STRUCK BY LIGHTNING: THE ELEVATION OF PROCEDURAL FORM OVER SUBSTANTIVE RATIONALITY IN CAPITAL SENTENCING PROCEEDINGS

RANDALL K. PACKER*

INTRODUCTION

The death penalty is qualitatively different from any other punishment under our system of criminal justice. For this reason, the United States Supreme Court has held that certain safeguards are necessary to ensure that sentences of death comply with the requirement of the Eighth and Fourteenth Amendments that capital punishment not be meted out in an arbitrary and capricious manner.[1] Among these safeguards are a legislative definition of the legally relevant factors that must be present before a sentence of death can be imposed[2] and a sentencing structure that allows the capital sentencer to consider relevant facts about the defendant's background and character and the circumstances surrounding his[3] crime.[4]

* B.A., 1990, George Washington University; J.D., 1993, New York University School of Law.

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1. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion).

2. *Id.*

3. It is the policy of *Review of Law & Social Change* to use feminine pronouns for the

Capital punishment statutes must be structured to narrow the class of murder defendants who may be sentenced to death.[5] This "narrowing" ensures that this qualitatively different punishment is imposed only upon those defendants who are most deserving of the harshest sanction possible[6] and that legally irrelevant factors such as race and economic status are not used as bases for a sentence of death.[7]

If a capital sentencing statute is written or applied too broadly, either in any of the particular statutory circumstances that make a defendant death eligible,[8] or in the aggregate effect of all the statutory circumstances taken as a whole, it fails to meet the Eighth Amendment requirement of narrowing. If the statute, or any of its constituent parts, encompasses too many defendants, the sentencer possesses de facto unfettered discretion: she may pick and choose from too large a universe those who will be sentenced to death and those who will be sentenced to life imprisonment.

This Article examines the history of the Supreme Court's modern death penalty jurisprudence and the reasons behind the limitations placed on capital sentencing proceedings. I argue that, while current capital punishment statutes technically conform to a procedural format held facially valid, they fail to meaningfully or substantively narrow the class of death eligible defendants. I further argue that the courts have effectively failed to inquire into the substantive narrowing performed by these statutes and have contented themselves with ensuring the presence of a mere procedural shell. As a result, these statutes create, and courts do little to safeguard against, a significant risk that improper factors will be considered in sentencing and that the death penalty will be imposed in an arbitrary and capricious manner.

I examine the details of North Carolina's capital sentencing statute as illustrative of many states' overbroad statutes. I argue that these statutes fail to satisfy the Eighth Amendment requirements articulated by the Court in its

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generic third person singular. However, because the overwhelming majority of capital defendants are male, this Article will use masculine pronouns for the generic third person singular when the pronoun refers to capital defendants or death row inmates.

4. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

5. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that a statute "must genuinely narrow the class of persons eligible for the death penalty").

6. *See id.* (stating that a statute must specify an aggravating circumstance that will "justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

7. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972) (Douglas, J., concurring) (finding it "uncontestable" that a death sentence imposed out of religious, racial, or social prejudice would violate the "unusual" prong of the Eighth Amendment); *id.* at 310 (Stewart, J., concurring) (concluding that a legal system that allows the death penalty to be "wantonly and . . . freakishly imposed" is violative of the Eighth and Fourteenth Amendments).

8. *Death eligible* is a term of art referring to a defendant who may be constitutionally sentenced to death because he is within a statutorily narrowed class, i.e., a statutorily enumerated aggravating circumstance that limits the number of murder defendants who can be sentenced to death.

death penalty decisions. Because courts have adopted a procedural rather than substantive approach to narrowing, current statutes continue to enjoy judicial approval despite their violation of important Eighth Amendment principles. This is not an argument that capital punishment is per se unconstitutional, but merely that current capital sentencing statutes fail to meet important constitutional standards in the area.

I
GUIDED DISCRETION AND THE CONSTITUTIONAL REQUIREMENT OF STATUTORY NARROWING

In 1972 in *Furman v. Georgia*,[9] the Supreme Court declared all capital sentencing statutes then in existence unconstitutional. While the Court's brief per curiam opinion did not provide reasons for this decision, three of the concurring opinions expressed the concern that the statutes were too susceptible to arbitrary and capricious imposition of the death penalty and therefore violated the Eighth and Fourteenth amendments.[10] The crux of *Furman* is that some rational system must exist to distinguish between those defendants sentenced to death and those subjected to a less severe penalty.

In the aftermath of *Furman*, thirty-five states passed new capital sentencing statutes.[11] These new statutes took two forms, both of which purported to meet the *Furman* requirements. Fifteen states imposed mandatory death sentences on those convicted of capital crimes.[12] Many of the remaining states enacted statutes based on the Model Penal Code,[13] providing for guided

9. 408 U.S. 238, 239-40 (1972) (per curiam).

10. *See id.* at 242 (Douglas, J., concurring) (finding the statutes unconstitutional because of the likelihood of imposition of a sentence of death for legally irrelevant factors including race and economic status); *id.* at 310 (Stewart, J., concurring) (finding the statutes unconstitutional because death sentences are "wantonly and . . . freakishly imposed"); *id.* at 313 (White, J., concurring) (finding the statutes unconstitutional because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"). The concurring opinions of Justices Brennan and Marshall concluded, after long discussions of the history of capital punishment and the cruel and unusual punishments clause of the Eighth Amendment, that the death penalty is per se unconstitutional. *Id.* at 312, 358-59.

11. *See* Jane C. England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between* Furman *and* Gregg, 52 NOTRE DAME LAW. 596, 600-02 (1977) (comprehensively discussing state responses to *Furman*).

12. *See id.* at 601 n.37 (citing DEL. CODE ANN. tit. 11, § 4209 (Supp. 1975); IDAHO CODE § 18-4004 (Supp. 1975); IND. CODE ANN. § 35-13-4-1 (West 1975); KY. REV. STAT. ANN. § 532.030 (Baldwin 1975); LA. REV. STAT. ANN. § 14:30 (West Supp. 1976); MD. PENAL CODE ANN. art. 27, § 413 (Supp. 1976); MISS. CODE ANN. §§ 97-3-19, -21, 97-25-55, 99-17-20 (Supp. 1975); N.H. REV. STAT. ANN. § 630:1 (1974); N.M. STAT. ANN. § 40A-29-2 (Michie Supp. 1975); N.Y. PENAL LAW §§ 60.06, 125.27 (McKinney 1975); N.C. GEN. STAT. § 14-17 (Supp. 1975); OKLA. STAT. ANN. tit. 21, §§ 701.1-.3 (West Supp. 1975-76); R.I. GEN. LAWS § 11-23-2 (Supp. 1975); S.C. CODE ANN. § 16-52 (Law. Co-op. Supp. 1975); VA. CODE ANN. §§ 18.2-10, -31 (Michie 1976)). These statutes were declared unconstitutional by Woodson v. North Carolina, 428 U.S. 153 (1976) (plurality opinion), and Roberts v. Louisiana, 428 U.S. 325 (1976). *See* discussion *infra* notes 25-26 and accompanying text.

13. *See* MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) (stating that the sentencer "shall not impose or recommend sentence of death unless it finds one of the aggravating

discretion in sentencing.[14] These statutes required the judge or prosecutor to find the presence of at least one statutorily enumerated aggravating circumstance[15] before a murder could be charged capitally, and required the sentencer to independently find the presence of at least one aggravating circumstance before a sentence of death could be imposed. Since 1978 the sentencer must also be permitted to consider any relevant evidence the defendant offers in mitigation of the sentence.[16] A few states attempted to meet the narrowing requirement by defining a somewhat smaller category of murders as capital and allowing only these offenses to be capitally tried.[17] The Court approved this method of narrowing if it genuinely narrows the class of death eligible defendants.[18]

A. The Birth of Modern Death Penalty Analysis

Four years after *Furman*, on July 2, 1976, the Supreme Court issued opinions in five cases[19] that shaped the way capital trials have since been conducted. In three of these cases, *Gregg v. Georgia*,[20] *Proffitt v. Florida*,[21] and *Jurek v. Texas*,[22] the Court held that, on their faces, the new "guided discretion" death penalty statutes based on the Model Penal Code[23] provided consti-

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circumstances enumerated . . . and further finds that there are no mitigating circumstances *sufficiently substantial* to find leniency") (emphasis added).

14. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976) (classifying Georgia statute as based on the Model Penal Code); Proffitt v. Florida, 428 U.S. 242, 258 (1976) (classifying Florida statute as based on Model Penal Code); England, *supra* note 11, at 601 n.37 (citing MONT. CODE ANN. § 94-5-105 (Special Supp. 1975); NEV. REV. STAT. § 200.030 (1973); TENN. CODE ANN. §§ 39-2402, -2406 (1975); WYO. STAT. § 6-54 (Supp. 1975)). Other, similar statutes have been classified as "quasi-mandatory," *see* England, *supra* note 11, at 602 n.38 (citing CAL. PENAL CODE §§ 190.1, 209, 219 (West Supp. 1976); CONN. GEN. STAT. §§ 53a-25, -35b, -46a, -54b (Supp. 1977); OHIO REV. CODE ANN. §§ 2929.02-.04 (Anderson 1975); TEX. PENAL CODE ANN. § 19.03(a) (West 1974)). These statutes purported to reduce the discretion in weighing aggravating and mitigating circumstances by mandating death sentences when aggravating, but no mitigating, circumstances were present. However, since the term *quasi-mandatory* is not widely used in case law or commentary and the statutes do not differ significantly in application from other guided discretion statutes, the term will not be used in this Article. *See* Jurek v. Texas, 428 U.S. 262, 273 (1976) (classifying Texas statute as based on Model Penal Code and not quasi-mandatory).

15. An aggravating circumstance is some specific factor about the offender or the crime that makes the offender more deserving of death than other capital defendants.

16. A mitigating circumstance is some fact about the defendant or the offense that argues in favor of a more lenient sentence. The defendant in a capital case must be permitted to present in mitigation any evidence relevant to his past, his character, or the circumstances surrounding the murder. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

17. *See, e.g.*, TEX. PENAL CODE ANN. § 19.03 (West 1989).

18. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).

19. 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) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325 (1976).

20. 428 U.S. at 198.

21. 428 U.S. at 258.

22. 428 U.S. at 273.

23. *See, e.g.*, GA. CODE ANN. § 27-2534.1(b) (Michie Supp. 1975). The Georgia statute reads as follows:

tutionally adequate guidance for considering aggravating and mitigating evidence, and thus satisfied the concerns of *Furman*. The Court did not rule on the constitutionality of the statutes as applied.[24]

In the two other cases,[25] the Court struck down mandatory death sentences as violative of the Eighth Amendment ban on cruel and unusual punishment because the statutes failed to provide procedures that guarded against arbitrary and capricious application of capital punishment.[26] These

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> [T]he judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
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> (1) The offense . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id.

24. *See* Zant v. Stephens, 456 U.S. 410 (1982). In *Zant*, the Court stated:

> In [*Gregg*], we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of *Furman v. Georgia* that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court's construing the statute and reviewing capital sentences consistently with this concern.

Id. at 413 (citations omitted), *certifying question to* Zant v. Stephens, 297 S.E.2d 1 (Ga. 1982), *answer to question conformed to in* Zant v. Stephens, 462 U.S. 862 (1983). *But see* Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (holding unconstitutionally vague, as applied, the Georgia aggravating circumstance that the offense was "outrageously or wantonly vile, horrible or inhuman").

25. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 334 (1976).

26. The *Woodson* plurality concluded that "mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion."

statutes also failed to allow for the sentencer to exercise discretion in determining whether certain first degree murderers are not deserving of the harshest penalty. Reasoning that "the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society,' "[27] the *Woodson* plurality held that the long history of jury and legislative rejection of mandatory death sentences indicates that such sentences are unconstitutional.[28] In its rejection of mandatory death sentences, *Woodson* held that death sentences may not be arbitrarily imposed and that a sentence of death must be appropriate to the particular offense and offender.

> [W]e 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.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[29]

It is difficult to discern a coherent underlying rationale for the Court's death penalty jurisprudence because the Court has never articulated one in any single case. However, a number of significant reasons for the requirement of guided discretion have been stated in different cases. The most fundamental of these is the concern, expressed in *Furman*, that capital punishment is likely to be imposed for legally irrelevant reasons, particularly on the basis of the

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Woodson, 428 U.S. at 302. The plurality reasoned that, because of the historic problem of jury nullification (i.e., juries acquitting guilty defendants because of the severity of the penalty), the mandatory statute at issue was no less susceptible to arbitrary jury action than the unguided pre-*Furman* statutes. The statute was found both too broad, because it encouraged juries to decline to convict palpably guilty defendants when death was an inappropriate punishment, and too narrow, because, absent a disavowal of the jurors' oath, it required sentencing to death those defendants who are guilty but not deserving of the death penalty.

> [This] mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under [this] law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly.

Id. at 302-03 (plurality opinion of Stewart, Powell & Stevens, JJ.).

27. *Id.* at 301 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

28. *Id.* at 298.

29. *Id.* at 304-05.

race or economic status of the defendant.[30] A requirement of statutory narrowing makes it more likely that a death sentence will not be imposed *solely* on a legally irrelevant basis.[31] At the very least, some statutory aggravating circumstance must be present. The presence of this ostensibly legally relevant factor means that, even if race does enter into the picture,[32] there also exists a presumably valid legal justification for the sentence. Once this initial step is taken, the Eighth Amendment prohibition on arbitrariness appears to be satisfied.

> [T]he risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. . . . [T]he size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.[33]

The presence of a legally relevant factor satisfies the Eighth Amendment because only those defendants charged with a crime already determined by the legislature to be in some way worse than the vast majority of murders may face the possibility of a death sentence.[34] The more typical murderer, one whose crime does not fall within the scope of an aggravating circumstance, may not face that possibility. Thus, in a statutory scheme with aggravating circumstances that do not apply to an inappropriately high percentage of murderers, the class of death eligible defendants will be significantly smaller than the entire universe of first degree murderers.

B. The Consideration of Mitigating Circumstances and the Requirement of Rationality in Capital Sentencing

While much of the Supreme Court's death penalty jurisprudence has focused on narrowing the class of death eligible defendants to reduce the risk of arbitrary application of the death penalty, another line of cases has focused on the need to give juries discretion to consider mitigating circumstances in deciding whether or not to impose the death penalty.[35] The joint requirements

30. Furman v. Georgia, 408 U.S. 238, 240 (1972) (Douglas, J., concurring).

31. *See* Zant v. Stephens, 462 U.S. 862, 877 n.15 (1983) ("[S]tandards for statutory aggravating circumstances address the concerns voiced by several of the opinions in *Furman v. Georgia* [that the death penalty is imposed capriciously].").

32. *See generally* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (arguing that post-*Furman* guided discretion statutes have not, in fact, in any measurable way eliminated racial considerations in capital sentencing decisions).

33. Walton v. Arizona, 497 U.S. 639, 715-16 (1990) (Stevens, J., dissenting); *see also Zant*, 462 U.S. at 876-77.

34. *See Furman*, 408 U.S. at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes . . . .").

35. *See* Eddings v. Oklahoma, 455 U.S. 104, 113 (1982) (holding that defendant must be permitted to present relevant mitigating evidence and that the sentencer must consider that evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (same).

of narrowing and discretion present an apparent paradox. If the purpose of statutory narrowing is to eliminate arbitrary and capricious sentencing decisions, then it appears incompatible to allow the sentencer discretion to decline to impose a sentence of death. Notwithstanding Justice Scalia's caustic concurrence in *Walton v. Arizona*,[36] the paradox can be resolved if jury discretion in weighing aggravating and mitigating circumstances is considered an additional narrowing step.

If the legislative narrowing operates as constitutionally required, it removes *some* murderers from the class of *all* murderers and makes only this narrower class death eligible. But while statutorily defined aggravating circumstances generally determine death eligible defendants, consideration of mitigating evidence allows the sentencer to make a particularized determination of whether the death penalty is morally appropriate in any given case.

The Court has held that a significant degree of culpability must exist before a sentence of death can be constitutionally imposed.[37] "[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the 'moral guilt' of the defendant."[38] Moral appropriateness has long been viewed as a relevant factor in Eighth Amendment analysis.[39]

> [B]ecause there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." "It is of vital importance to the defendant and to the community that any decision to

36. "To acknowledge that 'there perhaps is an inherent tension' between [the *Lockett*] line of cases and the line stemming from *Furman* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II." *Walton*, 497 U.S. at 664 (Scalia, J., concurring) (quoting McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting)). Justice Scalia concluded that he "will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." *Id.* at 673. For differing views on the necessity of the *Lockett* doctrine and its fit with the *Furman-Gregg* narrowing requirement, see *Walton*, 497 U.S. at 713-19 (Stevens, J., dissenting); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991).

37. *See* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). *Tison* and *Enmund* stand for the proposition that mens rea of at least reckless indifference is constitutionally required before a death sentence can be imposed. In *Enmund*, the Court vacated a death sentence imposed on the basis of accomplice liability when the defendant did not take, attempt, or intend to take a life and did not foresee that lethal force would be used during a robbery. *Enmund*, 458 U.S. at 797. In *Tison*, the Court remanded the case to determine whether the use of lethal force was a clearly foreseeable possibility in the escape of the defendants' father from prison. *Tison*, 481 U.S. at 157-58. Though neither Tison brother participated in the subsequent multiple murder, the Court found the death sentence could be constitutionally acceptable due to (1) the foreseeability of lethal force, (2) the defendants' culpable mental state of reckless indifference, and (3) the defendants' major participation in the felony escape. *Id.*

38. Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

39. Trop v. Dulles, 356 U.S. 86, 101 (1958) (recognizing that the Eighth Amendment draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society").

> impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[40]

In determining whether sufficient culpability exists in any particular case such that a sentence of death, the strongest expression of community outrage, is appropriate, it is necessary to consider not only whether the requisite mens rea is present, but also the relevant evidence of the defendant's background and character and the circumstances surrounding the offense.[41]

The Court's rationale for requiring jury discretion is consistent with the rationale underlying *Furman*[42] only if the legislature provides meaningful narrowing at the beginning of the process, the charging stage. If no narrowing occurs there, the sentencer merely exercises its unchecked discretion in deciding whether or not to impose a sentence of death on any given murderer.[43] If the universe of defendants eligible for this punishment is *legitimately* narrowed before the jury arrives, or if the jury's discretion is substantially constrained by a narrowly drafted list of aggravating circumstances, the sentence imposed will be rational because those defendants upon whom the jury *may* impose a sentence of death will comprise a small class legislatively distinguished from the larger class of all murderers. A jury that declines to pass a sentence of death upon a death eligible defendant on the basis of mitigating circumstances uses a legitimate means of further narrowing, finding that, while on the generalized basis of his offense this defendant *may* be sentenced to death, particular facts about this defendant show that he does not deserve the sentence.

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40. Zant v. Stephens, 462 U.S. 862, 884-85 (1983) (citations omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) and Gardner v. Florida, 430 U.S. 349, 358 (1977)); *see also Walton*, 497 U.S. at 675 (Brennan, J., dissenting):

> Even if I did not believe that the death penalty is wholly inconsistent with the constitutional principle of human dignity, I would agree that the concern for human dignity lying at the core of the Eighth Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

41. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see also Spaziano*, 468 U.S. at 480-81 (Stevens, J., concurring in part and dissenting in part) (stating that the trier of fact must be permitted to weigh any consideration, including any aspect of the defendant's crime or character, in determining whether the crime so offends the moral sensibility of the community that it demands retribution); *Zant*, 462 U.S. at 879 ("What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."); *Enmund*, 458 U.S. at 797 (holding that participation in robbery where murder was committed during commission of the robbery is not so grievous an affront to humanity that the only adequate response is the death penalty).

42. For a discussion of the *Furman* narrowing requirement and rationale, see Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); *Walton*, 497 U.S. at 713-19 (Stevens, J., dissenting).

43. All murderers will not come before capital sentencers because prosecutors will not charge all capitally. But all *could* be capitally tried under a scheme that fails to statutorily narrow the class of death eligible defendants. It is precisely this possibility that *Furman* seeks to avoid. Furman v. Georgia, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring); *see also Walton*, 497 U.S. at 685-86 n.6.

C. *The Failure of Courts to Inquire into the Substantive Application of* Furman *Principles*

Mere statutory enumeration of the aggravating circumstances that can be considered at the charging or sentencing stage does not provide adequate guidance. Legislators must ensure that the circumstances, considered in the aggregate, genuinely narrow the class of death eligible defendants. Because courts choose to review aggravating circumstances as discrete factors and ignore their aggregate effect,[44] they fail to recognize that current capital sentencing schemes are unconstitutionally overbroad.

The Supreme Court has commented largely on procedural, rather than substantive, means of narrowing[45] and has not specified any particular procedural method as necessary to ensure the substantive requirement of genuine narrowing.[46] As a result, state and lower federal courts apply these requirements in an inconsistent and often confused manner. These courts resort to a formulaic enforcement of procedures in lieu of substantive safeguards. The resulting jurisprudence is "the predictable scattering of judges required to react, not reason."[47]

At first, a largely procedural focus made sense. The states could respond to *Furman* only by abolishing capital punishment or by instituting a procedural mechanism to achieve the substantive goals. The Court recognized that the procedures would have to be scrutinized for actual compliance with the substantive requirements of the Eighth and Fourteenth Amendments[48] but never made the necessary leap from analysis of the procedural form to analysis of the substantive effect. Rather than analyzing whether capital sentencing statutes in fact narrow discretion, courts have been content to ensure that some format is in place that *appears* to narrow discretion.

In choosing to review statutory aggravating circumstances as discrete, isolated factors, courts fail to perform their necessary function of determining whether the statute, as a whole, meets constitutional requirements. This focus also effectively grants very deferential treatment to legislative decision making. Almost any aggravating circumstance, standing alone, will appear to identify a

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44. *See, e.g.*, Clemons v. Mississippi, 494 U.S. 738 (1990) (holding that a state appellate court can affirm a sentence of death based in part on a constitutionally invalid aggravating circumstance if at least one valid aggravating circumstance was applicable and the remaining aggravating circumstance(s) are reweighed against the mitigating circumstances); *see also* State v. Moose, 313 S.E.2d 507, 571 (N.C. 1984), discussed *infra* note 88. These two cases indicate the overbreadth of the statutes.

45. *See, e.g.*, Zant v. Stephens, 456 U.S. 410, 413 (1982) (discussing validity of death penalty statutes that contain standards and procedures designed to alleviate the concerns of *Furman*), *certifying question to* Zant v. Stephens, 297 S.E.2d 1 (Ga. 1982), *answer to question conformed to in* Zant v. Stephens, 462 U.S. 862 (1983).

46. *See Gregg*, 428 U.S. at 195 (indicating that *Furman* permits a variety of capital sentencing systems, not limited to the Georgia procedures).

47. Graham v. Collins, 950 F.2d 1009, 1037 (5th Cir. 1992) (en banc) (Higginbotham, J., dissenting), *aff'd*, 113 S. Ct. 892 (1993).

48. *Gregg*, 428 U.S. at 196.

characteristic of a crime or defendant that makes a defendant more deserving of harsher punishment and thus will be treated deferentially by courts.[49] Since a series of individually valid aggravating circumstances may still cast an unacceptably wide net, this deferential approach effectively serves to eviscerate the *Furman* narrowing requirement. The effect of this statutory overbreadth and judical deference is illustrated in the next section.

II
THE FAILURE OF THE NORTH CAROLINA STATUTE, AND THOSE WRITTEN IN THE SAME MOLD, TO ADEQUATELY NARROW

Every state that enacted a death penalty statute after *Furman* and *Gregg* either enacted a restrictive definition of capital murder[50] or attempted to follow the format approved in *Gregg*.[51] To illustrate the differences between the narrowly tailored capital sentencing scheme envisioned by the *Gregg* Court and those statutes enacted in response to *Gregg*, this Article will focus on the North Carolina capital sentencing process. North Carolina's scheme was chosen because it is typical of those now in effect.[52] The statute's format squares

49. There are a few examples of specific aggravating circumstances being struck down on overbreadth grounds when state courts have failed to place a limiting construction on them. *See* Shell v. Mississippi, 498 U.S. 1, 1 (1990) (per curiam) (finding limiting instruction for "especially heinous, atrocious, or cruel" aggravating factor insufficient); Maynard v. Cartwright, 486 U.S. 356, 359-64 (1988) (striking down similar factor in Oklahoma because it can be used as a catch-all); Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (holding statutory findings that offenses were "outrageously or wantonly vile, horrible or inhuman" unconstitutionally vague). The Court did not strike any of the statutes on their face, nor did it examine the aggravating circumstances at issue as part of a larger, unified statute.

50. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (approving restrictive definition of capital murder in Louisiana). Oregon, Texas, and Virginia are among the states attempting to narrow at the definitional stage. Each of these states also requires a finding of some additional issue or factor. *See* OR. REV. STAT. §§ 163.095, 163.150 (1991); TEX. PENAL CODE ANN. § 19.03 (West 1989 & Supp. I 1993); TEX. CRIM. PROC. CODE ANN. § 37.071 (West Supp. 1993); VA. CODE ANN. § 19.2-264.2 (Michie 1990).

51. *See supra* notes 12 & 14 for statutes.

52. North Carolina first attempted, post-*Furman*, to impose capital punishment through mandatory death sentences, which were struck down in Woodson v. North Carolina, 428 U.S. 280, 305 (1976). After *Woodson*, North Carolina adopted a Model Penal Code type of statute with guided discretion, similar to Georgia's scheme, which was approved in Gregg v. Georgia, 428 U.S. 153 (1976). See *supra* note 23 for the text of the statute at issue in *Gregg*. For examples of similar capital sentencing schemes, see ALA. CODE §§ 13A-5-45 to 13A-5-52 (1982 & Supp. 1993); ARK. CODE ANN. §§ 5-4-601 to 5-4-605 (Michie 1993); COLO. REV. STAT. § 16-11-802 (Supp. 1993); CONN. GEN. STAT. § 53a-46a (1985); DEL. CODE ANN. tit. 11, § 4209 (1987 & Supp. 1992); FLA. STAT. ch. 921.141 (1993); GA. CODE ANN. § 17-10-30 (Michie 1990 & Supp. 1993); ILL. ANN. STAT. ch. 720, para. 5/9-1 (Smith-Hurd 1993), *amended by* 1993 Ill. Legis. Serv. 88-176 (West); IND. CODE § 35-50-2-9 (Supp. 1981); MD. ANN. CODE art. 27, §§ 412-13 (1992 & Supp. 1993); MASS GEN. LAWS ANN. ch. 279, § 68-69 (West Supp. 1993); MISS. CODE ANN. § 99-19-101 (Supp. 1992); MO. REV. STAT. § 565.032 (1986 & Supp. 1993); NEV. REV. STAT. § 175.554 (1991); N.M. STAT. ANN. § 31-20A (Michie 1990 & Supp. 1993); OKLA. STAT. tit. 21, §§ 701.10-12 (1991 & Supp. 1993); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1976 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-27A-1-6 (1988 & Supp. 1993); TENN. CODE ANN. § 36-13-204 (1991 & Supp. 1993); WYO. STAT. § 6-2-102 (1977).

with *Furman*, *Gregg*, and *Woodson* only in a technical sense, leaving great potential for abuse.[53]

On its face, the North Carolina scheme, like the one approved in *Gregg*, appears to serve some narrowing function.[54] But this holds true only if neither of two contingencies occur: (1) state courts construe facially valid individual aggravating circumstances so broadly as to include an unacceptably wide range of criminal activity; or (2) discrete aggravating circumstances, taken together, include virtually every first degree murder.[55] Although the Court has shown some willingness to strike components of capital statutes when they are given an overbroad construction,[56] the latter situation, which has *not* been addressed by the courts, is the more subtle, and more common, constitutional defect. A listing of particular aggravating circumstances may only cause the sentencer to pick and choose which it wishes to apply in any particular capital murder case, without substantively narrowing the number of death eligible defendants.

The Court has stated that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute *that ensures that the sentencing authority is given adequate . . . guidance.*"[57] Narrowly tailored individual aggravating circumstances that are cumulatively overbroad fail to provide the sentencing authority with adequate guidance.

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53. Justice Douglas's concurrence in *Furman* expressed concern about the potential abuses inherent in unfettered discretion. Furman v. Georgia, 408 U.S. 238, 248-57 (1972) (Douglas, J., concurring).

54. Commentators have argued that, even on its face, a statute containing an aggravating circumstance similar to North Carolina's "especially heinous, atrocious, or cruel" circumstance, N.C. GEN. STAT. § 15A-2000(e)(9) (1988), does not adequately narrow the class of death eligible defendants, because it is so vague that it can be applied to any first degree murder. *See, e.g.*, Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941 (1986) (arguing that statutes with the heinous, atrocious, or cruel aggravating circumstance violate the Eighth and Fourteenth Amendments because they provide inadequate guidance to sentencers and make unfair application a certainty). The Supreme Court has rejected this argument. *Gregg*, 428 U.S. at 200. However, the Court has expressed a willingness to strike down such aggravating circumstances when state courts fail to provide some narrowing construction. *See, e.g.*, Shell v. Mississippi, 498 U.S. 1, 1 (1990) (per curiam) (holding insufficient a limiting instruction used to define the "especially heinous, atrocious, or cruel" aggravating factor); Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (overturning as overbroad a construction of the "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance).

55. For example, an aggravating circumstance might be shown to apply to only 2 percent of all murders. Viewed as a discrete entity, it appears to legitimately narrow. But if the statute contains fifty such circumstances, it potentially eliminates no one from the universe of death eligible defendants. These numbers provide illustration only. No current statute contains any number even approximating 50 aggravating circumstances. But a statute need not apply to 100 percent of murderers to be constitutionally inadequate.

56. *See supra* note 49.

57. *Gregg*, 428 U.S. at 195 (emphasis added).

A. The Overbreadth of the North Carolina Capital Sentencing Statute

The North Carolina statute specifies eleven aggravating circumstances.[58] The potential overbreadth of certain circumstances[59] and the range of activity encompassed by the entire law make the North Carolina statute applicable to virtually every first degree murder.

In North Carolina, capital murder includes only first degree murder, classified as those killings committed with premeditation and deliberation, or committed in the course of certain felonies even absent intent to kill (felony murder).[60] In addition, at least one statutory aggravating circumstance must apply to the offense for it to be charged capitally.[61] The scheme requires a capital charge if, in the prosecutor's judgment, the evidence establishes that the murder is in some way aggravated.[62] Initially, at the charging stage, this

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58. N.C. GEN. STAT § 15A-2000(e) (1988) reads as follows:

Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

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

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

The fifth aggravating circumstance has been found to be a violation of the North Carolina constitution, at least when the felony murder is also used as the basis for charging the crime capitally. *See infra* note 76 and accompanying text.

59. *E.g.*, "The capital felony was especially heinous, atrocious, or cruel." N.C. GEN. STAT. § 15A-2000(e)(9) (1988). *See supra* note 54 and *infra* notes 78-85 and accompanying text.

60. N.C. GEN. STAT. § 14-17 (1988 & Supp. 1993). The felonies include "arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." *Id.*

61. N.C. GEN. STAT. § 15A-2000(b)(1) (1988).

62. State v. Case, 410 S.E.2d 57, 58 (N.C. 1991) (holding that "where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must

requirement appears to begin the narrowing process: of all first degree murders, only those to which at least one statutory aggravating circumstance applies may be capitally tried. Conversely, if there are some first degree murders to which no aggravating circumstances apply, these murders cannot be capitally tried.

The crucial question for purposes of this Article and the constitutionality of the North Carolina statute is whether the statute meaningfully narrows the class of death eligible defendants from the class of all potentially death eligible murderers.[63] As is illustrated below, the eleven aggravating circumstances appear to include virtually all first degree murders. The statute therefore does nothing to narrow the class of death eligible defendants at either the charging or sentencing stage of the process.

The first three aggravating circumstances label a defendant death eligible based on his status. A defendant lawfully incarcerated at the time of the murder becomes death eligible.[64] This circumstance, standing alone, certainly narrows the class. Most murders are not committed by people lawfully incarcerated at the time. A defendant is also death eligible if he was convicted of first degree murder prior to committing the murder for which he is now being sentenced.[65] Again, most murders are not committed by those with prior convictions for first degree murder. There appears to be a valid penological rationale for imposing a more severe penalty on a person convicted of first degree murder for a second time. A defendant is also death eligible if he

be based on a genuine lack of any aggravating circumstance"); State v. Britt, 360 S.E.2d 660, 662 (N.C. 1987) (stating "the question of trying a first degree murder case as capital or noncapital is not within the [prosecutor's] discretion"); State v. Johnson, 257 S.E.2d 597, 619-20 (N.C. 1979) (holding that prosecutors must submit all aggravating circumstances that are supported by the evidence). Although on its face this apparent narrowing of prosecutorial discretion might appear to reduce the arbitrary and capricious imposition of the death penalty, it does nothing to cure any constitutional infirmities. The limitations on prosecutorial discretion will rarely, if ever, be enforced. No defense attorney will ask a court to require that her client be charged capitally when the prosecutor chooses to charge noncapitally in spite of strong evidence. *But see Case, supra* (where the defense counsel raised the issue on appeal because the defendant was sentenced to death despite the fact that not all the aggravating circumstances that were supported by the evidence were submitted). A trial court will most likely not do so sua sponte since it does not yet any have knowledge of the evidence. Appellate courts only review evidence to determine if it supports the jury's verdict and sentence. They are unlikely to remand a case with orders that it be retried capitally since a defendant appealing a conviction is unlikely to complain that he was not tried for a more serious offense, and in any case, the only evidentiary record before the court will be that developed at trial. In any event, *Furman*, at least as interpreted by *Woodson*, is concerned with restraining the *sentencer's* discretion, not the prosecutor's. *See supra* notes 25-29 and accompanying text.

63. *See* Maynard v. Cartwright, 486 U.S. 356, 359-64 (1988) (striking down Oklahoma statute as overbroad because its heinous, atrocious, or cruel aggravating circumstance was applied as a catch-all); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1124-25 (1990) ("The issue in analyzing a narrowing device is . . . whether the narrowing device . . . both genuinely narrow[s] the class of death-eligible defendants and do[es] so in a way that identifies those defendants most deserving of death.").

64. N.C. GEN. STAT. § 15A-2000(e)(1) (1988).

65. *Id.* § 15A-2000(e)(2).

was convicted of any felony involving either the use or threat of violence prior to the murder for which he is now being sentenced.[66] This section specifies that the only thing necessary to make the defendant death eligible is that the prior felony have included *the threat* of violence to the person.

The effect of these circumstances is that after examining the first three of North Carolina's eleven aggravating circumstances, all defendants who are (or were at the time of the murder) prisoners or have a prior conviction for any felony ranging from first degree murder to attempted assault or robbery involving the threatened use of violence (even if the defendant in fact had no weapon)[67] are automatically death eligible. While each of these aggravating circumstances, standing alone, may serve a narrowing function, when combined they begin to include a very broad cross-section of first degree murder defendants.

The next few aggravating circumstances involve the circumstances surrounding the murder. If the murder was committed for the purpose of either avoiding or preventing a lawful arrest, the defendant is death eligible.[68] Similarly, if the murder was committed to disrupt or hinder the exercise of a governmental function, it may result in a sentence of death.[69] The defendant is also death eligible if he intended to receive anything of monetary value, either as compensation for committing the murder or as a result of the killing.[70]

If the murder was a felony murder, the defendant is death eligible.[71] Felony murder includes murders committed *during the commission* of nine enumerated felonies, or *during flight after commission* of these felonies.[72] No intent to kill is necessary.[73] For example, if a gun accidentally discharges and kills someone in the course of a robbery, the defendant may be capitally tried regardless of whether or not the defendant fired the gun. Similarly, a defend-

66. *Id.* § 15A-2000(e)(3).

67. Several years ago, I was robbed on the streets of Washington, D.C. When asking for the contents of my wallet, the assailant informed me that he had a gun and would not hesitate to use it. He took a small amount of cash from me and fled on foot. He was arrested soon after and searched by the arresting officer. He did not, in fact, have a gun. Nevertheless, had he been convicted of a felony for this incident and, if at some future time he was charged with first degree murder in North Carolina, he would be death eligible. His prior conviction included the "[threat] of violence to the person. A felony involves the . . . [threat] of violence to the person if the perpetrator kills or inflicts physical injury on the victim, *or threatens to do so*, in order to accomplish his criminal act." NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS 9 (1990) [hereinafter PATTERN JURY INSTRUCTIONS] (brackets in original) (emphasis added) (on file with author and the *New York University Review of Law & Social Change*).

68. N.C. GEN. STAT. § 15A-2000(e)(4) (1988).

69. *Id.* § 15A-2000(e)(7).

70. *Id.* § 15A-2000(e)(6). This is known as the pecuniary gain aggravating circumstance.

71. *Id.* § 15A-2000(e)(5).

72. The felonies include "homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb." *Id.*

73. PATTERN JURY INSTRUCTIONS, *supra* note 67, at 1, 6; *see also* Tison v. Arizona, 481 U.S. 137, 157-58 (1987).

ant may be capitally tried if a murder was committed while he aided or abetted the commission of, or flight after, a felony.[74] The defendant need not be present during or after commission of the felony, as long as he "shares another's criminal purpose and to the other's knowledge is aiding [the other] or is in a position to aid [the other] when the felony is committed."[75]

Felony murder raises serious constitutional questions. It uses the same conduct both to elevate a homicide to first degree murder and to make the defendant death eligible. A few state courts, including the North Carolina Supreme Court, have held that such double counting (using felony murder both to elevate a homicide to first degree murder and as an aggravating circumstance) violates the state constitution.[76] Thus, for the felony murder aggravating circumstance to be submitted, the homicide must be elevated to first degree murder for a reason other than because it was committed during the course of an underlying felony. Similarly, if the killing is elevated to first degree murder as a felony murder, the felony murder aggravating circumstance cannot also be used to make the murderer death eligible.

The status of the victim may also make the defendant death eligible. If the victim was a law enforcement officer, employee of the Department of Correction, jailer, firefighter, judge or justice, prosecutor, juror, or witness against the defendant and the murder was committed during, or as a result of, the performance of the victim's official duties, the defendant may be sentenced to death.[77]

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74. PATTERN JURY INSTRUCTIONS, *supra* note 67, at 1, 6; *see also Tison,* 481 U.S. at 157-58. See *supra* note 37 for a discussion of intent and/or foreseeability as prerequisite(s) for charging capitally.

75. PATTERN JURY INSTRUCTIONS, *supra* note 67, at 12-14.

76. *See, e.g.*, State v. Cherry, 257 S.E.2d 551, 567-68 (N.C. 1979); State v. Middlebrooks, 840 S.W.2d 317, 342 (Tenn. 1992), *cert. granted*, 113 S. Ct. 1840, *cert. dismissed as improvidently granted*, 114 S. Ct. 651 (1993). However, the strong likelihood that the underlying felony will also create an additional aggravating circumstance causes the prohibition on double counting to have little substance. *See, e.g.*, State v. Oliver, 274 S.E.2d 183, 202, 204 (N.C. 1981) (vacating death sentences under the *Cherry* prohibition on double counting but affirming submission of "pecuniary gain" aggravating circumstance where defendants committed a homicide during the course of a robbery); *cf.* State v. Quesinberry, 354 S.E.2d 446, 451-52 (N.C. 1987) (explaining that *Oliver* rests on distinction between motive, e.g., committing the murder for pecuniary gain, and action, e.g., committing the murder during the course of an enumerated felony). Felony murder also covers a broad range of homicides. The Court has held that a conviction for felony murder may not necessarily make the defendant death eligible. *See* Enmund v. Florida, 458 U.S. 782, 797 (1978). *Enmund* vacated a death sentence because the defendant neither used, nor anticipated that his accomplices would use, deadly force in the commission of a robbery. The defendant merely drove a getaway car and was not physically present at the place of the murders. *But cf. Tison,* 481 U.S. at 157-58 (remanding the case when defendants' father and an accomplice committed the murders during flight after a prison break, to determine whether defendants must have anticipated the possibility of the use of deadly force in effecting a prison break, even though the actual murders took place some time afterwards and some distance from the prison). These problems are beyond the scope of this Article, but for an analysis of the constitutional problems of felony murder as a criterion for death eligibility, see Rosen, *supra* note 63.

77. N.C. GEN. STAT. § 15A-2000(e)(8) (1988).

The defendant is also death eligible if the murder was "especially heinous, atrocious, or cruel."[78] Trial courts must initially determine whether it is appropriate to submit this circumstance to the jury. They do so in a substantial proportion of capitally tried murder cases.[79] Yet, facially, this circumstance tells the jury nothing.

The Supreme Court recognized this very early in the development of its modern death penalty jurisprudence and held that its validity would depend on an appropriately narrow construction by state courts.[80] An overbroad construction creates an unacceptable risk that the circumstance will be used as a catch-all provision authorizing imposition of the death penalty if no other aggravating circumstance applies.

North Carolina courts' construction of its "heinous, atrocious, or cruel" aggravating circumstance does not adequately narrow the scope of its application, as the pattern jury instruction illustrates:

> In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been *especially* heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.[81]

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78. *Id.* § 15A-2000(e)(9).

79. An informal survey of the North Carolina Appellate Defender's office and the North Carolina Death Penalty Resource Center, taken at the author's request, revealed that in 25 capitally tried cases comprising 31 murders (as of April 28, 1993), the heinous, atrocious, or cruel aggravating circumstance was submitted to the jury in 11 cases, or 32.4 percent of the murders. The jury found the circumstance in nine of these cases, or 81.8 percent. In one case in which the heinous circumstance was submitted, the jury found it at the initial trial. The sentence was vacated on other grounds, and in the subsequent sentencing hearing, on the same facts, the circumstance was submitted to the jury but not found. Telephone Interview with Benjamin Sendor, Assistant Appellate Defender, State of North Carolina (April 29, 1993). Thus, a jury clearly has discretion in finding this aggravating circumstance.

80. In rejecting defendant's argument that Georgia's "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" aggravating circumstance was facially overbroad, the Court reasoned that "there is no reason to assume that the Supreme Court of Georgia will adopt . . . an open-ended construction." Gregg v. Georgia, 428 U.S. 153, 201 (1976). The Georgia court did in fact adopt an open-ended construction, and the Court struck down that construction as unconstitutionally overbroad four years later. Godfrey v. Georgia, 446 U.S. 420, 427-33 (1980); *see id.* at 428-29 ("[A] person of ordinary sensibility could fairly characterize any murder as 'outrageously or wantonly vile, horrible and inhuman.' ").

81. PATTERN JURY INSTRUCTIONS, *supra* note 67, at 18-19.

While North Carolina courts make much of the admonition that the murder must have been "*especially* heinous, atrocious or cruel" as defined in the jury instruction,[82] they have not explained how a jury should know the level of brutality "normally present in any killing." North Carolina courts have held that this aggraveting circumstance is not unconstitutionally vague if used only in cases in which the murder was "conscienceless or pitiless" and "unnecessarily torturous to the victim."[83] Yet despite the insistence that murders must have been "*especially* heinous" the language of the jury instruction does little to guide the jury in determining whether any particular murder fails this requirement because the jury lacks a basis for comparison. Furthermore, the North Carolina Supreme Court's comments on this aggravating circumstance indicate that any murder in which the victim does not die instantaneously falls within its scope.[84] It is therefore highly questionable whether this circumstance and jury instruction adequately address the concerns of *Godfrey v. Georgia*.[85]

The final two aggravating circumstances involve the risk or commission of other related crimes. The defendant is death eligible if he "knowingly cre-

82. *See, e.g.*, State v. Hamlet, 321 S.E.2d 837, 845-46 (N.C. 1984) (vacating death sentence in favor of life imprisonment where evidence failed to support finding that murder was especially heinous, atrocious, or cruel); State v. Goodman, 257 S.E.2d 569, 585 (N.C. 1979) (noting that evidence did support finding that murder was especially heinous, atrocious, or cruel, but vacating death sentence on other grounds).

83. *See, e.g.*, State v. Martin, 278 S.E.2d 214, 218-19 (N.C.) (holding that North Carolina's "especially heinous" circumstance "will not become a 'catch-all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances"), *cert. denied*, 454 U.S. 933 (1981).

84. *See* State v. Artis, 384 S.E.2d 470, 494 (N.C. 1989) (holding that a jury may infer psychological torture and find the heinous, atrocious, or cruel circumstance from death by strangulation because death may take several minutes and the victim is conscious of impending death), *vacated on other grounds and remanded*, 494 U.S. 1023 (1990); *see also* Sochor v. Florida, 112 S. Ct. 2114, 2121 (1992) (holding Florida Supreme Court's construction of heinous, atrocious, or cruel aggravating circumstance sufficiently narrow as applied to defendant because "the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim"). These rulings present a genuine risk that any murder in which the victim does not die instantaneously, regardless of the killer's intent or lack thereof to inflict unnecessary suffering, may be "heinous, atrocious, or cruel" using the rationale articulated in *Artis* and Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990) (holding that the fact that defendant "might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of circumstances than to the perpetrator's."). The pattern jury instruction form does, however, contain the following note to trial judges:

> While every murder is, at least arguably, heinous, atrocious and cruel, this aggravating circumstance is not intended to be submitted in every case. There must be some evidence upon which the jury could reasonably conclude that the brutality involved in the murder in question exceeded that normally present in any killing. . . . In addition, this aggravating circumstance is limited to acts done *during* the commission of the murder.

PATTERN JURY INSTRUCTION, *supra* note 67, at 18 (citing State v. Goodman, 257 S.E.2d 569, 585 (1979)).

85. 428 U.S. 153 (1976).

ate[d] a great risk of death to more than one person" through the use of a weapon ordinarily dangerous to more than one person.[86] This aggravating circumstance has been limited somewhat—it does not, for example, necessarily include all handgun killings in which a person other than the victim and killer was present, despite the possibility of a bullet ricocheting or passing through one victim into another.[87] But it almost certainly includes any murder committed with a shotgun.[88]

Finally, the defendant is death eligible if the murder was "part of a course of conduct in which the defendant engaged" that included crimes of violence against other people.[89] A murder qualifies as "part of a course of conduct" if sufficiently connected to the other acts to establish a plan connecting the offenses. The same modus operandi and motivation may be sufficient to establish "a course of conduct," despite a significant interval between offenses.[90] For example, if during the commission of a burglary, the perpetrator finds two people present and kills them both, the murders are potentially capital as felony murder on the basis of the burglary, and each murder is potentially capital under the course of conduct aggravating circumstance on the basis of the other.[91] If the defendant murders two members of the same family over a period of years, he may still be death eligible under the course of conduct aggravating circumstance. The sentencer need only "discern some connection [or] common scheme" linking the acts.[92]

There are probably some cases in which a defendant, with the premeditation and deliberation necessary for first degree murder, planned to kill someone, confronted the victim in a location with no one else present and, with a well-aimed gunshot, ended the victim's life.[93] However, while statistics are

86. N.C. GEN. STAT. § 15A-2000(e)(10) (1988).

87. State v. Moose, 313 S.E.2d 507, 517 (N.C. 1984) (dictum).

88. Although the Supreme Court in Godfrey v. Georgia, 446 U.S. 420 (1980), held the goriness of a shotgun killing insufficient to characterize it as "outrageously or wantonly vile, horrible or inhuman," *id.* at 432-33 & n.15, (the Georgia equivalent to North Carolina's heinous, atrocious, or cruel aggravating circumstance), a shotgun *is* a weapon "ordinarily dangerous to more than one person." *Moose*, 313 S.E.2d at 517 (dictum). Therefore, the defendant in any shotgun murder is still automatically death eligible under North Carolina law. This illustrates the overlap of aggravating circumstances and the resulting statutory ability to apply some aggravating circumstance to a wide range of first degree murders, even if one has also been held constitutionally inapplicable to any particular type of murder.

89. N.C. GEN. STAT. § 15A-2000(e)(11) (1988).

90. *See* State v. Cummings, 422 S.E.2d 692, 703-05 (N.C. 1992) (holding "course of conduct" aggravating circumstance properly submitted despite lapse of 26 months between murder of two sisters).

91. State v. Gibbs, 436 S.E.2d 321, 354-55 (N.C. 1993).

92. *Cummings*, 422 S.E.2d at 705.

93. These circumstances appear to be a virtual necessity in order to escape the reach of one of the aggravating circumstances in North Carolina. If the defendant used a shotgun or explosive device, he knowingly created a risk of death to more than one person. If he used some method other than a gunshot or large explosion, the victim probably did not die instantaneously, and the defendant is theoretically death eligible under the heinous, atrocious, or cruel circumstance. *See* State v. Artis, 384 S.E.2d 470, 494 (N.C. 1989) (affirming finding of heinous, atrocious, or cruel circumstance in murder by strangling because victim remained conscious for

not probative on this point, it seems counterintuitive that these cases comprise more than a small handful of all first degree murders. The circumstances necessary for a murder to fall outside the scope of the statutory aggravating circumstances are simply too rare, especially considering that the heinous, atrocious, or cruel aggravating circumstance applies if the victim does not die instantaneously. Thus, a statute ostensibly drafted to limit death sentences both quantitatively[94] and qualitatively[95] effectively does neither, at least at the charging stage.[96] Unless death sentences are limited at the charging stage, the jury's discretion has not been effectively constrained as required by *Furman.*[97]

It might be argued that even if a statute's aggravating circumstances cover all first degree murders, the presence of one or more in a particular case is sufficient to conclude that the murderer is deserving of death. However, this simply reinstates pre-*Furman* capital sentencing problems. Juries would be free to sentence to death whomever they chose, and courts would possess no means of ensuring that those chosen to die are not chosen for a legally irrelevant reason, and are not "wantonly and freakishly" sentenced to death.[98] The plurality reasoned in *Woodson* that the history of jury sentencing in capital trials leads to the conclusion that under the Eighth Amendment not all first degree murderers can be sentenced to death.[99] Therefore, the Eighth Amendment concerns of *Furman* are not satisfied merely by legislatures providing some words about aggravating circumstances for sentencers to mouth while engaging in arbitrary and capricious sentencing decisions.

Jury discretion might be less problematic if the initial stage of the process meaningfully narrowed the universe of death eligible defendants. *Woodson* requires jury discretion.[100] As the *Woodson* plurality discussed, discretion allows the jury to act in its historic capacity as the conscience of the community without resorting to acquittal of guilty defendants by jury nullification when the death penalty is inappropriate.[101] However, without meaningful statutory guidance through aggravating circumstances that genuinely circumscribe the

several minutes), *vacated on other grounds and remanded*, 494 U.S. 1023, 1023 (1990); State v. Barfield, 259 S.E.2d 510, 544 (N.C. 1979) (affirming finding of heinous, atrocious, or cruel aggravating circumstance in murder by poisoning.)

94. *See* Zant v. Stephens, 462 U.S. 862, 877 (1983).

95. *See, e.g.*, Shell v. Mississippi, 498 U.S. 1, 1 (1990) (per curiam); Maynard v. Cartwright, 486 U.S. 356, 359-64 (1988); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); *see also* Rosen, *supra* note 63, at 1124-25.

96. *See* BARRY NAKELL & KENNETH HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 152-58 (1987) (concluding based on empirical study that prosecutorial discretion is the major source of arbitrariness in the application of the death penalty in North Carolina); *see also supra* note 62 (discussing the failure of the North Carolina statute to limit prosecutorial discretion).

97. *See supra* notes 25-29 and accompanying text.

98. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

99. 428 U.S. at 302-03; *see also supra* notes 25-26.

100. 428 U.S. at 302-03.

101. *Id.*; *see infra* note 112 for discussion of the jury acting as the conscience of the community.

number of defendants who may be capitally tried, the jury potentially exercises its discretion on virtually the entire universe of murder defendants. Unless the jury's sentencing decision is meaningfully circumscribed, nothing in the process brings about the rationality in capital sentencing required by the Constitution.

The constitutional objection is not that the statute is actually applied too broadly but that it might be so applied under the existing construction.[102] The fact that the North Carolina statute is not currently used to make virtually every first degree murder defendant death eligible does nothing to cure the constitutional infirmity. Justice Douglas's *Furman* concurrence[103] stressed that the *possibility* of legally irrelevant factors entering into sentencing consideration was unacceptable. If virtually every first degree murder defendant is death eligible, then some factor must meaningfully circumscribe jury discretion. The existence of an aggravating circumstance means nothing when the aggravating circumstances in the aggregate cover virtually every first degree murder. A specific and rationally reviewable aggravating circumstance must mark the difference between those cases resulting in a death sentence and those resulting in a sentence of imprisonment.

B. The Effect of the North Carolina Capital Sentencing Statute on Jury Decision Making

Once a capital jury is impanelled, there has already been a judgment made by a prosecutor and, in some circumstances, a judge[104] that at least one aggravating circumstance exists in the case. Considering the breadth of several circumstances standing alone and the eleven aggravating circumstances collectively, it may be argued that this does not require much judgment at all. Therefore, if a murder can be classified as first degree, it can almost certainly be capitally tried; if it can be capitally tried, a reasoned judgment has already been made that at least one aggravating circumstance applies. Upon conviction, the jury can return a sentence of death if *it* finds at least one aggravating circumstance present and no mitigating circumstances sufficient to outweigh the aggravating circumstance(s).[105] Once again, a statute creates a situation in

102. Overbreadth raises serious constitutional problems itself. But the concern here is simply the arbitrary and capricious imposition of capital punishment. Overbreadth is relevant only insofar as it affects arbitrariness.

103. Furman v. Georgia, 408 U.S. 238, 242 (1972).

104. *See, e.g.*, State v. Watson, 312 S.E.2d 448, 451-52 (N.C. 1984) (commending defense counsel for making pretrial motion allowing trial judge to declare evidence insufficient to support the only proffered aggravating circumstance, thereby causing the case to be tried as non-capital first degree murder).

105. The North Carolina statute requires the jury to return a "recommendation." N.C. GEN. STAT. § 15A-2000(b) (1988). However, this "recommendation" is binding on the trial court. State v. Smith, 292 S.E.2d 264, 276 (N.C.), *cert. denied*, 459 U.S. 1056 (1982). It may not be possible to determine what effect this dilution of personal responsibility (by shifting it to others involved in the process) might have on jurors' willingness to return sentences of death. But moral philosophers, psychologists, and penologists have raised interesting questions con-

which nearly absolute discretion to sentence a defendant to death rests in the hands of the jury.

In deciding whether to impose a sentence of life imprisonment or death, a North Carolina jury must answer four questions.[106]

1. Are there any aggravating circumstances? If the jury finds none, it must return a sentence of life imprisonment. This question is designed to limit the death penalty to aggravated murders only. But if the eleven aggravating circumstances can be applied, individually or in the aggregate, to most murders, this merely asks the jury to arbitrarily decide whether or not it chooses to find any of the circumstances in a particular case. If the jury answers this question in the affirmative, it then goes on to the second question.
2. Are there any mitigating circumstances?[107] If the jury answers this question in the negative, it must answer only one further question: are the aggravating circumstances of sufficient weight to justify imposition of a sentence of death? If the jury finds one or more mitigating circumstances, it must proceed to the next two questions.
3. Are the mitigating circumstances of sufficient weight to outweigh the aggravating circumstances? If the jury answers this affirmatively, it must

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cerning the enabling effect of removing feelings of personal responsibility for the death of others. *See, e.g.*, FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 98-103 (1986).

106. N.C. GEN. STAT. § 15A-2000(b) (1988); State v. McDougall, 301 S.E.2d 308, 323 (N.C.), *cert. denied*, 464 U.S. 865 (1983).

107. N.C. GEN. STAT. § 15A-2000(f) (1988) specifies the following mitigating circumstances:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

The jury is not limited to the mitigating circumstances enumerated in the statute. Under Lockett v. Ohio, 438 U.S. 586 (1978), the defendant must be permitted to present any evidence about his character, background, or the circumstances surrounding the offense that might have mitigating value. At the charge conference, defense counsel asks the trial judge to instruct the jury on any mitigating circumstances offered into evidence. The judge should instruct the jury on any mitigating circumstance supported by the evidence. N.C. GEN. STAT. § 15A-2000(b) (1988).

return a sentence of life imprisonment. If not, the jury continues on to the final question.

4. Is the relative weight of the aggravating and mitigating circumstances sufficient to justify the imposition of a sentence of death? If the jury answers in the negative, it must impose a sentence of life imprisonment. If it answers in the affirmative, it must impose a sentence of death.

The constitutionally relevant question is whether this system provides any meaningful guidance to the jury in executing its sentencing duties. Facially, the scheme may appear to do so. Upon closer scrutiny, however, the jury is simply left to its own unfettered discretion in passing sentence upon the capital defendant.[108]

If the statutory aggravating circumstances are as broad as this Article argues, a jury should be able to find one or more in most first degree murder cases. Finding no aggravating circumstances may be an act of mercy by the jury, but it cannot be rationally explained by the statutory circumstances as written or construed. Nor can it be rationally explained relative to other, factually similar, homicides. If the statutory aggravating circumstances exist in almost any first degree murder, then the jury's finding turns solely upon its subjective discretion. Therefore, the statute fails to offer any meaningful guidance to the jury or opportunity for meaningful appellate review that would effectively limit the jury's discretion.

The unguided weighing process exacerbates this problem of unfettered

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108. The Pattern Jury Instruction form purports to guide the jury:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. . . . In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. . . . [Y]ou must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances. . . .
>
> . . . [In deciding whether the aggravating circumstance(s) found justify a death sentence when considered with the mitigating circumstance(s) found], you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. . . .
>
> . . . [In cases with aggravating but no mitigating circumstances], you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty.
>
> Substantial means having substance or weight, important, significant or momentous. . . . [I]t is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty . . . .

PATTERN JURY INSTRUCTIONS, *supra* note 67, at 34-35.

discretion. The jury must first make a determination whether, in its opinion, aggravating circumstances, which *could* be found by a reasonable jury in any given case, exist in the particular case. Then the jury must determine, still with no guidance, how much weight these circumstances carry and whether they are "sufficiently substantial to call for the imposition of the death penalty."[109] The jury then repeats this process with regard to mitigating circumstances. It must determine if any statutory or nonstatutory mitigating circumstances exist. If so, the jury must determine with no guidance what weight, if any, these mitigating circumstances carry. It need not be unanimous about the existence or weight of mitigating circumstances.[110] The jury compares the ephemeral relative weight of these aggravating and mitigating circumstances. Finally, if the jury determines that the mitigating circumstances do not outweigh the aggravating circumstances, it must determine if the aggravating circumstances are sufficient to justify a death sentence.

In theory, the required weighing and balancing make sense as a means for juries to dispense mercy and to provide the individualized sentencing consideration required by *Woodson v. North Carolina*.[111] These steps allow the jury to act as the conscience of the community.[112] If the aggravating circumstances had any legitimate narrowing effect, the additional steps the jury must follow would simply provide a means to decide whether certain defendants in a narrow class deserve, due to unique circumstances, to be removed from that class. However, absent statutory aggravating circumstances that meaningfully narrow the class of death eligible defendants, the unguided weighing and balancing requirements serve only to make the entire process more arbitrary and open up the process to the consideration of legally irrelevant factors, such as race and economic status.

CONCLUSION

The Eighth and Fourteenth Amendments require that capital sentencing

109. N.C. GEN. STAT. § 15A-2000(c)(2) (1988).

110. McKoy v. North Carolina, 494 U.S. 433, 444 (1990). However, unanimity is required as to the existence, although not the weight, of aggravating circumstances. State v. Kirkley, 302 S.E.2d 144, 155 (N.C. 1983).

111. 428 U.S. 280, 303 (1976).

112. The jury has long been understood to represent the conscience of the community. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 145, 155 (1968). This is especially true in capital cases, where a sentence of death may be seen as a statement of community outrage at a particularly horrible crime. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976):

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

(citations omitted); *see also* Walter Berns, *The Morality of Anger, in* THE DEATH PENALTY IN AMERICA 333 (Hugo Adam Bedeau ed., 3d ed. 1982) (arguing that the death penalty is an expression of anger by a moral community against a violator of the community's foundations).

statutes meaningfully narrow the class of murderers eligible for the death penalty. The narrowing must significantly limit the possibility of death sentences being imposed for legally irrelevant reasons, such as race or economic status,[113] and must ensure that the defendant bears a substantial degree of culpability before he may be sentenced to death.[114] In addition, the sentencer must be permitted to make a determination, based on mitigating circumstances, that the defendant is not sufficiently morally culpable to deserve the most extreme expression of community outrage.[115]

The North Carolina capital sentencing statute, and other states' statutes structured and construed in the same mold, fail to meet the Eighth and Fourteenth Amendments' narrowing requirements. Aside from, and more important than, the possible constitutional problems of individual aggravating circumstances, the statute's eleven aggravating circumstances in the aggregate fail to narrow the class of death eligible defendants in any meaningful way.[116] The result of this failure is that North Carolina prosecutors can try virtually any first degree murder capitally. North Carolina juries then have unfettered discretion whether or not to impose a sentence of death in any capitally tried case.

Courts allow this unfettered discretion because they view each aggravating circumstance as a discrete entity. The courts should ask whether the statute as a whole eliminates all but the worst offenders from the universe of death eligible defendants. Instead they ask merely whether any particular aggravating circumstance presents some plausible claim that an offender is deserving of death. Any particular aggravating circumstance might be applicable only to a fraction of all murder defendants, but if the statute contains enough of such circumstances, the range encompassed by the statute as a whole becomes too broad.

Despite an elaborate procedure designed to heed guided discretion requirements, the current capital sentencing scheme is virtually identical in its practical effect to the one that existed before *Furman*. Juries are able at sentencing to consider a range of circumstances that cover virtually all first degree murders in deciding whether or not to impose the death penalty. Such a scheme does not impose substantive restraints on the use of the death penalty. If the Court's death penalty cases over the past twenty-two years reveal anything, it is that the capital sentencing scheme now employed by North Carolina, and many other states, is unconstitutional. Until courts scrutinize statutes as a whole rather than as a series of discrete, isolated aggravating

113. Furman v. Georgia, 408 U.S. 238, 240 (1972) (Douglas, J., concurring).

114. Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 801 (1982).

115. Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part); *Enmund*, 458 U.S. at 800-01; Lockett v. Ohio, 438 U.S. 586, 604 (1978).

116. This does not suggest that no statute could ever meet the requirements. A statute could possibly be framed to adequately and meaningfully narrow. However, the specific content of such a statute is a matter for the legislatures to address.

circumstances, no meaningful narrowing will occur. Now, no less than before *Furman*, state capital sentencing schemes are "cruel and unusual in the same way that being struck by lightning is cruel and unusual"[117] because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[118]

117. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).
118. *Id.* at 313 (White, J., concurring).