Code accordingly contains no explicit treatment of the case of homicide upon request.

[§ 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 senteuce for a felouy of the first degree if it is satisfied that:

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

(h) substantial mitigating circumstances, estahlished hy the evidence at the trlal, call for leniency; or

(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 commlssion of the crime; or

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

(f) although the evidence suffices to sustain the verdict, It does uot foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant shonld be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted hy a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with

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* *History.* Presented to the Institute as Section 201.6 of Tentative Draft No. 9 and considered at the May 1959 meeting. *See* ALI Proceedings 146–219 (1959). Presented again to the Institute in the Proposed Official Draft and considered at the May 1962 meeting. ALI Proceedings 120–34, 141–43, 226–27 (1962). Detailed commentary was originaily included in Tentative Draft No. 9 at 63–80 (1959).

The brackets are meant to reflect the fact that the Institute took no position on the desirabiiity of the death penalty. The Institute position is fully explained in the commentary to this section and to Section 210.2 *supra*.

the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, backgrouud, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section

7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(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.]

Comment †

1. *Institute Position on Capital Punishment.* The Model Code provision on capital punishment was adopted in tentative form at the 1959 meeting of the Institute.[1] Then, as today, the death penalty ranked high among the issues of public controversy in the criminal law. At that time, the death penalty could be imposed for murder, or, if murder was divided into degrees, for

† Except where otherwise noted, the abbreviated citation of statutes refers to enactments prior to November 1, 1978. However, the subsequently enacted New Jersey statute has been included throughout. As used in an abbreviated citation, the symbol (p) refers to a proposed code for the indicated jurisdiction. A full explanation of all abbreviated citations appears at p. XXXIX *supra*.

[1] MPC § 201.6, T.D. 9, at 59–80 (1959); ALI Proceedings 146–216 (1959).

murder in the first degree, in all but seven abolition states.[2] Except for one jurisdiction,[3] however, its imposition was discretionary under a number of different procedural schemes.

For reasons detailed below,[4] the Reporters favored abolition of the capital sanction. The Advisory Committee recommended by a vote of 17–3 that the Institute express itself upon the issue, whatever its opinion proved to be. By a vote of 18–2, the Advisory Committee also recommended that the Institute favor abolition. The Council was divided on the issue of retention or abolition but substantially united in the view that the Institute could not be influential in its resolution and therefore should not take a position either way. The Institute agreed with the Council,[5] and the Model Code therefore does not take a position on whether the sentence of death should be retained or abolished.

It was clear in any event that many jurisdictions would retain the sentence of death for some forms of murder for many years, a prediction that is still accurate today. It was therefore regarded as essential that the Model Code address itself to the problem presented in such jurisdictions. Two questions were thus required to be faced: first, in what cases should capital punishment be possible; and second, what agency and what procedure should determine whether the sentence of death should be imposed. Section 210.6 embodies the solutions adopted by the Institute for resolving these issues. It bears repeating, however, that inclusion of this provision in the Model Code does not signal Institute endorsement of capital punishment, nor does the optional authorization of this penalty under the statute reflect an Institute decision in favor of abolition.

2. *The Problem of Capital Punishment.* Nearly 20 years after the Institute's initial consideration of the question, a broad societal consensus on the issue of capital punishment seems as elusive as ever. Debate continues, and the literature on the subject grows more and more abundant. Although this commentary makes no attempt to resolve the matter, it may be useful to

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[2] The abolitionist states were Delaware, Maine, Michigan, Minnesota, North Dakota, Rhode Island, and Wisconsin. In both North Dakota and Rhode Island, however, the death penalty was available for murder by life-term prisoners. *See* MPC § 201.6, T.D. 9, App. D, at 126 (1959).

[3] *See* Comment 4(c) and text accompanying note 76 *infra*.

[4] *See* Comment 2 *infra*.

[5] ALI Proceedings 217–19 (1959).

describe the dimensions of the controversy. Abolitionist sentiment often reflects a profound moral distaste for "official murder." For some, the death penalty is simply an unacceptable contradiction of the intrinsic worth of a human being.[6] As Mr. Justice Brennan made the point, "the calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." [7] For others, death is a fitting penalty for one who takes another's life and an appropriate expression of societal outrage at such conduct.[8] In any event, judgments of this sort do not readily yield to reasoned support or refutation, at least not in terms within the special competence of lawyers. The debate, therefore, has tended to shift to other grounds.

Chief among them is the efficacy of the death penalty as a deterrent. In a monograph prepared for the Institute, Professor Thorsten Sellin collected data on actual imposition of the death penalty and attempted to assess the relationship, if any, between homicide rates and the authorization of death as a possible sanction for murder.[9] Sellin selected clusters of neighboring states with similar social and economic conditions. Within each cluster he compared the experience of abolitionist and retentionist jurisdictions and found no significant or systematic difference between them: "The inevitable conclusion is that executions have no discernible effect on homicide death rates . . . ." [10]

Sellin concluded that a sentence of death is executed in a trivial fraction of the cases in which it might legally be imposed and that there is no quantitative evidence that either its availability or its imposition has noticeable influence upon the frequency of murder. The latter conclusion is not surprising when it is remembered that murders are, upon the whole, either crimes of passion, in which a calculus of consequences has small psychological reality, or crimes of such depravity that the actor re-

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[6] *See, e. g.*, Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 Notre Dame Law. 722 (1976). *See generally* H. Bedau, The Courts, the Constitution, and Capital Punishment (1977).

[7] Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

[8] *See, e. g.*, Gregg v. Georgia, 428 U.S. 153, 183 (1976).

[9] T. Sellin, The Death Penalty (ALI 1959), also printed at MPC § 201.6, T. D. 9, at 221 (1959). *See* Sellin, *Capital Punishment*, 25 Fed.Probation, Part 3, at 3 (1961); Sellin, *Homicides in Retentionist and Abolitionist States*, in Capital Punishment (T. Sellin ed. 1967).

[10] T. Sellin, The Death Penalty 34 (ALI 1959).

veals himself as doubtfully within the reach of influences that might be especially inhibitory in the case of an ordinary man. These factors, therefore, leave room for substantial doubt that any solid case can be maintained for the death penalty as a deterrent to murder, at least as it is employed in the United States. If this conclusion is correct, it would seem that the social need for grievous condemnation of the act can be met, as it is met in abolition states, without resorting to capital punishment.

Sellin's work proved extremely influential for almost 15 years. It survived without major challenge until Professor Isaac Ehrlich's efforts to test implications of general deterrence theory in the context of capital punishment.[11] Ehrlich looked at the relationship between the homicide rate in the nation as a whole and the "execution risk," that is, the fraction of convicted murderers who are actually put to death. He tried to hold other factors constant by the technique of multiple regression analysis. From experience in the United States from 1933 through 1967 Ehrlich drew the tentative conclusion that execution of an offender tended on the average to deter eight homicides.[12] This finding prompted a storm of controversy that has not yet begun to abate. Sellin's work and Ehrlich's analysis have been attacked and defended on methodological grounds,[13] and each has been tested by replication.[14] These disputes of methodology and statistical technique are largely be-

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[11] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 Am.Econ.Rev. 397 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death* (Working Paper No. 18, Center for Economic Analysis of Human Behavior and Social Institutions, 1973).

[12] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 Am.Econ.Rev. 397, 398, 414 n. 15 (1975).

[13] *See, e. g.*, Zeisel, *Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 Sup.Ct.Rev. 317 (1976); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975); Ehrlich, *Deterrence: Evidence and Inference*, 85 Yale L.J. 209 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and his Critics*, 85 Yale L.J. 359 (1976); Ehrlich, *Rejoinder*, 85 Yale L.J. 368 (1976).

[14] W. Bowers, Executions in America 137–47 (1974); Bailey, *Murder and the Death Penalty*, 65 J.Crim.L.C. & P.S. 416, 421 (1974); Passel, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 Stan.L.Rev. 61 (1975); Passel & Taylor, *The Deterrent Effect of Capital Punishment: Another View* 9–11 (Discussion Paper 74–7509, Columbia Univ. Dept. of Economics, Feb. 1975).

yond the competence of those without special training in the field. Further research may clarify the matter, but at present the verdict must be that the existence of a significant deterrent effect from retention of the death penalty has been neither proved nor disproved.

Apart from the efficacy of the death penalty as a deterrent, its possible imposition exerts a discernible and baneful effect on the administration of criminal justice. A trial where life is at stake becomes inevitably a morbid and sensational affair, fraught with risk that public sympathy will be aroused for the defendant without reference to guilt or innocence of the crime charged. In the rare cases where a capital sentence is imposed, this unwholesome influence carries through the period preceding execution, reaching a climax when sentence is carried out.

The special sentiment associated with judgment of death is reflected also in the courts, lending added weight to claims of error in the trial and multiplying and protracting the appellate processes, including post-conviction remedies. As astute and realistic an observer as Mr. Justice Jackson observed to the Chief Reporter shortly prior to his death that he opposed capital punishment because of its deleterious effects on the judicial process and stated that he would appear and urge the Institute to favor abolition.

Beyond these considerations, it is obvious that capital punishment is the most difficult of sanctions to administer with even rough equality. A rigid legislative definition of capital murders has proved unworkable in practice, given the infinite variety of homicides and possible mitigating factors. A discretionary system thus becomes inevitable, with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place.[15] Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice.

Sellin's data showed a total of 3096 civilian executions for murder in the United States during the years 1930–57.[16] This

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[15] Even when a capital sentence is imposed, the speed as well as the certainty of its execution may depend primarily upon the resignation of the individual or his disposition to pursue appellate and collateral proceedings which may carry on for years. Indeed, as recent experience has shown, even the resignation of the individual to execution will not necessarily bring litigation to an end. *See* Gilmore v. Utah, 429 U.S. 1012 (1976).

[16] T. Sellin, The Death Penalty 5 (ALI 1959).

number represents only a small fraction of all murder convictions. The annual number of executions declined noticeably across this time period. The decline resulted in part from a decreasing homicide rate and in part from the removal of mandatory death sentences in a few jurisdictions, but it also reflects a growing reluctance by judges and juries to impose the ultimate sanction.[17] Subsequent experience confirms the point that imposition of the death penalty is an increasingly rare occurrence. The average annual rate of execution dropped from 128 in the 1940's to 72 in the 1950's to 31 in the years 1960–65.[18] These figures give rise to the argument that the death penalty is actually carried out so rarely that its imposition in any particular case must be arbitrary. As Mr. Justice Stewart captured the thought in a constitutional context, "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." [19] Discomfort with the discretionary aspects of the system is aggravated, moreover, by a suspicion that the grounds for differentiating among individuals may include illegitimate factors such as race.[20] Finally, there is the point that erroneous convictions are inevitable and beyond correction in the light of newly discovered evidence when a capital sentence has been carried out.

These, then, are the major arguments against capital punishment for murder. The arguments on the other side may well begin with crediting some deterrent efficacy to the threat of death as punishment, given the weight that such a threat appears to have on introspection. However one evaluates the studies by Sellin and Ehrlich, reported homicide rates per 100,000 of population may be too crude an instrument to reflect all the cases where the threat has been effective [21]; and it may be regarded

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[17] *Id.* at 11–14.

[18] United States Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 46, Capital Punishment 1930–1970, at 8 (Aug. 1971).

[19] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

[20] More than half the persons executed in the years 1930–57 were nonwhite. T. Sellin, The Death Penalty 5 (ALI 1959). *See also* Furman v. Georgia, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

[21] *Cf.* Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw.U.L.Rev. 433, 457 (1957):

> In the thirty years from 1910 to 1939 the ten year average murder rate in England fell from 4.1 to 3.3 per million. Yet if the death penalty had been abolished at the beginning of this period . . . and if this had resulted in 100 more murders than there actually were during this

as sufficient to justify the means that some innocent lives *may* be preserved.

Many would argue, further, that it is appropriate for a society to express its condemnation of murder by associating the offense with the highest sanction that the law can use, however much considerations of humanity should temper the exaction of the penalty when there are extenuations. And some communities may still have cause to fear the greater evil of resort to private violence as reprisal, if the law excludes the possibility that the murderer may lose his life. The problem of equality, to which attention has been drawn, will not appear to all to be dispositive. Arguments based on the discretionary character of the death penalty and the infrequency of its imposition may call for reform and review of the discretionary system rather than abolition of the punishment. And it may be thought enough that the capital penalty is merited in any case in which it actually is imposed. Finally, these arguments may be regarded as outweighing the costs of the penalty to the administration of justice, given the difficulty of measuring the effect of such factors on the deterrence and the condemnation points.

Whatever the merits of the debate, in any event, capital punishment continues to command substantial political support within the American system.[22] It is as clear today as it was when the Model Code was drafted that many jurisdictions will continue to authorize the death penalty for at least some offenses for a considerable time to come. Those jurisdictions that elect to retain the penalty must confront the special need to pro-

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period, there would still have been a substantial decrease (from 4.1 to 3.5 million) in the murder rate following this abolition.

[22] As of 1976, 10 states had abolished the death penalty for all crimes: Alaska (1957), Hawaii (1957), Iowa (1965), Maine (1887), Michigan (1847), Minnesota (1911), Oregon (1964), South Dakota (1976), West Virginia (1965), and Wisconsin (1853). Popular support for the death penalty, as indicated by the Gallup polls, declined consistently from 62 per cent in 1936 to 42 per cent in 1966. After 1966, however, the trend reversed and by 1969 the approval rating had risen to 51 per cent. Erskine, *The Polls: Capital Punishment*, 34 Pub.Opinion Q. 290 (1970). A nationwide Harris survey conducted in 1973 showed that 59 per cent of the American people supported the death penalty for murder while 31 per cent opposed it. The Harris Survey, Louis Harris and Associates Inc., New York, N.Y., June 11 and 14, 1973 (Copyright, The Chicago Tribune, 1973). The reaction to the *Furman* decision by the national and state legislatures, see text accompanying note 149 *infra*, and to the 1976 death penalty decisions, see text accompanying notes 191–192 *infra*, is further evidence of the substantial political support the death penalty commands.

vide a fair and rational system of administration and to meet recently developed constitutional standards. Section 210.6 addresses that need.

3. *Crimes Other than Murder.* Although the Model Code neither endorses nor rejects capital punishment for murder, it does disallow the death penalty for all other offenses. This decision marks a significant departure from prior law. As of 1959, some 35 jurisdictions punished kidnapping as a capital offense, and treason and rape were capital crimes in 25 and 21 jurisdictions, respectively.[23] Less commonly, the death penalty was authorized for some forms of robbery, lynching, bombing, arson, trainwrecking, burglary, and some varieties of aggravated assault.[24] Recently enacted statutes have added aircraft hijacking to the list.[25]

For some of these crimes, the Model Code has no parallel. Thus, the Code omits treason on the ground that political disloyalty is properly handled as an offense against the national government. State treason statutes are used, if ever, against instances of violent insurrection already covered by other offenses. The Code also contains no separate provision against aircraft hijacking.[26] No need for a special offense on this subject was apparent during the period when the Model Code was drafted. Finally, the Model Code assimilates many narrowly drafted state statutes into more broadly defined crimes. Thus, for example, lynching is covered as a form of homicide and not as a distinct offense.

Of course, the Model Code does continue as non-capital offenses several crimes for which the death penalty has been authorized in some American states. Of these, kidnapping, robbery, arson, burglary, and assault seem to have been punishable by death principally because they commonly involve risk to life. Where death of another occurs in the course of such conduct, the actor may be prosecuted for homicide, and the death penalty may come into play in those jurisdictions that choose to retain

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[23] T. Sellin, The Death Penalty 4 (ALI 1959).

[24] *Id.* For a more detailed listing, see H. Bedau, The Death Penalty in America 42–52 (1964).

[25] *E. g.*, Ga. § 27–2534(1)(a); 49 U.S.C. § 1472. *See also* note 50 *infra*.

[26] Aircraft hijacking is included within the offense of terroristic threats, as defined in Section 211.3 *infra*. Under this section it is a felony of the third degree to threaten to commit any crime of violence with the purpose to terrorize another or to cause serious public inconvenience.

capital punishment for murder. Where the risk of homicide is not realized, however, the ultimate sanction seems plainly excessive. This judgment is confirmed by experience if not by the statutes. In the years from 1930 through 1957, only 61 persons were executed for crimes other than murder and rape.[27] Of these, eight were put to death by the federal government for espionage.[28] That leaves an average of fewer than two executions annually for kidnapping, robbery, burglary, and assault combined. This history comes close to *de facto* abolition of the death penalty for these crimes, and the Model Code makes that position explicit. It might be added also that recent Supreme Court decisions discussed in connection with rape, below, and in Comment 12, *infra,* make it increasingly doubtful that capital punishment in any context where a life is not taken will survive constitutional challenge.

Rape involves somewhat different concerns. Although coercive sexual intercourse generally entails assaultive behavior, the gravamen of the crime is not risk to life but the extreme indignity of forced sexual intimacy. Nevertheless, prior to the recent constitutional decisions on the death penalty, slightly more than one-third of the states retained capital punishment for rape.[29] Following the *Furman* decision in 1972, six Southern states reenacted the death penalty for some form of rape.[30]

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[27] T. Sellin, The Death Penalty 11 (ALI 1959).

[28] *Id.*

[29] In 1926, 20 American jurisdictions (18 states, the federal government, and the District of Columbia) made rape of an adult female punishable by death. Bye, *Recent History and Present Status of Capital Punishment in the United States,* 17 J.Crim.L.C. & P.S. 234, 241–42 (1926). By 1971 the number had decreased to 17 (16 states and the federal government). *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning,* 57 Calif.L.Rev. 839, 844 (1969).

[30] All 17 jurisdictions with capital-rape statutes in 1971 allowed the death penalty to be imposed at the unguided discretion of the jury; hence none of these statutes survived Furman v. Georgia, 408 U.S. 238 (1972). Following *Furman,* only Georgia, North Carolina, and Louisiana enacted statutes making rape of an adult female punishable by death. Ga. § 27–2534.1; La. § 14:42; N.C. § 14–21. However, in North Carolina and Louisiana the death penalty was mandatory, and these statutes were effectively invalidated by Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976). In 1977, the Supreme Court struck down the Georgia statute as well. Coker v. Georgia, 433 U.S. 584 (1977). Florida, Mississippi and Tennessee also enacted post-*Furman* legislation authorizing the death penalty for certain rapes of children by adults. Fla. § 794.01(1); Miss. § 97–3–65; Tenn. § 39–3702. However, the Tennessee capital-sentencing stat-

The Model Code's exclusion of capital punishment for rape rests in part on the several reasons for opposing the death penalty in any context. The character and irrevocability of the sanction call for a generally cautious approach to its use. Additionally, the sentence of death may seem a disproportionate and excessive penalty for any crime not involving loss of life. One need not gainsay the gravity of rape to believe that it is not as heinous as murder and that a properly proportionate scheme of penalties requires a lesser sanction. Finally, the history of actual imposition of the death sentence for rape is distinctly unsettling. In the years 1930–57, the states executed 409 persons for rape.[31] All of these executions took place in the South or in border states.[32] Of the 409 persons put to death, 366 were black.[33] Disparity of this magnitude is too suggestive to ignore, and more recent data follow the same trend.[34] In combination these factors persuaded the Institute that death should not be an authorized penalty for rape.

This judgment has recently been confirmed by the Supreme Court in unequivocal terms. In *Coker v. Georgia*,[35] the Court

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ute was mandatory and was held invalid under the *Woodson* and *Roberts* decisions. *See* Collins v. State, 550 S.W.2d 643 (Tenn.1977), *cert. denied*, 434 U.S. 905 (1978). Of the states to enact new capital-punishment statutes since *Woodson* and *Roberts*, only North Carolina authorized the death penalty for some form of rape. The statute provides for a sentence of death for rape of a "virtuous female" under 12 years of age. N.C. § 14–21. This statute would now appear to be unconstitutional under the *Coker* decision discussed in the text accompanying note 35 *infra*.

[31] T. Sellin, The Death Penalty 7 (ALI 1959).

[32] *Id.* The following states executed at least one person for rape in the years 1930–57: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

[33] *Id.*

[34] In the period 1958 to 1965, seven whites and 36 blacks were executed for rape. There were no executions for rape in the United States from 1965 through 1975. United States Dept. of Justice, Law Enforcement Administration, National Prisoner Statistics Bulletin No. SD–NPS–CP–3, Capital Punishment 1974 at 16–17 (November 1975); Brief for Petitioner at 52, n. 59 in Coker v. Georgia, 433 U.S. 584 (1977). On July 2, 1976, of the 28 persons under sentence of death for rape in the United States, 21 were black. *Id.* at 54. For an exhaustive statistical analysis of racial discrimination in the imposition of the death penalty for rape which examines the possible significance of non-racially related factors, see Wolfgang & Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals 119 (1973).

[35] 433 U.S. 584 (1977). For a pre-*Coker* discussion of the subject, see White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U.Pitt.L.Rev. 145 (1976).

held that the sentence of death "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruei and unusual punishment." [36] The Court was plainly influenced by the fact that only three states responded to the Furman decision by enacting death penalty statutes for rape of an adult [37] and by the small number of persons sentenced to death under the Georgia statute. But the Court faced the proportionality argument and squarely rested its decision on that ground:

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.
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> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder. . . . We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," . . . is an excessive penalty for the rapist who, as such, does not take human life.[38]

4. *Background of Capital Murder.* Before undertaking an explanation of the approach reflected in Section 210.6, it is necessary to consider the background against which it was written. From the common-law heritage on which the American legal system was based, there were primarily two innovations that dominated thought about how the capital sanction should be ad-

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[36] 433 U.S. at 592 (footnote omitted). Six members of the Court joined or concurred in this judgment. Mr. Justice Powell agreed that the death penalty should be set aside on the facts before the Court but left open the possibility that the death penalty might be appropriate for certain forms of aggravated rape. The Chief Justice and Mr. Justice Rehnquist dissented.

[37] *See* note 30 *supra.*

[38] 433 U.S. at 597 (footnotes omitted).

ministered. These were the advent of the degree structure introduced in Pennsylvania in 1794 and the introduction of discretion pioneered by Tennessee in 1838. Each of these developments merits further consideration.

(a) *The Common Law.* The early common law punished only a single offense of criminal homicide. The offense carried a capital sanction, subject to the exclusion of those entitled to benefit of clergy. Persons in that category came within the more lenient system of punishments administered by the ecclesiastical authorities.[39] Over time the standards for claiming benefit of clergy became so relaxed that virtually any literate person could avoid the capital sanction for unlawful homicide. The secular powers reacted with a series of statutes that restricted ecclesiastical jurisdiction by withdrawing benefit of clergy for "murder upon malice prepensed."[40] These statutes initiated the division of criminal homicide into the distinct offenses of murder and manslaughter. Murder, which was defined in terms of the developing concept of "malice prepense" or "malice aforethought," retained the status of a capital offense. All other unlawful homicides were punished as manslaughter.[41]

The subsequent history of capital murder at common law may be charted in the evolution of the phrase "malice aforethought." At one time the term probably meant homicidal intent conceived well in advance of the fatal act. The common-law courts, however, stretched the concept until it came to stand for any of several mental states deemed sufficient to support liability for murder. Thus, there developed variants of murder based on intent to kill, intent to cause grievous bodily harm, intent to commit a felony, and extreme recklessness or negligence indicating a depraved

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[39] 1 J. Stephen, History of the Criminal Law of England 459–64 (1883).

[40] 12 Hen. 7, ch. 7 (1496) ("willful prepensed murders"); 4 Hen. 8, ch. 2 (1512) ("murder upon malice prepensed"); 23 Hen. 8, ch. 1, §§ 3, 4 (1531) ("willful murder of malice prepensed"); 1 Edw. 6, ch. 12, § 10 (1547) ("murder of malice prepensed").

[41] After 1547, manslaughter remained clergyable and, for those persons entitled to benefit of clergy, was punishable by branding the left thumb with an "M." 4 Hen. 8, ch. 13 (1487). Only clergy who were actually members of an order were entitled to benefit of clergy more than once. For those not entitled to benefit of clergy, manslaughter was a felony punishable with death, unless committed in self-defense or by "misadventure," in which case the convict would avoid hanging by purchasing a royal pardon and forfeiting his chattels. 21 Edw. 3, ch. 17B (1348). *Cf.* 24 Hen. 8, ch. 5 (1532).

heart. The earlier connotation of advance design was narrowed into the common-law rule of provocation. This doctrine punished as manslaughter rather than murder intentional homicide committed in a sudden heat of passion engendered by adequate provocation. If the provoking event were not deemed legally sufficient, the crime was murder no matter how suddenly the homicidal act followed intent to kill. The upshot of this history is that the capital crime of murder gradually expanded, and the residual offense of manslaughter underwent a corresponding contraction in scope.[42]

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[42] The common law remained unchanged in England until the Homicide Act of 1957, with reliance in the interim placed on the prerogative of mercy, as exercised by the Home Secretary in the name of the sovereign, to mitigate the rigors of the law in proper cases. In the years 1900–1948, over 46 per cent of all death sentences were commuted. *See* Royal Comm'n on Capital Punishment, Minutes of Evidence 1–15, 23–25 (1949). Dissatisfaction with this sytem, based primarily upon the cruelty of passing sentence in so many cases where it would not be carried out and the fact that the decisive judgment was so largely made *in camera*, was felt for the best part of a century before a major change was made. There were, however, mitigations adopted in the Childrens Act of 1908 (excluding the death sentence for persons under 16), the Infanticide Act of 1922 (excluding the capital sanction for certain cases of infanticide by the mother), and the Sentence of Death (Expectant Mothers) Act of 1931 (excluding death for pregnant women).

The English system survived so long because successive commissions, established to propose improvement, concluded that adequate statutory grading was impossible and discretion in the judge or jury undesirable. *See* Royal Comm'n on Capital Punishment, Report, CMD. No. 8932, at 159–77, 190–208, 467–74 (1953); House of Commons, Select Committee on Capital Punishment, Report §§ 162 to 182 (1930). The Homicide Act of 1957, however, adopted the grading device that the British theretofore had so steadfastly rejected. The capital class was limited to a second murder and to the following cases: murder in the course or furtherance of theft; murder by shooting or by causing an explosion; murder in the course, or for the purpose, of resisting or preventing a lawful arrest or effecting or assisting an escape from legal custody; murder of a police officer acting in the execution of his duty or of a prison officer by a convict or of a person assisting such an officer. In any case, however, the murder was capital only for the actor whose "own act" caused the death and not for an accomplice. Sentence of death was also excluded for persons under 18 years of age at the time of the murder.

The theory of the retention of the death sentence in the enumerated classes of murders was not that they afforded a principled delineation of the most offensive homicides or an indication of the gravest depravity of character, but rather that under prevailing circumstances in England they struck at the professional criminal and eliminated what was regarded as the special danger that he might be led to carry and resort to firearms if the death penalty should be removed. *See* Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 Colum.L.Rev. 624, 648–50 (1957);

(b) *The Advent of Grading.* The first major limitation on capital murder in the United States was the Pennsylvania Act of 1794. In the years preceding the American Revolution, Pennsylvania had witnessed the growth of a movement for reform of the penal law generally and for moderation of punishments in particular.[43] Rather than attempting redefinition of the traditional crimes of murder and manslaughter, the reformers sought to confine the capital sanction to instances of murder deemed especially heinous. The Act of 1794 provided that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree. . . ." [44] Only first-degree murder was capital.

As a model for subsequent legislation, the Pennsylvania statute proved extremely influential. Virginia adopted the reform in 1796,[45] and other states soon followed suit. At the time the Model Code provision on capital murder was drafted, 34 American jurisdictions had laws based closely on the original Pennsylvania formulation.[46] Some states added "torture" or "starving" to the specification of methods of first-degree murder,[47] and a few jurisdictions added a cate-

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Elliott, *The Homicide Act* [1957] Crim.L.R. 282. Viewed as a means to these ends, the value of the formulation was regarded as peculiar to the British situation and thus as not suggestive of the course that should be followed in drafting a model penal code for American use. It also was subjected to severe criticism even in the British context. *See* Prevezer and Elliott, *supra.*

England abolished the death penalty in the Murder (Abolition of Death Penalty) Act, 1965, 8 Halsbury's Statutes of England 541.

[43] *See* Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder,* 97 U.Pa.L.Rev. 759, 764–73 (1949).

[44] Pa.Laws 1794, ch. 257, §§ 1 and 2.

[45] 2 Va.Stat. § 1.2, at 5–6 (Sheperd 1796).

[46] For a compilation of these statutes, see MPC § 201.6, T.D. 9, App. C, at 115–20 (1959); Comment, *Lying in Wait Murder,* 6 Stan.L.Rev. 345, 347 n. 22 (1954). The single murder category of the common law had survived in only 10 states at this time, one of them being Maine, an abolition jurisdiction. *See* MPC § 201.6, T.D. 9, at 66 (1959).

[47] *E. g.,* Cal. § 189 ("torture") (current version at Cal. § 189); Va. § 4393 ("starving") (current version at Va. § 18.2–32); W.Va. § 5916 ("starving") (current version at W.Va. § 61–2–1). For a complete compilation of the fac-

gory of extreme recklessness to the capital version of the offense.[48] After the Lindbergh experience, many jurisdictions amended their statutes to include kidnapping within the rule of first-degree felony murder,[49] and more recently some states have added aircraft hijacking to the list.[50]

Despite its success as a model for other states, the Pennsylvania statute did not achieve a rational or intelligible limitation of capital murder. For one thing, there has always been some confusion over whether a murder committed by one of the specified means—*e. g.*, poison—must also be found "wilful, deliberate and premeditated" in order to support the capital sanction. Some courts invoked the principle of *ejusdem generis* and applied the "deliberate and premeditated" requirement to murder by whatever means.[51] Others construed the statute literally and found use of a specified method of murder an independently sufficient basis for classification as a capital offense.[52] Of course, the latter interpretation tends to rob the statute of any consistent basis for differentiating the degrees of murder.

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tors determinative of first-degree murder in 1959, see MPC § 201.6, T.D. 9, App. C, at 115–20 (1959).

[48] Murder is first-degree if committed by an act "imminently dangerous to others" and evincing a "depraved mind." *See, e. g.*, N.Y. § 1044 (current version at N.Y. § 125.25; classified as second-degree murder); Wash. tit. 4, § 2392 (current version at Wash. § 9A.32.030).

[49] *E. g.*, La. art. 740–30 (current version at La. § 14:30.1; classified as second-degree murder); N.H. ch. 455, § 1 (current version at N.H. 630:1–B; classified as second-degree murder); Pa. tit. 18, § 2221 (current version at Pa. tit. 18, § 2502(a); classified as first-degree murder). A number of other felonies were added in some states, principally including mayhem, larceny, and sodomy. Perjury was also added in one state. For a complete compilation of the factors in use in each state at this time, see MPC § 201.6, T.D. 9, App. C, at 115–20 (1959).

[50] *E. g.*, Ark. § 41–1501(1)(a) ("vehicular piracy"); Neb. § 28–401 ("hijacking of any public or private means of transportation"); Tenn. § 39–2402(4) ("aircraft piracy").

[51] *E. g.*, State v. Moffitt, 199 Kan. 514, 431 P.2d 879 (1967); People v. Thomas, 25 Cal.2d 880, 156 P.2d 7 (1945).

[52] *E. g.*, People v. Valentine, 28 Cal.2d 121, 136, 169 P.2d 1, 10 (1946) (murder by means of poison, torture or lying in wait is a separate category of first-degree murder, without regard to the elements of willfulness, deliberation or premeditation); Jackson v. State, 180 Tenn. 158, 172 S.W.2d 821 (1943) (murder committed by lying in wait is presumptively conclusive of premeditation and deliberation).

More pervasively, the Pennsylvania reform was undermined by the inability or unwillingness of courts to settle on any dependable content for the "deliberate and premeditated" formula. Early Pennsylvania decisions read this language to require nothing more than proof of intentional homicide.[53] Since intent to kill is the chief meaning of the "malice aforethought" concept used to define murder generally, identifying that state of mind as sufficient for murder in the first degree blurs any distinction between the two categories of the offense. Other jurisdictions experienced similar difficulties,[54] and modern decisions revealed continuing conflict and uncertainty about the distinguishing criteria of capital murder.[55] At least in some jurisdictions, an intention to kill could be "deliberate" even though it was not a product of calm reflection and "premeditated" even though no appreciable time elapsed between the intention and the act.[56] As a Massachusetts court stated:

> It is not so much a matter of time as of logical sequence. First the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution; and all this may occur in a few seconds.[57]

Reflective incapacity, whether produced by transport of passion or other cause, did not therefore preclude a first-degree conviction unless it excluded formulation of a conscious purpose to kill.[58] Indeed, where the cause of such claimed inca-

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[53] Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U.Pa.L.Rev. 759, 773–75 (1949).

[54] *See* Michael & Wechsler, *A Rationale for the Law of Homicide I*, 37 Colum.L.Rev. 701, 707–09 (1937).

[55] *Compare* People v. Anderson, 70 Cal.2d 15, 447 P.2d 942, 73 Cal.Rptr. 550 (1968), *and* People v. Granados, 49 Cal.2d 490, 319 P.2d 346 (1957), *with* Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963).

[56] *See* Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963).

[57] Commonwealth v. Tucker, 189 Mass. 457, 495, 76 N.E. 127, 141 (1905). For other decisions, see Michael & Wechsler, *A Rationale of the Law of Homicide I*, 37 Colum.L.Rev. 701, 707–08 (1937). *See also* Brenner, *The Impulsive Murder and the Degree Device*, 22 Fordham L.Rev. 274, 280 *et seq.* (1953); Knudson, *Murder by the Clock*, 24 Wash.U.L.Q. 305 (1939).

[58] While this was the prevailing view at the time the Model Code was drafted, there were dissenting jurisdictions. Some states recognized the possibility that mental abnormality could negate deliberation and premeditation, even though an intention to kill could still be formed. *See* note 97 *infra*. Other states required more than an intent to kill. In Missouri, for example,

pacity was mental disease or deficiency short of irresponsibility, many jurisdictions held the claim irrelevant, anomalously it would seem, since they would concede the relevancy of intoxication.[59]

In such circumstances, it was a task of surpassing subtlety to say what the "deliberate and premeditated" formula did require. This confusion prompted Cardozo's famous remark, which may well serve as the epitaph for the traditional distinction between degrees of murder:

> What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.[60]

Most importantly, judicial inconsistency and obscurity are largely symptomatic of the lack of an intelligible policy underlying the Pennsylvania formulation. To the extent that the words "deliberate and premeditated" have ascertainable

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it was held that a "cool state of the blood" was essential for deliberation, at least in cases that involved a cause of passion that was meaningful even if not legally sufficient to reduce the homicide to manslaughter. *See* State v. Speyer, 207 Mo. 540, 553, 106 S.W. 505, 509 (1907); State v. Kotovsky, 74 Mo. 247, 249–51 (1881); *see also* Torres v. State, 39 N.M. 191, 43 P.2d 929 (1935); Winton v. State, 151 Tenn. 177, 268 S.W. 633 (1925); *cf.* Fisher v. United States, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting). There was some approach in this direction in New York, where it was specially demanded by the logic of the statute then in effect, since second-degree murder was not, as in most states, a residual category. Rather, it was specially defined as a killing with design but without premeditation and deliberation. The statutory scheme would therefore have been nullified if deliberation were construed to mean only design. *See* B. Cardozo, *What Medicine Can Do for Law*, in Law and Literature and Other Essays and Addresses 70, 99–100 (1931); People v. Zackowitz, 254 N.Y. 192, 194–95, 172 N.E. 466, 467 (1930). There were reversals of convictions on the ground that the defendant was too distraught to have deliberated, notwithstanding sufficient time. *See, e. g.*, People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927); People v. Fiorentino, 197 N.Y. 560, 91 N.E. 195 (1910); People v. Barberi, 149 N.Y. 256, 43 N.E. 635 (1896). Such decisions were exceptional, however. If the jury had been instructed that it must find that there was in fact some deliberation, a first-degree verdict almost certainly would have been upheld.

[59] *See* Fisher v. United States, 328 U.S. 463 (1946).

[60] B. Cardozo, *What Medicine Can Do for Law*, in Law and Literature and Other Essays and Addresses 70, 99–100 (1931).

meaning, they suggest a plan or design conceived well in advance of the homicidal act. Under this view, a significant lapse of time between initial determination to kill and the act of killing would be the critical evidentiary fact. When this distinction is used to define capital murder, it probably rests on the premise that there exists some dependable relation between the duration of reflection and the gravity of the offense. Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis.

It seems clear that the deliberation standard ought to exclude from the capital category cases where the homicide is committed under the influence of an extreme mental or emotional disturbance produced by causes that give rise to proper sympathy for the defendant. But insofar as this is the objective to be sought, it is accomplished by the provision for a reduction to manslaughter in Section 210.-3(1)(b) in cases of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse." Given this recognition of the role of mental or emotional disturbance, the case for a mitigated sentence on conviction of murder does not depend on a distinction between impulse and deliberation. Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor's normal character. Thus, for example, one suspects that most mercy killings are the consequence of long and careful deliberation, but they are not especially appropriate cases for imposition of capital punishment. The same is likely to be true with respect to suicide pacts, many infanticides, and cases where a provocation gains in its explosive power as the actor broods about his injury.[61]

It also seems clear, moreover, that some purely impulsive murders will present no extenuating circumstance. The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required. As Stephen put the point long ago:

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[61] *See, e. g.*, State v. Gounagias, 88 Wash. 304, 153 P. 9 (1915).

> As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A man passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as 'aforethought' in 'malice aforethought,' but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.[62]

A similar argument was advanced by the Home Office in testimony submitted to the Royal Commission on Capital Punishment:

> Among the worst murders are some which are not premeditated, such as murders committed in connection with rape, or murders committed by criminals who are interrupted in some felonious enterprise and use violence without premeditation, but with a reckless disregard of the consequences to human life. . . . There are also many murders where the killing is clearly intentional, unlawful and unaccompanied by any mitigating circumstances, but where there is no evidence to show whether there was or was not premeditation.[63]

In short, the notion that prior reflection should distinguish capital from non-capital murder is fundamentally unsound.

Even graver objections apply to the alternative basis of capital murder under the Pennsylvania formulation—homicide committed in the perpetration or attempted perpetration of specified felonies. The felony-murder rule premises liability for murder on the underlying felony and does not require proof of any culpability with respect to the homicide itself. Thus, this doctrine punishes as murder some homicides that are merely negligent and even some killings

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[62] 3 J. Stephen, History of the Criminal Law 94 (1883).

[63] Royal Comm'n on Capital Punishment, Minutes of Evidence 12; Report, CMD. No. 8932, at 174–75 (1953).

that are truly accidental. Punishing some instances of felony murder as a capital crime simply compounds the fundamental illogic and unfairness of this rule of strict liability.[64]

(c) *The Advent of Discretion.* At common law, death was the exclusive and mandatory penalty for many crimes. The American colonies reduced the number of capital offenses but continued to impose a death sentence on every person convicted of specified felonies. Although the Pennsylvania reform narrowed the definition of capital murder, it did not alter the mandatory character of the sanction. Death remained the automatic penalty for all murder, or in many states first-degree murder, in every American jurisdiction until 1838, when Tennessee introduced sentencing discretion in capital cases.[65] Alabama and Louisiana quickly followed suit,[66] and by the turn of the century, 23 American jurisdictions had authorized discretionary imposition of capital punishment for the highest category of murder.[67]

The origins of this idea are not altogether clear. The most obvious explanation is that legislators, viewing mandatory capital punishment against a background of increasingly widespread sentencing discretion in other contexts, simply thought the reform better policy. Moreover, the movement toward discretion gained impetus from the refusal by juries to regard every instance of murder or of "deliberate and premeditated" homicide as an appropriate case for the death penalty. Many killings plainly within any ordinary construction of the offense seemed equally clearly not to warrant the ultimate sanction. In such cases, juries balked at conviction of the capital offense. In some circumstances, this exercise of unauthorized discretion resulted in convic-

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[64] For a more detailed discussion of the felony-murder rule, see Comment 6 to Section 210.2 *supra*.

[65] Tenn.Laws 1837–38, Act of June 10, 1838, ch. 29.

[66] Ala.Penal Code of 1841, Act of Jan. 9, 1841, ch. 3, § 1; La.Acts 1846, Act of June 1, 1846, No. 139.

[67] Tennessee (1838), Alabama (1841), Louisiana (1846), Texas (1858), Georgia (1861 and 1866), Illinois (1867), Minnesota (1868), West Virginia (1870), Florida (1872), Mississippi (1872), Kentucky (1873), California (1874), Utah Territory (1876), Iowa (1878), Indiana (1881), Dakota Territory (1883), Arizona Territory (1885), Oklahoma Territory (1890), Nebraska (1893), South Carolina (1894), the United States (1897), Ohio (1898), and Alaska (1899). *See* Brief for the United States as *Amicus Curiae*, App. B, in McGautha v. California, 402 U.S. 183 (1971).

tion of a lesser offense, but it sometimes led to outright acquittal. Thus, in large part, the introduction of discretion reflected an effort to avoid jury nullification.[68]

Additionally, it has been suggested that the advent of discretionary sentencing in capital cases was a triumph of early movements to abolish the death penalty altogether.[69] Agitation for abolition of capital punishment flourished in the three decades immediately preceding the Civil War, waned in the aftermath of that bloody conflict, and revived again in the last third of the nineteenth century.[70] Although the reformers secured total abolition in only a few states,[71] their activities undoubtedly contributed to a further reduction in the number of capital offenses and to the elimination of death as a mandatory punishment for murder. But while abolitionists may have welcomed discretionary sentencing as a step in the right direction, they must also have recognized that it made attainment of their ultimate goal more remote. During the course of the nineteenth century, six states substantially ended capital punishment.[72] Prior to abolition, none of these jurisdictions had authorized sentencing discretion; each moved to abolition from a mandatory death penalty for murder. Subsequently two of these states reinstated that sanction on a discretionary basis.[73] On the other hand, no state allowing jury discretion in capital cases acted to eliminate the death

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[68] H. Bedau, The Death Penalty in America 27 (rev. ed. 1967). *Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. Rev. 32 (1974); H. Kalven & H. Zeisel, The American Jury 306–12 (1966).

[69] *E. g.*, Furman v. Georgia, 408 U.S. 238, 339 (1972) (Marshall, J., concurring).

[70] Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 Am.Hist.Rev. 23 (1957); Filler, *Movements to Abolish the Death Penalty in the United States*, 284 Annals 124 (1952).

[71] *See* Furman v. Georgia, 408 U.S. 238, 372 (1972) (App. 1 to opinion of Marshall, J., concurring).

[72] *Id.* In order of date of abolition, these states were: Michigan (1847), Rhode Island (1852), Wisconsin (1853), Iowa (1872), Maine (1876), and Colorado (1897). Brief for United States as *Amicus Curiae*, App. B, in McGautha v. California, 402 U.S. 183 (1971).

[73] In order of date of reinstatement, these states were: Iowa (1878) and Colorado (1901). Brief for United States as *Amicus Curiae*, App. B, in McGautha v. California, 402 U.S. 183 (1971).

penalty until Minnesota did so in 1911.[74] In short, introduction of jury discretion in capital cases was not so much a prelude to abolition as it was an alternative. For that reason, the shift toward discretionary sentencing undoubtedly had retentionist as well as abolitionist support.

In any event, the movement continued in the twentieth century as 23 additional jurisdictions abandoned mandatory death sentences for murder.[75] By 1959, when the Model Code provision on capital punishment was drafted, only the District of Columbia retained a mandatory death penalty for murder. This last vestige of the common-law heritage was removed in 1962.[76] As of that date, mandatory death penalties existed in the United States only under laws punishing murder or assault with a deadly weapon by a life-term prisoner[77] and under a handful of obscure statutes lacking any history of enforcement.[78] As is elaborated below,[79] a number of states revived the mandatory death penalty following the Supreme Court's decision in *Furman v. Georgia*,[80] but it seems plain that these actions represented an attempt to accommodate the constitutional constraints announced in those opinions rather than a wholly voluntary

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[74] Furman v. Georgia, 408 U.S. 238, 372 (1972) (App. 1 to opinion of Marshall, J., concurring). Minnesota had adopted discretionary sentencing in capital cases in 1868. Minn.Gen.Laws 1868, ch. 88.

[75] These jurisdictions, in order of introduction of sentencing discretion for capital murder, include: Colorado (1901), New Hampshire (1903), Missouri (1907), Montana (1907), Vermont (1910), Idaho (1911), Nevada (1911), Virginia (1914), Arkansas (1915), Wyoming (1915), Maryland (1916), New Jersey (1916), Delaware (1917), Washington (1919), Oregon (1920), Pennsylvania (1925), Kansas (1935), New York (1937), New Mexico (1939), North Carolina (1949), Connecticut (1951), Massachusetts (1951), and Hawaii (1955). Brief for United States as *Amicus Curiae*, App. B, in McGautha v. California, 402 U.S. 183 (1971).

[76] D.C. Act of Mar. 22, 1962, Pub.L. 87–423, § 1, 76 Stat. 46.

[77] Cal. § 4500 (the California Supreme Court by implication held § 4500 to be unconstitutional when it determined the death penalty to be cruel and unusual punishment, *see* People v. Anderson, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972)); R.I. § 11–23–2; Wash. § 9A.32.045(2). The Rhode Island provision was expanded in 1973 to impose capital punishment for murder committed by any inmate of a state adult correctional institution. 1973 R.I.Pub.Laws (Ex.Sess.), ch. 280, § 1.

[78] *See* H. Bedau, The Death Penalty in America 47 (rev.ed.1967).

[79] *See* Comment 12 *infra*.

[80] 408 U.S. 238 (1972).

reversion to prior policy. Indeed, the plurality opinion in *Woodson v. North Carolina*, recognized as much in declining to give weight to post-*Furman* enactments as support for the argument that the mandatory death penalty was constitutional.[81]

The introduction of discretionary sentencing in capital cases solved some problems but created others. It obviuted jury nullification in capital cases, and it contributed to a generai moderation of the societal approach toward the death penaity. In some ways, however, discretionary sentencing became a mask obscuring the underlying problems in the administration of capital punishment. As of 1959, none of the statutes authorizing sentence of death for murder provided standards to guide the determination whether to impose that penalty.[82] Discretion always includes the possibility of abuse, and discretion that is neither disciplined nor informed by intelligible standards is all the more likely to be exercised on unacceptable bases. Moreover, *ad hoc* decision-making tends to undermine consistency and predictability of result. The lack of consistency across cases gives rise to an argument of unfairness in every instance in which the death penalty is actually imposed, and the absence of any predictable basis for invoking the sanction tends to vitiate any deterrent impact that it might otherwise exert.

5. *The Model Code Approach.* For reasons explained in the preceding commentary, the Model Code does not follow the degree structure used by prior law to determine the category of capital murder. A system of wholly unguided discretion is also rejected. Instead, Section 210.6 attempts a more informative delineation of the instances of murder to which the death penalty should be confined, if its use in any circumstances is admitted.

The starting point is to ask whether the crime of murder includes any identifiable class of cases for which the death penalty should be mandatory. Some states have maintained automatic capital punishment for murder or assault with intent to kill

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[81] The opinion noted that "it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing." 428 U.S. at 298 (1976).

[82] H. Kalven & H. Zeisel, The American Jury 435 (1966). *See* Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099 (1953).

by a life-term prisoner.[83] The apparent rationale is that a person in such circumstance has nothing else to lose; consequently, any lesser sanction must necessarily prove ineffective to deter such conduct. But even granting the force of this argument generally, it is the threat of capital punishment that is indicated, not its actual imposition in every case. Factors relating to the mental or emotional capacity of the individual or to the peculiar circumstances surrounding a given crime may call for mitigation in this context as in any other, despite the marginal diminution of deterrence that may thereby be achieved. The Model Code therefore recognizes no class of cases for which mandatory capital punishment is authorized.

On the other hand, there is at least one class of murder for which the death sentence should never be imposed. This situation is murder by juveniles. The Institute believes that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders.[84] Subsection (1)(d) therefore excludes the possibility of capital punishment where the actor was under 18 years of age at the time of the homicide. Of course, any bright line of this sort is somewhat arbitrary, and many juveniles of lesser years have the physical capabilities and mental ingenuity to be extremely lethal. The Institute debated a motion to lower the age of exclusion to 14 but rejected that proposal on the ground that, however dangerous some children may be, the death penalty should be reserved for mature adults.[85] It should also be noted that 18 is the limit of juvenile court jurisdiction contemplated in Section 4.10 of the Code. A more difficult issue is the choice between an absolute bar of capital punishment, as provided in Subsection (1)(d), and mere consideration of youth as a mitigating circumstance, as indicated in Subsection (4)(h). The Institute defeated a motion to delete the former provision altogether and relegate the offender's age to evaluation as one of several mitigating factors.[86] This decision reflects the view that no juvenile should be executed.

Subsection (1) also excludes the death penalty in three other contexts. Subsection (1)(c) forbids consideration of a death sentence where "the defendant, with the consent of the prosecut-

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[83] *See* note 77 *supra*.

[84] *See* H. Bedau, The Death Penalty in America 52–56 (rev.ed.1967).

[85] ALI Proceedings 157 (1959).

[86] *Id.* at 156.

ing attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree." Imposition of capital punishment in spite of such an understanding would amount to an obviously intolerable breach of faith by the public authorities.[87] Additionally, Subsection (1)(e) precludes capital punishment where "the defendant's physical or mental condition calls for leniency." This language refers to the defendant's condition at sentencing rather than any mitigating factor that may have existed at the time of the crime. It deals with the unusual case of the defendant with a terminal illness or with some catastrophic physical impairment. In such instances, it may be thought that fate's judgment on the defendant is punishment enough and consequently that it is unnecessary for the state to carry out an execution in a particularly gruesome context. Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

The original draft of this section also would have excluded the possibility of capital punishment in cases where "the defendant has previously been sentenced to death for the same crime and his conviction and sentence set aside." [88] The argument in favor of this proposal was set forth in the Comments to Tentative Draft 9:

> [W]e think that there is special cruelty in repeated trials for life, with prisoners moved in and out of death cells as the judgments change. We would not argue for the British practice of excluding a re-trial, but we believe it reasonable to insist that when a capital charge is pressed, the prosecution prevail without error at the trial. If this results in more restraint in the conduct of capital trials, that certainly will be a gain.[89]

[87] Indeed, under recent decisions such a breach of faith would likely be unconstitutional. *Cf.* Santobello v. New York, 404 U.S. 257 (1971). No problem appears to arise under United States v. Jackson, 390 U.S. 570 (1968). The Model Code provision simply recognizes the practice of plea-bargaining in the capital context. *See* Brady v. United States, 397 U.S. 742 (1970). *See also* Lockett v. Ohio, 438 U.S. 586, 613–19 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

[88] MPC § 201.6(1)(f), T.D. 9, at 59 (1959).

[89] *Id.* at 71.

This suggestion won favor in the Advisory Committee and in the Council but was rejected by the Institute.[90] There it was argued that an appellate court, in reviewing a case in which the death penalty had been imposed, would be reluctant to reverse for alleged trial errors if it knew that the sentence could not be reimposed on retrial. This view persuaded a majority of the Institute to delete this exclusion from the draft.

Apart from these special situations, the Institute agrees with the Royal Commission on Capital Punishment that "there are not in fact two classes of murder but an infinite variety of offenses which shade off by degrees from the most atrocious to the most excusable." [91] As the Royal Commission further explained, "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula." [92] It is, however, within the realm of possibility to identify the main circumstances of aggravation and mitigation that should be weighed and *weighed against each other* when they are presented in a concrete case.

The discussion in the Advisory Committee reflected a strong sentiment in favor of tighter controls on the discretionary judgment, the proposal having the most support calling for proof of at least one of the enumerated aggravations to justify a capital sentence. This might be achieved by constructing a class of capital murder, subject to a discretionary death sentence, which lists the aggravating factors in Section 210.6(3) as part of the definition of the offense. Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is the balancing of any aggravation against any mitigation that appear. The object sought is better attained by requiring a finding that an aggravating circumstance is established *and* a finding that there is no substantial mitigating circumstance. Put in this way, the exclusion of cases where there is no aggravating circumstance is accomplished but the concept of a final judgment based upon a balancing of aggravations and of mitigations is maintained. This approach met the views of the Advisory Committee and was approved by the Council and the Institute.[93]

[90] ALI Proceedings 168 (1959).

[91] Royal Comm'n on Capital Punishment, Report, CMD. No. 8932, at 174 (1953).

[92] *Id.*

[93] ALI Proceedings 152, 170 (1959).

6. *Ingredients of the Capital Judgment.* Under Subsection (1)(a) the court is directed to sentence for a first-degree felony, without conducting any further proceeding, if it is satisfied that none of the aggravating circumstances was established by the evidence at the trial or will be established if a further proceeding on the issue of the death sentence is initiated. Thus, if no aggravating circumstance appears from the evidence and the prosecuting attorney does not propose to prove one in the subsequent proceeding, sentence of imprisonment will be imposed. On the other hand, if an aggravating factor appears to exist or might be proved, a separate proceeding is to be conducted, as described below. It is appropriate at this point, however, to consider the substance of the aggravating factors that are deemed sufficient to warrant the sentence of death, bearing in mind that it is a balanced judgment of one or more of these factors against any mitigation that constitutes the ultimate decision. The substance of the mitigating factors prescribed by Subsection (4) will also be considered at this point.

(a) *Aggravating Factors.* Subsection (3) specifies the aggravating circumstances that should be considered in determining whether to impose the capital sanction in a particular case. Paragraph (a) recognizes the need for a special deterrent to homicide by convicts under sentence of imprisonment. Especially where the prisoner has no immediate prospect of release in any event, the threat of further imprisonment as the penalty for murder may well seem inconsequential. For that reason, the Model Code raises the possibility of capital punishment in such a case. Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior 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. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty. Paragraphs (c) and (d) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons. In both in-

stances, the defendant's contemporaneous behavior is not unlike the prior conduct specified as an aggravating factor in Paragraph (b). Paragraphs (e), (f), and (g) identify three further circumstances in which the death penalty should be considered. The first concerns murder committed in connection with designated felonies, each of which involves the prospect of violence to the person. Another such circumstance is murder for the purpose of preventing lawful arrest or escaping from lawful custody. The third is murder for pecuniary gain. Finally, Paragraph (h) states a residual category of murder "especially heinous, atrocious or cruel, manifesting exceptional depravity." Of course, virtually every murder is heinous, but Paragraph (h) addresses the speeial case of a style of killing so indicative of utter depravity that imposition of the ultimate sanction should be considered.

(b) *Mitigating Circumstances.* Against these circumstances of aggravation must be balanced the mitigating factors specified in Subsection (4), as well as any other mitigating evidence offered by the defendant. It is important to note in this respect that the list of mitigating factors provided in Subsection (4) is not exclusive. As developed in Comment 12(c) *infra*, the Supreme Court plurality in the *Lockett* decision held that it is constitutionally necessary to allow the defendant to proffer any aspect of his character or record or any circumstance of the offense in mitigation. The Model Code provision is consistent with this requirement. Subsection (2) provides that the death penalty cannot be imposed unless at least one of the aggravating factors listed in Subsection (3) is found and it is further found "that there are no mitigating circumstances sufficiently substantial to call for leniency." Though a list of potential mitigating factors is provided, there is no language in the Model Code precluding the consideration of other factors raised by the defendant, and it is not intended that the defendant be so precluded. It was the perception, however, that the capital statute should provide a list of the types of considerations that might be regarded as relevant to withholding the capital penalty.

Just as prior conviction of a felony involving violence is designated an aggravating circumstance, the absence of any significant history of prior criminal activity calls for mitigation of sentence under Paragraph (a). The word "significant" was inserted into the tentative-draft formulation iest

a trivial and remote conviction be construed to bar consideration of an otherwise law-abiding life as a mitigating factor. Another characteristic of the offender that cuts against the capital sanction is youth. Subsection (1)(d) excludes the capital sanction altogether where the defendant was under 18 years of age at the time of the homicide. Above that age, the "youth" of the defendant may be considered a factor of mitigation as provided in Paragraph (h) of Subsection (4).

Offender characteristics concerning mental condition are specified as mitigating circumstances in Paragraphs (b) and (g). The former provision deals with imperfect provocation. Section 210.3(1)(b) reduces murder to manslaughter where the homicide is committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." In Paragraph (b) the Code recognizes that, even where extreme emotional distress is not subject to reasonable explanation or excuse, it may be weighed against imposition of the capital sanction. Generally speaking, one who kills in a state of extreme emotional disturbance is not as blameworthy as one who murders while in normal control of his faculties. Paragraph (g) deals similarly with the insanity defense. Section 4.01(1) excludes criminal responsibility where the actor, as a result of mental disease or defect, "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Because legal insanity results in acquittal, Section 4.01 requires a lack of "substantial" capacity before the defense is made out. Some lesser impairment or incapacity may suffice to suggest that the death penalty should not be invoked. Additionally, Paragraph (g) encompasses mental impairment or incapacity resulting from voluntary intoxication.

Taken together, Paragraphs (b) and (g) move toward the approach known in many American jurisdictions as diminished or partial responsibility. This doctrine treats emotional disturbance or defect as a grading factor in the law of homicide. In California, where the idea has received its most elaborate articulation, diminished responsibility applies at two stages. Emotional disturbance or defect may preclude conviction of murder in the first degree. More serious impairment reduces intentional homicide to manslaughter, even though the circumstances do not satisfy the tradi-

tional requirements of the rule of provocation. The California courts tend to explain these results as logical inferences from the definition of homicide offenses. Thus, intoxication and emotional instability are said in some instances to preclude the "deliberation and premeditation" required for first-degree murder.[94] Greater impairment is said to negate that "malice aforethought" that distinguishes murder from manslaughter.[95] Statements of this sort are more nearly conclusions than explanations. They amount to *sub silentio* redefinition of "premeditation and deliberation" and "malice aforethought." The underlying point is that emotional disturbance or defect is relevant to the blameworthiness of the actor even where it does not negate formation of intent to kill. Thus, in California, intentional homicide may be first-degree murder, second-degree murder, or manslaughter, depending on the presence and severity of emotional disturbance or defect. The difference among these offenses turns not on the actor's state of mind (intent to kill in every case) but rather on the quality of that state of mind as an indicator of blameworthiness.

Invocation of this doctrine to reduce murder to manslaughter has not been widely followed in other American jurisdictions.[96] Most courts have adhered to the traditional view that intentional homicide is murder unless it was committed in sudden heat of passion engendered by adequate provocation. On the other hand, a number of states have endorsed diminished responsibility as a basis for differentiating between the degrees of murder.[97] This widespread

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[94] People v. Wolff, 61 Cal.2d 795, 394 P.2d 959, 40 Cal.Rptr. 271 (1964).

[95] People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal.Rptr. 815 (1966).

[96] Decisions in at least five states have allowed serious emotional impairment to reduce intentional homicide to manslaughter. *See* People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal.Rptr. 815 (1966); State v. Santiago, 516 P.2d 1256, 55 Haw. 162 (1973); State v. Nichols, 3 Ohio App.2d 182, 209 N.E.2d 750, 32 O.O.2d 271 (1965); State v. Schleigh, 210 Ore. 155, 310 P.2d 341 (1957); State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

[97] Reported decisions in 20 states and the District of Columbia have allowed "diminished responsibility" to reduce first-degree to second-degree murder. *See* People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492 (1959); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Andersen v. State, 43 Conn. 514 (1876); United States v. Brawner, 153 App.D.C. 1, 471 F.2d 969 (1972); State v. Santiago, 55 Haw. 162, 516 P.2d 1256 (1973); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); State v. Anderson, 515 S.W.2d 534 (Mo. 1974); Washington v. State, 165 Neb. 275, 85 N.W.2d 509 (1957); Fox v.

acceptance springs from the recognition that the "deliberation and premeditation" formula used to define first-degree murder only makes sense if it is construed as an essentially subjective inquiry into degrees of blameworthiness or moral turpitude.[98] Consideration of emotional disturbance or defect is consistent with that understanding. As explained earlier, the Model Code eliminates degrees of murder, in part because of the perception that "deliberation and premeditation" is a particularly wooden and opaque standard for determining who may be subject to the capital sanction. The Code, however, continues to recognize the relevance of emotional distress or mental impairment at the time of the crime as a mitigating factor in assessing whether the death penalty is appropriate in a given case. Paragraphs (b) and (g) accomplish that result in terms derived from the Model Code formulations of provocation and insanity and are included here in order to provide an integrated and systematic scheme for evaluating the effect of mental or emotional abnormality in the law of homicide.

Additional paragraphs in Subsection (4) focus on circumstances surrounding commission of the homicide as factors of mitigation. Paragraph (c) addresses the case where the victim is partially responsible for his own death. This circumstance obtains chiefly in two kinds of situations. First, there are occasions in which the defendant and his victim are engaged jointly in an activity highly dangerous to each. If each person's participation depends upon the cooperation of the other, a murder conviction may lie for the death of one actor, even though both share responsibility. An example may be the case of Russian roulette, at least where the defendant actually fires the shot that kills his partner.[99] A

State, 73 Nev. 241, 316 P.2d 924 (1957); State v. Di Paolo, 34 N.J. 279, 168 A.2d 401, *cert. denied*, 368 U.S. 880 (1961); State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959); People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Adin, 7 Ohio Dec. Reprint 25, 1 W.L.Bull. 38 (1876); State v. Wallace, 170 Ore. 60, 131 P.2d 222 (1942); Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976); State v. Fenik, 45 R.I. 309, 121 A. 218 (1923); State v. Green, 78 Utah 580, 6 P.2d 177 (1931); Dejarnette v. Commonwealth, 75 Va. 867 (1881); Hempton v. State, 111 Wis. 127, 86 N.W. 596 (1901); State v. Pressler, 16 Wyo. 214, 92 P. 806 (1907). *See Annot.*, 22 A.L.R.3d 1228 §§ 7 and 8 (1968).

[98] B. Cardozo, *What Medicine Can Do for Law*, in Law and Literature and Other Essays and Addresses, 70, 99–100 (1931).

[99] *E. g.*, Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946).

second situation within the scope of Paragraph (c) is the true mercy killing. There the defendant's homicidal act may not have occurred had the victim not consented to it. In either of these contexts, the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence.

Paragraph (e) covers the situation where the actor "was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor." In such a case, the defendant's personal responsibility for the homicide, although sufficient to support conviction, may be attenuated. A similar situation is covered by Paragraph (f), which addresses the case of a person who kills under duress or under the domination of another. Section 2.09 provides a defense where the actor is compelled to engage in criminal conduct by force or threat of force "which a person of reasonable firmness in his situation would have been unable to resist." Where the coercion is directed toward homicide, the compulsion required to overcome the resistance of a person of reasonable firmness must be very considerable. A weak or impressionable person who yields to lesser coercion has no defense to liability for murder, but he is entitled under Paragraph (f) to have the circumstances of his act considered in mitigation of sentence.

Finally, Paragraph (d) specifies as a mitigating factor the defendant's belief in a "moral justification or extenuation for his conduct." Of course, the actor has a complete defense if the homicide is justified under the terms of Article 3 of the Code. Paragraph (d) concerns the different question of an idiosyncratic belief in a moral basis for homicide. The purpose of this provision is chiefly to call for mitigation of sentence where the actor kills from an arguably humane motive. Thus, for example, one who kills only in order to put a helpless invalid out of his misery may invoke Paragraph (d) in opposition to a death sentence. The Code does not legitimate euthanasia, but it does recognize that the person who commits such an act is not morally equivalent to one who kills for personal gain or satisfaction. Construed literally, Paragraph (d) also seems to call for mitigation of sentence in cases of quite a different sort. The assassin who kills in furtherance of political ideology may well assert some kind of moral justification for his con-

duct. The sense of Paragraph (d) is that consideration of this claim should not be excluded, but it is also expected that the impact of the defendant's aberrational belief will be discounted by the extravagance of its departure from societal norms.

7. *Court or Jury as the Organ of Discretion.* If a sentence of imprisonment is not imposed by the court under Subsection (1), a further proceeding must be initiated to determine whether a sentence of death should be imposed. As described above, this proceeding will call for a balance of aggravating and mitigating factors and will not permit the imposition of a sentence of death unless an aggravating circumstance as listed in Subsection (3) has been found *and* no overriding mitigation is found to exist.

The next issue to be faced is where the ultimate discretionary decision involving this balance of factors is to be made. The decision may be lodged in the court, in the jury, or in the joint judgment of court and jury. Prevailing law at the time the Model Code was drafted generally vested discretion in the jury, unless trial of guilt was to the court sitting alone, the defendant pleaded guilty, or both prosecution and defense waived jury trial on sentencing.[100] The jury's determination was usually binding on the court, though some jurisdictions allowed the judge to disregard jury recommendations.[101]

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[100] Royal Comm'n on Capital Punishment Report, CMD. No. 8932, at 174 (1953).

[101] As of 1959, a jury recommendation was not binding on the court in Utah or South Dakota, except that in South Dakota a jury recommendation of mercy was binding. *See* MPC § 201.6, T.D. 9, App. D, at 125 (1959). South Dakota has since abolished the death penalty, 1976 S.D.Sess.Laws, ch. 158 § 16–9, and Utah has adopted a statute which removes the court's sentencing discretion in jury trials. Utah § 76–3–207(2). Only a few of the discretionary sentencing statutes adopted in response to *Furman* allowed the court to disregard a unanimous jury determination of sentence, and most contained explicit mandatory language, *e. g.*, Tex.Code Crim.Proc. art. 37.071(e): "If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death." By contrast, the Florida statute, upheld in Proffitt v. Florida, 428 U.S. 242 (1976), provides that the jury shall "render an advisory sentence to the court" and that the court "[n]otwithstanding the recommendation of a majority of the jury" may then sentence the defendant to death or life imprisonment. Fla. § 921.141(2), (3). A revision of the Kentucky statute, approved after *Proffitt* (Dec. 22, 1976), follows the Florida statutory scheme and provides that the jury shall "recommend a sentence" but that the sentence is to be fixed by the court. Ky. § 532.025(1)(b). While the Florida and Kentucky statutes empower the judge to impose a sentence of death despite a jury recommendation of mer-

After extensive debate at the 1959 meeting, the Institute decided to set forth alternative resolutions of this question.[102] The first version of Subsection (2) requires that, absent waiver of jury trial for guilt or sentencing, the jury should play a role in determining whether to impose the capital sanction. The jury's discretion under this scheme is not unlimited. Under Subsection (1), the court has both power and duty to exclude consideration of the death penalty where it is clear that some condition calling for leniency has been established. Moreover, the first version of Subsection (2) empowers the court to impose a life sentence on completion of the supplemental sentencing proceeding, notwithstanding a jury recommendation of death. Thus, the court may withhold consideration of the death penalty from the jury, or it may override a jury decision in favor of death. The court may not, however, impose the capital sanction without concurrence by the jury. This system of joint decision by judge and jury has been used for some time in a few states.[103]

The alternative formulation of Subsection (2) vests discretion in the court alone. The arguments in favor of this solution may be summarized as follows. Judicial determinations would probably be less emotional or prejudiced than those of juries, and the continuity of judicial personnel would promote equity and consistency in death penalty determinations. Moreover, courts may be persuaded to give reasons for their decisions, a development that would enhance rationality and responsibility and facilitate appellate review. These arguments have not, however, met with widespread acceptance. The practice of court imposition of the death penalty without jury participation has little precedent in the American experience.[104]

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cy, both statutes require the court in such cases to designate the aggravating circumstances it has found. Fla. § 782.04(3); Ky. § 532.025(9). Both of these states provide for automatic review of all death sentences by the state supreme court, which has authority to vacate the sentence. Fla. § 921.14 (4); Ky. §§ 532.075(1), (5).

[103] Md. art. 27, § 413; Ill. ch. 38, § 1–7(c). Currently sentence is deter-

[103] Md. art. 27, § 413; Ill. ch. 38, § 1–7(c). Presently sentence is determined in Maryland by the trier of fact, Md. art. 27, § 413(b), and in Illinois by a majority of a three-judge panel, Ill. ch. 38, § 1005–8–1A. The prevailing practice at the time the Model Code was under consideration was to leave the decision to the discretion of the jury. A state-by-state summary is provided in MPC § 201.6, T.D. 9, App. D, at 121–25 (1959). *See also* Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099 (1953).

[104] *But see* Ill. ch. 38, § 1005–8–1A (sentencing by a majority of a three-judge panel). Connecticut, Ohio, and Pennsylvania have also used multiple-

The Advisory Committee and Council endorsed this alternative formulation of Subsection (2). The Institute, however, decided against vesting the life-or-death choice exclusively in judges. Many legislators would resist such a change on the ground that imposition of the death penalty should reflect community judgment rather than specialized expertise. Additionally, many judges would oppose assumption of this new responsibility, as English judges consistently have. Finally, vesting discretion in the court alone may lead to unwarranted acquittals where the jury wishes to eliminate all possibility that a death sentence will be imposed. These certain sources of objection should not be invited in the absence of strong conviction that lodging exclusive sentencing discretion in the court would work some great improvement in the system.[105] A majority of the Institute remained doubtful on the issue and therefore voted to endorse joint decision-making by judge and jury. Because the question involves a close balance of competing perceptions of merit, the Code includes both formulations as acceptable solutions.

8. *Separate Proceeding to Determine Sentence.* Systems providing for jury discretion with respect to capital punishment confront an inescapable dilemma if the jury is required to impose sentence at the same time that it renders a verdict on guilt. Such information as prior criminal record of the accused may be important to choice of punishment yet highly prejudicial to determination of guilt. Either sentencing must be based on less than all the evidence relevant to that issue, or otherwise inadmissible evidence must be allowed in the trial on the ground that it contributes to an informed assessment of sentence. Contemporaneous decision of both questions forces a choice between a solution that detracts from the rationality of the sentencing decision and one that threatens the fairness of the determination of guilt. Either choice is undesirable, and the second alternative

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judge panels, but only in guilty-plea cases. *See* MPC § 201.6, T.D. 9, at 73 (1959); *id.*, App. D, at 121, 124. The Ohio statute described in Comment 12(c) *infra* leaves the discretionary components of the death penalty to a single judge but requires that the jury find the existence of specified aggravating factors.

[105] See the defense of jury discretion by Mr. Justice Frankfurter in testifying before the Royal Commission on Capital Punishment, in which he observed: "I do not understand the view that juries are not qualified to discriminate between situations calling for mitigated sentences." Royal Comm'n on Capital Punishment, Minutes of Evidence 583 (1950), reproduced in F. Frankfurter, Of Law and Men 87 (1956).

may well be unconstitutional.[106] Trial lawyers understandably have little confidence in the intermediate solution of admitting such evidence and trusting an instruction to limit its consideration to sentencing rather than guilt.[107]

The obvious solution was proposed by the Royal Commission on Capital Punishment and adopted by the Institute in Section 210.6. It calls for a bifurcated proceeding with strict observance of the rules of evidence until the guilty verdict and subsequent consideration of all additional information relevant to sentence. This solution is analogous to the procedure followed in a non-capital case: after determination of guilt, the court conducts a separate inquiry before imposing sentence.[108] This procedure

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[106] Whether a unitary capital trial procedure is constitutionally permissible is once again an open question. In McGautha v. California, 402 U.S. 183 (1971), the Court specifically rejected the claim that "the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was constitutionally impermissible." 402 U.S. at 185. Yet in the 1976 death penalty cases, each of the statutes which survived constitutional scrutiny provided for a bifurcated trial, but neither of the two invalidated statutes contained this feature. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Whether this distinction is of constitutional stature is not entirely clear. The plurality in *Woodson* held that in capital cases the eighth amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304. Although *McGautha* was not expressly overruled, arguably *Woodson* is "squarely contrary" to *McGautha* on this point. 428 U.S. at 324 (Rehnquist, J., dissenting).

[107] For decisions confining the evidence to that otherwise admissible on guilt or innocence, see, *e. g.*, Commonwealth v. McNeil, 328 Mass. 436, 104 N.E.2d 153 (1952); State v. Barth, 114 N.J.L. 112, 176 A. 183 (Ct.Err. & App. 1935). For decisions granting wider latitude to assist the jury in the exercise of its discretion, see, *e. g.*, Commonwealth v. Parker, 294 Pa. 144, 143 A. 904 (1928) (other crimes); Harris v. Commonwealth, 183 Ky. 542, 209 S.W. 509 (1919) (drunkenness insufficient to reduce the crime); Prather v. State, 14 Okla.Crim. 327, 170 P. 1176 (1918) (defendant serving life sentence); Fletcher v. People, 117 Ill. 184, 7 N.E. 80 (1886) (evidence of provocation insufficient to reduce to manslaughter). A statute excluding evidence of other crimes, unless otherwise admissible on guilt or innocence was held unconstitutional in Commonwealth v. DePofi, 362 Pa. 229, 66 A.2d 649, *cert. denied*, 338 U.S. 852 (1949). *See also* United States v. Price, 258 F.2d 918 (3rd Cir. 1958). *See generally* Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L.Rev. 50, 61 (1964); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1090 (1953).

[108] *See* Section 7.07 *supra*.

has long been followed in courts-martial for capital crimes and was adopted in California in 1957.[109]

Except where capital punishment is excluded under Subsection (1), Subsection (2) of the Model Code provision requires a separate proceeding to determine whether a person convicted of murder should be punished for a felony of the first degree or sentenced to death. That proceeding will be held before the court alone or before court and jury, depending on whether the jury has a role in making the sentencing decision.[110] In either event, evidence may be presented on any matter that the court deems relevant to sentence. Of course, the most critical matters are those specified as aggravating and mitigating circumstances in Subsections (3) and (4), but the court may also allow consideration of any additional information concerning the nature and circumstances of the crime or the defendant's character, background, history, or mental or physical condition. Subsection (2) further provides that the ordinary rules of evidence shall not apply to exclude evidence that the court "deems to have probative force." The prosecution may offer reports of pre-sentence investigation of the defendant, subject to a fair opportunity for the defense counsel to rebut any hearsay statements. This means that the defense must be seasonably informed of the factual contents and conclusions of any report that will be used. Section 7.07(5) of the Code adopts this safeguard for the use of pre-sentence reports generally.[111]

Ordinarily, the separate sentencing proceeding will be held before the same jury that determined guilt. This practice leads to an obvious economy in that evidence admitted in the first stage need not be repeated. There may be cases, however, where it is desirable to empanel a new jury for the sentencing proceeding, as, for example, where the trial jury is exhausted and quarrelsome after a long period of seclusion. Subsection (2) therefore gives the court power to call a new jury "for good cause shown." Arguably, of course, a juror's knowledge that he may not be in a position to control sentencing may induce him to hold out

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[109] Cal. § 190.1.

[110] *See* Comment 7 *supra.*

[111] In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court vacated on due process grounds a death sentence imposed on the basis of a pre-sentence investigation report, portions of which were not disclosed to defense counsel. *See also* Alford v. Florida, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912 (1976), *reconsidered after* Gardner, 355 So.2d 108 (Fla.), *cert. denied*, 429 U.S. 873 (1978) (Marshall and Brennan, JJ., dissenting).

against conviction even where liability is plain.[112] In practice, however, use of the trial jury is likely to be so common and predictable that the bare possibility of empanelling a new jury will not create significant risk of nullification and unwarranted acquittal.

It also should be noted that Subsection (2) explicitly provides that both the prosecution and defense may present argument for or against sentence of death. No effort is made to prescribe a limitation on the arguments that may be made[113] in the view that this is not a problem that will yield to legislative formulation. The court must be relied upon to insure that the decencies prevail.

Under Subsection (2) the jury must be instructed separately on the question of sentencing. Many prior statutes vesting discretion in the jury provided no guidelines for the exercise of that discretion, and some courts interpreted such laws to forbid judicial advice on the question of sentencing.[114] Under the Mod-

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[112] The elimination of this risk is, indeed, one of the virtues of the discretionary plan. If this risk is deemed, as it may be, a point entitled to controlling weight, the provision for another jury ought to be eliminated. As noted in the text, however, the problem is likely to be largely theoretical since the same jury can be expected to be used virtually all of the time.

[113] The right to call upon the jury to fix sentence of death or of imprisonment is almost universally acknowledged. *See, e. g.*, Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938). *See also Annot.*, 120 A.L.R. 502 (1939). There is dispute, however, as to the scope of permissible argument. *See, e. g.*, Hartfield v. State, 186 Miss. 75, 189 So. 530 (1939) (reversible error to argue that sentence should be death because defendant already serving life sentence).

[114] Insofar as the law vested discretion in the jury at the time the Model Code was drafted, the statutes left open how it ought to be instructed, stating merely that the jury had "discretion," or that the "jury may decide," "jury may qualify," or "unless the jury qualifies." There was a division in the decisions as to what guidance the court could give. One group of jurisdictions, perhaps the larger, held that the jury should not be given any standards or advice, that the exercise of its discretion was absolute and uncontrolled. *See, e. g.*, State v. Bunk, 4 N.J. 461, 73 A.2d 249, *cert. denied*, 340 U.S. 839 (1950); State v. McMillan, 233 N.C. 630, 65 S.E.2d 212 (1951) (jury must be instructed that its discretion is unbridled); Holmes v. State, 6 Okla.Crim. 541, 119 P. 430 (1911) (court properly refused request to define "discretion"); Winston v. United States, 172 U.S. 303 (1899) (error to instruct that jury must find mitigating circumstances to render qualified verdict); *cf.* Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 328 (1947). Other states held that the court could advise the jury. *See, e. g.*, Commonwealth v. Zietz, 364 Pa. 294, 72 A.2d 282 (1950) (court may express opinion as to sentence and point out facts bearing on penalty if it also reminds jury that it is not bound by

el Code provision, jury discretion is constrained by law, and the court therefore must instruct the jury that it must find at least one of the aggravating circumstances specified in Subsection (3) and the absence of any mitigating factor "sufficiently substantial to call for leniency." The court may also give whatever assistance is required in explaining the meaning of the various circumstances of aggravation and mitigation. Beyond that, the matter rests in the collective judgment of the jurors.

The Model Code also resolves the much disputed question whether the jury should be informed of the character of the alternative to the death penalty.[115] Subsection (2) provides that the court "shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death." The arguments in favor of this position are that an informed decision necessarily presupposes an awareness of alternatives and further that the jury will speculate about the matter in any event. Explicit instructions on the question will allow the court to put the possibility of eventual

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court's opinion); Commonwealth v. Foster, 364 Pa. 288, 72 A.2d 279 (1950); Howell v. State, 102 Ohio St. 411, 131 N.E. 706 (1921) (jury may be told to make its recommendation "in view of all the circumstances and facts leading up to and attending the alleged homicide"); State v. Caldwell, 135 Ohio St. 424, 21 N.E.2d 343, 14 O.O. 320 (1939) (jury may be told not to consider sociological matters and environment so long as it is told to base its determination on the evidence).

[115] For decisions holding that the court should refuse to comment on the possibility of parole, *see, e. g.*, Thompson v. State, 203 Ga. 416, 47 S.E.2d 54 (1948); State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955); Commonwealth v. Johnson, 368 Pa. 139, 81 A.2d 569 (1951); Wansley v. Commonwealth, 205 Va. 412, 137 S.E.2d 865 (1964), *cert. denied*, 380 U.S. 922 (1965). For decisions sustaining such comment, *see, e. g.*, People v. McGautha, 70 Cal.2d 770, 452 P.2d 650, 76 Cal.Rptr. 434 (1969), *aff'd*, 402 U.S. 183 (1971) (trial court should inform jury in general terms that life imprisonment can result in parole); People v. Barclay, 40 Cal.2d 146, 252 P.2d 321 (1953) ("to aid the jury in fixing punishment . . ., the Court may instruct the jury as to the consequences of the different penalties that may be imposed so that an intelligent decision may be made"); State v. Molnar, 133 N.J.L. 327, 44 A.2d 197 (Ct.Err. & App.1945); State v. Meyer, 163 Ohio St. 279, 126 N.E. 2d 585, 56 O.O. 256 (1955); Phillips v. State, 92 So.2d 627 (Fla.1957). As of 1968, a majority of jursidictions had adopted the "no comment" rule. *See Annot.*, 35 A.L.R.2d 769, 775–80 (1968).

As to the permissibility of comment by the prosecutor, see, *e. g.*, People v. Reese, 47 Cal.2d 112, 301 P.2d 582 (1956), *cert. denied*, 355 U.S. 929 (1958) (permitting comment); *cf.* Lee v. Alabama, 265 Ala. 623, 93 So.2d 757 (1957). *Contra, e. g.*, State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953). *See Annot.*, 132 A.L.R. 678, 687–97 (1941).

release in its proper perspective by noting that the parole system permits retention as well as discharge and by explaining that the decision will be made by a competent tribunal some years in the future, when time and the correctional experience may have effected fundamental changes in the defendant's personality.

9. *The Requirement of Jury Agreement and Unanimity.* The law at the time the Model Code was drafted exhibited considerable variation as to whether the jury was required to reach agreement with respect to the death penalty and as to the consequences of its failure to agree, although it was agreed on guilt. Most statutes authorizing jury discretion in capital cases failed to specify the consequences of disagreement,[116] with the result that the matter was resolved by judicial decision. In some states, the courts held that the jury was unable to return a verdict unless it could achieve unanimity respecting sentence.[117] In others, the court was either empowered [118] or required [119] to impose sentence of death unless the jurors agreed on a qualifying recommendation of imprisonment. In still other jurisdictions, the court was required to impose sentence of imprisonment unless the jury reached a unanimous judgment in favor of death,[120] or if the jury were unable to agree.[121] Finally, one state allowed a bare majority of the jury to make a binding recommendation of mercy.[122] Though a jury verdict for or against death was almost always binding on the court, there were exceptions to that principle as well.[123]

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[116] *See* Andres v. United States, 333 U.S. 740, 759, 767–70 (1948) (opinion of Frankfurter, J., concurring). Those statutes that did speak to the subject are summarized in MPC § 201.6, T.D. 9, App. D, at 121–25 (1959).

[117] *See, e. g.*, People v. Hicks, 287 N.Y. 165, 38 N.E.2d 482 (1941), *aff'd*, 289 N.Y. 576, 43 N.E.2d 716 (1942); Mays v. State, 143 Tenn. 443, 226 S.W. 233 (1920); *cf.* People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956) (verdict incomplete; reversed for retrial as to sentence only).

[118] *See, e. g.*, Mo.Rules Crim.Proc. § 546.440 (1953); Mont. § 94–7412 (repealed 1968); Neb. § 28–401 (repealed 1963).

[119] *See, e. g.*, Bullen v. State, 156 Ark. 148, 245 S.W. 493 (1922); Commonwealth v. MacNeil, 328 Mass. 436, 104 N.E.2d 153 (1952); State v. Bunk, 4 N.J. 461, 73 A.2d 249, *cert. denied*, 340 U.S. 839 (1950).

[120] N.H. §§ 585:4, :5 (repealed 1974); Wash. § 9.48.030 (repealed 1976).

[121] Miss. §§ 2217, 2536.

[122] Fla. §§ 782.04, 919.23 (repealed 1972).

[123] Ga. § 26–1005 (repealed 1969); Md. art. 27, §§ 412, 413; N.Y. §§ 1044(2), 1045–a (repealed 1967).

Subsection (2) of the Model Code provision requires unanimous concurrence of the jury for imposition of a death sentence. This position continues the tradition of jury unanimity in criminal matters.[124] It has the additional virtue of reducing the danger that one or two jurors opposed to imposition of a death sentence may hold out against conviction rather than run the risk of being overridden in the sentencing phase. Most importantly, the requirement of unanimity reflects the judgment that sentence of death is a sanction so enormous and exceptional that it should not be imposed unless the case is clear enough to convince all the jurors.[125] The Model Code therefore provides that failure to reach unanimous agreement on a death sentence results in imposition of a sentence of imprisonment by the court.[126]

10. *Alternative to Death Sentence.* There remains the question of the alternative to a sentence of death upon conviction of murder. In most states, the alternative is life imprisonment, though eventual release from confinement is not the exception but the rule.[127] Quite generally, persons sentenced to life im-

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[124] In 1962, it may have been assumed that a unanimous jury verdict in criminal cases was constitutionally required. However, in Apodaca v. Oregon, 406 U.S. 404 (1972), the court rejected an attack on an Oregon statute permitting a 10–2 verdict in non-capital cases. At the time *Apodaca* was decided, only Oregon and Louisiana allowed a less than unanimous verdict in trials of felony offenses. La.Const., art. VII, § 41; La.Code Crim. Proc. art. 782; Ore.Const., art. I, § 11; Ore. § 136.610 (current statute at 136.450). *See* Brief for Petitioner at 18, in Apodaca v. Oregon, 406 U.S. 404 (1972).

[125] Virtually all American jurisdictions, including Oregon and Louisiana, require a unanimous verdict before a sentence of death may be imposed. *See* Ore.Const., art. I, § 11; La.Const., art. I, § 17. Oregon abolished the death penalty in 1964 by referendum. 1963 Ore.Laws, ch. 625, § 6.

[126] If the jury are unable to agree, there is a question whether the court should be empowered to submit the issue to a second jury, as the California statute provides. *See* Cal. § 190.1. The fact that the Model Code does not permit this alternative is deliberate. One submission ought to be enough, and, if there is disagreement, the court should terminate the matter by imposing a sentence of imprisonment.

[127] T. Sellin, The Death Penalty 74, Table 25 (ALI 1959). At least eight states do not provide by statute for parole of life prisoners. Ala. § 13A–6–2(c); Ark. § 41–1302(3); Colo. §§ 17–1–204, 18–1–105; La. § 14:30 (as amended, Acts 1976, No. 657, § 1); Mass. ch. 265, § 2; N.H. §§ 4:23, :25; Pa. tit. 18, § 331.17; Wyo. §§ 17–13–203, –301. While practice varies widely, in some of these states executive pardon or commutation of sentence performs the same function as parole, *e. g.*, New Hampshire and Vermont (state policy to consider life prisoner for conditional pardon after 15 years). *See* E. Powers, Parole Eligibility of Prisoners Serving a Life Sentence (1969).

prisonment become eligible for parole after a determinate term. Ten years is a common period of required incarceration,[128] though several states allow earlier parole.[129] In other jurisdictions, life termers become eligible for parole after 15 years,[130] and in an increasing number of jurisdictions longer terms are required.[131] Similar parole provisions exist in states that have abolished capital punishment.[132]

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[128] A prisoner under life sentence for murder can be eligible for parole after 10 years in nine capital jurisdictions, including the federal government. Conn. § 53a–35 (10-year minimum sentence for class A felony); Idaho § 20–223; Miss. § 47–7–3 (except no parole for robbery committed with a firearm); Ohio § 2967.13(c) (if life term imposed for a non-capital offense); N. M. § 41–17–24; Nev. §§ 200.030, .320, .363 (for first-degree murder, aggravated rape, and aggravated kidnapping); R.I. § 13–8–13 (with unanimous vote of the Board of Parole); S.C. § 55–611; 18 U.S.C. § 4205(a).

[129] Two states provide for shorter periods by statute. Cal. § 3046 (seven years); Nev. §§ 200.030, .320, .363 (five years for second-degree murder and non-aggravated rape or kidnapping). In six other states a life prisoner is eligible for parole at any time. Ga. § 77–5–11; Ky. § 439.340; Mo. § 549.261; Neb. § 83–192; N.D. § 12–59–06; Vt. tit. 28, § 1051. In these states the parole board generally determines as a matter of policy the minimum sentence which must be served before parole will be granted, *e. g.*, Georgia (seven years), North Dakota (15 years for first-degree murder, 10 years for second-degree murder). Often the state parole board will set forth its policy in administrative regulations, *e. g.*, 501 Ky.Ad.Regs. 1:010, § 4 ("all persons serving a single life sentence . . . shall have their cases reviewed after having served (6) years."). *See* E. Powers, Parole Eligibility of Prisoners Serving a Life Sentence (1969).

[130] At least seven capital jurisdictions allow parole for life termers after 15 years. Del. tit. 11, §§ 4209, 4346 (reduced by good time; the court may impose a sentence of life without parole for first-degree murder); Kan. § 22–3717(2); Md. art. 27, § 122(B) (reduced by good time); N.Y. §§ 70.00, .30, .40 (minimum sentence for a class A felony is 15–25 years); Ohio § 2967.-13(B) (if life term imposed for a capital offense); Utah § 77–62–9; Va. § 53.-251.

[131] At least 11 capital states require life termers to serve 20 years or more to be eligible for parole: Ariz. § 13–902 (after 25 years); Fla. § 775.082 (after 25 years); Ill. ch. 38, § 1003–3–3 (after 20 years, reduced by good time); Ind. § 35–50–2–4 (minimum sentence of 20 years for a class A felony, no life imprisonment); Mo. § 565.008 (after 50 years); Mont. § 95–3214 (after 30 years reduced by good time); N.J. § 30:4–123.11 (after 30 years reduced by good time); N.C. § 148–58 (after 20 years); Tenn. § 40–3613 (after 30 years); Tex.Code Crim.Proc. art. 42.12, § 15 (after 20 years reduced by good time); Wash. § 9.95.115 (after 20 years reduced by good time).

[132] The 10 states which had completely abolished capital punishment by 1976 vary greatly on the question of parole eligibility for life termers. Alas. § 33.15.080 (after 15 years); Haw. §§ 706–606, –669 (life term may be imposed without parole or parole may be granted at any time after six months

The Model Code makes no provision for a separate category of life sentence as an alternative to capital punishment. Thus, persons convicted of murder but not sentenced to death are subject to imprisonment for a maximum term of life and a minimum term of not more than ten years.[133] This resolution reflects the judgment that supervised release after a period of confinement is altogether appropriate for some convicted murderers, even though incarceration for the prisoner's lifetime may be required in other instances. In keeping with the theory of its correctional provisions, the Model Code leaves such questions to the board of parole.

The principal argument against this scheme is the fear that a jury may be influenced in favor of a death sentence by the knowledge that the prisoner may otherwise become subject to parole at some future date. This objection touches a real concern; certainly the political viability of capital punishment derives in part from the popular conception that any lesser sentence results in early release and a new opportunity for the defendant to resume his attack on society. It is not unreasonable to suspect that some jurors will react in the same way when called upon to determine whether death is an appropriate penalty in a particular case. Against this danger must be weighed a number of other factors. As is explained in detail in the commentary to Section 6.07, there are strong objections to longer minimum terms of imprisonment. Where a longer minimum is authorized, it will inevitably be employed in some cases where it proves to be unnecessary. There is, moreover, the special difficulty posed to the correctional authorities by the prisoner who has no realistic incentive to improve or behave. On balance, therefore, the Model Code rejects creation of a special form of sentence as an alternative to death. The Model Code endorses the same position for those jurisdictions that elect to abolish capital punishment for murder. Should it be thought essential, however, to differentiate between a flat life sentence and the range of sanctions authorized for a felony of the first degree, Section 210.6 can readily be adapted to this end.

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of confinement); Iowa § 902.1 (no parole unless governor commutes sentence); Me. tit. 17A, §§ 1251, 1254 (after 25 years); Mich. § 791.234 (life term may be imposed without parole or parole may be granted after 10 years); Minn. § 243.05 (after 25 years reduced by good time); Ore. §§ 144.-175, .180 (at any time); S.D. §§ 22-6-6, 23-60-5, -8 (after 5 years); W.Va. § 62-12-13 (after 10 years); Wis. §§ 53.11, 57.07 (after 20 years reduced hy good time).

[133] Sections 6.06(1) and 6.07(1) *supra*.

11. *Limitations on Execution of Death Sentence.* The Model Code does not include provisions governing the execution of a death sentence. Jurisdictions choosing to retain capital punishment must specify the method of execution and consider the traditional exemptions for pregnant women and insane persons. The primarily correctional concerns of the Model Code led to omission of this subject.

12. *Subsequent Constitutional Developments.* The Model Code provision on capital murder was approved in tentative form in 1959 and incorporated in the Proposed Official Draft in 1962. As of those dates, the constitutionality of existing death penalty procedures was generally assumed. This assumption seemed to have been confirmed in *McGautha v. California,*[134] where the Supreme Court rejected a due process challenge to the exercise of wholly unguided jury discretion in imposing sentence of death for murder. In a companion case,[135] the Court also upheld the use of a single verdict for both guilt and punishment in capital cases, despite defendant's claim that the unitary trial forced him either to forego his right to silence on the issue of guilt or to allow the jury to reach a judgment on sentence without benefit of his exculpatory testimony. These decisions notwithstanding, the Court soon reversed field and began to articulate new constitutional constraints on capital punishment. This line of development is not completed, but the Court has worked dramatic change in the landscape of permissible legislative choice for use of the death penalty and seems to have established the major outlines of an acceptable approach to the problem. Assessment of the impact of recent decisions on the Model Code provision requires some background.

(a) *Furman v. Georgia.* Constitutionalization of the law of capital punishment began in 1972 with *Furman v. Georgia.*[136] Three persons sentenced to death, one for murder and two for rape, challenged imposition of the capital sanction as violative of the eighth amendment guarantee against cruel and unusual punishment. The Court sustained these attacks in a short Per Curiam opinion that explains nothing of its reasoning. Each of the Justices filed a separate concurring or dissenting opinion, and it is from this aggregation of views, totalling over 230 pages,

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[134] 402 U.S. 183 (1971).

[135] Crampton v. Ohio, 402 U.S. 183 (1971), *vac.*, 408 U.S. 941 (1972).

[136] 408 U.S. 238 (1972).

that guidance must be sought. What follows is, therefore, only a crude summary of an extremely complex and multifaceted debate among the nine Justices.

Two Justices rejected capital punishment altogether. Mr. Justice Brennan evaluated the death penalty against four concerns derived from the constitutional guarantee against cruel and unusual punishment and regarded their cumulative impact as controlling. He found, first, that the death penalty was cruel and unusual because, like barbaric punishments such as the rack, the thumbscrew, and the iron boot, it necessarily demeans the value of human life;[137] second, that sentences of death were imposed on essentially arbitrary grounds; third, that the infrequency of actual execution showed that capital punishment had become morally unacceptable to contemporary American society; and, fourth, that the absence of any measurable deterrent impact rendered the death penalty a gratuitous and therefore excessive infliction of punishment. Mr. Justice Marshall echoed the last two reasons.[138] He found capital punishment invalid on the ground that the average American citizen, if fully informed on the issue, would find the death penalty "shocking to his conscience and sense of justice."[139] Independently, he thought capital punishment an unconstitutionally excessive penalty because its use served no valid legislative purpose. This conclusion he based in part on disallowance of retribution as a permissible legislative end and in part on his analysis of statistical evidence demonstrating the absence of significant deterrent effect. For these reasons, Justices Brennan and Marshall concluded that capital punishment was *per se* unconstitutional.

Three Justices concurred on apparently narrower grounds. Mr. Justice Douglas emphasized the differential impact of capital punishment on blacks and the poor and suggested that the sanction was applied discriminatorily against minorities and others in socially disadvantaged positions.[140] He specifically reserved the question whether

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[137] *See* 408 U.S. at 273, 290 (opinion of Brennan, J., concurring).

[138] 408 U.S. at 314 (opinion of Marshall, J., concurring).

[139] 408 U.S. at 369 (opinion of Marshall, J., concurring).

[140] 408 U.S. at 256–57 (opinion of Douglas, J., concurring):

> Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an in-

a mandatory death penalty might be constitutionally permissible, but his opinion contained wide-ranging language not wholly consistent with a limited holding. Mr. Justice Stewart found it unnecessary to consider the constitutionality of capital punishment in the abstract. Instead, he concluded that "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." [141] Thus, Mr. Justice Stewart focused on the potential for unguided discretion to degenerate into wanton and freakish exercise of the capital sanction, but he did not rest his conclusion on the suggestion of racial discrimination, which he found had not been proved. Mr. Justice White joined in this general line of reasoning.[142] He argued that deterrence could not be served where the death sentence was carried out so rarely that it ceased to be a credible threat, and he reiterated the point that no meaningful basis appeared for distinguishing the few who should die from the many who would be imprisoned.

Finally, the Chief Justice and Justices Blackmun, Powell, and Rehnquist dissented.[143] Their opinions emphasized the long tradition of capital punishment in this country, its acceptance by the Framers, and its continuing popular support as reflected through the political process. The dissenters attacked the majority's conclusion as an unwarranted usurpation of legislative function and a contradiction of an appropriate sense of judicial restraint.

The decisions in *Furman* left retentionist jurisdictions in a quandary. The Court had made it clear, albeit by the slightest of majorities, that a system of wholly unguided jury discretion in imposing the death penalty would not be permitted. On the other hand, one could only speculate as to whether some other basis for capital punishment might survive constitutional scrutiny. The task was to devise

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gredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

[141] 408 U.S. at 309 (opinion of Stewart, J., concurring).

[142] 408 U.S. at 310 (opinion of White, J., concurring).

[143] 408 U.S. at 375 (opinion of Burger, C. J., with whom Blackmun, Powell, and Rehnquist, JJ., joined, dissenting); 408 U.S. at 405 (opinion of Blackmun, J., dissenting); 408 U.S. at 414 (opinion of Powell, J., with whom Burger, C. J., and Blackmun and Rehnquist, JJ., joined, dissenting); 408 U.S. at 465 (opinion of Rehnquist, J., with whom Burger, C. J., and Blackmun and Powell, JJ., joined, dissenting).

some system that would meet the objections of Justices Stewart and White. Neither Justice had found the death penalty unconstitutional *per se*; each had focused on the infrequency of its imposition and the absence of any meaningful standards for determining who should live and who should die.

Two quite different solutions held some prospect of allaying these concerns. First, the states might attempt to constrain and systematize jury discretion by adopting legislative standards to control its exercise. This approach, of course, is exemplified in the Model Code provision on capital murder, and many states patterned their revisions more or less closely after Section 210.6.[144] The alternative approach solved the problem of jury discretion by eliminating it. A number of states responded to *Furman* by enacting mandatory death penalty provisions.[145] Usually, these re-

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[144] Fifteen states adopted post-*Furman* statutes that provided for bifurcation of capital trials and consideration of aggravating and mitigating circumstances by the sentencing authority. Ala. § 2005; Ala.Acts of 1975, No. 213; Ariz.Rev.Stat. §§ 13–452 to –454 (current version at Ariz. § 13–902); Ark. § 41–4706 (current statute at § 1301(3)); Cal. §§ 190.1, 209, 219 (current version at § 190 to 190.5); Colo. § 16–11–103; Conn. §§ 53a–25, –35b, –46a, –54b; Fla. §§ 782.04, 921.141; Ga. §§ 26–3102, 27–2528, –2534.1, –2537; Ill. ch. 38, §§ 9–1, 1005–5–3, –8–1a; Neb. §§ 28–401, 29–2521 to –2523; Ohio §§ 2929.02 to .04; Pa. tit. 18, §§ 1102, 1311; Tenn. §§ 39–2402, –2406 (invalidated for constitutional defect in the title of the bill in State v. Hailey, 505 S. W.2d 712 (Tenn.1974), replaced with a mandatory statute, Tenn. §§ 39–2402 to –2406, which in turn was replaced with a bifurcated statute, Tenn. §§ 39–2404 to –2406); Tex. § 19.03; Tex.Code Crim.Proc. art. 37.071; Utah § 76–3–207. However, seven of these states adopted "quasi-mandatory" statutes that depart from the Model Code proposal by requiring that the death penalty be imposed when the sentencing authority finds one or more aggravating circumstances and no mitigating circumstance. These states were Arizona, California, Colorado, Connecticut, Ohio, Pennsylvania, and Texas. Two other states adopted statutes that allowed consideration of aggravating and some mitigating circumstances but failed to provide for bifurcation. Md. art. 27, § 413; Mont. § 94–5–105 (current version at § 94–2206.6 to –2206.13).

[145] The following 18 states adopted mandatory death penalty statutes after *Furman*: Del. tit. 11, § 4209; Idaho § 18–4004; Ind. § 35–13–4–1 (current version at Ind. §§ 35–42–1–1, –50–2–3); Ky. § 507.020 (1975) (current version at Ky. §§ 507.020, 532.025, .030, .035, .075 follows the Model Code); La. § 14:30 (current version at La.Code Crim.Proc. art. 905.0–.9); Miss. §§ 97–3–19, –21, 97–25–55, 99–17–20; Mo. §§ 559.009, .005; Nev. § 200.030; N.H. § 630:1; N.M. § 40A–29–2; N.Y. §§ 60.06, 125.27; N.C. § 14–17; Okla. tit. 21, §§ 701.1 to .3 (current version at Okla. tit. 21, §§ 701.7 to .15 follows the Model Code); R.I. § 11–23–2; S.C. § 16–52; Va. §§ 18.2–10 to –31; Wash. §§ 9A.–32.045, .046; Wyo. § 6–54 (current version at Wyo. 6–4–102, –103).

visions entailed some narrowing of the class of cases subject to capital punishment,[146] and at least one state did so by incorporating into the definition of capital murder some of the factors specified as aggravating circumstances for determination of sentence under Section 210.6.[147] At the other extreme, at least one state made death the mandatory penalty for every person convicted of first-degree murder as traditionally defined.[148] As of July 2, 1976, at least 35 states and the U.S. Congress had reacted to *Furman* by enacting new legislation on capital punishment for crimes that resulted in death.[149]

(b) *The 1976 Decisions.* A representative sample of the new legislation came before the Supreme Court in 1976. This round of litigation involved constitutional review of five post-*Furman* statutes on capital murder.[150] In line with their *Furman* concurrences, Justices Brennan and Marshall voted to invalidate all five statutes.[151] On the other hand, four Justices voted to sustain all five laws. Mr. Justice White found that his problems with unbridled jury discretion had been resolved by the new legislation, and he

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[146] *See, e. g.*, N.Y. § 125.27 (death penalty limited to intentional homicide by a life-term convict and murder of a corrections or police officer); Nev. § 200.030 (capital murder defined as murder of a police officer, murder by a life term convict, murder for hire, murder by explosives, and multiple murder); N.H. § 630:1 (capital murder defined as murder of a law enforcement officer, murder in connection with kidnapping, murder for hire, and successful solicitation of murder for hire).

[147] *E. g.*, Wash. § 9A.32.045 ("aggravated murder" defined as first-degree murder committed under any of several enumerated circumstances, *e. g.*, the defendant was a convict under term of imprisonment, the murder was committed for pecuniary gain, there was more than one victim, or the killing was a felony murder committed in connection with rape or kidnapping).

[148] N.M. § 40A-2-1 (mandatory death penalty for all first-degree murder and all felony murder).

[149] The state statutes are cited in notes 144–45 *supra*. The federal enactment is codified at 49 U.S.C. § 1472. *See also* Gregg v. Georgia, 428 U.S. 153, 179 (1976).

[150] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[151] Gregg v. Georgia, 428 U.S. at 227 (opinion of Brennan, J., dissenting); *id.*, at 231 (opinion of Marshall, J., dissenting); Woodson v. North Carolina, 428 U.S. at 305 (opinion of Brennan, J., concurring); *id.*, at 306 (opinion of Marshall, J., concurring); Roberts v. Louisiana, 428 U.S. at 336 (opinion of Brennan, J., concurring); *id.* at 336 (opinion of Marshall, J., concurring).

wrote to express that conclusion on behalf of himself, the Chief Justice, and Mr. Justice Rehnquist.[152] Mr. Justice Blackmun explained his vote to uphold all five statutes by reference to his dissent in *Furman*.[153] The decisive votes were cast by Justices Stewart, Powell, and Stevens. They issued a series of joint opinions upholding three statutes and invalidating two others. By allying first with one group and then with the other, the three Justices were able to form a majority in each of the five cases.

In *Proffitt v. Florida* [154] the Court upheld a statute closely derived from the Model Code provision on sentence of death. The Florida law requires a separate evidentiary proceeding following conviction of first-degree murder, and it allows admission into evidence of any matter deemed relevant to sentence. The jury is directed to determine sentence by balancing enumerated circumstances of aggravation and mitigation. The statutory specification of those factors largely tracks Subsections (3) and (4) of the Model Code provision.[155] The principal innovations of the Florida statute are that the jury's determination is made by majority vote and that such determination, whether in favor of death or of sentence of imprisonment, is not binding on the court. Imposition of a death sentence by the court must be accompanied by written findings concerning the various matters of aggravation and mitigation, and such sentence is subject

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[152] Gregg v. Georgia, 428 U.S. at 207 (opinion of White, J., concurring); Proffitt v. Florida, 428 U.S. at 260 (opinion of White, J., concurring); Jurek v. Texas, 428 U.S. at 277 (opinion of White, J., concurring); Woodson v. North Carolina, 428 U.S. at 306 (opinion of White, J., dissenting); Roberts v. Louisiana, 428 U.S. at 337 (opinion of White, J., dissenting).

[153] Gregg v. Georgia, 428 U.S. at 227 (opinion of Blackmun, J., concurring); Proffitt v. Florida, 428 U.S. at 261 (opinion of Blackmun, J., concurring); Jurek v. Texas, 428 U.S. at 279 (opinion of Blackmun, J., concurring); Woodson v. North Carolina, 428 U.S. at 307 (opinion of Blackmun, J., dissenting); Roberts v. Louisiana, 428 U.S. at 363 (opinion of Blackmun, J., dissenting).

[154] 428 U.S. 242 (1976).

[155] The Florida law alters the Model Code specification of aggravating circumstances by omitting Paragraph (c), dealing with multiple murder, and by adding as an aggravating factor that the murder "was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." Fla. § 921.141(5)(g). The statute changes the Model Code list of mitigating circumstances only by deleting Paragraph (d), which deals with the defendant's belief in a moral justification or extenuation for the homicide. In other respects, the Florida law is substantially the same as the Model Code provision.

to automatic appellate review. The plurality found that this scheme achieves "an informed, focused, guided, and objective inquiry" into whether a particular defendant should be sentenced to death. The contention that the various circumstances of aggravation and mitigation were too indefinite to serve as meaningful constraints on the exercise of discretion was rejected and the constitutionality of the Florida statute was sustained.

Gregg v. Georgia[156] involved a statute patterned somewhat more loosely after the Model Code. The Georgia law also provides a bifurcated trial with substantial evidentiary latitude in the sentencing stage. Where a jury hears the sentencing issues, its recommendation is binding on the court. In order to impose sentence of death, the court or jury must find beyond a reasonable doubt at least one of the 10 aggravating circumstances specified in the statute. These factors significantly overlap the specification of aggravating circumstances in Subsection (3) of the Model Code provision. There is, however, no parallel to the Subsection (4) enumeration of mitigating factors. The jury is entitled to consider any non-statutory aggravating or mitigating circumstance "otherwise authorized by law," but the statute nowhere specifies what those mitigating circumstances might be.[157] This innovation undercuts the Model Code position that sentence of death be premised on a balancing of aggravating and mitigating circumstances, but it does not leave discretion of judge or jury wholly unconstrained. The Georgia statute also provides for special appellate review based on whether the sentence of death was imposed "under the influence of passion, prejudice, or any other arbitrary factor," whether the evidence supports the necessary finding of a statutory aggravating circumstance, and whether the death penalty "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." After considering this scheme, the plurality concluded that requirement of at least one statutory circumstance of aggravation coupled with the expanded scope of appellate review of sentence met the essential objections expressed in *Furman*: "No longer can a jury wantonly and freakishly impose the death sentence; it

[156] 428 U.S. 153 (1976).

[157] Ga. § 27-2534.1.

is always circumscribed by the legislative guidelines." [158] Therefore, the statute was upheld.

The third statute sustained by the Court bears little relation to the Model Code provision on sentence of death. *Jurek v. Texas* [159] involved a statutory definition of 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. Upon conviction of capital murder, a separate sentencing proceeding is held. The jury is directed that it may impose sentence of death only upon a unanimous and affirmative finding on each of the following issues: whether the homicidal conduct was done deliberately and with reasonable expectation of killing another; whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and, if raised by the evidence, whether the defendant's conduct was unreasonable in response to provocation by the deceased.[160] Sentence of death is subject to expedited appellate review. The plurality approved this scheme on the following reasoning. It viewed the five categories of capital murder as functional equivalents of specified circumstances of aggravation, and it concluded that judicial interpretation of the second sentencing question (probability of future violent crimes) was broad enough to allow consideration of any mitigating circumstance that might exist.

Two other statutes were invalidated by the Court. Each involved a mandatory death penalty for certain classes of cases. The statute considered in *Woodson v. North Carolina* [161] condemned to death every person convicted of first-degree murder. The Court found three constitutional defects in this approach. First the mandatory death penalty ran afoul of evolving standards of decency, as

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[158] 428 U.S. at 207 (plurality opinion of Stewart, Powell and Stevens, JJ.).

[159] 428 U.S. 262 (1976). For a discussion of the Texas statute, see Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 Tex.L.Rev. 1343 (1977).

[160] Tex.Code Crim.Proc. art. 37.071(b).

[161] 428 U.S. 280 (1976).

evidenced by the uniform rejection of a mandatory death sentence for murder prior to the Court's intervention in *Furman*. Second, and somewhat strangely, the Court complained that the North Carolina statute failed to resolve the problem of unbridled and arbitrary jury discretion in imposing capital punishment. Apparently, the Court felt that juries would continue to except sympathetic cases by simply refusing to return a verdict of guilty of first-degree murder. The ostensibly mandatory character of the sanction attempted to paper over this difficulty, but it failed, in the Court's view, "to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." [162] Finally, the Court found an independent constitutional flaw in North Carolina's failure to allow particularized consideration of the character and history of the individual defendant. The Court found these same defects controlling in *Roberts v. Louisiana*.[163] The Louisiana statute imposed a mandatory sentence of death for conviction of five specified categories of murder. The Court invalidated this scheme, even though the defining circumstances of capital murder closely paralleled circumstances elsewhere approved as aggravating factors for consideration in sentencing.[164]

(c) *The 1978 Decisions.* The Supreme Court returned to the question of the minimum constitutional requirements for a death penalty statute in two cases from Ohio decided on the last day of the October 1977 Term.[165] Although the Chief Justice noted that "the States now deserve the clearest guidance that the Court can provide," [166] the Justices were again badly divided. Mr. Justice Brennan did not participate, and the remaining eight Justices wrote five separate opinions.

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[162] 428 U.S. at 303.

[163] 428 U.S. at 325 (1976).

[164] The five categories of capital murder included murder in the course of certain specified felonies, murder of a fireman or peace officer, murder by a person previously convicted of an unrelated murder or serving a life sentence, murder by conduct intended to endanger more than one person, and murder for remuneration. La. § 14:30 (1974) (current version at La. § 14:30).

[165] Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978). The major opinions were written in the *Lockett* case. Though separate opinions were written in the *Bell* case, they in effect reiterated the views already stated in *Lockett*.

[166] 438 U.S. at 602.

The Ohio statute [167] provided for imposition of the death penalty for murder if one or more of seven aggravating factors were specified in the indictment and proved beyond a reasonable doubt. In jury cases,[168] the jury was required to return a verdict on the principal charge of murder and a separate verdict on each of the aggravating factors alleged. In the event of a guilty verdict and an affirmative finding on one or more of the aggravating factors, the sentence was to be imposed by the judge after considering a presentence report, a psychiatric examination and report, and evidence submitted by the parties at a separate hearing. The death penalty was precluded when:

> considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [sic] of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The statute was interpreted by the Ohio courts to require the imposition of the death penalty if one of these mitigating factors was not proved by the defendant by a preponderance of the evidence.

The Chief Justice wrote for himself and the 1976 plurality of Justices Stewart, Powell, and Stevens. After reviewing the Court's recent capital punishment decisions, he concluded that:

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the de-

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[167] Ohio §§ 2929.03, .04.

[168] In non-jury trials, the case was to be tried by a panel of three judges and sentence imposed by the three judges under the same procedures.

fendant proffers as a basis for a sentence less than death.[169]

The opinion then noted that since the mitigating factors that may be considered were limited to the three specified in the statute, the death penalty must be set aside because it precluded consideration of other relevant mitigating factors.[170]

A wide range of views was expressed in the remaining opinions. Mr. Justice Marshall adhered to his view that the death penalty is unconstitutional under all circumstances. Mr. Justice Blackmun concurred on two separate grounds. First, he held the Ohio statute deficient since it authorized the death penalty for a defendant who only aided and abetted a murder, without permitting consideration of the extent of her involvement or the degree of her *mens rea* in the commission of the homicide. Second, he found a violation of the principle of *United States v. Jackson*,[171] since the sentencing court had full discretion to prevent the imposition of a capital sentence "in the interests of justice" if the defendant pleaded guilty but lacked such authority if the defendant went to trial. This disparity, in his view, was "too great to survive under *Jackson*." [172] Mr. Justice White disagreed with the views expressed in the Chief Justice's opinion on the ground that it invited "a return to the pre-*Fur-*

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[169] 438 U.S. at 604. After "in all but the rarest kind of capital case," the Chief Justice added a footnote (n. 11) in which he stated that "we express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder."

[170] The *Lockett* case involved a prosecution for a death during a robbery. The case arose under Ohio's doctrine of imputed intent, which functions in a manner similar to the common-law rule of felony murder. *See* Comment 5 to Section 210.2 note 80 *supra*. Lockett was in a car outside the robbery scene at the time of the homicide. If given the opportunity, she apparently would have argued in mitigation that she was a minor participant in the homicide and would have urged as additional mitigating circumstances her youth (21 years old) and the fact that she had committed no major crimes in the past. Bell was 16 years old at the time of the offense. The murder was committed by his 18-year old accomplice in the kidnapping of an older man. He apparently wished to argue in mitigation his youth, the fact that he had cooperated with the police, and the lack of proof that he had participated in the killing. Compare Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977), *cert. denied*, 438 U.S. 914 (1978) (invalidating Pennsylvania death-penalty statute).

[171] 390 U.S. 570 (1968).

[172] 438 U.S. at 619.

man days," [173] when the death penalty was, as he expressed in his *Furman* opinion, erratically imposed. He concurred in the judgment, however, on the ground that the death penalty is disproportionate "without a finding that the defendant possessed a purpose to cause the death of the victim." [174] Finally, Mr. Justice Rehnquist dissented from the reversal of the death sentence. He reaffirmed his judgment that the *McGautha* case [175] was correctly decided and concluded that Ohio was not required to consider any mitigating evidence which an accused or his lawyer wishes to offer. He also criticized the Chief Justice's opinion, as did Mr. Justice White, for reinstating the very evils which the *Furman* opinions were designed to eradicate.

Two additional points should be made about the 1978 decisions. First, eight of the nine Justices have now come to the view that the death penalty is unconstitutional under the eighth and fourteenth amendments in at least some circumstances. Only Mr. Justice Rehnquist maintains the position that the states should have a free hand under any of the traditional or more modern provisions for imposition of the capital sanction. Second, the Court again left open a number of questions, although some of the Justices spoke to them. The Chief Justice's opinion ends with a footnote that listed a number of contentions that were not resolved:

> [W]e need not address her contention that the death penalty is constitutionally disproportionate for one who has not been proven to have taken life, to have attempted to take life, or to have intended to take life or her contention that the death penalty is disproportionate as applied to her in this case. Nor do we address her contentions that the Constitution requires that the death sentence be imposed by a jury; that the Ohio statutory procedures impermissibly burden the defendant's exercise of his rights to plead not guilty and to be tried by a jury; and that it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases.[176]

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[173] 438 U.S. at 623.

[174] 438 U.S. at 624.

[175] 402 U.S. 183 (1971). *See* text accompanying note 134 *supra.*

[176] 438 U.S. at 609 n.16. A similar reservation was made in the *Bell* case, with the additional notation that Bell had raised arguments concerning the

(d) *Status of Model Code.* These decisions are recounted in some detail in order to support a few tentative generalizations about the constitutional status of capital punishment for murder. Three broad propositions emerge from the 1976 and 1978 cases. First, the holding of *Furman v. Georgia* has survived in the sense that wholly unguided jury discretion in imposing a sentence of death will not be permitted. However the Court may resolve the tension between *Furman* and *Lockett*, it seems clear at least that specific focus upon aggravating and mitigating factors at the sentencing stage is a constitutional requirement. Second, a mandatory death penalty will also be disallowed. As the plurality expressed its view in *Woodson*, "we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [177] The logic of this view would seem to extend to every mandatory death penalty, for no matter how narrowly the capital offense is drawn, an automatic sanction necessarily obviates consideration of any mitigation that may arise from the defendant's character, background, or emotional or mental condition at the time of a crime. Thus, in a later decision the Court relied upon *Woodson* and *Roberts* in striking down a Louisiana statute which imposed a mandatory death sentence for murder of an on-duty policeman for failure to provide for consideration of mitigating circumstances.[178] The plurality, however, has consistently reserved decision on the constitutionality of a mandatory capital sanction for murder by a prisoner serving a life

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lack of meaningful appellate review under the Ohio structure. 438 U.S. at 642 n.*.

These arguments were addressed on the merits by several justices. Mr. Justice Rehnquist rejected all of them and voted to affirm the death sentences. As noted in the preceding text, Mr. Justice Blackmun accepted the "minor participant" argument, and Mr. Justice White accepted the argument that the death penalty is disproportionate where the actor has no intention to take life.

[177] 428 U.S. at 304.

[178] Roberts v. Louisiana, 428 U.S. 325 (1977). Three other states imposed a mandatory death penalty for the murder of an on-duty policeman at the time the Louisiana statute was invalidated. Mont. § 94–5–105; N.H. § 630:1; N.Y. § 125.27(1)(a).

sentence.[179] A statute of this description would preclude consideration of some mitigating factors,[180] but at least it would have the virtue of defining capital murder in terms of relevant criteria based on the characteristics of the offender as well as the circumstances of the crime.

The third general proposition is that capital punishment for murder may be imposed where the system allows individualized determinations under standards that inform and constrain the exercise of discretion. The minimum ingredients of such a system are not entirely clear, but certain common aspects of the 1976 and the 1978 decisions should be noted. The three statutes upheld in the 1976 decisions require a separate sentencing proceeding unburdened by the usual restrictions of the rules of evidence. This bifurcated procedure allows a more comprehensive basis for imposing sentence, and it avoids confronting the defendant with the cruel choice of whether to introduce evidence that may be at once confirmatory of his liability for the crime yet indicative of some ground for mitigation of sentence. All three statutes also provided some opportunity for appellate review of a sentence of death. Perhaps most importantly, all three statutes identified proof of some relevant circumstance of aggravation as a prerequisite to the capital sanction. The Texas statute reaches this result by narrowing the definition of capital murder rather than by enumerating aggravating factors for the sentencing proceeding, but the two approaches are functionally similar. The various circumstances of aggravation need not be objectively demonstrable or utterly precise. It is apparently permissible, for example, to premise capital punishment on a finding that the murder was especially heinous or cruel and manifested exceptional depravity. This standard for discretion is not notably informative, but it does represent an advance from the traditional first-degree formula of premeditation and delib-

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[179] Woodson v. North Carolina, 428 U.S. at 292 n.25. *Cf.* Roberts v. Louisiana, 431 U.S. 633, 637 n.5 (1977); Roberts v. Louisiana, 428 U.S. 325, 334 n.9 (1976). The reservation was repeated in the *Lockett* decision. *See* note 169 *supra*. At least four states now have such statutes. *See* note 77 *supra* and N.Y. §§ 60.06, 125.27(1)(a)(iii). The New York statute, however, has been held unconstitutional. *See* People v. Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456 (1977), *cert. denied*, 435 U.S. 998 (1978).

[180] For this reason it might be thought that the *Lockett* decision would be inconsistent in principle with upholding such a statute, although the Court did reserve decision on the point. *See* note 169 *supra*.

eration. Finally, it is clear that the capital sentencing structure must allow consideration of mitigating as well as aggravating circumstances. The Court indicated in the 1976 decisions that a failure to permit consideration of both sides of the equation would "almost certainly" be fatal[181] and confirmed this conclusion in 1978. It is true, of course, that the Georgia statute upheld in 1976 nowhere specified what those mitigating factors might be and that the Texas law upheld in the same year invited consideration of mitigation only under the broad rubric of an assessment of dangerousness. The fact that both schemes were upheld suggests that a rational articulation of mitigating circumstances is not essential; moreover, the *Lockett* decision clearly prohibits rigid limitation of the range of factors the defendant may wish to introduce. What is required, therefore, is a system that allows submission to court or jury of the evidentiary basis for whatever mitigation may exist. This opportunity, when coupled with a limitation of capital punishment for murder to certain specified circumstances of aggravation, apparently suffices to withstand constitutional scrutiny.

Cumulatively, these observations confirm what the 1976 plurality several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation. The Court's resolution of the 1976 and 1978 cases amounts to a broad endorsement of the general policy reflected in the Model Code provision. The more closely a state statute follows Section 210.6, the more likely it will survive constitutional scrutiny. Significant departures from that scheme will be allowed, as the Georgia and Texas cases demonstrate, but negation of the essential thrust of the Model Code approach will bring a death penalty statute into serious constitutional difficulty.

13. *Impact of Model Code.* Prior to 1972, no American jurisdiction had followed the Model Code in adopting statutory crite-

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[181] Jurek v. Texas, 428 U.S. at 271:

> But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in Woodson v. North Carolina . . . to be required by the Eighth and Fourteenth Amendments.

ria for the discretionary imposition of the death penalty.[182] Before 1972 the only discernible effect of the Model Code proposal was introduction of a bifurcated capital trial procedure in six states.[183] Following *Furman* the legislative response was diverse, with the majority of retentionist jurisdictions enacting mandatory capital punishment for certain offenses.[184] Of the 15 states that generally followed the Model Code bifurcation procedure in restoring the death penalty, seven were "quasi-mandatory," departing from the Code provision by *requiring* a sentence of death if the judge or jury found at least one aggravating circumstance and no mitigating circumstance.[185] It is questionable whether such statutes are truly mandatory where the sentencing authority is not required to indicate what mitigating circumstances it relied upon in deciding for leniency and particularly where the statute allows the sentencing authority discretion to determine what constitutes a mitigating circumstance.[186] The inclusion of mandatory language in these statutes seems to have resulted from the misconception, prevalent after *Furman*, that only a mandatory penalty could withstand constitutional scrutiny. Thus, it appears that the mandatory and quasi-mandatory statutes enacted after 1972 reflected a desire to comply with the *Furman* decision, rather than a legislative preference for a mandatory penalty.

Among the Model Code-type statutes passed after *Furman* there was considerable variation in the formulation of aggravating and mitigating circumstances. The most common departure was to add as an aggravating circumstance the knowing killing of a police officer, fireman, or prison guard.[187] Another common modification was to require that the sentencing authority consider mitigating circumstances without further specification or refer-

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[182] For a compilation of jurisdictions and statutory provisions relating to standardless capital sentencing, see Note, *Standardless Sentencing*, 21 Stan. L.Rev. 1297, App. A (1969).

[183] California, Connecticut, Georgia, New York, Pennsylvania and Texas. *See* Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 Ark.L.Rev. 33, 39 n.9 (1972).

[184] *See* note 145 *supra*.

[185] *See* note 144 *supra*.

[186] *E. g.*, Ariz. § 13-902 (capital punishment is imposed if "the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency").

[187] *E. g.*, Ohio § 2929.04(A)(6); Pa. tit. 18, § 1311(d)(1)(i).

ence to any statutory criteria for mitigation.[188] Generally, however, the states plainly drew upon the circumstances listed in Section 210.6(3) and (4) in drafting the post-*Furman* enactments. Only the Texas statute [189] could be said to mark a rejection of the Code formulation, and despite its approval by the Court in *Jurek v. Texas*, the Texas procedure remains an anomaly.[190]

A pattern of legislative response to the 1976 death penalty cases has emerged as states seek to restore the sanction.[191] Each of the 19 new statutes examined when this comment was prepared resembles the Model Code provision and provides for bifurcation and consideration of specified aggravating circumstances.[192] All but three of these statutes enumerate statutory criteria for mitigation,[193] and only Arizona does not prescribe automatic appellate review.[194] Each adopts the requirement of Section 210.6(2) that the death sentence shall not be imposed unless there is present at least one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency.[195]

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[188] *E. g.*, Ga. § 27.2534.1 ("mitigating circumstances" undefined); Ill. ch. 38, 1005-8-1A (death unless a majority of the three-judge panel finds "compelling reasons for mercy"). *See also* Mont. § 94-5-105 ("mitigating circumstances" undefined); Okla. § 701.11 ("mitigating circumstances" undefined; supersedes former mandatory provision enacted after *Furman*).

[189] Tex. § 19.03; Tex.Code Crim.Proc. art. 37.071.

[190] None of the statutes enacted after *Jurek v. Texas* follows the three-question format contained in Tex.Code Crim.Proc. art. 37.071.

[191] Mr. Justice Blackmun noted in his opinion in the *Lockett* case that 34 states now have death-penalty statutes for homicide. The statutes are cited in notes 144, 179, *supra*, and 192, *infra*.

[192] Ariz. § 13-902; Cal. §§ 190 to 190.5; Del. tit. 11, § 4209; Idaho § 19-2515; Ind. § 35-50-2-9; Ky. §§ 507.020, 532.025; La.Code Crim.Proc. arts. 905 to 905.9; Miss. §§ 99-19-101, -103, -105, -107; Mo. §§ 565.008, .012, .014; Mont. §§ 95-2206.6 to -2206.13; Nev. §§ 200.030, .033, .035; N.H. § 630:-5; N.C. § 15A-2000 to -2003; Okla. tit. 21, §§ 701.9 to .15; S.C. §§ 16-3-20 to -28; Tenn. §§ 39-2404 to -2406; Va. §§ 19.2-264.2 to 264.5; Wash. § 9A.-32.040 to .047; Wyo. §§ 6-4-101 to -103.

[193] Del. tit. 11, § 4209; Idaho § 19-2515; Okla. tit. 21, §§ 701.10 to .12.

[194] The Arizona constitution does provide for a first appeal as of right from the conviction, and the criminal code stipulates that such appeals shall be made directly to the state supreme court which shall have full power to review the propriety of sentence. Ariz.Const. art. 2, § 24; Ariz. §§ 13-4031, -4037.

[195] Ariz. § 13-902(E); Cal. § 190.1; Del. tit. 11, § 4209(c)(4); Idaho § 19-2515(b); Ind. § 35-50-2-9(a); Ky. § 532.025(2)(b)(9); La.Code Crim.Proc. art.

The aggravating and mitigating circumstances enumerated in the new statutes conform more closely to the Code provision than did those in post-*Furman* Model Code-type statutes. One recurrent deviation is the rejection of the "moral justification" mitigation of Section 210.6(4)(d) of the Code by all but four of the states.[196] Another significant divergence is found in the Idaho statute, which designates as an aggravating circumstance that "the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society,"[197] and the comparable provision in Virginia "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."[198] This aggravating factor does not appear in the Model Code provision and is derived from the Texas death penalty statute.[199] Unlike the Texas statute, however, the new Idaho statute requires the jury to consider nine other aggravating circumstances.[200] And though the Virginia code includes only one other statutory aggravating circumstance (that the murder was "outrageously or wantonly vile, horrible or inhuman"[201]) it also prescribes consideration of five mitigating circumstances, all drawn from Section 210.6(4) of the Model Code. Aside from the absence of statutory mitigating factors in three instances,[202] the remaining modifications found in the 19 statutes are minor.[203]

Only the new California statute departs substantially from the bifurcation provision of the Model Code. By requiring that any

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905.3; Miss. § 99-19-101(3); Mo. § 565.012(1)(4); Mont. § 95-2206.10; Nev. § 200:030(4)(a); N.H. § 630:5(IV); N.C. § 15A-2000(b); Okla. tit. 21, § 701.-11; S.C. § 16-3-20(C); Tenn. § 39-2404(g); Va. § 19.2-264.3(C); Wash. § 9A.32.040(1); Wyo. § 6-4-102(e).

[196] Cal. § 190.3(e); Ky. § 532.025(2)(b)(4); La.Code Crim.Proc. art. 905.5(d); Tenn. § 39-2404(j)(4).

[197] Idaho § 19-2515(f)(8).

[198] Va. § 19.2-264.2.

[199] Tex.Code Crim.Proc. art. 37.071(b)(2).

[200] Idaho § 19-2515(f).

[201] Va. § 19.2-264.2.

[202] *See* note 193 *supra*.

[203] E. g., La.Code Crim.Proc. art. 905.5(d). Louisiana has modified the Model Code's mitigating circumstance of moral justification (Subsection (4)(d)) by requiring that the defendant's belief meet the objective standard of reasonableness.

case in which the death penalty may be imposed be tried in separate "phases," [204] the California code mandates a trifurcated procedure. After a determination of guilt, two separate proceedings must be conducted: first to establish the truth of any "special" aggravating circumstances charged,[205] and then to fix the penalty after consideration of ten possible aggravating and mitigating factors.[206]

When compared with the 125-year effort required for universal acceptance of discretionary capital sentencing in America,[207] the reforms in capital sentencing achieved since 1972 appear dramatic. While many forces contributed to this transformation, by far the most significant was the Supreme Court and particularly its changing perception of a death penalty provision based upon the Model Code. Speaking for the Court in *McGautha v. California*, Justice Harlan discussed Section 210.6 at length and concluded that it was a futile effort to solve the "intractable" problem of standards in capital sentencing, which demonstrated that the Court should not undertake "to pronounce at large that standards in this realm are constitutionally required." [208] The subsequent reexamination and ultimate rejection of this conclusion by 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.

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[204] Cal. §§ 190.1, .4.

[205] Cal. § 190.2.

[206] Cal. § 190.3.

[207] *See* Comment 4(c) *supra*.

[208] McGautha v. California, 402 U.S. 183, 207 (1971).