review. However, it is also due to the South Carolina Supreme Court's approach to decisions in this area. The court's decisions reflect that proportionality review focuses on the wrongfulness involved

355. See supra notes 10-17 and accompanying text.
356. See supra notes 126-29, 207-11 and accompanying text.
357. See supra notes 126, 130-32, 271-75 and accompanying text.
358. See supra notes 151-66 and accompanying text.
359. See supra notes 108-12 and accompanying text.
360. See infra notes 698-785 and accompanying text.
361. See infra notes 870-952, 964-79 and accompanying text.
in each case rather than on the relative treatment of similar persons.362 However, this is only implicit in the decisions, since the court has never explicitly articulated this approach to appellate review. Moreover, the brevity of the court's proportionality review decisions363 and its expressed disinterest in philosophical concerns364 make it virtually impossible to determine how the court decides when a criminal and crime are so wrong that the death penalty is appropriate. Indeed, there is good reason to believe that the court lacks a legitimate model of proportionality.365

The lack of a clear, legitimate model of appellate review is disquieting. The statutory,366 constitutional,367 and philosophical368 validity of capital punishment is based in part on the notion that the discretionary process of imposing the death penalty will be subject to appellate review so that any abuse of sentencing discretion will be reversed. One reason so much weight is placed on this review process is the belief that review will be undertaken carefully, thoughtfully, rationally, and consistently.369 One traditional way that courts have assured that this faith is not misplaced is to give reasons that indicate how and why decisions are made.370 Thus, the failure of the South Carolina Supreme Court to articulate a theoretical model for its proportionality review casts doubt on the legitimacy of the death penalty in this State. The resulting lack of assurance in the review process is particularly troubling since its proportionality decisions in at least three cases appear to be contrary to cultural views of proportionality.371 However, it is still early in the deve-

362. See supra notes 277-88 and accompanying text.
363. See supra notes 277, 284 and accompanying text.
364. See supra note 288 and accompanying text.
365. See supra notes 284-302 and accompanying text.
366. See supra notes 132, 283-75 and accompanying text.
367. See infra notes 704, 780-85 and accompanying text.
368. See infra notes 893, 923, 931-32, 938-49 and accompanying text.
371. See supra notes 276-302 and accompanying text, and infra notes 733-35 and accompanying text.
opment of the South Carolina common law of capital punish-
ment, and future cases may provide further development of a
just model of appellate review.

II. THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT

Constitutional challenges to legislative schemes for imposing
capital punishment present the United States Supreme Court
with a dilemma. On the one hand, the statute under review re-

flects the “popular will” as determined by the state’s elected leg-
islature. Consequently, if the Court holds the statute unconstitu-
tional, its decision would raise serious questions about the
legitimacy of the court’s interference with the democratic pro-
cess and with the values implicit in a federal system. This is par-
ticularly true when vague requirements such as the prohibition
of “cruel and unusual punishment” are involved. Thus, it is not
surprising that the Court grants state legislation a generous pre-
sumption of validity in death penalty cases. On the other hand,
it is a well-accepted tenet of our political system that judicial
review of the constitutionality of statutes is necessary to prevent
the improper exercise of legislative power. As a result, the Court
cannot simply defer to the legislature.

Because of the difficulty in striking a balance between these
two conflicting concerns, there is no consensus on the Court con-
cerning the constitutionality of capital punishment. Stable ma-
ajorities have emerged on some issues — for example, a majority
of the Court agrees that capital punishment is not per se uncon-
stitutional. However, many important underlying issues — for
example, the conditions under which capital punishment is con-
stitutional — have never been decided by a clear majority.
When these disagreements occur, viewing the Court in terms of
three groups or “blocs,” representing fairly consistent patterns
of decisions may prove helpful. One group — Justices Brennan
and Marshall — has rejected capital punishment as cruel and
unusual per se and thus prohibited under the eight amendment.
The remaining Justices can be divided — albeit very roughly —
into two blocs. Chief Justice Burger, Justices Rehnquist, White,
and Blackmun grant much greater deference to legislative deci-
sionmaking and usually hold capital punishment schemes to be
constitutional. Justices Powell, Stewart, and Stevens take an in-
termediate position and uphold the imposition of capital punish-
ment so long as it is imposed only for extreme crimes such as premeditated murder and only in accordance with substantial procedural protections against arbitrariness. It is too soon to determine the position of Justice O'Connor in terms of these blocs.

The Justices do not fit neatly into "blocs," particularly when an issue such as capital punishment is involved. Instead, views may merge on one case or series of cases, but diverge on others. Consequently, the cases in this area should also be viewed in terms of a chronological development. The following discussion will consider the basic positions of the three groups of Justices within the context of such a chronological development. It also will propose alternative perspectives for dividing the Court into groups. The concluding section will use this background to consider briefly the constitutionality of the South Carolina scheme for imposing capital punishment.

A. The Development of the Current Standard of Adequate Procedural Safeguards

1. The Evolution of the Basic Framework

a. Upholding the Death Penalty Against Due Process Challenges — McGautha v. California

The historical development of the current position on the Supreme Court begins with McGautha v. California,372 in which the death penalty was challenged on two grounds. First, it was contended that leaving the sentencing decision to the absolute discretion of the jury violated the due process clause of the fourteenth amendment. Second, it was argued that due process required bifurcation of capital punishment proceedings so that the question of sentencing was addressed in a hearing separate from the trial of guilt. The Court denied both challenges and upheld the death penalty.

The issue of sentencing discretion centered on whether the jury must be given standards to guide their decision. The Court briefly reviewed the history of capital punishment in England

372. 402 U.S. 183 (1971). The Court consolidated this case with Crampton v. Ohio, which focused on the asserted constitutional right to a bifurcated trial.
and the United States, concluding that “[t]his history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.” The Court further noted that recent studies supported the conclusion that such a task was beyond present human ability.

The defendant offered an alternative view of the history of capital punishment. He argued that absolute sentencing discretion was initially introduced to deal with the rare case in which the death penalty was thought unjustified. He further noted that far less than half of present-day capital offenders are sentenced to death. Therefore, he concluded that the role of sentencing discretion has changed from dispensing mercy to imposing death and that the states and the federal government have implicitly accepted this change. He argued that this change is constitutionally impermissible without standards to guide the identification of those extraordinary cases which called for the death penalty. The Court rejected this argument and concluded its discussion of the issue as follows:

For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless “boilerplate” or a statement of the obvious that no jury would need.

The alleged right to a bifurcated trial rested on two grounds. First, the defendant argued that bifurcation was required so that evidence relevant solely to the issue of punishment would not prejudice his case on guilt. Second, a single

373. Id. at 197-203.
374. Id. at 197.
375. Id. at 204-08.
376. Id. at 203-04.
377. The Court accepted this view of the history of capital punishment but characterized it as a response to jury nullification. Id. at 199.
378. Id. at 208. The court later noted that the McGautha facts indicated that standardless sentencing discretion worked because the jury sentenced McGautha to death but gave his codefendant a life sentence, id. at 221, and because the facts reflected relevant differences in their criminal roles. See id. at 187-91.
379. Id. at 209-10. This issue was raised only in the case of Crampton v. Ohio. California already had bifurcated proceedings. Crampton also challenged the jury’s unlimited sentencing discretion and the Court decided this issue in conjunction with McGautha’s claim.
trial creates an intolerable tension between defendant's fourteenth amendment right to be heard on the issue of punishment and his fifth amendment right not to testify at trial. The Court did not address the argument based on the relevancy of evidence and rejected the "intolerable tension" argument in both possible situations: (1) when the defendant is compelled to testify on guilt in order to testify on punishment, and (2) when the defendant is precluded from testifying on punishment because of his refusal to testify on guilt.

In rejecting the "compelled testimony" argument, the Court relied on an analysis of the history, policies, and precedents of the fifth amendment. History offered no insight, and the policies were too varied to offer meaningful guidance. Precedent offered little support to the defendant because no defendant had ever been allowed to take the stand for a limited purpose under the fifth amendment. As a result, the Court concluded that "[t]he relevant differences between sentencing and determination of guilt or innocence are not so great as to call for a difference in constitutional result. Nor does the fact that capital, as opposed to any other, sentencing is in issue seem . . . to distinguish this case."

The Court's consideration of the second possible situation began by noting that a due process right to be heard on sentencing issues had never been clearly recognized. The Court then assumed that such a right existed and concluded that it had not been violated. Since the defendant's attorney was allowed to argue for mercy in summation and allowed to present punishment evidence at trial, the issue was narrowed to the possibility of evidence or information within the peculiar knowledge of

380. Id. at 210-11.
381. The Court again noted this argument for bifurcation in Gregg v. Georgia, 428 U.S. 153, 190-92, 195 (1976).
382. 402 U.S. at 213-14.
383. Id. at 214.
384. Id.
385. Id. at 215.
386. Id. at 217. In later cases, the differences between capital and other sentences was to become a cornerstone of constitutional analysis. See, e.g., infra notes 481-85 and accompanying text.
387. Id. at 218.
388. Id. at 218-19.
389. See id. at 219.
the defendant. The Court concluded that this possibility was not sufficiently great to require reversal and that even if such knowledge existed, the Constitution did not forbid requiring a defendant to choose between disclosure of this information or not to testify at all. Justice Black's concurring opinion accepted the majority's judgment but warned that the Court's proper role was determining whether any express or implied federal rights had been denied, not whether the trial had been fairly conducted. Justice Douglas, Brennan, and Marshall dissented because they accepted the intolerable tension argument and because they felt that sentencing standards were required to insure consistency of decision and government by law rather than government by whim.

b. Striking Down One Scheme for Imposing the Death Penalty for Offending the Cruel and Unusual Punishment Clause — Furman v. Georgia

Despite the decision in McGautha, the Court struck down the death penalty for murder and rape only a year later in Furman v. Georgia. The Court was remarkably divided in Furman and all nine Justices wrote separate opinions. Five Justices concluded that the death penalty in these cases constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Two of these Justices, Brennan and Marshall, rejected capital punishment as per se unconstitutional and have relied on this position in all later cases. Therefore, consideration of their positions is deferred until the later analysis of

390. Id. at 220.
391. Id.
392. Id. at 225-26.
393. Id. at 239.
394. Id. at 250. The dissenting opinions are not considered in greater detail for three reasons. First, Justice Douglas is no longer on the Court. Second, Justices Brennan and Marshall have since concluded that capital punishment is per se unconstitutional. See infra notes 508-30 and accompanying text. Third, later cases require sentencing standards and approve, if not require, bifurcated trials. Thus, it will be better to consider the basis for these requirements when considering these later cases.
395. 408 U.S. 238 (1972). The murder case was Furman v. Georgia and the two rape cases were Jackson v. Georgia and Branch v. Texas.
the three blocs on the Court,\textsuperscript{396} and the present discussion will address only the opinions of the other Justices.

(1) Justices Douglas, Stewart, and White — The Eighth Amendment Right to Special Procedural Safeguards

Justice Douglas\textsuperscript{397} used notions of due process and equal protection under the aegis of the eighth amendment\textsuperscript{398} to support his reversal of the death penalties in \textit{Furman} and its companion cases. Based on a review of the history of the cruel and unusual punishment clause and the use of the death penalty,\textsuperscript{399} Justice Douglas concluded that it is "cruel and unusual" for society to impose the death penalty only on politically weak, unpopular minorities, when it would not approve general application of the penalty.\textsuperscript{400} Justice Douglas conceded that no evidence of such discrimination existed in the records of the individual cases under consideration,\textsuperscript{401} but found the statutory schemes to be "pregnant with discrimination."\textsuperscript{402} The possibility of discrimination resulting from unbridled sentencing discretion was deemed sufficient to find these statutes unconstitutional.

Justice Stewart\textsuperscript{403} prefaced his opinion by noting that the death penalty is unique in several respects: its irrevocability, its rejection of rehabilitation, and its "absolute renunciation of all that is embodied in our concept of humanity."\textsuperscript{404} He did not think it necessary to reach the issue of per se unconstitutional-

\textsuperscript{396} See \textit{infra} notes 508-30 and accompanying text.
\textsuperscript{397} For Justice Douglas' opinion, see 408 U.S. at 240-57.
\textsuperscript{398} Justice Douglas concluded that the eighth amendment imposed the following constraints on the means of imposing the death penalty:

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

\textit{Id.} at 256.

\textsuperscript{399} \textit{Id.} at 242-55. Justice Douglas also concluded that "[o]ne cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." \textit{Id.} at 255.

\textsuperscript{400} \textit{Id.} at 245.

\textsuperscript{401} \textit{Id.} at 253.

\textsuperscript{402} \textit{Id.} at 257. \textit{See id.} at 249-52. Justice Douglas noted also that the sentencing decision depended on the uncontrolled discretion of the sentencing authority. \textit{Id.} at 253.

\textsuperscript{403} For Justice Stewart's opinion, see 408 U.S. at 306-310.

\textsuperscript{404} \textit{Id.} at 306.
ity, because the statistical evidence indicated that the particula-
statutory schemes before the Court were being imposed capri-
ciously.405 Though noting that this capriciousness was perhaps
the result of racial discrimination, he did not base his opinion on
this possibility.406 Instead, Justice Stewart based his decision on
the broader notion that "the Eighth and Fourteenth Amend-
ments cannot tolerate the infliction of a sentence of death under
legal systems that permit this unique penalty to be so wantonly
and so freakishly imposed."407

Justice White408 also argued that the Court needed to de-
cide only the narrow issue of whether the death penalty is con-
stitutional when the judge and jury have unlimited discretion
and when the penalty is rarely imposed in practice.409 After dis-
cussing the relationship between the infrequency of imposing
the death penalty and the purposes of punishment — retribu-
tion and deterrence410 — he stated that "there is no meaningful
basis basis for distinguishing the few cases in which it is im-
posed from the many cases in which it is not.411

These three Justices emphasized the infrequency of capital
punishment and the lack of standards and procedures to insure
that the death penalty is not imposed discriminatorily, arbitrar-
ily, or capriciously. These concerns suggest that the Justices
based their opinions on the right to due process and equal pro-
tection; however, attacks on that basis had recently been re-
icted in McGautha, in which Justices White and Stewart joined
the majority. Consequently, Furman was based on an eighth
amendment right to special procedural protection when the
death penalty is imposed.

(2) The Dissenters

Although each dissenter wrote a separate opinion, their
opinions expressed considerable unanimity.412 The criticisms of

405. Id. at 306-10.
406. Id. at 310.
407. Id.
408. For Justice White's opinion, see 408 U.S. at 310-14.
409. Id. at 310-11.
410. Id. at 311-13.
411. Id. at 313.
412. With the exception of the brief dissenting opinion by Justice Blackmun, all
the per se argument, contained in Chief Justice Burger's opinion, will be discussed below.\textsuperscript{413} As to the other majority opinions, each dissent emphasized a different criticism. Chief Justice Burger\textsuperscript{414} attacked two crucial assumptions. First, he argued that no reason existed to conclude that the infrequency in imposing the death penalty indicated arbitrariness rather than proper jury selectiveness.\textsuperscript{415} Second, he contended that the eighth amendment does not address the equal treatment and procedural concerns that were the focus of the opinions by Justices Douglas, Stewart, and White.\textsuperscript{416} Justices Blackmun\textsuperscript{417} and Rehnquist\textsuperscript{418} focused on the need for judicial restraint and deference to the legislature. Justice Blackmun also indicated concern that the majority had forgotten the victims\textsuperscript{419} and expressed a fear that mandatory death penalties would result from the emphasis on avoiding arbitrary decisions.\textsuperscript{420} Justice Powell also emphasized the need for judicial restraint in this area and argued that neither precedent nor cultural standards provided a basis for the majority position.\textsuperscript{421}

c. Upholding the Death Penalty only when Adequate Procedural Safeguards Exist

\textit{Furman} effectively negated all existing capital punishment statutes and presented legislatures with a difficult task. Since only two Justices had rejected capital punishment as per se unconstitutional, the legislatures could continue to utilize the death penalty if they could draft a statute that would meet the objections of Justices Douglas, Stewart, and White. This task

\footnotesize{\textsuperscript{413} See infra notes 414, 417, 418, and 421.  
414. For Chief Justice Burger's opinion, see 408 U.S. at 375-405. Justices Blackmun, Powell, and Rehnquist joined his opinion and filed separate dissents.  
415. Id. at 388-90, 397-99.  
416. Id. at 390 n.12, 397, 399. Chief Justice Burger also noted that only one year earlier \textit{McGautha} foreclosed this due process argument. Id. at 399-400.  
417. For Justice Blackmun's opinion, see 408 U.S. at 405-414. No other Justice joined in his opinion.  
418. For Justice Rehnquist's opinion, see 408 U.S. at 465-70. Chief Justice Burger and Justices Blackmun and Powell joined this opinion.  
419. Id. at 413-14.  
420. Id. at 413.  
421. For Justice Powell's opinion, see 408 U.S. at 414-65. Chief Justice Burger and Justices Rehnquist and Blackmun joined Justice Powell's opinion.}
Capital Punishment was complicated because these Justices did not support their judgments with detailed analyses, and their opinions accounted for only 28 pages of a 230 page decision. However, one point was clear: all three agreed that unbridled sentencing discretion was the major problem. The legislatures used a variety of approaches to sentencing discretion, and a number of these were challenged on constitutional grounds.

On July 2, 1976, the Court decided five cases that addressed these new schemes. Justices Stewart, Stevens, and Powell determined the outcome of all five cases. They struck down mandatory capital punishment schemes as a constitutionally impermissible response to the *Furman* mandate. In their view *Furman* required that discretion be limited, but not eliminated. Thus, the adequacy of procedural safeguards which limit and channel sentencing discretion became the crucial question, and the Court upheld the capital punishment schemes of three states because the schemes provided these safeguards. Because of their per se rejection of the death penalty,422 Justices Marshall and Brennan concurred whenever a capital punishment statute was struck down and dissented whenever one was upheld. Chief Justice Burger and Justices Rehnquist, White, and Blackmun voted to uphold the death penalty scheme in all five cases.423

(1) **Mandatory Capital Punishment Prohibited**

The defendant in *Woodson v. North Carolina*424 challenged the North Carolina statute because it imposed a mandatory death penalty for a broad category of homicides.425 Justice Stewart, writing for himself and Justices Powell and Stevens, declared the statute unconstitutional on three grounds: (1) contemporary standards indicated a rejection of mandatory capital punishment as too harsh and rigid;426 (2) the scheme did not limit jury discretion because many jurors might refuse to convict when they felt that the mandatory death penalty was inappro-

422. For a discussion of the Justices' position, see infra notes 508-30 and accompanying text.
423. For a discussion of the Justices' position, see infra notes 531-51 and accompanying text.
425. *Id.* at 286.
426. *Id.* at 288-301.
(2) Capital Punishment Approved Where Adequate Procedural Safeguards Exist

(a) Gregg v. Georgia

Following the Furman decision, the Georgia legislature adopted a capital punishment statute based on the Model Penal Code approach of bifurcated hearings and guidance of sentenc-
ing discretion by aggravating and mitigating circumstances.\textsuperscript{437} Under the new statute, the first stage of a capital case addressed the guilt or innocence of the defendant. If he was found guilty of a capital offense, a separate sentencing proceeding was held to determine if the punishment would be life imprisonment or death.\textsuperscript{438} Sentencing discretion was checked and guided by the requirement that the jury consider aggravating and mitigating circumstances.\textsuperscript{439} Except in cases of treason or aircraft hijacking, the statute required the establishment of at least one aggravating circumstance beyond a reasonable doubt before the death penalty could be imposed.\textsuperscript{440} The statute also required expedited direct review by the Georgia Supreme Court to determine if the death penalty had been properly imposed.\textsuperscript{441} In \textit{Gregg v. Georgia},\textsuperscript{442} the United States Supreme Court considered the constitutionality of this scheme and rejected the argument that the death penalty was unconstitutional.\textsuperscript{443} The Court also rejected four challenges to the adequacy of Georgia's statutory standards and procedures.

The first such challenge argued that opportunities for unbridled discretion remained under the statute in the form of prosecutorial discretion, lesser included offenses, and executive clemency.\textsuperscript{444} The Court rejected these arguments as misinterpretations of \textit{Furman}. The challenged discretion removed defendants from being subjected to possible capital punishment. This

\textsuperscript{437} \textit{Id.} at 190-95.

\textsuperscript{438} \textit{Id.} at 162-68.

\textsuperscript{439} For the aggravating circumstances, see \textit{id.} at 165 n.9. The statute requires the judge to consider, or include in his jury instructions any mitigating or aggravating circumstances authorized by the law. The statute does not delineate the scope of these circumstances. \textit{Id.} at 163-64. See \textit{id.} at 196-206 for further discussion of the Georgia statutory scheme.

\textsuperscript{440} \textit{Id.} at 164-66. In addition, the statute requires a report of the trial judge. \textit{Id.} at 167.

\textsuperscript{441} \textit{Id.} at 166-67. The statute requires the Georgia Supreme Court to: (1) consider all errors enumerated by appeal; (2) determine if the death penalty was imposed under influence of passion, prejudice, or any other arbitrary factors; (3) determine if the evidence supports any finding of a statutory aggravating circumstances; and (4) determine if the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. \textit{Id.}

\textsuperscript{442} 428 U.S. 153 (1976).

\textsuperscript{443} For discussion of the \textit{per se} position, see \textit{infra} notes 508-30 and accompanying text.

\textsuperscript{444} 428 U.S. at 199.
removal did not violate *Furman* because *Furman* held only that the imposition of capital punishment, not the granting of mercy, had to be standarized.\textsuperscript{445}

Second, the statutory aggravating circumstances were challenged on the ground that they were too broad and vague to limit and guide jury discretion.\textsuperscript{446} In particular Gregg challenged:

(1) the circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;"\textsuperscript{447} and

(2) circumstances such as "substantial history of serious assaultive criminal convictions" and creating a "great risk of death to more than one person."\textsuperscript{448}

Justice Stewart agreed that this problem existed but concluded that it probably would be resolved because the Georgia Supreme Court had a history of concern for curing these deficiencies by way of statutory construction.\textsuperscript{449}

Third, the petitioner objected to the wide scope of evidence and argument in the penalty phase of the trial.\textsuperscript{450} Justice Stewart summarily concluded that such a procedure was a wise choice, provided it did not prejudice a defendant,\textsuperscript{451} because it provided the jury with more sentencing information.\textsuperscript{452}

Finally, Gregg argued that the Georgia statute failed to satisfy *Furman* because the jury was empowered to give life imprisonment even if the State established an aggravating circumstance beyond a reasonable doubt.\textsuperscript{453} Justice Stewart again noted that *Furman* did not prohibit standardless grants of mercy.\textsuperscript{454} In addition, he concluded that this argument ignored the proportionality review provided by the Georgia Supreme

\textsuperscript{445. Id.}
\textsuperscript{446. Id. at 200.}
\textsuperscript{447. Id. at 201.}
\textsuperscript{448. Id. at 202.}
\textsuperscript{449. Id. at 201-02.}
\textsuperscript{450. Id. at 203.}
\textsuperscript{451. Id. at 203-04.}
\textsuperscript{452. Id. at 204.}
\textsuperscript{453. Id. at 203.}
\textsuperscript{454. Id.}
Court.\textsuperscript{455} Justice Stewart summarized the Georgia proportionality requirement as follows: "If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.\textsuperscript{456}

(b) \textit{Proffitt v. Florida}\textsuperscript{457}. 

The Florida statute also provided for bifurcated trials in capital cases. At the sentencing hearing, the judge admitted any evidence he deemed relevant to sentencing as well as evidence relevant to the aggravating or mitigating circumstances listed in the statute.\textsuperscript{458} The jury was instructed to weigh mitigation against aggravation to determine whether to recommend life imprisonment or death. The verdict was determined by majority vote and was only advisory; the trial judge determined the actual sentence.\textsuperscript{459} However, if the jury recommended life imprisonment, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ" before the trial judge could impose capital punishment.\textsuperscript{460} The trial judge must also put his findings in writing if he imposed death.\textsuperscript{461} The statute provided for automatic review but did not require any specific form of appellate review; however, the Florida Supreme Court considered its function to be to pro-

\textsuperscript{455} 428 U.S. at 203.
\textsuperscript{456} Id. at 206. See also, id. at 204-06. The exact role of proportionality review remains unsettled at this time and is discussed further at infra notes 780-85 and accompanying text.
\textsuperscript{457} 428 U.S. 242 (1976).
\textsuperscript{458} Id. at 248. For the statutory aggravating circumstances, see id. at 248 n.6. For the statutory mitigating circumstances, see id. at 248 n.6. Petitioner challenged the statute as allowing the imposition of capital punishment solely on the basis of nonstatutory aggravation only. Justice Stewart did not clearly address the argument, stating only that it was unlikely that the Florida court would approve a death sentence based entirely on nonstatutory aggravating circumstances. See id. at 250 n.8, 256 n.14.
\textsuperscript{459} Id. at 248-49. Justice Stewart noted that although the jury performs an important role in sentencing decisions, jury sentencing never has been constitutionally required. In fact, Justice Stewart surmised that judicial sentencing should lead to greater consistency due to the greater experience of trial judges. Id. at 252.
\textsuperscript{460} Id. at 249.
\textsuperscript{461} Id. at 250.
vide the same type of review as the Georgia Supreme Court.462

Justice Stewart determined that this statutory scheme satisfied Furman463 and rejected several specific attacks on the statute for reasons that paralleled those given to similar challenges in Gregg. Thus, challenges to the following were rejected: (1) prosecutorial discretion to seek the death penalty;464 (2) lack of control of jury discretion resulting from vagueness in the statutory aggravating and mitigating circumstances465 and from the subjectivity in the process of evaluating their relative weights;466 and (3) inadequacy of proportionality review.467

(c) Jurek v. Texas468

The Texas statute limited capital punishment to intentional and knowing murders in five statutorily enumerated circumstances.469 When the jury found the defendant guilty of such a murder, a separate sentencing hearing was conducted. At this hearing, the statute directed the jury to consider two (and sometimes three) questions addressed to whether the defendant or his crime indicated aggravation or lack of mitigation.470 If the

462. Id. at 250-51. See id. at 251-53, 258-60.
463. Id. at 251-53, 259-60.
464. Id. at 254.
465. Id. at 254-56. As in Gregg, see supra note 449 and accompanying text, Justice Stewart noted that the Florida Supreme Court could and had cured these potential problems by statutory construction.
466. Id. at 257-58. Stewart noted that the balancing process was no more difficult than other tasks undertaken by juries and that the statute guided discretion by focusing on the individual defendant and his crime. In his concurring opinion, Justice White concluded that the death penalty recommendation was mandatory if the aggravating circumstances outweighed the mitigating circumstances, id. at 260, but Justice Stewart did not address this argument. However, the Florida scheme required an individual decision based on all the circumstances. This distinction was important to Justice Stewart’s upholding the mandatory Texas statute in Jurek v. Texas, 428 U.S. 262 (1976). See infra notes 474-80 and accompanying text.
467. 428 U.S. at 258-60. See id. at 250-53, 259-60.
468. Id. at 263 (1976).
469. Id. at 268. See id. at 265 n.1.
470. Id. at 269. See id. at 267-69. The following questions were posed to the sentencing jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and which the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
jury determined that each of these questions was affirmatively answered beyond a reasonable doubt, they were to impose the death sentence. If one question was answered negatively, they were to impose a life sentence. When the jury imposed the death penalty, the statute provided for an expedited appeal to the Criminal Court of Appeals.

In upholding this scheme, Justice Stewart focused on whether given the requirement that the jury impose the death penalty when all three questions were answered affirmatively rendered the Texas statute subject to the same infirmities as the mandatory schemes in Roberts and Woodson. He identified the constitutional vice of mandatory capital punishment as preventing an individualized decision by prohibiting the consideration of mitigating circumstances. Even though the Texas statute did not mention mitigating circumstances, Justice Stewart relied on state court construction of the statute to conclude that Texas did allow the defendant to present whatever evidence in mitigation he could show. Thus, the limitations of capital punishment to the statutorily enumerated circumstances and the requirement that the jury answer three broad questions about the crime and defendant meant that the Texas scheme was substantially the same as that used by Georgia and Florida. Like those schemes, the Texas system satisfied Furman even though it did not limit prosecutorial discretion and even though the statutory circumstances would be difficult to apply.

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 269.

471. Id. at 269.
472. Id.
473. Id. See id. at 276.
474. Id. at 271. See supra note 428 and accompanying text.
475. 428 U.S. at 272.
476. Id. at 272-73, 276.
477. Id. at 270-74.
478. Id. at 276-77.
479. Id. at 274.
480. Id. at 274-76.
d. Imposing the Death Penalty for Rape is Cruel and Unusual Punishment — Coker v. Georgia

After Gregg, it was still not clear whether there were substantive as well as procedural limits on capital punishment. Coker v. Georgia resolved this uncertainty.481 Coker was convicted of kidnapping, robbery, theft, housebreaking, escape from prison, and rape. He was sentenced to death for the rape. He appealed the sentence on the ground that the death penalty for rape was unconstitutional. Justices Brennen and Marshall voted in favor of his challenge because of their per se objection to capital punishment.482 Justice White, in an opinion joined by Justices Stewart, Blackmun, and Stevens, declared that the death penalty was always unconstitutional when imposed for rape because both justice and cultural standards indicated that the punishment was excessive and disproportionate to the crime.483 Justice Powell concurred in the holding because he viewed the penalty as unconstitutional in Coker’s case because Coker had not physically harmed or tortured his victim. Justice Powell dissented from the broader holding that death was per se a disproportionate penalty for rape, however.484 Chief Justice Burger and Justice Rehnqust dissented, arguing that the decision was an unjustified interference with the judgement of the state legislature.485

482. Id. at 600-01. See infra notes 508-30 and accompanying text.
483. 433 U.S. at 586-600. In reaching this conclusion, Justice White relied on his own judgment, id. at 587-600, as well as a variety of sources indicating a cultural rejection of the death penalty for rape. First, he reviewed the history of rape legislation in this country and concluded that this history, though conflicting on some points, strongly indicates a cultural rejection of the death penalty for rape. Id. at 593-96. In addition, the opinion noted that 57 of 60 major nations surveyed had rejected the death penalty for rape. Id. at 596 n.10. Finally, a review of the sentencing patterns of Georgia juries indicated that the death penalty had not been imposed in 9 out of 10 cases in which it could have been imposed. Id. at 596-97.
484. Id. at 601-04.
485. Id. at 604-22. The basic points stressed by Chief Justice Burger’s dissent are:
   (1) The effect of the decision would be to prevent Georgia from imposing additional punishment on life prisoners who escape, thus removing any deterrent restraints on their commission of any crime except murder, id. at 605-07;
   (2) Justice White’s use of data to determine public views was flawed and misleading because it focused only on the immediate post-Furman legislative experience, id. at 613-15;
   (3) the decision did not respect the values implicit in a federal system in
e. The Constitutionality of the Death Penalty — The Positions of the “Groups” on the Supreme Court

Coker was the last case in the development of the basic positions of the groups on the Supreme Court concerning the constitutionality of the death penalty. After Gregg and Coker, it was clear that the death penalty for murder was constitutional as long as the procedural safeguards were adequate to satisfy the concerns of Justices Stewart, Powell, and Stevens. When the scheme did not satisfy those concerns, as in Woodson and Roberts, the three Justices voted with Justices Marshall and Brennan to strike the scheme down. When the scheme had adequate procedures to control discretion, the three joined with the other Justices in upholding the scheme. Because of the pivotal position the intermediate group holds between the other two groups, it is helpful to begin with them and use their framework as the basis for developing and comparing the other two positions.

This mode of analysis is useful in understanding and predicting refinements in the notion of the Eighth Amendment right to adequate procedural limitations. In addition, the analysis recognizes that two other well-reasoned approaches exist — the per se approach and the deference to state legislation approach — which together represent the views of perhaps a majority of the Court. An awareness of these approaches and the reasons for their adoption helps identify the issues involved and also provides a framework for understanding possible shifts in positions and voting patterns of the justices in the future.486 Finally, the arguments for and against each position provide a foundation for the discussion of the philosophical issues in Part III and thus are relevant to the development of one’s views concerning the proper role of legislators, prosecutors, the governor, and citizens.

which each state should be free to experiment, id. at 615-20;

(4) rape victims were denied the potential deterrent impact of capital punishment, id. at 616-18; and

(5) capital punishment is not excessive when imposed for a heinous crime such as rape, especially when committed by a recidivist such as Coker, id. at 607-13, 619-21.

486. See infra notes 684-97 and accompanying text.
In considering challenges that the imposition of capital punishment offends the eighth amendment's prohibition of cruel and unusual punishment, the intermediate group has developed a two-pronged test. The first prong focuses on cultural standards of decency, as reflected in history, cross-cultural comparisons, legislation, precedent, and jury behavior. When the intermediate group has used this approach to evaluate capital punishment, it has concluded that contemporary society clearly accepts the death penalty as long as it is imposed for murder. One advantage of this approach is that the Court's decision arguably is based on something other than the personal views of the justices concerning the meaning of the eighth amendment. The Court, however, cannot simply follow cultural standards of acceptable punishment because these may not adequately protect the constitutional right. Consequently, the intermediate group also has adopted a second test: the challenged punishment must comport "with the basic concept of human dignity at the core of the amendment." In order to satisfy this second standard, three questions must be considered: (1) whether the punishment is imposed in order to achieve a legitimate purpose; (2) whether the punishment is grossly disproportionate to the crime; and (3) whether the punishment is imposed arbitrarily and capriciously.

Punishment satisfies the first consideration if it is imposed to achieve one of two purposes — retribution or deterrence. Retribution is permissible and consistent with a respect for the dignity of men because it expresses society's moral outrage at crime and thus helps to maintain respect for law and to insure that people will not feel the need to seek revenge through self-
help.\textsuperscript{496} Capital punishment achieves this retributive goal if it is reserved for those extreme crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death."\textsuperscript{497} Given the inconclusive debate over the deterrent impact of the death penalty, the intermediate group concluded that this issue is best addressed by state legislatures.\textsuperscript{498}

Proportionality was initially presented in \textit{Gregg} when Justice Stewart simply concluded that it was not possible to say that execution, even though severe and irrevocable, was not proportional to a deliberate murder.\textsuperscript{499} In \textit{Coker}, Justice White, joined by Justices Stewart, Blackmun, and Stevens, considered not only his personal judgment but also cultural attitudes, as reflected in sources such as statutes, in deciding that capital punishment was disproportionate to the crime of rape.\textsuperscript{500} Thus, proportionality appears to be measured against cultural standards and the Justices' view of the "core" of the eighth amendment.

The final consideration used by the intermediate group is whether sufficient procedural safeguards have been adopted to insure that the death penalty is not imposed arbitrarily and capriciously, whether as a result of unlimited jury discretion\textsuperscript{501} or of rigidly mechanical mandatory sentences.\textsuperscript{502} These procedures need not restrict decisions not to execute\textsuperscript{503} but must insure that when the death penalty is imposed, it is appropriate for the particular defendant and the particular crime.\textsuperscript{504} Because of the procedural emphasis of this concern, concluding that it is based on the due process guarantee of the fourteenth amendment is tempting. However, the Court decided \textit{Furman} only a year after rejecting due process challenges to the death penalty in \textit{Mc-}

\textsuperscript{496} Id. at 183-84.
\textsuperscript{497} Id. at 184.
\textsuperscript{498} Id. at 186-87. Because the intermediate group perhaps relied unduly on an unpublished study, the group has been criticized for misusing empirical studies to conclude that the issue was unsettled. \textit{E.g.}, Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 Mich. L. Rev. 1177, 1206 (1981). However, apart from this criticism of the use of sociological research, good reasons exist for viewing the debate as necessarily inconclusive. \textit{See infra} notes 878-79, 881 and accompanying text.
\textsuperscript{499} \textit{Gregg}, 428 U.S. at 187.
\textsuperscript{500} \textit{See supra} note 483.
\textsuperscript{501} \textit{See supra} notes 403-11, 436-80 and accompanying text.
\textsuperscript{502} \textit{See supra} notes 424-35, 466-74 and accompanying text.
\textsuperscript{503} \textit{See supra} notes 444-45, 464, 479 and accompanying text.
\textsuperscript{504} \textit{See supra} notes 424-29, 434-35 and accompanying text.
"Gautha v. California. As a result, the procedural concerns were grounded in the eighth amendment.\(^5\) Thus, although it is open to dispute and criticism,\(^6\) the intermediate position can be summarized as follows:

Capital punishment for murder is not cruel and unusual, even if the statutory scheme provides unlimited discretion not to execute, so long as the decision to execute a particular defendant is based on procedures which provide adequate information and guidelines and sufficient checks on abuse to insure that the imposition of the death sentence is based on a consideration of the combined relevant circumstances of the particular crime and the defendant to determine whether capital punishment in a particular case satisfies both cultural standards of decency and the two basic concerns central to the eighth amendment — purposiveness and proportionality.

The intermediate group has been optimistic about the ability of the states to satisfy this standard. However, the per se group has been more pessimistic and has argued that subsequent cases indicate that this pessimism is warranted.\(^7\)

(2) The "Per Se Position"

(a) Justice Brennan

Justice Brennan argued that the basic concept underlying the eighth amendment is the concern for promoting the dignity of man by prohibiting uncivilized and inhuman punishment.\(^8\) He then argued that four principles, reflected in the cases and inherent in the amendment, could be used to determine whether a particular punishment offends human dignity.\(^9\) First and most important, the punishment must not be so severe, painful,
or demoralizing that it indicates that the person being punished is regarded as a mere thing rather than a person.\textsuperscript{510} Torture imposed by the rack and screw is a clear example of such inhuman treatment.\textsuperscript{511} The second principle requires regularity and fairness in the imposition of severe punishments, thus prohibiting the arbitrary imposition of such a punishment on some while others escape punishment for no good reason.\textsuperscript{512} Third, the punishment must be acceptable to contemporary society.\textsuperscript{513} Whether a particular punishment has been accepted or rejected by society can be determined by considering objective indicators such as legislation and patterns of sentencing in all the states.\textsuperscript{514} Finally, punishment should not be more severe than is necessary to accomplish a legitimate purpose.\textsuperscript{515}

Justice Brennan’s scheme of the essence of the cruel and unusual punishment clause is in some respects similar to that of the intermediate group both in its general concern for human dignity\textsuperscript{516} and in its specific content. His third principle, like the intermediate group’s first prong, focuses on cultural acceptance and, like the intermediate group, he is also unwilling to use social acceptance as the sole standard. In addition, Brennan’s concern with the prevention of arbitrariness and of purposeless punishment is very similar to the second prong of the intermediate group’s two part test.

Justice Brennan’s four principles are, nonetheless, different in two basic respects. First, the marked emphasis on human dignity and the explicit focus on “inhuman” punishment are unique. Second, Brennan argues that the punishment is to be measured against the four principles as a systematic whole and that a punishment which partially fails to satisfy all of them can be stricken down even if it is not fatally offensive under any single principle.\textsuperscript{517} These are important differences because the vagueness in the notion of “degrading and inhuman” and the flexibility in applying the principles as a system combine to pro-

\textsuperscript{510} Furman, 408 U.S. at 271-74. See Gregg, 428 U.S. at 227-31.
\textsuperscript{511} Furman, 408 U.S. at 272.
\textsuperscript{512} Id. at 274-77.
\textsuperscript{513} Id. at 277-79.
\textsuperscript{514} Id. at 278-79.
\textsuperscript{515} Id. at 279-81.
\textsuperscript{516} See Gregg, 428 U.S. at 182, 183.
\textsuperscript{517} Furman, 408 U.S. at 281, 305.
vide much greater potential for holding a particular punishment unconstitutional.

Because of this greater potential, Justice Brennan found that the death penalty fails to satisfy the four principles. Since death is a total denial of status and rights and involves considerable mental and perhaps physical pain, it offends the first principle. While it has a long history of use in this country, the death penalty is now used so rarely that a strong probability exists that our procedures are not adequate to prevent arbitrariness. Moreover, the present infrequency of use, combined with a history of controversy, indicate substantial doubt in society about the propriety of the death penalty. Finally, the assumption that the death penalty provides any deterrent or retributive impact greater than life imprisonment is implausible.

(b) Justice Marshall

Justice Marshall developed four standards to be used in determining whether a punishment is cruel and unusual: (1) whether it is so painful that a civilized society would not tolerate it; (2) whether it is unusual; (3) whether it serves a valid purpose; and (4) whether it is acceptable to society. He focused on the last two in his review of the death penalty and concluded that it was unconstitutional.

Of the many purposes that might be asserted to justify the death penalty, only deterrence and retribution are serious candidates as a legitimate purpose. Deterrence does not justify punishment because empirical studies indicate that life imprisonment is just as effective as a deterrent. Retribution does not justify the death penalty because life imprisonment is suffi-
cient to prevent self-help or to maintain respect for the law.\textsuperscript{526} Marshall also rejected the argument that the death penalty can be imposed to achieve the retributive goal of imposing the only penalty that is proportional to the crime involved. The concern for human dignity at the core of the eighth amendment involves a right to be treated as more than a means to satisfy social demand for a particular punishment.\textsuperscript{527}

Initially, Justice Marshall argued that an informed citizenry would not accept the death penalty\textsuperscript{528} and that, therefore, the penalty was unconstitutional.\textsuperscript{529} Subsequently, he modified his position somewhat because of more recent legislative enactments of the death penalty and because of his uneasiness concerning the antimajoritarianism implicit in his emphasis on an informed electorate.\textsuperscript{530} Thus, his opposition to capital punishment is based primarily on the assertion that it serves no legitimate purpose.

(3) The “Defe\(\text{r}^{\text{e}}\)nce to Legislative Decisions Position”

The primary characteristic that identifies this “group” is a strong commitment to judicial self-restraint and deference to state legislatures, which is expressed as a strong presumption in favor of the constitutionality of legislatively adopted punishment schemes.\textsuperscript{531} This approach is considered to be particularly appropriate in reviewing challenges to capital punishment because the eighth amendment is so vague and because decisions about “proper” punishment are so difficult.\textsuperscript{532} To fulfill their duty to provide constitutional review while also avoiding the imposition of their own subjective predilections on society,\textsuperscript{533} this group has identified three objective factors relevant to the review of capital punishment legislation. The group has consistently upheld challenges to the death penalty on the basis of these factors.

\textsuperscript{526} Gregg, 428 U.S. at 237-39.
\textsuperscript{527} Id. at 239-41.
\textsuperscript{528} Furman, 408 U.S. at 362-69.
\textsuperscript{529} Id. at 360-69.
\textsuperscript{530} See Gregg, 428 U.S. at 232-33.
\textsuperscript{532} Id. at 375-76, 395-96, 403-05.
\textsuperscript{533} Id. at 376, 405-06, 431, 460-69.
First, the intent of the drafters of the Constitution must be considered. Since capital punishment existed at the time of the adoption of the Constitution, arguing that the eighth amendment was clearly intended to prohibit executions is not possible. However, whether the intent was always to allow capital punishment is not clear. This uncertainty exists because, in all likelihood, the framers intended for the amendment to be flexible so that its applicability would change as the basic mores of society changed.

To provide for this concern, the second measure for reviewing a punishment is cultural acceptance. The primary evidence of such acceptance in a given state is legislation: “in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.”

No reason exists to believe that the legislatures are not serving as a barometer of public views on this issue. Given the overwhelming legislative adoption of capital punishment it cannot be said that this is a punishment adopted by only a few deviant states. Moreover, opinion polls (for whatever they may be worth) do not indicate a social rejection of the death penalty.

The argument that the infrequency of executions indicates lack of acceptance does not withstand analysis. Infrequency is, if anything, an indication of judgment and selectivity and does not support the argument that this discretion is applied in a way that reflects a pattern of racial or other discrimination against the weak and powerless. The argument that the penalty is imposed randomly and arbitrarily is also unsupported by

534. See id. at 380-84.
535. Id. at 380. See id. at 419-20.
536. Id. at 382-83, 409, 420, 429-30.
537. Id. at 384, 420-21.
538. Id. at 384. See id. at 436-37.
539. Id. at 386. See id. at 411-13, 417-18, 437-39.
540. Id. at 385-86.
541. Id. at 386-87, 443-50.
542. Id. at 387-91, 439-41.
543. Id. at 389 n.12. See id. at 444-45, 449-50. Justice Powell noted that because the underprivileged receive a criminal penalty more often than more wealthy persons is not a constitutional issue. Id. at 447-48.
empirical findings. Moreover, even if the findings did not support the argument, the solution to this would be more executions, not fewer, and mandatory death penalty schemes would be constitutional. In any event, even if evidence of discrimination or arbitrariness existed, the argument would raise a fourteenth amendment issue, not an eighth amendment question. The prohibition of cruel and unusual punishment is concerned with the type of punishment, not the process of imposing it.

The third objective measure of proper punishment is stare decisis, and no precedent exists for the conversion of the eighth amendment into a guarantee of procedural protections for defendants. The novel notion that the amendment authorized the Court to consider whether capital punishment accomplishes a legitimate purpose is also unprecedented. In addition, the insurmountable problems involved in assessing matters such as the incremental deterrent effect of execution vis-a-vis life imprisonment counsel against judicial intervention except in cases in which the legislation clearly lacks justification.

(4) Justice O''Connor

Although Justice O'Connor was not appointed until several years after Coker, summarizing her position as it has emerged in more recent cases will be helpful. She has written only two opinions in the area; therefore, some degree of speculation is necessary. Nevertheless, two points seem clear.

First, Justice O'Connor, like the Justices of the intermediate group, based her approach in large part on insuring that careful, individualized decisions are made concerning whether a particular defendant deserves the death penalty. Thus, when doubt has existed concerning the consideration of relevant mitigating fac-

544. Id. at 389 n.12, 399.
545. Id. at 398.
546. Id. at 413.
547. Id. at 389 n.12, 449-50.
548. Id. at 397.
549. Id. at 421-28, 430-31.
550. Id. at 391-94, 451.
551. Id. at 395-96, 451-56.
tors, she has voted to reverse the death sentence and remand for resentencing. 553

Second, when substantive rules are involved she has taken a position more like that of the deference to legislation group. Thus, she has been very reluctant to find that some portion of a statutory scheme offends cultural notions of proportionality. For example, she requires that both legislative and jury decisions indicate a rejection of the death penalty under the circumstances contemplated by the scheme. 554 In determining whether such a rejection is indicated, she interprets the data broadly in favor of the death penalty. 555 In addition, so long as the jury bases its decisions upon the proper procedures, she is reluctant to assume that their decisions indicate anything but a careful choice to limit the death penalty to those cases in which it is appropriate. 556 When she measures the death penalty against noncultural standards of proportionality, Justice O'Connor has been hesitant to strike down a death sentence on the ground that it does not adequately serve any legitimate purpose of punishment. 557

(5) Limitations on Group Analysis and Alternative Perspectives on the Court's Divisions

Although the division of the Court into these three groups can be helpful in a number of ways, 558 it should be stressed once again that the Court does not vote in "blocs." Each Justice has his own views and Justices often change their position — for example, a respect for precedent can support initial objection to a new position, but once this position is established, that same respect will result in support for the new position. 559 Furthermore, the analytical scheme used to divide the groups is somewhat ar-

553. Eddings, 102 S. Ct. at 877-79; Enmund, 102 S. Ct. at 3394.
554. Enmund, 102 S. Ct. at 3386, 3390.
555. Id. at 3386-90.
556. See id. at 3392.
557. See id. at 3386, 3390-92. This point is discussed further at infra note 674 and accompanying text.
558. See supra note 486 and accompanying text.
559. This reason might explain, for example, the shift in position by Justice Blackmun from voting to uphold the death penalty in Furman, Woodson, and Roberts, see supra notes 417, 419, 423, 531-51 and accompanying text, to voting to strike it down for procedural reasons in Lockett and for substantive reasons in Enmund. See supra notes 602, 609, 657 and accompanying text.
bitary. In later opinions, for example, the Court seems to be composed of four groups which can be distinguished on their views concerning both substantive and procedural limitations on the death penalty.

If we take this perspective and consider shifts in the position of individual Justices, the Court could be divided — albeit very roughly — into four positions: (1) objecting to the death penalty as absolutely, per se unconstitutional (Justices Marshall and Brennan); (2) upholding the death penalty so long as certain procedures are followed and it is limited to certain substantive types of crimes that clearly satisfy cultural and noncultural standards of proportionality (Justices White, Blackmun, and Stevens);560 (3) upholding the death penalty so long as certain procedures are followed and it is limited to certain types of crimes that apparently satisfy cultural and noncultural standards of proportionality (Justices Powell561 and O'Connor);562 and (4) upholding the death penalty if the democratically elected legislature of the state adopted it, (Justices Burger563 and Rehnquist). This analytical framework parallels the one developed above in the two extreme positions — per se objection and strict legislative presumption. However, it involves a larger intermediate group, which can be subdivided in accordance with the strictness of their review of the substantive criminal conduct for which death can be imposed.

560. Qualifications are, of course, in order. For example, Justice White wrote the plurality opinions striking down the death penalty for substantive reasons in Coker and Enmund. See supra note 483 and accompanying text, and infra notes 655-68 and accompanying text. However, he has often voted with the deference to legislation group. See supra notes 531-51 and accompanying text. For example, he dissented in one of the recent cases striking down the death penalty on procedural grounds, Godfrey v. Georgia, 446 U.S. 420 (1980). See infra notes 638-41 and accompanying text.

561. When the death penalty was struck down on substantive grounds, Justice Powell concurred on a narrow ground, in Coker, see supra note 484 and accompanying text, and joined Justice O'Connor's dissent, in Enmund. See infra notes 669-75 and accompanying text.

562. See supra notes 553-57 and accompanying text.

563. Most of Chief Justice Burger's decisions reflect this position of deference. See supra notes 531-51 and accompanying text, and infra note 638 and accompanying text. However, his deference to state legislatures has limits because he has voted to reverse death sentences. See infra notes 568-74, 594, 607-26 and accompanying text.
2. Refining the Standard of Adequate Procedural Safeguards

By 1977, the positions of the three groups had developed, and the death penalty for murder clearly was constitutional so long as its imposition was based on adequate procedural protection to insure that the defendant deserved the punishment. Subsequent cases have addressed issues involved in refining this approach because cases like Gregg did not address a number of details concerning the procedural adequacy of capital punishment sentencing schemes. The following sections discuss this refinement, focusing first, on the adjudication of guilt and second, on the sentencing process.

a. The Adjudication of Guilt

The use of lesser included offense instructions in capital cases allows the jury to convict a defendant of a lesser included offense; therefore, the instruction can be viewed as granting the jury the discretion to avoid finding the defendant guilty of a capital crime even if he committed that crime. For this reason, the use of such instructions was challenged in Gregg,\(^564\) Profit,\(^565\) and Jurek\(^566\) as contrary to the requirements of Furman. However, these attacks were summarily rejected as misinterpretations of Furman because Furman focused on the adequacy of procedures in cases in which the death penalty was imposed rather than on the discretion not to impose the penalty.\(^567\)

In Beck v. Alabama,\(^568\) the Court was presented with a case which did raise Furman issues because the defendant in Beck had been sentenced to death. The Alabama statute prohibited the use of lesser included offense instructions even in a case such as Beck's in which the facts would support such an instruction.\(^569\) The effect of the denial of the instruction was to force

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564. 428 U.S. 153, 199 (1976). For a discussion of this case, see supra notes 436-56 and accompanying text.
566. 428 U.S. 262, 274 (1976). For discussion of this case, see supra notes 468-80 and accompanying text.
567. See supra notes 501-04, 564-66.
569. Id. at 627. Under the Alabama statute, the death penalty could be imposed only for intentional murder, and this intent could not be supplied by the felony-murder
the jury to choose between convicting the defendant of a capital offense or acquitting the defendant, thereby allowing him to escape all punishment regardless of his crime.\textsuperscript{570} Under some circumstances, this procedure may be an advantage to the defendant.\textsuperscript{571} However,

when the evidence unquestionably establishes that the defendant is guilty of a serious violent offense — but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.\textsuperscript{572}

This risk cannot be tolerated because of the constitutionally significant difference between the death penalty and lesser punishment.\textsuperscript{573} Thus, the prohibition of the lesser included offense instruction is unconstitutional because it reduces the reliability of the guilt determination with possibly serious adverse impact on the defendant.\textsuperscript{574}

The interrelated nature of the guilt and sentencing decisions was also the basis of a constitutional attack on the death penalty in \textit{Lockett v. Ohio}.\textsuperscript{575} Under the Ohio statute, the sentencing court had unlimited discretion to impose a life sentence in the interest of justice if a defendant pleaded guilty or no contest.\textsuperscript{576} No such interest of justice discretion existed if the defendant pleaded not guilty,\textsuperscript{577} in which case the defendant had to rely on a limited statutory list of mitigating circumstances in at-

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document. \textit{Id.} at 627-28. Beck admitted that he was involved in the commission of a felony which resulted in death, but denied he killed the victim or intended his death. \textit{Id.} at 629-30. Thus, he argued that he was entitled to an instruction concerning felony-murder, which is a lesser included offense of capital murder in Alabama. \textit{Id.}

570. \textit{Id.} at 629.
571. \textit{Id.} at 633-35.
572. \textit{Id.} at 637.
573. \textit{Id.} at 637-38.
574. \textit{Id.} at 638. \textit{See also, id.} at 633 for Alabama's argument in favor of its procedure, and \textit{id.} at 638-46 for the Court's response. Chief Justice Burger and Justices Brennan, Stewart, Blackmun, and Powell joined Justice Stevens' majority opinion. Justices Brennan and Marshall wrote concurring opinions based on their per se position. \textit{Id.} at 646. Justice White joined Justice Rehnquist's dissent, which was based on the petitioner's failure to raise the lesser included offense issue in the Alabama Supreme Court. \textit{Id.} at 646-48.

576. \textit{Id.} at 618.
577. \textit{Id.}
tempting to convince the judge to sentence him to life imprisonment.\textsuperscript{578} Lockett argued that this disparity in sentencing discretion impermissibly interfered with her right to a trial by jury under the sixth amendment and her right to plead not guilty under the fifth amendment.\textsuperscript{579} Her death penalty was reversed on other grounds,\textsuperscript{580} and only Justice Blackmun’s concurring opinion addressed this challenge. Justice Blackmun agreed that the statutory difference was unconstitutional because the defendant’s rights were unnecessarily burdened by forcing her to choose between “fully” discretionary sentencing and semi-mandatory sentencing.\textsuperscript{581}

b. The Sentencing Process

(1) Gardner v. Florida\textsuperscript{582}

The Florida death penalty statute authorized the judge to overrule a jury recommendation of life imprisonment if he found that the death penalty was clearly required.\textsuperscript{583} Acting pursuant to this authority, the trial judge in Gardner v. Florida overruled the jury’s recommendation of life imprisonment and sentenced the petitioner to death because the judge concluded that the petitioner showed no mitigation.\textsuperscript{584} In reaching this decision, the trial judge considered not only the evidence presented at the guilt and sentencing trials, but also factual information contained in the presentence investigation report.\textsuperscript{585} This report contained a confidential portion, which was not revealed to defense counsel, though the rest of the report was disclosed.\textsuperscript{586} Defense counsel made no request to see the confidential information and the trial judge did not comment on the confidential portion of the report.\textsuperscript{587} The Florida Supreme Court upheld the
petitioner's death sentence without considering the confidential information.\textsuperscript{588}

The defendant appealed this sentence to the United States Supreme Court. Justice Stevens, joined by Justices Stewart and Powell, concluded that the use of the confidential information denied Gardner his right to due process of law and remanded the case to the trial court for resentencing.\textsuperscript{589} Stevens considered and rejected four arguments by the State in support of the use of the information. First, the State argued that confidentiality was necessary to insure the obtaining of relevant but sensitive information from persons unwilling to comment publicly. Justice Stewart responded that the interest in accuracy was greater than the interest in confidentiality.\textsuperscript{590} Second, the State's argument that full disclosure would cause unnecessary delay was summarily rejected because any delay which increased the probable accuracy of a life-death decision could hardly be unnecessary.\textsuperscript{591} Third, the Court rejected the argument that full disclosure will occasionally disrupt rehabilitation because the death penalty precludes rehabilitation.\textsuperscript{592} Finally, the State argued that trial judges could be trusted to act responsibly even if acting on the basis of secret information. The State premised this argument on the assumption that the participation of adversary counsel is superfluous, and Justice Stevens denied this premise because debate between adversaries and full disclosure of all facts are essential to finding the truth.\textsuperscript{593}

Four judges concurred.\textsuperscript{594} Justices White\textsuperscript{595} and Blackmun\textsuperscript{596} concurred in the result but based their opinion on the eighth amendment requirement of adequate procedures rather than on the due process clause. Justice Brennan concurred but continued

due process. \textit{Id.} at 349-50.
\textsuperscript{588} \textit{Id.} at 353-54.
\textsuperscript{589} \textit{Id.} at 362.
\textsuperscript{590} \textit{Id.} at 358-59.
\textsuperscript{591} \textit{Id.} at 359-60.
\textsuperscript{592} \textit{Id.} at 360.
\textsuperscript{593} \textit{Id.} at 360-61.
\textsuperscript{594} Chief Justice Burger concurred without an opinion. \textit{Id.} at 362.
\textsuperscript{595} \textit{Id.} at 362-64.
\textsuperscript{596} \textit{Id.} at 364. Justice Blackmun simply noted that, given the eighth amendment cases of \textit{Woodson} and \textit{Roberts}, see supra notes 424-35 and accompanying text, he concurred in \textit{Gardner}.  

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to adhere to this per se position. Justice Marshall dissented on the basis of his opposition to the death penalty and emphasized that the record in Gardner indicated that the states were not in fact providing adequate procedural safeguards. Justice Rehnquist also dissented, stressing that the eighth amendment imposed substantive, not procedural, standards and that the due process clause had never been held to invalidate procedures like those used in Gardner.

(2) Bell v. Ohio and Lockett v. Ohio

On July 8, 1978, the United States Supreme Court rendered two decisions invalidating the Ohio capital punishment scheme: Bell v. Ohio and Lockett v. Ohio. Lockett, the central case, contained a mixture of majority opinion and plurality judgment, addressing a variety of issues including: (1) scope and nature of evidence in mitigation; (2) exclusion of jurors; and (3) adequacy of notice under the fourteenth amendment. Before discussing these issues, a review of the facts and trial proceedings of these cases is appropriate.

In Bell, the defendant and Samuel Hall participated in the kidnapping of Julius Graber, a 64 year-old man. Armed with a

598. Id. at 365-70.
599. Id. at 371.
603. The plurality opinion also considered and rejected a claim of improper closing remarks by the prosecution. Id. at 594-95. In addition, the plurality explicitly did not address the following issues: (1) whether the death penalty is constitutionally disproportionate for one who has not taken, attempted to take, or intended to take life; (2) whether the Constitution requires jury participation in the sentencing decision; (3) whether the defendant's plea may affect the scope of sentencing discretion; (4) whether placing the burden of proving mitigating circumstances on a capital defendant is constitutionally permissible; and (5) whether meaningful appellate review is constitutionally required. Lockett, 438 U.S. at 609, n.16; Bell, 438 U.S. at 642, n.*. Justices Blackmun and White discussed the first issue. See infra notes 60913 and accompanying text. The Court also addressed the issue in Enmund v. Florida, 102 S. Ct. 3368 (1982). See infra notes 655-79 and accompanying text. Justice Blackmun addressed the third issue in his concurring opinion. See supra notes 575-81 and accompanying text.
sawed-off shotgun, they forced Graber to surrender his car keys and put him in the car's trunk. Bell, following Hall's directions, drove the car to a cemetery. Graber then was taken from the car and shot twice, fatally, with the shotgun. Bell and Hall accused each other of the shooting, and there were no other eyewitnesses.\footnote{604}

In \textit{Lockett}, the defendant participated in the planning and execution of the armed robbery of a pawnshop. Her co-conspirators committed the actual robbery, during which the owner was fatally shot, while Lockett remained outside in the car. The trigger-man plea-bargained for life imprisonment in exchange for his testimony against Lockett and the other co-defendants. Lockett rejected three plea-bargaining offers.\footnote{605}

Bell and Lockett were sentenced to death pursuant to the Ohio statute, which provided for a bifurcated capital punishment trial. The guilt stage was held before a jury or a three judge panel to determine if the defendant was guilty of capital murder. If found guilty, a sentencing hearing was held before the trial judge. The death penalty was mandatory unless the court found that one of three mitigating circumstances was established by a preponderance of the evidence. These circumstances were: (1) whether the victim had induced or facilitated the offense; (2) whether the defendant acted under duress, coercion, or strong provocation; or (3) whether the offense was primarily the product of the defendant's psychosis or mental deficiency. In determining the existence of these circumstances, the court was to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.\footnote{606}

\textit{(a) Mitigating Circumstances}

In \textit{Bell} and \textit{Lockett}, Chief Justice Burger, joined by Justices Stewart, Stevens, and Powell, held that:

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, \textit{as a mitigating factor}, any aspect of a defendant's character or record and any of the circumstances

\footnote{604. \textit{Bell}, 438 U.S. at 639-40.}
\footnote{605. \textit{Lockett}, 438 U.S. at 589-92.}
\footnote{606. \textit{Id.} at 593-94.}
of the offense that the defendant proffers as a basis for a sentence less than death.\(^{607}\)

Chief Justice Burger concluded that the three statutory mitigating circumstances were too limited to provide the individualized sentencing decision required in capital cases.\(^{608}\)

Justices Blackmun and White took somewhat different positions in their concurring opinions. Justice Blackmun agreed that the defendant's mental state and degree of participation should be considered in mitigation, but he did not accept the plurality's broad view that mitigating circumstances must be unlimited.\(^{609}\) Justice White also disagreed about unlimited mitigation but adopted a per se position about unintentional homicides. He argued that because the penalty was disproportionate to the crime and did not further any legitimate goal of punishment, the death penalty was excessive under the eighth amendment unless the defendant intended to cause the victim's death.\(^{610}\)

Justice White based his position on a statistical analysis similar to the one he used in *Coker*.\(^{611}\) He noted that only eight nontriggermen had been executed for murder since 1954, whereas seventy-two persons had been executed for rape during the same time period. He recognized that almost half of the state statutes still allowed capital punishment for nontriggermen but considered the frequency of actual imposition to be of greater weight. Justice White concluded that this recent history revealed society's rejection of capital punishment for unintended defendants as grossly disproportionate to the severity of the crime.\(^{612}\) He also concluded that the deterrent value of capital punishment for unintended murders was extremely attenuated and that the likelihood that capital punishment would serve any legitimate penal purposes was questionable in light of the recent sentencing history.\(^{613}\)

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\(^{607}\) *Id.* at 604 (emphasis in original); *Bell*, 438 U.S. at 642 (emphasis in original).

\(^{608}\) *Lockett*, 438 U.S. at 605-08.

\(^{609}\) *Id.* at 615-16.

\(^{610}\) *Id.* at 622-28.

\(^{611}\) For a discussion of Justice White's opinion in *Coker*, see *supra* note 483 and accompanying text.

\(^{612}\) *Lockett*, 438 U.S. at 624-25.

\(^{613}\) *Id.* at 625.
In *Lockett*, four veniremen were excluded on the basis of their refusals to take an oath that they would truly try the case despite the possibility of capital punishment.\(^6\) The petitioner contended that their exclusion violated her sixth and fourteenth amendment rights under the principles established in *Witherspoon v. Illinois*\(^6\) and *Taylor v. Louisiana*,\(^6\) but the Court concluded that her rights had not been violated.\(^6\)

In *Witherspoon*, veniremen were excluded because they were opposed generally to capital punishment,\(^6\) and the Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."\(^1\) The Court in *Witherspoon* noted, however, that a veniremen could be excluded if his views on capital punishment would interfere with his duty to determine the defendant's guilt in accordance with law.\(^2\)

Although the jury's sole function under the Ohio statute was to determine the defendant's guilt, the Court assumed *arguendo* that *Witherspoon* provided grounds for challenging a conviction as well as a sentence.\(^3\) The Court held the exclusions in *Lockett* to be proper because the veniremen had made unmistakably clear that they could not be trusted to abide by existing law or to follow the trial judge's jury instructions. Thus, their opinions on capital punishment could interfere with their determination of guilt.\(^4\)

*Taylor* upheld a defendant's right to a representative jury,\(^5\) but the Court in *Lockett* held that this right had not been denied because it does not include "the right to be tried by

\(^{614}\) Id. at 595-96.
\(^{615}\) 391 U.S. 510 (1968); *Lockett*, 438 U.S. at 595.
\(^{616}\) 419 U.S. 522 (1975); *Lockett*, 438 U.S. at 595.
\(^{617}\) *Lockett*, 438 U.S. at 596-97.
\(^{618}\) *Witherspoon*, 391 U.S. at 513; *Lockett*, 438 U.S. at 596.
\(^{619}\) *Witherspoon*, 391 U.S. at 522; *Lockett*, 438 U.S. at 596.
\(^{620}\) *Witherspoon*, 391 U.S. at 522-23; *Lockett*, 438 U.S. at 596.
\(^{621}\) Id. at 596.
\(^{622}\) Id.
\(^{623}\) *Taylor*, 419 U.S. at 530; *Lockett*, 438 U.S. at 596.
jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge.\[624\]

(c) Adequacy of Notice

In Lockett, the petitioner also challenged her conviction on the ground of inadequate notice under the fourteenth amendment, contending that the Ohio Supreme Court's interpretation of the statute was "so unexpected that it deprived her of fair warning of the crime with which she was charged."\[625\] The Court summarily concluded that the Ohio Supreme Court's interpretation of the complicity statute was consistent with prior state law and the legislative history of the statute and, therefore, rejected the challenge.\[626\]

(3) Godfrey v. Georgia\[627\]

In Godfrey v. Georgia, the Supreme Court was forced to reconsider the decision in Gregg that statutory construction by the Georgia Supreme Court would resolve the potential problem that several aggravating circumstances in the Georgia statute were overbroad and vague.\[628\] The Georgia statute provided that a convicted capital offender could be sentenced to death if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."\[629\] Godfrey shot his estranged wife and mother-in-law at point blank range with a shotgun, killing them both instantly. The prosecution admitted that the crime did not involve torture or aggravated battery. The trial judge concluded that the crime did not involve torture or physical harm other than the actual killing. The sentencing jury imposed death, specifying the finding "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld

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624. Id., at 596-97.
625. Id. at 597.
626. Id.
627. 446 U.S. 420 (1980).
628. See supra notes 446-49 and accompanying text.
629. Godfrey, 446 U.S. at 422.
Godfrey's death sentence. Justice Stewart, joined by Justices Blackmun, Powell, and Stevens, held that the aggravating circumstance was unconstitutionally vague.

Justice Stewart's opinion reviewed the post-Gregg history of death sentence cases construing the challenged section. These cases revealed a narrow construction of the statute by the Georgia Supreme Court, with a focus on pre-death torture of and aggravated battery to the victim. However, Godfrey's crime did not include these elements and the Georgia Supreme Court simply had asserted that the verdict was "factually substantiated." As a result of this broad application of the section, the issue became the constitutionality of the phrase "outrageously or wantonly vile, horrible or inhuman in that [the murder] involved . . . depravity of mind . . .." Justice Stewart concluded that no principled way existed to distinguish the application of the phrase in Godfrey's case from the many cases in which the death penalty had not been imposed. Therefore, the section was not a sufficient restraint of sentencing discretion. In short, the Georgia Supreme Court had not provided the safeguard of proper statutory construction relied on in Gregg.

Justices Marshall and Brennan concurred on the basis of their per se unconstitutional position. They also argued that this case indicated the impossibility of eliminating the arbitrary infliction of capital punishment and that, therefore, the death penalty "must be abandoned altogether."

Chief Justice Burger and Justices Rehnquist and White dissented. Chief Justice Burger criticized the decision as being a usurpation of both the jury's judgment and the state legislature's province. He warned that the Court was taking on an unwarranted case-by-case workload. Justice White, joined by Justice Rehnquist, characterized the Court's judgment as turning "a blind eye to the facts surrounding the murders . . . and

630. Id. at 425-28.
631. Id. at 429-32.
632. Id. at 432.
633. Id.
634. Id. at 433.
635. Id. at 429, 432. See supra notes 446-49 and accompanying text.
636. Godfrey, 446 U.S. at 433.
637. Id. at 440, 441-42.
638. Id. at 443-44.
to the constancy of the State Supreme Court in performance of its statutory review function.\textsuperscript{639} His opinion contained a detailed description of the murder scene, emphasizing the choice of weapon and the "bloody mess" that it caused.\textsuperscript{640} He also noted that Godfrey's mother-in-law, who was shot after Mrs. Godfrey, was undoubtedly as terrified as humanly possible by the bloody death of her daughter and such terror could be viewed as torture.\textsuperscript{641}

\begin{enumerate}
\item[(4)] Zant v. Stephens\textsuperscript{642}
\end{enumerate}

The defendant in \textit{Zant v. Stephens} was convicted of murder in the guilt phase of his capital trial. The jury based the sentence of death on three statutory aggravating circumstances:

\begin{enumerate}
\item [(1)] that the offense of murder was committed by a person with a prior record of conviction of a capital felony, \ldots
\item [(2)] that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, \ldots
\item [(3)] that the offense of murder was committed by a person who had escaped from the lawful custody of a police officer at a place of lawful confinement. \ldots
\end{enumerate}

On appeal, the Georgia Supreme Court set aside the second statutory aggravating circumstance as unconstitutional and affirmed the death penalty.\textsuperscript{644} Thus, the appeal to the United States Supreme Court apparently raised the question of whether a reviewing court could affirm a death penalty after striking down one of the statutory aggravating circumstances found by the sentencing jury.\textsuperscript{645} In its per curiam opinion, the majority avoided this issue. It noted that although the Georgia Supreme Court clearly had decided that a death penalty could be affirmed even though one of the aggravating circumstances was stricken,\textsuperscript{646} the basis of this rule was unclear.\textsuperscript{647} Consequently, the majority utilized a

\begin{footnotes}
\item[639] Id. at 447.
\item[640] Id. at 449-50.
\item[641] Id. at 450-51.
\item[642] 102 S. Ct. 1856 (1982).
\item[643] Id. at 1857.
\item[644] Id.
\item[645] Id.
\item[646] Id. at 1857-58.
\item[647] Id. at 1858.
\end{footnotes}
state statute authorizing the Georgia Supreme Court to decide questions certified by the United States Supreme Court and remanded the case to the state court to answer the following question: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" 648

Three justices dissented. 649 Justice Marshall, joined by Justice Brennan, argued that the sentence should have been reversed and the case remanded for resentencing because no post hoc rationalization by the Georgia Supreme Court could avoid the constitutional infirmity of basing the sentence at least in part on an invalid aggravating circumstance. The State had argued that the requirement of establishing a statutory aggravating circumstance is a:

threshold determination that only allows the jury to consider the death penalty, but has no impact on whether that penalty should be imposed. After reaching this threshold determination, the jury may consider any 'evidence in aggravation' or mitigation in reaching its conclusion as to whether the death penalty should be imposed. 650

Justice Marshall assumed arguendo the plausibility of this statutory interpretation but found it uncontrolling because the trial record indicated that the jury had not been told of such a view. 651 Consequently, the jury may have been influenced by the invalid circumstances. Thus, no interpretation of the statutory scheme by the Georgia Supreme Court could cure the taint in the underlying jury determination. 652 Justice Powell, also dissenting, agreed with Justice Marshall's position that resentencing was necessary, 653 but argued that it might be possible under state law for the Georgia Supreme Court to resentence the defendant. 654

648. Id. at 1859.
649. Id. at 1859-65.
650. Id. at 1863.
651. Id. at 1862-65.
652. Id.
653. Id. at 1865.
654. Id.
In *Enmund v. Florida*, the defendant was tried under the felony-murder rule\(^5\) for two homicides committed by his co-felons. At trial, he was convicted of murder and sentenced to death; the Florida Supreme Court affirmed the conviction and sentence even though there was no proof that Enmund killed, attempted to kill, intended to kill, or contemplated that killing would occur. Justice White, writing for the five to four majority,\(^6\) held that it was unconstitutional to sentence a person to death without such proof, reversed the sentence, and remanded the case.\(^7\) Justice O'Connor, writing for the dissenters, disagreed with this broad holding.

Underlying the disagreement in the Court is a basic dispute over two points. First, although both opinions adopted and utilized the proportionality test used in *Coker v. Georgia*,\(^8\) they reached different results concerning its exact phrasing and application. Second, there is a significant dispute over the facts of the case.\(^9\) Both agree that Enmund's two co-felons robbed and killed the victims. Justice White asserts that the only evidence of Enmund's participation was that he drove the getaway car.

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655. 102 S. Ct. 3368 (1982).
656. The felony-murder rule has two roles. First, the rule supplies the malice aforethought necessary for a conviction of murder. *Id.* at 3372. *See supra* notes 46, 52, 76 and accompanying text. Second, the rule makes all the participants in the felony vicariously liable for a homicide committed by a cofelon. *Enmund*, 102 S. Ct. at 3372. *See supra* note 192 and accompanying text.
657. Justice White's majority opinion was joined by Justices Blackmun, Stevens, Marshall and Brennan. Justice O'Connor's dissent was joined by Chief Justice Burger and Justices Powell and Rehnquist. However, this opinion was in effect another 3-2-4 decision since Justices Brennan and, presumably, Marshall continued to adhere to their per se position. *See Enmund*, 102 S. Ct. at 3379.
658. *Id.* at 3379.
659. *See supra* notes 487-93 and accompanying text, for a general description of this test.
660. This disagreement concerning Enmund's participation in planning the robbery arose largely from the Florida Supreme Court's reversal of a factual finding by the trial court. The trial judge found that Enmund had planned the armed robbery and that he shot both victims to eliminate them as witnesses. *Enmund*, 102 S. Ct. at 3371 nn. 2, 3. The Florida Supreme Court rejected that finding by concluding that it had not been shown that Enmund was present at the shooting scene and this his only participation was driving the getaway car. *Id.* at 3371 n.2. Justice White interpreted the Florida Supreme Court's decision as a rejection of the trial court's finding that Enmund had planned the robbery, whereas Justice O'Connor concluded that the finding of planning the robbery had been implicitly approved. *Id.* at 3384 n.24.
There was no direct evidence that Enmund was present when the plan to rob the victims was formulated, and he clearly was not physically present at the shooting. Justice O’Connor agreed that Enmund was not physically present at the shooting but found that he had planned the robbery. Thus, she focused on the issue of whether a person who plans an armed robbery may be sentenced to death. Justice White phrased the issue more broadly both because he disagreed concerning the facts and because the Florida Supreme Court had indicated that it was irrelevant whether Enmund had planned the robbery or had merely been a participant.

Having phrased the issue in terms of a robber who did not kill or intend to kill, Justice White, utilizing the framework developed in his concurring opinion in Lockett, found that the death sentence was excessive. This disproportionality was evidenced by objective indicia of contemporary judgments which suggested a general rejection of imposing the death penalty on such a person.661 In addition, the death penalty in such cases conflicts with the basic theory of the eighth amendment in two respects.662 First, vicarious liability for unintended consequences offends the requirement that the death penalty be based on an individualized consideration of the crime and the defendant.663 Second, neither deterrence nor retribution justifies sentencing Enmund to death.664 Retribution does not justify the death penalty because it is based on culpability, which focuses on personal actions, expectations, and intentions.665 The death penalty does not measurably add to the deterrence of robbers who neither kill, intend death, nor contemplate that lethal force will be used

661. Justice White’s objective indicia analysis began with a consideration of legislative judgments. He concluded that “only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die.” Id. at 3374. While not compelling, this statistic weighed against imposing capital punishment for the crime at issue. In addition, the jury standard revealed that no person had been executed for the crime at issue in the past 25 years and only three persons, including the petitioner, were presently awaiting a death sentence for the crime at issue. Id. at 3375-76. Finally, if prosecutors rarely sought the death penalty for the crime at issue, the excessiveness of the death penalty here was further supported. Id. at 3376.

662. See supra notes 490-505 and accompanying text for discussion of this theory.
663. Enmund, 102 S. Ct. at 3378.
664. See supra notes 492, 495-98, 522-27 and accompanying text for discussion of the requirement that the death penalty contribute to these functions.
665. Enmund, 102 S. Ct. at 3378.
by others. The rare imposition of the death penalty on such an offender further attenuates its effectiveness as a deterrent. In addition, he noted that robberies rarely result in homicides. Thus, the likelihood of homicide in the course of robbery could not be substituted for an offender's intent (or knowledge) that a homicide occur for purposes of deterrence.

After a general discussion of several previous death penalty cases, Justice O'Connor's dissent focused first on the question of whether the death penalty for an intentional armed robbery was acceptable to contemporary society. She criticized the majority's approach to this empirical issue and argued that her assessment of the question indicated that it was acceptable. Justice O'Connor then considered whether the death penalty was excessive when measured against the noncultural standards of the eighth amendment. She argued that this standard was satisfied if the penalty was "proportional to the harm caused and the defendant's blameworthiness." Since homicide is the type of harm that is proportional to the death penalty, and since two deaths occurred during the robbery, the issue in Enmund's situation was whether he caused the harm. Justice O'Connor simply assumed that it was proper to say that he had "caused" this harm because he was "legally responsible" for the two deaths which occurred. Blameworthiness, argued Justice O'Connor, is a complex concept that is best handled on an individual basis by the trial courts. In particular, the term "intent" has a variety of meanings, and "intent to kill is not so critical a factor in de-

666. Id. 667. Id. 668. Id. 669. Id. at 3386-90. Justice O'Connor's disagreement with the majority's analysis emphasized three points: (1) the statistical data on jury decisions relied upon by the majority is not sufficiently precise to indicate what percentage of cases were similar to Enmund's, id. at 3388; (2) even if juries only sentenced non-triggermen to death under rare circumstances, whether this indicates a rejection of death in such cases or a pattern of reserving the death penalty for only the most extreme cases is unclear, id.; and (3) even if the jury decisions indicated a societal rejection of the death penalty for all non-triggermen, jury verdict statistics are only one source of data concerning cultural views. Legislation must also be considered and a careful review of legislation does not indicate a rejection of the death penalty in such cases since, under Justice O'Connor's counting of the states, over half the states allow capital punishment for non-triggerman. Id. at 3390. 670. Id. at 3390-91. 671. Id. at 3391. 672. Id. at 3391-92.
termining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murders.”

Justice O’Connor’s discussion of proportionality did not explicitly consider whether capital punishment was excessive in the sense that it was not necessary to achieve a legitimate goal of punishment.

Despite her disagreement with the reasoning of the majority, Justice O’Connor agreed that the case should be remanded for resentencing. The basis for her decision to remand was that the trial court had viewed Enmund as an actual triggerman and had, therefore, failed to consider his lack of participation in the killing as a mitigating circumstance.

The exact rule of Enmund is not clear. The felony-murder rule is two pronged — imputing the mens rea of malice aforethought and imposing vicarious liability. In addition, Justice White’s holding appears to be phrased in terms of a defendant who neither killed nor intended to kill. Consequently, it is not

673. Id. at 3391.
674. This omission could be due either to her rejection of this test or her view that retribution is served by insuring that the penalty is proportional to the blameworthiness of the defendant.
675. Enmund, 102 S. Ct. at 3394.
676. See supra notes 656.
677. Justice White phrased the issue several times in his opinion, with deletions and additions in each restatement. He first presented the question in terms of Enmund’s petition for certiorari: “whether death is a valid penalty under the Eighth and Fourteenth Amendments ‘for one who neither took life, attempted to take life, nor intended to take life.’” Enmund, 102 S. Ct. at 3371. In the next paragraph, Justice White modified the question by deleting the reference to attempt and adding considerations of whether or not Enmund was present at the killing. Id. at 3372. In addition, he implied that actual intent to kill was not the crucial point by introducing the element of whether Enmund “anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape.” Id. This focus on anticipation is lessened by Justice White’s third restatement on the issue:

[Does] the Eighth Amendment [permit] imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.

Id. at 3376-77. The element of attempt was resurrected and the element of presence deleted. Read literally, the latter half of the restatement connects intent, rather than anticipation, to the use of lethal force. It seems reasonable to state that a defendant could “anticipate” that the use of lethal force might be necessary but still not “intend” that it be used. Thus, the relationship between intent and anticipation needs to be clarified. Justice White’s final restatement of the issue was embodied in his conclusion. He based his reversal and remand on the fact that the Florida Supreme Court had affirmed Enmund’s death penalty without proof that Enmund had killed or attempted to kill and
clear whether a person who inadvertently killed another person during the commission of a felony can be sentenced to death. Moreover, as Justice O'Connor's dissent emphasized, the concept of "intent" is extremely vague. Would extremely reckless behavior be sufficient grounds for capital punishment under the eighth amendment? This article takes the position that capital punishment is not justified except where a person can plausibly be deterred only by the death penalty. Consequently, when these questions are considered in more detail in the discussion of South Carolina's system, it will be argued that the constitutional development in this area should satisfy this requirement and prohibit the death penalty except where the defendant is conscious that killing is so likely that he is running a substantial risk of being sentenced to death if he commits the crime being contemplated.

3. Summary and Conclusion

Although the Court is divided on the issue of capital punishment, the intermediate group's view of the eighth amendment right to special procedural safeguards has emerged as the basic standard which legislatures must satisfy. Even where a decision is based on other constitutional grounds, the cases have been influenced by the core idea of the special nature of the death penalty developed in the eighth amendment cases.

Several issues have clearly been resolved under this standard. First, when the judge and jury have no guidelines to limit their exercise of sentencing discretion, the capital punishment scheme is unconstitutional because of too much discretion. Second, when capital punishment is mandatory under certain circumstances, the statutory complex is unconstitutional because it accords too little discretion to insure that the circumstances of

"regardless of whether Enmund intended or contemplated that life would be taken." Id. at 3379. In so concluding, Justice White interjected the elements of contemplation into the relationship between intent and anticipation.

678. See infra notes 870-93 and accompanying text.

679. See infra notes 706-36 and accompanying text.


681. E.g., Furman v. Georgia, 408 U.S. 238 (1972). For a discussion of this case, see supra notes 395-421 and accompanying text.
the particular murder and the particular defendant justify the
death penalty.682 Finally, capital punishment is constitutional
when the statutory scheme provides standards and procedures
which adequately guide and control sentencing discretion.683 In
determining adequacy, some detailed questions have also been
resolved. For example, the sentencing decision must be based on
information that is available to the defendant;684 the standards
must be clear enough to enable the sentencing authority and a
reviewing court to determine whether the death penalty is justi-
fied for a particular defendant and crime;685 and a person cannot
be sentenced to death for a homicide he neither intended nor
committed.686

However, many basic issues have not been decided. For ex-
ample, it is not clear whether appellate review is required and, if
so, what form this review must take.687 The resolution of such
issues may be influenced by the views of the other two positions
on the Court. Strict requirements concerning proportionality re-
view and the murders that justify capital punishment would in-
dicate a greater concern for the per se position, while a more
flexible approach to legislative schemes would suggest that the
views of the legislative presumption position have a greater
influence.688

All three positions have strengths and weaknesses, which
are reflected in the earlier discussion.689 Nevertheless, it should
be helpful to emphasize several basic problems underlying all
three positions. First, there is the tension between limiting judi-
cial interference with democratic decision-making in a federal
system and implementing a system of constitutional checks on
the legislature. Second, there is a similar tension between cul-
tural standards of proper punishment and each Justice's per-
sonal theory of just punishment. Finally, the critical empirical

682. See supra notes 424-35 and accompanying text.
683. See supra notes 436-80 and accompanying text.
notes 582-99 and accompanying text.
685. See Godfrey, 446 U.S. at 428. For a discussion of this case, see supra notes 627-
41 and accompanying text.
686. See supra notes 655-79 and accompanying text.
687. See supra note 603.
688. See supra notes 486-551 and accompanying text.
689. Id.
issues, like the deterrent impact of capital punishment and the actual behavior of juries and judges, are necessarily unresolvable.\(^{690}\)

Later portions of this article will present arguments concerning the best resolution of these problems, and it will be helpful to conclude the analysis of constitutional doctrine by summarizing these arguments. First, there is good reason not to grant the South Carolina legislature a generous presumption in this area.\(^{691}\) Thus, the per se group and the intermediate group seem correct in their approach. Second, judges must not limit their review to cultural notions of proper punishment. In addition, they must use a theory of just punishment to determine when capital punishment is legitimate.\(^{692}\) Thus, a central constitutional task is the development of a just theory of capital punishment, and the intermediate and per se groups are correct in attempting such development. Third, the empirical issues concerning deterrence can be resolved only by insuring that \textit{both} deterrence and retribution are served in a particular case.\(^{693}\) Consequently, the intermediate position is wrong in adopting the position that either purpose is adequate. As a result, further development of the standard of adequate procedural safeguards should proceed in the direction of more restrictive procedural and substantive limits on the death penalty to require that both retribution and deterrence are satisfied.\(^{694}\) Other empirical issues — for example, possible racial discrimination in sentencing — are not so easily resolved.\(^{695}\) Finally, the intermediate position requires the Court to monitor all state court decisions to insure that the process is constitutionally adequate. The case load resulting from this oversight could result in the neglect of other important judicial tasks.\(^{696}\) Consequently, because of this problem as well as other social costs of the death penalty, the per se position may ultimately be the best approach in this area.\(^{697}\)

\(^{690}\) See infra notes 878-81 and accompanying text.

\(^{691}\) See infra notes 966-69 and accompanying text.

\(^{692}\) See infra note 971 and accompanying text.

\(^{693}\) See infra notes 870-949 and accompanying text.

\(^{694}\) See infra notes 882-949 and accompanying text.

\(^{695}\) See infra notes 950-52, 965 and accompanying text.

\(^{696}\) See infra notes 965, 979 and accompanying text.

\(^{697}\) See infra notes 964-65 and accompanying text.
B. The Constitutionality of the South Carolina Capital Punishment Scheme

The South Carolina death penalty statute has been held constitutional by the South Carolina Supreme Court, but no federal court has considered the validity of the statute. It is likely that the general scheme is constitutional because of its similarity to the Georgia statute upheld in Gregg. Moreover, it satisfies Coker since only murderers are subject to the death penalty, and it satisfies some of the specific procedural requirements developed in later cases — for example, any mitigating circumstances can be considered. However, not all of its details are so free from constitutional questions; the following sections, therefore, will address the potential constitutional problems raised by specific parts of the South Carolina scheme.

This discussion will be tentative at times because of three factors. First, since it is not possible to anticipate or consider all the possible problems that may arise in future cases, the discussion will generally be limited to issues presented by cases that have been decided by or appealed to the South Carolina Supreme Court. Second, the South Carolina opinions are often so short and conclusory that the underlying rationales are absent or undeveloped. This lack of clear rationales has two effects: it is not always possible to determine the current doctrine in South


702. See supra notes 207-10, 607-13 and accompanying text.

703. See, e.g., supra notes 277, 284, 289-302 and accompanying text.
Carolina; and the United States Supreme Court, which has often relied on state supreme courts to resolve potential problems in capital punishment schemes,\textsuperscript{704} may lose confidence in the ability of the South Carolina Supreme Court to fulfill this role because of the lack of clear rationales in South Carolina opinions.

The third factor which makes it difficult to determine the constitutionality of particular parts of the South Carolina scheme is the diversity of views on the United States Supreme Court. Their decisions have seldom been rendered by a single majority opinion. Moreover, even though many of the constitutional decisions concerning capital punishment have been determined by the intermediate "group" composed of Justices Stewart, Stevens, and Powell,\textsuperscript{705} no "group" has consistently followed a united approach. In addition, the basis of the opinion is simply not clear in many cases. Because of these problems, attempts to go beyond the facts of a particular case must often be tentative.

1. \textit{The Basic Substantive Issue — The Definition of Capital Murder}

The definition of those murders that justify the death penalty overlaps considerably with the articulation of the guidelines for sentencing. However, it will be useful here to consider whether execution for some types of murder would be unconstitutional regardless of the procedure used in sentencing. Consider, for example, the following hypothetical:

Alpha and Beta make plans to rob Doe. Pursuant to the plan, Beta provides Alpha with an iron pipe with which to threaten Doe in committing robbery. When Doe resists the demand for his money, Alpha hits him with the pipe, and Doe dies as a result. Alpha's intent in hitting was to escape, and he did not desire to injure Doe at all.

Under South Carolina law, both Alpha and Beta have committed murder, because malice aforethought is implied by law

\begin{itemize}
\item \textsuperscript{705} See, e.g., supra notes 487-506 and accompanying text for discussion of their position.
\end{itemize}
where a deadly weapon is used to attack another and death occurs as a result of the commission of a dangerous felony,⁷⁰⁶ and because Beta is vicariously liable for the acts of Alpha committed in furtherance of the plan.⁷⁰⁷ Moreover, the robbery constitutes an aggravating circumstance under the South Carolina statute,⁷⁰⁸ and Beta would be vicariously liable for an aggravating act committed by his co-conspirator Alpha.⁷⁰⁹ Thus, it seems that Alpha and Beta could be sentenced to death under the South Carolina statute.⁷¹⁰ Would either sentence be unconstitutional?

*Enmund v. Florida*⁷¹¹ provides considerable guidance in answering this question, but uncertainties still remain. The rationales of *Enmund* and other cases suggest that the death sentence for either Alpha or Beta would be unconstitutional for two reasons. First, it would probably be disproportionate to the crime involved. The cultural data presented in *Enmund* concerned persons in Beta’s situation,⁷¹² and the majority held that this indicated a rejection of the penalty in such circumstances. However, this evidence is not necessarily conclusive;⁷¹³ and it is not clear what the cultural evidence is concerning persons like Alpha. Nevertheless, the death penalty for either Alpha or Beta would appear to offend noncultural standards of proportionality because they are basically robbers, not murders.⁷¹⁴ Thus, retributive notions of just deserts would not be served by killing them.⁷¹⁵ In addition, as Justice White noted in *Enmund*, such

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⁷⁰⁶. See *supra* notes 46-54 and accompanying text.
⁷⁰⁷. This vicarious liability could be based on: (1) the felony-murder rule, see *supra* notes 656, 676 and accompanying text; (2) the liability of a conspirator for the acts of a co-conspirator committed in furtherance of the conspiracy; see *supra* notes 186 and accompanying text; or (3) the liability of an accessory for the acts of the principal. See § 16-1-40 (1976).
⁷⁰⁹. See, *Woomer* (1), 276 S.C. 258, 277 S.E.2d 696 (1981). This aspect of *Woomer* (1) is discussed at *supra* notes 186-93 and accompanying text.
⁷¹⁰. The South Carolina Supreme Court has indicated in dictum that such a sentence would be permitted. See *State v. Thompson*, ___ S.C. ___, 292 S.E.2d 581 (1982), which is discussed at *supra* notes 153-58 and accompanying text.
⁷¹¹. 102 S. Ct. 3368 (1982). For discussion of this case, see *supra* notes 655-79 and accompanying text.
⁷¹³. *Id.* at 3376.
⁷¹⁴. *Id.* at 3377.
⁷¹⁵. See *id.* at 3378.
robbers are not likely to be deterred by the very slight chance that a death will occur.\textsuperscript{716}

A second reason for doubting that the death penalty is appropriate in the hypothetical is the lack of guidelines to prevent arbitrary decisions. In the United States, persons like Alpha and Beta are rarely sentenced to death. In addition, no one in South Carolina has been sentenced to death under the current statute for an unintentional killing. As a result, the jury must have some way of determining which persons like Alpha and Beta deserve death; yet the scheme provides no guidelines. Consequently, the death sentence in such a case would probably be based upon an unconstitutionally vague standard.\textsuperscript{717}

A more difficult problem is presented by the use of armed robbery as an aggravating circumstance where the killing is intentional but not planned or considered at the time the robbery was planned. Such a situation would exist in a somewhat different hypothetical than that above:

Gamma and Delta make plans for Gamma to rob Roe by threatening him with a gun. They explicitly intend and agree that under no circumstances will the gun actually be used. However, during the course of the robbery Gamma panics and fatally shoots Roe.

Delta was a nonparticipant and did not intend death, but the likelihood of a homicide was higher than in Beta's case. However, this would probably not affect the outcome of Delta's case for several reasons. First, the cultural data indicate at least a reluctance to execute nonparticipants.\textsuperscript{718} Second, the possibility of such an occurrence is so remote and the likelihood of the death penalty if homicide did occur so low that no deterrent impact is likely.\textsuperscript{719} Finally, his moral wrongdoing should be measured by what he did, not what Gamma did.\textsuperscript{720} As a result, retribution would not justify sentencing Delta to death.

\textsuperscript{716} Id..
\textsuperscript{717} See, e.g., Godfrey v. Georgia, 446 U.S. 420, 427-29, 433 (1980); Furman v. Georgia, 408 U.S. 238, 309-310 (1972). Furman is discussed at supra notes 395-421 and accompanying text, and Godfrey is discussed at supra notes 627-41 and accompanying text.
\textsuperscript{718} See supra note 661.
\textsuperscript{719} See supra notes 666-68 and accompanying text.
\textsuperscript{720} See supra note 665 and accompanying text.
Gamma's case is not so clear. *Enmund* stressed both participation and intent,\(^{721}\) and Gamma clearly has both. Thus, capital punishment in his case is probably constitutional unless the Court goes well beyond the narrow focus of *Enmund*, and such a development is not likely. There were four dissenters in *Enmund*; consequently, all the Justices in the majority would have to agree on such a development. Justices Marshall and Brennan are absolutely opposed to the death penalty so they would agree with the extension.\(^{722}\) However, Justices Blackmun, Stevens, and White are not all likely to concur in such a change. For example, Justices White and Blackmun have voted with the deference to legislation group in many cases,\(^ {723}\) and striking down the death penalty in a case like Gamma's would be a major interference with the death penalty scheme in a larger number of states. The extent of this interference can be seen by considering its impact on South Carolina. Armed robbery is the most common aggravating circumstance,\(^ {724}\) and has been the only aggravating circumstance in a number of cases where the death penalty has been imposed\(^ {725}\) and upheld.\(^ {726}\) Many of these sentences would be in doubt if *Enmund* were extended to cases like Gamma's.

Nevertheless, the concern for proportionality in opinions like *Coker* and *Enmund* provides some support for the view that Gamma should not be sentenced to death. Under the noncultural test for proportionality developed in these cases, the death penalty must further one of the legitimate goals of punishment — deterrence or retribution.\(^ {727}\)

Executing Gamma would not deter him from his crime unless it is assumed either: (1) that at the time of his initial decision to commit the robbery he not only thought that a homicide was likely but also realized that he could be sentenced to death for that homicide; or (2) that at the time he decided to shoot Roe he realized that he was risking execution rather than merely imprisonment. The second assumption seems unlikely given the

\(^{721}\) See *supra* notes 661-68 and accompanying text.
\(^{722}\) See *supra* notes 508-30 and accompanying text for a discussion of their positions.
\(^{723}\) See, *e.g.*, *supra* notes 417, 423, 531-51, 638-41 and accompanying text.
\(^{724}\) See *supra* notes 335-37 and accompanying text and tables.
\(^{725}\) See *supra* note 348.
\(^{726}\) See *supra* notes 296-97 and accompanying text.
\(^{727}\) See *supra* notes 483, 495-500, 664-68 and accompanying text.
fact that he shot in panic. The first assumption also seems questionable, particularly in light of the facts. Moreover, if the first assumption is valid, then executing Delta or Beta (or even an armed robber whose victim was not killed) would be legitimate from a deterrence point of view.

It also seems unlikely that the death penalty satisfies the retributive goals of punishment as that goal is expressed in Justice White's opinions. Retribution focuses on insuring that the defendant receives his just desert for his crime, and in Justice White's scheme of retributive punishment, a person's just desert depends very much on his intent. However, intent has a variety of meanings, and Gamma's panic shooting is less culpable than a long-planned, cold-blooded killing. Moreover, justifying Gamma's execution solely because of its retributive impact faces a number of other difficulties. For example, Gamma's actions are no more wrongful that those of a person who shoots during a robbery but does not kill anyone. Yet, such persons are not executed. In addition, the role of the robbery as an aggravating circumstance is no longer clear. From a retributive perspective, why is a robber who shoots his victim in panic more wrongful than a person who commits a deliberate, intentional murder without any aggravating circumstance?

One final example of the difficulties with justifying Gamma's execution in terms of Justice White's retributive perspective is the fact that less than one-fourth of the persons who killed during an armed theft were sentenced to death in South Carolina. While this may not indicate a cultural rejection of the death penalty in such cases, it does raise doubts about the

728. Justice White seemed to view the assumption as invalid. See supra notes 666-69 and accompanying text.
729. For general discussions of the problem of justifying differences in punishment based solely on difference in consequences where these differences are not due to any act of the defendant, see, e.g., "The Case of Lady Eldon's French Lace," in CRIMINAL LAW AND ITS PROCESSES 362-68 (Kadish & Paulsen 3d ed. 1975); Shulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497 (1974).
730. See infra notes 792-802 and accompanying text.
731. See supra note 729. For a general discussion of the problems of retribution schemes and the inadequacy of retribution as a justification for the death penalty, see infra notes 792-826 and accompanying text.
732. See supra note 729.
733. See supra note 348 and accompanying text.
retributive justification because Justice White's opinion in Enmund made two points about such a sentencing rate. First, it cast doubt on the acceptance of the penalty and this doubt suggests that death is not regarded as the just desert for such a crime. Second, the sentencing pattern raises doubt about whether the death penalty is being applied fairly, and this doubt raises questions about whether death is indeed being based on notions of just desert rather than on some other, improper consideration.

Consistency and justice indicate that Enmund should be extended to include a case like Gamma's because the death penalty should only be imposed where two conditions are satisfied: (1) the murder could plausibly be deterred only by the death penalty; and (2) capital punishment is proportional to the wrong involved. When a person plans a robbery and contemplates the use of deadly force to effectuate this robbery, then the first condition is satisfied. Moreover, such premeditation satisfies the second condition if deadly force is used and death results. Thus, unless capital punishment is carefully limited to those murders which satisfy these two conditions, the constitutionality of the South Carolina scheme is subject to varying degrees of doubt concerning the definition of capital murder.

2. The Procedural Issues — The Process of Imposing the Death Penalty for Capital Murder

a. The Pretrial Proceedings

The United States Supreme Court has consistently resisted challenges to prosecutorial discretion in deciding to charge murder, to seek the death penalty, and to plea bargain. As a result, unless a defendant can show abuse of this power, the South Carolina scheme is probably constitutional in this re-

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734. See supra notes 300-01, 661 and accompanying text.
735. See Enmund, 102 S. Ct. at 3378. See also supra notes 299-301 and accompanying text.
736. See infra notes 870-49 and accompanying text.
737. See, e.g., supra notes 444-45, 464, 479 and accompanying text.
spect, particularly since the practice can be justified as a "veto" on the death penalty where there is any doubt concerning its propriety.

South Carolina's system of special pretrial rights is also likely to survive constitutional attack since the general scheme appears to satisfy the minimum standards of the due process clause. However, there may be instances in which, because of lack of funds, a defendant lacks adequate counsel or adequate expert assistance in preparing his defense.

b. The Trial Proceedings

(1) The Bifurcated Trial and the Defendant's Election of a Jury Trial or Jury Sentencing

The South Carolina statute grants the defendant the right to choose to be tried and sentenced by a jury or to choose to be tried and sentenced by a judge. The defendant cannot: (1) plead guilty or be tried by the judge and then sentenced by the jury; or (2) be tried by the jury and sentenced by the judge. It is not clear whether thus limiting a defendant's choice presents constitutional problems because this issue involves several inter-related questions which have not been resolved by the United States Supreme Court:

(1) Whether a capital defendant has a right to sentencing by a jury?
(2) If so, whether this right is improperly restricted by limiting it to cases where guilt is determined by the jury?

739. See supra notes 10-17 and accompanying text for a discussion of the South Carolina scheme.
740. See infra note 927 and accompanying text.
741. See supra notes 18-27 and accompanying text for a discussion of these special procedural rights.
743. See supra notes 93-94 and accompanying text.
745. For an argument that the defendant has such a right, see, e.g., Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 39-74 (1980). This argument should be viewed critically because the Court has not indicated that such a right would be recognized. In Proffitt, for example, Justice Stewart noted that jury sentencing had never been constitutionally required and that judicial sentencing might be more consistent. See supra note 459 and accompanying text.
(3) If there is no right to sentencing by a jury, whether it is nonetheless unconstitutional to compel jury sentencing for those who choose to be tried by a jury while compelling judge sentencing for those who do not — for example, because such differential treatment is a denial of equal protection or is an improper burden on defendant’s initial exercise of his right to be tried by a jury.

This article will only discuss the uncertainty of this issue in the capital punishment cases and will not develop the seventh amendment dimensions involved.

The United States Supreme Court has never directly addressed the question of whether jury sentencing is a constitutional requirement, but two cases suggest that it is not. First, the Court has approved the Florida capital punishment scheme which allows the trial judge to impose death despite a recommendation of life imprisonment by the jury. However, the jury recommendation limits his discretion so it is not clear whether these cases indicate that there is no right to some jury participation in sentencing. Second, Bell v. Ohio involved a defendant who waived trial by jury and thereby lost his statutory right to jury sentencing, but the Court refused to reach this issue and reversed the sentence on other grounds.

The statute in Lockett v. Ohio provided that the trial judge had unbridled sentencing discretion when a defendant pleaded guilty, but the jury’s discretion was limited if the defendant went to trial by jury. In Justice Blackmun’s concurring opinion, the difference in sentencing discretion was deemed to burden the defendant’s seventh amendment right because it made waiver of jury trial a prerequisite to unlimited potential for life imprisonment. This difference in sentencing discretion is not present in the South Carolina scheme; thus, this rationale does not directly apply. Nevertheless, it does indicate that, in capital cases, the Court will closely scrutinize whether the defendant’s choice of trial by judge or jury may be influenced by the effect of

746. See supra notes 459, 583 and accompanying text.
747. See supra note 460 and accompanying text.
748. Bell, 438 U.S. at 640. See Lockett, 438 U.S. at 610, for the pertinent statutory provisions.
749. Bell, 438 U.S. at 642 n.*.
750. Lockett, 438 U.S. at 618-19 (Blackmun, J., concurring).
that choice on sentencing.

(2) Voir Dire

*Lockett* makes it clear that jurors may be excluded if they are unable to follow the law as given in the judge's instructions. Thus, there seem to be no constitutional problems with the South Carolina rule concerning exclusions where a person's beliefs could improperly interfere with his decision, although there may have been some instances of misapplication of the rule. However, the process of determining whether the prospective jurors satisfy this test seems to result in a jury which is more prone to convict and sentence to death. It is not clear whether such tendencies would render the South Carolina scheme unconstitutional because the statistical studies are so new that they have not been subjected to professional criticism and because the alternatives to the current system have serious drawbacks. For example, eliminating questions about willingness to impose the death penalty could result in worse consequences. It has been suggested that different juries should be used for each stage of the trial, but this will not resolve the problem.

751. See supra notes 614-26 and accompanying text.
752. South Carolina *voir dire* must be narrowly circumscribed by focusing on situations where impartiality is affected or where jurors would automatically vote for or against the death penalty. See, e.g., Adams v. Texas, 448 U.S. 38 (1980). Thus, the South Carolina scheme, discussed at supra notes 29-45, 247-54 and accompanying text, must allow persons to be jurors regardless of their beliefs about the death penalty if those beliefs do not have one of the effects listed above. In at least one instance, however, the exclusion seems to have gone further. See supra note 249 and accompanying text.
753. See, e.g., Hovey v. California, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); Haney, Juries and the Death Penalty: Readdressing the Witherspoon Question, 26 CRIME & DELINQ. 512 (1980); Jacoby & Paternoster, Sentence Disparity and Jury Packing: Further Challenges to the Death Penalty, 73 J. CRM. L. & CRIMINOLOGY 379 (1982). For further discussion, see infra notes 933-35 and accompanying text.
754. E.g., Haney, Juries and the Death Penalty: Re-addressing the Witherspoon Question, 26 CRIME & DELINQ. 512 (1980). In Hovey v. California, 28 Cal. 3d 1, 82, 616 P.2d 1301, 1347-55, 168 Cal. Rptr. 128, 182 (1980), the California Supreme Court required that the jurors be sequestered and questioned separately so their predispositions would not be biased. This decision, however, was vigorously criticized by the dissenting Justices as wasteful, ineffective, counterproductive, and unfounded. Id. at 82-84, 616 P.2d at 1255-56, 168 Cal. Rptr. at 182-84. In South Carolina, the trial judge has discretion to determine how the *voir dire* is conducted. See supra note 30 and accompanying text. It should be noted, however, that sequestration and individual questioning of capital veniremen appears to be the current practice in South Carolina. In addition, each venireman is cautioned not to read media accounts of the trial, including *voir dire*. In
The composition and attitudes of the jury that determined guilt would still be affected by questions concerning the effect that the death penalty might have on their decision, and the voir dire of the sentencing jury could bias their makeup in favor of the death penalty. The problem could be "solved" by striking down the death penalty, but the United States Supreme Court is unlikely to take such an extreme step.

(3) The Adjudication of Guilt

A criminal defendant's constitutional right to due process requires that the State prove each element of a crime beyond a reasonable doubt. Thus, it is unconstitutional to use mandatory presumptions which shift the burden of disproving an element to the defendant. The State may, however, rely on permissive presumptions which permit, but do not require, the jury to find that the prosecution has satisfied its burden of proof. In addition, the State has considerable discretion in defining the elements of the crime. Consequently, the State can, for example, define murder simply as the intentional killing of another person, and then require the defendant to prove, as an affirmative defense to murder, that the killing resulted from extreme emotional distress.

The South Carolina law concerning the elements of murder and burden of proof is uncertain. Two cases suggest that the defendant must prove the elements of self defense. Since the absence of such a justification appears to be part of the definition of malice (and thus part of one of the elements of the crime), these two cases seem contrary to the constitutional requirement concerning the State's burden of proof. Although one could argue that the absence of the justification is not one of the elements of murder under South Carolina law, such an argument

this way, the candor of potential jurors can be better protected. Telephone interview with Richard Harpootlian, Deputy Solicitor of the Fifth Judicial Circuit (Aug. 11, 1982).

759. See supra notes 55-77 and accompanying text.
759.1. See supra notes 60-68 and accompanying text.
760. See supra notes 55-59 and accompanying text.
would be contrary to cases defining malice in terms of lack of justification\textsuperscript{761} and to cases which appear to place the burden of lack of excuse on the State.\textsuperscript{762}

(4) Sentencing

The South Carolina sentencing process satisfies the Constitution in most respects because it emphasizes the need to control and structure discretion to insure that there is a meaningful basis for imposing the death penalty. Moreover, its general framework parallels the Georgia scheme upheld in \textit{Gregg v. Georgia}.\textsuperscript{763} In addition, a number of specific provisions satisfy subsequent cases — for example, the \textit{Lockett} requirement that the jury not be limited in its consideration of mitigating circumstances.\textsuperscript{764} Nevertheless, some parts of the South Carolina scheme could be unconstitutional. For example, the South Carolina Supreme Court has shown an inadequate concern for double jeopardy problems.\textsuperscript{765} More importantly perhaps, several aspects of the sentencing process are probably contrary to the constitutional requirement that there be a meaningful basis for the decision to impose the death penalty.

The treatment of aggravating circumstances involves three instances of such constitutional difficulty: (1) the overlapping nature of aggravating circumstances;\textsuperscript{766} (2) the broad construction of robbery and larceny with a deadly weapon;\textsuperscript{767} and (3) vicarious liability for the aggravating conduct of another.\textsuperscript{768} All

\textsuperscript{761} See \textit{supra} note 59 and accompanying text.
\textsuperscript{762} See \textit{supra} notes 69-75 and accompanying text.
\textsuperscript{763} See \textit{supra} notes 4-5, 436-56, and accompanying text.
\textsuperscript{764} See \textit{supra} notes 207-10, 607-08 and accompanying text.
\textsuperscript{765} See \textit{supra} notes 194-204 and accompanying text. The leading case concerning double jeopardy in situations in which the death penalty is sought in resentencing proceedings is \textit{Bullington v. Missouri}, 101 S. Ct. 1852 (1981).
\textsuperscript{766} This overlap is discussed and criticized at \textit{supra} notes 151-71 and accompanying text. In \textit{Zant}, the United States Supreme Court indicated that there was serious doubt concerning the death penalty when one of the aggravating circumstances considered by the jury was not proper. See \textit{supra} notes 642-54 and accompanying text. Since an overlapping circumstance may influence the jury in the same way that an improper one may, South Carolina's approach raises a problem similar to that involved in \textit{Zant}.
\textsuperscript{767} This construction is discussed and criticized at \textit{supra} notes 172-85 and accompanying text.
\textsuperscript{768} This decision is discussed and criticized at \textit{supra} notes 186-93 and accompanying text. The decision in \textit{Enmund}, concerning homicides which the defendant neither
three of these instances could mislead the sentencing authority concerning the appropriateness of the death penalty in a particular case; thus, they may offend the constitutional requirement that sentencing discretion be meaningfully structured.

In addition, the constitutionality of several other parts of the South Carolina scheme is at least questionable because these aspects also cast doubt on whether the sentencing determination has a meaningful basis. Allowing the consideration of nonstatutory aggravating evidence\(^{769}\) may raise problems of vagueness like that in Godfrey\(^{770}\) since it may not be possible to articulate precisely the role of such evidence. In addition, Zant\(^{771}\) casts considerable doubt on a mechanical treatment of the statutory circumstances as a threshold requirement.\(^{772}\) It may be possible to address these potential problems by carefully guiding the jury consideration of nonstatutory aggravating factors where at least one statutory circumstance exists. However, this does not appear to have been done in the past,\(^{773}\) and this failure may be unconstitutional. Other areas of potential constitutional problems are: (1) the treatment of psychological, emotional, and mental handicaps;\(^{774}\) (2) the approach used in admitting and excluding evidence concerning the propriety of the death penalty;\(^{775}\) and (3) the definition of capital murder through the interpretation of aggravating circumstances.\(^{776}\) The South Carolina law concerning these topics is unclear, and future cases may eliminate any question concerning constitutionality by adopting a broad ap-

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committed nor intended, see supra notes 655-79 and accompanying text, certainly casts doubt on the use of vicarious liability for aggravating conduct.

769. See supra notes 134-50 and accompanying text.

770. See supra notes 627-41 and accompanying text. Justice Stewart has implicitly approved the consideration of nonstatutory aggravating factors provided that at least one statutory aggravating circumstance is established before imposing the death penalty. Gregg, 428 U.S. at 164-66, 197; Proffitt, 428 U.S. at 250 n.8, 256 n.14. However, the issue of whether such factors interfere with the need to limit discretion and provide a meaningful basis for appellate review was not explicitly addressed.

771. See supra notes 642-54 and accompanying text.

772. See supra notes 139-50 and accompanying text for discussion of South Carolina's possible use of the threshold approach and supra notes 642-54 and accompanying text for discussion of the treatment of the approach in Zant. See supra note 770 for an indication that the "threshold" approach has been implicitly approved by the Court.

773. See supra notes 140-44 and accompanying text.

774. See supra notes 212-29 and accompanying text.

775. See supra notes 247-54 and accompanying text.

776. See supra notes 706-36 and accompanying text.
approach concerning the handicaps\textsuperscript{777} and propriety\textsuperscript{778} and interpreting aggravating circumstances narrowly so they are clearly limited to cases in which deterrence and proportionality are satisfied.\textsuperscript{779} This approach would insure that any imposition of the death penalty is based on a meaningful consideration of the individual being sentenced, of the proper role of the death penalty in particular cases, and of the need to insure that the death penalty is only imposed where deterrence is plausible and where the defendant and crime are extremely wrongful.

c. Appellate Review

Although the United States Supreme Court has not explicitly required appellate review by the state supreme courts, its decisions implicitly suggest such a requirement. In Gregg, the United States Supreme Court noted that the Georgia Supreme Court could be trusted to insure that the death penalty was imposed only where it could be proportional to the crime because, "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."\textsuperscript{780} In addition, in Zant \textit{v.} Georgia, the Court stressed the constitutional requirement that the death penalty not be imposed capriciously, noting that "the constitutionality of Georgia's death sentences ultimately could depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern."\textsuperscript{781}

The South Carolina statute provides for automatic review of the death penalty and requires the South Carolina Supreme Court to insure that its application is not arbitrary or capricious. However, it appears that the court has not consistently met its obligations under the statute. This failure is reflected both in its

\textsuperscript{777} See supra note 229 and accompanying text.
\textsuperscript{778} See supra notes 247-54 and accompanying text.
\textsuperscript{779} See supra note 736 and accompanying text.
\textsuperscript{780} Gregg \textit{v.} Georgia, 428 U.S. 153, 206 (1976). See id. at 204-206. Two companion cases to Gregg—Woodson and Roberts—indicated that the mandatory death penalty schemes were unconstitutional because they lacked meaningful appellate review of jury sentencing. See supra note 435.
\textsuperscript{781} 102 S. Ct. 1855, 1857 (1982).
decisions approving the constitutionally suspect parts of the sentencing process discussed above and in its inadequate approach to proportionality review. Since the South Carolina Supreme Court has no systematic way to monitor patterns of jury decisions, its review procedures may not be adequate to identify cultural patterns of proportionality by determining "when juries generally do not impose the death sentence in a certain kind of death case." In addition, it does not seem to have an adequate noncultural model of proportionality. Finally, the court has no way of determining whether improper racial discrimination is affecting the process. Because of these inadequacies in appellate review of proportionality, the South Carolina scheme may be unconstitutional in practice.

3. Conclusion

Although South Carolina's general scheme will probably survive constitutional challenges, it seems likely that future cases will modify or clarify parts of the system to eliminate the potential constitutional problems involved in specific aspects of

782. Zant v. Georgia, 102 S. Ct. 1855, 1857 (1982). While the South Carolina system of judicial review has flaws, see supra notes 277-79, 286-87 and accompanying text, it may not be constitutionally inadequate for two reasons. First, there are limits on the amount of empirical study that can be legitimately expected of the court. See supra note 279, 307-08 and accompanying text. Second, it is not clear what type of review is necessary to make the determination referred to in the quote from Zant above. See, e.g., Baldus, Pulaski, Woodworth, & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L. REV., 1, 1-22 (1980). Nevertheless, the Court's expressed disinterest in life cases, see supra note 279 and accompanying text, raises questions about the process of proportionality review in South Carolina. See supra notes 238-308 and accompanying text, for a general critique of the South Carolina Supreme Court's approach to proportionality review.

783. See supra notes 284, 288-302 and accompanying text, and infra notes 933, 923, 931-32, 949 and accompanying text. Since the United States Supreme Court has no objection to "mercy" in the capital sentencing system, see supra notes 444, 445, 464, 479 and accompanying text, it has apparently approved the "objective" model of proportionality review used by the South Carolina Supreme Court. See supra notes 276-282 and accompanying text, and infra notes 936-949. But see Baldus, Pulaski, Woodworth, & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L. REV. 1, 9-22 (1980). Thus, the problem is not with South Carolina's decision to use "objective" proportionality, but with the manner in which it implements this approach. See supra notes 284-302 and accompanying text.

784. See supra note 285 and accompanying text, and infra notes 950-52 and accompanying text.

the scheme. However, completion of this process will only insure that capital punishment in South Carolina satisfies the minimal requirements imposed by the constitution. As a result, there will be no assurance that the South Carolina scheme is just. In order to address this issue and to understand better the constitutional requirements and the policies underlying the South Carolina system, the next part of this article develops a philosophical perspective on the legitimacy of the death penalty.

III. PHILOSOPHICAL JUSTIFICATION OF CAPITAL PUNISHMENT

There is little agreement concerning the justice of capital punishment, largely because providing a philosophical justification for capital punishment is troublesome in two respects. First, like any criminal punishment, it involves the intentional infliction of pain and injury by the state; and second, capital punishment is at least prima facie more questionable than other punishments because death is so complete, final, and irreversible. Part A of this section addresses the first aspect of the dispute and discusses the issues involved in justifying punishment. The first two portions of this discussion place the topic in context by addressing the nature of punishment and the interrelated questions involved in justifying punishment. The middle portion discusses the traditional justifications of punishment — retribution and deterrence. The final portion discusses the role of a general theory of just punishment and sketches a proposed theory. Part B focuses on the narrow issue of the death penalty and uses the proposed theory of just punishment to develop a critique of South Carolina's approach to capital punishment.

This critique involves two interrelated arguments. First, capital punishment is just only if several conditions are satisfied. The discussion focuses on the requirement of a process to insure that there is a meaningful basis for identifying those persons to be executed. Such a meaningful basis exists only if two conditions are clearly satisfied: (1) the only persons executed are those who might plausibly be deterred by the death penalty but not by life imprisonment, and (2) persons should not be executed unless they can be viewed as severely reprehensible and morally blameworthy.

The second argument has two prongs. First, the discussion asserts that many aspects of the South Carolina scheme of capi-
tal punishment indicate a commitment to insuring that these conditions are satisfied. The second prong of the argument is that, despite this general compliance with the requirements of justice, there are several basic flaws in the current application of the scheme. As a result, it is necessary to conclude that South Carolina may unjustly execute someone in the near future. On the other hand, no one has yet been executed because no one has yet exhausted all the procedural protections available to capital defendants. As a result, there is still the possibility that the state or federal courts will correct the present shortcomings in the South Carolina scheme. It is, therefore, too soon to know whether the South Carolina scheme will result in an unjust execution.

A. Justification of Punishment

1. The Nature of Punishment

Before discussing the justifications for punishment it will be helpful to define punishment and distinguish it from related notions such as restraint and rehabilitation, which are alternatives to punishment and which are sometimes confused with justifications for punishment. In *Punishment and Responsibility*, H.L.A. Hart notes that the core of what we mean by punishment involves five elements:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be of an actual or supposed offender for his offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.786

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787. Id. at 4-5. For further discussion of the definition of punishment, see e.g., J. Kleinig, *Punishment and Desert* 10-48 (1973); M. Mackenzie, Plato on Punishment 5-17 (1981); Ducasse, Philosophy and Wisdom in Punishment and Reward, Philosophical Perspectives on Punishment 3, 78 (E. Madden, R. Handy & M. Farber ed. 1968); and Pratt, Professor Ducasse and the Meaning of "Punishment," in Philosophical Perspec-
Restraint—for example, by imprisonment or by quarantine—is different from punishment in two important respects: it need not involve pain or other unpleasant circumstances other than loss of freedom to move about, and it is sometimes imposed even where there has been no offense. Justifications for restraint are usually phrased in terms of prevention of harm rather than in terms of retribution for an offense or in terms of deterrence of an offender through the teaching of a painful lesson.

Rehabilitative approaches view criminal conduct as a manifestation of an “illness” or condition that can be “cured.” Treatment may involve restraint—for example, by commitment to a mental institution—but it might also consist of therapy imposed outside of institutions. Treatment differs from punishment in two ways. First, pain and other unpleasant consequences are not necessarily involved. Their use is only incidental to “curing” the illness. Second, there need not be an offense against the legal rules. The justification for rehabilitation is that it will make the person “better” and thus reduce harmful conduct.

These concerns can overlap. For example, when a person is imprisoned for punitive purposes, he is also restrained. While he is imprisoned, one might also attempt to rehabilitate him by providing occupational training or psychological therapy. These goals are still different, however, and the distinctions can be seen by considering a case like Commonwealth v. Ritter, where the defendant killed his mistress as a result of despair and alcohol. There was no need to restrain him after the killing, and, except for possible alcoholism, there was nothing to treat. Yet he was sentenced to life imprisonment to punish him for his act.

TIVES ON PUNISHMENT, supra at 20-25.


789. The court concluded that the defendant was no longer a menace to society. Id. at 293.

790. The court rejected retribution as a reason for punishment. Id. at 290-291. The justification for the imprisonment is unclear since the court also concluded that no deterrent effects would result from the punishment because Ritter individually was not a further threat to society and because crimes like Ritter’s, resulting from passion and alcohol, are not likely to be deterred by consideration of potential punishment. The sentence probably resulted from an institutional concern about the proper role of courts. See infra note 800.
2. The Questions Involved in Justifying a System of Punishment

The traditional justifications for punishing persons like the defendant in *Ritter* are retribution and deterrence. Although these justifications have been phrased in a variety of forms, the two approaches can be distinguished in terms of whether they are primarily concerned with the future or with the past. Deterrent schemes focus on preventing future crimes. The need for and amount of punishment are determined by considering their preventive impact on the number and severity of crimes in the future. Retributive theories focus on the past, and punishment is imposed in accordance with the “badness” of the criminal and of the crime he committed. Thus, punishment is viewed as the “just desert” imposed on a person for his past conduct, and there is no concern with the prevention of crimes in the future.

In practice, both justifications are often used, or at least appear to be used, at the same time. Nevertheless, there are cases where it is necessary to distinguish them. For example, if it appears that capital punishment does not deter murders any more than imprisonment, then capital punishment is only justified by adopting a retributive approach to punishment. Consequently, a short critique of each justification is required.

In order to better understand this critique, it is helpful to remember that both retributive and deterrent justifications must not only justify the imposition of punishment as a general proposition—*i.e.*, answer the question “why punish?”—they must also provide at least some insight into four other interrelated questions:

1. What acts should be punished?
2. Who should be punished?
3. How much punishment should be imposed for a particular crime and on a particular person?
4. What institution should address these issues and what procedures should be used?

791. For an empirical study of attitudes toward the respective importance of the different “goals” of sentencing, see, *e.g.*, Forest and Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment*, 33 Rutger's L. Rev. 799 (1981). The present article adopts the position that only a particular combination of the two approaches can justify punishment. See infra notes 849-69 and accompanying text.
These questions must be addressed in order to go beyond the justification of punishment and provide a system of punishment that enables us to consider specific cases. The following summary and critique of retribution and deterrence illustrate the difficulties involved in formulating a justification which can provide the basis for a systematic response to all of these questions. The discussion following this critique will then sketch a general approach to providing such a systematic response.

3. Retributive Justification of Punishment

While retributive schemes vary, they all share two common tenets:792

(1) The person being punished "deserves" the punishment in that
   (a) he has committed some offense; and
   (b) the amount of punishment is proportional to the offense and to the "badness" of the offender.

(2) Punishment in accordance with (1) is legitimate regardless of whether it will prevent future offenses in any way.

These two tenets will be discussed separately.

a. The First Tenet—The Notion of "Just Desert"

The first tenet has considerable appeal because it reflects

792. See, e.g., H.L.A. Hart, Punishment and Responsibility (1968); T. Honderick, Punishment: The Supposed Justifications 2251 (1969); M. Mackenzie, Plato on Punishment 21-33 (1981); E. Pincoffs, The Rationale of Legal Punishment, 2-16 (1968); Bedau, Retribution and the Theory of Punishment, 75 J. Phil. 601 (1978). For short selections from various retributive schemes, see, e.g., Criminal Law and Its Processes 6-21 (S. Kadish and M. Paulsen 3d ed. 1975); Philosophical Perspectives on Punishment 102-184 (G. Ezorsky ed. 1972). A number of concerns are often improperly included in retributive schemes. For example, revenge is often confused with retribution because both focus on the past. Revenge, however, is not a justification for punishment. See, e.g., E. van den Haag, Pursuing Criminals 10-14 (1975). This point is pursued further at infra notes 825-26, 854 and accompanying text. Another common confusion is to mistake a deterrent theory for a retributive scheme. Three examples of this are discussed later in the text: (1) the confusion of the determination of who and how much to punish with the question of why punish, see infra notes 820-24 and accompanying text; (2) the view that punishment is necessary in order to prevent self-help, see infra notes 825-26; and (3) the view that punishing to increase respect for law is a retributivist rather than a deterrent justification for punishment. See infra notes 820-21, 844-46 and accompanying text.
the view that government is limited in inflicting punishment by the requirements that no one should be punished unless he has committed an offense and that punishment should be somehow proportional to the offense. However, despite its initial appeal, the notion of "just desert" has a number of basic problems. An initial difficulty is that punitive effects are not limited to the wrongdoer. If a guilty person is imprisoned, the innocent spouse and children also suffer. Another flaw is that the ability to understand, employ, or evaluate retributive schemes is seriously impeded by the vagueness and ambiguity of the terms involved. For example, the first tenet asserts that a criminal "deserves" to be punished, but the notion of "deserves" or of "just desert" is vague. This vagueness can be seen by considering how well it helps answer two of the questions involved in developing a system of just punishment.

How does one know what acts deserve punishment? In many discussions of retribution it is unclear whether punishment is retribution for: (1) a violation of the law; (2) a violation of another person's rights; (3) a breach of morality; (4) an injury to someone; or (5) some combination of these four. The difficulty is not limited to situations like parking violations where the act does not clearly involve moral issues. It also arises where morality is clearly involved. For example, in Regina v. Dudley and Stephens, the defendants and several other seamen had been on a lifeboat for nearly three weeks and were likely to perish from lack of food and water. To survive, the defendants killed and ate a member of the group. Because of this circumstance, the remaining seamen lived long enough to be rescued. Upon their return to England, Dudley and Stephens were charged with murder. After trial and appeal, they were sentenced to death. It seems that this punishment can only be justified by a retributive scheme. A person threatened by virtually certain death unless he commits a homicide is not likely to be deterred from committing that killing by the threat of death in.

793. See infra notes 863, 900, 907 and accompanying text, for further discussion of this problem.
793.1. Professor Ferdinand Schoeman was very helpful in developing and clarifying this ambiguity.
794. 14 Q.B.D. 273 (1884). See infra note 799 for further discussion of this case and similar cases.
the future. But it is not clear that retribution is appropriate in this case. Is it wrong to take one life in order to save several in this kind of situation?

Perhaps Dudley and Stephens deserved punishment because it is always wrong to kill an innocent person. Giving reasons for this view is difficult, however. If such killing is wrong because life is sacred, then it seems that taking one life is better than having more die because several "sacred" lives seem more important than one. If one says it is wrong because it is wrong, then the argument is circular and conclusory.

An alternative argument is that an affirmative act which causes death is more culpable than an omission to act to prevent a death. There may be situations where the distinction is significant. For example, shooting a baby does at least seem different from refusing to contribute money to an international program to provide food for poor nations even though the effect of both the shooting and the refusal is to cause a child's death. Nonetheless, the distinction can be criticized even here. Moreover, there are other situations in which the distinction seems contrived and meaningless. For example, why should it be permissible to fail to provide an artificial life support system to a patient but objectionable to "pull the plug" on the system? The lifeboat situation in Regina v. Dudley and Stephens seems more like the health care example because the persons involved are all known and present (rather than a statistical entity thousands of miles away) and the different consequences of the act or omission are relatively clear, direct, and immediate.

Even if we could address such problems and devise a scheme to be used in justifiably labeling an act as "wrong", there would still remain the question of how much punishment is deserved. In Regina v. Dudley and Stephens, the court sentenced the defendants to death, but their sentences were later com-

795. For a general discussion of life and death situations, see e.g., J. GLOVER, CAUSING DEATH AND SAVING LIVES (1977).
796. See, e.g., id. at 109-10.
797. See, e.g., id. at 92-116.
muted to six months imprisonment by the Crown.\textsuperscript{799} Such disparity indicates that there is no consensus on the proper amount of punishment that is deserved for a specific wrongful act,\textsuperscript{800} particularly where the death penalty is concerned.\textsuperscript{801}

The determination of the amount of punishment is further complicated by the fact that retributive schemes usually require that punishment be proportional not only to the crime but also to the "badness" of the wrongdoer. For example, if two men both commit theft but one does it for the thrill and out of a desire to hurt others while the second does it only to feed his family and with a feeling of guilt and remorse, many retributivists argue that the first should be punished more severely.\textsuperscript{802}

These problems in determining the amount of punishment are not limited to life and death dilemmas like those in \textit{Regina v. Dudley and Stephens}. For example, questions of making the punishment proportional to the individual offender are always present when a recidivist is sentenced. Even with a first offender, problems arise upon considering the totality of circumstances involved in evaluating an "act." For example, how does one determine just desert in cases involving civil disobedience of a trespass statute in order to protest racial discrimination?

\textbf{b. The Second Tenet—The Purpose of Punishment}

Retributivists are often criticized for their lack of concern for deterrence. According to the critics, if there are no such ben-

\textsuperscript{799} \textit{Criminal Law and Its Processes} 10 n.2 (S. Kadish & M. Paulsen 3d ed. 1975). In United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842)(No. 15,383), an American case similar to \textit{Regina v. Dudley and Stephens}, the defendant seaman was convicted of manslaughter for ejecting some passengers in an overcrowded lifeboat. He was sentenced to six months imprisonment and a fine of $20, but the penalty was later remitted. \textit{Criminal Law and Its Processes}, supra at 544. For discussion of the issues in such cases, see, e.g., F. Hicks, Human Jettison (1927); Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949).

\textsuperscript{800} The difference in sentencing might be the result of the different institutional roles of the judiciary or the executive, i.e., courts lack the discretion to sentence a murderer to a short sentence, but the executive has the power to commute the sentence or grant a pardon. See, e.g., Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616, 619, 631-37, 641-42 (1949).

\textsuperscript{801} See, e.g., Videmar & Ellsworth, Research on Attitudes Toward Capital Punishment, in \textit{The Death Penalty in America} 68-92 (H. Bedau 3d ed. 1982).

eficial consequences, then people are being punished for no purpose and this is wrong. Three types of approaches have been used to respond to such criticisms. First, some argue that criminal actions result in an imbalance in the moral order that must be restored by punishing the defendant. Second, it can be argued that deterrence is not the only beneficial result of punishment. By forcing the criminal to "pay his debt" to society, it helps reintegrate the criminal into society. A third response is to confuse deterrence and retribution and defend retribution by deterrence arguments.

(1) Restoring the "Moral Order"

Some retributivists argue that imposing punishment where it is deserved is inherently good because it restores a balance to the "moral order;" there is no need to show that it results in any other good consequences. From this perspective, imposing punishment is viewed as being like enforcing a promise and preventing unjust enrichment. If Alpha promises to pay Beta $5.00 to mow Alpha's yard and if Beta mows the yard in reliance on that promise, some argue that it is unnecessary to ask whether enforcing Alpha's promise will have beneficial results—for example, by deterring people from breaching agreements in the future. Instead, it is only necessary to say that Beta has earned the $5.00 and now "deserves" to receive it or that Alpha has benefited and would be unjustly enriched if payment were not required.

This position has two problems. First, it is not altogether

803. See, e.g., T. Honderich, Punishment: The Supposed Justification 22-26 (1969); Pugsley, A Retributivist Argument Against Capital Punishment, 9 Hofstra L. Rev. 1501, 1510-16 (1981). This position is reflected in the view that the death penalty is just because it expresses society's legitimate anger at an outrageous crime. See supra notes 638-39 and accompanying text. Punishing for mere anger would be revenge, not retribution; thus, it is important that this anger be based on moral grounds rather than emotion. See infra note 804 and accompanying text. Later it will be argued that there is no such moral basis for imposing the death penalty. See infra notes 870-71, 876-77 and accompanying text.


clear that promising would impose moral obligations unless the consequences of the practice were generally beneficial. Second, even assuming that promising did impose moral obligation without regard to consequences, there are numerous disanalogies between promising and punishment. For example, few, if any, criminals have explicitly agreed to obey the particular criminal prohibition they have violated. Arguing in terms of an implied promise to obey would raise numerous other problems. For ex-


807. Oaths of loyalty and pledges of allegiance arguably qualify as such an explicit promise, but the following problems exist in viewing them as promises: (1) Are they mere rituals? (2) Do they include an agreement to obey all the laws all the time? (3) Are they freely given or are they coerced to some extent? (4) To whom is the promise made? (5) What about persons who have never made an oath or pledge since becoming adults?

808. Speaking in terms of an implied promise raises a host of problems. For example, who is the person to whom the promise is made and can this person authorize breaches of the promise? Underlying such specific problems is the basic difficulty in arguing that it is legitimate to imply a promise when none was explicitly made. The problems are clear in the following considerations of some of the conduct that arguably could serve as the justification of this implied promise:

(1) It can be argued that participation in the political process — e.g., voting — indicates a promise to be bound by the results. This view involves a number of difficulties: What about non-participants? Is it accurate or even fair to say that because a person votes in an election he, therefore, promises to obey all the laws all the time? Should there be some minimal level of meaningful participation? How would this level be determined? What about laws resulting from legal processes where a person did not participate directly — e.g., administrative decrees? To whom is the promise made? All other citizens? All other participants? If the promise is made to all other participants, can it be broken where only a non-participant will be affected?

(2) Since a person receives the benefit of other persons obeying the law, it can be argued that receiving this benefit implies a promise that the recipient will also obey the law. This argument can be buttressed by reference to the exercise of legal rights, e.g., participation in voting or appealing to the law in resolving disputes. This position is subject to a variety of objections. For example:

(a) What do we mean when we say a person "benefits" from the system of laws? Do we mean he is better off than with no laws? If so, then the obligation exists in almost any legal system, no matter how reprehensible and unjust. However, this result seems intuitively offensive. If we mean that he is better off than he would be if there were a different hypothetical system, how do we identify this hypothetical legal system? What if a person is worse off under the actual legal system than he would be under the hypothetical one?

(b) Is the obligation owed only to those who confer the benefits? How do we identify these persons? Are they all citizens? What about lawbreakers? Is a person free to disobey the law if only lawbreakers are affected?

(c) Why is it proper to say that receipt of benefits implies a promise
ample, an explicit promise indicates "just desert" by its terms. But how does one determine the "just desert" for breaching an implied promise? As indicated above, there is good reason to doubt our ability to determine "just desert" in such circumstances.

Another objection to the analogy between promising and punishment is that even if there is a moral obligation to fulfill a promise, it should be distinguished from the legally enforceable obligation to perform a contract. Under this view, promises should not be enforced by the legal system without assurance that good consequences will result. Underlying this criticism is a reluctance to grant the state the right to use its coercive power to correct an imbalance in the "moral order" even though no good consequences result. Such a grant of power is contrary to many current theories of the just state, which stress the need to limit state power, particularly the power to punish, and skepticism about the utility of an objective moral order to impose such limits on the state. Thus, a breach of the "moral order" may be a necessary condition of punishment, but not a sufficient condition. In other words, the state may not punish without such a breach; but even if there is such a breach, punishment is neither required nor is it justified absent a showing of something more-for example, beneficial consequences like deterrence.

This last objection reflects the point of view that, despite

**Note:** To obey all laws? How would one refuse these benefits? Do we always say that receipt of a benefit implies a promise to convey a similar benefit? If a person obeys the law for selfish, prudential reasons and thus conveys a benefit to X, why should this imply an obligation on X's part to obey the law even where it is not in X's self-interest to do so?

(3) Since other persons have obeyed the law in reliance on X's also obeying the law, X has an obligation to obey the law as well. This approach is similar to the benefits argument but focuses on the detriment that others incur by obeying the law rather than on the benefits conveyed to X by that obedience. Because of this similarity it is subject to similar objections such as: Is the obligation owed only to those who obey in reliance on X's obedience? Why should reliance of others necessarily impose an obligation on X? Additional problems result from the fact that persons obey the law for a variety of reasons; and reliance on X, if present in fact at all, is only one such reason. Thus, it is not self-evident that reliance supports an obligation to obey.

809. See supra notes 793-802 and accompanying text. See supra note 808.

810. See generally, e.g., J. Rawls, A Theory of Justice (1971).

the problems involved, we should not reject the notion that there is a moral order which limits the state. There is considerable merit in this perspective because, as the following discussion of alternative retributive purposes and deterrence will indicate, it is not possible to address some questions, such as how much should a person be punished, without such a scheme. Consequently, a later portion of this article adopts this perspective and argues that the best way to fulfill this need (while also avoiding the problems of vagueness and possible abuse of the coercive power of the state) is to view proportionality as a necessary, but not a sufficient, condition for punishment and to impose procedural safeguards on the application of the proportionality condition.

(2) Reintegrating Wrongdoers into Society

A second response to the criticisms of the second tenet is that deterrence is not the only good consequence that results from punishment. Punishment also aids in reintegrating a criminal into society. People have certain natural, justifiable psychological reactions to a person who commits crime. They may, for example, regard the criminal with contempt, anger, disapproval, fear, and distrust. In addition, the criminal may feel guilty and remorseful about his crime and view himself as a bad person.

812. See infra text accompanying note 819.
813. See infra notes 829-41, 848 and accompanying text.
814. See infra notes 864-69 and accompanying text.
815. See infra notes 850-63 and accompanying text.
816. See infra notes 867-69, 894-932 and accompanying text.
817. If the criminal does not have these feelings, the punishment may help him develop them by emphasizing society's condemnation of his conduct. See infra notes 845-46 and accompanying text. See, e.g., State v. Chaney, 477 P.2d 441 (Alaska 1970). The defendant was convicted of rape and robbery and sentenced to concurrent one-year terms of imprisonment with a provision for parole at the discretion of the parole board. Acting pursuant to its power to disapprove (but not increase) a sentence, the Alaska Supreme Court observed:

In view of the circumstances of this record, we think the sentence imposed is not well calculated to achieve the objective of reformation of the accused. Considering the apologetic tone of the sentencing proceedings, the court's endorsement of an extremely early parole, and the current minimum sentences which were imposed for these three serious felonies, we fail to discern how the objective of reformation was effectuated. At most, appellee was told that he was only technically guilty and minimally blameworthy, all of which minimized the possibility of appellee's comprehending the wrongfulness of his conduct.
It is socially useful, therefore, to have a mechanism for allowing a criminal to atone for his crime and thus start over again with a relatively clean slate.\textsuperscript{818} A retributivist could argue that punishment fulfills this function and assists in reintegrating a criminal into society. Consequently, punishment is beneficial to the criminal and to society even if it provides no deterrent impact.

While such reintegration is a valid function of punishment, difficulties could arise if popular notions of "just desert" diverged from "objective" notions. Such difficulties would arise if most members of society felt that an act of sodomy by two consenting adults was so repulsive that only twenty years of imprisonment would atone for the "crime." Without some concept of proper punishment which is independent of cultural notions of morality, we would be logically required to approve any such penalty if the majority feels that it is necessary.\textsuperscript{819}

\((3)\) Confusing Deterrence with Retribution

The third approach to criticism of the second tenet also asserts that retribution has good consequences. Unfortunately, however, these consequences are really deterrent effects. Thus, this approach confuses retribution with deterrence and offers rationales in support of retribution that are really forms of the deterrence perspective. A common instance of this confusion is to speak in terms of the need to punish wrongdoers in order to reaffirm norms of behavior or to maintain respect for the law. Under this view, if wrongdoers do not receive their just desert in the form of punishment, then legal rules are merely words and people will be confused about proper behavior and lose respect for the legal system.\textsuperscript{820} However, the reason for the concern


\textsuperscript{819} For a discussion of why it is objectionable to punish simply because of a social desire, see supra note 792 and infra notes 825-26, 854 and accompanying text.

about norms and respect is the desire for norms to be followed and for the law to be obeyed. In other words, the concern is to deter violations of legal and other norms of behavior.\textsuperscript{821}

The confusion here results in part from the failure to distinguish two questions: why have any criminal punishment; and why is a particular individual punished?\textsuperscript{822} The answer to the first question often reflects a deterrent perspective: punishment is necessary to deter crime. On the other hand, the answer to the second question is usually phrased in retributive terms: the wrongdoer deserves punishment. For example, South Carolina has adopted criminal prohibitions against certain types of conduct—shoplifting,\textsuperscript{823} for instance—and if a person violates these provisions, we say that he deserves punishment because he voluntarily broke the rules. Even though we speak in terms of just desert under such a set of rules, this manner of speech should not obscure two points: (1) the rules may be designed to deter shoplifting; and (2) the punishment of a particular shoplifter is necessary if the threat of punishment is to be an effective deterrent. In other words, the shoplifter deserves punishment because he has truly been “bad”; he had an obligation to obey the rules and breached this obligation.\textsuperscript{824} But the source of his obligation is a rule designed to deter shoplifting in the future and the justification for punishing shoplifting is to deter crime. This deterrence orientation conflicts with the second tenet of retributive rationales.

A similar problem underlies another argument that is often given in support of retribution: offenders must be punished by the legal system because, if they do not receive their just desert, society will engage in self-help to vent its instinct for such punishment.\textsuperscript{825} This rationale, however, is really concerned with deterring illegal self-help, not with imposing just desert. Moreover, if the punishment is imposed to channel the community’s desire for vengeance or moral rectification, there is a serious risk of

\textsuperscript{821} See infra notes 843-47 and accompanying text.

\textsuperscript{822} For development of this distinction, see, e.g., H.L.A. Hart, Punishment and Responsibility, 3-13 (1968); H. Packer, The Limits of the Criminal Sanction 35-61 (1968); A. von Hirsch, Doing Justice 35-96 (1976); Rawls, Two Concepts of Rules 64 Phil. Rev. 3 (1955).

\textsuperscript{823} §§ 16-13-110 to -140 (Supp. 1981).

\textsuperscript{824} See infra note 860 and accompanying text.

fending the first tenet because the amount of punishment will probably be proportional to popular emotions rather than to the offender’s wrongfulness. While there is a definite relationship between social views as to just deserts and some objective standard, the two conceptions of desert are not necessarily the same.  

4. Deterrent Justifications of Punishment

There are two distinguishable types of deterrence—specific and general. Specific deterrence refers to deterrence of the specific criminal being punished. In a sense, specific deterrence is a form of rehabilitation since the punishment is imposed on the specific individual to “cure” him of criminality by deterring him from committing similar crimes. General deterrence is designed to prevent people generally from committing crime by making them aware that crime is punished.

Since deterrent theories view punishment as a way of influencing human behavior, all such theories must be based on a model of human conduct. Thus, another important distinction in considering deterrence models is the identification of two different models of human behavior. The first, more basic model views behavior in terms of rational persons concerned only with their own selfish interests. The second model is more complex because it views behavior both in terms of self-interest and in terms of a concern for respecting obligations even when this is personally costly.

a. The Basic Model of Human Behavior—Rational Self-Interest

According to the rational self-interest model, many people can only be deterred from committing crime if threatened with punishment that is sufficiently severe to outweigh their gains from crime. It is not essential to this model that punishment deter all people from all crimes. Thus, the model does not deny that there may be many persons who refrain from criminal be-

826. See supra notes 483, 487, 551 and accompanying text, and infra notes 825, 854, 864-69 and accompanying text.

havior because of such things as an internal ethic or a desire to avoid social censure. Nor does it deny that there are many people who are not deterred because they, for example, are irrational or lack choice. This model only asserts that some "significant" portion of the population is deterred by, and only by, the threat of punishment. 828

This model seems to be a plausible representation of a substantial portion of human behavior. It also appears to provide a guide to the proportionality question because there is no point in punishing a person more than is necessary to deter him. For example, if a $50 fine deters speeding, then it would be unjustified to impose a $100 fine. Nevertheless, this approach is subject to a number of criticisms, and the following paragraphs provide a brief review of some of the major objections.

First, the model of behavior assumes the validity of statements such as the following:

If X is likely to gain $500 from a robbery, if there is a 5% chance of detection and imprisonment for the crime, and if each year in prison is worth at least $2,000 to X, then he will be deterred by a sentence of slightly over five years because the discounted value of the sentence (.05 x $2,000 x 5) exceeds the $500 to be gained.

Yet it is only possible to do this in a theoretical sense; specific dollar values and percentages are not assignable in the real world. In many cases, one might respond that this criticism does not matter because only approximations are needed. However, rough guesses may not be adequate when capital punishment is involved. 829

A second flaw can be illustrated by assuming the following pattern of behavior of a population of 100,000 persons in response to variations in the amount of punishment for the crime of shoplifting.


829. See infra notes 878-932 and accompanying text.
### TABLE VII

<table>
<thead>
<tr>
<th>Number of persons committing crime of shoplifting each year</th>
<th>Penalty for shoplifting</th>
</tr>
</thead>
<tbody>
<tr>
<td>3,000</td>
<td>No punishment</td>
</tr>
<tr>
<td>1,000</td>
<td>Imprisonment for 3 months</td>
</tr>
<tr>
<td>500</td>
<td>Imprisonment for 1 year</td>
</tr>
<tr>
<td>250</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>50</td>
<td>Imprisonment for 5 years</td>
</tr>
<tr>
<td>2</td>
<td>Imprisonment for life</td>
</tr>
<tr>
<td>1</td>
<td>Death</td>
</tr>
<tr>
<td>0</td>
<td>Death preceded by extreme torture</td>
</tr>
</tbody>
</table>

This pattern is entirely consistent with the basic model. People will respond differently to the same amount of punishment because a year in prison will be a greater cost to some than to others, because some people will have a greater “need” to shoplift, and because people will have different views about the likelihood of their being caught and punished. Thus, increasing the amount of punishment would be expected to increase the deterrent effect. The problem with applying the deterrent model to this factual situation is that the rationale can justify any punishment, including death and torture, because there is some marginal increase in deterring shoplifting for each increase in punishment. A deterrent theorist can respond to this situation in one of two ways: (1) concede that all the above amounts of punishment are justified; or (2) propose a more refined scheme for determining what amount of punishment is proportional to the crime so we can identify which punishments are too small and which too large. The first response is intuitively troublesome because most people feel that torturing and then executing shoplifters is so out of proportion to their crime that it would be wrong to do so. Consequently, the most common response to the
shoplifting illustration is to refine the basic model.

Jeremy Bentham adopted this approach in *An Introduction to the Principles of Morals and Legislation*. Bentham defended punishment from a utilitarian perspective and argued that inflicting pain was justified so long as the harm it deterred exceeded the pain inflicted. Using his utilitarian framework he argued that there are a number of situations where no punishment is justified:

[1] Where it is groundless: where there is no mischief for it to prevent; the act not being mischievous upon the whole.
[2] Where it must be inefficacious: where it cannot act so as to prevent the mischief.
[3] Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.
[4] Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate. . .

In addition, Bentham developed the following principles for determining the amount of punishment which is justified:

[1] The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense.
[2] The greater the mischief of the offense, the greater is the expense, which it may be worth while to be at, in the way of punishment.
[3] Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.
[4] The punishment should be adjusted in such manner to each particular offense, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.


832. Id. at 844.
833. Id. at 845.
834. Id.
835. Id.
[5] The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.  

[6] That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility [to pain] ought always to be taken into account [in sentencing].

Bentham’s scheme appears to be a useful way of identifying both the acts that are “bad” enough to be punished and the amount of punishment that is proportional to each offense. But there are problems with the approach.

One problem is that the refinements result in inconsistencies with the basic deterrent model. This result can be illustrated by comparing the above robbery example with the crime of shoplifting. The example assumed a 5 percent probability of being sentenced for robbery. It seems plausible that the probability of detecting the person who commits a robbery is greater than that of discovering a shoplifter since so many occurrences of shoplifting will not even be discovered, much less reported, and because so many more police resources are devoted to each robbery. Thus, it is reasonable to assume that there is a one in a thousand chance of being caught shoplifting. Using the basic deterrent model of behavior, this difference in probability of being caught for robbery as opposed to shoplifting would lead to the following sentence structure for a person who calculates the cost of a year’s imprisonment to be $2,000:

<table>
<thead>
<tr>
<th>CRIME</th>
<th>BENEFIT TO CRIMINAL</th>
<th>PROBABILITY OF BEING PUNISHED</th>
<th>MINIMUM SENTENCE NECESSARY TO MAKE PUNISHMENT, DISCOUNTED BY PROBABILITY, AT LEAST EQUAL TO BENEFIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery</td>
<td>$500</td>
<td>.05</td>
<td>5 years</td>
</tr>
<tr>
<td>Shoplifting</td>
<td>$20</td>
<td>.001</td>
<td>10 years</td>
</tr>
</tbody>
</table>

836. Id.  
837. Id. at 845-46.
Sentencing a person to twice the penalty for shoplifting as for robbery would conflict with Bentham's scheme of proportionality. However, if sentencing is discounted by probability of punishment, such conflicts are inevitable.

Another flaw in Bentham's scheme is that it treats the criminal's suffering and the victim's suffering equally. For example, if the harm to the victim of a crime was $10,000 and the only way to deter this type of crime would be to impose suffering of $11,000, Bentham's scheme indicates that the criminal should not be punished. This view totally ignores the distinction between the innocence of the victim and the guilt of the criminal.838

These problems with Bentham's approach reflect a more general objection to deterrent views based on the basic model: the application of the basic deterrent approach to many situations yields intuitively offensive results. The discussion of Bentham reflects two such outcomes: (1) punishing shoplifters more severely than robbers, and (2) refusing to punish a person because the reduction in injury to an innocent victim would be less than the injury to the criminal resulting from his punishment. This same insensitivity of the deterrent approach to guilt and innocence is reflected by the lack of objection to punishing an innocent person so long as people could be convinced that he was guilty and thus deterred from committing crime.839

A final difficulty with the basic deterrence model is that it may not accurately describe human behavior. In particular, a considerable amount of empirical research suggests that the amount of punishment is really not a very important factor in determining the degree of deterrence. Instead the primary factor is likely to be probability of detection.840 Although there is no clear, simple answer to the question of empirical validity concerning the relative importance of detection vis-a-vis amount of punishment,841 there is at least good reason to avoid dogmatism

838. See infra notes 863, 896 and accompanying text.
839. See infra notes 859-63 and accompanying text, for further discussion of the impropriety of punishing the innocent.
841. See, F. Zimring & G. Hawkins, Deterrence: The Legal Threat in Crime
about the validity of the model.

b. The Complex Model of Human Behavior—Rational Self-Interest and Obligation

The more complex model accepts the view that rational self-interest is a useful concept for understanding a substantial portion of human behavior. Many people are indeed almost totally selfish, and even altruists are at least partially selfish. However, the complex model rejects the notion that selfishness alone is a sufficient basis for a deterrent theory. In addition, a considerable amount of behavior results from an internal sense of obligation to obey the law. The distinction between obligation and self-interest may be seen by considering situations in which a person could steal with virtual certainty of not being caught. The selfishness model would predict theft in such a situation, yet many people would not steal under such circumstances because they feel it would be “wrong.”

It could be argued that this behavior is consistent with the selfishness model because the sense of obligation not to steal is simply the result of a decision that it is in each person’s self-interest to have the law of theft obeyed generally. This argument has an initial appeal because it is true that all would suffer if individual possessions were not secure. However, it is not necessarily true that I am better off if your possessions are secure from theft. If I could steal from you without being caught and if my theft would not change your behavior towards my possessions, then it would be in my self-interest to steal from you. This is precisely the situation in any large society: no single instance of theft has a significant impact on whether people generally believe that others are obeying the law. As a result, it would be rational to steal if this could be done without detection because no single theft would threaten the thief’s self-interest in having the law of theft obeyed by others. Thus, obligation is not simply another form of the self-interest model.

Control 194-208 (1973) [hereinafter cited as F. Zimring & G. Hawkins].
At the same time though, the complex model includes a concern for self-interest in the development of notions of obligation. Even though a person may feel that theft is wrong, he may steal if he thinks society (or a significant portion of society) no longer accepts his view of theft. This result could occur when theft is widespread or when thieves are not punished. Thus, one effect of punishment is to reaffirm norms and increase respect for the law by: (1) assuring members of society that it is not foolish to base their behavior on their sense of obligation;\textsuperscript{844} (2) conveying a strong message about social disapproval of certain types of conduct and thus strengthening moral inhibitions;\textsuperscript{845} and (3) inculcating the habit of obeying the law.\textsuperscript{846}

This more complex model appears to be an accurate description of a vast range of behavior, including not only the purely selfish conduct envisaged in the simpler model, but also more complicated actions resulting from obligation. However, to the extent that it relies on the selfishness model, it is subject to most of the problems associated with that model. In addition, the inclusion of a sense of obligation in the complex model results in new difficulties. A short discussion of several of these should illustrate the type of problems involved.

First, all the deterrent models require measurement of empirical patterns of behavior to determine what effect punishment will have on crime. Such measurement is difficult with the relatively simple selfishness model; it becomes virtually impossible when the notion of respect for the law as a motivating factor is included.\textsuperscript{847} Thus, skepticism is required with regard to empiri-

\textsuperscript{844} See, e.g., J. Rawls, A Theory of Justice 240 (1971); F. Zimring & G. Hawkins, supra note 841 at 87-89.
\textsuperscript{845} J. Feinberg, Doing and Deserving 98-105 (1970); F. Zimring & G. Hawkins, supra note 841 at 84-87.
\textsuperscript{846} F. Zimring & G. Hawkins supra note 841 at 87-89.
\textsuperscript{847} This difficulty results in part from the ambiguity of the concept "respect for law." Does this concept refer to a specific criminal law, to all criminal laws, or to all laws, civil as well as criminal? If law generally is meant, are all laws the same? For example, is it equally as important to have respect for parking requirements as for murder prohibitions? Another fundamental difficulty results from the need to show both that punishment changes internal attitudes about law and that these changes result in changes in behavior. Empirical studies, however, have had problems in developing specific factual support for such relationships. One principal difficulty is that if punishment is increased in amount or severity and compliance increases, it is not clear whether the increased compliance is the result of fear or an increase in respect. In order to answer this question, surveys of people's attitudes concerning the change in punishment and in behavior.
cal assertions concerning specific penalties where such assertions are based on concern for respect for law.

Other problems result from the possibility of conflict between the two components of the complex model: selfishness and obligation. This conflict can be illustrated by several plausible assumptions about shoplifting:

1. Most recidivists cannot be deterred by punishment short of life imprisonment because so many of them are irrational.
2. Most recidivists could be "cured" of their irrationality, but the cure is expensive.
3. Most persons would have their respect for law diminished if such "excessive" punishment were imposed or if expensive treatment were provided to criminals at no charge.

The selfishness portion of the complex model indicates that either life imprisonment or perhaps a compulsory treatment approach should be imposed if this is cheaper; however, the complex model's concern for obligation and respect for law indicates that neither is appropriate.

It is not clear how such dilemmas should be resolved. One possible approach would be to "maximize" deterrence and emphasize the selfishness or the obligation model depending upon which approach gives the greatest amount of deterrence. Thus, if respect for law had a greater impact in reducing crime in the above shoplifting example, it would be appropriate to continue to use imprisonment for short terms even though it had no impact on the recidivists. However, this resolution of the conflict is objectionable because it is virtually impossible to make such empirical determinations about relative deterrent impact.

Other problems emerge when one attempts to develop and apply the concepts of obligation and respect for law. Some of these difficulties can be appreciated by restating the model as follows:

must be conducted. However, such surveys are difficult and questionable, particularly when they rely not only on answers about attitudes but also on self-evaluations of the behavioral effects of these attitudes. See, e.g., F. ZIMRING & G. HAWKINS supra note 841 at 307-12; LAW AND THE BEHAVIORAL SCIENCES 208-12 (L. Friedman and S. Macaulay 2d ed. 1977). Although a willingness to accept such attitudinal research might exist when determining whether obligation and respect have some role in obedience, relating this somewhat unreliable research to specific changes in punishment patterns is very questionable.
In order to deter crime, we need to reaffirm norms and maintain respect for law by assuring citizens that persons who commit crime will be punished in proportion to their wrongdoing.

The last portion of this statement parallels the first tenet of retributive schemes of punishment. As indicated in the earlier discussion of this tenet, it is difficult to determine what acts should be punishable and how much punishment is proportional to a particular person's crime.

This task is even more difficult within the context of a deterrent scheme, because deterrence focuses on actual behavior rather than on some objective scheme of just desert. As a result, there is always the potential for conflict between cultural notions of just desert and objective notions. For example, we could justify punishing an innocent person if we could make society believe he was guilty and if it were necessary to punish someone in order to increase respect for law. Such conflicts could also arise in determining what acts are punishable and how much to punish. For instance, if virtually all of a society is both white and racist, respect for the law would be diminished if the criminal law were not racially discriminatory in favor of whites—for example, by punishing homicide of a white by a black more severely than homicide of a black by a white. 848

5. A Proposed System of Just Punishment

Many of the objections to deterrence and retribution can be addressed by viewing these justifications as only one part of a scheme of punishment in a just state. For instance, both retribution and deterrence have been criticized for their inability to provide sufficient guidance to address concerns such as proportionality in punishment. By expanding the analysis to include other concerns normally included in discussions of justice, such as notions of a right to equal treatment, it is possible to say more about problems such as proportionality. For example, it is improper to use race to determine the amount of punishment, and this might be so even if the race of the defendant were a statistically significant indication of the amount of punishment.

848. For discussion of such a problem in South Carolina, see supra note 285 and accompanying text, and infra notes 950-52 and accompanying text.
necessary to achieve some level of deterrence. This section adopts this broader perspective and sketches a scheme of just punishment in terms of five tenets or requirements which must be satisfied if punishment is to be just.

This scheme is designed to serve as a framework to be used in considering the justice of capital punishment in South Carolina. Consequently, this section does not fully consider the scheme of just punishment. Such development, which would include not only details and refinements omitted here but also an analysis of the basis for asserting that these and only these tenets are required, is beyond the scope of this article. Consequently, specifics will be omitted unless they are directly relevant to capital punishment. Similarly, arguments for the tenets will be omitted or limited to brief indications of their usefulness in providing a system of ordered liberty.

a. A Reasonably Just Society

The system of punishment must operate within the framework of a reasonably just society. This first tenet is necessary because there may be circumstances in which the background system of legal rights and duties is so unjust that numerous violations of the law might be justified. This situation could arise, for example, when the rules of governing ownership of property or participation in selecting legislators are so unfair that the wrongfulness of most types of theft is open to debate.

849. If these arguments concerning the basis of the tenets were to be developed further, the development would take a social contract approach. See J. Rawls, A Theory of Justice (1971). In the context of the present discussion, this approach can be roughly summarized as follows: If an individual knew nothing specific about his society or about himself (for example, his intelligence, race, sex, or parents), he would accept the proposed tenets as guides for determining just punishment. See id. at §§ 24-25, 38.

850. The textual statement is limited because of the problems involved in determining the relationship between moral and legal obligations in an unjust society. For example, no matter how unjust the system of ownership, murdering a person in order to rob him seems wrong except in the most extreme circumstances. See infra note 860 and accompanying text. For a general discussion of some of the problems in such a situation, see, e.g., L. Fuller, The Morality of Law 245-53 (rev. ed. 1969). For a general discussion of obligation, see supra notes 807-11 and accompanying text.
b. Limits On the Types of Conduct That May Be Punished

Conduct should not be prohibited unless the prohibition is necessary to prevent harm to persons who do not consent to that harm and unless it is possible for people to comply with the prohibition. Some might object to this second tenet on a variety of grounds — for example, because it restricts the state's ability to adopt paternalistic legislation or to prohibit conduct which offends public decency or morality. However, it is not necessary to address such objections or to explore the reasons for this tenet here because South Carolina's scheme of capital punishment satisfies the tenet. This requirement of just punishment is listed in order to measure the South Carolina approach against a general standard which cannot be criticized as lacking sufficient limits on the state's conduct.

c. The Purposeful Nature of Punishment

Punishment is justified only if it deters crime or assists in reintegrating wrongdoers into society. This third tenet insures that the harmfulness of punishment will provide some benefit. This is accomplished both by prohibiting punishment where no good can result and by preventing one type of excessive punishment — i.e., punishment in excess of the amount necessary to deter the crime or to assist in reintegrating the criminal into society. Thus, this tenet achieves to some extent the goals that Bentham had in mind when he developed his scheme discussed above. Most of the objections to Bentham's scheme can be met by the other tenets, which require that punishment decisions not be made solely on stark utilitarian grounds. If these other tenets are respected and if the reintegrative purpose of punishment is considered, then we need not be concerned with problems such as punishment of the innocent or the torture and execution of shoplifters.

This third tenet also limits the types of goals that can be

852. For arguments concerning the need for harm to others, see e.g., J. Mill, On Liberty (1859). For a discussion of the requirement that conduct be possible, see, e.g., Lambert v. California, 355 U.S. 225 (1959); L. Fuller, The Morality of Law 7079 (rev. ed. 1969); J. Rawls, A Theory of Justice 236-37 (1971).
used to justify punishment. For example, the state cannot normally justify the imposition of unpleasant circumstances if the purpose is to coerce confessions, compel disclosure of information, or break the spirit of a person. When these purposes are involved, the state is torturing people, not legitimately punishing them. 853 Similarly, we should not punish a person simply to satisfy some vague sense of community outrage. Such vengeance is not justified because it violates the defendant's right to respect by treating him simply as a means of gratifying an emotion held by a substantial number of persons. 854

d. Punishment in Accordance with Rules

Punishment can only be imposed in accordance with a clear rule promulgated prior to the offense. 855 One reason for this fourth tenet is that it fosters individual liberty by restricting the state. For example, it grants a right of "notice" of the prohibition and of the amount of punishment. Thus, it forbids the use of ex post facto laws or the imposition of criminal sanctions where a person could not reasonably be expected to know the conduct involved was prohibited. 856 The requirement that punishment be "in accordance with rules" also limits the state since it provides a basis for identifying and preventing arbitrary action by officials. 857 For example, it enables us to have meaningful procedures of arrest and trial that are designed to insure

853. Torture is objectionable for a number of reasons: (1) it is dehumanizing; (2) it grants the state too much power over individuals; and (3) the information gained is not reliable. See, e.g., C. Beccaria, On Crimes and Punishment (H. Paolucci trans. 1963); M. Ruthren, Torture: The Grand Conspiracy (1978); Klayman, The Definition of Torture in International Law, 51 Temp. L.Q. 449 (1978); Shue, Torture, 7 Phil. & Pub. Aff. 124 (1978); Twining and Twining, Bentham on Torture, 24 N. Ir. L.Q. 305 (1976).

854. See supra note 315 and accompanying text, and infra notes 862-63 and accompanying text. It can be argued that responding to such outrage is necessary to accomplish reintegration or to maintain respect for law and thus to increase the deterrent impact of the criminal law. See supra notes 817-19, 844-46 and accompanying text. However, this argument is limited to those situations in which such a deterrent or reintegrative effect exists; and there is good reason to be skeptical about either of these impacts. See supra notes 819, 847-48 and accompanying text, and infra note 877 and accompanying text.

855. For general discussion of such a requirement, see e.g., L. Fuller, The Morality of Law 33-94 (rev. ed. 1969); J. Rawls, A Theory of Justice 238 (1971).


that the accused has in fact committed the crime. A second reason for this requirement is that it would be impossible to deter conduct without having provided meaningful notice of the conduct to be deterred. Finally, this requirement provides part of the basis for distinguishing wrongdoers from the rest of the population.

This last distinction is possible because in a reasonably just society there is an obligation to obey criminal prohibitions. While the character of this obligation is subject to debate under some circumstances, there is no dispute that there is both a legal and a moral obligation not to kill or steal absent exceptional circumstances such as theft of food to save a life. It is also undisputed that the very notion of obligation is meaningless unless breaches of the legal/moral obligation to obey the law are labelled as wrong and unless the wrongful character of the breach has an impact on treatment of the wrongdoer. In other words, when a person has breached his legal/moral obligation to obey the law, three things are justly said: (1) that he is a wrongdoer; (2) that his victim is innocent (if the victim has not committed some act which would justify, excuse, or mitigate the wrongdoing); and (3) that this difference has an important impact on the way the wrongdoer and the innocent victim are viewed. As a result, it is possible to address two potential objections to the third tenet, which asserts that punishment is legitimate if it achieves some future benefit.

The first such possible objection is that the third tenet is too narrow because it allows punishment in situations in which punishment of some crime provides very little social benefit from deterring crime or from reintegrating wrongdoers into society. Some people find this objectionable because punishment under such circumstances may be socially inefficient in that the harm to the wrongdoers from punishment outweighs the meager

social benefit gained from punishment. See supra notes 831, 838 and accompanying text.

861. See supra notes 831, 838 and accompanying text.

862. For philosophical perspectives on this intuitive notion, see, e.g., R. Dworkin, Taking Rights Seriously (1978); I. Kant, On the Foundation of Morality (E. Liddell Trans. 1970); Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death 53 S. Cal. L. Rev. 1143, 1174 nn. 104-05 (1980). Several points should be made concerning the textual assertion. First, there are many situations where it is moral to treat persons as a means—for example, many, if not most, economic transactions involve such treatment. Thus, the textual statement is that persons have a right not to be treated as only a means. See, e.g., I. Kant, supra at 138-40, 152-162. Second, there may be situations in which violations of the right to be treated as an end are justified—for
Despite the merits of the first part of the objection, the second assertion about the impropriety of general deterrence is invalid because it ignores the importance of the wrongful nature of criminal conduct. This importance can be seen by changing the earlier illustration about solar energy cells as follows:

The design is available and the cells are used widely. However, vandals are preventing the cells from providing cheap, abundant energy by shooting the energy cells with rifles. A statute is enacted prohibiting such shooting and Gamma deliberately violates this prohibition.

The punishment of Gamma cannot be equated with the enslavement of Alpha and Beta. The reason for the prohibition—the production of cheap solar energy—is the same reason as that given for the enslavement of Alpha and Beta. However, Gamma's case is profoundly different because the prohibition changed the context of his behavior by imposing a legal and moral obligation on Gamma. It is just to punish him because of this breach and the punishment is triggered by his wrongdoing, not simply by a desire to produce energy.863

This difference can be seen from another perspective by considering a final illustration addressed to the problem of example, when the violation is necessary to prevent some catastrophe. See R. Dworkin, supra, at 191. Finally, speaking in terms of the right to be treated as an end may not be helpful in many circumstances. For example, if the power cells in the textual example would significantly improve the living conditions of a number of persons, it could be said that refusing to hand over Alpha and Beta is tantamount to treating these prospective beneficiaries as simply the means of protecting Alpha and Beta. Moreover, this conflict cannot be easily resolved by distinguishing an act—granting Alpha and Beta to the scientist—from an omission—not granting Alpha and Beta—because of the underlying problems in justifying the act- omission distinction. See supra notes 796-98 and accompanying text.

863 Problems remain, however. For example, one of the side effects of punishing Gamma may be the suffering by innocent persons who have relationships with Gamma. See supra note 793 and accompanying text, and infra notes 900, 907 and accompanying text, for further discussion of this problem. Another problem is that mistaken convictions are inevitable in a fallible system. See, e.g., infra notes 898-99, 959 and accompanying text. As a result, it is possible to argue that some innocent persons will be convicted, and that innocent persons will be used as a means to achieve effective deterrence. See, e.g., Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143 (1980); infra notes 899, 959 and accompanying text. There are only two solutions to this problem: abandon all punishment or devise a procedural scheme that minimizes the likelihood of erroneous convictions. Because of the tremendous problems with the first approach, our system utilizes the second. See, e.g., notes infra 924-35 and accompanying text.
vandalism:

Despite the statute, vandalism was not deterred because vandals did not think they would be caught. The state officials, therefore, fabricated a convincing case against Delta so that vandals would believe that enforcement was effective and would thereby be deterred.

Punishment of Delta is wrong and is prohibited by the fourth tenet. The deterrent impact of his punishment might be equal to or greater than that of Gamma's punishment, but Delta is not a wrongdoer.

e. Proportionality

As the preceding discussion indicates, the notion of “wrong-doing” is crucial to the justification of punishment. This importance is reflected in the fifth tenet: punishment must be based on a procedural scheme which insures that punishment is proportional to the wrongfulness of the crime and to the “badness” of the wrongdoer. Before discussing the procedural emphasis of this tenet, it will be useful to discuss the reasons for requiring proportionality in punishment and the problems involved in implementing such a vague requirement.

First, it not only requires the state to treat similar cases alike but also focuses on the crime and the criminal as relevant aspects of similarity. To punish differently based on the race of the victim or of the criminal is a clear example of action that is improper under this tenet. Race has nothing to do with wrongfulness in this context. In contrast, age can be highly relevant. Under some circumstances, this tenet would permit, indeed require, the consideration of either the age of the victim—rape of a ten year old, for example—or the age of the accused—a five year old who had shot someone, for example.

Second, the reintegration of criminals into society requires such a scheme since punishment is designed to insure that a criminal has “paid his just debt.” Thus, more serious crimes such as armed robbery should be punished more severely than petty shoplifting. In addition, excuses and other mitigating factors must play a role. For example, a man who steals bread to

864. See infra notes 817-19 and accompanying text.
feed his family should not be punished as severely as a person who steals because he enjoys the suffering of his victims. Similarly, a person with a severe mental defect should be punished less severely if his defect contributed to his criminal conduct. Factors such as seriousness of harm, exigent circumstances, and mental defect are all relevant to determining a person’s just desert and thus are important indicators of the amount of punishment necessary to accomplish the reintegrative role of punishment.

Third, satisfying the reintegrative notion of proportionality should have a beneficial impact on deterrence because such proportionality should increase respect for the legal system and reinforce basic norms of right and wrong behavior. This should improve the willingness of the general population to obey the criminal law voluntarily and support law enforcement efforts.

Despite the need for proportionality in punishment, it is an extremely vague concept and is difficult to apply in many cases. For example, how does one compare an instance of white collar crime, such as illegal price-rigging by an otherwise respectable and productive citizen, with theft and housebreaking by an unemployed thirty-year-old with no useful skills? Other examples of this difficulty were presented in the earlier discussion of retribution and deterrence. Another problem which is central to capital punishment is raised by the question of when, if ever, is execution proportional to a crime? This aspect of proportionality will be discussed in more detail below, but further consideration of vagueness is appropriate here because it will elucidate the reasons for the procedural emphasis of the proportionality requirement in capital punishment cases.

The discussion of the fourth tenet indicated several reasons for avoiding vagueness in rules. Two of these reasons are that vague standards provide no guidance to citizens, and that vague restrictions cannot limit the state by identifying and preventing arbitrary action by officials. These problems could be solved by rigid, mechanical rules; but this would often result in other, sometimes greater problems. One such problem is that it may not be possible to identify the “right” rule. In addition, it is im-

865. See supra notes 799-802, 819 and accompanying text.
866. See supra notes 829-41, 847-48 and accompanying text.
867. See supra notes 855-60 and accompanying text.
possible to foresee all the possible situations and variations to include in a rule. Moreover, even with total prescience, it would not be possible to formulate a comprehensible rule that includes all the possible variables. In short, it is impossible to completely eliminate a role for official discretion in interpreting and applying vague standards such as the requirement of proportionality in punishment.\textsuperscript{668}

Discretion, however, need not mean arbitrariness and unpredictability, because it is possible to devise procedural safeguards to at least reduce the likelihood of arbitrariness. Several common procedural limitations are: (1) clear rules indicating the cases where discretion is appropriate and limiting the range of decisions that might be made; (2) guidelines that are relevant to the exercise of discretion; (3) statements of reasons for a decision; and (4) checks on abuse by the review of decisions by a higher official, by the need to convince a majority of the members of an official body to decide in a particular way, or by open debate and criticism of decisions.\textsuperscript{669} Thus, even though proportionality is vague, it can serve a meaningful role in a just system of punishment if adequate procedural safeguards are used. For this reason, the fifth tenet is phrased in terms of the adoption of procedures adequate to insure punishment in accordance with a thoughtful consideration of the badness of the crime and of the criminal.

**B. Capital Punishment in South Carolina**

The scheme of just punishment sketched above can be used to critique the justice of South Carolina's scheme of capital punishment. An argument in favor of the scheme consists of five assertions concerning the tenets of just punishment:

(1) South Carolina is a reasonably just state.

(2) Murder is the type of conduct that should be criminalized.

(3) Capital punishment may deter some murders that life imprisonment would not deter, and the South Carolina scheme is

\textsuperscript{668} See, e.g., ARISTOTLE, NICOMACHEAN ETHICS Bk. V, Ch. 9; H.L.A. HART, THE CONCEPT OF LAW 121-26 (1961); PLATO, STATESMAN 294; Christie, Vagueness and Legal Language, 48 MINN. L. REV. 885 (1964).

designed to insure that capital punishment is imposed only when persons might plausibly be deterred by capital punishment but not by life imprisonment.

(4) The crime of murder and the punishment scheme for murder are clearly defined, and capital punishment is imposed only in accordance with this scheme.

(5) Capital punishment is imposed only on the basis of an elaborate procedural system designed to insure that this very severe punishment is only imposed on very "bad" people for very "bad" murders.

The objections to capital punishment focus on the last three assertions, and the following discussion will consider these objections to determine whether South Carolina’s system of capital punishment is just.

These objections can be divided into three categories. First, some argue that the third tenet of punishment is not satisfied because capital punishment does not deter murders that life imprisonment would not deter. Second, it is argued that the last three tenets are violated because, even if capital punishment does provide such deterrence, the South Carolina scheme is inadequate to provide a meaningful basis for executing some persons while sentencing others to life imprisonment. A third argument emphasizes the unique nature of the death penalty and asserts that, even if the death penalty does deter and even if there is a meaningful basis for selecting persons to be executed, the death penalty is nonetheless improper.

As a general matter, these objections are not valid because the South Carolina scheme contains a number of provisions that address the concerns underlying the objections. Nevertheless, the cumulative impact of these objections is sufficient to support the conclusion that the South Carolina scheme is currently unjust in many important respects. The system could, in theory at least, be reformed to meet these specific shortcomings. However, the conclusion to this section indicates that there is reason to be pessimistic about South Carolina’s adoption of these reforms.

1. **General Deterrence — The Only Legitimate Purpose of Capital Punishment**

In order to satisfy the third tenet of just punishment, a particular punishment must deter crime or assist in reintegrating
wrongdoers into society. Other purposes — for example, correcting "moral imbalance,"\textsuperscript{870} expressing community outrage,\textsuperscript{871} and efficient use of resources\textsuperscript{872} — have already been shown to be inadequate as justifications for punishment. Capital punishment obviously provides no reintegrative impact. Since the alternative is life imprisonment, the death penalty does not provide additional specific deterrence.\textsuperscript{873} Thus, capital punishment can only be justified on the basis of its general deterrent effect — \textit{i.e.}, it must be shown that some persons who are deterred from committing crime by the threat of the death penalty would not be deterred if only life imprisonment were imposed.

Some critics of capital punishment argue that it does not provide any more deterrence than life imprisonment.\textsuperscript{874} In evaluating this assertion, it is helpful to remember that general deterrence arguably results from two different types of effects: (1) by deterring persons from committing crime because they fear punitive sanctions;\textsuperscript{875} and (2) by deterring crime by fostering respect for law.\textsuperscript{876}

The second type of deterrent impact has received virtually no attention in the context of capital punishment. This is not surprising, because it would be virtually impossible to determine whether imprisoning murderers for life rather than executing them so diminishes respect for law that it results in violations of the law that would not have otherwise occurred. Moreover, the existence of such a subtle correlation seems so speculative and implausible that this type of deterrent impact could not be used to satisfy the requirement that punishment be purposive and thus justify executing murderers rather than imprisoning them

\textsuperscript{870} See supra notes 803-16 and accompanying text. While this emotion cannot alone justify punishment, it does provide an essential part of a system of just punishment. See supra notes 812-16 and accompanying text.

\textsuperscript{871} See supra notes 315, 854 and accompanying text.

\textsuperscript{872} See supra notes 316-17 and accompanying text.

\textsuperscript{873} See supra note 827 and accompanying text. The textual assertion assumes that the imprisonment will provide effective restraint. While there may be occasional cases of escape or of commissions of further crimes, the assumption seems to be valid as a general proposition.


\textsuperscript{875} See supra notes 828-41 and accompanying text.

\textsuperscript{876} See supra notes 842-48 and accompanying text.
It is also difficult to determine whether the fear of the death penalty deters potential murderers who would not be deterred by the threat of life imprisonment. If this determination were possible, we would know whether capital punishment satisfies the third tenet of just punishment. Although most studies suggest that there is no such deterrent impact, the studies are contradictory and inconclusive. The basic difficulty with all such studies is that there are too many variables involved. For example, if the murder rates differ between two societies or in the same society at different times, we cannot be sure whether the variation is due to the use of capital punishment or to some other variable such as wealth, social attitudes, or availability of weapons. Thus, even though most studies suggest that there is no incremental deterrent impact from capital punishment, the issue is simply unresolved.

2. A Meaningful Basis for Selecting Persons to be Executed — Strengths and Shortcomings of the South Carolina Scheme.

Some of the empirical problems in determining whether capital punishment provides an incremental deterrent impact

877. See supra notes 847-48 and accompanying text.


880. Id. at 1197-1222; Amsterdam, Capital Punishment, in THE DEATH PENALTY IN AMERICA 346, 354-58 (H. Bedau 3d ed. 1982).

881. See supra note 878. This inconclusiveness seems inevitable in the near future since all studies conducted prior to the adoption of the current system of capital punishment cannot be conclusive concerning the current system.
can be addressed by using standards and procedures designed to insure that capital punishment is only imposed where two conditions are satisfied. First, the murder involved is of a type that can plausibly be deterred. Second, considering the circumstances of the crime and the characteristics of the murderer, it is fair to say that any doubt about the deterrent efficacy of executions or the morality of punishing to accomplish deterrence should be resolved in favor of protecting innocent victims rather than in favor of protecting serious wrongdoers. If these conditions are satisfied, then there is a meaningful basis for saying that deterrence is justly achieved by executing some murderers but not others. In other words, it is possible to feel more confident about the deterrent impact of the death penalty and less concerned with the possible consequences of guessing wrong about deterrence.

Largely as a result of the need to comply with the requirements of the United States Constitution, the South Carolina scheme for imposing capital punishment can be viewed as a system of standards designed to satisfy the two conditions of "meaningful" imposition of the death penalty. Nevertheless, the South Carolina system has shortcomings and is currently unjust in many respects. While some of these can be corrected, it is not clear whether they will be; moreover, it may not be possible to correct some of the flaws. Consequently, there is no way to eliminate a certain sense of doubt about the fairness and deterrent efficacy of the death penalty and therefore, about the justice of capital punishment in South Carolina.

a. Procedural Protections to Insure that the Particular Type of Murder can Plausibly be Deterred by the Death Penalty

The statutory list of aggravating and mitigating factors is the primary technique used to insure that the death penalty is only imposed where the likelihood of deterrent impact is increased. For example, deterrence is more likely where a person

882. See supra notes 2-7 and accompanying text.
883. For a discussion of this view of the scheme, see supra notes 108-32 and accompanying text.
884. See § 16-3-20(C)(a)(1)(e), (f); (4); (5); (6); (7)(Supp. 1981). For criticism of the position that deterrence is more likely in situations involving killing of policemen or murder for hire, see, e.g., Lempert, Desert and Deterrence: An Assessment of the Moral
views the murder in terms of economic gain and this increased likelihood is reflected by the listing of the commission of murder "for the purpose of receiving money or any other thing of monetary value" as an aggravating circumstance.\textsuperscript{886} On the other hand, a deficiency in rational faculties or in self-control would reduce the likelihood of deterrence. Thus, the majority of the listed mitigating circumstances address such deficiencies.\textsuperscript{886}

The application of this scheme has serious shortcomings, however, because the South Carolina Supreme Court has shown little concern for insuring that the condition of plausible deterrence is satisfied. For example, this lack of concern is reflected in the court's open-ended approach to aggravating circumstances\textsuperscript{887} and its apparent willingness to make a murderer vicariously liable for the aggravating conduct of a codefendant\textsuperscript{888} and to use conduct subsequent to the murder as an aggravating circumstance.\textsuperscript{889} Similarly, its failure to adopt an explicit requirement that only intentional killings should be subject to death\textsuperscript{890} indicates a troubling disinterest in insuring that capital punishment is only applied where deterrence is likely. The impact of this disinterest will be reduced by constitutional limits on imposing the death penalty where an unintentional killing is involved.\textsuperscript{891} However, it may still be constitutionally permissible to sentence to death for some unintentional or impulsive killings, even though this would be unjust.\textsuperscript{892} Moreover, even if the United States Supreme Court should unequivocally hold in the

\textit{Bases of the Case for Capital Punishment}, 79 Mich. L. Rev. 1177, 1195 (1981). Professor Lempert argues that murder in these instances cannot be deterred by any punishment because of the incentive to kill to escape capture or the confidence that a well-planned, professional murder will not go awry. However, if his assertion is true it would be assumed that there is \textit{never any} deterrent impact from punishing, whether by imprisonment or execution, persons who shoot policemen or who engage in contract killings; yet this broad assumption is very implausible. Moreover, his criticism does not address the fact that these situations may involve cases in which persons will not only consider the potential for punishment but also be affected by the \textit{incremental} impact of the death penalty. This incremental impact is crucial to the defense of the death penalty.

887. See supra notes 134-204 and accompanying text.
888. See supra notes 186-93 and accompanying text.
889. See supra notes 138, 172-85 and accompanying text.
890. See supra notes 78-83, 230-32 and accompanying text.
891. See supra notes 655-68 and accompanying text.
892. See supra notes 676-78, 706-36 and accompanying text.
future that it is unconstitutional to execute unintentional killers, the South Carolina Supreme Court's lack of concern with intention and deterrence may remain and manifest itself in other areas — for example, in its exercise of proportionality review. 883

b. Procedural Protections to Insure that the Defendant and his Crime are Seriously Wrongful

In addition to insuring a plausible deterrent impact, a capital punishment scheme must also insure that the defendant and his crime are seriously wrongful. This second condition is necessary for two reasons. First, the fifth tenet of just punishment requires an adequate consideration of whether the death penalty is proportional to the wrong involved. Second, this emphasis on wrongdoing helps address the uncertainty about the deterrent impact of the death penalty.

Some critics of the death penalty argue that the burden of proof of its deterrent effect should be on the state and that the inconclusiveness of the empirical studies, therefore, means that capital punishment should be abandoned. 884 This approach is subject to two objections. First, if there can be no death penalty anywhere, it will be virtually impossible to conduct empirical studies (except those based on historical data) that can be used to satisfy the state's burden. 885 Second, the critics of capital punishment phrase the issue as if it were a struggle between the state, with all of its awesome resources, on one side and a single, helpless individual on the other. Accordingly, say the critics, the state should have the burden of proof on the deterrence issue. However, this manner of stating the issue totally ignores the plight of the innocent victims of murder and the wrongfulness of the murder. 886 If we cannot be sure whether capital punishment deters but it is plausible to assume that it might deter in some

883. For an example in which such a problem appears to be involved, see supra notes 289-95 and accompanying text.


885. Since the current model for the United States is still being shaped by the decisions of the United States Supreme Court, studies based on historical data would always be subject to the criticism that they are based on a different capital punishment scheme.

886. See supra notes 838, 859-63 and accompanying text, supra. A similar type of argument was made by Justice Blackmun in Furman. See supra note 419 and accompanying text.
cases, then it seems fairer to execute murderers and risk executing them for no reason, than to refuse to execute and risk the lives of innocent victims who might be saved by the increased deterrent effect of capital punishment. Moreover, when phrased in this way, it seems fair to say that we need not show that for each murderer executed at least one murder is deterred. 897

However, it is not easy to be sure that only very bad wrongdoers will suffer from the death sentence because of four problems. First, there is always the possibility that a person will be convicted erroneously. 898 While such a risk always exists in any criminal proceeding, the irrevocable nature of the death penalty arguably increases the severity of the problem. 899 Second, whenever a person is executed, it is likely that innocent persons who have close relationships with him — his wife and children, for example — will also suffer more severely than they would if he were imprisoned for life. 900 Third, because of the procedural protections, particularly rights of appeal, granted in capital cases, so much time elapses between the commission of

897. See, e.g., Conway, Capital Punishment and Deterrence: Some Considerations in Dialogue Form, 3 Phil. & Pub. Aff. 431, 435-43 (1974), for an argument based on the notion that the lives of the potential victim and the killer are entitled to equal weight. The point made in the text above is subject to limitations because the number of murders deterred may be small. See infra note 964 and accompanying text. Therefore, it may be that at some point so few people are protected by this incremental deterrent effect that the right of these potential innocent victims to be protected by the general deterrent effect of capital punishment is outweighed by other concerns. See supra note 862. These might include concern for defendants, see infra notes 924-35; concern for the high costs of the death penalty, see infra notes 964-65 and accompanying text; or concern for eliminating racial discrimination. See infra notes 950-52 and accompanying text.

898. South Carolina recently had two examples of such erroneous convictions. In State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), the defendant's conviction and death sentence were reversed. On retrial, he was acquitted. State v. Linder, No. 79-GS-15-216 (S.C., Nov. 9, 1981). In the second example, evidence discovered after the trial conviction indicated that the two defendants may have been wrongly convicted. The State, July 21, 1982, at 1-C col. 1; 5-C; col. 3.

899. See, e.g., Amsterdam, Capital Punishment, in The Death Penalty in America 346, 369-52 (H. Bedau 3d ed. 1982); Bedau, Miscarriages of Justice and the Death Penalty, Death Penalty in America, supra id. at 234-41; Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 Mich. L. Rev. 1177, 1225-31 (1981); Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143 (1980). By considering legal errors — e.g., denial of the right to a neutral jury through improper voir dire — as well as factual errors, the problem is compounded. E.g., Amsterdam, supra. It should be stressed that the underlying problem here — punishment of the wrongly convicted innocent person — exists with all punishment. See supra note 863.

900. See notes 793, 814, 855, 865 and accompanying text.
the murder and the actual execution that there is a possibility of such radical change for the better that the "person" executed is not the same "bad person" who committed the crime.\textsuperscript{901} Fourth, some critics of capital punishment argue that deliberate executions increase the number of murders because they have a "brutalization" effect — \textit{i.e.}, by making murderers seem "important" and by lessening respect for life, the number of murders is actually increased.\textsuperscript{902} If this empirical assertion is true, capital punishment not only fails to reduce murders, it may also actually increase the chances that an innocent victim will die. Consequently, both murderers and some potential victims would prefer that capital punishment not be used; and wrongdoing could not be used as the basis of a fair allocation of the burden of proof. Unfortunately, the empirical evidence concerning brutalization, like the evidence concerning deterrence, is so very sketchy and inconclusive\textsuperscript{903} that a dilemma results: how to choose between the innocent victim who \textit{might} be saved by deterrence and the innocent victims who \textit{might} be killed because of brutalization?

There is no clear answer to these problems, but the following approach offers at least a tentative resolution. First, procedures should be designed to insure that the defendant is indeed guilty as charged — for example, by imposing heavy burdens of proof on the state. Second, the possible suffering of innocent relatives should be a relevant factor in determining whether a person should be sentenced to death. Third, the possibility of reformation should be considered as a mitigating circumstance in the sentencing phase of a capital case, and a sincere, substantial reformation should be relevant to decisions by the executive to commute a death sentence to life imprisonment.\textsuperscript{904} Fourth, since there has been so little study of the brutalization effect, it seems

\textsuperscript{901} Such a concern appears to be involved in the prohibition against the execution of insane persons. See, \textit{e.g.}, Hazard and Louisell, \textit{Death, The State and the Insane: Stay of Execution}, 9 U.C.L.A. L. Rev. 381, 386-87 (1962).

\textsuperscript{902} See, \textit{e.g.}, Bowers & Pierce, \textit{Deterrence or Brutalization, What is the Effect of Execution?}, 26 Crime & Delinq. 453 (1980); King, \textit{The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina}, 57 Soc. Forces 683 (1978).


\textsuperscript{904} See supra note 901 and accompanying text, and infra note 977 and accompanying text.
fair (for now at least) to assume that there is little, if any, brutalization effect.\textsuperscript{905} However, since there may in fact be such an effect, attempts should be made to minimize it in the approach to executions. For example, the treatment of murderers should indicate respect for life even where capital punishment is used.

The South Carolina capital punishment scheme reflects a sensitivity to these concerns in a variety of ways. First, the burden of proof of guilt and of aggravating circumstances is on the state.\textsuperscript{906} Second, South Carolina has shown a concern for minimizing the suffering of innocent relatives by recognizing a murderer’s having a child and grandmother as a mitigating circumstance.\textsuperscript{907} Third, statutory mitigating circumstances, such as the age of the defendant,\textsuperscript{908} indicate a concern for the possibility that he may be reformed and improved in the future.\textsuperscript{909} Fourth, respect for life is reflected in the statutory aggravating circumstances designed to insure that any person sentenced to death is clearly a “bad” person who has committed a serious wrong — for example, murder coincident with rape or torture.\textsuperscript{910} All of the listed mitigating circumstances also reflect this concern. A person with mental, emotional, or psychological deficiencies is less “bad.”\textsuperscript{911} Similarly, a person or crime is not as seriously wrong in cases involving the other statutory mitigating factors: lack of

\textsuperscript{905} See supra note 903 and accompanying text. The textual assumption concerning brutalization is subject to the objection that it is not consistent with this article’s assumption that general deterrence is more plausible in some cases. Arguably, there is no more reason to assume no brutalization effect than it is to assume some deterrent effect. This objection has merit; no matter how much study is made of either effect, the results are likely to be inconclusive. See supra notes 829, 840-41, 847, 878-81 and accompanying text. Nevertheless, the brutalization effect seems more like the deterrent effects resulting from respect for the law because both effects are based on changes in attitude. Since this article rejects respect for law as a justification for the death penalty, see supra note 877 and accompanying text, the problem of consistency is reduced. At the same time, however, it cannot be denied that there is considerable room for disagreement about these important empirical relationships.

\textsuperscript{906} See supra notes 55-56 and accompanying text.

\textsuperscript{907} In State v. Plath, --- S.C. ---, 284 S.E.2d 221 (1981), the South Carolina Supreme Court noted that while the trial court did not specifically charge the child as a mitigating circumstance, the daughter and grandmother had testified at the trial and the jury was free to consider any evidence in mitigation. Id. at ---, 284 S.E.2d at 230.

\textsuperscript{908} § 16-3-10(C)(b)(7)(9) (Supp. 1981).

\textsuperscript{909} § 16-3-20(C)(a)(2), (C)(b)(1), (2), (5), (6), (8) (Supp. 1981).

\textsuperscript{910} § 16-3-20(C)(a)(1)(a), (c) (Supp. 1981). See § 16-3-20 (C)(a)(1)(b), (c); (3) (Supp. 1981).

\textsuperscript{911} § 16-3-20(C)(b)(2), (6), (7) (Supp. 1981).
prior record of violence,\textsuperscript{912} consent or provocation by victim,\textsuperscript{913} and minor role in the crime.\textsuperscript{914} In addition, when the victim participates in,\textsuperscript{915} consents to,\textsuperscript{916} or provokes the crime,\textsuperscript{917} there is less reason to resolve any doubt about deterrence in favor of protecting such victims.

The South Carolina scheme for identifying serious wrongs and wrongdoers has a number of flaws, however. Examples of such serious problems are the use of nonstatutory aggravating circumstances,\textsuperscript{918} the use of aggravating circumstances that overlap with the crime of murder\textsuperscript{919} and with one another,\textsuperscript{920} vicarious liability for aggravating acts committed by a codefendant\textsuperscript{921} and perhaps for a murder committed by another,\textsuperscript{922} and the apparent lack of meaningful proportionality review by the South Carolina Supreme Court.\textsuperscript{923}

c. Procedural Bias in Favor of the Defendant

Another method to insure the satisfaction of the two conditions — plausibility of deterrence and wrongfulness of the defendant and his act — is to bias the consideration in favor of the accused. South Carolina has adopted this approach at many points in the death penalty scheme. For example, the jury must find the existence of at least one of the statutory aggravating circumstances,\textsuperscript{924} but the jury is not limited to the statutory list in determining whether mitigating circumstances are present\textsuperscript{925} and may recommend life even if an aggravating circumstance exists but no mitigating circumstance exists.\textsuperscript{926} Another instance of this approach is the grant of a "veto" to execution at various

\begin{enumerate}
\item\textsuperscript{912} § 16-3-20(C)(b)(1) (Supp. 1981).
\item\textsuperscript{913} § 16-3-20(C)(b)(3), (8) (Supp. 1981).
\item\textsuperscript{914} § 16-3-20(C)(b)(4) (Supp. 1981).
\item\textsuperscript{915} § 16-3-20(C)(b)(3) (Supp. 1981).
\item\textsuperscript{916} Id.
\item\textsuperscript{917} § 16-3-20(C)(b)(8) (Supp. 1981).
\item\textsuperscript{918} See supra notes 134-50 and accompanying text.
\item\textsuperscript{919} See supra notes 151-58 and accompanying text.
\item\textsuperscript{920} See supra notes 159-71 and accompanying text.
\item\textsuperscript{921} See supra notes 186-93 and accompanying text.
\item\textsuperscript{922} See supra notes 676-79, 706-36, 891-92 and accompanying text.
\item\textsuperscript{923} See supra notes 284-302 and accompanying text.
\item\textsuperscript{924} § 16-3-20(C) (Supp. 1981).
\item\textsuperscript{925} See supra notes 207-11 and accompanying text.
\item\textsuperscript{926} See supra note 211 and accompanying text.
\end{enumerate}
stages of the process. A person cannot be sentenced to death unless the prosecution seeks the penalty, the jury sentences to death, the judge upholds the sentence, and the South Carolina Supreme Court upholds it.927

Unfortunately, there are important exceptions to this bias in the South Carolina system. First, burdens of proof are not always on the state — for example, the apparent placing of the burden of proof of self-defense on the defendant928 and the vagueness concerning the burden of proof as to mitigating factors and the ultimate propriety of the death penalty in a particular case.929 Second, very little is known about the exercise of prosecutorial discretion in this area. As a result, there is no assurance that prosecutors are not abusing their power to use the threat of execution to compel defendants to plead guilty to murder or to a lesser crime. There may be a legitimate role for plea bargaining, but it should be narrowly constrained to prevent abuse.930 Granting prosecutors the unrestricted power to threaten death arguably goes beyond these contraints, particularly since the threat can be used in cases where there are serious doubts about the propriety of the use of the death penalty. Third, it is not clear that the "veto" system works effectively. For example, the trial judge and the South Carolina Supreme Court may not provide an adequate check on the abuse of jury discretion. The death penalty has been reversed for procedural errors in a number of cases; however, no jury recommendation for death has been reversed because of a substantive lack of a meaningful basis for execution. Although the lack of such reversals might be due to legitimate factors in the cases, the decisions do not indicate these factors.931 Moreover, there is reason to believe the South Carolina Supreme Court does not have an adequate model of proportionality review.932 Finally, the extensive voir dire in capital cases933 may have two troublesome effects. First, it may increase the likelihood of a guilty verdict because

927. See supra notes 130-32 and accompanying text.
928. See supra notes 55-77 and accompanying text.
929. See supra notes 233-38, 242-43 and accompanying text.
931. See supra notes 280-81, 284 and accompanying text.
932. See supra notes 283-302 and accompanying text.
933. See supra notes 29-45 and accompanying text.
the discussion of punishment prior to trial apparently predisposes the jury to assume the defendant is guilty, particularly where each prospective juror listens to the voir dire of all the others.\footnote{934} Second, it may increase the likelihood of a guilty verdict and a death sentence recommendation because it tends to exclude persons who are more predisposed to support the defense and to vote for life imprisonment.\footnote{935}

d. Excessive Punishment and Equal Treatment

The South Carolina scheme arguably fails to provide a meaningful basis for selecting persons to be executed because it denies defendants their right to equal treatment. In order to assess this criticism, it is necessary to distinguish two types of inequality. First, one might object simply because some persons are sentenced to death while other, equally “bad” persons are sentenced to life imprisonment.\footnote{936} Second, one might object because

\footnote{934} See, e.g., Hovey v. Superior Court, 28 Cal. 3d 1, 69-82, 616 P.2d 1301, 1347-55, 168 Cal. Rptr. 128, 174-82 (1980); Haney, Juries and the Death Penalty: Readdressing the Witherspoon Question, 26 CRIME and DELINQ. 512 (1980). Because of this effect, the California Supreme Court required the prospective jurors to be sequestered and questioned separately during voir dire. Hovey, 28 Cal. 3d at 80-81, 616 P.2d at 1354-55, 168 Cal. Rptr. at 181-82. Three judges dissented from this holding for the following reasons: because of the cumbersome, wasteful nature of such a proceeding; because of the loss of the benefits of traditional voir dire; because of the doubtful benefits of the new scheme; and because the holding was based on only one scientific study — i.e., Haney, supra Hovey, 28 Cal. 3d at 82-85, 616 P.2d at 1355-56, 168 Cal. Rptr. at 182-84. It should be noted that South Carolina often appears to utilize such sequestering in practice. See supra note 754.

\footnote{935} See, e.g., Hovey v. Superior Court, 28 Cal. 2d 1, 26-69, 616 P.2d 1301, 1314-46, 168 Cal. Rptr. 128, 141-74 (1980); Haney, Juries and the Death Penalty: Readdressing the Witherspoon Question, 26 CRIME & DELINQ. 512 (1980); Jacoby & Paternoster, Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982). The California Supreme Court ultimately concluded that the California approach to exclusions based on views concerning the death penalty had not been shown to affect the jury because the sociological studies involved did not consider a system exactly like California’s. Hovey, 28 Cal. 3d at 6869, 616 P.2d at 1346, 168 Cal. Rptr. at 173-74.

the decision to impose the death penalty may be based on improper factors like the race of the victims. Each of these inequalities will be discussed separately.

(1) Excessive Punishment — Objective and Relative Proportionality

A person's punishment may be excessive in two ways. First, it can be excessive by being disproportionate to the particular crime and criminal when measured against some "objective" standard of proportionality. Second, even if the punishment is "objectively" proportional in relation to the specific crime and criminal, it can be "relatively" excessive if similar persons who commit similar crimes are punished much more leniently — i.e., because "simple" inequality exists. Both types of disproportionality are objectionable; but the first is more so since it involves punishing a person more than he deserves, while the second type raises difficulties because some people are being punished less than they deserve. This is particularly true where capital punishment is involved since executing an undeserving person is intuitively more disquieting than imposing life imprisonment on a person who could legitimately be sentenced to death while at the same time executing others who can be legitimately executed.

Because "objective" disproportionality is so much more troublesome, the primary concern should be to reduce such disproportionality. As indicated in the more general discussion of proportionality, the best approach to addressing this concern is to devise a procedural scheme to insure objective proportionality. When the death penalty is involved, this scheme must be biased in favor of life imprisonment so that problems resulting from the inability to resolve the empirical issues concerning the deterrent impact of the death penalty can be reduced.

One necessary consequence of South Carolina's having adopted such a bias against capital punishment is that relative excessiveness is virtually certain, and this result raises a prob-

938. See e.g., E. van den Haag, In Defense of the Death Penalty: A Practical and Moral Analysis, in The Death Penalty in America, 323 (H. Bedeau 3d ed. 1982).
939. See supra notes 865-69 and accompanying text.
940. See supra notes 878-935 and accompanying text.
lem. If three similar persons commit similar murders, if the juries sentence only two of them to death, and if the trial judges sentence one of these to death and the other to life, then the South Carolina Supreme Court faces a dilemma. If the primary concern is the potential deterrent impact of the scheme, then the remaining person should be sentenced to death if death seems appropriate in the "objective" sense of proportionality. However, if the primary concern is equal treatment, then the remaining person cannot be sentenced to death because such punishment would be excessive if compared to the other two. Moreover, since relative excessiveness is virtually certain given the bias of the system, no one could be executed if absolute evenhandedness were the primary concern.

As indicated above, there are good reasons for placing greater emphasis on "objective" proportionality. Thus, it is not surprising that both the South Carolina Supreme Court and the United States Supreme Court have apparently resolved the above dilemma in favor of deterrence and thus in favor of "objective" proportionality. In other words, the South Carolina Supreme Court has implicitly construed the section of the Code concerning proportionality review to read: "the Court shall determine . . . whether the sentence is [objectively] excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Interpreted in this way, it is sufficient to review only death cases to determine whether these indicate that a particular person's death sentence is objectively disproportionate. Such review need not be a mere formality. A consideration of all the cases where death is imposed by the trial judge and jury could provide helpful guidance in determining what constitutes sufficient wrongfulness to justify the death penalty.

In addition, this interpretation complies with the requirement of the fourth tenet that punishment be imposed in accordance with the rules. Statutes must be interpreted; and a number of helpful, though often contradictory, canons of interpretation have been developed over the years. One of these

941. See supra notes 276-82, 783 and accompanying text.
943. See supra notes 867-968 and accompanying text.
canons is that the language of the statute should be construed so as to give effect to its "plain meaning." However, another well-accepted canon of statutory interpretation is that individual sections of a statute should not be interpreted in a way that would defeat the basic purpose of the total statute. Each section should be interpreted to give meaning to that section while also furthering the basic statutory purpose. This is precisely the result of the above interpretation of the section of the South Carolina statute requiring proportionality review; given the bias against the death penalty, there would be no executions if relative proportionality were the standard. Consequently, objective proportionality is used in order to effectuate the basic statutory purpose.

Although there are strong arguments in favor of the justice of focusing on objective proportionality, the current South Carolina scheme forinsuring objective proportionality is inadequate in many respects. South Carolina uses a procedural approach to address the difficult task of determining when a person and crime are so bad that capital punishment is justified. However, this process needs considerable reform because the standards and procedures used to guide the sentencing process have the shortcomings discussed above. As a result, the trial court may impose the death penalty on persons who are not the type who can be deterred by the death penalty or where the crime or person is not sufficiently wrongful. Moreover, errors by the trial court may not be corrected because the South Carolina Supreme Court's approach to proportionality review has several serious deficiencies.

(2) Excessive Punishment — Racial Inequality

Even if South Carolina only imposed the death penalty on persons who could plausibly be deterred and who were sufficiently wrongful, the system would be unjust if white persons who satisfied these two conditions were sentenced to life impris-

945. Id. at 524.
946. Id.
947. See supra notes 855-932 and accompanying text.
948. See supra notes 887-93, 918-23, 928-35.
949. See supra notes 284-302 and accompanying text.
onment while similar black persons were sentenced to death. Fortunately, there does not seem to be such blatant racial discrimination in the imposition of the death penalty in South Carolina. However, a more subtle form of discrimination may be involved because there appears to be a statistically significant correlation between sentencing decisions and the race of the victims, the death penalty being more likely where the victim is white. If such a racial bias does play a significant role, the system would be unjust.

Three points concerning this problem are clear. First, it is not evident whether this pattern is the result of improper racial discrimination or of some other, legitimate factor or factors. Second, despite this uncertainty, the burden should be on the state to investigate further, since there is evidence indicating a substantial possibility of racial discrimination. South Carolina, however, has not shown any interest and concern with investigating this problem. Third, if such a racial pattern does exist, elimination of the death penalty seems to be the only way to resolve it. Since persons sentenced to life imprisonment by the jury cannot be sentenced to death by the South Carolina Supreme Court, the only possible solution would be to reverse cases where the death penalty is imposed. However, it is impossible to know which death penalty decisions are racially motivated. If the court simply reversed all cases involving white victims, while upholding cases involving black victims, then a new form of racial discrimination would be involved.


951. Id. at 384-86. For criticisms of racial and social discrimination in capital punishment sentences in other states, see, e.g., Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 26 CRIME & DELINQ. 563, 593-601, 607-16, 629-32 (1980); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 466 (1981).

952. The published results of the study of racial discrimination in South Carolina capital sentencing did not consider, for example, whether the pattern could have resulted from differences in aggravating circumstances. Jacoby & Paternoster, Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982). Such a difference might occur if armed robbery tends to be characterized by white victims and black defendants. See supra notes 335-37 and accompanying text for discussion of the frequency of armed robbery as an aggravating circumstance.
3. Absolute Objections to the Death Penalty

Some persons take an absolute position and argue that the death penalty is objectionable even if it does deter because it is always wrong for the state to kill citizens. One problem with this position is that it is not clear why such killing is wrong. The state frequently makes decisions that cause death. For example, the decision to impose a 55 m.p.h. speed limit on highways rather than a 50 m.p.h. limit results in increased deaths since the higher speed limit results in more traffic fatalities. Moreover, the state cannot avoid deciding to kill in the murder situation because this absolute objection concedes that capital punishment does have a deterrent impact. Consequently, not using capital punishment is, in effect, a decision in favor of the death of the victims of the murders that could have been deterred. Two reasons could be given for such a decision. First, it could be argued that there is an important moral difference between deliberately killing a specific person and deliberately deciding to follow a course of action which fails to prevent a death which is only statistically certain. Second, it can be argued that deliberate cold-blooded killing by the state, using its vast resources and acting for its citizens, is not done in a reasonably just state.953

There are a number of difficulties with this absolute position. First, the distinction between killing an identifiable person as opposed to a statistical person is questionable.954 If death results because a person went to the top of a tower and randomly fired at unknown persons on the ground or placed capsules filled with cyanide in bottles of Tylenol on a store's shelves, we would not think that his conduct was any better than that of a murderer who knew his victim.955 If it has any effect, such random disregard for life indicates that the murderer's conduct is more shocking.

Second, the absolute argument is premised in part on the

953. See, e.g., Amsterdam, Capital Punishment, in The Death Penalty in America 346 (H. Bedau 3d ed. 1982).
notion that there is an important distinction between acts and omissions. However, while the distinction is helpful in some circumstances, its general validity is questionable. Consequently, it is necessary to show that it is valid in the case of killing; but there are numerous situations where the distinction does not seem proper in this context. For example, there is no important difference between hitting a pedestrian by steering the car in his direction and hitting him by failing to apply the brakes even though he is clearly visible and it would be a simple matter to brake. Similarly, we are more likely to praise than criticize (much less punish) a person who deliberately kills a terrorist who is preparing to shoot a hostage. Thus, defense of the absolute position requires going beyond the fact that executions are deliberate and showing that there is no justification for such a deliberate act.

Third, since the absolute position concedes that there may be a deterrent impact, the argument concedes that innocent victims may die as a result of not imposing capital punishment. Even though these victims are statistical entities, they are probably innocent while the murderers are wrongdoers. As indicated above, there are good reasons to prefer innocent victims, and there is no reason to change this preference simply because the identity of innocent victims is unknown.

Because of the problems with the absolute position, the objection to deliberate killing by the state should be expressed as a condition: the state should not deliberately kill unless such killing is justified under the circumstances. Phrased in this manner, the problem is clearly similar to that presented in justifying any punishment. Punishment always involves the deliberate infliction of unpleasantness by the state, and this should not be done unless justified. If punishment in the form of imprisonment is justified by its deterrent impact, why is capital punishment improper even though it deters? What is special about executions?

One answer to this question is that death is irrevocable. A result of this irrevocability is that mistakes cannot be corrected.

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956. See supra notes 796-98 and accompanying text.
957. See supra notes 838, 889-83 and accompanying text.
This problem was addressed earlier.959 Another result is that it precludes any chance for reform and reintegration of the criminal. The criminal is, in effect, no longer viewed as a person worth our concern and respect. Thus, executions are arguably objectionable because all persons have a basic right to human dignity which the state would deny if it were to identify a specific individual (as opposed to a statistical person) and execute him.960

The difficulty with the argument for human dignity is that it fails to consider the rights of the victims of murders. Their identity may not be known, but that does not make them any less real. Moreover, the victims may be innocent while the murderers are guilty of serious wrongdoing. Thus, even if it can be said that it is in some sense "wrong" to execute murderers, this "wrong" is outweighed by the saving of the lives of innocent victims. Once again, it is not possible to speak in terms of absolutes.961

It should be helpful to conclude the discussion of the absolute position by summarizing the argument in favor of the justice of capital punishment:

Capital punishment could be justifiable under some circumstances first, because it is at least plausible that it deters some murderers that life imprisonment would not deter, and second, deliberate killing by the state is not unjustified given the following: (1) The state cannot avoid life and death choices; (2) the distinction between the acts and omissions is questionable, particularly in the context of homicide; (3) justice is better served by objecting only to executions that are not justified than by absolutely prohibiting all executions; and (4) capital punishment is justified because any wrong done to the person executed is justified by the prevention of the murders of innocent victims.

959. See supra notes 898-99, 906 and accompanying text. See supra note 863 for a general discussion of the problem of mistakes and an analysis of the reasons for punishing even though we know mistakes are inevitable.


4. Conclusion — Four Questions

Four basic questions must be answered in order to assess the justice of the South Carolina capital punishment scheme. First, is the scheme as presently devised and applied just? The answer to this is affirmative in many respects. However, the scheme does not satisfy the tenets of just punishment in a number of specific details. As a result, we cannot confidently conclude that there will not be cases where the death penalty is unjustly imposed.

No one has yet been executed, however, so these problems could be resolved if there is an adequate answer to the second question: how can the scheme be revised so that the death penalty is only imposed justly? Although there is good reason to be cautious in answering this question, it seems that in theory, if a democratically elected legislature decided to adopt a scheme to deter murders, it should be possible to devise a scheme for imposing the death penalty which meets virtually all of the substantial objections to capital punishment. The basic outline of this scheme parallels the current South Carolina scheme in many respects but would use more safeguards to insure that there is a meaningful basis for selecting persons to be executed.

Even if the South Carolina system could be reformed, another question must be faced: is it worth it? Providing the necessary safeguards will be expensive; only a few persons will be executed and the deterrent impact of these executions will probably be minimal at best. Perhaps these resources could be better used elsewhere in our efforts to reduce crimes and injustices.

962. See, e.g., supra notes 877-81, 898-905 and accompanying text.
963. See infra note 966 and accompanying text.
964. The studies of deterrence are inconclusive. See supra notes 878-81 and accompanying text. However, this very inconclusiveness suggests that the deterrent impact is not substantial because a substantial impact would probably have some empirical support and there does not seem to be any such support. See supra note 880 and accompanying text.
965. The costs include: (1) the expense of conducting capital trials and appeals, which are more expensive than non-capital cases, see supra notes 316-17, 696 and accompanying text; (2) the costs resulting from the substantial, widespread objection to any death penalty; (3) the possible increase in homicides resulting from the brutalization effect, see supra notes 902-03; (4) the possible execution of the “wrong person”, see supra notes 898-99, 901 and accompanying text; and (5) the suffering of innocent per-
Finally, addressing these questions is useless without considering a fourth question: will the South Carolina scheme in fact be reformed so the death penalty will not be imposed unjustly? The answer to this question goes beyond philosophical analysis to forecasting. Nevertheless, since our system of just punishment is based in part on a faith in institutions, it is appropriate to consider the characteristics that the institutions of South Carolina should have in order to justify optimism about the elimination of injustice through reform.

The basic institution in a democracy is the legislature. As the elected representative of the people, the South Carolina legislature is given considerable latitude in resolving disputes concerning the deterrent impact of the death penalty and concerning conflicting values. Thus, one of the strongest reasons for viewing the death penalty in South Carolina as just is that the legislature has adopted it. However, there are several factors which suggest that the democratic process is not a reliable indicator of the just result in this case. For example, citizens and legislators do not seem to be well informed about the issue and seem uninterested in learning more. In addition, the persons who are tried for capital murder in South Carolina appear to come largely from segments of society that are relatively weak politically. Thus, it is not surprising that many of the basic

sons related to the person executed, see supra note 900 and accompanying text.


967. The textual assertion is based on non-random discussions, review of media accounts, and survey of transcripts of voir dire in capital cases. In addition, the inadequacy of the South Carolina Supreme Court's model of review reflects a lack of concern with the topic of capital punishment. See supra notes 284-302, 362-71 and accompanying text. Others share this perspective about the United States as a whole. See supra note 528 and accompanying text.

968. This discriminatory impact is reflected in the aggravated homicide cases in which race can be determined from the record. Approximately 60% of the defendants in aggravated homicide cases are black; when the death penalty is sought, over 50% of the defendants are black. Jacoby & Paternoster, Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty, 73 J. Crim. Law & Criminology 379, 383 (1982). (Blacks constitute less than a third of the total population in the state. South Carolina Stat. Abstract 9 (1980)). But see supra note 952 for criticism of this study. The impact is also reflected in the fact that so many defendants are indigent and thus are represented by the Public Defender's Office or by appointed attorneys. The point in the text is not that intentional racial or economic discrimination is involved in the adoption or application of the scheme. Instead, the point is that we cannot rely on the legislators to indicate the proper result because the poor and racial minorities are less able to influ-
improvements in the South Carolina scheme have resulted from the impact of decisions by the United States Supreme Court. Although such criticisms can often be made about the legislative process, they modify the endorsement of legislation as prima facie just and give us reason to be less optimistic about legislative reform.

Another central institution is the court system, which must impose constitutional limits on the legislature and interpret statutes and precedents in a way that is both constitutional and just. Although the South Carolina Supreme Court has taken a number of steps to fulfill this responsibility, many of these steps were in response to United States Supreme Court decisions. Moreover, the South Carolina decisions are deficient in many respects. In this regard, perhaps its most important shortcoming is its failure to articulate and apply a just theory of the meaningful imposition of the death penalty. With such a theory, most, if not all, of the basic flaws in the South Carolina scheme could be resolved through statutory interpretation. However, given the past patterns of decisions, there is reason to be concerned about the likelihood of such a development. Moreover, even if such reforms occurred, the South Carolina Supreme Court is only one part of the court system; trial judges, attorneys (particularly the solicitors), and the juries must also meet their responsibilities. If, for example, racial discrimination affects their decisions, then the judicial institutions cannot be relied upon to impose the death penalty justly. This is an important problem, and it is not encouraging that so little has been

ence legislation than are other segments of society. For a similar criticism of all schemes in the United States, see supra notes 401-02 and accompanying text; Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 CRIME & DELINQ. 563, 593-601, 607-16, 629-32 (1980). It is also relevant to note that the percentage of blacks in this country opposed to the death penalty is much higher than the percentage of whites opposed. See, e.g., Hovey v. Superior Court, 28 Cal. 3d 1, 56, 616 P.2d 1301, 1338, 163 Cal. Rptr. 128, 165-66 (1980).

969. See, e.g., supra notes 1-6 and accompanying text.

970. See, e.g., J. RAWLS, A THEORY OF JUSTICE § 32 (1971); supra notes 487-551 and accompanying text.


972. See, e.g., supra notes 2-7 and accompanying text.

973. See supra notes 284-302, 362-71 and accompanying text.

974. See supra notes 950-52 and accompanying text.
done to investigate the possibility of improper discrimination. Similarly, the role of prosecutorial discretion in seeking the death penalty is central to the justice of the South Carolina system, but virtually nothing has been done to monitor the exercise of this discretion or to develop standards to guide its exercise.975

The final South Carolina institution that is important in applying the death penalty is the office of the Governor. The life-boat cases clearly illustrate the role of executive clemency,976 and the South Carolina Governor may face analogous cases. For example, a person who has been truly reformed since being sentenced to death would be a good candidate for a commutation of his sentence to life imprisonment.977 The Governor’s Office is also perhaps the best institution for developing data on statistical patterns of sentencing in South Carolina.978 However, the Governor’s Office has not undertaken such a task, and there is no way of knowing how the virtually unrestrained power to commute death sentences will be applied.

The United States Supreme Court may correct failures in the South Carolina scheme by continuing to strike down the death penalty where no meaningful basis exists for its imposition. The United States Supreme Court, however, has a heavy caseload and must respect the values implicit in federalism and representative democracy. Moreover, its opinions reflect basic disagreements, and there is a possibility that only a minority of the Justices have committed themselves to a just theory of capital punishment.979 As a result, it is not possible to be sure that the United States Supreme Court will prevent injustice.

Ultimately, the answer to the fourth question depends upon each person’s faith in these institutions and upon his optimism about their performance. Opinions, therefore, can vary. Nevertheless, the past performances of the South Carolina legislature and courts do not appear to give much support to those who are optimistic about South Carolina satisfying the requirements of just punishment without considerable pressure from the United States Supreme Court.

975. See supra notes 10-17 and accompanying text.
976. See supra notes 794-800 and accompanying text.
977. See supra notes 901, 904 and accompanying text.
978. See supra notes 303-08 and accompanying text.
979. See supra notes 680-97 and accompanying text.
IV. Conclusion

Although no position concerning capital punishment is free from criticism, several points are clear. First, the general scheme for capital punishment in South Carolina is constitutional, although several important aspects may be unconstitutional. Second, while the scheme generally satisfies the requirements for justly imposing the death penalty, it has a number of basic flaws. Third, many problems of constitutionality and justice could be resolved by the South Carolina Supreme Court. Fourth, if the South Carolina Supreme Court fails to meet its responsibility in this regard, many of the problems could be corrected by the federal courts. Fifth, other institutions should be involved in deciding about capital punishment in an informed and meaningful way. Finally, the citizens of South Carolina have critical roles as jurors and as voters; and these roles require them to make intelligent, informed decisions about the proper role, if any, of capital punishment in South Carolina.

The death penalty is a uniquely final, irreversible form of punishment and no one, whether he is an official or a citizen, should be disinterested in whether it is justly imposed. Where society does have such interest and elects to impose the death penalty only in those few cases where it may provide additional deterrence and where particularly bad crimes and criminals are involved, there is reason to believe that the penalty is just. However, unless South Carolina clearly has such sincere interest and concern, and until the South Carolina scheme has such narrow scope, the death penalty in South Carolina will, in many respects, be both unconstitutional and unjust.