

## A Punishment in Search of a Crime: Standards for Capital Punishment in the Law Of Criminal Homicide

Franklin E. Zimring

Gordon Hawkins

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Franklin E. Zimring, & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law Of Criminal Homicide*, 46 Md. L. Rev. 115 (1986)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol46/iss1/11>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# A PUNISHMENT IN SEARCH OF A CRIME: STANDARDS FOR CAPITAL PUNISHMENT IN THE LAW OF CRIMINAL HOMICIDE\*

FRANKLIN E. ZIMRING\*\*  
GORDON HAWKINS\*\*\*

The substantive criminal law is rarely discussed in debates about the wisdom and utility of the death penalty. But the criminal law of homicide, important in its own right, also provides insight into the problems of selection, moral coherence, and practical administration that bedevil attempts to harness the punishment of death for public purposes. If that task is to be performed, the substantive criminal law must be the mechanism by which it is accomplished. Yet, since mid-century, the attempt to fashion standards for capital sentencing has been a fight against historical forces stronger than the power of legal classification. The current jurisprudence of death thus demonstrates the futility of the exercise.

In this essay, we discuss the development of standards for the death penalty in the *Model Penal Code* (the Code), analyze the influence of the Code provisions on modern death penalty legislation in the states, and question whether legal standards are closely linked to the propensity to condemn murders and conduct executions. We conclude that efforts to provide a legal rationale for executions occurred far too late in the progress toward abolition of capital punishment in Western Society to have any hope of success.

## I. A PENAL PARADIGM

The most ambitious attempt to define the principles of substantive criminal law, at least in this century, is the American Law Institute's *Model Penal Code*. A product of reform efforts in the 1950s and 1960s, the Code addressed the issue of standards for capital punish-

---

\* A version of this essay was delivered by Frank Zimring as the Simon E. Sobeloff lecture in March 1986 at the University of Maryland School of Law and will appear later in 1986 as Chapter 4 in ZIMRING & HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA*, published by the Cambridge University Press.

\*\* Professor of Law and Director of the Earl Warren Legal Institute, University of California at Berkeley. B.A., Wayne State University, 1963; J.D., University of Chicago, 1967.

\*\*\* Visiting Fellow, Earl Warren Legal Institute, University of California at Berkeley; Retired Director, Institute of Criminology, University of Sydney Law School. B.A., University of Wales, 1950.

ment despite the opposition of its advisory committee to capital punishment. Ironically, the Code's death penalty standards have had a greater impact on state legislation on this subject than on any other.

The Code defines murder as follows:

Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly;

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.<sup>1</sup>

This definition of murder differs from those found in the majority of American jurisdictions because it does not establish degrees of murder. The most common definitions of first and second degree murder originated from the Pennsylvania Act of 1794. The Act limited first degree murder to premeditated, deliberate homicide ("[a]ll murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing") and homicide occurring in the course of or in the attempt to commit certain felonies ("or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary"). Second degree murder encompassed all other homicides that would have been murder at common law ("and all other kinds of murder shall be deemed murder in the second degree").<sup>2</sup>

---

1. MODEL PENAL CODE § 210.2(1) (1980). Section 210.3(1)(b) refers to circumstances in which

a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

2. Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 704-05 & nn.13-15 (1937). Wechsler and Michael explained that the primary objective of this distinction was to restrict the use of the death penalty to a limited class of murders. *Id.* at 703. The preamble to the Pennsylvania statute states that "it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety . . ." *Id.* Thus, the deliberation and premeditation formula and the felony-murder rule simply identified those homicides that might be capitally punished.

The murder classifications drawn by most statutes have been much criticized. Interpreting "deliberation" and "premeditation" has been a particularly troublesome task. As Judge Cardozo argued:

The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its formation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds may be enough. What is meant as I understand it, is that the impulse must be the product of an emotion or passion so swift and overmastering as to sweep the mind from its moorings. A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death.<sup>3</sup>

In many cases, as the Commentary to the *Model Penal Code* (the Commentary) notes, "it was a task of surpassing subtlety to say what the 'deliberate and premeditated' formula did require."<sup>4</sup>

The felony-murder rule has proved to be no less ambiguous and problematic. Wechsler and Michael remarked that "[c]onceding the ever-present legislative necessity for reconciling extremes by drawing arbitrary lines the justice of which must be viewed from afar, the limits of intelligent casuistry have clearly been reached."<sup>5</sup> The Commentary devotes more than thirteen pages to discussion of the "essential illogic" of the felony-murder rule.<sup>6</sup>

The American Law Institute, although adopting no position on whether death should be an authorized sentence for murder, included a lengthy provision on capital punishment in the Code:

Section 210.6 Sentence of Death for Murder; Further Proceedings to Determine Sentence

(1) *Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

---

3. B. CARDOZO, *LAW AND LITERATURE* 99-100 (1931).

4. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 126.

5. Wechsler & Michael, *supra* note 2, at 716.

6. MODEL PENAL CODE, *supra* note 1, § 210.2 commentary at 29-43.

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt . . . .

(3) *Aggravating Circumstances.*

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) *Mitigating Circumstances.*

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.<sup>7</sup>

In marked contrast to the elegantly concise definition of murder, Section 210.6 of the Code reopens Pandora's Box with a vengeance—making a multitude of fine distinctions and attempting to subdivide murder into penological categories relevant to the choice between life and death. The effort to reform the law of murder apparently had collided with the drafters' concerns about adequate capital punishment standards.

Later commentary alleged that the drafters intended that the Code be "a model for constitutional adjudication as well as for state legislation."<sup>8</sup> Moreover, they felt that the Supreme Court's 1976 and 1978 death penalty cases were "a broad endorsement of the general policy reflected in the Model Code Provision."<sup>9</sup> The most recent Commentary on Section 210.6 concludes that "the Court has left the Model Code provision as the constitutional model for capital sentencing statutes and in the future may transform Section 210.6 into a paradigm of constitutional permissibility."<sup>10</sup> The remaining question is whether this "paradigm" is sufficient for such a momentous task.

## II. THE WEIGHT OF CIRCUMSTANCES

The moral legitimacy of the Code's definitions of aggravating and mitigating circumstances is questionable. Even an aggravating circumstance as unambiguous and relevant as (3)(b)—"the defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person"—hardly provides a morally acceptable instrument for making decisions be-

---

7. *Id.* § 210.6.

8. *Id.* commentary at 167.

9. *Id.*

10. *Id.* commentary at 171.

tween life and death. More importantly, the inclusion in subsection (3)(e) of all robbery killings is hard to justify in that ultimate context. Why does that crime warrant a death sentence? The Commentary makes no attempt to provide a rationale for this inclusion, merely observing that this paragraph "concerns murder committed in connection with designated felonies, each of which involves the prospect of violence to the person."<sup>11</sup> Subsection (3)(h), which essentially creates another murder category, "murder . . . especially heinous, atrocious or cruel, manifesting exceptional depravity," is not only unconstitutionally vague<sup>12</sup> but also very difficult for a jury, confronted by its first experience of murder of any kind, to apply. Nevertheless, the Code must contain some provision for horrible murders if it is to be morally defensible. Otherwise, some unanticipated but ineffably awful murder might not be subject to the death penalty while a relatively routine murder would.

The identification of mitigating circumstances, though more elaborately supported in the Commentary and better integrated with the rest of the Code, also has considerable problems. For example, subsection (4)(a), the mitigating circumstance counterpart to (3)(b), burdens the jury with the task of weighing "against each other"<sup>13</sup> the incommensurable. To what extent should the fact that the defendant has no significant history of prior criminal activity mitigate crimes like the Charles Whitman killings in Austin, Texas in 1966 or the McDonald's massacre in San Ysidro, California in 1984? The Commentary does not explain why this particular mitigating circumstance is relevant to death sentencing. Though relevant to non-capital sentencing, it seems irrelevant as a factor in making the choice between life or death. Subsection (4)(d), which specifies as a mitigating factor the defendant's belief in a "moral justification or extenuation for his conduct," as the Commentary explains, concerns the "question of an idiosyncratic belief in a moral basis for homicide," including, for example, "the assassin who kills in furtherance of a political ideology" and claims moral justification for such conduct.<sup>14</sup> The Commentary states that "consideration of this claim should not be excluded, but it is also expected that the defendant's aberrational belief will be discounted by the extravagance

---

11. *Id.* commentary at 137.

12. See *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding Georgia's application of an aggravating circumstance unconstitutional).

13. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 135.

14. *Id.* commentary at 141-42.

of its departure from societal norms."<sup>15</sup> It seems extremely optimistic to expect juries to possess the casuistical expertise required for this type of moral accountancy. How this paragraph should apply to, for example, the cases of Sirhan Sirhan or Charles Manson is unknown.

### III. WHO SHOULD DIE?

These sections of the *Model Penal Code* quite simply ask "who should die?" and "why?" But the answers to these questions reveal an extraordinary ambivalence. The Commentary supporting the death penalty provisions is the least persuasive in the entire Code. Perhaps those who drafted these sections and the accompanying comments felt that they were engaged in a mission doomed to failure. The Council of the Institute, divided on the issue, decided that the Institute should not take any position.<sup>16</sup> The Advisory Committee, by an 18-2 vote, however, recommended abolition of the death penalty.<sup>17</sup> The ambivalence born of such indecision and opposition is reflected throughout the Commentary, beginning with the first question posed: "[F]irst in what cases should capital punishment be possible?"<sup>18</sup>

The remarkable imbalance in the Commentary's treatment of aggravating and mitigating circumstances also evidences the drafters' ambivalence toward their task. Aggravating circumstances occupy less than one of the sixty-five pages of Commentary devoted to capital punishment; the discussion of mitigating circumstances is more carefully developed and is five times as long.<sup>19</sup> In all, less than two percent of the capital punishment Commentary is devoted to the central question of who should die. Indeed, the Code never indicates under what circumstances an offender *should* be sentenced to death; that decision is always discretionary. Instead, the Code indicates only when an offender *should not* be sentenced to death;<sup>20</sup> aggravating circumstances permit, but never mandate, a death sentence. Furthermore, the court may override a jury decision in favor of death, but it may not impose the capital sanction without

---

15. *Id.* commentary at 142.

16. *Id.* commentary at 111.

17. *Id.*

18. *Id.* commentary at 111 (emphasis added).

19. *Id.* commentary at 137-42.

20. For example, the Code advises that juvenile murderers should not be sentenced to death. *Id.* commentary at 133.

the concurrence of the jury.<sup>21</sup> Thus, the Code establishes a set of limiting conditions that obviate or preclude the death penalty without expressly prescribing it. It answers the question "who should live?" but avoids the question "who should die?"

Another striking feature of the Commentary's purportedly comprehensive analysis is the unreasoned character of much of the exposition. Not only is the entire discussion of eligibility for the death sentence accomplished in less than one page of the lengthy discussion, but that page also consists for the most part of unsupported propositions.<sup>22</sup> Justice Harlan's celebrated passage in *McGautha v. California* suggests an explanation for this odd silence:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.<sup>23</sup>

The Code's unsatisfactory attempt to define the types of murder that should or should not be punished by death motivated Justice Harlan to append the relevant subsections of the Code to the *McGautha* opinion. Justice Brennan, in a forceful and lucid dissent objecting to standardless sentencing, did not defend the *Model Penal Code* standards.<sup>24</sup> Although Justice Brennan was correct in insisting that the decision to take a human life should be subject to the rule of law, nevertheless, Justice Harlan was not necessarily wrong in suggesting that the task of determining the criteria under which capital felons should be chosen to live or die is "beyond present human ability."

Finally, the Code provisions and the accompanying Commentary identifying which persons should be eligible for capital punishment stand strangely isolated from the rest of the Code. The concepts and categories, the principles, and the vocabulary that explain the model statute are abandoned in the aggravating circumstances discussion. The clarity and precision and dialectical acumen that characterize the treatment of the mitigating circumstances provisions are replaced by bald assertions with scarcely any supporting reasoning. Two examples previously noted illustrate this point.

---

21. *Id.* § 210.6(2), § 210.6 commentary at 143.

22. *Id.* § 210.6 commentary at 132-33.

23. *McGautha v. California*, 402 U.S. 183, 204 (1971).

24. *Id.* at 248.

First, the Code offers no explanation why felony murder, which alone accounts for the majority of all death sentences and executions since *Gregg v. Georgia*,<sup>25</sup> should be considered an aggravating circumstance. Second, the proffered reason that aggravating circumstance (3)(b)—“[t]he defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person”—is relevant to death sentencing is that

[p]rior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some future occasion.<sup>26</sup>

Remarkably, in an otherwise well documented text, no evidence is offered to support these two inferences.

#### IV. THE NEW STATUTES IN PRACTICE

The Code provisions became the model for capital punishment legislation after the United States Supreme Court ruled in *Furman v. Georgia*<sup>27</sup> that standardless jury discretion to impose the death penalty violated the eighth amendment prohibition on cruel and unusual punishment.<sup>28</sup>

It is interesting to look at the post-*Furman* murder statutes in the light of Justice Blackmun's remarks in that case about legislator's sensitivity to “constitutional overtones” in relation to death penalty legislation.<sup>29</sup> After *Furman*, new death penalty legislation attempted to avoid the Supreme Court's objections to the previously administered statutes and, in particular, to alleviate the concerns of Justices Stewart and White regarding the absence of standards to determine who shall receive a death sentence. Eighteen states responded to *Furman* by enacting mandatory death penalty provisions.<sup>30</sup> But a number of other states that enacted new capital punishment legislation patterned their revisions on the *Model Penal*

---

25. 428 U.S. 153 (1976).

26. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 136.

27. 408 U.S. 238 (1972).

28. For a critique of *Furman*, see Zimring & Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927 (1985).

29. *Furman*, 408 U.S. at 413 (Blackmun, J., dissenting) (“It is impossible for me to believe that the many lawyer-members of the House and Senate—including, I might add, outstanding leaders and prominent candidates for higher office—were callously unaware and insensitive of constitutional overtones in legislation of this type.”).

30. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 156 n.145.

Code provisions for aggravating and mitigating circumstances. But in so doing, several states varied the language of those provisions.

For instance, the Georgia statute,<sup>31</sup> upheld by the Supreme Court in *Gregg*, grossly distorted the Code's aggravating and mitigating circumstances provisions. The Georgia statute had ten aggravating circumstances rather than the eight enumerated in the Code and completely eliminated the Code's extensive list of mitigating circumstances. This failure to specify any mitigating circumstances renders the likelihood of proper consideration of all the "main circumstances of aggravation and mitigation that should be *weighed* and *weighed against each other*"<sup>32</sup> extremely remote. Thus, Georgia had adopted and extended the one portion of the Code that is weakest in jurisprudential terms, the aggravating circumstances provisions, and disregarded the mitigating circumstances provisions, which are supported by a carefully articulated, if imperfect, rationale. As *Gregg* demonstrates, this considerable and detrimental departure from the Code standards nevertheless passes the constitutional test.

The Texas statute,<sup>33</sup> upheld by the Supreme Court in *Jurek v. Texas*,<sup>34</sup> departs even further from the Code and, according to the Commentary, "could be said to mark a rejection of the Code formulation."<sup>35</sup> The Texas code defines capital murder as intentional or knowing homicide in five situations: murder of a fireman or peace officer; murder committed in the course of certain specified felonies; murder committed for remuneration; murder committed in an escape or attempted escape from prison; and murder of a prison employee by an inmate.<sup>36</sup> Upon conviction of capital murder, a separate sentencing proceeding is held.<sup>37</sup> The jury may impose a death sentence only upon unanimous findings that the homicidal conduct was done deliberately and with reasonable expectation of killing another; that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and, if the evidence presents the issue, that the defendant's conduct was unreasonable in response to provocation

---

31. GA. CODE ANN. § 27-2534.1 (Supp. 1975) (superceded). All references to the Georgia capital punishment statutes discuss the statute approved in *Gregg v. Georgia*, 428 U.S. 153 (1976). The current Georgia statute does require consideration of a statutory list of mitigating factors. See GA. CODE ANN. § 27-2534 (1983).

32. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 135.

33. TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1986).

34. 428 U.S. 262 (1976).

35. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 169.

36. TEX. PENAL CODE ANN. § 19.03(a) (Vernon 1974 & Supp. 1986).

37. TEX. CRIM. PROC. CODE ANN. § 37.071(a) (Vernon Supp. 1986).

by the deceased.<sup>38</sup> Although Texas adopted neither the aggravating circumstances nor the mitigating circumstances provisions of the Code, the Supreme Court held that the State's "action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose."<sup>39</sup> The Court also concluded that the requisite deliberations on the probability of future violent crimes would be broad enough to allow consideration of any mitigating circumstances that might exist.<sup>40</sup>

The Florida statute, upheld by the Supreme Court in *Proffitt v. Florida*,<sup>41</sup> altered the Code specifications for both aggravating and mitigating circumstances by omitting one of each<sup>42</sup> and adding as a new aggravating circumstance that the murder "was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws."<sup>43</sup> The *Proffitt* plurality endorsed the Florida scheme as achieving "an informed, focused, guided, and objective inquiry" into whether the convicted person should be sentenced to death.<sup>44</sup>

None of these statutes attempts to repair the deficiencies in the *Model Penal Code* capital sentencing provisions. What they, and other legislative reactions to *Furman*, illustrate is a "search for a formula that would restore the death penalty, never mind for what. These statutes . . . do not represent a legislative judgment that particular offenses are 'atrocious' in any singular sense."<sup>45</sup> At one extreme is the Texas statute, which has been described as "fundamentally defective as originally written, . . . [unimproved] by judicial interpretation, and . . . administered [in violation of] the minimal requirements of evenhanded application set forth in the July 1976 decisions."<sup>46</sup> At the other extreme is the Florida statute, which is described in the Commentary as "closely derived from the Model Code provision on sentence of death."<sup>47</sup>

Because the Florida statute approximates the Code provisions, it displays some of the problems of implementing that approach.

---

38. *Id.* § 37.071(b)-(d).

39. *Jurek*, 428 U.S. at 270.

40. *Id.* at 276.

41. 428 U.S. 242 (1976).

42. The omitted circumstances were § 210.6(3)(c), (4)(d).

43. FLA. STAT. ANN. § 921.141(5)(g) (West 1985).

44. *Proffitt*, 428 U.S. at 259.

45. Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 250-51 (1976).

46. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1414 n.340 (1977).

47. MODEL PENAL CODE, *supra* note 1, § 210.6 commentary at 158.

Under the Florida statute, at the conclusion of the sentencing hearing, the jury is instructed to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life imprisonment or death."<sup>48</sup> The jury's verdict, determined by a majority vote, is advisory, and the trial judge, who must independently weigh the statutory aggravating and mitigating circumstances, determines the sentence.<sup>49</sup>

To the petitioner's contention in *Proffitt* that the failure of the Florida law to assign any specific weight to the various circumstances prevented rational sentencing decisions, Justice Stewart, speaking for himself and Justices Powell and Stevens, responded:

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.<sup>50</sup>

Like the Code and Commentary, the Court's response entirely fails to answer the petitioner's concerns. First, the conclusion that the questions and decisions involved in the comparative weighing of aggravating and mitigating circumstances "require no more line

---

48. FLA. STAT. ANN. § 921.141(2)(b)-(c) (West 1985).

49. *Id.* § 921.141(3).

50. *Proffitt*, 428 U.S. at 257-58.

drawing than is commonly required of a factfinder in a lawsuit" erroneously ignores the reality of the sentencing experience. There are few parallels between the judgments typically required in ordinary lawsuits and the complex judgments required of a jury when it "weighs," for example, the "especially heinous, atrocious, or cruel" aggravating circumstance against the "no history of criminal activity" mitigating circumstance. The difference is not only in the difficulty of the line drawing, but also in the nature of the line itself.

Second, the analogy between the jury's tasks in death sentencing and in insanity cases is instructively inept. In a capital sentencing proceeding, rather than determining whether a defendant's mental condition satisfies a legally defined standard of insanity, the jury must measure degrees of culpability by balancing the mitigating force of the defendant's insanity against, for example, the aggravating circumstance that the insanely motivated act was committed during an armed robbery. Thus, the jury not only must decide the ultimate sentencing issue, but also must supply its own standards by which to measure the relative weight to be given to both the insanity and the armed robbery. The death sentencing jury's task is more analogous to the task of a judge in awarding custody of a child in a divorce case to the contesting parent whose care would be in the child's "best interests." This decision requires the same combination of comparative weighing of the incommensurable and uncontrollable discretion characterizing the new jurisprudence of death. Scholarly suggestions in criticism of the "best interests" standard that society may be better off by requiring judges to flip a coin<sup>51</sup> might easily be extended to the death sentencing conundrum.

Third, the assertion that "the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty" suggests that the mere examination of relevant sentencing factors will of itself, in some occult fashion, guarantee a rational decision. What seems to be required is an immediate apprehension or intuition, not mediated by any conscious reasoning process. For in the absence of any specific weights assigned to the circumstances to be considered, and lacking any kind of comparative weighing formula, how else can the

---

51. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979) (criticizing the "best interests" standard); see also Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 235-37 (1975) (discussing development of "best interests" standard and collecting statutes).

sentencing authority be expected to derive any conclusion from all the aggravating and mitigating information presented to it?

Finally, the notion that "the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty" is based on a misconception. The sentencing authority's *attention* remains unguided and uncontrolled if aggravating and mitigating circumstances are present. The "clear and precise" directions given to the judge and jury by the Florida statute provide no principles by which to make sentencing judgments, no standards to regulate the decision to kill. Because the absence of any established weighing process requires each sentencing authority to devise its own scheme for deciding whether to impose death, the Florida statute and the Code actually increase the dangers of uncontrolled discretion; a different standard for deciding who shall die is used in every capital case.

#### V. DOES THE LAW MATTER?

A decade after the Supreme Court upheld the revised death penalty statutes, a fundamental question remains: Do the various *Model Penal Code* provisions that "satisfy the concerns of *Furman*" actually control the imposition of the death penalty in a significant manner?

A recent empirical study conducted in Georgia investigated how judges, juries, and prosecutors in that state decide which convicted killers should be sentenced to death.<sup>52</sup> The study estimated the probability, given the circumstances of a particular murder case, that the perpetrator would be sentenced to death. Answers were based on the details and outcomes of over 600 murder cases, all of which were tried between 1973 and 1978 under Georgia's then current death penalty statute.<sup>53</sup> The study concluded that cases in which the death penalty was imposed differed from the others in three ways: (1) the certainty the defendant was a deliberate killer; (2) the "status" of the victim; and (3) the "heinousness of the killing."<sup>54</sup> In this classification system, the word "certainty" means "the degree of assurance that the defendant was, in fact, the killer," and "deliberateness" relates to whether the defendant acted know-

---

52. Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985).

53. *Id.* at 1336-38.

54. *Id.* at 1339.

ingly to cause the victim's death.<sup>55</sup> The "status" of the victim represents the relationship between the victim and the accused, and reflects the widely observed pattern that stranger-to-stranger killings are more likely to result in death sentences than those in which the victim knew the defendant.<sup>56</sup> "Heinousness" refers to such killings as those with multiple victims, those preceded by psychological torture or sexual abuse, and those involving bizarre weapons or mutilated bodies.<sup>57</sup>

This classification procedure proved to have strong discriminatory and predictive capability. Yet the classification rules were derived quite independently of, and do not coincide with, the aggravating factors in the Georgia capital murder statute. Indeed, the "status" factor has no explicit basis in the law. Yet, the author of the study concluded that "[i]t is hard to avoid speculating that, in killings in which jurors can imagine themselves or their loved ones as victims, death penalties are more likely to be imposed."<sup>58</sup> Conversely, the study also found that creating "a great risk of death to more than one person," a sentencing factor established by the Georgia statute, appeared "to have little practical importance."<sup>59</sup>

This study suggests that when jurors make death penalty decisions they consider factors that may be unrelated to any statutory provisions or to the weighing of mitigating and aggravating circumstances. Of course, in Georgia the statutory list of aggravating factors is not accompanied by a list of mitigating factors, and a Georgia jury is under no obligation to treat any aspect of the case as mitigating. But because the jury's behavior is predictable without referring to the aggravating factors, there is no reason to believe that statutory provisions of any character significantly influence jurors when they make death penalty decisions.

Moreover, examining the records of different states that have adopted some variation of the Code provisions highlights the irrelevance of the various sentencing schemes. If sentencing procedures actually affect the decision to impose the death penalty—an assumption necessary to the *Gregg* Court's conclusion that the new statutes eliminated the pre-*Furman* arbitrariness—we would expect similar patterns in those states with similar death sentencing laws. The three states selected for this comparison are Georgia, Florida, and

---

55. *Id.* at 1339-40.

56. *Id.* at 1340.

57. *Id.* at 1341.

58. *Id.*

59. *Id.* at 1355.

Pennsylvania. Although Pennsylvania has what some have termed a mandatory death penalty statute,<sup>60</sup> it does not automatically impose a death sentence upon conviction of a certain offense. The Pennsylvania statute, like Florida's and unlike Georgia's, explicitly provides the defense the opportunity to prove the existence of mitigating circumstances, and permits admission of evidence of mitigating circumstances other than those specified in the statute.<sup>61</sup> One commentator, however, correctly labeled this comparison of the Pennsylvania and Georgia statutes a "[d]istinction without a difference."<sup>62</sup>

Table 1 presents the relevant comparative data.

*Table 1*

Homicides, Death Row Populations, and Executions  
in Georgia, Florida, and Pennsylvania

State	State Population <sup>63</sup> (1980 Census)	Number of Homicides <sup>64</sup> (1982)	Year End Death Row Population <sup>65</sup> (1983)	Number of Executions <sup>66</sup> (to Aug. 31, 1986)
Georgia	5,463,105	713	102	7
Florida	9,746,324	1,409	193	16
Pennsylvania	11,863,895	678	33	0

The striking contrast between Pennsylvania and the other two states suggests that the most powerful predictor of differential imposition of the death penalty is certainly not substantive law, but rather geographical region. Such regional differences have a long history and a remarkable degree of consistency.<sup>67</sup> But this type of

60. The current Pennsylvania statute, 42 PA. CONS. STAT. ANN. § 9711 (Purdon 1982), was amended in 1978. See 1978 Pa. Laws 756; see also 1980 Pa. Laws 693 (recodifying the statute to its current location).

61. 42 PA. CONS. STAT. ANN. § 9711(a), (e).

62. Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 DUQ. L. REV. 103, 107-09 (1982).

63. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 2 (1983) (Table A).

64. U.S. DEP'T OF JUSTICE, FBI, UNIFORM CRIME REPORTS: CRIME IN THE U.S. 44 (1982) (Table 3).

65. BUREAU OF JUSTICE, STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1983, at 3 (1984) (Figure 4).

66. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. (August 1, 1986).

67. See F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA ch. 2 (to be published in 1986 by the Cambridge Univ. Press).

consistency is surely not what the Supreme Court referred to when it required "the evenhanded, rational, and consistent imposition of death sentences under law."<sup>68</sup>

When the states responded to *Furman* by enacting selected provisions of the off-the-shelf *Model Penal Code*, they were not seeking to develop a coherent, well-reasoned punishment policy or to articulate a rational method for determining who shall live and who shall die. What they were seeking was death penalty "legislation that passes constitutional muster,"<sup>69</sup> to borrow the Supreme Court's description of the Florida statute. That task proved easier than they probably anticipated. As Robert Weisberg observed:

the Court has asked virtually nothing of the states that they were not doing before *Furman* . . . . It is as if the constitutional strictures on the death penalty are merely a matter of legal aesthetics. The state will satisfy the Court if it can describe its penalty scheme according to some rational-looking form—indeed some metaphor of rational form.<sup>70</sup>

Yet, to conclude that the *Model Penal Code* provisions and their legislative progeny are largely meaningless to the actual administration of the death penalty is not to say that the efforts of the Code's drafters can be ignored. On the contrary, their attempt to resolve the conflict between the state's power to kill and the rule of law<sup>71</sup> deserves close attention.

The standard-setting exercise of the *Model Penal Code*, like the post-*Furman* legislative efforts to provide standards for a death penalty, was doomed for many reasons. Chief among these reasons is that these efforts were arguments against history, coming far too late in the progress toward abolition of capital sentencing to have any coherence.

Many of the intellectual problems of the Code have historical roots. The effort to classify types of murder came after the system based on premeditation had collapsed under scholarly criticism. The death sentencing standards were constructed at a time when no more than one out of a hundred killings could lead to execution. Defining in advance the elements that make some killings more worthy of punishment is difficult in any context, but defining criteria to

---

68. *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

69. *Proffitt v. Florida*, 428 U.S. 242, 259 (1976).

70. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 354.

71. *Cf. McGautha v. California*, 402 U.S. 183, 249-50 (1971) (Brennan, J., dissenting) (concluding that, when conflict arises, the rule of law must prevail over the state's power to kill).

choose one case in 100 or 200 is *prima facie* an impossible task. The moral equivalence of murder and execution had not survived into the modern world. The Code drafters did not wish to restore this equivalence. Instead trivial distinctions were given controlling influence in the decision between life and death.

The Code did not fail because of lack of effort. What the drafters did represents an earnest and sustained attempt to accomplish their objective. It did not fail because of their particular ambivalence, because ambivalence is inherent in the task of condemning people to death. It did not fail because of insufficient juristic competence or ingenuity on the part of the drafters; indeed, they were among "the finest artists of criminal law doctrine."<sup>72</sup> It failed because some decisions can never be subjected to legal discipline, and of those, the deliberate decision to take human life is, and will remain, absolutely preeminent.

---

72. Weisberg, *supra* note 70, at 313.