Chapter 13: Constitutional Law

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CHAPTER 13

Constitutional Law

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§13.1. Mandatory Retirement: Equal Protection. In *Massachusetts Board of Retirement v. Murgia*, the United States Supreme Court, reversing a three-judge district court, held that a Massachusetts statute requiring a uniformed state police officer to retire at age fifty did not contravene the equal protection clause of the United States Constitution. In so holding, the Court clearly announced that state statutes classifying individuals on the basis of age for the purposes of public employment would be upheld if they bore a rational relation to a legitimate public interest. Only Justice Marshall, in dissent, took a different view.

As in other equal protection cases, the Court first considered which

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3 G.L. c. 22, § 26(3). Section 26(3) allows state police officers who have served on the force for less than twenty years to continue beyond age fifty until they have completed twenty years. However, because G.L. c. 22, § 9A requires that new enlistees be no more than thirty years old, few retirements are delayed beyond age fifty. See 427 U.S. at 308-09 n.1. It appears that only those who left the service and then returned or those who are entitled to certain special statutory dispensation — in all about thirty-five out of the 2,061 individuals who have served on the force since 1921 — remained on the force beyond age fifty. See 345 F. Supp. at 1143. While Murgia had initially claimed that the special exemption allowing certain officers to serve beyond age fifty violated his right to equal protection, id. at 1141, the claim does not appear to have been raised at the Supreme Court level. 427 U.S. at 308-09 n.1.

4 427 U.S. at 317.

5 The majority opinion, in which seven Justices joined, was per curiam and the tone of the opinion suggested that the Court regarded the case as presenting no special problems. Justice Marshall dissented and Justice Stevens did not participate in the decision.

6 427 U.S. at 312-14.

7 Id. at 317-27.

standard of review was appropriate for determining whether the Massachusetts retirement statute violated plaintiff Murgia's right to equal protection.\footnote{Plaintiff Murgia was a Lieutenant Colonel in the Uniformed Branch of the Massachusetts State Police. Upon reaching the age of fifty, he was involuntarily retired by the Massachusetts Board of Retirement pursuant to the state police mandatory retirement statute. G.L. c. 22, § 26(3). Murgia subsequently brought a civil action in the United States District Court for the District of Massachusetts claiming that § 26(3) denied him equal protection. 376 F. Supp. at 753.} In a quite synoptic analysis, the Court decided that a "relatively relaxed" rational basis standard was the proper test to be applied.\footnote{427 U.S. at 314.} The Court noted that if the retirement statute had encroached upon a "fundamental right"\footnote{The Court listed as fundamental rights the right to privacy involved in the abortion decision, Roe v. Wade, 410 U.S. 113 (1973), the right to vote, Bullock v. Carter, 405 U.S. 134 (1972), the right of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), rights guaranteed by the first amendment, Williams v. Rhodes, 393 U.S. 23 (1968), and the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942). See 427 U.S. at 312 n.3.} or created a "suspect classification," then it would have judged the statutory scheme by the more demanding "strict judicial scrutiny" test.\footnote{427 U.S. at 312. Statutes subjected to strict scrutiny must be shown by the state to serve a "compelling interest" by the least restrictive means. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). The broad contours of the compelling interest test are difficult to define, though clearly the standard is more rigid than mere "rationality." For a brief but sound overview of the Supreme Court's work in the equal protection area, see Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1535-36 n.9 (1974).} The Court concluded, however, that there is no fundamental right to governmental employment,\footnote{The Court noted that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." 427 U.S. at 313, quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970). During the Survey year, the Sixth Circuit also concluded that there is no constitutionally protected right to public employment. See Talbot v. Pyke, 533 F.2d 331, 332 (6th Cir. 1976).} and that the class of uniformed state police officers over fifty is not a suspect class for the purposes of the equal protection clause.\footnote{427 U.S. at 313.} With respect to the statute's age classification, the Court reasoned that older persons, particularly where age fifty is the standard, are not the victims of such systematic oppression or so politically powerless that they should be the objects of special judicial solicitude.\footnote{427 U.S. at 313.} More
broadly, the Court, in dicta, indicated that even those statutes which more clearly penalize the elderly by requiring retirement at ages beyond fifty do not "impose a distinction sufficiently akin" to suspect classifications to require strict judicial review.\(^\text{17}\) Concluding its analysis of the appropriate standard of review, the Court stated that its inquiry would accord the statute its usual presumption of validity, recognizing that legislative perfection in classifications is neither "possible nor necessary."\(^\text{18}\)

Having determined that a rational basis test was the proper standard, the Court had no trouble upholding the statute as rationally furthering the purpose identified by the Commonwealth. Physical fitness of uniformed police officers was obviously, the Court noted, a legitimate governmental objective "presumptively" furthered by requiring retirement at fifty.\(^\text{19}\) Accordingly, the Court found the requirement constitutional even though officers between the ages of forty and fifty have to pass rigorous annual physical exams and many officers would be physically capable of performing effectively after age fifty.\(^\text{20}\) Given the standard of review, the Court did not require a showing that the governmental interest could not be sufficiently served by further physical examinations on an individual basis after age fifty.\(^\text{21}\)

Justice Marshall's dissent in *Murgia* took a fundamentally different approach to analyzing the mandatory retirement statute. Unlike the majority, Justice Marshall attempted to relate the case to the entire body of equal protection law. In so doing, Justice Marshall strongly criticized the recent work of the Court. Although he has voiced the same objections in somewhat different form many times before,\(^\text{22}\) his

\(^{17}\) 427 U.S. at 314. Because the Massachusetts statute drew the line at age fifty, the Court did not view it as creating a classification penalizing the elderly. Age fifty, the Court noted, is a line "at a certain age in middle life." *Id.* at 313.

\(^{18}\) *Id.* at 314.

\(^{19}\) *Id.* at 314-15.

\(^{20}\) *Id.* at 314-16, 314 n.7. The Court cited the principle accepted by Massachusetts legislative commissions that the appropriate maximum retirement age should be the age "at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." *Id.* at 316 n.9.


views deserve attention because they seem to have merit and have been left largely unaddressed by other members of the Court.

Justice Marshall's major criticism was that the Court's two-tier approach to equal protection is too rigid and does not reflect the diversity of the problems that come before the Court.\textsuperscript{23} Justice Marshall argued that the Court should recognize that certain rights, while not classified as "fundamental," are yet vital to a flourishing society; and that certain classes, while not classified as "suspect," nonetheless suffer invidious discrimination unrelated to their members' individual worth. These rights and classes, he reasoned, do not deserve to be cast into the outer darkness of the mere rationality standard.\textsuperscript{24}

A further problem with the majority's approach, in Justice Marshall's view, was that the Court, perhaps sensitive to the criticism that the strict scrutiny test is so severe and the rationality test so loose that the decision of which standard to apply usually predetermines a case's outcome, has in fact partially abandoned its two-tier approach, without quite admitting it has done so.\textsuperscript{25} For example, on occasion the Court, while professing to apply a rationality test, in fact applied some intermediate standard of review involving at least a "reasonably probing look at the legislative goals and means" as well as the "significance of the personal rights and interests invaded."\textsuperscript{26} The problem, Justice Marshall noted, is that the Court has supplied no doctrinal foundation for the shift away from the strict two-tier approach.\textsuperscript{27} Instead, the Court, on the one hand, has simply refused to expand the current list of fundamental rights and suspect classifications; in this way the Court, recognizing perhaps that the strict scrutiny standard results in virtually every case in the striking down of the statute in question, has declined to give that standard broader applicability.\textsuperscript{28} On the other

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\item[23] 427 U.S. at 318-20 (Marshall, J., dissenting).
\item[24] Id. at 319-20.
\item[25] Id. at 318, 320. See cases cited at note 26 infra.

In recent years the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed. The Court has indicated that a statute creating any classification must at least "be reasonable, not arbitrary, and must rest upon some ground of difference have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

\item[27] 427 U.S. at 327 (Marshall, J., dissenting).
\item[28] Id. at 319.
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hand, the Court now deals with nonfundamental, nonsuspect categories on an ad hoc, case-by-case basis, with virtually no review at all in purely economic cases and some undefined level of scrutiny for cases touching on individual liberties, thereby robbing the law of system and predictability.29

In light of the criticisms thus leveled against the majority's two-tier analysis, Justice Marshall went on to argue that it was time to recognize the inadequacies of the old approach and cut a fresh beginning in an effort to articulate a generally applicable standard. The standard envisioned by Justice Marshall would be a flexible one that could accommodate the different variables presented by the vast array of equal protection cases. The fundamental inquiry according to Justice Marshall would focus upon "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification."30 This inquiry, Marshall added, should be accomplished by "individualized assessments of the particular classes and rights involved in each case."31

Applying this standard to the statute in Murgia, Justice Marshall reasoned that individuals have an important interest in employment, whether or not this interest is labelled a "fundamental right;"32 and that given the widespread discrimination against the elderly in employment, elderly workers constitute a class which "merits judicial attention,"33 even if it is not "suspect." Thus, Marshall concluded that the Commonwealth was required to "show a reasonably substantial interest and a scheme closely tailored to achieving that interest."34 Justice Marshall concluded that the Commonwealth failed to meet the second prong of his proposed test. While agreeing that the interest of the state in a physically fit police force was "legitimate, and indeed compelling," Justice Marshall found the means utilized to achieve the purpose drastically overinclusive.35 In this context, Justice Marshall pointed to the fact that every officer must pass a rigorous physical examination every year after age forty.36 A person who failed the annual examination would have his employment terminated or be refused reenlistment.37 Therefore, by the Commonwealth's own admis-

29 Id. at 320-21.
30 Id. at 318, 321-22.
31 Id. at 319 n.1.
32 Justice Marshall reviewed almost a century of Supreme Court cases, see id. at 322-23, construing the constitutional status of "the right of the individual ... to engage in any of the common occupations of life." Id. at 322, citing Board of Regents v. Roth, 408 U.S. 564, 572 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
33 427 U.S. at 324 (Marshall, J., dissenting).
34 Id. at 325 (emphasis added).
35 Id.
36 Id. at 325.
37 Id. at 325-26.
sion, every officer still on the force at age fifty would have shown repeatedly that he was physically fit for the job. In sum, Justice Marshall found the Massachusetts statutory framework irrational because it required retirement of those who had best shown an ability to serve the state's interests. Accordingly, Justice Marshall determined that the mandatory retirement law, when measured against the "significant deprivation" the statute worked, was unconstitutional.

Justice Marshall's equal protection theory contains both a critique and a suggested reform. His criticism of the current state of equal protection law seems meritorious. The Court appears to realize that its two-tier approach is defective and has modified it at least in application. Nonetheless, the majority of the Court is unwilling to accept Justice Marshall's proposed reform, even though other members of the Court must perceive the force of his criticism. The reason for their reluctance to embrace the Marshall theory may be that while his approach does speak effectively to the defects in currently prevailing analysis, it creates problems that are equally serious.

While Justice Marshall's approach does avoid the inflexibility and the mechanical aspects of the Supreme Court's two-tier approach, it may effect a replacement of the Court's approach with a calculus more appropriate for the legislative than the judicial branch. Justice Marshall identified the following three factors to be weighed:

1. The character of the classification;
2. The importance of the governmental benefits denied; and
3. The state interests asserted in support of the classification.

If the Court is to make a case-by-case assessment of the impact of these factors and then make an overall determination based on such case-by-case assessment of the validity of the classification, it would be open to the criticism that it was presuming to make value judgments for the rest of society in a way that invades the role of the legislature. Indeed, in many ways there is more principle and pre-

38 Id. at 327.
39 Justice Marshall relied in part on a report of the American Medical Association's (AMA) Committee on Aging which found that mandatory retirement poses a direct threat to the health and life expectancy of the retired person. The AMA submitted an amicus brief on behalf of Murgia to the Supreme Court. See id. at 323 & n.4.
40 Id. at 327.
41 See note 26 supra and accompanying text.
42 427 U.S. at 318, 321-22. Justice Marshall employed a similar standard when writing for the Court in Dunn v. Blumstein, 405 U.S. 330 (1972). According to Justice Marshall: "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Id. at 335.
43 This was precisely the reason the interventionist doctrine of substantive due process was laid to rest. See Ferguson v. Skrupa, 372 U.S. 726, 728-32 (1963). The Court noted in Ferguson that states had the power freely to legislate against "injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of
dictability in the majority's approach, perhaps enough so that it ought to be reformed rather than abandoned. The Court has always accompanied the decision that a particular right is fundamental or that a certain classification is suspect with an explanation of why the category in question triggered heightened judicial scrutiny. While admittedly the "compelling interest" test may in some instances be too severe, it might also be criticized as too lenient insofar as it has allowed the Court to apply a high standard of deference to purely economic legislation. However, with few exceptions, the role of strict scrutiny has for the most part been well-defined, well-explained, and rooted in constitutional history. More importantly, however, the most significant defect in the Court's two-tier system is that there is not, except perhaps sub silentio, an intermediate standard. Appropriate standards for reviewing statutes that implicate individual liberties, but do not fit into the favored categories of fundamental rights and suspect classifications have not been clearly articulated. Hence, it is unclear in such cases whether a court should accord the same deference to the Legislature as it would accord in cases involving business reg-

some specific constitutional provision." Id. at 730-31. This "relaxed" approach was reversed during the interventionist years of the Warren Court and the early years of the Burger Court. See Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L. J. 920, 926-30, 935-43 (1973). The objections to the interventionist approach have been stated often and are best illustrated by the Court's language in Ferguson:

We refuse to sit as a "superlegislature to weigh the wisdom of legislation" . . . [n]or are we willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is of no concern of ours.


44 See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court explained in detail, with recapitulation of relevant prior cases, its conclusion that "education" is not a fundamental right and "wealth" classifications are not suspect. Id. at 18-39.

45 See 427 U.S. at 319, where dissenting Justice Marshall noted that statutes subjected to strict judicial scrutiny are nearly always struck down. Marshall cited Korematsu v. United States, 323 U.S. 214 (1944), in support of this proposition.

46 But see City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam), overruling Morey v. Doud, 354 U.S. 457 (1957). In Dukes, the Court noted that Morey was the only case in the last half century to invalidate an economic regulation. 427 U.S. at 306. However, it appears that the Dukes Court did employ a somewhat stricter standard of review than is customary for purely economic regulation. See text at notes 63-65 infra.

ulation. Absent further guidance, lower courts are left to choose between the inflexibility of the majority's approach and the risk of subjectivity inherent in Justice Marshall's proposed reform.

Professor Gerald Gunther has written an article, frequently cited in Justice Marshall's opinions and elsewhere, that offers even a third approach to the Court's equal protection analysis. Gunther's approach is to preserve strict scrutiny in the areas in which it is already established—this apparently as a concession to doctrinal continuity, and because these classifications on the whole have firm historical roots—but to avoid development of additional categories. For other cases, the Court should focus on means, not ends, and should make the test of equal protection whether the "legislative means ... substantially further [the] legislative ends" articulated by the state. This would be a less severe standard than strict scrutiny, but much more severe than the extreme deference traditionally associated with ordinary economic legislation. Courts would assess the legislative purposes on the basis of materials actually offered by the state, and not on the basis of conjecture or "perfunctory judicial hypothesis." This means-oriented scrutiny, Gunther advocates, would be applicable to a wide range of statutes, including the social and economic regulations traditionally evaluated under the "toothless minimum scrutiny standard." Gunther concludes that his "modest interventionism" approach would provide an appropriate "common meeting ground" reflecting both the Court's gradual turning away from the "extreme judicial abdication" of the 1930's, and the Court's revived concern for certain nonfundamental rights and interests.

To some extent the Gunther and Marshall approaches intersect because, under both, the relationship of means to ends is evaluated. For Justice Marshall, however, the degree of closeness required between means and ends is a function of the relative importance in the particular case of the three factors noted above: the nature of the classification, the loss to the individual, and the governmental end to be achieved. Because Justice Marshall regarded the classification in Murgia—age—as at least somewhat invidious and the interest in employment a crucial one, he insisted on a tight fit between means and ends. Justice Marshall found this fit wanting, although he conceded that the state purpose is not only legitimate but compelling.

50 Gunther, supra note 48, at 24.
51 Id. at 20.
52 Id. at 21.
53 Id. at 21, 19.
54 Id. at 37-46.
55 427 U.S. at 325 (Marshall, J., dissenting).
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It is not at all clear that the majority approach in *Murgia* is defective by the Gunther standard. There is a fairly detailed assessment of the relationship between means and ends and, in substance, the Court found that the classification substantially furthered the articulated state purpose of a physically fit uniformed state police.\(^{56}\) Such an analysis of the majority's approach in *Murgia* is not meant to suggest that the Court has embraced the Gunther methodology. It does appear, however, that *Murgia* is a further indication that for cases midway in the spectrum between the purely economic and the most established of the strict scrutiny categories, the Court is more willing to examine the relationship between legislative means and legislative ends than it is to accept Justice Marshall's invitation to enter into a weighing of the relative societal importance of the various values implicated in a particular case.\(^{57}\)

Part of Gunther's suggestion is that means scrutiny should be utilized in purely economic cases in contradistinction to the excessive deference to legislative judgment usually displayed by the Court in such cases.\(^{58}\) *City of New Orleans v. Dukes*,\(^{59}\) another per curiam decision handed down the same day as *Murgia*, might appear at first to signal a rejection of this suggestion because in it the Supreme Court overruled *Morey v. Doud*,\(^{60}\) the "only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds . . . ."\(^{61}\) Closer analysis reveals, however, that *Dukes* may not indicate a rejection of Gunther's suggestion. In *Dukes*, a New Orleans ordinance prohibited vendors from selling foodstuffs from pushcarts in the French...

\(^{56}\) *Id.* at 314-17.

\(^{57}\) For a recent example of heightened means scrutiny, see *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) (three-judge court), a case that considered the constitutionality of the Massachusetts Veterans' Preference Statute, G.L. c. 31, § 23. The court perceived the case as involving sex discrimination because of the more limited opportunity women have had to serve in the Armed Forces. Relying on applicable Supreme Court precedent, the district court determined that the statutory classification would be upheld if supported by a "convincing factual rationale." *Id.* at 495 (citations omitted). Applying this standard, the court determined that the statute was unconstitutional because of its inequitable impact upon women. Conceding that the legislative purpose of rewarding veterans is "worthy," the court nonetheless found that the means chosen to further that purpose unconstitutionally deprived women of their equal protection rights. *Id.* at 496. In reaching its decision, the court gave great weight to evidence that showed that the absolute preference for veterans established by the statute had the effect of permanently depriving women of a significant number of civil service positions for which they otherwise would have qualified on the basis of test scores. *Id.* at 497-98. Furthermore, the court found it critical that less drastic means of attaining the same legislative goal, such as a limited point-system based on length of military service, were available. *Id.* at 499. *Anthony* has been distinguished on the facts. *See Branch v. DuBois*, 418 F. Supp. 1128, 1132 (E.D. Ill. 1976) (Illinois statute that did not give veterans an absolute preference upheld).

\(^{58}\) *Gunther*, supra note 48, at 43-44.

\(^{59}\) *427 U.S. 297* (1976) (per curiam).

\(^{60}\) *354 U.S. 457* (1957).

\(^{61}\) *Dukes*, 427 U.S. at 306.
Quarter in order to preserve the distinctive character of that area for residents and tourists. The ordinance contained a grandfather provision in favor of vendors who had already been there eight years or longer. The practical effect of the grandfather clause was to favor two pushcart vendors who had worked the area for twenty years or more. In an explicit discussion of constitutional standards, the Court set forth its classic two level analysis. According to the Court:

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions . . . require only that the classification challenged be rationally related to a legitimate state interest . . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

In applying the two level analysis, however, the Duke Court took a somewhat more sophisticated approach than might be expected given the language utilized by the Court to describe the analysis. The Court carefully assessed the rational relation between the "grandfather" exception and the legislative objective. The Court noted three factors that influenced its holding with respect to the validity of the "grandfather" provision. First, the Court indicated that the ordinance banning all but two pushcarts vendors may be merely the first stage in a gradual elimination of all such vendors in the area, invoking the familiar principle that the legislature may move one step at a time in addressing a problem. Second, the Court found it a reasonable assumption that the city determined that vendors more recently established in the area are less likely to have developed a substantial reliance interest in continued operations. Finally, the Court stated that the city could reasonably have decided that the two vendors in question had themselves become part of the character and charm of the French Quarter due to their long tenure in the area. The Court's analysis of these factors indicates a greater willingness to probe the rationality of legislative means than might have been expected under the circumstances. Indeed, the mere fact that the Court spoke with a full written opinion, even of the per curiam variety, may be taken as a sign of agreement with Gunther's point that even purely economic regulations should be subjected to more than entirely casual scrutiny for a rational relationship between means and ends.

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62 Id. at 298-300.
63 Id. at 303-04.
64 Id. at 305, citing Katzenbach v. Morgan, 384 U.S. 641, 657 (1966).
65 427 U.S. at 305.
66 The overruling of Morey is somewhat of a puzzle. In Morey, The Supreme Court considered the constitutionality of an Illinois statute that imposed certain financial responsibility requirements on businesses issuing money orders, but made a specific exception for the American Express Company. 354 U.S. at 457. The statute further
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In light of recent Supreme Court decisions like Murgia and Dukes, it can be expected that the Court will continue to adhere formally to its rigid two-tier approach in reviewing legislative classifications under the equal protection clause. Its review, however, in nonsuspect, nonfundamental categories should also contain a willingness to question the legislative purpose of the classification and the means adopted to effectuate that purpose. More explicit formulation of equal protection review must await further decisions in this area.

§13.2. Selective Incorporation Revisited: Application of the Bill of Rights to Massachusetts Law. A fundamental problem of constitutional law is the relationship between the Bill of Rights and the fourteenth amendment. The first eight amendments to the United States Constitution, the Bill of Rights, *ex proprio vigore* bind only the federal government, not the states. The fourteenth amendment, however, which on its face is binding on the states, imposes values parallel to those in the Bill of Rights, even though there is no express "incorporation" of the Bill of Rights into the fourteenth amendment. Moreover, there has long been a vigorous minority who argue that the fourteenth amendment incorporated the entire Bill of Rights and exempted American Express from a prohibition against selling money orders in retail establishments and a requirement that a showing of public convenience and advantage be made before a license to sell money orders could be issued. *Id.* at 463. In a six to three decision, the Supreme Court ruled that the exceptions for American Express violated the equal protection clause. *Id.* at 469-70.

The Fifth Circuit in *Dukes* had relied on *Morey* in holding the grandfather clause in *Dukes* unconstitutional. *Dukes* v. City of New Orleans, 501 F.2d 706, 713 (5th Cir. 1974). The Supreme Court stated that the Court of Appeals had reached the correct conclusion, given *Morey*, and therefore felt obliged to overrule *Morey* explicitly. *See* 427 U.S. at 306. It is unclear, however, why the Court so readily conceded, without discussion, that *Morey* was indistinguishable from *Dukes* and that *Morey* had been wrongly decided. *Dukes* involved merely the recognition of the economic disaster that could befall a financially helpless pushcart vendor if he were banished from the area where he had built up a business over a period of twenty years. *Morey*, on the other hand, involved a statutory scheme that severely regulated companies that already had problems enough competing with American Express. It would seem then that American Express was not in need of a special statutory exemption akin to the grandfather clause in *Dukes*. Thus, it is not clear that *Morey* had to be overruled rather than distinguished in order to save the statute in *Dukes*.


2 U.S. Const. amend. XIV. The fourteenth amendment provides in part:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.


that, consequently, these amendments are as binding on the states as the federal government. Finally, there is a compromise view to the effect that some but not all of the Bill of Rights are incorporated, namely, those that are "fundamental." Although the intellectual underpinnings of this latter position remain unclear, the theory appears to have carried the day. Its application over the years has resulted in the "incorporation" of most of the provisions of the first eight amendments.

During the Survey year, two cases were decided that touch upon the selective incorporation of provisions in the Bill of Rights to Massachusetts law. In Commonwealth v. Davis, the Supreme Judicial Court applied the doctrine in a relatively straightforward manner; in Ludwig v. Massachusetts, however, the United States Supreme Court appeared to suggest some backsliding to a doctrine once regarded as firmly discredited.

In Davis, the Supreme Judicial Court upheld the conviction of a man for illegal possession of a shotgun. Among the defenses re-

7 The doctrine of selective incorporation does not seem to have been the intention of the framers of the fourteenth amendment. Compare Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949) with Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring) and Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
8 See Duncan v. Louisiana, 391 U.S. 145, 148 & nn. 3-9. Notable exceptions are the fifth amendment right to indictment by grand jury, Hurtado v. California, 110 U.S. 516, 538 (1884), and the seventh amendment right to certain civil jury trials, Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875). Because the grand jury as an institution is under fire, see Campbell, Eliminate the Grand Jury, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Shannon, The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor, 2 N.M. L. REV. 141 (1972); Younger, The Grand Jury Under Attack, 46 J. CRIM. L.C. & P.S. 214 (1955); and because the need and utility for jury trials in civil cases is widely questioned, see Peck, Do Juries Delay Justice? in 18 F.R.D. 455 (1956); Desmond, Juries in Civil Cases – Yes or No, 36 N.Y.S.T. B.J. 104 (1964); Devitt, Federal Civil Jury Trials Should be Abolished, 60 A.B.A.J. 570 (1974); Steuer, The Case Against The Jury, 47 N.Y.S.T. B.J. 101 (1975); it is not likely that these provisions will be made applicable to the states, although of course the states may if they choose make use of the grand jury and civil jury as a matter of state law. For an extra-judicial statement by Justice Brennan regarding the related question of state courts' interpreting their own constitution as providing more protection than the Supreme Court finds in the federal constitution, see 62 A.B.A.J. 993-94 (1976). While the state courts are free to reach this result through interpretations of state law, they are not free to depart from Supreme Court interpretations of federal law, even where the result would be more protective of individual liberties. See Oregon v. Hass, 420 U.S. 714, 719 (1975).
11 1976 Mass. Adv. Sh. at 695, 343 N.E.2d at 847. Defendant was convicted under G.L. c. 269, § 10(c), which section penalizes possession of a shotgun with a barrel less than eighteen inches long. Section 10 has been amended by Acts of 1974, c. 649, § 2, and further amended by Acts of 1975, c. 113, §§ 2, 3, and by Acts of 1975, c. 588, § 1, all inapplicable to the present case.
jected by the Court was the claim that the statute under which the prosecution was brought violated the defendant's second amendment right "to keep and bear arms." The Supreme Judicial Court held that the second amendment had not been made applicable to the states and probably would not be "for unlike some other provisions of the bill of rights, this is not directed to guaranteeing the rights of individuals, but rather, as we have said, to assuring some freedom of State forces from national interference." The Court's position seems correct. Although citations offered by the Supreme Judicial Court to support the proposition that the second amendment is not incorporated are dated, the result in these cases has survived the many changes in constitutional theory. No fundamental personal right would seem to be at stake; thus, incorporation of the second amendment would not be appropriate.

Furthermore, even if the second amendment were applicable against the states, it does not follow that all gun control legislation is unconstitutional. The amendment was included in the Constitution to meet the needs of a period when men called for service supplied their own arms. As a result, the second amendment has been construed to prohibit only regulations that interfere with the efficiency of a well regulated militia and to apply only to weapons that are part of ordinary military equipment. Today, it is largely an anachronism. Therefore, because the Massachusetts statute is not an attempt to interfere with the protection of the public or regulation of military equipment, but is merely a restriction on private access to weaponry, the amendment would not affect the Massachusetts statute.

12 1976 Mass. Adv. Sh. at 693-95, 343 N.E.2d at 850-51. The second amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

Defendant Davis also argued that the Massachusetts statute violated the state constitutional provision contained in article 17 of the Massachusetts Declaration of Rights guaranteeing the "right to keep and bear arms." The Court rejected the argument reasoning that article 17 was directed only to providing adequate means for the common defense and not to guaranteeing individual ownership or possession of weapons for the purpose of self-defense. 1976 Mass. Adv. Sh. at 689-92, 343 N.E.2d at 848-49. In this respect the Court's reasoning is very similar to its analysis of the federal constitutional provision. See text at note 13 infra.

13 Id. at 694, 343 N.E.2d at 850.

14 See id. at 693-94, 343 N.E.2d at 850. The cases are all from the nineteenth century when it was not generally believed that the fourteenth amendment incorporated anything. See Twining v. New Jersey, 211 U.S. 78, 96-98 (1908).

15 See text at note 6 supra.


17 Id. at 178. See also United States v. Synnes, 438 F.2d 764, 772 (1971), vacated on other grounds, 404 U.S. 1009 (1972).


19 Cf. United States v. Three Winchester Carbines, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (defendant's second amendment defense to federal firearms conviction rejected without discussion).
If Commonwealth v. Davis is an application of the doctrine of selective incorporation, Ludwig v. Massachusetts appears to be a questioning of it. Ludwig is one of a spate of cases considering and rejecting challenges to the de novo system of criminal appeals that flourishes in Massachusetts and elsewhere. Among various claims rejected by the United States Supreme Court was the argument that the requirement of an initial trial without a jury as a precondition to a jury trial de novo places an unconstitutional burden on the right to a jury in non-petty criminal cases.

The Court, speaking through Justice Blackmun, stated that the standard to be applied is the "Fourteenth Amendment's guarantee that no person may be deprived 'of life, liberty, or property without due process of law.'" Applying this standard, the majority concluded that the financial and psychological hardship of two trials along with the potentiality of a harsher sentence at the second trial did not amount to an unconstitutional burden upon the right to a jury trial. The Court, conspicuously, did not refer to the sixth amendment. The Court also noted that it was not obliged to reconsider an earlier Supreme Court decision, Callan v. Wilson, holding a federal criminal de novo system unconstitutional because, among other reasons, the right to a jury trial in federal courts is also guaranteed by the third clause of section two of Article III of the United States Constitution.

21 See North v. Russell, 427 U.S. 328, 333-38 (1976) (Kentucky two-tier court requiring initial trial before a nonlawyer police judge does not deny due process to a defendant subject to possible imprisonment when a later de novo trial is available in the circuit court before a lawyer-judge); Colten v. Kentucky, 407 U.S. 104, 114-19 (1972) (Kentucky System whereby circuit court may impose greater penalty than police court not a denial of due process).

The two-tier system is used by many states. See Colten, 407 U.S. at 412 n.4. The Massachusetts system is composed of a first tier consisting of district courts of the state's several counties and the Municipal Court for the City of Boston. G.L. c. 218, § 1. The district court and municipal court do not provide a jury trial. Id., § 2. If a judgment of guilty is made at the first tier, the defendant may appeal to the superior court for the City of Boston where a twelve-person jury is available, id. 1, §§ 2, 18, or to the jury division of the district court where a six-person jury is available. Id., §§ 18, 27A.

22 427 U.S. at 624-30. Defendant Ludwig also argued that the Massachusetts procedure violated the double jeopardy clause of the United States Constitution by forcing him to bear the risk of two trials. The Court rejected this argument with little discussion, noting that the decision to elect a second trial rests with the defendant and not the state. In this respect, the Court found Ludwig's position no different than that of a convicted defendant who successfully appeals on the basis of error at his first trial and gains a reversal of his conviction and a remand for a new trial. Id. at 630-32.

23 Id. at 624.
24 Id. at 626-27. The Court noted that the accused could mitigate the hardship by not presenting a full defense at the first trial. In addition, the indigent defendant could receive counsel without cost. Id., citing Argersinger v. Hamlin, 407 U.S. 25 (1975). The Court also noted that the risk of a harsher sentence inherent in a two-tier system was an argument squarely disposed of in Colten v. Kentucky, 407 U.S. 104, 114-19 (1972). See note 21 supra.

stitution. Why this provision should have a different impact upon the states than the sixth amendment right to a jury trial in regard to the constitutionality of the de novo system was not explained.

Justice Powell wrote a concurring opinion in Ludwig. The entire opinion apart from citations, consisted of the following statement:

I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment. . . . I add only that Callan v. Wilson . . . is distinguished most simply by the applicability to that case of the Sixth Amendment.

Justices Brennan, Stewart, and Marshall joined in a dissent by Justice Stevens that went to the merits of the questions raised, but strangely did not address itself to the potentially important implications contained in Justice Powell's concurring notation and portions of the Court's opinion with respect to the distinction between sixth and fourteenth amendment rights.

These implications must be assessed in the light of the cases involving the sixth amendment right to a jury trial decided by the United States Supreme Court in the past few years. In the 1968 case of Duncan v. Louisiana, the Court held the sixth amendment right to a jury trial in all criminal cases applicable to the states through the fourteenth amendment. Thereafter, the question arose whether the sixth amendment right as applied to the states necessarily required a jury of twelve. Two years after the decision in Duncan, the Supreme Court in Williams v. Florida answered this question and held that a jury of twelve was not a constitutional requirement. The Justices in Williams disagreed on whether their decision "diluted" the sixth amendment as

26 427 U.S. at 629-30.
27 If there is any conflict in meaning between these two provisions, the meaning of the amendment controls. See Schick v. United States, 195 U.S. 65-68 (1904); R. Berger Impeachment: The Constitutional Problems 82 (1973).
28 427 U.S. at 682.
29 See also Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam):
[I] am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the states by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech, Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes J., dissenting), that the latter incorporates.

Id. at 291 (Rehnquist, J., concurring and dissenting).
30 Justice Stevens in dissent gave great weight to the fact that the Massachusetts system did not allow a defendant to waive the trial at the first tier. The dissent also believed that the two-tier system constituted an unconstitutional burden upon a defendant due in large part to the psychological hardships he must endure to receive his jury trial at the second tier. 427 U.S. at 634-38.
it had recently been made applicable to the states by Duncan.\footnote{Compare the majority opinion of Justice White, \textit{id.} at 100-03, with the concurring opinion of Justice Harlan, \textit{id.} at 117-29, and the dissenting opinion of Justice Marshall, \textit{id.} at 116-17.} Despite this disagreement, however, they continued to concur in the proposition that because of the selective incorporation theory, whatever the sixth amendment requires in the federal context the fourteenth amendment requires in the state context.\footnote{See \textit{id.} at 86-87, 103: \textit{id.} at 105 (Burger, C. J., concurring); \textit{id.} at 116-17 (Marshall, J., dissenting in part). Justice Harlan stood by his position in \textit{Duncan}, 391 U.S. at 171, that the fourteenth amendment incorporates none of the provisions in the Bill of Rights. 399 U.S. at 133.} The obvious followup question to Williams, whether unanimous juries are constitutionally required in criminal cases, was considered in two subsequent cases. In \textit{Johnson v. Louisiana},\footnote{406 U.S. 356, 362 (1970).} the Supreme Court held that the fourteenth amendment did not require a unanimous jury to implement the reasonable doubt standard. The Court decided the case under the fourteenth amendment because the facts of the case took place before \textit{Duncan}, and \textit{Duncan} had been held nonretroactive.\footnote{See \textit{DeStefano v. Woods}, 392 U.S. 631, 633-35 (1968).} In the companion case to \textit{Johnson}, \textit{Apodaca v. Oregon},\footnote{406 U.S. 404 (1972).} the sixth amendment question was squarely presented, but because of a curious division in the Court it was only obliquely decided. In \textit{Apodaca}, eight of nine Justices agreed that the sixth amendment was applicable to the states.\footnote{Justice White wrote the plurality opinion in \textit{Apodaca} in which Chief Justice Burger, Justice Blackmun, and Justice Rehnquist joined. \textit{id.} at 405-15. A majority of the Justices in \textit{Apodaco} accepted without question the view that \textit{Duncan} correctly made the sixth amendment applicable to the states through the fourteenth. \textit{id.} at 407. Justice Stewart wrote a dissenting opinion in \textit{Apodaca} in which Justices Brennan and Marshall joined. \textit{id.} at 415-16. The dissenting justices also accepted the teaching of \textit{Duncan} without question. Justice Douglas wrote a separate dissenting opinion in \textit{Apodaca} which is attached to \textit{Johnson v. Louisiana}, 406 U.S. at 381-395, likewise accepting \textit{Duncan}'s incorporation of the sixth amendment. \textit{See id.} at 386. Only Justice Powell, whose opinion is also attached to \textit{Johnson}, dissented on this point. \textit{id.} at 370-74 (Powell, J., concurring in the judgment).} However, these eight Justices divided four to four on whether the sixth amendment required unanimity.\footnote{Chief Justice Burger, Justice White, Justice Blackmun, and Justice Rehnquist agreed that the sixth amendment did not require unanimity. \textit{Apodaca}, 406 U.S. at 407. Justices Stewart, Brennan and Marshall thought the opposite conclusion was correct. \textit{id.} at 415. Justice Douglas also believed that unanimity was the correct view. \textit{Johnson}, 406 U.S. at 384.} The crucial swing vote was supplied by Justice Powell, the one Justice who believed the sixth amendment not applicable to the states.\footnote{\textit{Apodaca}, 406 U.S. at 370-74 (Powell, J., concurring in the judgment).} Justice Powell agreed that the sixth amendment required a unanimous jury, but refused to allow this interpretation of the amendment to be binding on the states.\footnote{\textit{id.} at 379-81.} Justice Powell, therefore, was willing to supply the critical fifth vote in favor of an in-
interpretation of the sixth amendment requiring unanimous juries.\footnote{42} However, Justice Powell would not supply this vote insofar as it pertained to the states.\footnote{43} Accordingly, the Court upheld, five to four, Oregon's less-than-unanimous jury verdict requirement.\footnote{44} The conclusion to be drawn from \textit{Apodaca} is that, as a matter of constitutional law, unanimous juries in criminal cases are required in federal but not state cases, even though eight Justices rejected the theoretical basis for the possibility of such a result, \textit{i.e.}, that the sixth amendment binds the federal government, but not the states.\footnote{45}

Justice Powell's role as "swingman" on the Court surfaced again in \textit{Ludwig}. Justice Powell, in a brief concurring notation,\footnote{46} supplied the critical fifth vote to the majority opinion upholding the de novo system of criminal appeals in Massachusetts. Justice Powell frankly repeated in \textit{Ludwig} his position in \textit{Apodaca} that the sixth amendment is not applicable to the states through the fourteenth amendment.\footnote{47} Justice Powell also expressed his understanding that the opinion of the Court in \textit{Ludwig} was "consistent" with his view.\footnote{48} It is unclear, however, whether Justice Powell meant that the Court impliedly stated that which he expressly stated or merely that the opinion of the Court did not indicate a view to the contrary. If Justice Powell intended the latter interpretation, then his statement with respect to the Court's opinion being "consistent" with his own view is trivial because surely the Court has emphasized on many occasions that the fourteenth amendment incorporates many of the provisions of the Bill of Rights, and not merely that the fourteenth amendment contains some values analogous to certain provisions of the Bill of Rights. The Court's failure explicitly to repeat this doctrine would certainly not be significant.

If the question is not one of the Court's failing expressly to set forth a view contrary to the one held by Justice Powell, the issue then becomes whether Justice Powell was correct in believing that the \textit{Ludwig} Court majority was sending preliminary signals of a willingness to reconsider the doctrine of selective incorporation in favor of an interpretation of the fourteenth amendment that had prevailed for many decades,\footnote{49} but seemed to have been buried in dishonor some years ago, over the protests in particular of the second John Marshall Harlan.\footnote{50} There are some signals in \textit{Ludwig}. The Court, as noted, in-

\footnote{42}Id. at 372. 
\footnote{43}Id. at 381. 
\footnote{44}\textit{Apodaca}, 406 U.S. at 415. 
\footnote{45}The Supreme Court does not have to face up to the anomaly cast in terms of the sixth amendment, however, since in any event the Federal Rules of Criminal Procedure require a unanimous verdict. \textsc{Fed. R. Crim. P. 31(a)}. 
\footnote{46}For the text of Justice Powell's opinion, see text at note 29 \textit{supra}. 
\footnote{47}See 427 U.S. at 632 (Powell, J., concurring). 
\footnote{48}Id. 
\footnote{49}See note 14 \textit{supra}. 

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dicated that its standard was the fourteenth amendment. Significantly, the Court in its "standards" discussion did not provide any references to the sixth amendment. Furthermore, the distinction between federal and state cases on the basis of the Ludwig majority's reference to Article III federal jury trials has about it something of the deus ex machina: no explanation is given why this provision speaks to the problem in a way that the sixth amendment does not.

It may be that there is a further signal about the meaning of Ludwig in Roe v. Wade. Justice Blackmun wrote for the Court in both Roe and Ludwig. One of the principal theoretical problems encountered by the Court in Roe, although unnoticed popularly at the time because of the sensitivity of the subject matter, was the opposite side of the selective incorporation coin. Under the selective incorporation doctrine, the fundamental issue is to determine whether a provision of the Bill of Rights is contained in the fourteenth amendment. Roe considered whether the Court may strike down under the due process clause of the fourteenth amendment substantive regulations not running afoul of the specifics of the Bill of Rights, and, if so, whether such an action by the Court would constitute a return to the substantive due process era, during which era the Court arrogated to itself the powers of a super legislature.

The stage had been set for speaking to such substantive due process considerations in Roe in the earlier case of Griswold v. Connecticut, which case dealt with the related problem of contraceptive devices. In Griswold, a majority of the Court, uncomfortable with the fact that the specifics of the Bill of Rights were not involved, but more uncomfortable with the prospect of ruling that the statute was constitutional, attempted to finesse the issue. In this context, the Griswold majority claimed that while the provisions of the Bill of Rights were not precisely at issue in the case, the statute violated a constitutional zone of privacy formed by "emanations" and "penumbras" from various of the amendments, including the ninth. In Roe, however, Justice

51 424 U.S. at 624.
52 At other points the Court's opinion seems ambivalent on the incorporation question. Towards the beginning of the opinion, the Court determined that one of the issues presented by Ludwig was "whether the Massachusetts procedure violates the Double Jeopardy Clause of the Fifth Amendment made applicable to the states by the Fourteenth." Id. at 620. This is traditional selective incorporation language. Later in the Ludwig opinion, however, the Court stated that Duncan resolved whether there is a right to a jury trial "by reference to, and in light of, the Sixth Amendment." Id. at 624. This appears to be a much more cautious statement.
54 Id. at 129, 152. The Roe majority struck down the state criminal abortion statutes as violative of a pregnant woman's right to privacy. Id. at 147-64. The Court admitted that the Constitution does not specifically mention a right to privacy, id. at 152, but found such a right implicit in the "Fourteenth Amendment's concept of personal liberty." Id. at 153.
55 See id. at 167 (Stewart, J., concurring).
56 381 U.S. 471 (1965).
57 Id. at 484.
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Blackmun, now writing for the Court, did not seem concerned with preserving intellectual continuity with Griswold, but seemed willing to base the Court's authority directly on the due process clause of the fourteenth amendment.\(^{58}\) While it is regrettable that Justice Blackmun did not address more of his opinion to this crucial aspect of the cases, its significance for the problems suggested by Ludwig lies in its foreshadowing of a greater willingness by the Court to strike down state statutes under the fourteenth amendment, without "incorporating" a specific provision of the Bill of Rights. In addition, while it is logically possible to adhere to both the doctrine of selective incorporation and substantive due process, in general those Justices who have been the most willing to find substantive content in the fourteenth amendment, independent of the Bill of Rights, are those who think that the incorporation theory is doctrinally flawed.\(^{59}\)

If it is true that Ludwig portends some backing off from incorporation theory, the implications could be momentous. It is not likely that decisions making provisions of the Bill of Rights applicable to the states will be overturned. However, as indicated by Ludwig itself, the meaning of constitutional requirements could be more flexible as to the states under the fourteenth amendment than as to the federal government through the more specific constitutional provisions. For example, in Palko v. Connecticut,\(^{60}\) one of the classic cases from the substantive due process era, the Court ruled that the fourteenth amendment did not incorporate the double jeopardy provision of the fifth amendment. Nevertheless, the Court in Palko acknowledged that the fourteenth amendment of its own force might forbid certain forms of double jeopardy.\(^{61}\) Thus, a new trial of an acquitted defendant on a claim of trial error might be consistent with due process, while a new trial just because the government wanted a second bite at the apple might not be, even though both would be inconsistent with the double jeopardy prohibition in the fifth amendment sense. This possibility would of course have its analogues in many other Bill of Rights provisions.

If there is even a germ of a possible alteration in the Court's approach to the incorporation issue in the majority opinion, it is interesting to question why the dissent does not contain criticism specifically directed to such a possibility. It is always perilous to speculate concerning the reasons for what is contained in or omitted from judicial opinions.\(^{62}\) It is conceivable, however, that perhaps the dissenting Jus-

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\(^{58}\) See 410 U.S. at 153.

\(^{59}\) This would seem to be Justice Powell's position. See 424 U.S. at 632. See also Palko v. Connecticut, 302 U.S. 319, 323, 328 (1937).

\(^{60}\) 302 U.S. 319, 323 (1937).

\(^{61}\) Id. at 328.

\(^{62}\) For a very interesting article on the behind the scenes discussions and motivations involved in Supreme Court opinions, see Note, The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 YALE L.J. 1202 (1974). This article was based largely on the papers of Mr. Justice Burton on deposit in the Library of Congress.
tices, some of whom had already expressed anguish over what they perceived to be a dismantling of the patrimony of the Warren years, and who are aware that it is necessary to voice objections to new beginnings at an early stage, simply regarded a possible retreat from incorporation theory as too horrible to contemplate seriously. Maybe it would go away if not commented on, whereas dissenting commentary would make it appear the wave of the future.

§13.3. Nude Bathing as Constitutionally Protected Activity. The Cape Cod National Seashore ("Seashore") is a national park established in 1959. It contains within its limits beaches and adjacent lands covering a substantial portion of Cape Cod. It also includes private property that has not been the subject of condemnation.

Long before the federal government acquired any regulatory power over the beaches, nude bathing was an accepted practice at certain beaches. For decades summer visitors had engaged in the practice of nude bathing without governmental interference at remote locations between established town beaches. One of the areas traditionally used for this purpose is a stretch of beach known as Brush Hollow, located approximately one mile south of the Truro town beach.

The National Park Service has classified the beach at Brush Hollow as "a natural environment area." As such, it is open to the public for recreation but, unlike a "managed beach," does not provide lifeguards, bathhouses, sanitary facilities, or public parking. There is no public parking available within one mile of the beach at Brush Hollow.

For many years the practice of nude bathing continued at Brush Hollow without opposition. The intervening federal control of the beach area in 1959 had also made no difference. During 1973 and 1974, however, due to widespread publicity about Brush Hollow, there occurred an abrupt increase in the number of bathers and on-
lookers, culminating in a crowd of approximately twelve hundred on August 25, 1974.\(^5\) This increased crowding gave rise to numerous problems, including severe parking congestion at various points in Truro, trespass upon and damage to private property that was used as a short cut to the beach, and various forms of environmental damage to the beach area such as littering, destruction of beach grass, and dune erosion.\(^6\)

As a result of complaints from occupants of residential property within the Seashore, the Park Service reviewed the problem and a range of possible solutions. Eight alternatives were considered. These included totally banning nudity, closing all beach areas to swimming except for managed areas designed for beach use, accommodating nude bathing at existing managed beaches, developing Brush Hollow as a managed beach, and, finally, using Brush Hollow at a level consistent with its status as a natural environment area.\(^7\) At the conclusion of the study of these alternatives in 1975, the Secretary of the Interior promulgated a regulation proscribing public nudity, including public nude bathing by any person on federal property within the Seashore.\(^8\) In making this decision, the Secretary placed primary emphasis on conservation and, in accordance with the statutory requirement, the interests of the owners of private property within the area.\(^9\)

In *Williams v. Kleppe*,\(^10\) regular summer users of Brush Hollow beach sought a declaration that the Department of the Interior regulation was invalid.\(^11\) The original defendants were officials of the Department of the Interior and the National Park Service. The Truro

\(^5\) *Id.* There was testimony that the opportunity to observe nude bathing had even attracted low-flying aircraft. Brief for Appellee at 7, *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

\(^6\) *Williams v. Kleppe*, 539 F.2d 803, 806 & nn. 4-8 (1st Cir. 1976).


\(^8\) *Id.* at 123. The Regulation provided:

Public nudity, including public nude bathing, by any person on Federal land or water within the boundaries of Cape Cod National Seashore is prohibited. Public nudity is a person's intentional failure to cover the person's own genitals, pubic areas, rectal area, or female breast below a point immediately above the top of the aureola when in a public place. Public place is any area of Federal land or water within the Seashore, except the enclosed portions of bathhouses, restrooms, public showers, or other public structures designed for similar purposes or private structures permitted within the Seashore, such as trailers or tents. This regulation shall not apply to a person under 10 years of age.

36 C.F.R. § 7.67(g) (1976).

\(^9\) *Williams v. Kleppe*, 539 F.2d 803, 805 (1st Cir. 1976). In 16 U.S.C. § 459b-6(b)(2) (1970), the Secretary of the Interior is directed to "provide public use areas ... as ... will not diminish for its owners or occupants the value or enjoyment of any improved property located within the seashore."

\(^10\) 539 F.2d 803 (1st Cir. 1976).

\(^11\) *Id.* at 804-05.
Neighborhood Association, an organization of residents and summer residents of Truro, was allowed to intervene as a party defendant. The district court upheld the regulation despite its view that constitutional rights were implicated. Some measure of constitutional protection was appropriate, in the view of the court, because the traditional practice of nude bathing at Brush Hollow is a "liberty" interest within the meaning of the fourteenth amendment. However, the court, in applying a balancing test, found that the plaintiffs' liberty interest was outweighed by the interest of the government in alleviating the problems that gave rise to the regulation. The district court acknowledged that the problems associated with nude bathing could have been addressed through alternative means, but concluded that the constitutional right involved was not of such "moment" that the government was obliged to adopt the solutions that would preserve the practice of nude bathing.

The United States Court of Appeals for the First Circuit affirmed. Like the district court, the circuit court first considered whether any constitutional right at all was involved. The plaintiffs contended that tradition had given rise to an expectation that nude bathing somewhere within the Seashore outside of the sight of those who might be offended would be permitted. The significance of this long tradition of nude bathing, the plaintiffs argued, was that "where there is no claim that persons have been offended by the practice of nude bathing, the existence of a constitutionally protected liberty to engage in that practice, based on the Fifth Amendment cannot be denied."

12 Id. at 804.
14 Id. at 127. The district court expressly limited constitutional protection to the bather at Brush Hollow because that was the only area shown by the plaintiffs to be a nude beach by tradition and custom. Id. at 127 n.1.
15 Id. at 128. The court adopted the balancing framework of analysis from Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), in which it was stated that when a "personal liberty is involved," a court must determine "whether there is an out­weighing [governmental] interest justifying the intrusion. The answer to this question must take into account the nature of the liberty asserted, the context in which it is as­serted, and the extent to which the intrusion is confined to the legitimate public interest to be served." Id. at 1285.
17 539 F.2d at 807.
18 Id. at 806. The plaintiffs claimed: "[W]here ... as at Brush Hollow, tradition, cus­tom and usage have given rise to the reasonable expectation that one may engage in a harmless, healthful-activity outside the sight of those who might be offended without fear of harassment, arrest and prosecution, there exists a right to nudity." Id.
19 Reply Brief for Appellant at 11, Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976). Plaintiffs' emphasis on prior community tolerance of nude bathing appears to conflict with the argument presented forcefully in their original brief that the justifications for the regulation were actually a subterfuge for opposition to nudity per se. Main Brief for Appellant at ___, Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976). The First Circuit ignored the argument apparently because the case had not been tried on such a theory. If the plaintiffs had raised this contention in the trial court, it would have involved the court in an unusually murky area of the law. The general rule had been that courts do
Whatever the source of the claimed constitutional right, the circuit court briskly concluded its discussion by assuming that the plaintiffs were entitled to at least some measure of substantive constitutional protection, without, however, actually deciding that "incandescent question." The standard of review was to be the "ordinary, relaxed not inquire into the motives of the legislature. Palmer v. Thompson, 403 U.S. 217 (1971). But the reality has always been more complicated than the black letter would suggest. See Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (Marshall, J., dissenting). See generally Brest, Palmer v. Thompson: An Approach to the Problems of unconstitutional Motivation, 1971 Sup. Ct. Rev. 95; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). In Palmer, the City of Jackson, Mississippi had closed its municipal swimming pools in the aftermath of a desegregation decree. 403 U.S. at 218-19. Petitioners, black citizens of Jackson, claimed that the closing was motivated by invidious discrimination in violation of the equal protection clause. Id. at 224-26. The city claimed that the pools were closed because it feared violence and because it believed the swimming pools were no longer economically viable. See id. at 219. The, Supreme Court, dividing five to four, affirmed an en banc decision of the Fifth Circuit 419 F.2d 1222 (5th Cir. 1969), that had divided seven to six in upholding the city, largely on the grounds that motivation is both irrelevant and unascertainable. 403 U.S. at 225; Id. at 228 (Burger, C.J., concurring).

The Supreme Court again considered the motivation problem this past term in Washington v. Davis, 426 U.S. 229 (1976). In Davis, applicants for the District of Columbia Metropolitan Police Department claimed that a written personnel test violated the constitution because of its disproportionate impact upon blacks. Id. at 232-33. In that case, which involved constitutional standards rather than Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970) (amended 1972), the Court ruled that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Id. at 239. The Court was unwilling to impose even a special burden of justification on classifications that are neutral in ends, but racially uneven in impact, in view of the varied contexts in which such problems arise. See id. at 248 n.14 (de facto school segregation; minimum wage and usury laws; professional licensing requirements). Having determined that statistical impact alone, absent a racially discriminatory purpose, is not enough to make out a constitutional violation, the Court then had to come to grips with cases such as Palmer which held that motivation is irrelevant. Referring to Palmer, the Court said:

The opinion warned against grounding decision on legislative purpose of motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences. Id. at 2439. Later in the opinion the Court put it more bluntly: "To the extent that Palmer suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases ... are to the contrary." Id. at 2440 n.11. After Davis, the problem of the unconstitutional motive seems to be even more opaque than it was before. In the course of rejecting the view that proof of a discriminatory racial purpose is not necessary to make out an equal protection violation, the Court listed and disapproved fifteen lower federal court cases that were to the contrary. Id. at 2440 & n. 12. Included in the list was Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972), in which the First Circuit had held that an intelligence test may not be used in screening applicants for the police force unless the test is validated.

20 Williams, 539 F.2d at 807.
standard of review, satisfied by a conceived rational relationship." \(^{21}\) Applying this standard, the court found that the regulation "easily" passed scrutiny. \(^{22}\)

The apparent reason for the court's abbreviated discussion of the constitutional questions is that recent decisions of the Supreme Court had undercut the legal position of the plaintiffs. At the time of the decision by the district court, the plaintiffs had a respectable array of precedent to invoke for their position that public nudity at Hollow Beach was not subject to state prohibition. First, broad decisions such as *Roe v. Wade* \(^{23}\) and *Griswold v. Connecticut* \(^{24}\) had clearly established that constitutional protection under the due process clause is available to prevent state action infringing certain liberties not specifically enumerated in the Bill of Rights. \(^{25}\) Second, it seemed that the 1975 Supreme Court case of *Erznoznik v. City of Jacksonville* \(^{26}\) extended such protection in some manner to restrict the state's power to proscribe public nudity. In that case, decided a few weeks before the decision of the district court in *Kleppe*, the Supreme Court struck down a municipal ordinance proscribing nudity on any drive-in theatre screen visible from a public street, in part on the theory that any offended persons had merely to avert their eyes. \(^{27}\)

Finally, the plaintiffs in *Williams* had reason to rely heavily on the First Circuit's prior decision in *Richards v. Thurston*. \(^{28}\) In *Richards*, the First Circuit had held that suspension of a

\(^{21}\) Id.

\(^{22}\) Id. The court accepted the conclusion in the trial record that banning nudity "bears a real and substantial relationship to the objectives of the seashore." \(\text{Id.}\) The court noted in particular the continuing threat to the fulfillment of the Seashore's conservation purposes. \(\text{Id.}\)

\(^{23}\) 410 U.S. 113 (1973).

\(^{24}\) 381 U.S. 479 (1965).

\(^{25}\) The effect of *Roe* and *Griswold* is discussed in text at notes 53-58, § 13.2 supra.

\(^{26}\) 422 U.S. 205 (1975).

\(^{27}\) Id. at 211. The City of Jacksonville had argued that "any movie containing nudity which is visible from a public place may be suppressed as a public nuisance." \(\text{Id.}\) at 208. The Court dismissed the claim and held that the ordinance violated the first amendment. \(\text{Id.}\) at 217-18. *See also* Cohen v. California, 403 U.S. 15, 26 (1971), where the Supreme Court reversed a conviction for wearing in the corridor of a courthouse a jacket bearing a plainly visible vulgar expletive. The Court stressed that offended viewers had merely to avert their eyes. \(\text{Id.}\) at 21.

The significance of *Erznoznik* as precedent for the plaintiff's position was undercut somewhat by the Court's statement that the nudity displayed in a pornographic drive-in is distinguishable "from the kind of public nudity traditionally subject to indecent exposure laws." 422 U.S. at 211 n.7. Also, on the same day that the Court decided *Erznoznik*, it dismissed for want of substantial federal question an appeal from a decision upholding the validity of an ordinance prohibiting nudity on a town beach. Ellis v. California, 422 U.S. 1030 (1975). The plaintiffs in *Williams* distinguished their position from the indecent exposure cases by stressing that the nudity at Hollow Beach is public only in a limited sense because it is at a remote beach. Brief for Appellant at , *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

\(^{28}\) 424 F.2d 1281 (1st Cir. 1970). *Richards* addressed a question which had divided the lower courts, *see id. at 1282 n.3*, and which the Supreme Court had declined to resolve. *See Freeman v. Flake*, 405 U.S. 1032 (1972) (denial of certiorari).
student from school for refusal to have his hair cut violated the student's substantive rights protected by the "liberty" assurance of the due process clause. The circuit panel determined that the right to wear one's hair as on wishes is entitled to some constitutional protection.

With regard to the applicable standard of review, the Richards court stated that "whether there is an outweighing state interest justifying the intrusion" must be assessed in relation to "the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served." No justification for the suspension had been presented and the court did not regard any as self-evident. For the plaintiffs in Williams, Richards was a significant case because it put the First Circuit on record as regarding the liberty of the fourteenth amendment as embracing comparatively minor matters of personal autonomy and as employing a standard of review that appeared to be of at least intermediate intensity.

By the time Williams was argued in the First Circuit, however, the plaintiffs' position had been significantly undercut. The First Circuit cited two recent Supreme Court cases for the proposition that the relatively minor rights of personal autonomy reflected in decisions like Richards might not be entitled to the same substantive protection as previously assumed. In the first case, Kelley v. Johnson, the Supreme Court, dissenting from the denial of certiorari declared: Today the court declines to decide whether a public school may constitutionally refuse to permit a student to attend solely because his hair style meets with the disapproval of the school authorities. The court also denied certiorari in Olff v. Eastside Union High School District, 404 U.S. 1042, which presented the same issue. I dissented in Olff, and filed an opinion. For the same reasons expressed therein, I dissent today. I add only that now eight circuits have passed on the question. On widely disparate rationales, four have upheld school hair regulations (see Freeman v. Flake, 448 F.2d 258 (CA10 1971); King v. Saddleback Junior College District, 445 F.2d 935 (CA9 1971); Jackson v. Dorrier, 424 F.2d 213 (CA6 1970) and Ferrell v. Dallas Independent School District, 392 F.2d 697 (CA5 1968) ), and four have struck them down (see Massie v. Henry, 455 F.2d 779 (CA4 1972); Bishop v. Colaw, 450 F.2d 1069 (CA8 1971); Richards v. Thurston, 424 F.2d 1281 (CA1 1970); and Breen v. Kahl, 419 F.2d 1034 (CA7 1969) ).

405 U.S. at 1032.

29 424 F.2d at 1284-86. Defendant, principal of the school from which plaintiff was suspended, admitted that there was no written regulation governing hair length or style. Id. at 1282.

30 The court stated that "within the commodious concept of liberty, embracing freedom great and small, is the right to wear one's hair as he wishes." Id. at 1281.

31 Id. at 1285.

32 Id. at 1282-83.

33 There are, however, distinctions between Williams and Richards. In Richards, the student was compelled to attend school and then was subjected to a regulation which affected his lifestyle not merely while in school, but virtually all months of the year. In Williams, the plaintiffs sought to continue an activity which was, at best, seasonal.

34 Williams, 539 F.2d at 803.

The Supreme Court upheld a grooming regulation for policemen against a claim that it infringed fourteenth amendment rights. While *Kelley* would not at first glance appear to be fatal to the claim of the plaintiffs in *Williams*, given the obvious difference between the rights of public employees and private bathers, the decision nonetheless underscored the recent disinclination of the Burger Court to extend the *Roe-Griswold* principles to lesser areas of personal autonomy. The Court laconically observed that "whether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance." Providing the cue for the First Circuit's handling of the claim in *Williams*, the Court then assumed an affirmative answer without actually deciding the question. There can be no doubt that the Court in *Kelley* did not value very highly this "right," the existence of which it assumed. The Supreme Court regarded the grooming regulation as so clearly valid that it thought the trial court had been correct in dismissing the complaint without hearing any evidence. Its standard of review was whether the regulation was totally arbitrary. Certainly, there was not even a germ of "least restrictive alternative" analysis. Indeed, the regulation specifically prohibited the less intrusive means of wearing wigs or hairpieces in order to conceal hair lengths which exceeded the standards set forth in the regulation.

The First Circuit also cited *Paul v. Davis* as a recent indication of the reluctance of the Supreme Court to give additional substantive scope to fourteenth amendment liberty. *Paul* further undercut the plaintiffs' position in *Williams* because the case, unlike *Kelley*, did involve state action which arguably infringed the rights of private citizens and not just the rights of public employees. In *Paul* a photograph of the plaintiff bearing his name was included in a flyer of "active shoplifters" distributed to approximately eight hundred merchants by police authorities after the plaintiff had been arrested on a shoplifting charge. Shortly after the flyer was circulated, the charge

36 The *Kelley* Court emphasized the distinction between the due process rights of the citizenry at large and the lesser rights of public employees. See *id.* at 244-47. Although the broad principle is that public employment may not be conditioned on the surrender of constitutional rights, see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); see generally *Van Alstyne, The Demise of the Right-Privilege Distinction In Constitutional Law*, 81 HARV. L. REV. 1439 (1968), the state has interests as an employer that give it greater power to regulate the first amendment activities of its employees than it has in regard to citizens generally. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Servo Comm. v. National Ass'n of Letter Carriers*, AFL-CIO, 413 U.S. 548 (1973).

37 425 U.S. at 244.
38 *Id.*
39 *Id.* at 247-48.
40 *Id.* at 248.
41 See *id.* at 255 n.7 (Marshall, J., dissenting).
against the plaintiff was dismissed.\(^43\) The Court, speaking through Justice Rehnquist, who also wrote for the Court in *Kelley*, held that the defamation involved in the distribution of the flyer did not deprive the plaintiff of any "liberty" or "property" within the meaning of the fourteenth amendment.\(^44\)

The plaintiffs' legal position was also undercut by a decision not cited by the circuit court, *Doe v. Commonwealth's Attorney*,\(^45\) which again indicated the Supreme Court's disinclination to extend the *Roe-Griswold* principles. In that case, the Supreme Court summarily affirmed a lower court decision that a state sodomy statute proscribing private, adult, homosexual activity did not violate the fourteenth amendment.\(^46\) Once again, points of distinction are readily available

\(^{43}\) *Id.* at 694-96.

\(^{44}\) *Id.* at 710-12. An earlier sign that the Court would not uncritically extend *Roe-Griswold* into other areas of personal autonomy came in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In *Belle Terre*, the Court, speaking through Justice Douglas, upheld an ordinance restricting land use to one-family dwellings, defining the word "family" to include not more than two unrelated persons. The challenge to the ordinance arose when the owners of a house in a village inhabited by only about seven hundred people rented the house to six unrelated students. *Id.* at 2-3, 8-10. Justice Douglas concluded that no fundamental right guaranteed by the Constitution, such as association or privacy, was at stake. *Id.* at 7-8. Essentially, in the Court's view, *Belle Terre* was simply a zoning case. Because it was in the area of social and economic legislation and was not totally arbitrary, the classification was upheld as valid. *See also* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

Justice Marshall in dissent in *Belle Terre* protested that the students rights of privacy and association were indeed at stake and that therefore strict judicial scrutiny was appropriate. 416 U.S. at 15-18. (Marshall, J., dissenting). For Justice Marshall this case was well within the *Roe-Griswold* doctrine of constitutional autonomy, because it involved the deeply personal matter of choice of household companions. The ordinance was both overinclusive and underinclusive in relation to the stated objectives of restricting uncontrolled growth, managing traffic problems, and maintaining reasonable rental levels. Therefore, in the view of Justice Marshall, the ordinance was unconstitutional. *Id.* at 18-19.


\(^{46}\) 403 F. Supp. 1199, 1200 (E.D. Va. 1975) (three-judge court). The district court majority in *Doe* read precedents such as *Griswold* to stand only for the proposition "that the Constitution condemns State legislation that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life." *Id.* at 1200. But Judge Mehrige in dissent viewed those same cases "as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern." *Id.* at 1203.

The principles of *Doe* have been followed. *See Matlovich v. Secretary of the Air Force*, 45 U.S.L.W. 2074 (D.D.C. July 16, 1976) (discharge of homosexual from the Air Force upheld on authority of *Doe*). The vitality of pre-*Doe* decisions which suggested that state power was limited in this area would seem to be in question. *E.g.*, *Commonwealth v. Balthazar*, 1974 Mass. Adv. Sh. 2001, 2004-05, 318 N.E.2d 478, 480-81, where the Supreme Judicial Court interpreted a statute forbidding "unnatural and lascivious" acts not to apply to private, adult, consensual activity. The Court in reaching that interpretation was influenced by its doubts whether such conduct could any longer be forbidden under prevailing constitutional standards. *See id.* at 2005 & n.2, 318 N.E.2d at 480 & n.2.
and aim in different directions. On the one hand, presumably the state interest in suppressing the activity in Doe—preserving the integrity of the family—is stronger than the state interests in conservation and private property rights at stake in Williams. Accordingly, the plaintiffs in Williams would not be foreclosed by Doe from arguing that the nudity regulation was not justified by a sufficient state interest. On the other hand, the personal privacy interests at stake in Doe are much stronger than the plaintiffs' interest in Williams and much more closely analogous to the interests protected in Griswold-Roe. Whatever the distinction, Doe again highlighted that the decision in Williams, once it reached the circuit court, was a foregone conclusion.

For the view that court decisions should be value neutral except insofar as the values espoused may be traced to the text of the Constitution, see Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973). For the view that the courts properly police legislation to insure that it actually reflects current moral values, see Perry, Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 U.C.L.A. L. REV. 689 (1976).

The plaintiffs in Doe relied chiefly on Griswold in pressing their claim at the district court. See 403 F. Supp. at 1200. Dissenting Judge Mehrig thought Griswold required the court to hold the state sodomy statute unconstitutional. See id. at 1203-04. In addition, the activity involved in Doe was private, as distinguished from the secluded-public activity in Williams, pointing to a plausible argument that Doe should be controlled by Stanley v. Georgia, 394 U.S. 557, 565-68 (1969), which held that the private possession in the house of obscene materials cannot constitutionally be punished.

The precise significance of Doe cannot be determined because the case was a summary affirmand. This is noteworthy and, to some, shocking in itself. See A. Lewis, No Process of Law, N.Y. Times, April 8, 1976, at 37, col. 1. A summary affirmand, unlike a denial of certiorari, is a decision on the merits. Hicks v. Miranda, 422 U.S. 332 (1975). One interpretation of the summary disposition is that the Court thought that the constitutional challenge was so obviously insubstantial that plenary consideration was unnecessary. This poses a logical problem. Affirming the decision of a three-judge district court implies that the court was properly convened. This in tum implies that there was a substantial federal question. See Colorado Springs Amusements Ltd. v. Rizzo, 96 S. Ct. 3228, 3223, (1976) (Brennan, J., dissenting from denial of certiorari). If this interpretation is followed, due allowance having been made for the points of distinction between Doe and Williams, it would be hard to avoid the conclusion that Williams was correctly decided, particularly once the teaching of Kelley v. Johnson is put into the equation. However, the Court has left an ambiguity in its practice regarding summary affirmands. It has made it plain that they are to be accorded full precedential weight by lower courts, Hicks v. Miranda, 422 U.S. 332 (1975), but at the same time has emphasized that it will itself more readily refuse to follow one of its own precedents, if that precedent was the product of summary action without the benefit of full briefing and oral argument. Edelman v. Jordan, 415 U.S. 651, 670-71 (1974). Thus, the Court may not in effect be saying that no substantial constitutional issue was presented in Doe, but merely that it does not wish to address the question at this time. This has the effect of freezing development of the law in the lower courts, a result that would not occur if the case were within the discretionary jurisdiction and certiorari were denied. In view of the serious nature of the arguments against the result in the lower court in Doe, it is possible that a later full consideration is not foreclosed.

As a solution to the problem that summary dispositions tend to deprive the Court of the opportunity to obtain guidance from further consideration of a problem in the lower courts, Justice Brennan has proposed remanding the constitutional issues for further consideration in the case "giving appropriate, but not necessarily conclusive,
§13.3 CONSTITUTIONAL LAW

While the recent Supreme Court cases suggest that the First Circuit decided Williams correctly, they do not provide detailed guidance on the three main questions presented by Williams:

1. Is any constitutional liberty at all involved in nude public bathing?
2. What is the standard of review to be applied to nude bathing?
3. If the government regulates nude bathing, is it obliged to utilize the least restrictive alternative?

It is hard to find that if the Supreme Court squarely decided the first question, it would fail to conclude that constitutional rights are involved. The rights asserted by the plaintiffs in Williams should not be viewed as insignificant. A law requiring all citizens to wear hats would not be a minor matter. There must be in personal matters a presumption in favor of liberty, and it must be recognized that it is of constitutional magnitude. This is not to say that there cannot be sufficient countervailing interests or that the requirement that what statutes quaintly call "opaque coverings" be provided for certain parts of the body is indistinguishable from a requirement that all citizens wear hats.

The second and third questions left unanswered by Williams and recent Supreme Court cases are somewhat related. If a standard of review of mere "rationality" is applied in the way it has been in the past, regulations such as are found in Williams will be upheld routinely. Justice Marshall seems clearly wrong in Kelley when he says in his dissent that no consideration need be given to the question of standard of review because the grooming regulation there failed to satisfy even min-

weight to our summary dispositions." Colorado Springs Amusements Ltd. v. Rizzo, 96 S. Ct. 3228, 3293 (Brennan, J., dissenting from denial of certiorari). See generally Comment, The Precedential Weight of a Dismissal By the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda, 76 COLUM. L. REV. 508 (1976), concluding that the distinction between appeal and certiorari is now so eroded that this is an additional reason for Congress to abolish the Court's obligatory jurisdiction. See also Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B.U. L. REV. 373 (1972).

The Court has indicated that under some circumstances "bar room" type nude dancing may be entitled to first amendment protection. See Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. La Rue, 409 U.S. 109 (1972).

Refusal to find substantive content in the fourteenth amendment, apart from the incorporation of the Bill of Rights, may be a solution to the problem of judicial usurpation, but it may leave the door open to totalitarian legislation. For example, with regard to involuntary sterilization, compare Griswold v. Connecticut, 381 U.S. 479, 496-97 (1965) (Goldberg, J., concurring) and Skinner v. Oklahoma, 316 U.S. 535 (1942) (involuntary sterilization unconstitutional) with Buck v. Bell, 274 U.S. 200 (1927) and In Re Moore, 289 N.G. 95, 221 S.E.2d 307 (1976) (involuntary sterilization not unconstitutional).


The regulation is set forth in full at note 8 supra.
On the other hand, least restrictive alternative analysis appears to be too harsh. It would be possible to attack the problems associated with the nude bathing in a more direct fashion. Parking facilities could be provided; cars could be ticketed or towed. If there is a littering problem, the littering could be prohibited and sanctioned by a fine. If the number of people using a beach is ecologically undesirable, the number can be restricted. It was not necessary, therefore, to attack the problems indirectly by prohibiting nude bathing altogether. Public nude bathing, however, does not have such an exalted constitutional status that it may not be restricted simply because less inhibiting alternatives are available, at least where those alternatives are much more awkward administratively. The governmental interests clearly articulated in Williams, including the protection of the interests of private property owners, are very substantial. These interests seem quite adequate to satisfy an intermediate "substantial relation" standard of review, however that standard may be denominated. The judgment whether the awkwardness of alternatives justifies a restriction on constitutional rights must be left for the appropriate political department where the constitutional right is not fundamental and the governmental interest is very substantial.

It may be conceded that this makes for an anomalous situation because parking, littering, and other problems are not directly related to whether the users of the beach are clad or unclad. If it is true that the objection was not to nudity per se, but to the various problems that arose indirectly from the beach's availability for the purpose of nude bathing, one might wish that the appropriate authorities could have found remedies more sharply and immediately focused on the problem. It is another thing to claim that a fulfillment of that wish is to be found in the interstices of the Constitution.

§13.4. School Desegregation: Federal Court Remedial Power. In the well-publicized 1974 case of Morgan v. Hennigan, the Federal District Court for the District of Massachusetts held that certain defendant school authorities had intentionally brought about substantial un-

53 425 U.S. at 256 n.8 (Marshall, J., dissenting).
54 This is the choice that the first amendment requires where the problem is littering caused by the distribution of handbills and circulars. See Schneider v. State, 308 U.S. 147 (1939); T. Emerson, The System of Freedom of Expression 346-47 (1970). It has been held that the rule is otherwise in regard to commercial handbills. See Valentine v. Chrestensen, 316 U.S. 52 (1942). However, the major premise of that case, that commercial speech is wholly outside the first amendment, has since been repudiated. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

2 The defendants in Hennigan were the Boston School Committee, its individual members, the Superintendent of the Boston public schools [hereinafter referred to collectively as the "defendant officials"], and the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education [hereinafter referred to as the "state defendants"]. 379 F. Supp. at 415.
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constitutional segregation in the Boston public schools. In accordance with applicable Supreme Court precedent, the district court ordered the defendant officials to formulate and implement a plan to desegregate the Boston schools within the remedial guidelines established by the court. The plan ultimately submitted by the defendant Boston School Committee was rejected by the district court in a separate opinion, Morgan v. Kerrigan. The court found the Commit-

3 The district court found that the policies of the defendant officials in several areas were marked by "segregative intent." Id. at 481. Specifically, the district court found segregative practices with respect to facilities utilization and the planning of new structures, id. at 425-30; the drawing and redrawing of school district lines, id. at 433-37; the developing of "feeder" patterns which determine enrollments at specific high schools, id. at 441-49; the open enrollment and controlled transfer policies, id. at 449-55; and the hiring, promotion, and assignment policies with respect to black faculty and staff, id. at 456-61, 463-66. The district court also found unconstitutional de facto segregation in the city's competitive examination schools, Boston Latin, Girls Latin, and Boston Technical. 379 F. Supp. at 466-67. The district court concluded that these schools had been intentionally segregated because the defendant officials failed to rebut the presumption of discriminatory intent set forth by the Supreme Court in Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1972): "A finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious. It establishes ... a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because ... there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." 379 F. Supp. at 467, quoting Keyes, 413 U.S. at 208. The district court's finding of liability, however, did not extend to the state defendants. In this regard, the court concluded that the evidence "did not warrant a finding that the state defendants intentionally contributed to or participated in any substantial way in creating or maintaining racial segregation in the Boston public schools." Id. at 476. Nevertheless, the district retained the state defendants for purposes of formulating and implementing appropriate remedies. Id. at 477, citing Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 234 (1964).


5 379 F. Supp. at 482-84. The remedial guidelines proposed by the district court included the "starting point" that a proper desegregation plan "ideally" would provide racial proportions for each Boston school that are identical to the corresponding racial proportions of the public school population as a whole. Id. at 483.


It is difficult but necessary to keep the liability and remedial phases of the litigation separate. The liability issue was decided by Federal District Judge Arthur Garrity in June, 1974 and is reported as Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974). Judge Garrity's disposition of the remedial phase of the litigation is reported as Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975). Both decisions were appealed to the First Circuit and are now cited respectively as Morgan v. Kerrigan, 509 F.2d 580 (1st
tee plan to be constitutionally inadequate because it did not "promise realistically to desegregate the public schools."7 Because time did not permit further proposals before the 1975 school year commenced,8 the district court devised its own comprehensive desegregation plan9 and ordered the appropriate defendant officials to oversee its implementation within the timetable established by the district court.10

On appeal in Morgan v. Kerrigan,11 defendants set forth several broad challenges to the district court's desegregation plan.12 Of particular note was the defendants' claim that the remedy ordered by the district court was overbroad because it sought to effect the maximum practical amount of actual desegregation and not merely the elimination of that segregation which was the result of official action.13 A second claim raised by the defendants was that the district court's refusal to consider the potential effects of "white flight"14 from the Bos-

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7 401 F. Supp. at 228-29. The School Committee proposed a "freedom of choice" plan consisting of a series of options to the students and parents. Students in schools that remained "racially isolated" after the voluntary assignment process would be required to attend certain desegregated third-site resource centers one day a week for elementary schools and one day every two weeks for middle schools. Id. at 228.

8 The School Committee plan was submitted on January 27, 1975. A panel of four masters, appointed by the district court, held evidentiary hearings which considered the merits of this plan, as well as the plans submitted by the plaintiffs and the Home and School Association; see note 7 supra. On March 31, 1975, the masters filed a final report with the court which proposed a new plan incorporating elements of the other plans and the suggestions of the masters. 401 F. Supp. at 227. The district judge rendered his decision rejecting the school committee plan on June 5, 1975. By this time, commencement of the new school year was only three months away. See id. at 229.

9 Id. at 268-70. By this time the Mayor of Boston had been joined as a defendant. See Morgan v. Kerrigan, 530 F.2d 401, 407 (1st Cir.), cert. denied, 426 U.S. 935 (1976). The heart of the district court plan consisted of a restructuring of the Boston School System into eight Community School Districts and one citywide school district. Within each district were "geocode units" consisting of a bounded area of five to fifteen residential blocks. For each district, planning specifications were set forth which established allowable percentage variations in the racial composition of the schools in light of the racial composition of the district as a whole. 401 F. Supp. at 252-57. Where possible, students were assigned on the basis of their preference. Id. at 258, 261. To the extent necessary to meet the planning specifications in each geocode, the plan provided for mandatory transportation of students. The court estimated that 21,000 students would be subject to this requirement. Id. at 263.

10 Id. at 267-70. By this time the Mayor of Boston had been joined as a defendant. See Morgan v. Kerrigan, 530 F.2d 401, 406 n.2 (1st Cir.), cert. denied, 426 U.S. 935 (1976).

11 530 F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976). This was the appeal on the remedial portion of the litigation. See note 6 supra.

12 See 530 F.2d at 408.

13 Id. at 415.

14 The district court defined "white flight" as the "departure of white children from the Boston city schools to parochial, private, or suburban school systems." 401 F. Supp. at 233-34.
ton schools in devising its plan constituted an abuse of discretion constituting grounds for reversal.\textsuperscript{15} Finally, the defendants argued that the district court plan exceeded the restrictive desegregation guidelines set forth by Congress in the Equal Educational Opportunities Act of 1974.\textsuperscript{16}

In an extensive and thorough opinion, the United States Court of Appeals for the First Circuit rejected all of the defendants' challenges\textsuperscript{17} and affirmed the order of the district court.\textsuperscript{18} The decisive

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} 530 F.2d at 419-20.
\item \textsuperscript{16} Id. at 411-15. The Equal Educational Opportunities Act of 1974 (the "Act"), Pub. L. No. 93-380, August 21, 1974, 88 Stat. 514-21, is codified at 20 U.S.C. 1701-58 (Supp. IV 1974). This challenge, as pressed by the Mayor of Boston, see note 10 supra, and joined in by the Home and School Association, see note 7 supra, was based primarily on \S 213 of the Act which provides that a court shall "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection." 20 U.S.C. \S 1712 (Supp. IV 1974). The Mayor argued that the plan proposed by the court-appointed masters, see note 8 supra, was constitutionally sufficient. Therefore, the district court plan, which went beyond the masters' plan, violated \S 213's command to limit remedies to the extent necessary to "correct particular denials . . . equal protection." See 530 F.2d at 411.
\item \textsuperscript{17} 530 F.2d at 414-15, 417-18, 422. The circuit court panel also had no trouble rejecting the defendants' claim that the district court's refusal to adopt the school committee plan, see note 7 supra, was not error. 530 F.2d at 409-11. In this regard, the circuit court agreed with the district court that the school committee plan "could not realistically sustain the burden of achieving desegregation of the Boston city schools." Id. at 410. The circuit court also rejected claims that the district court's use of ratios, see note 9 supra, was improper, finding that the planning specifications establishing ranges of thirty to seventy percent black and white were consistent with statistical ranges sanctioned in other desegregation cases. 530 F.2d at 423, citing United States v. School Dist. of Omaha, 521 F.2d 530, 546-47 (8th Cir.), cert. denied, 425 U.S. 946 (1975) (citywide school racial composition eighty percent white, twenty percent black; schools to be five to thirty-five percent black, sixty-five to ninety-five percent white); Yarbrough v. Hulbert-West Memphis School Dist. No. 4, 457 F.2d 333, 334-35 (8th Cir. 1972) (citywide elementary schools forty-seven percent white, fifty-three percent black; schools to be thirty to seventy percent for black and white).
\item \textsuperscript{18} 530 F.2d at 431. The Supreme Court denied certiorari to the defendants' petition for review in June of the Survey year, 426 U.S. 935 (1976), thereby putting to rest the last hopes that the district court's broad desegregation order would be revised. However, the precedential impact of a denial of certiorari is at best limited. In an immediate, practical sense, it is true that the effect of the Court's refusal to hear a case is to leave the judgment of the court below unreviewed and therefore undisturbed. Nevertheless, it must be remembered that the Court has been emphatic that failure to grant a petition does not mean that the Court agrees with the judgment, much less the reasoning, of the court below. See, e.g., Brown v. Allen, 344 U.S. 443, 489-97 (1953) (opinion of Frankfurter, J.); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950). As stated by Justice Frankfurter in Baltimore Radio, a denial of a petition for certiorari "simply means that fewer than four members of the court deemed it desirable to review a decision of the lower court." Id. at 917.
\end{itemize}
\end{footnotesize}
circuit court opinion clearly establishes that the district court segregation of the Boston schools is unlikely to be disturbed. The remainder of this section will consider the First Circuit panel's treatment of the defendants' three major challenges to the district court order. In examining the court's treatment of the defendants' claim under the Equal Educational Opportunities Act of 1974, particular attention will be devoted to determining whether specific anti-busing legislative proposals conform to constitutional standards.

I. THE SCOPE OF FEDERAL DESEGREGATION REMEDIAL POWER

The defendant officials' general objection to the district court remedy was that it was not limited to the extent of the constitutional violation determined at the liability portion of the litigation. The defendants contended that a large part of the segregation of the Boston schools was simply the product of population patterns in neighborhood schools and not of illegal state action. Because the fourteenth amendment as interpreted prohibits only state imposed racial segregation, the defendants claimed the district court's remedial power was limited to remedying the specific effects of the "state action." While admitting that the defendants' theory possessed "some surface plausibility," the court of appeals rejected this line of reasoning for two reasons: first, binding United States Supreme Court precedent is to the contrary; second, the illegal causes of segregation in the schools and the indirect effects thereof are not truly severable from other causes. Because the Supreme Court precedent constituted the crux of the circuit court's reasoning, it is appropriate to review the main cases themselves.

The three major United States Supreme Court cases found binding by the First Circuit were Green v. School Board of New Kent County, selves, should think that the denial indicates a view on the merits of the case." Id. at 460-61 (citations omitted).

At any rate, it is at least the general rule that the denial of certiorari means that the Supreme Court has chosen not to hear the case and nothing more. See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 213-18 (4th ed. 1969).

19 Other aspects of Judge Garrity's continuing implementation of desegregation of the Boston schools have likewise been affirmed by the First Circuit. In a companion case, Morgan v. Kerrigan, 530 F.2d 431 (1st Cir.), cert. denied, 426 U.S. 935 (1976), the First Circuit upheld an order directing the hiring of one black teacher for each white teacher until the percentage of black permanent teachers in the district was approximately the same as the percentage of blacks in the city population. See also Morgan v. McDonough, 540 F.2d 527, 533-35 (1st Cir. 1976) (upholding an order of the district court designating a temporary receiver for South Boston High School.)

20 530 F.2d at 415.

21 The circuit court, noting the defendants' reliance upon the "language of the Fourteenth Amendment," cited the Civil Rights Cases, 109 U.S. 3 (1883), for the state action proposition. See 530 F.2d at 415.

22 530 F.2d at 415.

23 Id. at 415-19.

Swann v. Charlotte-Mecklenberg Board of Education, and Keyes v. School District No. 1, Denver. Green, the earliest of the three, is sometimes referred to as the case in which the Supreme Court first insisted on actual integration as a remedy for segregation in the public schools rather than merely the elimination of governmental establishment of segregation. If Green was an innovation, however, it was a mild innovation. There a “freedom of choice” plan was adopted in a county that had practiced total segregation as a matter of state statutory and constitutional law. Although the Court did not determine that freedom of choice plans are per se unconstitutional, it did hold that freedom of choice was an inadequate remedy in that particular case. In context, this was not a far-reaching determination. There were only two schools and no residential segregation in the county. Under prior law, one school had been “white” and one “black.” Given the circumstances of community hostility to Brown v. Board of Education, the Court believed that freedom of choice was insufficient to eradicate the effects of past de jure segregation, especially where the alternative of geographic zones was so obviously and simply available.

Although Green seemed to be a modest extension of the Brown principle, the Court in the course of its discussion made two observations

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28 391 U.S. at 431-42.
29 Id. at 439-41.
30 Id. at 432.
32 391 U.S. at 439-42. The Court noted that in three years of operation, not a single white child (out of five hundred fifty) chose to attend the all black school, while one hundred fifteen black children (out of seven hundred forty) chose to attend the all white school. Id. at 441; see id. at 432.
33 The Court in Brown stated simply: We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. 347 U.S. at 495.
that have proved to be oft-quoted and seminal. The Court stated that the school board was charged with an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”

Further, the Court, wearied after years of foot dragging since Brown, announced that “the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.” These statements by the Court, although ambiguous because of their context, can be regarded as authority for the proposition that the remedy for de jure segregation must be an actually integrated school system and not merely the cessation of governmental involvement in segregation, i.e., integration, not merely desegregation.

The next case of principal concern to the First Circuit in Morgan was Swann. This was a case involving remedies analogous to the remedies adopted by the district court in Morgan. On the rhetorical level there is a tantalizing ambiguity in the case concerning whether school authorities must adopt integration as a remedy or merely desegregation. On the one hand, the Court reaffirmed the Green principle that there is an obligation to convert to a unitary school system in which the effects of de jure segregation are eliminated root and branch.

On the other hand, the Court pointed out that “judicial powers may be exercised only on the basis of a constitutional violation,” and that “as with any equity case, the nature of the violation determines the scope of the remedy.” As an abstract matter, these latter statements would seem to establish that desegregation, not integration, is what is required.

34 391 U.S. at 437-38 (citations omitted).
35 Id. at 439 (emphasis in original).
36 A case decided the same day as Green, Monroe v. Board of Commissioners, 391 U.S. 450 (1968), involved somewhat different facts. Monroe concerned a school system in Jackson, Tennessee that formerly had been segregated by law. After a successful challenge to this system in federal district court, the respondent school board adopted a desegregation plan that called for geographic zoning, with a provision for “free transfer” at the option of any student, on a space available basis. Students taking advantage of the transfer option had to supply their own transportation because the school system did not operate any buses. Id. at 452-54. Because of residential segregation and optional transfers by both black and white students, comparatively little integration resulted. In schools that were predominantly white there were as few as three blacks out of 781 students, but no more than 160 blacks out of 682 students. Id. at 454, 457. The school system as a whole was about forty percent black. Id. at 452. The Supreme Court ruled that the school board’s plan violated the Constitution, stressing the following factors: the school board had long delayed before adopting any plan at all; the board had administered its own plan in a discriminatory fashion until checked by legal action; and the board acknowledged in its brief that the transfer option was necessary to prevent white students from fleeing the school system altogether. The Court thus regarded the plan not as a desegregation plan, but simply as a device to facilitate resegregation. Id. at 458-59.
37 402 U.S. at 15.
38 Id. at 16.
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The problem with this interpretation is that Swann is more than just a compilation of aphorisms about the law of constitutional remedies. These statements were made in a context where the Court upheld a remedial plan that went beyond what had been imposed in Boston. For example, some of the school zones were neither compact nor contiguous and were the product of what the Court itself described as "a frank—and sometimes drastic—gerrymandering of school districts and attendance zones." Nothing so severe was imposed by the district court in Morgan. Thus, while some of the abstract statements in Swann might provide support for the theory that desegregation is a sufficient remedy for de jure segregation, in the full context the Court made it plain that integration is required.

The third and final United States Supreme Court case found controlling by the Morgan court was Keyes. Keyes was important because it applied principles of desegregation derived in "southern" cases to Denver, Colorado, a "northern" city in which racial segregation in public education was never mandated or permitted by law. Nevertheless, as in Morgan, various racially identifiable policies of the school board, including the manipulation of student attendance zones, school site selection, the utilization of mobile classrooms, and teacher and staff assignments, created racially segregated schools throughout the city which led to a decree requiring a remedy for the segregation in the schools. In reaching its decision, the Court specifically rejected the claim, which had prevailed in the lower courts, that the constitutionally appropriate remedy is merely the elimination of specifically demonstrated abuses and not the total integration of the entire school system:

Our Brother Rehnquist argues in dissent that Brown v. Board of Education did not impose an "affirmative duty to integrate" the schools of a dual school system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race . . . ." That is the interpretation of Brown expressed 18 years ago by a three-judge court in Briggs v. Elliott: "The Constitution, in other words, does not require integration. It merely forbids discrimination." But Green v. County School Board rejected that interpretation in-

39 Id. at 27.
40 The plan adopted to desegregate the Boston schools is set out at note 9 supra.
41 402 U.S. at 191. Prior to Keyes, one might still have objected that cases like Green and Swann were "southern" cases where a frank, open and complete system of racial separation of the races in the schools had been the order of the day before Brown and, indeed, in the years immediately after Brown. Thus, it was arguable that a system such as Boston that practiced no de jure segregation should not be treated in accordance with the southern model simply because certain administrative decisions had rendered the system in part segregated in a technical sense. Keyes put to rest the possibilities of such a double standard.
42 Id. at 200-02.
sofar as Green expressly held that "School boards ... operating state-compelled dual systems were nevertheless clearly charged [by Brown II] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green remains the governing principle.\footnote{Id. at 200 & n.10 (citations omitted). In its opinion, the Court also repeated a point that had been made in Swann, 402 U.S. at 20-21, and was ultimately relied upon by the First Circuit in Morgan, see 530 F.2d at 418, that the aggregate of acts of de jure segregation may have an effect on the racial composition of residential neighborhoods. Since any such effect is not really ascertainable, it would be impossible thereafter to separate racial isolation in the schools into de facto and de jure components. It would appear that this point, if true, is the real answer to Justice Rehnquist's claim that a decree requiring integration is in effect remedial overkill. See Yudof, Equal Educational Opportunity and the Courts, 51 TEX. L. REV. 411, 452, (1973).}

Whether or not one agrees with the analysis provided in these cases by the United States Supreme Court, it appears that they provide ample authority to support the First Circuit's affirmance of the district court remedy in Morgan. Indeed, the binding nature of these precedents seems inescapable. The catalogue of examples of de jure segregation is very much the same in Morgan as it was in Keyes. Most importantly, whatever doubt there may have been about the scope of an appropriate remedy or its application in a northern setting was certainly eliminated by Keyes.\footnote{44} As a practical matter, the circuit court's skepticism in Morgan of efforts to distinguish intentionally caused segregation from that which results from residential patterns\footnote{45} is understandable. The task of unscrambling what the racial composition of the different neighborhoods would have been absent unlawful discrimination would be speculative if not impossible. An added difficulty in this task would be the need to determine the extent to

\footnote{43 Id. at 200 & n.10 (citations omitted). In its opinion, the Court also repeated a point that had been made in Swann, 402 U.S. at 20-21, and was ultimately relied upon by the First Circuit in Morgan, see 530 F.2d at 418, that the aggregate of acts of de jure segregation may have an effect on the racial composition of residential neighborhoods. Since any such effect is not really ascertainable, it would be impossible thereafter to separate racial isolation in the schools into de facto and de jure components. It would appear that this point, if true, is the real answer to Justice Rehnquist's claim that a decree requiring integration is in effect remedial overkill. See Yudof, Equal Educational Opportunity and the Courts, 51 TEX. L. REV. 411, 452, (1973).}

\footnote{44 However, despite its broad language as to the proper scope of relief, the Keyes Court did not hold that the intentional separation of a substantial part of a school system is not of itself proof that the whole system is intentionally segregated. Rather, the Court stated that it would apply a presumption that the segregative intent found in a substantial part of the system affects the whole system and leaves the burden of proving otherwise to the school authorities. 413 U.S. at 208. The application by the district court of the Keyes presumption to the segregative practices in the Boston schools is somewhat unclear. Keyes was decided rather late in the district court's liability phase of the Morgan litigation. As a result, the defendants may not have been given the opportunity to rebut the presumption that a school system that was intentionally segregated to a substantial degree was to be regarded as a completely segregated system. See 530 F.2d at 419 n.26. However, the district court did apply the Keyes presumption to find that Boston's elite examination schools had intentionally discriminated against black school children. See note 3 supra. At any rate, attempts to raise such questions once again at the remedy phase were rejected and the court was willing to entertain only those plans that had as their premise that Boston was in its entirety a segregated school system. 401 F. Supp. 225, 229. In this regard, the court stated: "In default by school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." Id. at 229, quoting Swann, 402 U.S. at 16.}

\footnote{45 401 F.2d at 418. See text at note 23 supra.
which intentional acts of segregation in schools affected the residential patterns in the neighborhood. Finally, as the circuit court in Morgan noted, partial desegregation in schools in which minorities remained segregated might not in the future be treated even-handedly by administrators. Consequently, the prevention of such abuses would be best effectuated by making sure that no schools were identifiable by a concentration of minority students.

In light, then, of the binding Supreme Court precedent and the practical difficulty in severing the illegal from the legal segregation, the circuit court's disposition of the defendants' challenge of overbreadth appears correct.

II. THE "WHITE FLIGHT" CONTROVERSY

Another major challenge proffered by the defendants was that the district court's refusal to consider the potential effect of "white flight" from Boston schools constituted an "abuse of discretion," rendering the desegregation plan defective. The circuit court in Morgan rejected this challenge stating that "white flight" is not a "practicability for which [a desegregation] plan must make an accommodation." In so deciding, the court pointed out that a refusal to accommodate opposition to desegregation has characterized the cases. Responding to defendants' claim that such a stance destroys the ultimate effectiveness of a plan because of the "resegregation" that occurs when whites withdraw in substantial numbers, the court stated:

The constitution cannot solve all problems. On the contrary, to the extent that it demands that rights which have previously been overridden be enforced, it creates social problems. It inconveniences, sometimes substantially, law enforcement officers, prison wardens, university administrators, and government bureaucrats... But expectable individual, official or group reaction does not outweigh constitutional rights. We therefore must agree with another court which said, "concern over white flight... cannot become the higher value at the expense of rendering equal protection of the laws the lower value."50

The First Circuit's decision, in light of applicable precedent, appears correct. There would be little rule of law if the courts crumbled in the

46 401 F.2d at 418. This consideration would entirely undercut any possibility of distinguishing between that segregation resulting from official action and that resulting from other causes.
47 530 F.2d at 419-20. "White flight" is defined at note 14 supra.
48 530 F.2d at 419.
49 The First Circuit relied in large part on Monroe v. Bd. of Comm'r's., 391 U.S. 450 (1960), a case that likewise rejected the "white flight" defense. See id. at 459.
face of community opposition to enforcement of constitutional rights. Nevertheless, the special nature of the “white flight” problem may merit closer attention than the Morgan circuit and district courts were willing to devote. One aspect of the problem is that “white flight” is not illegal activity. Thus, it is not quite accurate to characterize judicial willingness to consider this factor as subservience to threats of illegal interference with the execution of court decrees. Rather, one might claim that courts that are willing to consider “white flight” are merely evaluating a legal response of citizens that potentially will frustrate desegregation decrees, thereby reducing racial balance to levels prior to judicial intervention. In light of recent Supreme Court precedent forbidding a district court to respond to demographic changes after a constitutional plan has been implemented, it would seem that the better practice is for district courts at least to consider evidence of “white flight” before tying its hands irrevocably.

A second aspect of the “white flight” problem is that the “resegregation” that occurs when a substantial number of white children withdraws from balanced schools is not, as the First Circuit in Morgan recognized, segregation in a legal sense because it is not state imposed and because there is no constitutional right to any particular racial balance in schools. Such treatment is at least philosophically inconsistent with judicial willingness to include in a desegregation plan even those schools that are segregated in a de facto sense. In the former situation, courts are quite willing to regard as lawful the segregation that occurs when white students frustrate a decree simply

51 While there is no right to interfere with the execution of court decrees, see Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court has recognized “a First Amendment right ‘to engage in association for the advancement of beliefs and ideas.’” See NAACP v. Alabama, 357 U.S. 449, 460 (1958). “From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that children have an equal right to attend such institutions.” See Runyon v. McCrary, 427 U.S. 160, 176 (1976). A fortiori, there would be such a right when the motive is not a belief in or desire for segregated schools but opposition to transportation out of the neighborhood or fear of violence or concern over the quality of education available in the public schools.


53 This would allow district courts to soften the effect of “white flight” by modifying racial balance formulas to predict certain demographic changes in neighborhoods where the evidence of potential “white flight” was the greatest. The type of evidence relevant in such a determination is generally found in sociological studies of population shifts. See 530 F.2d at 420-21 nn. 29 & 30.


55 See text at notes 20-43 supra. In Morgan, the court spoke disparagingly about the possibility or desirability of regarding any segregation as de facto once there is a finding of substantial de jure segregation in the system:

[T]o require a district court to preserve intact every scrap of segregated education that somehow can be separated from governmental causation is to involve the federal courts in planning continued segregation and in perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage.

530 F.2d at 418.
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by withdrawing from the system. On the other hand, in the latter, courts remain quite unwilling to consider the possibility of segregation by geographical accident once the finding of specific intent has been made. Such dual treatment, in effect, is a concession that the issue in desegregation cases is not whether a school is "balanced," but whether there is discrimination.

To be sure, grave problems would arise from taking "white flight" into account in formulating a plan. First, it is difficult to show a clear empirical consensus as to the relationship between "white flight" and court ordered desegregation. Second, to adopt a rule that potential withdrawal of students from the system is a factor to be taken into account in formulating a desegregation plan would put a premium on the manufacturing of community opposition along with threats and predictions of flight from the city.

A dilemma seems to emerge. There are practical and perhaps theoretical obstacles to taking "white flight" into account in formulating plans. Nevertheless, it appears that if the problem arises, as it apparently has in the Boston schools, the courts—given what the Supreme Court has said about modifying decrees and about metropolitan remedies—can respond to the resegregation of schools only by throwing up their hands and announcing that this segregation is "de facto."

One solution might be for courts to grapple with the problems of distinguishing between segregation that has been caused by the action of school authorities and that which is the product of residential patterns and other causes. In this manner, district courts could formulate

56 The circuit court in Morgan noted that the "relationship between white flight and court ordered desegregation is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged." 530 F.2d at 420-21 n.29.

57 School department statistics released in early November, 1976, indicated that more than 20,000 white students, out of the 53,593 counted in 1973, left the city's school enrollment since busing began in September 1976. The number of black students dropped very slightly from 31,963 in 1973 to 31,910 in November 1976. The enrollment of "others" remained relatively steady at about 9,000. N.Y. Times, November 13, 1976, p.8.


59 See Milliken v. Bradley, 418 U.S. 717 (1974). In Milliken, the Court held that a cross-district remedy should not be imposed unless it is first shown that there has been a constitutional violation in one district that produces a significant segregative effect in another. Id. at 744-45. But see Buchanan v. Evans, 425 U.S. 963 (1975), in which the Supreme Court summarily affirmed an order of a three-judge district court, 393 F. Supp. 428 (D. Del. 1975), requiring an inter-district remedy. See generally Note, Interdistrict Desegregation: The Remaining Options, 28 STAN. L. REV. 521 (1976). See also Hills v. Gautreaux, 425 U.S. 284, 306 (1976), where the Court approved a plan requiring metropolitan public housing desegregation. In Hills, the remedy was commensurate with the wrong because HUD regarded the city housing market rather than the city limits as the relevant geographical area in its prior planning. Id. at 300-06.

60 See text at notes 45-46 supra.
plans that would have wider community acceptance and would at the same time remedy the constitutional violation. The more draconian solutions that have been adopted up to now have had the effect of embittering some segments of the community and, because of "white flight," further isolating those minorities the plans were designed to aid. However, until the Supreme Court announces differently, lower courts such as the district court and the First Circuit in Morgan should not be criticized for faithfully following the clear and binding precedents in the area.

III. CONGRESSIONAL RESTRICTION OF FEDERAL COURT REMEDIAL POWER

Defendant officials in Morgan also claimed that the district court desegregation decree violated section 213 of the Equal Educational Opportunities Act of 1974, which provides that a court shall "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." The defendants argued that a proper interpretation of section 215 was one that required district courts to adopt a more modest desegregation plan if the plan could of itself pass constitutional muster. The circuit court rejected this argument largely on the basis of section 203 of the Act which disavows any intention to restrict the obligation of the courts "to enforce fully" the obligation of the Constitution. The court read section 203 as indicating that Congress did not intend to overrule prior Supreme Court cases that called for remedies in which "discrimination would be eliminated root and branch." In light of

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61 This is not simply a conflict between the black and white communities. It is increasingly common for minority citizens closest to the actual impact of desegregation decrees to prefer solutions that emphasize increased local control and improved educational programs rather than a total emphasis on numerical mixing of the races, particularly where "white flight" makes further busing orders futile. This can result in a conflict in goals between the plaintiffs in segregation cases and the policies of national organizations such as the NAACP. For a thorough treatment of this problem see Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L. J. 470 (1976). See also L. Graglia, Disaster By Decree 330 n.107.


63 530 F.2d at 411. In particular, the defendants claimed that the district court should have adopted the plan submitted by the masters. See note 8 supra. The masters’ plan contemplated busing for 6,100 fewer students of the 84,000 total student population than did the court’s plan. See 530 F.2d at 411.

64 530 F.2d at 412. Section 203, 20 U.S.C. § 1702(b) (Supp. IV 1974) is set out in relevant part at note 62 supra.

65 530 F.2d at 412, quoting Green, 391 U.S. at 436.
this language, the court concluded that the Act's restriction on desegregation remedies must be read as simply a direction to "guide and channel" judicial discretion. Having so construed congressional intent, the circuit court had little trouble finding that the district court's remedy "reflected the channelling contemplated by the Act." Having so construed congressional intent, the circuit court had little trouble finding that the district court's remedy "reflected the channelling contemplated by the Act."67

In light of the ambivalent and internally conflicting nature of the statutory language, the First Circuit's conclusion seems justified. In effect, the First Circuit in Morgan has worked an accommodation of congressional intent to limit desegregation remedies to the well-settled desegregation precedent that has accumulated in the past twenty-three years. This handling of the claim is perhaps illustrative of how courts would assess the constitutionality of a more forthright anti-busing statute. In view of the recurring nature of anti-busing proposals, at least some sketching of the outlines of the problems with such proposals is appropriate.

On the surface the constitutionality of an anti-busing statute seems to be a simple problem. Court decisions in this area are of constitutional magnitude. Therefore, Congress can respond to them effectively only by considering possible amendments to the Constitution. Ordinary legislation would be void under settled principles.

There are reasons, however, why this analysis may be overly facile. Under the Constitution, Congress has control over the appellate jurisdiction of the Supreme Court. While constitutional scholars maintain that there are limits to any such control, it has not been settled that there are limits, much less has it been settled what those limits may be. Further, Congress has authority to regulate the jurisdiction, rem-

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66 530 F.2d at 413.
67 Id.
68 See note 62 supra.
70 Two key sections provide for liability and relief:
Liability: A state or local education agency will be liable for acts of unlawful discrimination if committed for the purpose of controlling the composition of the student population of schools. Relief: The court must limit the remedy to the particular school, if feasible. If unsuccessful, the court may examine the school system as affected by the unlawful acts of discrimination. A hearing will be conducted by the court to determine the degree of discrimination resulting from the unlawful acts. If unlawful discrimination exists the court must state the extent to which the relief reflects the unlawful acts. Finally the proposal requires transportation of students to be terminated upon completion of a three year period. The court may extend the remedy if there has not been good faith compliance or in other extraordinary circumstances.
71 U.S. CONST. Art. III, § 2, d. 2; Ex Parte McCardle, 74 U.S. 506 (1869).
edies, and indeed the existence of inferior federal courts. Thus, it is by no means self-evident that any legislation restricting the circumstances in which busing could be required as a remedy would be unconstitutional. It seems probable that the Supreme Court, if faced squarely with the question, would rule that while Congress may regulate or even forbid a particular court remedy, it may not forbid the only remedy that can effectively vindicate a constitutional right in a particular case. In practice this might well mean that no anti-busing legislation would have much more effect than did the 1974 Act in Morgan. The main point, however, is that the question is not a simple one, and it is not certain how the Supreme Court would respond.

In determining the constitutionality of such a statute, the Supreme Court would also have to take into account the power of Congress under section five of the fourteenth amendment to enforce equal protection by appropriate legislation. It is now settled that Congress, legislatng pursuant to section five, may require by legislation what equal protection of its own force would not require. The Court has also indicated, however, in dictum that while Congress has the power to enforce equal protection, it may not "dilute" equal protection. It may be suggested that an anti-busing proposal would be such a dilution of equal protection, but it is not inevitable that it be so viewed. The Supreme Court, in evaluating the scope of the power of Congress under section five, defers to the superior factfinding competency of Congress. Congress might, for example, draw conclusions on the degree to which "white flight" frustrates court desegregation plans or the extent to which de jure segregation has influenced residential patterns. Congress might also draw conclusions about the empirical valid-

72 See U.S. Const. Art. III, § 1, cl. 1; Sheldon v. Sill, 49 U.S. 441 (1850); See generally Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498 (1974).

73 See note 68 supra.

74 Section five of the fourteenth amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.


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ity of the Supreme Court's rule that a substantially segregated school system is presumed to be a totally segregated system. Buttressed by appropriate factual findings, a statute sharply curtailing transportation of students as a required remedy might not be perceived as a dilution of equal protection.

To be sure many of these conclusions are tentative. The point is that anti-busing proposals raise questions that go very much to the heart of the conflict of competency between the judicial and the political departments of the federal government. Arguments that Congress can influence events in this area by ordinary legislation are at least plausible.

STUDENT COMMENT

§13.5. Constitutional Law—Mandatory Death Penalty for Rape-murder: Commonwealth v. O'Neal

In December of the Survey year, the Supreme Judicial Court ruled that the Massachusetts mandatory death penalty statute for rape-murder violated the Massachusetts Declaration of Rights. In the case leading to the Court's holding with respect to the mandatory death penalty, defendant Robert E. O'Neal had been found guilty by special verdict of a jury of murder in the first degree, as defined in section 1 of chapter 265 of the General Laws, on the ground that the murder was committed in the course of rape. Pursuant to section 2 of chapter 265, the trial judge imposed

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78 See note 44 supra.

2 G.L. c. 265, § 2 reads in relevant part:
Whoever is guilty of murder in the first degree shall suffer the punishment of death, unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend that the sentence of death be not imposed, in which case he shall be punished by imprisonment in the state prison for life. No such recommendation shall be made by a jury or recorded by the court if the murder was committed in connection with the commission of rape or an attempt to commit rape.

The second sentence of section 2 constitutes the mandatory death penalty provision. Hereinafter murder committed in connection with the commission of rape or an attempt to commit rape will be referred to as rape-murder in the text.
4 G.L. c. 265, § 1 provides in pertinent part:
Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree .... The degree of murder shall be found by the jury.
5 The defendant was indicted on and found guilty of five separate charges: murder in the first degree; rape; robbery while being armed; assault and battery by means of a dangerous weapon; assault with intent to murder while being armed. On the first degree murder indictment, the jury, by special verdict, found the defendant guilty of...
the mandatory sentence of death. On appeal to the Supreme Judicial Court, the defendant, relying heavily on the 1972 United States Supreme Court decision in Furman v. Georgia, challenged both the conviction and the sentence. In Furman, the Supreme Court had held that the imposition of the death sentence under state statutes giving the jury untrammeled discretion to impose the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution. O'Neal argued that the mandatory death penalty for rape-murder, likewise, contravened the eighth and fourteenth amendments to the federal constitution, as well as article 26 of the Massachusetts Declaration of Rights. The gist of defendant's argument was that an impermissible murder committed in the commission of armed robbery and murder committed with deliberately premeditated malice aforethought as well as murder committed in the commission of rape. Main Brief for the Commonwealth at 1, Commonwealth v. O'Neal, 1975 Mass. Adv. Sh. 3502, 339 N.E.2d 676.

6 See note 2 supra for text of G.L. c. 265, § 2.


9 408 U.S. 238 (1972).


11 408 U.S. at 239-40. Although none of the nine Justices set out in detail the state statutes under attack, it is clear that the statutes provided for discretionary sentencing by the sentencing authority. See id. at 240, 256 (Douglas, J., concurring); id. at 310-11 (White, J., concurring). U.S. CONST. amend. VIII states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The eighth amendment ban on cruel and unusual punishments has been found to apply to the states through the due process clause of the fourteenth amendment. See Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459, 463-64 (1947) (Reed, J., announcing judgment of the Court) (dicta). In Francis, Justice Reed, joined by Chief Justice Vinson and Justices Black and Jackson, stated that the "Fourteenth would prohibit by its due process clause execution by a state in a cruel manner." Id. at 463. In a concurring opinion, Justice Frankfurter declined to find the eighth amendment binding on the states through the due process clause of the fourteenth amendment. Id. at 468-70. Instead, Justice Frankfurter believed that the fourteenth amendment imposed independent restrictions on a state's right to prescribe punishments: the "Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights." Id. at 468. The view of the four Justices in Francis was apparently adopted by a majority of the Supreme Court. See Robinson v. California, 370 U.S. 660, 666-67 (1962) (Stewart, J., writing the opinion of the Court); id. at 675 (Douglas, J., concurring).


13 Id. at 38-45. MASS. CONST. pt. 1, art. XXVI provides in full: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The defendant urged the Supreme Judicial Court to recognize that article 26, which employs the disjunctive form of the phrase, "cruel or unusual punishments," has a different meaning from the eighth amendment phrase, "cruel and unusual punishments." Main Brief for Defendant at 39-43, Commonwealth v. O'Neal, 1975 Mass. Adv. Sh. 3502, 339 N.E.2d 676. The defendant cited People v. Anderson, 6 Cal. 3d 628, 100
degree of discretion was inherent in the conviction and sentencing process so that the death sentence, although mandatory under the state statute, had been arbitrarily imposed on the defendant, in violation of the *Furman* holding. In the alternative, the defendant asserted that the death penalty, whether imposed under a discretionary or mandatory sentencing system, was excessively cruel in the constitutional sense.

In *Commonwealth v. O'Neal* (O'Neal I), decided on April 18, 1975, the Supreme Judicial Court affirmed the conviction, but deferred a final determination of the constitutionality of the mandatory death penalty statute. The justices were unable to achieve a majority for a finding that the conviction and sentencing process, although mandatory under the statute, involved a degree of discretion forbidden by *Furman*. They also could not reach a consensus on which state and/or federal constitutional provisions were appropriate for evaluating the mandatory death penalty statute.

Four justices did agree, however, that further briefing was necessary on the "question of the extent of the Commonwealth's interest in the imposition of the death penalty in rape-murder cases."

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Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied, 406 U.S. 958 (1972), in which the Supreme Court of California held that capital punishment violated the "cruel or unusual" punishment proscription of pt. I, § 6 of the California constitution. *Id.* at 654-57, 100 Cal. Rptr. at 70-71, 493 P.2d at 898-99 (emphasis supplied). The Supreme Court of California based its decision in part on the use of the disjunctive phrase in the California constitution which that court found created separate tests of the cruelty and the unusualness of the punishment challenged. *Id.* at 636-37, 100 Cal. Rptr. at 157-58, 493 P.2d at 885. The California court concluded that capital punishment was both cruel and unusual in the constitutional sense. *Id.* at 654-57, 100 Cal. Rptr. at 170-71, 493 P.2d at 898-99.

15 *Id.* at 80-127.
17 *Id.* at 1093, 1100-01, 327 N.E.2d at 664, 668-69.
18 Chief Justice Tauro rejected the defendant's contention that the Massachusetts statutory framework embodied in G.L. c. 265, §§ 1, 2, gave the jury discretion to impose the death penalty. These provisions permitted the jury to find the defendant guilty of either rape-murder requiring the death sentence, or second degree murder, for which no death sentence could be imposed. Chief Justice Tauro opined that a jury, which must find the facts upon the evidence presented, may not, if properly instructed, exercise discretion in determining whether a defendant committed first or second degree murder. *Id.* at 1090-93, 327 N.E.2d at 664-66. In contrast, Justice Wilkins, in his concurring opinion with whom Justices Kaplan and Hennessey joined, thought that the statutory provision allowing the jury to find the degree of murder required "further serious consideration as to whether a jury may in its arbitrary discretion return a verdict of murder in the second degree." *Id.* at 1103, 327 N.E.2d at 669.

Additionally, the Chief Justice refused to accept the defendant's argument that there are elements of discretion in a system of mandatory capital punishment such as prosecutorial discretion, plea-bargaining and executive clemency which make that system constitutionally defective. *Id.* at 1092 & n.2, 327 N.E.2d at 665 & n.2. The Chief Justice noted that plea bargaining and prosecutorial discretion are "necessary aspects of our
After supplemental briefing and argument by the parties, Commonwealth v. O'Neal (O'Neal II), the subject of this note, was decided on December 22, 1975 on state constitutional grounds. The Supreme Judicial Court held: "[t]he mandatory death penalty for murder committed in the course of rape or attempted rape violates the Massachusetts Declaration of Rights and is unconstitutional." Four of the seven justices on the Court ruled, in separate concurring opinions, that the mandatory death penalty for rape-murder ran afoul of the article 26 prohibition of cruel or unusual punishments. Two of the four justices in the majority also concluded that the mandatory sentence of death offended not only article 26, but also the constitutional guarantees of due process as embraced in articles 1, 10 and 12 of the Massachusetts Declaration of Rights.

Chief Justice Tauro argued that due process limitations should govern an appraisal of the constitutionality of the mandatory death penalty statute. Id. at 1096-97 & n.5, 327 N.E.2d at 667 & n.5, 668. Recognizing the novelty of his due process approach, Chief Justice Tauro announced: "We elect ... to adopt an approach free from the abundant commentary and exhaustive material surrounding the Eighth Amendment route." Id. at 1096, 327 N.E.2d at 667. Justices Wilkins and Kaplan believed that the constitutional question should be determined under the eighth amendment ("cruel and unusual punishments" clause) and its state constitutional counterpart ("cruel or unusual punishments" clause). Id. at 1102, 327 N.E.2d at 669. (Wilkins J., joined by Hennessey, Kaplan, J.J., concurring). Justice Hennessey was willing to employ either approach. Id. at 1105, 327 N.E.2d at 670 (Hennessey, J., concurring).

Id. at 1102, 327 N.E.2d at 669 (Wilkins J., joined by Hennessey, Kaplan J.J., concurring). The Chief Justice called for further briefing on the more limited issue of "whether the Commonwealth has a compelling interest which is served by imposition of the death penalty in rape-murder cases, and whether such penalty is the least restrictive means for furtherance of the Commonwealth's permissible objectives." Id. at 1101, 327 N.E.2d at 668-69. Justice Reardon, joined by Justices Braucher and Quirico, dissented, arguing that the Court should decide the issue on eighth amendment grounds without further briefing. Id. at 1106-07, 327 N.E.2d at 670. (Reardon, J., joined by Quirico, Braucher, J.J., dissenting).

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Justice Braucher failed to reach the constitutional issues but concurred in the result on the basis of statutory construction. Id. at 1105, 327 N.E.2d at 670 (Braucher, J., concurring). See note 110 infra. Justice Reardon, joined by Justice Quirico, registered a strong dissenting opinion. See text at notes 111-29 infra. Justice Reardon, joined by Justice Quirico, registered a strong dissenting opinion. See text at notes 111-29 infra.

Id. at 1102, 327 N.E.2d at 669 (Hennessey, J., concurring); id. at 1101, 327 N.E.2d at 668-69. Justice Reardon, joined by Justice Quirico, registered a strong dissenting opinion. See text at notes 111-29 infra. Justice Reardon, joined by Justice Quirico, registered a strong dissenting opinion. See text at notes 111-29 infra.

MASS. CONST. pt. 1, art. 1 provides in full: "All men are born free and equal and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

MASS. CONST. pt. 1, art. X provides in pertinent part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . . ."
Only seven months after the decision in *O'Neal II*, the United States Supreme Court issued its first major opinions on capital punishment since *Furman*. In a series of five cases, a plurality of the Supreme Court declared two mandatory capital sentencing statutes unconstitutional and three guided discretionary capital sentencing statutes constitutional under the eighth and fourteenth amendments to the federal constitution. The Court thus indicated that guided discretionary capital sentencing legislation could be compatible with the cruel and unusual punishments ban of the United States Constitution.

This note will briefly discuss the United States Supreme Court decision of *Furman v. Georgia* and the Supreme Judicial Court's reaction to *Furman* which set the stage for the *O'Neal II* decision. Next, both the state constitutional standards employed by the four justices in the *O'Neal II* majority and the federal constitutional requirements for death penalty legislation, as expressed by the United States Supreme Court in the five related death penalty cases decided after *O'Neal II* will be examined. Massachusetts legislation providing for capital sentencing for the crime of murder will then be considered in light of these two constitutional hurdles—the state standards established in *O'Neal II* and the federal requirements under the eighth amendment. Finally, this note will demonstrate that the stringency of the *O'Neal II* tests casts doubt on the constitutionality of future Massachusetts capital punishment statutes, except where such statutes apply only to a few specific murder offenses.

I. *Furman AND THE JUDICIAL RESPONSE TO Furman IN MASSACHUSETTS*

In a number of cases prior to *Furman*, the United States Supreme Court had upheld death sentences in the face of constitutional attack.

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**MASS. CONST. pt. 1, art. XII** provides in pertinent part:

"And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."


26 Woodson, 428 U.S. at 305; Roberts, 428 U.S. at 336.

27 Gregg, 428 U.S. at 207; Jurek, 428 U.S. at 276; Proffitt, 428 U.S. at 259.

28 408 U.S. 238 (1972).

29 Although *O'Neal II* involved a narrowly drawn mandatory death penalty statute, the *O'Neal II* Court introduced state constitutional tests that may be used to judge the constitutionality of discretionary capital sentencing statutes enacted hereafter in Massachusetts. See text at notes 254-282 infra.

30 The *O'Neal II* decision sets forth two tests whereby the constitutionality of the mandatory death penalty for rape-murder was judged: a compelling state interest/least restrictive means test, see text at notes 77-94 infra, and a substantial public purpose test, see text at notes 98-103 infra.
on the mode of inflicting the punishment of death, and, only one year before the Furman decision, the Supreme Court failed to find that standardless jury sentencing in capital cases violated the due process clause of the fourteenth amendment. In Furman, a five to four majority of the United States Supreme Court, in a per curiam opinion, vacated three death sentences imposed under uncontrolled jury discretion statutes. The Furman majority held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." However, because the Court was deeply divided in its reasoning, each of the nine Justices wrote a separate opinion.

31 In Wilkerson v. Utah, 99 U.S. 130 (1878), the United States Supreme Court ruled that the sentence of death by shooting imposed for the crime of first degree murder did not come within the eighth amendment prohibition of cruel and unusual punishments. Id. at 134-36. In the case of In re Kemmler, 136 U.S. 436 (1890), the Supreme Court rejected the petitioner's argument that a New York state statute prescribing the mode of execution to be by electrocution violated either the privileges and immunities clause or the due process clause of the fourteenth amendment, which the petitioner contended prohibited the states from inflicting cruel and unusual punishments. Id. at 444-46, 449. Significantly, the Supreme Court said: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." Id. at 447. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), Justice Reed, who announced the judgment of the Court, declared that a second attempt at execution of the petitioner by electrocution, after a mechanical failure prevented consummation of the first attempt, would not constitute cruel and unusual punishment in the eighth amendment sense. Id. at 460-61, 463-64. Justice Reed elaborated by stating: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Id. at 464.

32 McGautha v. California, 402 U.S. 183, 196 (1971). In McGautha, Justice Harlan, writing for the Court, went so far as to announce, in dicta, that "[i]n light of history, experience, and the present limitations of human knowledge, we find it impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." Id. at 207. See note 255 infra. In Crampton v. Ohio, decision reported sub. nom., McGautha v. California, 402 U.S. 183 (1971), the Supreme Court also decided that a sentencing phase separate from a guilt phase in a capital trial was not constitutionally mandated. Id. at 217, 220.

33 The two cases consolidated with Furman were Jackson v. Georgia and Branch v. Texas.

34 408 U.S. at 239-40. See text at note 11 supra. Petitioner in Furman was convicted of murder and sentenced to death pursuant to GA. CODE ANN. § 26-1005 (Supp. 1971) (as in effect prior to July 1, 1969). Petitioner in Jackson was convicted of rape and sentenced to death pursuant to GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). Petitioner in Branch was convicted of rape and sentenced to death pursuant to TEX. PENAL CODE, Art. 1189 (1961). 408 U.S. at 239.

35 Id. at 239-40. The eighth amendment has been applied to the states through the fourteenth amendment, see note 11 supra.

36 The five Justices who concurred in the judgment of the Court were Justices Douglas, Brennan, Stewart, White, and Marshall. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed separate dissenting opinions.
Of the five Justices who concurred in the judgment, three indicated that it was the manner of imposing capital punishment under these discretionary statutes that created the constitutional defect. Justice Douglas, focusing on the disproportionate number of poor and minority group members sentenced to death, invoked an equal protection notion to find that the statutes in question violated the Eighth Amendment. In this context, Justice Douglas stated that such discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection that is implicit in the ban on 'cruel and unusual' punishments.

Similarly, Justice Stewart considered the arbitrary application of the death penalty offensive, for he found the petitioners "among a capriciously selected random handful upon which the sentence of death has in fact been imposed. . . . [and] that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Justice White also stressed that the "death penalty is exacted with great infrequency . . . and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Because of this infrequency of inflicting the death penalty, Justice White further concluded that capital punishment as administered under the statutes in Furman and the consolidated cases did not operate as a deterrent and, hence, did not serve the goals of the criminal justice system.

Only two of the Furman Justices characterized capital punishment as unconstitutional per se. Viewing the basic concept of the Eighth Amendment as that of human dignity, Justice Brennan found the

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37 Commentators have debated whether the statutes in Furman and the companion cases were held unconstitutional because of actually demonstrated "arbitrariness" in the imposition of the death sentence by the sentencing authority or because of the potential for arbitrary imposition of the death penalty built into a capital sentencing system which gives the sentencing authority unguided discretion in imposing the punishment of death. See, e.g., Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1692-99 (1974) [hereinafter cited as Harvard Note]; Comment, The Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options, 54 B.U. L. Rev. 158, 162-66 (1974) [hereinafter cited as B.U. Comment].
38 408 U.S. at 249-52, 250 n.15 (Douglas, J., concurring).
39 Id. at 256-57 (Douglas, J., concurring).
40 Id.
41 Id. at 309-10 (Stewart, J., concurring).
42 Id. at 313 (White, J., concurring).
43 Id. at 312-14 (White, J., concurring).
44 Id. at 270 (Brennan, J., concurring). Justice Brennan asserted that the Supreme Court had "repudiated" the purely "historical" view of the Eighth Amendment cruel and unusual punishments clause, that the only punishments prohibited by the clause were those considered torturous at the time of adoption of the Bill of Rights. Id. at 266. Instead, Justice Brennan emphasized that the meaning of the clause is not "static." Id. at 269. Drawing from another Eighth Amendment case, Trop v. Dulles, 356 U.S. 86
punishment of death incompatible with four principles underlying the cruel and unusual punishments ban:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.45

Justice Marshall viewed the death penalty as excessive and unnecessary since it serves no valid legislative goal which could not be achieved by lesser penalties. The penalty could not be defended on grounds of retribution, deterrence, prevention of recidivism, encouragement of guilty pleas, eugenics or reduction of governmental expenditures.46 Furthermore, Justice Marshall believed that capital punishment would be morally unacceptable to American citizens if they were well-informed on the use and effects of the death penalty.47

None of the four dissenting Justices, Chief Justice Burger, Justice Blackmun, Justice Powell, or Justice Rehnquist, accepted the view that capital punishment invariably violates the Constitution,48 or that the manner of imposing the capital sentences in Furman offended the Constitution.49 All four Justices expressed the opinion that the judiciary should not encroach upon the legislative power to set punishments for crimes.50 Three dissenters pointed out, with disapproval, that the result of the majority's holding was to invalidate the death penalty statutes enacted by 40 jurisdictions—39 states and the District of Columbia—and several provisions of the United States Code.51

(1958), in which 4 Justices had determined that loss of citizenship for the offense of desertion was a punishment banned by the cruel and unusual punishments clause, 356 U.S. at 87, 101-03, Justice Brennan arrived at his vision of the contours of the eighth amendment provision:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

408 U.S. at 270.
45 Id. at 305 (Brennan, J., concurring).
46 Id. at 342-359 (Marshall, J., concurring).
47 Id. at 360-64 (Marshall, J., concurring).
48 Id. at 375 (Burger, C.J., dissenting); id. at 407-08 (Blackmun, J., dissenting); id. at 433-34 (Powell, J., dissenting); see id. at 465 (Rehnquist, J., dissenting).
49 Id. at 375 (Burger, C.J., dissenting); see id. at 413-14 (Blackmun, J., dissenting); see id. at 414-16 (Powell, J., dissenting); see id. at 465-66 (Rehnquist, J., dissenting).
50 Id. at 404-05 (Burger, C.J., dissenting); id. at 410 (Blackmun, J., dissenting); id. at 465 (Powell, J., dissenting); id. at 465-68 (Rehnquist, J., dissenting).
51 Id. at 411 (Blackmun, J., dissenting); id. at 417-18 (Powell, J., dissenting). Justice Rehnquist stated that Furman would invalidate the death penalty enactments of at least forty states. Id. at 465 (Rehnquist, J., dissenting).
The discretionary sentencing provision of section 2 of chapter 265 of the General Laws was among those state statutes expressly placed in constitutional jeopardy by the Furman decision. For example, in Stewart v. Massachusetts, a per curiam opinion issued on the same day as the Furman decision, the Supreme Court vacated the judgment of the Supreme Judicial Court affirming the death sentence of appellant Stewart. Stewart had been convicted of murder in the first degree by a jury which failed to recommend that the sentence of death not be imposed under the discretionary sentencing provision of section 2 of chapter 265. The Supreme Court cited Furman as authority for its finding that the imposition of the death penalty in the Stewart case would be violative of the eighth and fourteenth amendments to the federal constitution.

While the Furman holding expressly passed on the constitutionality of certain discretionary death penalty statutes, it did not affect the constitutionality of mandatory death penalty statutes, a question that none of the three Justices who joined Justices Brennan and Marshall to form the majority in Furman passed on directly. However, in dicta, Justice Douglas questioned the constitutionality of such statutes stating:

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

See note 2 supra, for text of G.L. c. 265 § 2. The first sentence of section 2 constitutes the discretionary sentencing provision.

Immediately following the Furman decision, the Supreme Court vacated the death sentences of defendants imposed under the statutes of twenty-six states. See Harvard Note, supra note 37, at 1690.

408 U.S. 845 (1972).

Id.


408 U.S. at 845. While the Court did not explicitly state it, presumably, the Supreme Court in citing Furman, was indicating that the Massachusetts discretionary capital sentencing provision suffered from similar constitutional inadequacies as did the statutes invalidated in Furman.

Chief Justice Burger, in his dissenting opinion in Furman, forecast that state legislatures might react to the Court's decision by enacting mandatory death penalty statutes. 408 U.S. at 400-01 (Burger, C.J., dissenting). See Harvard Note, supra note 37, at 1699-1712, which describes the different kinds of statutory schemes embodying capital sentencing enacted by twenty-eight states after Furman. Fourteen states were reported as having adopted mandatory death penalty statutes following the Furman decision. Id. at 1710.

408 U.S. at 257 (Douglas, J., concurring) (citation omitted).
Justice Stewart, in noting that a few legislatures had enacted mandatory death penalty statutes for narrowly defined categories of crime, specified the Massachusetts law requiring the death sentence for anyone convicted of rape-murder as an example. However, he left no doubt that had such a statute been under consideration, the Court would have been confronted with a different issue—the constitutionality of the death penalty "for all crimes and under all circumstances." Justice White also agreed that the "facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us." Furman and Stewart, therefore, had the effect of nullifying the discretionary sentencing provision of section 2 of chapter 265 of the General Laws, but left untouched the mandatory sentencing provision for rape-murder.

Responding to the commands of Furman and Stewart, the Supreme Judicial Court overturned the death sentence as prohibited by the eighth and fourteenth amendments in cases where the sentence had been imposed under the discretionary jury provision of section 2 of chapter 265. In Commonwealth v. LeBlanc, the defendant had been convicted of murder in the first degree and sentenced to death before the Supreme Court's decision in Furman. On appeal after Furman, the Supreme Judicial Court determined that: "In the light of the Furman case the Commonwealth agrees that the defendant's present sentence, which has been stayed, may not remain. The defendant is entitled to be resentenced to life imprisonment." In the more recent case of Commonwealth v. Harrington, the Supreme Judicial Court confirmed that a death sentence could not be imposed pursuant to section 2 of chapter 265 for a first degree murder committed after the Furman decision. However, the Court exempted from its holding sentencing under the provision requiring the death penalty for murder committed in connection with rape.

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60 Id. at 307 (Stewart, J., concurring).
61 Id. at 311 (White, J., concurring).
62 Two commentaries that discuss the interpretation of Furman v. Georgia by the Supreme Judicial Court are B.U. COMMENT, supra note 37; Note, The Death Penalty in Massachusetts, 8 SUFF. L. REV. 632, 647-52 (1974).
64 Id. at 1104-05, 299 N.E.2d at 726-27.
66 Id. at 461-62, 323 N.E.2d at 901. In Harrington, the Commonwealth had argued and the trial judge ruled that Furman nullified the jury discretionary sentencing provision so that a mandatory death penalty remained. Id. at 459, 323 N.E.2d at 900. The Supreme Judicial Court rejected this construction of the statute, and consequently, found no need to consider the constitutional questions raised with respect to a mandatory death penalty. Id. at 459-62, 323 N.E.2d at 900-01.
67 Id. at 462, 323 N.E.2d at 901. The Court indicated that the question of sentencing for the crime of rape-murder had not been presented in the Harrington case. Id.
§13.5 CONSTITUTIONAL LAW

Commonwealth v. A Juvenile\(^{68}\) gave the Supreme Judicial Court an initial opportunity to consider the constitutionality of the mandatory death penalty for rape-murder in light of Furman. In Juvenile, the defendant, who was under 17 at the time of commission of the crime and under 18 at the time of sentencing, was convicted on separate indictments of murder and rape.\(^{69}\) The mandatory sentence of death was imposed by the trial court under section 2 of chapter 265 for the murder conviction and a sentence of life imprisonment was imposed by the jury for the rape conviction.\(^{70}\) The Supreme Judicial Court affirmed the sentence of life imprisonment for rape, but reduced the death sentence to life imprisonment,\(^{71}\) reasoning that the trial judge had been given sentencing discretion, which discretion was forbidden by the federal constitution under Furman. Because of the defendant's age, the trial judge theoretically had the option of adjudicating the defendant's case under statutes providing for special procedures in juvenile cases,\(^{72}\) rather than sentencing him under the mandatory death penalty statute.\(^{73}\) In Juvenile, the Court explicitly reserved for a later case the question of the constitutionality of the mandatory death penalty for rape-murder when imposed on an adult.\(^{74}\) This question was squarely presented in Commonwealth v. O'Neal.


O'Neal II showed a sharply divided Supreme Judicial Court able to muster a majority only for the proposition that the mandatory death penalty imposed on a defendant convicted of rape-murder in accordance with section 2 of chapter 265 of the General Laws violated the

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\(^{70}\) Id. at 1199, 300 N.E.2d at 439-40. The text of G.L. c. 265, § 2 is set out at note 2 supra.

\(^{71}\) Id. at 1204-05, 300 N.E.2d at 442.

\(^{72}\) Under G.L. c. 119, § 83, the superior court was given the discretion to adjudicate a convicted person, under the age of eighteen at the time of sentencing, as a delinquent child according to G.L. c. 119, § 58, which permits the court upon adjudging the child a delinquent to place the case on file, or place the delinquent child in a probation officer's care or in the custody of the youth services department.


In basing its decision solely on state constitutional grounds, the majority in O'Neal II was free to fashion independent state standards for determining the constitutionality of the mandatory death penalty for rape-murder. Although four justices arrived at the same conclusion, that the mandatory capital sentencing provision was constitutionally infirm, the Justices were unable to agree on the constitutional standard to be utilized for determining whether the mandatory death penalty statute was unconstitutionally cruel or unusual.

Chief Justice Tauro, in an opinion with which Justice Hennessey agreed in both result and reasoning, viewed the question of the constitutionality of the mandatory death penalty statute for rape-murder as involving considerations under the due process guarantees, as well as under the cruel or unusual punishments prohibition, of the Massachusetts Declaration of Rights. In this context, the Chief Justice reasoned that the two constitutional provisions aligned to the point of merging and that a compelling state interest standard should therefore be employed. Quoting in part from Justice Marshall's opinion in Furman, Chief Justice Tauro explained:

This dual analysis is possible here where these two concepts are "so close as to merge" because the "due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause ...—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State."

Under the due process prong of the Chief Justice's analysis, he stated that:

In order to be sustained against a due process challenge, a statute affecting fundamental rights must be shown to serve a compelling governmental interest... "[A] heavy burden of justification is on the State ...." Additionally, it must be shown that the

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75 Only two Justices, not a majority, found that the mandatory death penalty statute violated the due process guarantees of the state constitution. See text and notes at notes 81-83 and 95 infra.

76 Chief Justice Tauro underscored that the Supreme Judicial Court's interpretation of the state constitution in O'Neal II would be final and could not be contested in the federal court system. 1975 Mass. Adv. Sh. at 3535, 339 N.E.2d at 690. The Chief Justice cited the Supreme Court case of Minnesota v. National Tea Co., 309 U.S. 551, 552-55, 558-59 (1940), in which Justice Douglas discussed the principle of federalism, that state courts should not be interfered with in determining the meaning of their respective state constitutions. Id. at 557.

77 See text and note at note 24 supra.

78 See note 13 supra.


80 Id. at 3504-05, 339 N.E.2d at 677, quoting Furman v. Georgia, 408 U.S. at 359-60 n.141 (Marshall, J., concurring).
The statutory scheme is the least onerous means of reaching the compelling goal.\textsuperscript{81}

The Chief Justice grounded his due process analysis in the belief that life is a fundamental right.\textsuperscript{82} Since the imposition of the mandatory death penalty for rape-murder would entail the extinction of that fundamental right, the Chief Justice found that strict judicial scrutiny was appropriate for reviewing the constitutionality of the sentence of death as required by section 2 of chapter 265.\textsuperscript{83} Accordingly, the inquiry under the compelling state interest and least restrictive means tests was whether the penal goals of the mandatory death penalty, which penalty infringes the fundamental right to life, could be achieved as effectively by the lesser punishment of life imprisonment.

Under the cruel or unusual punishments prong of his analysis,\textsuperscript{84} Chief Justice Tauro announced that the standard was likewise that of compelling state interest:

In order to uphold the constitutionality of punishment which inflicts such suffering and absolutely extinguishes all rights, the State must advance a substantial justification to demonstrate that the penalty of death is not disproportionate or unnecessary and is not, thus, cruel in a constitutional sense. I believe that the required showing is that of compelling State interest.\textsuperscript{85}

The stringent standard of compelling state interest was appropriate to review the mandatory death penalty because, as Chief Justice Tauro reasoned, death is a qualitatively different kind of punishment from punishments involving monetary penalties and incarceration. The death penalty entails an immeasurable degree of physical pain and extreme mental suffering as well as the extinguishment of all human rights of the capital offender.\textsuperscript{86} Thus, where the punishment is a restraint on liberty or a fine, the Chief Justice stated, the sentenced defendant bears the heavy burden of showing that the punishment is disproportionate to his crime.\textsuperscript{87} However, the burden of sustaining a

\textsuperscript{82} 1975 Mass. Adv. Sh. at 3506, 339 N.E.2d at 678.
\textsuperscript{83} Id.
\textsuperscript{84} Chief Justice Tauro made it clear that the majority in \textit{O'Neal II} did not base its decision on the use of the disjunctive article "or" in the cruel or unusual punishments clause of article 26. See note 13 \textit{supra}. The Chief Justice noted that the Supreme Judicial Court had in the past employed the disjunctive phrase, cruel or unusual punishments, interchangeably with the conjunctive phrase, cruel and unusual punishments, used in the eighth amendment. He also did not distinguish the word "cruel" in meaning from the word "unusual" for purposes of his constitutional argument. \textit{Id.} at 3508 n.4, 339 N.E.2d at 679 n.4.
\textsuperscript{85} \textit{Id.} at 3511-12, 339 N.E.2d at 681 (citations omitted).
\textsuperscript{86} \textit{Id.} at 3510-11, 339 N.E.2d at 680.
\textsuperscript{87} \textit{Id.} at 3510, 339 N.E.2d at 680.
legislative judgment to enact a mandatory death penalty statute rests with the state.\(^{88}\)

Having found compelling state interest to be the appropriate standard under both a due process and "cruel or unusual" analysis, the Chief Justice proceeded to determine that the Commonwealth had not advanced adequate justification for retention of the mandatory death penalty for rape-murder.\(^{89}\) In making this determination, the Chief Justice found that the punishment of life imprisonment was a less restrictive means of serving the state's interests. First, the evidence that capital punishment, either discretionary or mandatory, serves as a more effective deterrent than life imprisonment was found by the Chief Justice to be "equivocal."\(^{90}\) Secondly, the sentence of life imprisonment adequately isolates and incapacitates the capital offender so that the death penalty is not necessary to serve the penal purpose of isolation/incapacitation.\(^{91}\) Finally, retribution and moral reinforcement do not require a capital sanction and, in Chief Justice Tauro's

\(^{88}\) Id. at 3511-12, 339 N.E.2d at 681.

\(^{89}\) Id. at 3529-30, 339 N.E.2d at 687-88. The Chief Justice stated: "The Commonwealth has not met its heavy burden of demonstrating that, in pursuing its legitimate objectives, it has chosen means which do not unnecessarily impinge on the fundamental right to life." Id.

\(^{90}\) Id. at 3522-23, 339 N.E.2d at 685. Canvassing the vast array of studies and reports on the deterrent effect of capital punishment, the Chief Justice found that legislative commissions, including the special commission established by the Massachusetts Legislature in 1967 to study the effectiveness of the death penalty as a deterrent to crime, and criminologists and experts generally had concluded that the death penalty was not an effective deterrent. Id. at 3514-18, 339 N.E.2d at 682-83. Chief Justice Tauro noted that most of the information available on the deterrent effect of capital punishment related to the discretionary rather than the mandatory use of the death penalty. Id. at 3518, 339 N.E.2d at 683. However, the Chief Justice cited one recent study concluding that there is no indication that mandatory capital punishment is a superior deterrent of homicidal offenses than is the discretionary death penalty. Id. Chief Justice Tauro found no empirical support for the contention that police officers are safer in jurisdictions that retain capital punishment. Id. at 3520, 339 N.E.2d at 684. The one report, the "Erhlich" study, Erhlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 AM. ECON. REV. 397 (1975), noted by the Chief Justice as supporting the proposition that capital punishment has a deterrent effect, has been criticized for its methodology and results. 1975 Mass. Adv. Sh. at 3521 & n.15, 339 N.E.2d at 684 & n.15. See note 285 infra for a listing of recent articles discussing Erhlich's work concerning capital punishment as a deterrent. Chief Justice Tauro also rejected the subjective statements of offenders who had been apprehended as a reliable basis for finding the death penalty an effective deterrent. Id. at 3521-22, 339 N.E.2d at 684-85.

\(^{91}\) Id. at 3523-26, 339 N.E.2d at 685-86. Chief Justice Tauro emphasized that effective management of pardon and parole systems as well as custody and incarceration in prison can operate to protect society from murderers and, in particular, rape-murderers. He mentioned that special measures may be taken in respect to rape-murderers who may be more uncontrollable and thus more dangerous to society. Id. at 3523-25, 339 N.E.2d at 685-86. He added that incapacitating rather than executing the murderer keeps the offender available should his conviction be reversed. Id. at 3526 n.18, 339 N.E.2d at 686 n.18.
view, could not solely justify imposing the death penalty.\footnote{Id. at 3526-29, 339 N.E.2d at 686-87. The Commonwealth argued that its legitimate interest in preserving the "social compact" required that a punishment be proportionate to the offense. But Chief Justice Tauro, although conceding that the most grave crimes must be punished most seriously, declined to accept moral reprobation as a reason for a punishment as severe as that of death. Id. at 3526-27, 339 N.E.2d at 686-87. Quoting directly from Williams v. New York, 337 U.S. 241 (1949), that retribution "is no longer the dominant objective of the criminal law," \textit{id.} at 248, Chief Justice Tauro specifically declared that retribution "cannot act as the sole justification for a particular penalty." 1975 Mass. Adv. Sh. at 3528, 339 N.E.2d at 687. The contention that capital punishment prevents vigilantism among the citizenry was also rejected by the Chief Justice because of lack of evidence that the punishment of imprisonment rather than death encourages acts of private vengence. \textit{id.} at 3528-29, 339 N.E.2d at 687.}

The Chief Justice took care to restrict his finding of unconstitutionality to the statute at hand, which statute mandated the death sentence for rape-murder. In a footnote, he indicated that "he would not intend to foreclose the Commonwealth from enacting any statute authorizing the death penalty."\footnote{Id. at 3530 n.23, 339 N.E.2d at 688 n.23.} He also declared, however, that a future legislative enactment embodying a death penalty would be measured by the compelling state interest and least restrictive means tests.\footnote{Id.}

In a brief separate concurring opinion, Justice Hennessey registered his agreement with Chief Justice Tauro that the mandatory death penalty for rape-murder violated both the due process and cruel or unusual punishment provisions of the state constitution under the compelling state interest test.\footnote{Id. at 3545, 339 N.E.2d at 693.} Justice Hennessey seemed to suggest that, because the punishment of death had not been inflicted in Massachusetts in more than 25 years, it was unlikely that the state constitution would currently permit resumption of executions, at least as punishment for the crime of rape-murder.\footnote{Justice Hennessey noted that no one had been executed in the Commonwealth between 1947 and 1972 when \textit{Furman} was decided, and that the death sentences of 25 persons had been either reduced by the executive or commuted during the terms of seven different Governors. \textit{id.} at 3546, 339 N.E.2d at 694.} Significantly, Justice Hennessey concluded that a death penalty for some categories of murder, such as murder in connection with kidnapping or acts of terrorism, might pass the test of compelling state interest and thus be constitutional.\footnote{Id. at 3546-47, 339 N.E.2d at 694.}

The other two majority justices, Justices Wilkins and Kaplan, unlike Chief Justice Tauro and Justice Hennessey, regarded the article 26 ban on cruel or unusual punishments as the only appropriate provision of the Massachusetts Declaration of Rights for determining the constitutionality of the mandatory death penalty for rape-murder.\footnote{Id. at 3548, 339 N.E.2d at 694 (Wilkins, J., concurring in the result); \textit{id.} at 3552, 339 N.E.2d at 696 (Kaplan, J., concurring in the result).}
In an opinion with which Justice Kaplan agreed in both substance and result, Justice Wilkins introduced a substantial public purpose standard for evaluating the death penalty under article 26. According to Justice Wilkins' analysis, the sentence of death must be shown by the state to serve a substantial public purpose that cannot be achieved by a sentence of life imprisonment. Justice Wilkins' substantial public purpose standard may arguably not have required the same degree of showing by the Commonwealth if use of the term "substantial" is regarded as calling for a lesser showing than does the term "compelling." Justice Wilkins, however, did not indicate that his standard was either different in content or less stringent than that of Chief Justice Tauro, and Justice Wilkins' test, like the test enunciated by the Chief Justice, put the onus on the state to demonstrate a need for imposing the sentence of death.

Drawing on the opinion of Chief Justice Tauro, Justice Wilkins found that deterrence would be the likely basis for sustaining the death penalty if it could be sustained at all. Murder in the course of kidnapping or holding a hostage or murder by anyone already convicted of murder and sentenced to life imprisonment were proposed by Justice Wilkins as examples of crimes for which the threat of death might achieve the purpose of deterrence. According to Justice Wilkins, however, the Commonwealth had not demonstrated that the potential perpetrator of rape-murder could be effectively deterred by a threat of the death sentence and, therefore, had not shown that the mandatory death penalty for rape-murder fulfilled any substantial public purpose. In a footnote, Justice Wilkins reiterated Chief Justice Tauro's belief that retribution alone could not justify the imposition of the death penalty in the instant case.

Neither Chief Justice Tauro nor Justice Wilkins pointed to any direct sources in Massachusetts case law interpreting the article 26 ban on cruel or unusual punishments for their respective compelling state interest and substantial public purpose tests. Both justices indicated that they took an expansive view of article 26.

99 Id. at 3548-49, 339 N.E.2d at 694-95 (Wilkins, J., concurring in the result).
100 Id. at 3549, 339 N.E.2d at 695 (Wilkins, J., concurring in the result). Justice Kaplan went beyond Justice Wilkins' opinion in two respects. Justice Kaplan believed that if a death penalty statute for a particular homicidal offense could be shown to be a more effective deterrent than life imprisonment, the statute would still be subject to other constitutional inquiries: (1) whether it is imposed in a discriminatory fashion, and (2) "whether, judged by evolved standards, the penalty itself is not so brutal and brutalizing as to be proscript." Id. at 3552-53, 339 N.E.2d at 696 (Kaplan, J., concurring in the result).

101 Id. at 3550, 339 N.E.2d at 695 (Wilkins, J., concurring in the result).
102 Id.
103 Id. at 3549 n.2, 339 N.E.2d at 695 n.2.
104 Both Chief Justice Tauro and Justice Wilkins cited the same United States Supreme Court cases interpreting the eighth amendment to support their expansive reading of article 26. Id. at 3512 n.10, 339 N.E.2d at 681 n.10 (Tauro, C.J., concurring); id.
Chief Justice explained that the Supreme Judicial Court had assumed in the 1901 case of *Storti v. Commonwealth*\(^{105}\) that the death penalty was constitutional under article 26.\(^{106}\) In *Storti*, Chief Justice Holmes found that the punishment of death by means of electrocution imposed on a defendant convicted of murder was not cruel or unusual within the meaning of article 26.\(^{107}\) Chief Justice Tauro announced, however, that the Court was not bound by the decision in *Storti* "because art. 26, like the Eighth Amendment to the United States Constitution, must be interpreted progressively."\(^{108}\) Justice Wilkins expressed a similar notion when he stated that "[t]he application of constitutional principles is not immutable, and criminal penalties thought appropriate in 1780 are no longer accepted in our society."\(^{109}\) Using new standards for judging the constitutionality of the mandatory death penalty statute under the Massachusetts Declaration of Rights was, thus, justified by the majority justices as required by changing societal values.

In his dissenting opinion in *O'Neal II*, Justice Reardon, who was joined by Justice Quirico,\(^{110}\) rejected both Chief Justice Tauro's due process analysis and the *O'Neal II* majority's standards under the state cruel or unusual punishments clause. He believed that traditional fed-

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\(^{105}\) 178 Mass. 549, 60 N.E. 210 (1901).


\(^{107}\) 178 Mass. at 552-55, 60 N.E. at 210.


\(^{109}\) Id. at 3551, 339 N.E.2d at 696 (Wilkins, J., concurring in the result).

\(^{110}\) Justice Braucher failed to reach the constitutional questions but concurred in the result on the basis of statutory construction. He found a "clear statutory direction that rape-murder cases be treated like other cases in which no jury recommendation is made;" *id.* at 3557, 339 N.E.2d at 697, for which after *Furman* the only permissible punishment was life imprisonment. *Id.* at 3554-59, 339 N.E.2d at 697. Justice Braucher indicated that he was in agreement with Justice Reardon on the constitutional questions. *Id.* at 3554, 339 N.E.2d at 696.
eral eighth amendment standards should govern a determination of the constitutionality of the mandatory death penalty for rape-murder.\textsuperscript{111}

Justice Reardon rejected the due process approach as constitutionally incorrect.\textsuperscript{112} The due process analysis of Chief Justice Tauro, Justice Reardon pointed out, was designed to demonstrate that the mandatory death penalty for rape-murder could not withstand a constitutional attack under the due process clause of the fourteenth amendment to the United States Constitution.\textsuperscript{113} But, according to Justice Reardon, the due process clause limits a state's power to prescribe punishments only because it is through that clause that the eighth amendment prohibition of cruel and unusual punishments is applied to the states.\textsuperscript{114} Thus, Justice Reardon determined that the due process clause does not, as the Chief Justice believed, embody a "second, independent substantive limitation on punishments," in addition to the cruel and unusual punishments prohibition.\textsuperscript{115}

Justice Reardon also found Chief Justice Tauro's "fundamental rights" analysis under the state due process provision inappropriate. Justice Reardon noted that, although Chief Justice Tauro spoke of the right to life as fundamental, the Chief Justice had not cited any cases to demonstrate that the Supreme Court had treated the right to life as a fundamental right for purposes of triggering the compelling state interest or least restrictive means tests.\textsuperscript{116} Therefore, Justice Reardon thought strict judicial scrutiny of the mandatory death penalty was improper.\textsuperscript{117} By engaging in strict scrutiny of the mandatory death penalty statute, Justice Reardon contended, the Court was invading the province of the Legislature. In this context, Justice Reardon reasoned that the Legislature was the appropriate body "to make an empirical judgment about the efficacy of the death penalty as compared to life sentences in serving the various goals of the criminal law."\textsuperscript{118}

\textsuperscript{111} Id. at 3578-79, 339 N.E.2d at 705 (Reardon, J., dissenting).
\textsuperscript{112} Id. at 3566, 339 N.E.2d at 700.
\textsuperscript{113} Id. at 3565, 339 N.E.2d at 700.
\textsuperscript{114} Id. at 3566-67, 339 N.E.2d at 700-01.
\textsuperscript{115} Id. at 3567, 339 N.E.2d at 701.
\textsuperscript{116} Id. at 3570-71, 339 N.E.2d at 702. The cases cited by Chief Justice Tauro in \textit{O'Neal I} to support his view that the right to life is fundamental were Johnson v. Zerbst, 304 U.S. 458, 462 (1938) and \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 370 (1886).
\textsuperscript{118} Id. at 3573-74, 339 N.E.2d at 703. Apparently, Justice Reardon thought the Court should steer clear of making the kind of factual determinations involved in selecting an appropriate punishment to fulfill the various penological goals. These determinations and the fixing of appropriate punishments were best accomplished through study and debate of the Legislature. \textit{Id.} at 3573, 339 N.E.2d at 703. Justice Quirico echoed the view that fixing the punishment of death for the crime of rape-murder was a "matter of legislative judgment and policy," in his dissenting opinion in the case of \textit{Commonwealth v. Tarver}, 1975 Mass. Adv. Sh. 3591, 3619, 345 N.E.2d 671, 682-83, another rape-murder case decided on the same day as \textit{O'Neal II}, wherein the Supreme Judicial Court vacated the defendant's death sentence on the authority of \textit{O'Neal II}. \textit{Id.} at 3614, 345 N.E.2d at 681.
Justice Reardon also disagreed with the majority view that the state cruel or unusual punishments provision encompassed more restrictive standards for evaluating the death penalty than its federal eighth amendment counterpart. Justice Reardon saw the eighth amendment as setting the boundary for permissible punishments. Reviewing the Massachusetts cases decided under article 26, Justice Reardon maintained that "there is nothing in our case law which suggests that art. 26 imposes a more rigorous limitation on punishments than the Eighth Amendment. Indeed, if anything, art. 26 imposes less restriction on possible punishments."

Having decided that the eighth amendment was the appropriate constitutional provision for evaluating the Commonwealth's death penalty statute and that article 26 did not require a more restrictive analysis, Justice Reardon stated that eighth amendment case law did not outlaw a mandatory death penalty as a cruel and unusual punishment for a number of reasons. First, Justice Reardon read Furman as not forbidding a mandatory death penalty statute for the crime of murder primarily because three of the five Justices who formed the Furman majority refused to consider whether a statute mandating capital punishment would offend the eighth amendment. Secondly, Justice Reardon looked to the historical background of the eighth amendment and concluded that the amendment was designed to eliminate tortures, not capital punishment, and to preclude the imposition of punishments not authorized by statutory law. In this context, Justice Reardon noted that capital punishment was commonly imposed at the time of the framing of the Constitution. In addition, Justice Reardon stated that the eighth amendment had been interpreted to prohibit a punishment that is disproportionate to the offense. Although he denied approving of a "life-for-a-life" morality, Justice Reardon regarded the penalty of death as not grossly out of proportion to the crime of murder for which it was imposed. Justice Reardon also pointed out that, although the eighth amendment has been construed as prohibiting punishments that involve the infliction of excessive or unnecessary pain, he did not view the death penalty for rape-murder as unnecessarily cruel merely because a sentence of life imprisonment could

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121 Id. at 3580-81, 339 N.E.2d at 705-06. See text and notes at notes 58-61 supra.
122 Id. at 3584-85, 339 N.E.2d at 706-07. (Reardon, J., dissenting).
123 Id. at 3586, 339 N.E.2d at 707.
124 Id. at 3585, 339 N.E.2d at 707.
125 Id. at 3587, 339 N.E.2d at 707-08.
fulfill the same penal purposes. To so conclude, Justice Reardon contended, would overlook retribution as a permissible goal of punishment and, further, would constitute a rejection of the possibility that the threat of death is a more effective deterrent than life imprisonment. 126 Lastly, Justice Reardon focused on the eighth amendment concern that a punishment comport with "contemporary standards of decency." 127 The divided public opinion on the issue of the retention of the death penalty demonstrated to Justice Reardon that capital punishment was not repugnant to current concepts of decency. 128 Stressing that the Court should not perform legislative functions, Justice Reardon concluded that the mandatory death penalty for rape-murder was not banned by either the eighth amendment or article 26. 129

Both the compelling state interest and substantial public purpose standards set forth by the O'Neal II majority are empirical in nature for they both call for an evidentiary showing in the form of penological or sociological information, or at least factual or legislative findings, to support the use of the death penalty for a specific homicidal offense. 130 Significantly, both standards require a demonstration that there is a relationship between the nature of the punishment and the purposes of imposing that punishment. In this respect, the O'Neal II standards signal a departure from traditional article 26 and eighth amendment standards for appraising the constitutionality of punishments. O'Neal II clearly represents a departure from the traditional state constitutional standards used to determine whether a punishment is cruel or unusual. In Storti v. Commonwealth, 131 a 1901 decision unquestioned until O'Neal I and II, the Supreme Judicial Court assumed that the death penalty for the crime of murder did not offend the cruel or unusual punishments prohibition of article 26. 132 Moreover, the compelling state interest and substantial public purpose tests were not recognized as the appropriate standards for judging punishments under the cruel or unusual punishments clause of article 26, as evidenced by rulings of the Supreme Judicial Court for over three quar-

126 Id. at 3587-88, 339 N.E.2d at 708.
127 Id. at 3588-89, 339 N.E.2d at 708.
128 Id. at 3589, 339 N.E.2d at 708. Justice Reardon took judicial notice of the response of the Massachusetts voters to a question which appeared on the ballot in the 1968 general election, "Shall the commonwealth of Massachusetts retain the death penalty for crime?" Out of 2,348,005 ballots cast, 1,159,348 voted "Yes," 730,649 voted "No," and the remaining 458,008 were left blank. Id. at 3589 & n.1, 339 N.E.2d at 708 & n.1 (Reardon, J., dissenting).
129 Id. at 3589-90, 339 N.E.2d at 708.
130 See id. at 3513-30, 339 N.E.2d at 681-88 (Tauro, C.J., concurring); id. at 3549-50, 339 N.E.2d at 695 (Wilkins, J., concurring in the result).
132 Id. at 553-54, 60 N.E. at 210-11. See text at notes 105-08 supra.
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sters of a century. For example, in both the 1899 case of *McDonald v. Commonwealth*[^133] and the 1973 case of *Commonwealth v. Morrow*,[^134] the Supreme Judicial Court evaluated the cruelty or unusualness of a punishment by considering whether the punishment was disproportionate to the offense.[^135]

The compelling state interest and substantial public purpose tests also differ from those standards traditionally referred to in United States Supreme Court cases decided under the eighth amendment prior to the *Furman* decision.[^136] The pre-*Furman* standards included: a tortures standard—that the punishment must not be in the nature of a torture, or inhuman or barbarous;[^137] a proportionality test—that the punishment be graduated or proportionate to the offense;[^138] a necessity or excessiveness test—that the punishment not entail unnecessary pain[^139] or be excessive;[^140] and a human dignity standard—that the punishment meet civilized standards, and thereby not be degrading to human dignity.[^141] Furthermore, prior to *Furman*, capital punishment was assumed to be compatible with the federal constitution.[^142] In *Louisiana ex rel. Francis v. Resweber*,[^143] the Supreme Court permitted a second attempt at electrocution of the petitioner, after the first attempt failed to be consummated due to a mechanical failure. Justice Reed, in announcing the judgment of the Court, stated that the cruelty prohibited by the eighth amendment was that "inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[^144] In *Furman*,[^145] when

[^142]: See text and notes at notes 31-32 supra.
[^144]: *Id.* at 464. A more recent expression of the view that the death penalty is constitutional *per se* was made by Chief Justice Warren, who announced the judgment of the Court, in *Trop v. Dulles*, 356 U.S. 86 (1958), a nondeath case. The Chief Justice stated: Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.
[^145]: 408 U.S. 238 (1972).
the question of the constitutionality of death penalty statutes was posed under the eighth amendment, the opinions of the majority Justices were so divergent that no uniform standard to judge the constitutionality of a death penalty statute emerged.146

Despite O'Neal II's break with the traditional eighth amendment standards expressed in pre-Furman cases, there appears to be some basis in Furman for the O'Neal II majority standards. In their separate opinions in Furman, both Justices Brennan and Marshall expressed the principle that the death penalty is only constitutionally permissible if it serves a penal purpose or a valid legislative goal more effectively than a lesser punishment.147 Similarly, Chief Justice Tauro, in his compelling state interest test, and Justice Wilkins, in his substantial public purpose test, required a showing that there was a need for imposing the death penalty rather than a lesser punishment.148 However, the extent of the showing called for under the O'Neal II standards appears to be greater than that required by Justices Brennan and Marshall, since Chief Justice Tauro required the governmental interest demonstrated to be a compelling one and Justice Wilkins called for a showing of a substantial public purpose.149

146 See text at notes 33-36 supra. It has been observed that no single standard was used by more than three of the five Justices who formed the Furman majority. See Wheeler, Toward a Theory of Limited Punishment II: The Eighth Amendment after Furman v. Georgia, 25 STAN. L. REV. 62, 62, 80 (1972). The author pointed out that Justices Brennan, Stewart and Douglas used an eighth amendment standard based on the notion of arbitrariness. Id. at 80. See text at notes 37-47 supra.

147 408 U.S. at 279-80 (Brennan, J., concurring) ("that the punishment serves no penal purpose more effectively than a less severe punishment"). Justice Brennan cited Weems v. United States, 217 U.S. 349 (1910), as the source of this principle. 408 U.S. at 342 (Marshall, J., concurring) ("In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment."). Justice White voiced a related notion that a penalty that serves no social or public purposes would come within the cruel and unusual punishments prohibition of the eighth amendment. Id. at 312.

148 See text at notes 89-90 and 99-100 supra.

149 A further reason for viewing Furman as a springboard for the O'Neal II decision is the fact that the two-pronged analysis used by Chief Justice Tauro in O'Neal II was suggested by Justice Marshall in a footnote in Furman v. Georgia. 408 U.S. at 359-60 n.141. Specifically, Justice Marshall proposed that the state must have a compelling state interest to justify the use of capital punishment because the death penalty extinguishes the individual's fundamental right to life. Id. In the cruel and unusual punishments context, the operative principle is that a punishment may only be as severe as necessary to fulfill valid state interests. Id. A number of commentators have proposed that the stricter standard of review of the compelling state interest test be used by courts when evaluating the constitutionality of death penalty statutes under the cruel and unusual punishments provision. See Note, The Death Penalty Cases, 56 CALIF. L. REV. 1268, 1353-54 (1968); Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1784-85, 1794-98 (1970). See also The Supreme Court Term, 86 HARV. L. REV. 52, 76-85 (1972) in which the author suggested that a strict scrutiny standard may be appropriate for reviewing legislative enactments of the death penalty. Employing this
In addition to requiring a greater showing of a governmental interest or public purpose in imposing the death penalty, the O'Neal II majority also broke with constitutional precedent by abandoning the notion of the presumptive validity of legislative enactments in the area of criminal punishments.\textsuperscript{150} Chief Justice Tauro saw capital punishment as involving a great degree of suffering as well as the loss of all rights of the individual so that the state must justify the imposition of such a punishment.\textsuperscript{151} Justice Wilkins regarded the death penalty as so "brutalizing" that the state must show a need to impose it.\textsuperscript{152} In O'Neal II, the Commonwealth was therefore saddled with the burden of proving the validity of the mandatory death penalty statute.\textsuperscript{153} In order to meet this burden the Commonwealth was required to show that the mandatory sentence of death for the offense of rape-murder would better serve the penal goals of deterrence, isolation/incapacitation, and retribution/moral reinforcement,\textsuperscript{154} or some other substantial public purpose than a sentence of life imprisonment.\textsuperscript{155}

O'Neal II also represents a departure from constitutional tradition insofar as due process guarantees are used to appraise the constitutionality of the mandatory death penalty for rape-murder. The due process analysis, introduced by the Chief Justice in O'Neal II, stands or falls on the accuracy of his proposition that life is a fundamental right for the purposes of triggering strict scrutiny of a statute. In O'Neal I, Chief Justice Tauro cited two United States Supreme Court cases to lend support to this proposition.\textsuperscript{156} In Yick Wo v. Hopkins,\textsuperscript{157} the Supreme Court decided that San Francisco ordinances according the Board of Supervisors the power to grant or deny licenses to carry on


\textsuperscript{152} Id. at 3549, 339 N.E.2d at 695 (Wilkins, J., concurring in the result).

\textsuperscript{153} See text and notes at notes 88, 100 supra.

\textsuperscript{154} See text and notes at notes 89-92 supra.

\textsuperscript{155} See text and note at note 99 supra.

\textsuperscript{156} 1975 Mass. Adv. Sh. at 1099, 327 N.E.2d at 668.

\textsuperscript{157} 118 U.S. 356 (1886).
the business of a laundry were administered in a discriminatory fashion so as to deny the petitioners, who were of Chinese national origin, equal protection of the laws under the fourteenth amendment. In dicta, the Court referred to the fundamental "rights to life, liberty and the pursuit of happiness," but did not suggest that life is a fundamental right for purposes of strict scrutiny of the ordinances. In Johnson v. Zerbst, the Court remanded the petitioner's cause for a writ of habeas corpus to a federal district court to determine whether he had waived his right to assistance of counsel. In the course of discussing the sixth amendment right to assistance of counsel, the Court stated that such a safeguard was "deemed necessary to insure fundamental human rights of life and liberty." However, in neither of these cases did the Court speak of a constitutionally guaranteed fundamental right to life which would invoke strict scrutiny of a statute affecting that right. Thus, it would appear that the Chief Justice was incorrect in offering Yick Wo and Johnson as support for the proposition that life is a fundamental right so as to require strict scrutiny of a death penalty statute.

Other Supreme Court cases, in which a fundamental rights analysis has been used, however, do lay a foundation for Chief Justice Tauro's proposition. For example, in Skinner v. Oklahoma ex rel. Williamson, the Supreme Court struck down an Oklahoma statute that provided for sterilization of habitual criminals, defined as those persons convicted at least twice of a felony involving moral turpitude, but which exempted certain criminals such as embezzlers. The Court held that the statute violated the equal protection clause because it drew an "artificial line" for the purposes of punishment between those who had "committed intrinsically the same quality of offense." More significantly, the Court noted that it would apply strict scrutiny to the statute because it involved procreation, a basic right of man and one "fundamental to the very existence and survival of the race," and because it called for a permanent deprivation of that right. Arguably

158 Id. at 356-57, 374.
159 Id. at 370.
160 304 U.S. 458 (1938).
161 Id. at 469.
162 Id. at 462.
163 In O'Neal II Justice Reardon pointed out that Chief Justice Tauro had not supplied any case law to substantiate his proposition that life is a fundamental right which triggers the strict scrutiny of legislation affecting an interest in life. 1975 Mass. Adv. Sh. at 3570, 339 N.E.2d at 702.
164 316 U.S. 535 (1942).
165 Id. at 536-37, 541.
166 Id. at 541-42. The Oklahoma statute was also challenged as a penal statute which constituted a cruel and unusual punishment in violation of the fourteenth amendment, but since the Court rested its decision on the equal protection grounds, it did not reach the cruel and unusual punishments issue. Id. at 538.
167 Id. at 541.
the interests noted by the Court in *Skinner* as requiring strict scrutiny are also present in the area of capital punishment. Death penalty statutes involve the same threat to the existence and survival of the race and the same "permanent deprivation" as the sterilization statute examined by the Court in *Skinner*. Accordingly, the strict judicial scrutiny analysis applied by Chief Justice Tauro is not completely without precedential roots.

Further support for the Chief Justice's approach may be found in *San Antonio School District v. Rodriguez*, where the Supreme Court announced the rule that a fundamental right which triggers strict scrutiny must be a right "explicitly or implicitly guaranteed by the Constitution." The *Rodriguez* Court proceeded to find that education was not such a fundamental right. Using an explicitness test, life appears on the face of the Constitution to be guaranteed. The Court has so much as conceded this, albeit in dicta, in another fundamental rights case, *Roe v. Wade*, in which the Court declared the Texas criminal abortion statute unconstitutional under the due process clause of the fourteenth amendment. In *Roe*, the Court pointed out that if it found a fetus to be a "person" within the meaning of the fourteenth amendment, the fetus' "right to life would then be specifically guaranteed by [that] Amendment." The right to life is also arguably implicitly guaranteed by the Constitution. When a person is deprived of life pursuant to a death penalty statute, all other fundamental rights—the right to vote, to travel, to procreate, to privacy—are thereby extinguished.

The difficulties with a "fundamental rights" due process analysis for evaluating a punishment were underlined by Justice Reardon when he questioned whether it was appropriate to review the nature of punishments under the due process clause rather than the specific provision in the federal constitution dealing with punishments. The

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169 Id. at 33-34.
170 Id. at 35-37.
171 MASS. CONSTIT. pt. 1, arts. I, II, XII; U.S. CONSTIT. amend. XIV.
173 Id. at 164.
174 Id. at 156-57.
175 The Supreme Court has found these other personal interests to be fundamental: Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel); Griswold v. Connecticut, 381 U.S. 479, 493, 497 (1965) (Goldberg, J., concurring) (privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation). The novel "fundamental rights" due process approach to evaluating death penalty statutes, however, is not likely to be used by the United States Supreme Court. In *Furman*, the Court considered the constitutionality of death penalty statutes only under eight amendment standards. 408 U.S. 239-40. Furthermore, the Court has continued to review capital sentencing statutes under the eighth amendment since *Furman*. See text at notes 192-243 infra.
history of the adoption of the eighth amendment indicates that the cruel and unusual punishments provision of the Bill of Rights was passed to provide a constitutional limitation on the unbridled power of the legislative branch to enact punishments.\textsuperscript{177} The Supreme Court has characterized the eighth amendment cruel and unusual punishments clause as specifically framed to restrict the legislative power to fix criminal punishment.\textsuperscript{178} Although the Massachusetts counterpart, article 26, is literally worded to restrict only the action of magistrates and courts of law,\textsuperscript{179} and was originally interpreted as a check on the judicial and not the legislative power to punish,\textsuperscript{180} the Supreme Judicial Court has construed that clause as creating a specific constitutional boundary on the legislative power to fix punishments.\textsuperscript{181} The Massachusetts Declaration of Rights thus embraces a provision that specifically operates to circumscribe legislatively fixed punishments, whereas the due process provisions of the Massachusetts Declaration of Rights do not directly address the nature of punishments.\textsuperscript{182} Accordingly, Justice Reardon, would seem to be correct in concluding that the appropriate constitutional source for standards to judge the nature of punishments selected by the Legislature would logically be either the eighth amendment or article 26 rather than the less specific clauses guaranteeing due process.

Although a due process analysis may not be the most appropriate constitutional analysis for reviewing death penalty statutes, using a stricter standard of review than that used for other punishments under the cruel or unusual punishment clause of the Massachusetts Declaration of Rights may be justified. The death penalty is recognized as a unique punishment.\textsuperscript{183} Unlike other punishments, such

\begin{itemize}
  \item \textsuperscript{177} Furman v. Georgia, 408 U.S. 238, 262-63 (Brennan, J., concurring).
  \item \textsuperscript{178} Weems v. United States, 217 U.S. 349, 372-73 (1910).
  \item \textsuperscript{179} See note 13 \textit{supra} for text of MASS. CONST. pt. 1, art. XXVI.
  \item \textsuperscript{180} Sturtevant v. Commonwealth, 158 Mass. 598, 600, 33 N.E. 648, 649 (1893).
  \item \textsuperscript{182} See note 24 \textit{supra} for text of MASS. CONST. pt. 1, arts. I, X and XII.
  \item \textsuperscript{183} Furman, 408 U.S. at 286-93 (Brennan, J., concurring); \textit{id.} at 306 (Stewart, J., concurring). During the colonial period, the number of capital crimes in the colonies covered many offenses besides murder. In the Massachusetts Bay Colony, by the year 1684, 21 crimes were punishable by death including idolatry, witchcraft, blasphemy, murder, bestiality, sodomy, adultery, man-stealing, perjury in a capital case, conspiracy, rape of a married woman, rape of a single woman (not mandatory), cursing a natural parent by a child 16 or older, rebellion of son 16 or over, third offense of burglary, third offense of highway robbery, arson, second offense of heresy, returning of a Jesuit after banishment, returning of a Quaker after banishment, piracy and mutiny, and military service with enemies. \textbf{REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, MASS. H. REP. NO. 2575, at 98-99 APP. C (1959).} By 1852, first degree murder was the only offense subject to a mandatory death penalty. In 1951, the death penalty for first degree murder was made discretionary, and the mandatory death penalty for rape-murder was established. \textit{See Note, The Death Penalty in Massachusetts, 8 SUFF. L. REV. 632, 633-6 (1974).} Thus, during the history of the
\end{itemize}
as fines and incarceration, in recent years the penalty of death has been infrequently imposed—in Massachusetts not since 1947.\textsuperscript{184} By its nature it is irreversible.\textsuperscript{186} It not only rejects the notion of rehabilitation of the offender, but also denies that there is some value to every human life.\textsuperscript{186} Because of the unique nature of the death penalty, the stricter standards for determining its constitutionality created by the \textit{O'Neal II} majority may be appropriate. Saddling the state with the burden of advancing substantial reasons for a death penalty statute is, likewise, justified by the unique character of the death penalty in contrast to other criminal punishments.

Death penalty decisions inevitably have moral and social dimensions because, to some extent, they rest on the value society places on human life. In \textit{O'Neal II}, the majority decided that retribution could not solely justify the imposition of a mandatory death penalty for the crime of rape-murder. Society's need for revenge was thus outweighed by society's respect for human life, the life of the capital offender. In so deciding, the Court accepted its duty to decide constitutional issues, although they may have far-reaching social and moral ramifications.\textsuperscript{187}

In performing its constitutional duty the Court correctly went beyond accepting the Massachusetts constitutional document as the product of a single period in history. Justice Reardon argued that the historical meaning of the constitutional phrase, cruel or unusual punishments, should delimit the inquiry so that a form of punishment acceptable at the time of framing the Massachusetts Declaration of Rights would also currently be acceptable.\textsuperscript{188} But the history of the phrase is only one of the indicia of the phrase's meaning. The majority in \textit{O'Neal II} did not flatly dispense with the historical meaning of the phrase and rule that capital punishment is invariably cruel or unusual in the constitutional sense, rather the \textit{O'Neal II} Court created a useful method of inquiry so that the content of the constitutional phrase, cruel or unusual punishments, may be determined in light of available penological and sociological knowledge.

\begin{itemize}
  \item \textsuperscript{184} In \textit{O'Neal II}, both Justices Hennessey and Wilkins considered the fact significant that an execution had not taken place in Massachusetts since 1947. 1975 Mass. Adv. Sh. 3546-47, 339 N.E.2d 694 (Hennessey, J., concurring); \textit{id.} at 3549, 339 N.E.2d at 695 (Wilkins, J., concurring in the result).
  \item \textsuperscript{186} Chief Justice Tauro contrasted the absolute and irreversible nature of a mandatory death penalty with other forms of punishment. \textit{Id.} at 3506-07 n.2, 339 N.E.2d at 678 n.2.
  \item \textsuperscript{188} Chief Justice Tauro pointed out that the Commonwealth had not offered reformation of the capital offender as a justification for the mandatory death penalty statute because rehabilitation is not consistent as a penal goal with capital punishment. \textit{Id.} at 3513-14 n.11, 339 N.E.2d at 681 n.11.
  \item \textsuperscript{188} 1975 Mass. Adv. Sh. at 3584-85, 339 N.E.2d at 707.
\end{itemize}
III. FEDERAL AND STATE CONSTITUTIONAL REQUIREMENTS FOR FUTURE DEATH PENALTY LEGISLATION IN MASSACHUSETTS

In utilizing state standards to strike down the mandatory death penalty for rape-murder in O'Neal II, the Supreme Judicial Court created the possibility that future death penalty statutes enacted in Massachusetts will be subject to identical constitutional scrutiny under the state constitution. Just seven months after the Supreme Judicial Court decided O'Neal II, the United States Supreme Court ruled on the constitutionality of both mandatory and guided discretionary capital sentencing statutes enacted after Furman. In O'Neal II, Justice Reardon had urged for the sake of "symmetry of the law" that the Supreme Judicial Court withhold its judgment on the constitutionality of mandatory capital punishment for rape-murder until the Supreme Court had passed on a similar statute under the eighth and fourteenth amendments. Justice Reardon hypothesized that if the Supreme Court held the death penalty void in all cases and under all circumstances on federal constitutional grounds, then the issues in O'Neal II would be decided. If, on the other hand, the Supreme Court declared the death penalty constitutionally permissible, then the highest court of Massachusetts, Justice Reardon argued, would still be free to review the statute under the state constitution. Although Justice Reardon did not precisely predict it, the result of going forward with the O'Neal II decision may have been the creation of two independent constitutional hurdles, federal and state, for the drafters of future death penalty legislation in Massachusetts.

The federal constitutional requirements under the eighth amendment for state murder statutes allowing capital sentencing were laid out in a series of five cases. Seven members of the Supreme Court found that the death penalty for murder is not unconstitutional in

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189 1975 Mass. Adv. Sh. at 3562-64, 339 N.E.2d at 699. Justice Reardon called upon the Supreme Judicial Court to await the United States Supreme Court decision in North Carolina v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), which he thought involved constitutional questions identical to those in O'Neal II under the federal Constitution. Fowler had been argued once before the Supreme Court and had been set for reargument. See 1975 Mass. Adv. Sh. at 3562, 339 N.E.2d at 699. The judgment of the North Carolina Supreme Court upholding a mandatory death penalty in Fowler was eventually vacated by the Supreme Court in a memorandum decision. 428 U.S. 904, 904-05 (1976). The United States Supreme Court disposed of Fowler in accordance with its decision in Woodson v. North Carolina, 428 U.S. 280 (1976), issued 4 days earlier. See text at notes 230-37 infra for a discussion of Woodson.


191 Id.


193 The Supreme Court has granted certiorari to review a case which presents the issue of the constitutionality of the death penalty for the offense of rape. See Coker v. Georgia, 45 U.S.L.W. 3249 (U.S. Oct. 4, 1976) (No. 75-5444).
The guided discretionary capital sentencing statutes of three states were upheld in *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida*, while two mandatory death penalty statutes were struck down in *Woodson v. North Carolina* and *Roberts v. Louisiana*.

In *Gregg*, *Jurek* and *Proffitt*, seven members of the Court agreed to uphold the conviction and death sentence of the petitioners under state statutory schemes permitting guided discretionary capital sentencing, but the Court split in its reasoning. The pivotal opinions in these cases were written by a three-Justice plurality of Justices Stewart, Powell, and Stevens [hereinafter referred to as the plurality] who found on traditional eighth amendment grounds that the death penalty did not invariably violate the constitutional ban on cruel and unusual punishments. The plurality presented two major tests to...
judge the death penalty in the abstract: (1) whether capital punishment is consonant with contemporary values or standards of decency; and (2) whether it comports with human dignity. The death penalty, according to the plurality, met contemporary standards of decency because it is acceptable to American society as demonstrated by the legislative response to the Furman decision and the actual willingness of juries to impose the death sentence. In order to comport with human dignity, the plurality said that the penalty of death must not be excessive, which, in turn, required that the penalty neither entail unnecessary pain nor be disproportionate to the severity of the offense. With respect to the issue of the excessiveness of the death penalty, the plurality found that such a penalty was not excessive because it could serve the social purposes of retribution and deterrence and therefore was necessary. Moreover, death was not a punishment disproportionate to the offense when it is imposed for the crime of murder. Having determined that capital punishment does not in all cases and under all circumstances violate the eighth amendment, the plurality rejected the defendant's alternate contention that arbitrariness found constitutionally impermissible in Furman was inherent in those stages of the criminal justice system allowing discretionary action: prosecutorial decisionmaking, plea bargaining, conviction of lesser included offenses, and executive clemency. Observing that legislatively selected punishments are presumptively valid, and that a legislature is not required to choose the least severe punishment available, the plurality placed a heavy burden on the party challenging the validity of death penalty legislation.

Chief Justice Burger and Justices Blackmun and Rehnquist joined. Significantly, in Roberts, Justice White argued that a separate sentencing procedure at which the character and record of the capital offender would be considered was not constitutionally mandated. Id. at 358. See note 243 infra. Gregg, 428 U.S. at 173. Justice Stewart interpreted the post-Furman legislative activity in which 35 states passed new death penalty legislation, which attempted to satisfy the Supreme Court's concerns expressed in Furman, as evidence of society's endorsement of capital punishment for the crime of murder. Id. at 179-81. As further evidence of society's approval of the death penalty, Justice Stewart noted that juries had imposed the death sentence on a minimum of 240 persons since Furman (decided on June 29, 1972) and the end of 1974, and that 460 persons were under death sentences in March 1976. Id. at 182.

Id. at 173.
Id. at 182-87.
Id. at 187.
Gregg, 428 U.S. at 199; Jurek, 428 U.S. at 274; Proffitt, 428 U.S. at 254. A similar argument had been rejected by the Supreme Judicial Court in O'Neal I. See text at notes 14, 18 and note 18 supra.
Gregg, 428 U.S. at 175. Justice Stewart stated: "[I]n assessing a punishment selected by a democratically elected Legislature against the constitutional measure, we presume its validity."

Id.
Id.
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In *Gregg*, *Jurek*, and *Proffitt*, the plurality described the procedural attributes of the sentencing systems involved in those cases as consistent with the eighth amendment. In *Gregg*, Justice Stewart generalized:

In summary, 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 information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.211

In *Gregg*, Justice Stewart, writing for the plurality, identified a number of the specific elements of Georgia's statutory capital sentencing scheme which made that scheme constitutionally compatible with the eighth amendment. The statute called for a bifurcated procedure, so that after the guilt phase of the trial, in which the defendant was found guilty by either a judge or jury, a separate presentence hearing was held in which the judge or jury heard evidence in extenuation, aggravation, or mitigation of punishment.212 The judge or jury was required to find beyond a reasonable doubt that at least one of ten statutory aggravating circumstances existed before imposing the death sentence. The sentencing body was further authorized to consider any relevant aggravating and mitigating circumstances. The statute, in addition, provided for an expedited appeal to the highest state court. In reviewing capital sentences, that court was required to decide whether the death penalty was imposed under the influence of prejudice or passion, whether the finding of a statutory aggravating circumstance was supported by the evidence, and whether, as compared to the sentences imposed in similar cases, the sentence was disproportionate.213

The Texas statutory capital sentencing framework scrutinized in the *Jurek* case differed from that of Georgia as presented in *Gregg*. The Texas statutory definition of capital homicide was limited to five categories of intentional and knowing murder: (1) murder of a firefighter or peace officer; (2) murder committed in the course of certain felonies such as kidnapping, robbery or forcible rape; (3) murder committed for remuneration; (4) murder committed while escaping or attempting to escape from a penal institution; and (5) murder of a prison employee by a prison inmate.214 If the jury found the de-

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211 428 U.S. at 195.
212 *Id.* at 163-64.
213 *Id.* at 164-67.
214 *Jurek*, 428 U.S. at 268 (Stevens, J., joined by Stewart and Powell, JJ., concurring).
fendant guilty of one of the five types of capital homicides, then in a subsequent sentencing proceeding, the death sentence was imposed if the jury answered three questions and determined that the state had proved beyond a reasonable doubt that the response to each question was affirmative. The three questions to be presented to the jury are (1) whether the defendant’s conduct resulting in death was deliberate and engaged in “with the reasonable expectation that the death of the deceased or another person would result,” (2) whether it is probable that the defendant would engage in criminal acts of a violent nature constituting an ongoing threat to society, and (3) if raised by the evidence, whether the defendant's conduct constituted an unreasonable response to the provocation by the deceased. Texas law also called for an expedited appeal to the Texas Court of Criminal Appeals. Unlike the Georgia statute, which specifically set forth aggravating circumstances for consideration in imposing the death sentence and empowered the sentencing body to take into account any appropriate mitigating circumstances, the Texas law required the death penalty to be imposed upon certain jury findings. The plurality indicated, however, that the narrowing of the definition of capital homicide to five specific categories of murder was equivalent to requiring jury consideration of some of the aggravating factors spelled out in the Georgia law. The statutory questions posed in the Texas law, specifically the second question, whether the particular defendant would be likely to engage in future violent criminal conduct that would constitute a threat to society, commanded the sentencing authority to take into account particularized mitigating circumstances. In respect to mitigating factors, the plurality had stated: “in order, to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.” Consequently, despite the structural differences between the Texas and Georgia statutes, the plurality came to the conclusion that the Texas capital sentencing scheme did not violate the eighth and fourteenth amendments.

Florida’s post-Furman capital sentencing legislation was viewed by the plurality in Proffitt as similar to Georgia’s statutory scheme. Florida law provided for a bifurcated procedure with a guilt phase followed by a sentencing phase in which an evidentiary hearing was held. At the end of the evidentiary hearing, the jury was required to consider whether any mitigating circumstances outweighed any ag-

215 Id. at 269.
216 Id.
217 Id. at 270-72.
218 Id. at 272-74.
219 Id. at 271.
220 Id. at 276.
221 Proffitt, 428 U.S. at 251-52 (Powell, J., joined by Stewart and Stevens, JJ., concurring).
222 Id. at 248.
gravating circumstances, and on that basis to recommend that either life imprisonment or the death penalty be imposed. The jury's role, however, was only advisory, and the trial judge determined the sentence actually to be imposed. If the trial judge imposed the death sentence, he was directed to make written findings of fact that sufficient aggravating circumstances existed and insufficient mitigating circumstances existed to outweigh the aggravating circumstances. The Florida statute enumerated eight aggravating and seven mitigating circumstances. In contrast to Georgia law, under the Florida capital sentencing system, the jury performed only an advisory function. The plurality in Proffitt concluded that this major difference between the Georgia and Florida capital sentencing systems did not make Florida's legislation constitutionally deficient as there was no constitutional requirement that a jury rather than a judge perform the sentencing task of imposing the death penalty.

The two mandatory death penalty statutes reviewed by the Supreme Court in the Woodson and Roberts cases were invalidated by five to four margins. In those cases, Justices Brennan and Marshall re-affirmed the positions they had taken earlier in Furman that the death penalty invariably violates the cruel and unusual punishments prohibition of the eighth amendment. With Justices Brennan and Mar-

223 Id. at 248-50 & n.6.
224 Id. at 250-51.
225 Id. at 251-53. Although the Supreme Court had previously stressed in Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968), that capital sentencing by a jury may "perform an important societal function," the plurality indicated that sentencing by the judiciary might lead to greater consistency. Proffitt, 428 U.S. at 252.
226 Woodson, 428 U.S. at 305 (Stewart, J., joined by Powell and Stevens, J.J., announcing the judgment of the Court); id. at 305-06 (Brennan, J., concurring in the judgment); id. at 306 (Marshall, J., concurring in the judgment). Roberts, 428 U.S. at 336 (Stevens, J., joined by Stewart and Powell, J.J., announcing the judgment of the Court); id. (Brennan, J., concurring in the judgment); id. at 336-37 (Marshall, J., concurring). In Woodson, Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented. Justice Blackmun dissented in a separate statement, and Justice Rehnquist filed a separate dissenting opinion. In Roberts, Chief Justice Burger filed a dissenting statement. Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, filed a dissenting opinion. Justice Blackmun also filed a separate dissenting statement.
227 Woodson, 428 U.S. at 305-06; Roberts, 428 U.S. at 336. Justice Brennan referred to his dissenting opinion in Gregg, Woodson, 428 U.S. at 305; Roberts, 428 U.S. at 336, in which he expressed the view that the infliction of capital punishment by the state is degrading to human dignity. 428 U.S. at 229-30.
228 Woodson, 428 U.S. 306; Roberts, 428 U.S. 336-37. Justice Marshall simply said: "I am of the view that the death penalty is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments." Id.
229 408 U.S. at 305 (Brennan, J., concurring); 408 U.S. at 358-60 (Marshall, J., concurring).
shall, the plurality of Justices Stewart, Powell, and Stevens formed the
majority and filed the pivotal opinions.

In Woodson, the petitioners were found guilty of first degree mur­
der and were, as required by the North Carolina statute, automatically
sentenced to death.\footnote{Woodson, 428 U.S. at 284-86.} After examining the North Carolina statutory
scheme and the history of the mandatory death penalty, Justice
Stewart catalogued the reasons for finding that a death sentence im­
posed under the North Carolina mandatory statute was un­
constitutional.\footnote{Id. at 289-95. Justice Stewart emphasized that in Woodson the Court was not ruling on the con­
stitutionality of a narrowly drawn statute mandating the death penalty for a category of
murder defined in terms of the character or record of the offender as, for example, murder committed by a prisoner who is serving a sentence of life imprisonment. 428
U.S. 287 n.7, 292-93 n.25.} First, the common law practice of mandatorily impos­ing a capital sentence on all persons convicted of specified crimes had
been generally rejected before Furman by both legislatures and juries
as morally unacceptable. Justice Stewart outlined the history of the
adoption of discretionary capital sentencing statutes from the mid­
nineteenth century to Furman by the states that originally had manda­
tory statutes and retained capital punishment.\footnote{Id. at 289-95. Justice Stewart also said that the enactment of mandatory death
penalty statutes by a number of states in response to Furman did not evidence a new ac­
ceptance by society of mandatory capital punishment. Rather, it reflected a concern to
put into effect capital punishment legislation compatible with the federal constitution.
Id. at 298-99.} This legislative rejec­tion of mandatory capital punishment, together with the practice of
tory statues and regularized and made “rationally reviewable”.\footnote{Id. at 302-03.} Finally,
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Justice Stewart characterized mandatory capital sentencing statutes as constitutionally infirm because in capital cases, individualized sentencing decisions are constitutionally required due to the eighth amendment's basic concept of "respect for humanity." The North Carolina mandatory death penalty statute failed in this regard as it did not call for jury consideration of the individualized nature of the crime or character of the capital offender.

In Roberts, Justice Stevens, writing for the plurality, set aside a death sentence imposed on a defendant convicted of first degree murder under Louisiana's mandatory death penalty statute. The Louisiana statutory system defined first degree murder as homicide in five specific situations: (1) killing connected with the perpetration of the felonies of aggravated kidnapping, aggravated rape, or armed robbery; (2) killing of a fireman or peace officer while performing his duties; (3) killing by one serving a life sentence or one previously convicted of an unrelated murder; (4) killing with the intent to inflict great bodily harm upon at least two or more persons; and (5) killing for hire. The Louisiana responsive verdict procedure required, in cases of first degree murder, that the jury be instructed on the offenses of first degree murder, second degree murder and manslaughter regardless of the existence of evidence to support a verdict on the lesser offenses, and that the jury return either a verdict of guilty, guilty of second degree murder, guilty of manslaughter, or not guilty.

Justice Stevens found constitutional infirmities in the Louisiana mandatory death penalty scheme similar to those in the North Carolina statute. With the exception of killing by one serving a life sentence or one previously convicted of an unrelated murder, the five narrow definitions of first degree murder did not call for jury consideration of the character of the offender and the circumstances of the offense. The responsive verdict system did not provide standards to guide the jury's sentencing discretion. Rather, the system invited members of the jury to render a verdict for a lesser offense, in violation of their oaths, in order to avoid imposition of the death penalty. Furthermore, mandatory death penalty systems, like that of

236 Id. at 303-04.
237 Id. Four Justices in Woodson would have upheld the North Carolina mandatory death penalty statute. Woodson v. North Carolina, 428 U.S. 306-07 (White, J., with whom Chief Justice Burger and Justice Rehnquist joined, dissenting); id. at 307-08 (Blackmun, J., dissenting); id. at 308-09, 324 (Rehnquist, J., dissenting). Justice Rehnquist authored a vigorous dissenting opinion in which he accused the plurality of importing into the eighth amendment provision banning cruel and unusual punishments "procedural requirements which find no support in our cases." Id. at 309.
239 Id. at 329-30.
240 Id. at 335.
241 Id. at 333-34 & n.9.
242 Id. at 334-36.
Louisiana, had been consistently rejected by legislatures and juries.243

Although the plurality warned that henceforth capital sentencing systems would be evaluated “on an individual basis,”244 the 1976 Supreme Court death penalty cases may be taken to indicate that guided discretionary capital sentencing statutes patterned after the Georgia, Texas and Florida statutes considered in Gregg, Jurek and Proffitt would be likely to satisfy the eighth amendment, while mandatory death penalty legislation, identical to that successfully challenged in Woodson and Roberts, would not. A mandatory death penalty for rape-murder, like the statute found violative of the state constitution in O'Neal II, would probably have fallen within the shadow of unconstitutionality cast by the Supreme Court in the Woodson and Roberts cases. The North Carolina statute invalidated in Woodson defined first degree murder, *inter alia,* as murder “committed in the perpetration or attempt to perpetrate ... rape”245 and mandated death as the punishment for that offense,246 as did the mandatory provision of section 2 of chapter 265 of the Massachusetts statute.247 In Roberts, the

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243 *Id.* at 336. Four Justices in Roberts would have declared the Louisiana capital sentencing scheme constitutional. Justice White wrote an extensive dissenting opinion in which Chief Justice Burger, Justice Blackmun and Justice Rehnquist joined. Justice White rejected the petitioner's argument that the Louisiana statute was susceptible to a *Furman*-based attack because of the possibilities of jury nullification, prosecutorial discretion and discretion in the criminal process in the form of plea bargaining and executive clemency. *Id.* at 348-50. More importantly, Justice White discussed the reasons why the death penalty does not violate the eighth amendment proscription of cruel and unusual punishments in all cases and under all circumstances. First, the framers of the Constitution expressly contemplated the use of capital punishment in the fifth amendment, as did those who drafted the fourteenth amendment. Second, the death penalty has been in the arsenal of punishments of a majority of states since the formation of the country. *Id.* at 350-51. Justice White further noted that the death penalty was assumed to be constitutionally permissible before *Furman*. *Id.* The enactment of death penalty statutes by a large number of states in response to *Furman* demonstrated to Justice White that capital punishment was currently acceptable to the American people and that life imprisonment did not fulfill the citizens' need for retribution. *Id.* at 353-54. Because reasonable persons and legislators may differ as to the relative effectiveness of the death penalty and life imprisonment in satisfying the penal goal of deterrence, Justice White contended that legislative judgments should be respected. *Id.* at 355. Justice White refused to overturn the post-*Furman* statutes on the ground that life imprisonment serves the goals of the criminal justice system as efficaciously as the death penalty. Accordingly, Justice White rejected the notion that the death penalty satisfies no valid legislative or social purpose. *Id.* at 353-55. Justice White also expressed his disapproval of the plurality's view that a separate sentencing proceeding is constitutionally required and that the sentencing authority must consider the record and character of the capital offender. *Id.* at 356-58. Finally, Justice White noted that, contrary to the position of Justice Stewart, mandatory death penalties were not necessarily rejected by the American people, and, thus, could not on that basis be found to violate the Constitution. *Id.* at 358-63.

244 *Gregg*, 428 U.S. at 195.


246 *Id.*

Louisiana statute struck down automatically required imposition of the death penalty upon a finding of first degree murder, which was narrowly defined in one category as killing in connection with certain felonies, one of which was rape. Speaking of the deficiencies of the Louisiana law, Justice Stevens stressed that narrowing the categories of homicide to be covered by a mandatory capital sentencing statute did not cure a basic infirmity of the statute, the failure to focus on the character of the offender and the particular circumstances of the offense. Mandatory statutes, like the Massachusetts mandatory death penalty for rape-murder, did not permit the sentencing body to consider, what Justice Stevens described as, "[t]he diversity of circumstances presented in cases falling within the single category of killing during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes." The Massachusetts mandatory death penalty provision would presumably have failed the eighth amendment test in another respect. Like the North Carolina statute, the Massachusetts mandatory provision did not encompass standards to guide the jury in imposing the death sentence, and may have encouraged jury nullification. Moreover, the language in both Woodson and Roberts, which rejects mandatory capital sentencing as out of line with current societal concepts of decency, portends that a statutory scheme that calls for an automatic sentence of death upon conviction of even a narrowly defined category of first degree murder is not likely to be tolerated under the federal constitution.

Because mandatory capital sentencing schemes are particularly susceptible to constitutional challenge under the federal constitution,


"First degree murder. First degree murder is the killing of a human being:

1. When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery . . . ."

249 Id.

250 Id.

251 See text and notes at notes 234-35 supra.

252 See text and notes at notes 232-33 and 243 supra.

253 The Supreme Court has granted certiorari to review a case which poses the question of the constitutionality of a mandatory death penalty for the offense of killing a police officer. See Roberts v. Louisiana, 45 U.S.L.W. 3345 (U.S. Nov. 11, 1976) (No. 76-5206). In Woodson, the plurality left open the possibility that some narrowly drawn mandatory death penalty statutes might be constitutional. However, the plurality indicated that such statutes would mandate the death sentence for a category of murder defined in terms of the character or record of the offender, 428 U.S. at 287 n.7, 292-93 n.25, not in terms of the identity of the victim. See note 231 supra.

254 Several months after the U.S. Supreme Court's death penalty decisions, the Supreme Court of California in Rockwell v. Superior Court of Ventura County, 18 Cal. 3d 420, 134 Cal. Rptr. 650, 556 P.2d 1101 (1976) struck down a mandatory capital sentencing statute in light of the Supreme Court's holdings in Gregg v. Georgia, 428 U.S. 153, (1976), and the four companion cases. 556 P.2d at 1104, 1106-10. In Rockwell, the peti-
new death penalty legislation in Massachusetts most likely will take the form of a discretionary capital sentencing statute, which is designed with procedural features similar to those found acceptable in the statutes upheld in Gregg, Jurek and Proffitt. Primary among the procedural features of a discretionary capital sentencing system would be the inclusion of objective standards to guide the judge or jury in exercising sentencing discretion. Such objective standards could take the form of enumerated aggravating and mitigating factors to be considered or an equivalent, such as questions which focus on the character of the offender and the circumstances of his offense.\footnote{255} Other procedural features, not explicitly required by the federal cases, but which were encompassed in each of the Georgia, Texas and Florida statutory systems, were provisions for a bifurcated procedure and for expedited and meaningful appellate review.

A guided discretionary capital sentencing statute embodying these procedural components, however, would not, as a matter of course, satisfy the state standards that the O'Neal II majority established. The federal procedures do not require that the factors taken into account by the sentencing authority in imposing the death penalty be rooted in or relate to the penal purpose of deterrence which the O'Neal II Court indicated could possibly justify the use of capital punishment. For example, a sentencing body under the Georgia statute could decide to impose the sentence of death rather than life imprisonment on the basis that 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,"\footnote{256} or under the Florida...
statute on the ground that the capital offender had been previously convicted of a "felony involving the use or threat of violence to the person."\textsuperscript{257} The aggravating factor in the Georgia statute appears to be aimed at channeling the sense of moral reprobation of the community and the aggravating factor in the Florida statute may be directed toward incapacitating the individual offender, rather than deterring others from committing similar crimes.\textsuperscript{258} Under Chief Justice Tauro's analysis in \textit{O'Neal II}, however, the penal goal of retribution may not provide the ground for imposing the death penalty as opposed to a life sentence.\textsuperscript{259} Likewise, isolation/incapacitation of the offender can be achieved as effectively by a sentence of life imprisonment as by capital punishment,\textsuperscript{260} and, thus, the death penalty may not be imposed solely on the basis of incapacitation according to \textit{O'Neal II} standards. In sum, while the federal procedures insure that the sentencing authority will focus on the individual offender's background and character and the specific circumstances of his crime, by contrast, the state standards formulated in \textit{O'Neal II} demand that the court focus on the nature of the substantive homicidal offense to determine whether the death sentence may in any case serve any compelling or substantial governmental interest that life imprisonment could not serve as effectively as punishment for the offense. Because the majority in \textit{O'Neal II} established a set of state constitutional standards different in content from the federal procedural standards, a discretionary capital sentencing statute enacted in Massachusetts, which could clear the federal constitutional hurdle, would encounter a second constitutional hurdle under the due process and cruel or unusual punishments provisions of the Massachusetts Constitution.

The state standards enunciated in \textit{O'Neal II} should apply to future discretionary capital sentencing statutes enacted in Massachusetts, notwithstanding that that case involved a mandatory death penalty statute. The Supreme Judicial Court could narrowly limit the decision in \textit{O'Neal II} to the consideration of the specific statutory provision involved, the mandatory death penalty for rape-murder,\textsuperscript{261} holding that

\textsuperscript{257} Proffitt, 428 U.S. at 248 n.6.  
\textsuperscript{258} See \textit{The Supreme Court Term}, 90 \textit{Harv. L. Rev.} 63, 72, 73-74 & n.73 (1976), in which the commentator discusses the Supreme Court's failure to justify the three statutory capital sentencing systems upheld as serving the purposes, retribution and deterrence, which that Court found could possibly justify the imposition of capital punishment. It should be added that it would be anomalous to permit a jury to determine whether imposing the death penalty in a particular case would serve the purpose of deterring others from engaging in homicidal conduct if expert opinion is so divided on the question of the effectiveness of capital punishment as a deterrent. See note 90 \textit{supra} and note 283 \textit{infra}. 
\textsuperscript{259} See text and note at note 92 \textit{supra}. 
\textsuperscript{260} See text and note at note 91 \textit{supra}. 
\textsuperscript{261} In one case decided since \textit{O'Neal II}, the Supreme Judicial Court has spoken of the limited holding in \textit{O'Neal II}. See \textit{Commonwealth v. Hall}, 1976 Mass. Adv. Sh. 444, 343 N.E.2d 388. In \textit{Hall}, the Supreme Judicial Court reversed the judgments insofar as the
the state constitutional standards only apply to mandatory capital sentencing statutes. Some support for such a view could be found in the 1976 Supreme Court death penalty cases, where the plurality of Justices Stewart, Powell and Stevens treated mandatory capital punishment statutes as a separate class of legislation particularly repugnant to our society's values. It is also plausible that the constitutional standards introduced in O'Neal II were so stringent because the statute reviewed was mandatory and not discretionary. Since mandatory capital punishment statutes were effectively banned by the Supreme Court in the Woodson and Roberts cases, the state constitutional tests presented in O'Neal II may no longer be useful and may not apply to guided discretionary capital sentencing legislation.

Limiting the O'Neal II standards to mandatory capital sentencing schemes, however, would refute much of the language and reasoning in that opinion. Chief Justice Tauro expressly envisioned the application of the state constitutional tests to future death penalty legislation and did not state in O'Neal II that the compelling state interest test could only be used to evaluate the constitutionality of mandatory statutes. Justice Wilkins formulated his substantial public purpose test death sentence was imposed on the defendant, who had been convicted on two murder indictments and sentenced under the discretionary sentencing provision of G.L.c. 265, § 2 prior to the decision in Furman. Id. at 445, 472-74, 343 N.E.2d at 391, 401. Because of delay in the appellate procedure followed, the case reached the Supreme Judicial Court after O'Neal II had been decided. Id. at 452-54, 475, 343 N.E.2d at 394, 402. The Court remanded the case to the superior court for resentencing of the defendant to life imprisonment on the basis of Furman, as in other decisions in which the death penalty had been imposed pursuant to G.L.c. 265, § 2. Id. at 472-75, 343 N.E.2d at 40. Although Justice Quirico made it clear in Hall that the O'Neal II holding did not apply to the case at hand "because of the purported limitation of the holding to death sentences for the crime of rape-murder . . . ." id. at 475, 343 N.E.2d at 402, it may also be noteworthy that he did not state that the state constitutional standards established in O'Neal II could only be applied to mandatory capital sentencing statutes or that the O'Neal II standards could not be employed by the Court to determine the constitutionality of future death penalty legislation enacted in Massachusetts.

262 It could also be argued that, at the time of the writing of O'Neal II, it was assumed by the Massachusetts Court that only mandatory, and not discretionary, capital sentencing statutes were constitutional under the Supreme Court's holding in Furman. Hence, the majority justices in O'Neal II contemplated that, if their standards would be applied to future death penalty legislation, it would only be legislation cast in a mandatory mold. This argument is unpersuasive, however, since the Furman decision addressed only unbridled discretionary capital sentencing statutes and left wide open the issue of the constitutionality of either guided discretionary or mandatory statutes. See text at notes 51-58 supra.

263 See 1975 Mass. Adv. Sh. at 3530 n.23, 339 N.E.2d at 688 n.23. Chief Justice Tauro also stated: "My opinion is restricted solely to the pertinent statute which mandates the death penalty in rape-murder cases." Id. This statement may be intended to limit only his finding of unconstitutionality with respect to the mandatory death penalty statute for rape-murder and not his opinion as to the appropriate standards to apply in all death penalty cases. In O'Neal I, Chief Justice Tauro had written: "We address the constitutionality of a general statute requiring a death sentence for a murder committed during a rape. Consequently, our decision is limited to this issue and not to a discussion of
in terms of the death penalty in general and indicated that death penalty statutes for other types of murder might be evaluated and survive a constitutional attack under that test. Furthermore, the policy reasons that justify using stringent state standards for evaluating the constitutionality of a mandatory death penalty apply equally to discretionary death penalty statutes. A capital sentence, whether imposed under a mandatory or discretionary sentencing scheme, is different from other punishments. Such a penalty is irrevocable, infrequently utilized, and rejects the concept of rehabilitation and the value of the life of the offender. The rationale suggested by Chief Justice Tauro and Justice Wilkins for requiring the state to justify imposing a mandatory death sentence also applies to discretionary death penalty sentences, for death involves an immeasurable degree of suffering and is just as brutalizing whether inflicted pursuant to mandatory or discretionary sentencing. Beyond the reasoning of the O'Neal II opinions, there is little doubt that a state court may establish a stricter standard of constitutional protection for criminal defendants under a provision in the state constitution which is identical or nearly so to

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standards applicable to particular sentences imposed by judges exercising their sentencing discretion under other statutes." 1975 Mass. Adv. Sh. at 1086-87, 327 N.E.2d at 663. This limiting statement may be addressed to criminal sentencing statutes other than capital sentencing statutes, since, at the time of writing, capital sentencing pursuant to the Massachusetts discretionary provision of G.L.c. 265, § 2, had been prohibited under the Supreme Judicial Court's application of Furman v. Georgia. See Commonwealth v. Harrington, 1975 Mass. Adv. Sh. 447, 461-62, 323 N.E.2d 895, 901.

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285 Since the O'Neal II decision, the Supreme Judicial Court has had occasion to differentiate capital punishment from other criminal penalties in order to determine the constitutional standard of review. In Commonwealth v. Jackson, 1976 Mass. Adv. Sh. 735, 344 N.E.2d 166, the defendant, who had been convicted of the offense of carrying a firearm without a license and sentenced to a mandatory one year term in a house of correction pursuant to G.L.c. 269, § 10(a), contended that the appropriate standard of review of the constitutionality of the mandatory one year sentence statute under the due process provisions of both the state and federal constitutions was a compelling state interest/least restrictive means test. Id. at 735, 749, 752, 344 N.E.2d at 168, 175. The Court, however, referring to its decisions in O'Neal I and II pointed out that it had distinguished the punishment of death from other punishments and declined to apply a strict scrutiny standard to the mandatory one year sentence statute. Id. at 752-53, 344 N.E.2d at 175. Justice Hennessey wrote: "[I]n O'Neal II . . ., although subjecting the mandatory death penalty prescribed by G.L.c. 265, § 2, to strict scrutiny, the Court was careful to differentiate capital punishment from all other punishments because of the absolute and irreversible deprivation involved." Id. at 753, 344 N.E.2d at 175 (citation omitted). In response to the defendant's argument that the same statute was unconstitutionally cruel and unusual under the eighth amendment and the parallel state provision, article 26, the Court applied a disproportionality test, rather than either a compelling state interest or substantial public purpose test in upholding the mandatory one year sentence statute. Id. at 740-49, 344 N.E.2d at 170-74.

286 See text at notes 183-86 supra.


288 Id. at 3549, 339 N.E.2d at 695.
federal constitutional language. Thus, the Supreme Judicial Court is free to interpret O'Neal II as creating standards of constitutional review of capital punishment legislation which are more stringent under the state constitution than those used by the United States Supreme Court under parallel language of the federal constitution.

When a discretionary capital sentencing statute is challenged under O'Neal II standards, in order to sustain the statute, the state must demonstrate that imposing the death penalty for the specific homicidal offense in question fulfills a compelling state interest or substantial public purpose that could not be satisfied if the lesser penalty of life imprisonment were imposed. Of the three primary penal purposes to support utilization of capital punishment, deterrence, isolation/incapacitation, and retribution/moral reinforcement, as the O'Neal II majority indicated, deterrence would be the probable ground for sustaining the death penalty. Future death penalty enactments inMas-


Chief Justice Tauro's findings in O'Neal II that the penal goal of isolation/incapacitation could be achieved by life imprisonment as well as by a death sentence, 1975 Mass. Adv. Sh. at 3523-25, 399 N.E.2d at 685-86, and that retribution/moral reinforcement alone could not justify imposing a death penalty, id. at 3526-29, 399 N.E.2d at 686-87, would eliminate these grounds as justification for capital punishment. Justice Wilkins also expressed the view that the need for retribution may justify the amount of a punishment, but could not bear the sole burden of justifying inflicting a sentence of death rather than life imprisonment, at least under the circumstances in the O'Neal II case, id. at 3549 n.2, 399 N.E.2d at 695 n.2, and that deterrence would be the probable ground for sustaining the death penalty. Id. at 3549, 399 N.E.2d at 695.
sachusetts, thus, could be struck down under the O'Neal II standards if the Commonwealth fails to carry its burden of demonstrating that the sentence of death is a more efficacious deterrent for the specific crime for which it was imposed than life imprisonment.

An example of discretionary capital sentencing legislation that may be enacted by the Massachusetts General Court in the future was provided by House Bill 5272 which was drafted and considered by the state legislature within two months after the United States Supreme Court's rulings in Gregg and the companion cases. House Bill 5272 would amend section 2 of chapter 265 to eliminate both the jury discretionary sentencing provision and the mandatory death penalty provision for rape-murder. The amended section 2 restores to the jury the authority to decide when the death penalty should be imposed once the defendant has been found guilty of first degree murder. In particular, House Bill 5272 would add several new sections to the statutes which would provide for a bifurcated procedure, objective standards to guide the jury in exercising discretion to impose the death penalty, and expedited and meaningful appellate review. After a defendant has been found guilty of first degree murder, a pre-sentence hearing would be held in which the sentencing authority would hear “all relevant evidence in extenuation, mitigation, and aggravation of punishment” as well as oral argument in respect to imposing punishment. The sentencing authority would be required to consider any of eleven aggravating circumstances and any of six mitigating circumstances enumerated by statute which may be raised by the evidence. The death penalty may be imposed only if the sen-

272 Id. § 3. Both of these provisions have been abolished judicially. See text at notes 21-24 and 62-66 supra.
274 Id. § 4.
275 Id. The proposed statutory language reads:
In all cases for which the death penalty may be authorized, the court in cases tried by the court shall consider, or it shall include in its instructions to the jury in cases tried by a jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating and statutory mitigating circumstances which may be supported by the evidence:
(a) The following shall be the statutory aggravating circumstances:
(1) The offense of murder was committed by a person in connection with the commission of rape or an attempt to commit rape on the victim.
(2) The offense of murder was committed on the victim who was killed while serving in the performance of his duties as a police officer, firefighter or correctional officer.
(3) The offense of murder was committed on the victim during the commission of a breaking and entering into a dwelling.
(4) The offense of murder was committed on the victim in the course of a kidnapping for ransom of the victim or attempted kidnapping for ransom of the victim.
(5) The offense of murder was committed by a person who had previously been convicted of the crime of murder in the first degree.
tencing authority finds beyond a reasonable doubt and designates at least one of the eleven statutory aggravating circumstances. If the sentencing is performed by a jury, the jury's recommendation of death must be unanimous. Upon automatic appeal of a death sentence to the Supreme Judicial Court, the Court must determine, taking into account the sentences imposed in like cases:

Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether the evidence supports the jury's or trial court's finding of a statutory aggravating circumstance . . . and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.276

Because this House Bill adopted some of the key aspects of the statutory systems found compatible with the eighth amendment in Gregg and Proffitt, such as a bifurcated procedure, objective standards to guide the sentencing authority in the form of aggravating and mitigating circumstances and provision for expedited and meaningful appellate review of a capital sentence,277 the constitutional uncertainty

(6) 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.
(7) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
(8) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(9) The offense of murder was committed on the victim during the commission of an armed robbery.
(10) 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.
(11) The offense of murder was committed on the victim during the course of a hijacking or attempted hijacking of an airplane or school bus.

(b) The following shall be the statutory mitigating circumstances:
(1) The offense of murder was committed by one with no history of prior serious criminal activity.
(2) The offense of murder was committed by one who was under the influence of extreme mental or emotional disturbance.
(3) The offense of murder was committed by one who was a participant in the defendant's homicidal conduct or connected to the homicidal act.
(4) The offense of murder was committed by one under duress or under the domination of another person.
(5) The offense of murder was committed by one whose capacity to appreciate the 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 alcoholic or drug intoxication.
(6) The age or mental capacity of the defendant at the time of the crime.

Id. 276 Id.
277 See text and notes at notes 212-13 and 221-25 supra.
that such legislation faces arises from the Massachusetts Declaration of Rights rather than the federal constitution. Under the majority tests espoused in \textit{O'Neal II}, a court reviewing a discretionary capital sentencing statute would determine whether there is a compelling state interest or substantial public purpose in imposing the death penalty for each category of first degree murder embodied in the list of statutory aggravating circumstances. Specifically, under House Bill 5272, a reviewing court would determine whether the sentence of death could serve the penal goal of deterrence which goal could not be achieved by a sentence of life imprisonment imposed on a defendant found by a jury to have committed rape-murder or one of the other ten specific categories of murder as set forth in the statute, in the form of aggravating factors: (1) rape-murder; (2) murder of a police officer, firefighter or corrections officer engaged in the performance of his duties; (3) murder committed in the course of burglary; (4) murder of the victim of a kidnapping or an attempted kidnapping; (5) murder by a convicted first degree murderer; (6) murder which was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;" (7) murder for monetary gain; (8) murder for hire; (9) murder committed during armed robbery; (10) murder by one who knowingly caused a great risk of death to two or more

\footnote{The constitutional status of House Bill 5272 was considered debatable by the House of Representatives which requested an advisory opinion of the Supreme Judicial Court on the constitutionality of the bill under articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights, in light of the \textit{O'Neal II} decision. MASS. H.R. Doc. No. 5310 (1976). The House request recited the reasons for seeking the court's advisory opinion: 

The opinion of your Honorable Court in the case of the Commonwealth v. Robert O'Neal indicated that Article 26 of the Massachusetts Declaration of Rights may be found to be more restrictive than the eighth amendment to the Constitution of the United States; and

\ldots Said decision involved only the question of punishment for rape—murder but the language and reasoning of the court could be construed as being applicable to other murders; \ldots

\textit{Id.}

In a letter dated November 16, 1976, the members of the Supreme Judicial Court responded to the House request. Answer of the Justices, 1976 Mass. Adv. Sh. 2621. The Court declined to render the advisory opinion since the 1976 session of the General Court had been prorogued, and, hence, House Bill 5272 was no longer pending in the legislature. \textit{Id.} at 2623.

The substance of House Bill 5272 has been reintroduced in the 1977 legislative session as House Bill 3373, MASS. H.R. Doc. No. 3373 (1977), and a request for an advisory opinion on its constitutionality has again been sent to the Supreme Judicial Court, MASS. H.R. Doc. No. 5429 (1977). In addition, the 1977 session has witnessed the introduction of a number of proposals for capital punishment legislation: MASS. SEN. Doc. No. 643 (1977); MASS. H.R. Doc. No. 4474 (1977); MASS. H.R. Doc. No. 2581 (1977); MASS. H.R. Doc. No. 3560 (1977); MASS. H.R. Doc. No. 4289 (1977). The latter three bills are mandatory in form and may not pass constitutional muster under the federal cases. See text at notes 226-43 supra.}
persons in public by a device usually hazardous to two or more persons; (11) murder during the hijacking or attempted hijacking of a school bus or airplane.\textsuperscript{279}

In respect to rape-murder, as the *O'Neal II* court found, deterrence would not supply the grounds for imposing the death penalty rather than life imprisonment as punishment for this offense. However, two majority Justices in *O'Neal II* indicated that there may be a few homicide offenses, such as murder of a hostage or victim of a kidnapping and murder in connection with an act of terrorism, for which the threat of death is a more effective deterrent than life imprisonment because of the nature of these offenses.\textsuperscript{280} Such homicides may be categorized generally as planned or contemplated offenses, and, at least four of the types of homicides embodied in the aggravating circumstances of House Bill 5272 may be similarly categorized as planned or contemplated: murder of the victim of a kidnapping or attempted kidnapping, murder for hire, murder by one who knowingly caused a great risk of death to two or more persons in public by a device usually hazardous to two or more persons, and murder during the hijacking or attempted hijacking of a school bus or airplane. If the Commonwealth could demonstrate that these murder offenses are more efficaciously deterred by the death penalty than life imprisonment, then the death sentence could be constitutionally imposed under House Bill 5272 upon a jury finding of the aggravating factors which embrace these categories of homicide. The majority Justices also suggested that the crime of murder by a convicted murderer might pass the stringent compelling state interest or substantial public purpose tests\textsuperscript{281} so that a death penalty imposed on the basis of a jury finding that the murder was committed by a convicted first degree murderer might serve as a more effective deterrent than life imprisonment, and, thus, be constitutional. With respect to the other types of homicidal offenses embodied in the House Bill, murder of a police officer, fireman or corrections officer, murder committed in the course of burglary, murder which involved torture, depravity or aggravated battery, murder for monetary gain, or murder committed during armed robbery, the state would, likewise, have the heavy burden of demonstrating that the death penalty for these types of offenses serves more effectively a penal or public goal than would a life sentence. Under House Bill 5272, as in *O'Neal II*, a reviewing court would demand documentation or evidence that is more than "equivocal" that capital punishment fulfills the penal objective of de-


\textsuperscript{280} See text at notes 97 and 101-02 *supra*.

\textsuperscript{281} See text at notes 101-02 *supra*. 

http://lawdigitalcommons.bc.edu/asml/vol1976/iss1/17
terrence in respect to the type of homicidal offense for which it is imposed. 282

House Bill 5272 would not as a whole pass a constitutional attack under the compelling state interest or substantial public purpose tests, unless the Commonwealth could demonstrate that imposing the death penalty for each type of homicide encompassed in the eleven aggravating circumstances served a deterrent purpose or some other public purpose more effectively than would a sentence of life imprisonment. For a few specific types of planned or contemplated homicide offenses, as two Justices suggested, such a demonstration may be made. If so, then the bill might be preserved with only a few enumerated aggravating circumstances under which the death penalty could be imposed. Because the debate among the experts regarding the deterrent effect of capital punishment continues to rage, however, and the end of the empirical battle is not in sight, 283 the evidence which may be produced on the effectiveness of the death penalty as a deterrent may be "equivocal" for all types of homicide offenses. In that case, legislation similar to House Bill 5272 would not comport with the state constitution as interpreted by the Supreme Judicial Court in O'Neal II.

CONCLUSION

By placing the burden on the Commonwealth to justify the imposition of a capital sentence, the majority in O'Neal II made it clear that a

282 One of the legislative responses to the O'Neal II decision has been a proposal for a legislative amendment to the Massachusetts Declaration of Rights which would authorize the imposition of the death penalty under article 26. The article of amendment would add to the end of article 26: "The legislature may for the purpose of protecting the general welfare of the citizens authorize the imposition of capital punishment. No provision of the Constitution shall be construed as prohibiting the imposition of capital punishment." MASS. H.R. DOC. NO. 3385 (1977); MASS. SEN. DOC. NO. 684 (1977).

Under this amendment, the hands of the judiciary would probably be tied with respect to scrutinizing the penological purposes for which capital punishment is imposed by the legislature for any specific type of homicide offense. In a similar situation, the California electorate nullified the California Supreme Court's decision in People v. Anderson, 6 Cal. 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied, 406 U.S. 958 (1972). See note 13 supra. In the November 1972 general election, 67 per cent of the California voters approved proposition 17 which amended the state constitution to declare expressly that capital punishment is not cruel or unusual. CAL. CONST., Art. I, § 27 (effective Nov. 7, 1972). Rockwell v. Superior Court of Ventura County, 18 Cal. 3d 420, 446 n.1 134 Cal. Rptr. 650, 666 n.1 556 P.2d 1101, 1117 n.1 (1976) (Clark, J., concurring).

legislative judgment to enact a death penalty statute will not be accepted without question. The state constitutional standards enunciated by the majority in *O'Neal II* may be applied to guided discretionary capital sentencing legislation enacted hereafter in Massachusetts. Discretionary capital sentencing legislation which includes objective standards to guide the judge's or jury's sentencing discretion, a bifurcated process and expedited and meaningful appellate review procedures, would be likely to meet the federal constitutional requirements expressed by the Supreme Court in *Gregg* and the companion cases. However, it is doubtful whether a guided discretionary capital sentencing bill, such as House Bill 5272, would survive intact a constitutional challenge under the due process guarantees or the cruel or unusual punishments prohibition of the Massachusetts Declaration of Rights, for the *O'Neal II* standards would require an affirmative showing by the Commonwealth that the death penalty satisfies some penal or public purpose more effectively than does life imprisonment for the specific murder offense for which it is imposed.284

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284 Editor's Note: On June 8, 1977, five Justices of the Supreme Judicial Court delivered an advisory opinion to the House of Representatives finding that House Bill No. 3373, the successor bill to House Bill No. 5272, see note 278 supra, would violate the article 26 prohibition of cruel or unusual punishments. Opinion of the Justices, 1977 Mass. Adv. Sh. 1254, 1260.