1973

Furman v. Georgia: A Postmortem on the Death Penalty

Nicholas Scafidi

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation


This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.


**FURMAN V. GEORGIA: A POSTMORTEM ON THE DEATH PENALTY**

I. **INTRODUCTION**

Perhaps no controversy has generated as much attention as that surrounding the imposition of the death penalty. Since the adoption of the Bill of Rights, our Constitution has contained the eighth amendment\(^1\) proscription against those punishments which are "cruel and unusual." Notwithstanding this principle the implementation of capital punishment has been traditionally accepted as a legitimate function of our system of criminal justice.

In order to understand the problem of capital punishment, the social and political background of the movement against capital punishment, both in the United States\(^2\) and abroad, must be examined. Accordingly, before undertaking an analysis of *Furman v. Georgia*,\(^5\) this Comment will undertake a detailed and exhaustive examination of capital punishment as it developed in England and the United States. Such an examination will set the foundation for a critical evaluation of the arguments for and against capital punishment as advanced by the *Furman* Court. The issue of capital punishment cannot be discussed in a legal vacuum, but must be viewed from a moral, social, political, and philosophical, as well as legal, perspective.

With this structural background, this Comment will examine the road to *Furman* — the legislative history and case law which comprises the backbone of the eighth amendment. It is only by a combination of the social and political trends and the legal precedents that *Furman* can be fully appreciated.

After this historical review this Comment will examine *Furman* itself, probably the most lengthy and comprehensive opinion on constitutional law in the last decade, as well as the capstone on a relative handful of eighth amendment precedents. Because of the decision's length, an opinion-by-opinion approach will be utilized in order to insure clarity and cohesiveness.

Lastly, this Comment will analyse the status of the death penalty today and what, if anything, can be done to circumvent the explicit and implicit commands of *Furman*.

---

1. The eighth amendment provides:
   Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
   U.S. CONST. amend. VIII (emphasis added).

2. See notes 42-62 and accompanying text infra.

3. 408 U.S. 238 (1972). Certiorari was granted in *Furman* to determine whether the "imposition and carrying out of the death penalty in [these cases] constitute[s] cruel and unusual punishment." *Id.* at 239. Two other cases involving the same issue were decided with *Furman*. They were *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969), and *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969). Although the *Furman* decision itself was per curiam, it was accompanied by nine separate concurring and dissenting opinions.
II. HISTORICAL BACKGROUND

A. The Death Penalty

The death penalty, to be sure, is not an entity unique to Anglo-American law. Rather, it is an intricate part of man’s inborne psychological need for retribution. In tribal society, for example, one guilty of an offense against another member of that society might have been put to death by the tribe assembled, or by the relatives of his victim. The Bible prescribed capital punishment for fifteen different crimes, although it may be argued that Talmudic law was not static and that the rare imposition of death by the Sanhedrin amounted to almost de facto abolition. However, the penalty was there to serve man’s needs. Roman law also countenanced capital punishment, although it met with criticism and fell into disuse. While man’s desire for retribution must be constantly kept in mind, the focus of this Comment is not on the remote history of the death penalty but rather on the effect of the death penalty on English law. The English law, or more specifically, what some commentators refer to as “The Bloody Code,” was the progenitor of colonial criminal law.

1. Social and Political Background in England

By 1800, the Bloody Code recognized approximately 220 to 230 capital offenses, the exact number probably unknown even to the most astute legal authorities. This unpleasant situation represented a regression from medieval law for, in 1500, English law had recognized only eight capital crimes with the number steadily increasing until the early 1800’s. So numerous were the offenses for which one could be hanged that between 2000 and 3000 persons were said to have been executed between 1810 and 1815. One commentator, Koestler, attributes this proliferation

---

4. It cannot be doubted that the need for retribution has always been an integral reason for man’s punishment of his fellow man. See notes 203-06 and accompanying text infra.


6. The lex talionis is exemplified by the statement: “He that strikes a man with a will to kill him, shall be put to death.” Exodus 21:12.

7. R. Leigh, Man’s Right to Life 31-36 (1960). The restrictions instituted by the rabbis made it virtually impossible to enforce the death penalty. For the procedural aspects of a trial under the lex talionis, see A. Cohen, Everyman’s Talmud (1949).

8. See Green, An Ancient Debate on Capital Punishment, 24 Classical J. 267-75 (1929). The author acknowledged that occasionally there were wholesale executions of political offenders. However, executions were not a regular use of judicial procedure under Roman law from about 384 B.C. Id.


11. T. Plucknett, supra note 10, at 424-54. These crimes were: treason (including attempts and conspiracies), petty treason (the killing of a husband by his wife), murder (killing with malice), larceny, robbery, burglary, rape, and arson.

12. 1 L. Radzinowicz, supra note 10, at 153. It should be apparent that the statistics for this period are less than trustworthy and therefore no definite consensus on this point can be reached.
in the number of capital offenses to three causes: (1) England's lead in the
Industrial Revolution which produced an abundance of social evils whose
surface symptom (much like today) was a rising crime rate; (2) the
traditional English distaste for authority, which prevented creation of a
truly effective police force; and (3) the English Common Law which,
ochoked by precedent, was unable to make any concessions to modern
thought. However correct, these causes hardly justified their distasteful
results.

A conviction for anyone of the myriad capital offenses, whether execu-
tion was carried out or not, resulted in attainder—forfeiture of all real
and personal property to the Crown, and denial of all rights of
inheritance. The usual effectuation of the death penalty was by hanging,
although for some crimes this was considered insufficient.

Executions were always conducted in public. Often they were the
scene of drunken revels, scores of crimes (mostly capital offenses), and
occasionally, a riot. The Bloody Code was, however, considerably emas-
culated by the “benefit of clergy” and the royal prerogative of mercy
(although hundreds of capital offenses were still on the books and frequent
executions continued).

“Benefit of clergy” arose during the struggle between the ecclesiastical
and common law courts concerning jurisdiction over clerics for trial of a

---

13. See A. Koestler, supra note 9, at 23–29. It is to be admitted that Koestler
has little use for the principles of stare decisis or judicial restraint.

14. See The Death Penalty in America 2 (H. Bedau ed. 1968) [hereinafter
cited as H. Bedau]. Although appeal of the death sentence to a higher tribunal was
all but impossible, descendents of the executed criminal occasionally succeeded in
appealing the attainder. Id.

15. H. Bedau, supra note 14, at 2. See generally A. Koestler, supra note 9,
at 9–13.

16. For instance, pirates were executed and their bodies hung on gibbets on the
docks. Those convicted of treason, according to Blackstone, were given a special
sentence:

That you, and each of you, be taken to the place from whence you came,
and from thence be drawn on a hurdle to the place of execution, where you
shall be hanged by the neck, not till you are dead; that you shall be taken down,
while yet alive, and your bowels be taken out and burnt before your faces, that
your heads be then cut off, your ashes scattered to the winds. And may God have
mercy on your soul.

G. Scott, The History of Capital Punishment 179 (1950), quoted in H. Bedau,
supra note 14, at 3.

17. See A. Koestler, supra note 9, at 14–23, wherein the author gives a rather
gruesome dissertation on public executions and the events surrounding them in England.
See also H. Bedau, supra note 14, at 2–3.

18. Thackeray recalled the scene of one such execution:

I must confess . . . that the sight has left on my mind an extraordinary
feeling of terror and shame. It seems to me that I have been abetting an act of
frightful wickedness and violence . . . Forty thousand persons . . . of all ranks
and degrees . . . gather before Newgate at a very early hour: the most part of
them give up their natural quiet night's rest, in order to partake of this hideous
debauchery . . . .

Thackeray, Going to See a Man Hanged, Fraser's Magazine, Aug. 1840, at 156.
Thackeray's reaction to the execution is worthy of note. "I pray God that it may
soon be out of the power of any man in England to witness such a hideous and de-
grading sight." Id.

felony.\textsuperscript{20} In later centuries, "benefit of clergy" was applied to increasingly more defendants for an ever increasing number of felonies in the common law courts. Eventually, all first-time felony offenders were spared execution if their offense was "clergyable;" that is, the accused was made to recite the "Neck Verse" — the first lines of Psalm 52.\textsuperscript{21} As a result, the court could construe the defendant to be literate and hence "clerical." Thus, "benefit of clergy" became an irrational — albeit effective — device for mitigation of sentence. Conversely, "without the benefit of clergy," as later English and American statutes were phrased, meant simply that there was to be no mitigation of sentence, even if it was a first offense.\textsuperscript{22}

A similar effect was obtained by a totally dissimilar practice. The common law trial courts were authorized to recommend mercy to the Crown, represented by the Home Secretary.\textsuperscript{23} Such recommendations were frequently forthcoming since English law recognized no classification of crime and punishment; that is, all felonies were punishable by death. Strangely enough, at the same time that Parliament was increasing the number of capital offenses, the courts’ pleas for mercy were almost uniformly accepted.\textsuperscript{24} As a result, while sentences of death annually ran into the thousands by 1815, the number of executions seldom approached this number.\textsuperscript{25} Instead, many convicted felons were deported to the Colonies.\textsuperscript{26}

Between 1808 and 1837, there apparently occurred a shift in public opinion concerning the traditional use of the death penalty. A reform movement was led by Samuel Romilly.\textsuperscript{27} This reform movement, however, was not founded upon humanitarian grounds, but rather it was founded principally upon the disturbing fact that juries were simply not convicting people whom they would have to sentence to hang for the commission of petty crimes which were deemed felonious under English law. Another example of the shift in public opinion was demonstrated by a petition to the House of Commons by 150 bleaching house proprietors. This petition, remarkably, asked that the heinous crime of "stealing from bleached

\textsuperscript{20}. Id. at 5.

\textsuperscript{21}. Psalm 52 is an assault against a deceitful enemy: Why do you glory in evil, you champion of infamy? All the day you plot harm; your tongue is like a sharpened razor, you practiced deceiver. You love evil rather than good, falsehood rather than honest speech. You love all that means ruin, you of deceitful tongue. \textsuperscript{22}

\textsuperscript{22}. See H. Bedau, supra note 14, at 4 n.6.

\textsuperscript{23}. 1 L. Radzinowicz, supra note 10, at 151-53.

\textsuperscript{24}. H. Bedau, supra note 14, at 4.

\textsuperscript{25}. 1 L. Radzinowicz, supra note 10, at 151-53.

\textsuperscript{26}. A. Koestler, supra note 9, at 38.

\textsuperscript{27}. See J. Christoph, Capital Punishment and the British (1962). Romilly was in the vanguard of a movement led by the Society for the Diffusion of Knowledge upon the Punishment of Death. Several bills were introduced to eliminate hanging as the penalty for petty offenses. Those that passed Commons were invariably rejected by the upper chamber, generally on the same grounds that reform has been opposed in modern times; i.e., capital punishment was the only effective deterrent, no alternative punishment was equally effective, mitigation of the punishment would lead to increased crime, and, in any event, public opinion would not tolerate abolition. See A. Koestler, supra note 9, at 29-30.
grounds" be removed from the list of capital crimes. Their reason was that this crime was all the more rampant because juries refused to convict thieves, and a just sentence might make conviction more palatable and, hence, might serve as a more effective deterrent. This petition induced a host of similar petitions from such diverse groups as the Corporation of London, the bankers of over 200 cities, and even the jurors of London. Each demanded mitigation in felony punishment, arguing that the severity of the law made its enforcement all but impossible and thus abrogated any deterrent effect which the law might possess. Therefore, concluded the petitioners, in the interest of public safety, the least severe sentence, consonant with maximum effectiveness, should be imposed. Although Commons was deluged with more than 12,000 similar petitions, reform was still sluggish. Most resistance to reform finally disappeared when Robert Peel created a truly effective police force. Thus, by 1839, capital offenses were reduced to fifteen.

Although abolitionist activities continued, nothing of significance occurred until 1957, when Parliament further reduced the number of capital crimes, introduced the concept of diminished responsibility, and empowered a judge in sentencing to set a minimum number of years to be served before parole. Finally, in 1965, after several years of critical study, the death penalty was legislatively abolished in England.

2. Social and Political Background in the United States

The fledgling American Colonies, of course, had no uniform criminal law. Rather, each colony formulated its own laws, and thus, the range and variation of capital crimes should not be surprising. For example, in Massachusetts, the extent of the imposition of the death penalty in its early colonial period is not known. However, by 1785, largely because of

28. See 1 L. Radzinowicz, supra note 10, at 727; A. Koeßler, supra note 9, at 31.
29. 1 L. Radzinowicz, supra note 10, at 727; J. Christoph, supra note 27, at 16.
30. This deluge of petitions resulted in the decision by Commons in 1819 to appoint a Select Committee to examine English criminal law. The recommendations of the Select Committee were moderate: maintenance of the death penalty for certain offenses against personal property and repeal of obsolete statutes and abandonment of others. See A. Koeßler, supra note 9, at 31–32. However, little reform was achieved because of the continued vigorous opposition of the House of Lords. See note 27 supra.
31. See A. Koeßler, supra note 9, at 33. See also J. Christoph, supra note 27, at 17. Apparently, the more effective police force was responsible for a reduction in the crime rate. This accomplished, there was no longer as much need for hanging as a deterrent.
32. See T. Thomas, This Life We Take (1970).
33. Id. The ban was imposed as an interim gesture even though 79 per cent of Britains then opposed abolition or were uncertain of what position to assume. Abolition was made permanent in 1969.
practical necessity, the number of capital offenses in Massachusetts was reduced to nine.35

New Jersey and Pennsylvania originally adopted far less stringent capital statutes. The Royal Charter of South Jersey, drafted in 1646, made no mention of capital offenses.36 Pennsylvania, pursuant to the Great Act of 1682,37 specifically condemned the death penalty, except for treason and murder. These colonial efforts to mitigate punishment were, however, severely retarded when the Crown imposed a far harsher penal code on the Colonies.38

As a result, by the time of the Revolution, the capital statutes of the Colonies were roughly similar.39 While there was a relatively low number of capital crimes, this was probably due, in large part, to the practical need for labor.40 That there were any capital crimes at all was probably because there were few prison facilities; hence, the only way to insure public security from the very worst offenders was to execute them.41

a. The Reform Movement

(i) The Seed

Reference has already been made to the harsh penal code imposed on the Colonies by the Crown in 1718.42 The failure of this code was noted by William Bradford, the Attorney General of Pennsylvania, who observed that the earlier, milder code of offenses had not resulted in any more serious crimes than that which occurred under the harsher laws.43 Moreover, by the mid–1700’s, Beccaria had published his Essay on Crimes and Punishments44 calling for an abolition of the death penalty.45

35. These were: treason, piracy, murder, sodomy, buggery, rape, robbery, arson, and burglary. See Capital Punishment in the United States, LAW REPORTER, March 1846, at 487, cited in H. BEDAU, supra note 14, at 5-6.

36. H. BEDAU, supra note 14, at 6. In 1691, New Jersey carried out its first execution. The incident is interesting for it involved an attempt to detect the murderer by “the right of bier.” The “theory” was that if the murderer were brought near his victim’s coffin, the corpse would bleed and thus identify the culprit. See REX ET REGINA v. LUTHERLAND (J. SICKLER ed. 1948).

37. The Great Act was written by William Penn and showed concern for prison conditions as well as reform of punishments. See Filler, Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124 (1952).

38. H. BEDAU, supra note 14, at 6; Filler, supra note 37, at 124.

39. Benefit of clergy was rarely allowed and hanging was the usual mode of execution. See G. DALZELL, BENEFIT OF CLERGY IN AMERICA (1955).

40. See Filler, supra note 37, at 124.

41. Id. See generally McMaster, Old Standards of Public Morals, ANNUAL REP. AM. HIST. ASS’N 55, 67-70 (1905).

42. See note 38 and accompanying text supra.

43. W. BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 14 (1793).

44. Apparently, Bradford, like many of his contemporaries, came to his conclusions after reading Beccaria. See text accompanying note 51 supra. Beccaria argued that the severity of capital punishment was its own undoing. Therefore, in order that any punishment be just, it should carry only that degree of intensity sufficient to deter crime. C. BECCARIA, ON THE PENALTY OF DEATH (1764). This concept shall be hereinafter referred to as the “minimum effective deterrent.”

45. It is clear that his work, along with that of Montesquieu, Voltaire, and Bentham — all reformists and abolitionists — made a profound impression on American readers. Filler, supra note 37, at 124-25.
In 1787, Dr. Benjamin Rush prepared a paper which, in substance, recommended the construction of a penitentiary, a "house of reform," to remove criminals from the streets and to rehabilitate them.\(^{46}\) A short time later, Rush wrote *Considerations on the Injustice and Impolicy of Punishing Murder by Death*, which urged the abolition of the death penalty.\(^{47}\) Several other pamphlets advocating the same cause followed in which Rush relied heavily on Beccaria's arguments which drew support from Scripture, inherent limitations on governmental power, and an argumentative disclaimer on the deterrent effect of capital punishment.\(^{48}\)

Soon, other prominent Pennsylvanians, notably Benjamin Franklin and William Bradford, joined, to some extent, the abolitionist movement.\(^{49}\) By 1793, Bradford was satisfied that capital punishment did not deter crime and that, in any event, it was not an easy matter to obtain a conviction in a capital case.\(^{50}\) However, Bradford did not advocate total abolition of the death penalty. Rather, in 1794, he persuaded the Pennsylvania legislature to employ a legal distinction between murder in the first and second degrees. From that date, all capital crimes, except murder in the first degree, were abolished in Pennsylvania.\(^{51}\) However, these fledgling reforms in Pennsylvania bore little fruit in other states.

(ii) Reform

The rising tide of social, political, and intellectual reform in the 1830's was not altogether lost on penology. In 1834, Pennsylvania abolished public executions and the legislatures of several states were besieged with petitions urging the abolition of capital punishment;\(^{52}\) furthermore, abolitionist societies became predominant in the American struggle for social reform.\(^{53}\) The zenith of the movement was reached in the 1840's when the rising sentiment against capital punishment, the refusal of juries to convict in capital cases, and the expanded use of executive clemency, forced several states to repeal the death penalty for almost all crimes,\(^{54}\)

\(^{46}\) H. B**e**dau, supra note 14, at 8. Although concerned mainly with criminal reform, this paper contained the first reasoned authority for the abolition of the death penalty in America. Not surprisingly, it drew sharp criticism and rebuttal from other figures of the time. Filler, supra note 37, at 125.

\(^{47}\) This essay was published in 1792 in answer to the criticism generated by Rush's earlier essays. Rush is usually credited with being the forerunner of the abolition movement in the United States. H. B**e**dau, supra note 14, at 7-8; Filler, supra note 37, at 125.

\(^{48}\) Besides echoing Beccaria's thoughts (see note 44 supra), Rush referred to the experiences of other jurisdictions which had already abolished the death penalty. See Filler, supra note 37, at 125-26; H. B**e**dau, supra note 14, at 8. This heralded one facet of the approach which the Supreme Court was to take in later eighth amendment cases. See notes 99-139 and accompanying text infra.

\(^{49}\) H. B**e**dau, supra note 14, at 8.

\(^{50}\) Id.


\(^{52}\) Filler, supra note 37, at 127.

\(^{53}\) H. B**e**dau, supra note 14, at 9.

\(^{54}\) In New York, Massachusetts, and Pennsylvania, abolition bills were constantly before the legislatures. In 1847, Michigan abolished the death penalty, except for treason, followed by Rhode Island in 1852, Wisconsin in 1853, and Maine in
while several states replaced death with life imprisonment for several crimes. By the 1850's only murder and treason were uniformly punished by death. However, the immediacy of the rising anti-slavery campaign sapped the moral and political energy of reformers and the abolitionist movement rapidly lost its momentum.

The post-Civil War era began with deceptive encouragement to the abolitionists. Perhaps the most important achievement during this period was in the area of federal reform. Congress was persuaded, in 1897, to reduce the number of capital offenses to three — treason, murder, and rape — along with those prescribed in the Army-Navy Articles of War. In addition, federal juries, in cases of murder or rape, were given discretion to withhold capital punishment, in which event the sentence was life imprisonment at hard labor.

From 1900 to 1914 the emphasis was more on reform of prisons than on reform of punishments. Even during this period, however, eight states abolished the death penalty for murder and most other crimes.

By 1921, several previously abolitionist states had returned to the death penalty. Accompanying the period of prohibition was an almost total collapse of law enforcement. Accordingly, there was evidenced a significant and virulent anti-abolitionist sentiment. However, the reform movement was not yet dead. Although the abolitionist movement did little more than hold its grounds over the next few decades, the cause began to gain new ground during the 1950's, especially in the two dozen retentionist states, and it culminated, of course, in 1972 with Furman.
b. American Trends in Capital Punishment

In order to understand fully the Furman decision and what it will mean to our system of criminal justice, it is crucial that one gain some insight into how capital sentences are imposed and carried out in the United States. This country, unlike any other, has developed certain trends in capital punishment which account for much of the apathy and insensitivity surrounding the death penalty. These trends are certain advanced methods of execution, privacy of execution, degrees of murder, and, most importantly, jury discretion. After a general discussion surrounding these phenomena, they shall be discussed seriatim. As one progresses through the analysis of the eighth amendment and that of the instant case, it is important to keep these American trends in mind so that the full ramifications of Furman will be appreciated.

(i) General Background

The failure of the reform movement to achieve its goals by means of legislation could be attributed to many causes. First, the sentiments and arguments utilized by the abolitionists are those of compassion and logic, and there is in all of us a remainder of our unsocialized past which will not be moved by these factors. Second, few Americans of any generation have taken the necessary time to inform themselves of the actual use (or abuse) of the death penalty. Third, support for the death penalty seems to rest largely on attitudes inherent in human emotion and, therefore impervious to rational persuasion. Last, and most important, the very trends of execution in America, the result, for the most part, of hard fought reforms won by the abolitionists, have become the major obstacles to complete legislative abolition. These reforms have removed from public view the rigidity and structured brutality of state-imposed death to the point where the average citizen does not regard the execution of a criminal as an affront to morality. Therefore, the moral sensibilities of the average man — the key to reform — are no longer aroused by the cold, impersonal destruction of a human being. Nevertheless, each of these reforms was a product of American penology and each was an integral part of our system of capital punishment as it existed. 64

(ii) Methods of Execution

It is rather depressing to note the ingenuity which man has shown in arriving at a method by which to eradicate his fellow man. There can be little doubt that had flaying and impaling, crucifixion, drawing and quartering, or pressing to death, survived in the development of American law, public reaction would have banned capital punishment long ago. However, Americans traditionally opted for the more genteel method of

64. Id. at 13-15.
hanging, later superseded by electrocution, and finally by cyanide gas. These modern methods may have reduced, but have certainly not negated, the physical pain connected with state-imposed death. Moreover, the plight of the criminal so sentenced is more easily put out of mind since he is out of sight.

(iii) Privacy

Traditionally, executions were held in a public place in order to increase the alleged deterrent effect. However, this deterrent effect was seemingly overrated. The classic tale is that pickpockets plied their most effective trade at the foot of the gallows which was occupied by one of their former companions.

Nevertheless, public executions continued well into the 1800's. New York became the first state to prohibit public executions, and several other states soon followed its lead. Today, most states vest the warden with much discretion regarding whom to invite to an execution.

Privacy of execution has resulted in a kind of auto-amnesia of the public. The average citizen does not know, much less care, what the state is doing — presumably to protect him — in executing a criminal.

65. The constitutionality of electrocution was upheld in In re Kemmler, 136 U.S. 463 (1890). See text accompanying notes 108-10 infra. Kemmler was the first man to be electrocuted in the United States. H. Bedau, supra note 14, at 17.

66. Cyanide gas was introduced as a method of execution in Nevada in 1921. See supra at 18.

67. For a record of bungled executions in which there was undoubtedly much physical pain, see B. Prettyman, Death and the Supreme Court 105 (1961). It has been argued that all contemporary methods of execution are unnecessarily archaic, inefficient, cruel, and degrading. See King, Some Reflections on Do-It-Yourself Capital Punishment, 47 A.B.A.J. 668 (1961). Moreover, after careful examination, the Royal Commission was unable to find that either electrocution or cyanide had any humane advantage, in terms of pain inflicted, over hanging. The Commission did recommend that a lethal injection administered by a physician would be most efficacious, but British doctors were aghast at the idea. See Royal Commission on Capital Punishment: 1949-1953 Report, 256-58 (1953) [hereinafter cited as Royal Commission].

68. See notes 17-18 and accompanying text supra.

69. See H. Bedau, supra note 14, at 20.

70. Id. at 21.

71. Id. However, as late as 1936, a hanging in Kentucky attracted 20,000 interested onlookers. This was the last recorded manifestation of uninhibited tribal brutality in the United States. Teeters, Public Executions in Pennsylvania: 1682 to 1834, J. Lancaster County Historical Soc'y, Spring 1960; at 117. This type of behavior in seemingly normal men may serve as an argument against capital punishment. That is, delight in brutality, pain, violence, and death may always be with us, but surely we must conclude that these impulses ought not be encouraged by the law.

72. Most announcements of executions bring on a flood of requests. If the condemned is a cause célèbre, the mass media sends its representatives and the total can often swell to several dozen. This was the case in the executions of the Rosenbergs in 1953 and Caryl Chessman in 1960. H. Bedau, supra note 24, at 22. One warden has described some of the hundreds of applications he had received to view executions. L. Lawes, Life and Death in Sing Sing 168 (1928).

73. The former warden of San Quentin suggested that executions be televised in order to shock and thus educate the public. C. Duffy, 88 Men and 2 Women 21
curious phenomenon is made possible, to some degree, by the belief that capital punishment is not the dreadful event it once was. When the number of capital sentences decreased and the number of executions approached an all-time low, most Americans no doubt comforted themselves in the erroneous belief that death was imposed only on the most heinous of criminals.

(iv) Degrees of Murder

It is important to note that today, in most jurisdictions, the crime of murder, for which death has been the traditional punishment, is but one facet of homicide. However, at common law, murder was not categorized by degree, and all homicide which was not provoked, justified, or excused was a capital offense. Today, most states, including Pennsylvania, classify murder by degrees in order that the jury might reserve death for only the gravest offenders.

However, it is debatable whether the modern standards of malice, willfulness, and premeditation, all elements of first degree murder, could ever be understood adequately by a jury of laymen. Moreover, distinction by degrees can lead to the anomalous result of the hardened criminal going to prison while the first offender is sentenced to death.

(1962). However, the existentialist Camus has suggested at least one rationale for this aberrant desire for secrecy:

[P]ublicity . . . runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute men one after another . . . if those executions were translated into vivid images in the popular imagination. The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail. A. CAMUS, Reflections on the Guillotine, in RESISTANCE, REBELLION AND DEATH 133 (1960).

74. This, of course, is a misconception. Neither electrocution nor cyanide gas has made executions any more palatable to watch. The distasteful details are chronicled in The Case Against Capital Punishment, supra note 54, at 29–40.


76. 4 BLACKSTONE, COMMENTARIES 194 (E. Christian ed. 1809).

77. The distinction, proposed by Rush and advocated by Bradford, has survived to the present day. Pa. Stat. tit. 18, § 4701 (1963) provides in part:

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree.

All other kinds of murder shall be murder in the second degree.

Interestingly enough, the vast majority of executions in this country since 1930 have been for murder. Of the 3859 executions reported between 1930 and 1968, 3334 have been for murder. U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: CAPITAL PUNISHMENT — 1930-1968, at 107 (1969) [hereinafter cited as STATISTICS I]. There are no reliable statistics available on the breakdown between simple murder and felony-murder.

78. See B. CARDOZO, LAW AND LITERATURE 100 (1931).

79. Consider the situation where an otherwise respectable, law-abiding person murders his next door neighbor, while a multiple felon on parole engages in a barroom brawl as a result of which he recklessly causes the death of one of his adversaries. In the former case, the first offender may receive the death sentence, while in the latter, since the act was one of recklessness and not premeditation, it is murder in the second degree and punishable by imprisonment. Yet, commonsense would seem to dictate that an opposite result obtain.
These considerations involving the ability to efficaciously separate murder into degrees led the British Royal Commission on Capital Punishment to observe:

'[I]t must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux . . . is that any legal definition must be expressed in terms of objective characteristics of the offence, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion.\(^{80}\)

In addition to the introduction of degrees of murder, the Pennsylvania legislature was responsible for the introduction of the concept of felony murder,\(^{81}\) apparently for the laudable purpose of punishing the most offensive criminals. However, as felony murder became more widely accepted, it suffered drastic legal expansion, both in the class of felonies to which it applied and in the circumstances surrounding its application.\(^{82}\) Thus, it was not uncommon that exactly the opposite effect resulted as that for which it was intended; that is, instead of restricting the use of the death penalty, it was appreciably expanded.

\((v)\) Jury Discretion

Under English law, conviction of any felony was accompanied by the automatic imposition of death. The defendant was simply found guilty and sentenced to death or he was acquitted and released. The inability of this system to function effectively was due to its innate harshness and concomitant inability to secure convictions.\(^{83}\) In order to make the punishment more effectively fit the crime, it was necessary to mitigate the sentence to something less than death whenever possible. Thus, mandatory death penalties were subsequently abolished, and judges or juries were given the discretion to impose the sentence of death or, in the alternative, some lesser statutorily prescribed penalty.\(^{84}\) Moreover, this scheme insured the additional benefit of somewhat curtailing the executive prerogative of clemency and, in a very real way, substituted the more democratic popular will of the community.\(^{85}\) This, it would seem, was the real value of lodging discretion in the jury. As of 1967, twenty-two states had, by statute, made the imposition of death optional with the judge or jury. It is interesting to note that while the efficacy of capital punishment was continually debated, discretionary juries were almost universally accepted.\(^{86}\)

\(^{80}\) ROYAL COMMISSION, supra note 67, at 173.

\(^{81}\) See note 77 supra.


\(^{83}\) See notes 27-30 and accompanying text infra.


\(^{85}\) H. BEDAU, supra note 14, at 27.

\(^{86}\) Id. at 28-29.
Of all the persons under criminal sentence in 1967, only about 1 in 1000 faced a capital sentence. However, there are no national statistics which indicate whether the defendant fared better from a judge or jury. It is a fact, however, that most states, through their juries, used the death penalty so infrequently as to amount to almost \textit{de facto} abolition, although the reason for this phenomenon remains unclear.

\textit{B. The Eighth Amendment}

\textbf{1. History in English Law}

The eighth amendment was adopted in 1791 and provides:

\textit{Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.}\footnote{89}

Although included in the Bill of Rights, the origin of the cruel and unusual punishments clause is somewhat obscure, and there is but a scintilla of evidence regarding the decision of the Framers to include it among the restraints imposed on the federal government.

However, it is certain that the eighth amendment’s proscription had its derivation in English law. In the late 1500’s the Archbishop of Canterbury, through the ecclesiastical court (the High Commission), began the use of torture in order to extract confessions from suspects.\footnote{90} Soon, this procedure was extended to those already convicted of crimes, with death being the usual result. In 1685, the treason trials of the Duke of Monmouth — the Bloody Assize — culminated in a ghastly ritual of torture which probably spurred the inception of the English Bill of Rights in 1689.\footnote{91}

The last draft of the English Bill of Rights contained a proscription against “cruel and unusual” punishment.\footnote{92} Some commentators insist that the legislative history of the English Bill of Rights supports the proposition that it was not a reaction against torture or cruel sentences. Rather, they assert, the Bill was concerned with punishments inflicted without the authorization of statute and, hence, outside the jurisdiction of the courts, and with those punishments which were disproportionate to the...
offense. It is submitted, however, that the two views are not necessarily antithetical. The thrust of the Bill seems to have been against punishments which were excessive, a view which may lend support to both propositions. That is, punishments could be considered excessive when not supported by statutory authority as well as when they are disproportionate to the nature of the crime committed. Therefore, punishments could be excessive both in kind (without authority) and in degree (too severe).

2. Legislative History of the Clause

Initially, it must be noted that the Framers adopted the language of the English Bill of Rights and inserted it verbatim in the Constitution. Thus, one can begin with the assumption that, at the very least, the Framers intended to outlaw torture and other physically cruel punishment. The fact that the clause is one of those restraints imposed on the federal government indicates that the Framers were influenced by the cruelty which had been exercised by the Crown.

Unfortunately, the purpose of the clause was never really debated by the Framers. At the Massachusetts Convention, Mr. Holmes referred to "the most cruel and unheard-of punishments." This was echoed by Mr. Henry at the Virginia Convention when he spoke of "tortures, or cruel and barbarous punishment[s]." The focus of the debates, however, was not on the precise delineation of what was to be prohibited, but rather on the inherent necessity to restrain legislative power to punish. In the national debate over the adoption of the Bill of Rights, the focus was again on the need to restrain the exercise of legislative power.

While it is clear that the evidence does not unequivocally support the view that the Framers intended to ban only torturous punishments, it is also clear that no one knows exactly what the Framers considered to be cruel and unusual punishments. Thus, the import of the clause, based on its legislative history, is, at best, vague and indefinite and for guidance one must turn to the case law.

3. Precedent

Almost 80 years passed before the Supreme Court had occasion even to make reference to the clause. In Pervear v. Commonwealth, the
language of the clause received only cursory examination, with the Court concluding simply that the eighth amendment did “not apply to State but to National legislation.”

The Court did not squarely address the clause until the case of Wilkerson v. Utah. Wilkerson was convicted of murder and sentenced to be executed by firing squad in public. The challenge in Wilkerson, however, was not against the penalty itself, but rather against the way in which it was to be effectuated. After examining the statute, territorial history, current writings, and analogous practices in other jurisdictions, a unanimous Court rejected the contention that the means was cruel and unusual. In examining the words “cruel and unusual,” the Wilkerson Court observed:

[B]ut it is safe to affirm that punishments of torture . . . and all others of the same line of unnecessary cruelty, are forbidden . . .

It is submitted that Wilkerson properly stands for a dual proposition. First, implicit in the Court's language is the principle that the meaning of “cruel and unusual” will be defined, to some extent, by developing thought. Second, there is a distinction, and a fortiori a difference, between a punishment which is torturous and one unnecessarily cruel, although the eighth amendment applied to both. Unnecessary cruelty is that which is excessive; that is, beyond the bounds of what is needed to punish effectively. Thus, the eighth amendment proscription applies not only to punishments which are inherently cruel (torturous), as measured by developing thought, but also to those which are excessive.

The next case to address itself to the clause was In re Kemmler. Kemmler was sentenced to be electrocuted in 1889 and alleged that this...
mode of punishment was "unusual" within the literal meaning of the eighth amendment. However, Kemmler did not argue that the eighth amendment applied to the states, but rather that the privileges and immunities clause of the fourteenth amendment contained an identical restraint. A unanimous Court rejected this contention and once more held that the eighth amendment did not apply to the states. In an attempt to define "cruel," the Court stated:

Punishments are cruel when they involve torture or 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 mere extinguishment of life.

Although the holding was based on non-incorporation, the analysis in Kemmler was based on the fourteenth amendment. The Court took solace in the state's legislative intent to utilize this method of execution in order to minimize pain. Therefore, Kemmler seemingly stands for the proposition that a punishment is not, of necessity, "unusual" in the constitutional sense if the legislature had a humane purpose in selecting it. In short, such a punishment is not excessive either in degree or kind.

Two years later, the Court in O'Neil v. Vermont reaffirmed its position that the eighth amendment did not apply to the states. In O'Neil, the defendant was found guilty of 307 counts of illegal liquor sales. He was fined on each count and, alternatively, if the fine was not paid, he was to spend over 54 years in prison at hard labor. Although the majority upheld the sentence, three Justices vigorously dissented, arguing not only that the eighth amendment applied to the states, but also that O'Neil's sentence was violative of the amendment. Justice Field's analysis previewed what was to come later:

It [the sentence] was one which, in its severity, considering the offense of which (O'Neil) was convicted, may justly be termed unusual and cruel.

After analyzing the crime of the defendant, Justice Field observed:

The inhibition [cruel and unusual] is directed . . . against all punishments which by their excessive length or severity are greatly disproportionated to the offenses charged.
The approach advocated by the O'Neil dissenters was later utilized by a majority of the Court in *Howard v. Fleming.*115 There, the Court examined the three factors that were to comprise the standard approach in cases under the clause: (1) the nature of the crime charged; (2) the purpose of the law; and (3) the length of the sentence imposed.116

With these cases as a background, the first landmark case under the eighth amendment arose in *Weems v. United States,*117 where the Court for the first time invalidated a penalty as violative of the eighth amendment. In that case a minor officer of the United States Government in the Philippines was charged with falsifying government documents. He was sentenced to fifteen years at hard and painful labor while chained hand and foot, to loss of his civil liberties forever, and to perpetual surveillance. The Court recognized that the eighth amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice."118 With this in mind, the Court examined the nature of the offense, the purpose of the law, and the sentence actually imposed. The Court found:

"[The sentence] is cruel in its excess of imprisonment and that which accompanies and follows . . . . It is unusual in its character. Its punishments come under the bill of rights, both on account of their degree and kind."119

*Weems* was a landmark case for three distinct reasons. First, it was the first decision by the Court holding a legislatively enacted punishment cruel and unusual. Second, it established that the clause was to be continually redefined in light of contemporary morals and justice. Clearly, then, what the Framers intended to ban does not, of necessity, exhaust the list of punishments actually forbidden at any given point in time.120 Third, it established that punishments which are excessive in degree are as objectionable as those excessive in kind or inherently cruel.

Although the *Weems* approach was followed in two subsequent cases,121 nothing of significance was added to the scope of the eighth amendment

---

115. 191 U.S. 126 (1903).
116. *Id.* at 135–36 (dicta). The Court, however, dismissed the petition for want of a federal question. *Id.* at 137.
118. *Id.* at 378.
119. *Id.* at 377 (emphasis added). The proscription against cruel and unusual punishment in *Weems* was found in the Philippine Bill of Rights. However, it was borrowed from the United States Constitution and the same meaning attached to both. *Id.* at 367.
120. Consider the fact that whipping, branding, pillorying, and cutting-off an ear were standard punishments even after the Constitution was adopted. *See* 408 U.S. at 430 (Powell, J., dissenting). Clearly, the Framers did not intend to abandon them. But who would argue that cutting-off an ear or 100 lashes would today not be considered cruel and unusual? It is submitted that death deserves no less concern and in fact should be afforded a great deal more.
until United States ex rel. Francis v. Resweber. \(^{122}\) Francis was convicted of murder and sentenced to be electrocuted. Because of a malfunction, he unfortunately failed to expire as expected, and the state sought to attempt another execution. Eight members of the Court found that the eighth amendment applied to the state. \(^{123}\) However, the majority held that Francis would not suffer excessive pain in the subsequent execution and, hence, it was to be permitted. \(^{124}\) It is important to note that the initial sentence of death was not challenged by the Court:

> We find nothing . . . which amounts to cruel and unusual punishment in the constitutional sense. The case . . . does not call for an examination into any punishments except that of death. \(^{125}\)

Confining the clause to punishments which inflicted unnecessary pain and thereby impliedly asserting that the point at which capital punishment offended contemporary morals and justice had not yet been reached, the Court stated:

> The cruelty against which the Constitution protects . . . is cruelty inherent in the method of punishment, not the necessary suffering . . . employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution. \(^{126}\)

Although Resweber followed the Weems approach, it is of some significance that the case did not address itself to punishments excessive in degree. Resweber accepted without argument the validity of the death penalty and limited its discussion to the manner of imposition. However, this did not foreclose subsequent inquiry, for Weems had made clear that continual reevaluation of the clause was necessary if new conditions and views adopted by a progressing society were to be given credence. \(^{127}\)

Therefore, it is submitted that Resweber did not summarily reject the invalidity of punishments excessive in degree, but merely found, sub silentio, that the point had not yet been reached where the mental pain of a defendant awaiting execution could be considered.

\(^{122}\) 329 U.S. 459 (1947).

\(^{123}\) The Court stated that "the Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner." Id. at 463.

\(^{124}\) This finding is extraordinary in view of how one witness described the event:

> Then the electrocutioner turned on the switch and when he did Willie Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: "Take it off. Let me breathe."

\(^{125}\) The Case Against Capital Punishment, supra note 54, at 36. See 329 U.S. at 480 n.2 (Burton, J., dissenting).

\(^{126}\) 329 U.S. at 463. Apparently, this was bad grammar. The Court did not mean that it was examining the death penalty, per se, but rather whether Francis could be subjected to the penalty for a second time consonant with the eighth and fourteenth amendments.

\(^{127}\) Id. at 464 (emphasis added).

\(^{128}\) See notes 117–20 and accompanying text supra.
Trop v. Dulles\textsuperscript{128} marked the next major case under the clause. In Trop, the validity of the death penalty itself was not at issue. The Chief Justice made this clear when he stated:

\[ \text{[L]et us put to one side the death penalty as an index of the constitutional limitation on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.} \textsuperscript{129} \]

Note, however, that the Chief Justice implied that the death penalty was to be continually reexamined. To effectuate this process, the Court refined the Weems standard which guides inquiry regarding the clause:

The amendment must draw its meaning from the \textit{evolving standards of decency that mark the progress of a maturing society}.\textsuperscript{130}

Four years later the Court, in Robinson v. California,\textsuperscript{131} reemphasized this standard by declaring invalid, on eighth amendment grounds, a state statute making one's \textit{status} as a narcotic addict criminal, even though no drugs had been consumed in the state. In Robinson, the Court stated that the clause was not a static concept, but one which required continual reexamination “in the light of contemporary human knowledge.”\textsuperscript{132} Robinson crystallized the Court's intent to examine and declare invalid punishments which, even though widely accepted and approved, anteceded the point to which society had developed in dispensing justice. This is not necessarily contradictory since what the average layman believes is not at issue. Rather, the focus is upon the point of contemporary knowledge and decency which a progressive, enlightened society as a whole has reached.\textsuperscript{133} To proceed otherwise would be to emasculate the clause and hold it in a state of inertia suspended at 1791.

4. \textbf{Relation to Jury Discretion}

Before leaving the historical analysis of the eighth amendment, the area of jury discretion merits note. It has already been suggested that a peculiar characteristic of the death penalty in America is the extension of unabashed discretion to the jury in imposing the sentence of death or

\begin{itemize}
  \item \textsuperscript{128} 356 U.S. 86 (1958).
  \item \textsuperscript{129} \textit{Id.} at 99 (emphasis added).
  \item \textsuperscript{130} \textit{Id.} at 101 (emphasis added).
  \item \textsuperscript{131} 370 U.S. 660 (1962).
  \item \textsuperscript{132} \textit{Id.} at 666. In Powell v. Texas, 392 U.S. 514 (1968), the Court affirmed a state conviction for drunkenness in a public place. Although the defendant was an alcoholic, the Court distinguished Robinson. \textit{Id.} at 532-34. However, four Justices felt that Robinson was controlling. \textit{Id.} at 566-70 (Fortas, J., dissenting). At the very least, Robinson and Powell removed any doubts that the eighth amendment applies to the states. Moreover, the analysis in Powell followed that of Robinson in continually seeking to redefine the concepts of cruel and unusual.
  \item \textsuperscript{133} See notes 204-14 and accompanying text infra.
\end{itemize}
some lesser sentence. This factor is especially significant since each of the statutes involved in Furman was of this type. In McGautha v. California, this untrammelled jury discretion was attacked as a violation of due process since juries are provided no standards to guide their decisions. The Court rejected this contention holding:

In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that committing to the discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

In so holding, the Court reasoned that juries recognize the awesome responsibilities which face them in a capital case and act accordingly. More importantly, the Court recognized the insurmountable difficulty inherent in attempting to define categorically the factors which should influence a sentencing jury. In a concurring opinion, Justice Black added his historical view of the death penalty:

[T]hese words [cruel and unusual] cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and . . . at the time the Amendment was adopted.

IV. Furman v. Georgia — An Analysis

A. Factual Setting

In Furman, three cases were consolidated by the Court, but in each the factual setting was vastly different. Jackson, a Black, was convicted of the rape of a young White woman. A psychiatrist found Jackson of average intelligence and competent to stand trial, attributing Jackson’s criminal traits to environmental influences. Jackson’s victim was bruised but not permanently harmed, either physically or mentally.

Furman, a Black, murdered a householder while attempting to burglarize the house. He entered a plea of insanity but was found not to be a psychotic. However, he did suffer psychotic episodes associated with a convulsive disorder. The fatal shot was allegedly fired through a closed door when Furman, running away, tripped over a wire.
Branch, a Black, raped an elderly White woman, threatening to return and kill her if she reported the assault. Branch, a borderline mental deficient of dull intelligence, well below that of the average Texas prisoner, had only received the equivalent of 5½ years of grade school education.\textsuperscript{142}

Although the factual settings of each crime were dissimilar, there were key items of similarity. Each was convicted and sentenced to death. Each sentence was imposed by a jury. Each jury was empowered by state statute\textsuperscript{143} with complete discretion to sentence to death or imprisonment. The grant of certiorari\textsuperscript{144} was limited to the imposition and carrying out of the death penalty in these\textsuperscript{145} cases. At the outset, therefore, it is important to note that \textit{Furman} apparently applies only to cases where the death sentence has been imposed by a jury statutorily empowered with discretion.\textsuperscript{146} However, two of the five concurring Justices went further than this limited issue.\textsuperscript{147} Because of their importance to the impact of \textit{Furman} and the divergence among them, the five concurring opinions shall be discussed separately.

---

\footnotesize
\textsuperscript{142} 408 U.S. at 253 (Douglas, J., concurring). Branch's conviction for rape and the sentence of death were affirmed in Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969).

\textsuperscript{143} Jackson was convicted of rape and sentenced to death pursuant to GA. CODE ANN. § 26-1302 (Spec. Supp. 1971), which provided:

The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life.

This section was repealed and replaced, after July 1, 1969, by GA. CODE ANN. § 26-2001 (1971), which provides in pertinent part:

A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape based on the unsupported testimony of the female.

\textit{Furman} was convicted of murder and sentenced to death pursuant to GA. CODE ANN. § 26-1005 (Spec. Supp. 1971) which provided:

The punishment for . . . murder shall be death, but may be confinement in the penitentiary for life . . . if the jury . . . shall so recommend . . . .

This section was effective before July 1, 1969. After that date, GA. CODE ANN. § 26-1101 (1971) was amended to provide:

\textit{c} A person convicted of murder shall be punished by death or by imprisonment for life.

Although the new statute makes no provision for recommendation of sentence by the jury, the Committee notes make clear that this is still the procedure to be followed. \textit{See id. (annot.).}

Branch was convicted of rape and sentenced to death pursuant to TEX. PENAL CODE art. 1189 (1961) which provides:

A person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or by any term of years not less than five.

Although it does not specifically so state, this statute is interpreted to grant discretion to the jury. \textit{See, e.g.,} Head v. State, 267 S.W.2d 419 (Tex. Crim. App. 1954). Of course, these statutes were all invalidated as a result of \textit{Furman}.

\textsuperscript{144} 403 U.S. 952 (1971).

\textsuperscript{145} The precise question was framed:

Does 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?

\textit{Id.}

\textsuperscript{146} \textit{See} notes 83–88 & 140–42 and accompanying text \textit{supra}.

\textsuperscript{147} \textit{See} notes 148–77 & 196–241 and accompanying text \textit{infra}.
B. The Concurring Opinions

1. Justice Brennan

(a) Indicia of Cruel and Unusual Punishment

Justice Brennan's analysis of the clause and its compatibility with capital punishment was grounded on four factors. First, a punishment may be cruel and unusual if it does not comport with human dignity.\footnote{148} This overriding principle is but an expression of excessiveness; that is, a punishment cannot be so severe as to be degrading to the dignity of human beings. While this proscription on degrading punishment encompasses torture, \textit{Weems} had indicated that degrading punishments may also entail severe mental pain,\footnote{149} while \textit{Trop} had indicated that no physical suffering is necessary to render a punishment invalid.\footnote{150} Death, in its totality and finality, treats humans as non-humans, as objects to be discarded. Thus, all capital punishment is degrading to the dignity of man.\footnote{151}

Second, and concomitant with the dignity of man, is the elementary principle that the state may not \textit{arbitrarily} inflict punishment on a criminal.\footnote{152} The state does not respect human dignity when it, without a rational reason, inflicts upon some a more severe punishment than on others, all other factors being equal. Although Justice Brennan recognized the problems inherent in characterizing this type of state action as arbitrary, he argued that if the punishment (death) inflicted on a few is different from that generally imposed, then it is “substantially likely” that the state is acting arbitrarily.\footnote{153}

\begin{itemize}
\item 148. 408 U.S. at 270 (Brennan, J., concurring). Justice Brennan, after analysis of the relevant cases, concluded that the fundamental premise of the clause is that even the vilest criminal remains a human being possessed of common dignity. To inflict an extremely severe punishment on him in effect denies the person his humanity. \textit{Id.}
\item 149. \textit{See} notes 116–19 and accompanying text \textit{supra}.
\item 150. \textit{See} notes 128–30 and accompanying text \textit{supra}.
\item 151. 408 U.S. at 273–74 (Brennan, J., concurring). Justice Brennan minced no words in stating his distaste for the death penalty:
\begin{quote}
Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. \textit{Id.} at 290. Justice Brennan contrasted the death sentence with imprisonment and concluded that while death is total in its revocation of all rights, a person, though imprisoned, has rights, remains a member of the human family, and since he has access to the courts, his punishment is not irrevocable. \textit{See}, \textit{e.g.}, Witherspoon v. Illinois, 391 U.S. 510 (1968). A person may be sentenced to death pursuant to a statute or procedure that is later declared unconstitutional and retroactively applied. Moreover, it is not unknown for the innocent to have suffered death. \textit{Id.}
\end{quote}
\item 152. 408 U.S. at 274 (Brennan, J., concurring). The provision against cruel and unusual punishments in the English Bill of Rights seems to have been concerned, to some extent, with protection against arbitrary punishments. \textit{See} Granucci, \textit{supra} note 90, at 857–60; Goldberg & Dershowitz, \textit{Declaring the Death Penalty Unconstitutional}, 83 \textit{Harv. L. Rev.} 1773, 1789 n.74 (1970). The latter authors argue that inclusion of the clause in the English Bill of Rights was prompted by the trial of Titus Oates. Oates was not tortured but was singled out for a treatment not previously applied to others similarly situated. Thus, his punishment was neither authorized by statute nor within the jurisdiction of the court to impose. He was, in short, both arbitrarily and excessively punished. \textit{Id.}
\item 153. Between 1961 and 1970, an average of 106 death sentences were imposed each year for a total of 1057. However, during the same period, there were only 135
Third, the punishment inflicted must be acceptable to contemporary society. Rejection by society, while not conclusive, is a “strong indication” that the severity of the sentence does not comport with human dignity. Noting the need for an objective judicial determination, Justice Brennan rejected the theory that legislative action was a barometer of societal acceptance; rather, acceptance is indicated, not by availability, but by use.

Finally, Justice Brennan argued that the thrust of the clause was that a punishment may not be excessive. In substance, he tendered Beccaria’s theory of the minimum effective penalty; that is, where there is a less severe penalty which can achieve the same result as one which is more severe, the latter is unnecessary and therefore excessive.

executions. Commencing in 1967, a moratorium was declared on executions, but even before that year executions had dwindled.

<table>
<thead>
<tr>
<th>Year</th>
<th>Sentences</th>
<th>Executions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>140</td>
<td>42</td>
</tr>
<tr>
<td>1962</td>
<td>103</td>
<td>47</td>
</tr>
<tr>
<td>1963</td>
<td>93</td>
<td>21</td>
</tr>
<tr>
<td>1964</td>
<td>106</td>
<td>15</td>
</tr>
<tr>
<td>1965</td>
<td>86</td>
<td>7</td>
</tr>
<tr>
<td>1966</td>
<td>118</td>
<td>1</td>
</tr>
<tr>
<td>1967</td>
<td>85</td>
<td>2</td>
</tr>
<tr>
<td>1968</td>
<td>102</td>
<td>0</td>
</tr>
<tr>
<td>1969</td>
<td>97</td>
<td>0</td>
</tr>
<tr>
<td>1970</td>
<td>127</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>1057</strong></td>
<td><strong>135</strong></td>
</tr>
</tbody>
</table>


Unfortunately, before 1961 there was no reliable indicator on a national level of death sentences imposed and carried out. Presented in five-year intervals, the available statistics indicate that in 1935 there were 199 executions, in 1940 there were 124, in 1945 there were 117, in 1950 there were 82, and in 1955 there were 76. See STATISTICS I, supra note 77, at 1–7. It is interesting to note the general decline of executions from 1935 to the present. However, at the same time, an unprecedented number of men have accumulated on death rows. On January 1, 1961, there were 219 prisoners sentenced to death. By July 1971, that number had reached an all-time high of 650. Id. at 8. Moreover, since two of the three cases herein involved rape — particularly of a White woman by a Black man in a Southern state — one further statistical point bears mention. Even the most tenacious of retentionists have admitted the discriminatory aspects of capital punishment in cases on identical facts. The statistics seem to bear out this discrimination:

Of the 455 persons executed for rape in the United States since 1930, 405 were black and 2 were from other racial minorities. All of those executed for rape since 1930 were executed in Southern or Border States or in the District of Columbia. The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District have not executed a single white man for rape over this 42-year period. Together they have executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed 1 white man for rape since 1930. Together they have executed 71 blacks.

Hearings on H.R. 8414 Before a Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 184 (1972), testimony of Jack L. Greenberg [hereinafter cited as Hearings]. Notwithstanding such statistics, the North Carolina Supreme Court struck down that state’s mercy statute on the basis of Furman, with the result being a mandatory sentence of death on a conviction of rape. State v. Waddell, ___ N.C. ___, 490 S.E.2d 19 (1972).

154. This is but an acceptance of the standard enunciated in Weems, Trop, Robinson, and Powell. See notes 116–31 and accompanying text supra.
155. 408 U.S. at 279 (Brennan, J., concurring).
156. See note 44 supra.
Justice Brennan candidly admitted that in the application of these factors no penalty would patently offend all four. Therefore, the test for compatibility with the eighth amendment was to be cumulative.157

Although death was of common usage in the eighteenth century, Justice Brennan was unwilling to concede that the Framers forever intended to exempt death from the proscription of the clause.158 Moreover, he refused to bow to the cases which had sustained the validity of the death penalty in dicta.159 Applying the foregoing factors to the death penalty, Justice Brennan concluded that “death is today a ‘cruel and unusual’ punishment.”160

(b) Analysis

Death, because of its innate severity, is truly a unique punishment, the infliction of which is ironic in American society where the value of human life is paramount. Justice Brennan recognized that death is “unusually severe . . . unusual in its pain, in its finality, and in its enormity.”161 There is no method of execution which guarantees a painless death.162 More importantly, mental pain is an inescapable part of death. Therefore, state-sanctioned death — the killing of a human being by the state — is an inherent denial of the executed’s humanity. Justice Brennan asserted:

In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.163

However, Justice Brennan was hesitant to accord too much weight to this factor since the death penalty was of “longstanding usage and acceptance.”164 Therefore, the second factor — that the state may not arbitrarily inflict an unusually severe sentence — was carefully examined. Noting that the infrequency of actual executions strongly implied that death was not regularly and fairly applied,165 the burden of proof was placed on the states to show clearly that infliction of death was not

157. 408 U.S. at 282 (Brennan, J., concurring).
158. Id. at 283. Indeed, it could be argued that we really do not know what the Framers intended in much of the Constitution. For example, slavery was in common usage when the Constitution was adopted. Could it be rationally argued that the Framers intended to keep Negroes in bonds perpetually? Perhaps the fallacy in this argument lies in the fact that slavery was terminated legislatively by a constitutional amendment while the death penalty was invalidated by judicial construction.
159. See notes 100–32 and accompanying text supra.
160. 408 U.S. at 286 (Brennan, J., concurring).
161. Id. at 287.
162. See note 67 and accompanying text supra.
164. 408 U.S. at 291 (Brennan, J., concurring).
165. Cf. note 153 supra.
arbitrary. This, of course, the states would be unable to do. As Justice Brennan noted:

When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die and the many who go to prison.\footnote{168}

Citing \textit{McGautha}, Justice Brennan argued that criminal procedures have not been constructed or construed in such a way as to guard against the totally capricious selection of criminals on whom to impose death.\footnote{167} Therefore, it can be argued that Justice Brennan found fault, not with the penalty per se, but rather with the system imposing it. It is submitted, however, that that thrust of his opinion does not hinge on this factor. Rather, this is but one factor in the cumulative test and is, therefore, not necessarily crucial. Indeed, the arbitrariness was not patent, but its likelihood was "sufficiently substantial" when considered in conjunction with the other salient factors.

Justice Brennan next examined the death penalty in light of prevailing public opinion. Recognizing the continual debate on the efficacy of the punishment, he concluded:

\begin{quote}
The American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.\footnote{168}
\end{quote}

The paucity of analysis surrounding this conclusion is distressing. Justice Brennan merely traced the abolitionist movement in America and noted the increasing rarity of executions. Moreover, it is submitted that Justice Brennan committed logical error. He initially argued that the rarity in the actual infliction of death evidences a substantial likelihood that state action is arbitrary; later he used this same premise to prove that society has rejected the death penalty. Recognizing his less than certain stand, Justice Brennan retreated, noting that "at the very least . . . society views this punishment with \textit{substantial doubt}."\footnote{169}

The last section of Justice Brennan's analysis is the most forceful. Therein, an examination was made of the purposes of the death penalty in order to determine whether the penalty was excessive. The conclusion became inescapable that the states were unable to demonstrate any penal purpose that could not be served equally well by a less severe punishment. First, deterrence\footnote{170} could be accomplished by imprisonment complemented by imprisonment...
by reformation of pardon and parole laws. Further, isolation within prison confines could be a viable alternative, if necessary. Moreover, the argument that by common human experience men fear death as the ultimate punishment is based on the premise of swift and certain execution. This is simply not the case in the United States. At the time of the Furman decision, one convicted of a capital crime faced only a marginal possibility of execution. Second, the argument that death is a manifestation of the "outrage of the community" merely begs the question whether some less severe punishment could accomplish this as effectively. The practice of having private executions also defeats this purpose; that is, since they are viewed only by official witnesses, they are soon forgotten by the few who read about them. Third, the argument that death is needed for retribution is not borne out by the statistics. If retribution is society's goal, there is no reason why death is required for a few, while for the vast majority prison suffices. It is submitted, however, that this latter argument is not persuasive. That is, retribution cannot be measured quantitatively; rather, the criminal, the victim, and the crime are all factors that determine what is sufficient retribution. The interesting question, left unanswered by Justice Brennan, is whether retribution can ever be a permissible element of punishment, and, if not, how society can ever purge itself of its desire for retribution.

Finally, Justice Brennan argued that the vast majority of those convicted of a capital crime simply do not deserve to die. For the most part, they are cooperative prisoners and lead relatively law-abiding lives upon release. Justice Brennan summarized his arguments thusly:

Rather than kill an arbitrary handful . . . each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed..."
by penalties of just, not tormenting, severity, its repetition is pre-
vented, and hope is given for the reformation of the criminal.177

2. Justice Stewart

Justice Stewart prefaced his concurring opinion with the incontro-
vertible truism that death is unique in its total irrevocability, its rejection
of rehabilitation as a purpose of criminal justice, and its absolute renuncia-
tion of the concept of humanity.178 Nevertheless, he refused to reach the
question of the validity of the death penalty per se. Instead, he concluded:

[T]he Eighth and Fourteenth Amendments cannot tolerate the in-
fliction of a sentence of death under legal systems that permit this
unique penalty to be so wantonly and so freakishly imposed.179

It is important to note the distinction that Justice Stewart drew
between sentences imposed by a jury empowered with discretion and those
sentences which are mandatory. If the Court were reviewing mandatory
sentences, it would, of necessity, be compelled to determine whether the
legislature could determine, under any circumstances, that certain conduct
is so reprehensible that retribution and deterrence could only be served
by death, and that these factors override any consideration of reform.180
Justice Stewart did not address this weighty question. However, he did
observe that he believed retribution to be a constitutionally permissible
ingredient of punishment. This view was based on the somewhat question-
able premise that societies which have failed to mete out effective punishment
have traditionally been ripe for individual or vigilante style justice —
in short, anarchy.181 Nevertheless, Justice Stewart’s position is less than
clear on this point. He gives credence to retribution as an element of
punishment, while expressly noting that the empirical evidence on the
deterrent effect of the death penalty is inconclusive.182 Moreover, he
framed the issue that the Court would be forced to address in a case dealing
with mandatory sentences is such a way as to almost compel a negative
response.183 However, since Georgia and Texas in the instant cases had
not provide for a mandatory sentence, Justice Stewart was able to stop
short of the crucial question and infer that neither state had reached the
conclusion that the only effective deterrent to murder or rape was death.

177. 408 U.S. at 305-06 (Brennan, J., concurring), quoting Weems v. United
States, 217 U.S. 349, 381 (1910).
178. 408 U.S. at 306 (Stewart, J., concurring). Justice Stewart accepted Justice
Brennan’s conclusion that state-imposed death renunciates the humanity of the
criminal. See notes 148-51 and accompanying text supra.
179. 408 U.S. at 310 (Stewart, J., concurring).
180. Id. at 307. It is submitted that Justice Stewart’s formulation of this hypo-
thesical issue gives some indication of how he would decide it.
181. Id. at 308. The key here, of course, is the ambiguous word “effective” and
the manner in which it relates to retribution.
182. Id. at 307 n.7. See T. Sellin, The Death Penalty 19-24 (1959); Graves,
A Doctor Looks at Capital Punishment, 10 MED. Arts & SciL 137 (1956); Savitz,
183. See text accompanying note 80 supra.
The thrust of Justice Stewart’s analysis is an assault on a legal system that imposes capital punishment. To him, the death sentence is the “product of a legal system that brings [these sentences] . . . within the very core of the Eighth Amendment’s guarantee . . . .” These sentences were cruel in that they excessively went beyond the minimum punishments the states have determined to be necessary. Moreover, they were unusual in that death is infrequently imposed for murder and almost never for rape. In short, there is no rational way to explain why these juries sentenced these men to death while many who committed crimes just as reprehensible were merely imprisoned. Therefore, to Justice Stewart, these men were among a “capriciously selected random handful upon whom the sentence of death has in fact been imposed.” This statement is curious in light of his concurring opinion in McGautha which explicitly stated that there is no due process requirement that a jury be given standards before imposing the death sentence. Apparently, Justice Stewart has forsaken the jury as the proper vehicle for sentencing. It must be emphasized that Justice Stewart is not addressing himself to racial discrimination per se, or discrimination based on wealth. Rather, he is speaking of a method of imposing sentence — jury discretion — which to him is arbitrary and without any rationale foundation.

Clearly, Justice Stewart has taken a fundamentally different approach from that of Justice Brennan. However, it is submitted that the result reached by each is identical. Both determined that the sentences in these cases, imposed by a discretionary jury, are violative of the eighth amendment. While Justice Brennan addressed the death penalty per se Justice Stewart did not; although he has, in dicta, provided ample evidence to support the position that even mandatory sentences would run afoul of his interpretation of the clause. In his formulation of the issue which would confront the Court in such a case, Justice Stewart noted that to sustain such a scheme, the Court would have to find that the inconclusive evidence on deterrence as well as the reform purpose of penology, is outweighed by the state’s need to impose death. Clearly, this would be a most difficult conclusion for the Court to reach. Therefore, while their approaches were dissimilar, it is submitted that both Justices Brennan and Stewart reached fundamentally the same conclusion.

184. 408 U.S. at 309 (Stewart, J., concurring).
185. Justice Stewart stated:
These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.
Id. at 309. See note 153 supra. In 1967, when Branch was sentenced, there were 85 death sentences, but only 2 executions. Thereafter, in 1968, when Jackson and Furman were sentenced, there were 102 death sentences but not a single execution.
For an analysis of the sentence of death for rape, see Hearings, supra note 153, at 71.
186. 408 U.S. at 309-10 (Stewart, J., concurring) (footnote omitted). Justice Stewart was echoing the words of former Attorney General Ramsey Clark:
[Only a] small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned.
Hearings on S. 1760 Before a Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 93 (1968) (testimony of Ramsey Clark).
187. See notes 136-38 and accompanying text supra.
3. Justice White

Justice White also concurred but cautioned that he too did not reach the question of the constitutionality of the death penalty per se, nor did he hold that all systems of capital punishment violated the clause. Like Justice Stewart, he addressed only such situations in which the legislature did not compel death, but empowered juries with the discretion to impose it.188 Under such a scheme, Justice White posited the legislative will is not that criminals should die since the jury may impose death or not as it choses. Thus, the legislative will is never frustrated; not even if the death penalty is never used. It is submitted, however, that this begs the question of whether the legislative will is frustrated, as the dissent suggested,189 when the Court decrees that juries not be given discretion at all. That is, the will of the legislature is not that some die while others do not, but rather that the determinative choice be left to the populace as represented by the jury. Nevertheless, Justice White concluded:

[T]he death penalty is exacted with [such] great infrequency even for the most atrocious crimes . . . that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.190

Justice White rested his conclusion on three factors. First, the death penalty is imposed so infrequently that society's need for deterrence does not justify the imposition of death on so few, while for so many, prison will suffice. Second, the need for retribution cannot be measurably satisfied by imposing death so infrequently — either retribution demands death from everyone, or from no one. Third, the deterrent effect of capital punishment is not served where the infrequency of execution removes it as a credible threat and negates it as an influence on the conduct of others.191

It is submitted that Justice White's approach is not the same as Justice Stewart's, although both have reached the same conclusion. Justice Stewart grounded his rationale on the predicate that juries impose the death penalty in an arbitrary and capricious manner, with no rational basis to distinguish cases where death was imposed from those where it was not. In short, he found grave fault with the jury system.192 Justice White, however, ascribed different causes to the effect. To him the purpose of giving discretion to juries was to mitigate the potential harshness of the law

188. 408 U.S. at 311 (White, J., concurring).
189. See notes 246-50 and accompanying text infra.
190. 408 U.S. at 313 (White, J., concurring). In reaching this conclusion, Justice White conceded that he was unable to “prove” anything with the statistics at hand, but recognized that he had to make a judgment. To do so, he relied on “10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of . . . cases involving [the death penalty]”. Id.
191. Id. at 311-13.
192. See notes 84-88 and accompanying text supra.
while adding a community judgment as to guilt in determining sentence. This objective has been so well achieved that the death penalty has, for all practical purposes, fallen into disuse. Therefore, its occasional imposition serves no legitimate penal purpose. Although Justice White did not explicitly so state, it is submitted that he echoed the view of Justices Brennan and Marshall that contemporary society has rejected the use of the death penalty. This view is supported by Justice White's statement that the Court's holding will not frustrate legislative will since that concept is not measured by what the legislature has authorized, but rather by what juries do in the exercise of their discretion. Under the instant statutes, legislative will cannot be frustrated if, no matter what the circumstances, a jury refused to impose the death sentence. Since juries have been so consistent in their refusal to sentence to death, the actual imposition of the death penalty has "for all practical purposes run its course." Once this point has been reached, the imposition of death on a few becomes excessive and, serving no purpose in our system of criminal justice, is a violation of the mandate of the eighth amendment.

It must be noted that Justice White confined his analysis to sentences imposed by discretionary juries. Therefore, a literal reading of his opinion would indicate that a mandatory death sentence would be constitutionally permissible. First, the Justice admitted that retribution is a proper element in determining punishment. Second, legislative will — that death always be imposed on certain convicts — would most definitely be frustrated if the Court struck down such a penalty. However, it could be argued that Justice White's analysis also undercuts the permissibility of a mandatory death sentence. It has already been observed that Justice White viewed the infrequency of the infliction of capital punishment as indicative of society's rejection of it. If the sentence of death were mandatory, juries would have to convict as charged or on a lesser charge, if allowed, or acquit. The net result could be that a jury not favoring the death penalty for a particular crime or defendant will simply refuse to convict. Moreover, the command of Weems and Trop makes clear that a penalty rejected by contemporary society is per se invalid and the power of the sentencing jury would seem to be irrelevant once such a determination had been made. Therefore, it is quite possible that, having reached the conclusion that society has "for all practical purposes" rejected the death penalty, Justice White would find a statutorily mandated penalty of death as offensive as the statutes in the instant case.

This analysis, of course, makes certain assumptions which are based upon occurrences that cannot be predicted with certainty. First, it assumes that juries in states with mandatory death penalties will convict a few and will acquit or convict on a lesser charge many others who have

193. 408 U.S. at 311-12 (White, J., concurring).
194. Id. at 313.
195. See notes 93-98 and accompanying text supra.
committed equally serious crimes. In the alternative, it assumes that juries will simply fail to convict at all, as occurred in England and in our colonial period. In short, this analysis assumes that all variables will remain the same and that juries in mandatory states will act no differently than discretionary juries did.

4. Justice Marshall

(a) Approach

Justice Marshall, in an expansive opinion, joined Justice Brennan in examining the validity of the death penalty per se. Justice Marshall took great pain to underscore his objectivity, recognizing that the elasticity of the eighth amendment presented a significant danger of too much or too little judicial restraint. Notwithstanding this self-expressed need for restraint, Justice Marshall candidly acknowledged that he was unable to ignore the fact that the decision in the instant case would mean the difference between life and death for hundreds of people, and thus had to "be free from any possibility of error."

After a detailed and exhaustive analysis of legislative history and precedents, Justice Marshall concluded that a punishment may be cruel and unusual for any of four distinct reasons. First, punishments which involve so much physical pain and suffering that civilized society cannot tolerate them are forbidden. These, of course, come squarely within the literal words of the clause. Second, punishments which are unusual in the literal sense — those not previously used as penalties for a given offense — are forbidden unless they are intended to serve a human purpose. This category need not be discussed since the death sentence is not of recent vintage and, hence, not unusual in the literal sense. Third, a penalty may fall within the proscription of the clause if it is excessive in that it serves no valid legislative purpose. Since Justice Marshall accepted the view that the thrust of the eighth amendment is aimed at excessive punishments, it follows that an excessive punishment is invalid even if popular sentiment favors it. Fourth, a punishment is invalid if "popular sentiment abhors it" even if not excessive and serving a valid legislative purpose. Thus, Justice Marshall placed a high premium on the teaching of Trop.

---

197. 408 U.S. at 316 (Marshall, J., concurring).
198. Id. at 330.
199. Id. at 331. See notes 108–09 and accompanying text supra. An interesting question never answered is how much, if anything, the word "unusual" adds to the word "cruel" since these two words are used in the disjunctive.
200. 408 U.S. at 331. See notes 203–27 and accompanying text infra.
201. 408 U.S. at 332. There are no prior cases in which the Court has struck down a penalty on this ground alone. However, the notion of constant change in a modern society compels recognition of this element.
(b) Analysis

Recognizing that capital punishment is neither inherently cruel nor unusual in the literal sense, Justice Marshall addressed himself to the latter two factors. First, he had to determine whether the death penalty was excessive; that is, whether it served a valid legislative purpose. Second, he had to determine whether death is a penalty which is morally acceptable to contemporary society.

(i) Legislative Purpose

It has already been noted that in determining whether a penalty is excessive, the inquiry should properly focus on whether a less severe punishment could achieve the same purposes as the more severe penalty, if so, the latter is excessive and therefore invalid. Justice Marshall posited six conceivable purposes which capital punishment could serve: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas, eugenics, and economy.

Justice Marshall rejected out of hand the argument that retribution could be a proper end of punishment, apparently differing significantly from Justices Stewart and White. He argued that “retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations . . . .” The dicta in *Weems* supported this view. To the proposition that man is driven to seek retribution, Justice Marshall replied:

> [T]he Eighth amendment is our insulation from our baser selves. The “cruel and usual” language limits the avenues through which vengeance can be channeled.

It is submitted, however, that the views of Justices Marshall, Stewart, and White can be reconciled. The opinions of Justices Stewart and White cannot be fairly read to say that retribution, without more, could serve to legitimize capital punishment. Likewise, Justice Marshall cannot be fairly read to say that retribution is an entirely intolerable element of punishment, but rather that, as an end in itself, it cannot justify the imposition of the death penalty.

In examining the deterrent purpose of capital punishment, Justice Marshall began with the premise that death is a far more severe penalty than life imprisonment, a view he described as “perfectly reasonable.”

203. *See* note 44 supra.
204. 408 U.S. at 343 (Marshall, J., concurring).
205. 217 U.S. at 381.
Therefore, the issue is not simply whether death is a deterrent, but whether it is a more effective deterrent than life imprisonment, once again echoing Beccaria's approach of the minimum effective punishment.

Any examination of the deterrent effect of capital punishment is speculative at best. The most that can be known is exactly where the deterrent effect failed — a mere tally of the people on death row each year. However, the crucial question can never be answered; that is, how many people refrained from committing a capital crime because of their fear of the death penalty? There are two widely cited hypotheses supporting the deterrent effect of the death penalty. First, the whole experience of man compels him to fight for life; thus, the threat of instant death is the most effective deterrent. This view is neatly summarized by the maxim: "all that a man hath will he giveth for his life." Death, in short, eradicates all hope by its finality. Second, and more limited, is the view that once a man has been convicted of a capital crime and sentenced to life imprisonment with no hope of release, there is no logical reason why he should not kill again once in prison. Therefore, a life sentence has no deterrent effect against the commission of a second murder. Note that this theory does not focus on the effect of the death penalty on the conduct of others, but on the effect of the sentence on the convicted killer himself.

It is submitted that there is little, if any, basis in fact for these assertions. The available statistics seem to indicate that there is no appreciable difference in the homicide rates in abolitionist and retentionist states. Moreover, psychiatrists have theorized that the desire to die might well incite certain persons to commit capital crimes. Significantly, there seems to be virtually no effect on in-prison homicide rates by a

wherein the author asserts that anyone confronted with the option of death or life imprisonment would surely choose the former.

208. Hearings, supra note 153, at 227 (testimony of Frank G. Carrington), wherein it is argued that the death penalty should be retained for as long as it deters even one potential killer, since this would mean one innocent life saved.

209. See Royal Commission, supra note 67, at 19.


212. See H. Bedau, supra note 14, at 258-332; Sellin, The Death Penalty, in Report for the ALI Model Penal Code Project 5 (1959). These statistics show that there is no demonstrable correlation between the murder rate and the presence or absence of capital punishment.

Another interesting point is that the increase in the rate of homicides nationwide was less between 1967 and 1970 — the period of the moratorium — than in the four years preceding it. From 1963 to 1967, the increase in the homicide rate was 35.5 per cent, while from 1967 to 1970 the increase was only 27.8 per cent. See Hearings, supra note 153, at 181 (testimony of Marvin Wolfgang).

Many argue that such comparisons are invalid because different areas of the country experience different life styles and psychological climates which may act as undisclosed variables in such studies. However, the statistical studies are not done in a random manner. Rather, an abolitionist state is chosen and compared with a geographically contiguous retentionist state which has similar population and socio-economic characteristics. For an example of this practice, see Hearings, supra note 153, at 184-89.

213. See Graves, supra note 182. For a short documentation of five such cases, see The Case Against Capital Punishment, supra note 54, at 285-86.
sentence of life imprisonment.\textsuperscript{214} In fact, most persons sentenced to death are murderers and murderers tends to be model prisoners.\textsuperscript{215}

Recognizing these factors, Justice Marshall concluded that, although the result was not completely clear, capital punishment could not be justified by its alleged deterrent effect on the behavior of men. In so doing, Justice Marshall, like Justice Brennan, placed the burden upon the states to prove the efficacy of deterrence:

Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do.\textsuperscript{216}

It is submitted that Justice Marshall realized quite clearly that this burden of proof was virtually insurmountable. The state could never clearly prove that the deterrent effect works. Occasionally, there are stories about an individual who was deterred from the commission of a capital offense by fear of the death penalty,\textsuperscript{217} but more often than not these stories are probably contrived to tell the police "what they want to hear."\textsuperscript{218} Moreover, the ordinary criminal does not plan on being apprehended, and, in the vast majority of cases, does not plan to commit a capital offense.\textsuperscript{219} Therefore, the states will be forever unable to prove by clear and convincing evidence, much less beyond a reasonable doubt (the standard applied by Justice Marshall),\textsuperscript{220} that the deterrent effect works.

Obviously, capital punishment does prevent recidivism. However, if based on this fact alone, death is certainly excessive. There is no need to obliterate all capital offenders, and no rational basis for choosing those who are to die. More importantly, there is no need to prevent recidivism in the vast majority of cases. It has already been noted that those convicted of murder are usually first offenders who commit no further crimes while in prison, and are likely to become model citizens upon release.\textsuperscript{221}

It is submitted, however, that this analysis stops short of grappling with the obvious problem; that is, what is done with the very rare person who commits a second capital offense. The answer, it would seem, still falls short of death. Pardon and parole laws, as pointed out by Justice Brennan,

\begin{itemize}
  \item \textsuperscript{214} See L. Lawes, \textit{supra} note 72, at 150; McGee, \textit{Capital Punishment as Seen by a Correctional Administrator}, 28 \textit{Fed. Problems} 11 (1964).
  \item \textsuperscript{215} See \textit{The Case Against Capital Punishment, supra} note 54, at 291-93.
  \item \textsuperscript{216} 408 U.S. at 353 (Marshall, J., concurring).
  \item \textsuperscript{217} See \textit{Hearings, supra} note 153, at 225.
  \item \textsuperscript{218} Out of the thousands of murderers interviewed by Warden Duffy of San Quentin, not one thought of the death penalty prior to his act. Robbers who used unloaded or toy pistols did not fear execution, but rather had no desire to hurt anyone and only wanted money. When some were asked why they told police capital punishment deterred them, the typical response was that it seemed like a good thing to say at the time. \textit{The Case Against Capital Punishment, supra} note 54, at 14.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Cf. text accompanying note 216 \textit{supra}.
  \item \textsuperscript{221} See \textit{Royal Commission, supra} note 67, at 486-91. See also note 176 \textit{supra}.
\end{itemize}
could be changed to keep the convict in prison. In addition, the prisoner could be isolated from the rest of the prison community if he posed a significant danger. Thus, life imprisonment can, pursuant to the proper precautions, prevent commission of further crime just as effectively as execution, while, at the same time, further progressive penal aims. Therefore, it would seem clear that Justice Marshall is correct in his determination that prevention of recidivism via death is excessive and, therefore, invalid under the eighth amendment.

Justice Marshall dealt summarily with the last three possible legislative purposes effectuated by capital punishment. A brief discussion should disclose that this approach was correct. First, while capital punishment might be a practical tool to encourage guilty pleas, this usage also discourages defendants from exercising their sixth amendment rights. Moreover, the state still has the ominous weapon of life imprisonment if it must bargain for guilty pleas, a threat which gains credence from those who argue that life in prison is a fate worse than death. Most importantly, to the extent that death is used to encourage guilty pleas or confessions, it is not used for punishment. That is, if cooperation by the defendant removed the threat of death, then, a fortiori, life imprisonment is a sufficient deterrent. Second, any suggestion of using death to achieve eugenic benefits is without merit. Justice Marshall neatly summarized this problem:

On the one hand, due process would seem to require that we... demonstrate incurability before execution; and... equal protection would... require that all incurables be executed.

At any rate, selective breeding has never been a part of our system of justice. Third, economy is not served by execution. Courts, by nature, devote more time to capital cases, almost affirmatively seeking reversible error. The process of appeal and collateral attack is almost limitless and exhausts the time, effort, and resources of the state. While in prison under sentence of death, the accused is removed to death row and is unable to become a productive member of the prison community. Therefore, it costs less to keep a man in prison for life than to execute him.

222. 408 U.S. at 300 (Brennan, J., concurring).
223. Id. at 355 (Marshall, J., concurring).
224. To the extent that the death penalty is used to encourage guilty pleas and thus deter exercise of sixth amendment rights to a jury trial, it is unconstitutional. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968); United States v. Jackson, 390 U.S. 570 (1968).
225. 408 U.S. at 356 (Marshall, J., concurring) (emphasis added). See Buck v. Bell, 274 U.S. 200 (1927) (state allowed to sterilize woman who had given birth to several mentally defective children). This hardly seems to be a worthwhile goal. There is no evidence that mentally ill persons who commit murders are any different than other mentally ill persons, or that they respond less readily to treatment. See Cravant & Waldrop, The Murderer in the Mental Institution, 284 ANNALS 35 (1952).
226. See Slovenko, And the Penalty Is (Sometimes) Death, 24 ANTIQUOCH REV. 351 (1954).
227. T. Thomas, This Life We Take 20 (3d ed. 1965); McGee, supra note 214. In 1968, the annual maintenance cost for noncapital prisoners in California was $2700 while for death row prisoners it was $3800. This figure does not include the relative worth of prisoners who work in prison industry programs. See Comment,
Thus, an examination of the possible legislative purposes of capital punishment compelled Justice Marshall to conclude that the death penalty is indeed excessive and, therefore, violative of the eighth amendment.

(ii) Acceptance by Society

Justice Marshall's conclusion that the death penalty had become morally unacceptable to the American people marked his most radical departure from the other concurring opinions of the Court. Although Justices Brennan, White, and Stewart each alluded to this principle in some form, none, save Justice Marshall, explicitly affirmed it.

Justice Marshall began with the premise that popular opinion is of only marginal utility in determining acceptance of the death penalty.\(^{228}\) Thus, whether a punishment is violative of the clause depends not on whether it "shocks the conscience of the people" in general, but rather upon whether:

\[
\text{People who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and un-}\]

acceptable.\(^{229}\)

Justice Marshall afforded little weight to the argument that legislative authorization demonstrated the will of the people, arguing that the rarity of executions had created a spirit of indifference resulting in a preservation of the status quo, whether desirable or not. Note that this is but a new twist to an old argument. Whereas Justice White argued that the in-

\(^{228}\) The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1312 (1968). The relatively high cost of financing legal services and keeping the condemned are summarized in The Case Against Capital Punishment, supra note 54, at 61–62. As an example, Arkansas saved an estimated $1.5 million by commuting the sentences of 15 Arkansas prisoners in 1971. Time, Jan. 11, 1971, at 50. Admittedly, if capital punishments were effected soon after their imposition, the maintenance costs would probably be less for capital prisoners, merely due to the abbreviated duration of state maintenance as compared with the aggregated costs for the life prisoners.

\(^{229}\) In fact, polls traditionally have shown that Americans favor the death penalty. See H. Bedau, supra note 14, at 231–41. The latest post-\textit{Furman} poll, taken in California, showed that 66 per cent favored capital punishment. That was an increase of 17 per cent since 1965 and 8 per cent since 1971. Time, Sept. 18, 1972, at 8. A television poll was conducted by Channel 12, WHYY-TV, Wilmington, an educational television affiliate, after the death penalty was debated on its February 3, 1973 presentation of "The Advocates." It was reported on the broadcast of February 10, 1973 that, of the 8000 people who responded, 73 per cent favored the restoration of the death penalty while 27 per cent agreed with the \textit{Furman} decision.

However, it is submitted that the polls are unreliable in two respects. First, there is no manner to insure complete accuracy. Second, many people are in favor of capital punishment in the same way that they disfavor sin. That is, they vehemently favor capital punishment, yet most admit that they could not, as a juror in a capital case, impose the death sentence.

\(^{229}\) 408 U.S. at 361 (Marshall, J., concurring) (emphasis added). Cf. id. at 441 (Powell, J., dissenting), wherein Justice Powell argued that this conclusion by Justice Marshall is speculative at best, and beyond the scope of proper judicial review. At first glance, Justice Marshall’s position does seem elitist. However, the argument can be made that the legislative will is only voiced when there are concerned and informed citizens to guide it. Thus, since most people do not know anything about the death penalty, their ignorance has led to legislative inertia. That capital punishment remains a part of the law is, therefore, not necessarily indicative of the will of the populace.
frequency of executions merely exemplified public rejection of them. Justice Marshall conceded possible popular public acceptance of the death penalty, and argued that the infrequency of executions (and the privacy surrounding them) precluded most citizens from achieving an informed view of the death penalty and its inherent shortcomings.

Drawing on his conclusion that the death penalty was supported by no legislative purpose, Justice Marshall asserted that if a citizen had all of this information, he would, without hesitation, conclude the penalty to be “unwise.” Because the American people would never knowingly support a punishment based upon retribution alone, they would conclude that the death penalty was immoral and, hence, invalid.\(^{230}\) To bolster his conclusion, Justice Marshall suggested three factors of which society should be aware.

First, death is imposed discriminatorily on identifiable classes. Blacks are executed more often than Whites,\(^{231}\) evidencing racial discrimination, notwithstanding a higher crime rate among Blacks.\(^{232}\) Justice Marshall also viewed the holding of *McGautha* as an “open invitation to discrimination.”\(^{233}\) Concomitant with this theory is the fact that women are very unlikely to be executed, even after having participated in a crime as horrible as that of their male counterparts.\(^{234}\) On the whole then, the brunt of the burden imposed by capital punishment was borne by the poor, the ignorant, and the underprivileged — those who, lacking political clout, tend not to have their plight remedied by legislation.\(^{235}\) Second, even the “beyond a reasonable doubt” standard is far from foolproof. Innocent people have been executed,\(^{236}\) and there is little chance of rectifying the error since appellate courts are most unwilling to overturn a jury’s findings of fact.\(^{237}\) These findings of fact might easily be based on perjured or mistaken testimony.\(^{238}\) Moreover, death, in its finality, precludes correction of any error, should such error be subsequently discovered.\(^{239}\) Third, the death penalty wreaks havoc on the criminal justice

\(^{230}\) *See id.* at 363. This seems rather generous on Justice Marshall’s part. Nevertheless, it is submitted that this was the only conclusion at which he could arrive. He could not say that Americans would support a punishment based on retribution alone, for this would be a reversion to the stone age. Nor could he say that most Americans could not care less, one way or the other (although this is probably the case), since this point of view would cut across the grain of the principles upon which our republic is based.

\(^{231}\) *See Statistics II, supra* note 153, at 7.

\(^{232}\) 408 U.S. at 364 (Marshall, J., concurring).

\(^{233}\) *Id.* at 365.

\(^{234}\) *See Statistics II, supra* note 153, at 48. Although men commit murder four to five times more frequently than women, statistics show an almost 100 times greater chance of execution for men. Since 1930, only 32 women have been executed while 3,827 men met a similar fate.

\(^{235}\) *See H. BEDAU, supra* note 14, at 405–88.

\(^{236}\) *Id.* at 488–563. *See generally J. FRANK & B. FRANK, NOT GUILTY* (1957).

\(^{237}\) 408 U.S. at 367 (Marshall, J., concurring).

\(^{238}\) Examples of this are replete in criminology. *See The Case Against Capital Punishment, supra* note 54, at 41–46.

\(^{239}\) *See J. FRANK & B. FRANK, supra* note 236, at 11–12.
system. The sensationalism of a capital trial and the impossibility of reformation are stumbling blocks to the fair administration of justice and an advanced system of penal reform.240

Drawing on these three factors, Justice Marshall concluded:

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would . . . find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.241

5. Justice Douglas

Justice Douglas adopted the most expansive approach of all the concurring Justices. Like Justices White and Stewart, he addressed only those sentences imposed by discretionary juries. However, instead of confining his discussion to the “cruel and unusual” language of the eighth amendment, Justice Douglas began with the premise that implicit in the eighth amendment is the basic theme of equal protection.242 Equal protection, in the eighth amendment context, requires legislators to write laws that are nonselective and impartial, and requires judges to oversee imposition of these laws to insure they are not selectively applied.243

In this framework, Justice Douglas asserted that the imposition of the death penalty had taken on a caste aspect. To him, the poor, the despised, and the suspect or unpopular minority were selectively chosen to die in order to satisfy the prejudices of contemporary society.244 In short, Justice Douglas analyzed the facts before him in terms of overt racial and class discrimination. In this mode of analysis, he was alone.

Although Justice Douglas declined to address the issue of mandatory death sentences, it is submitted that the result under such a scheme would be the same. Under a mandatory death statute, assuming for the moment the validity of Justice Douglas’ charges, the jury would simply convict the poor, the despised, and the ignorant and acquit the rest. This would run afoul of Justice Douglas’ view of the clause, assuming that there is no rational basis on which to hinge the conviction of a few and the

240. See F. Frankfurter, Of Law and Men 81 (1956), wherein the author states:

I am strongly against capital punishment . . . . When life is at hazard in a trial, it sensationalizes the whole thing . . . . the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.

241. 408 U.S. at 369 (Marshall, J., concurring). Of course, this a speculative conclusion. It is again submitted, however, that it was the only one that could be reached consonant with faith in Americans. Could Justice Marshall conclude that, assuming full knowledge of all the facts, Americans would not care whether people were put to death? This seems highly improbable. Therefore, assuming good faith on the part of all Americans, Justice Marshall’s conclusion was dictated by the facts at his disposal.

242. Id. at 257 (Douglas, J., concurring).

243. Id. at 256.

244. Id. at 255.
acquittal of many. It is readily apparent that Justice Douglas was concerned not so much with the sentence imposed as with the reasons for its imposition. However, this view does not find support in the cases decided under the eighth amendment, or in its legislative history.

6. The Dissent

Extended discussion of the dissent in *Furman* would serve no useful purpose. For the most part, the dissenters analyzed the same legislative history and the same case law to arrive at a conclusion opposite that of the majority.

The dissenters, however, shared one common conclusion. Notwithstanding the considerations on whether the death sentence served a valid legislative purpose or whether the Framers meant to include death within the proscription of the clause, each dissenter vigorously maintained that the majority had overstepped the bounds of judicial authority and had encroached on what was properly in the legislative domain. Candor compels the admission that this approach is certainly tenable. For whatever else it may be, it is apparent that the controversy surrounding the death penalty, though sounding in eighth amendment terms, is, in reality, not a matter of legal dialectic. Rather, it is an issue of fact, about which reasonable men may disagree, coming to rest squarely on moral grounds. To the dissent, this determination is properly one for state and federal legislation, and not constitutional adjudication. Thus, there is merit in the dissenters' position that the plurality engaged not so much in an act of legal judgment as in an act of will.

To complicate matters, it remains unclear just what the plurality has done. Chief Justice Burger asserted that a mandatory death sentence could pass constitutional muster, apparently reading Justices Stewart, White, and Douglas narrowly. Justice Powell, however, taking note of the dicta in these three opinions, submitted that only a constitutional amendment could restore use of the death penalty. Whatever the result, it is at least clear that the death sentence, as imposed by a discretionary jury, is no longer constitutionally permissible in the United States. While the dissent views this as legislation by judicial fiat, it is submitted that any discussion and decision concerning the death penalty can be no less. That is, it is impossible to divorce the legal grounds from the moral. The very standard enunciated in the dicta of *Weems* and concretely set forth

245. *Id.* That is, the sentence of death is imposed not for any rational reason, but rather because the juries imposing the sentence are prejudiced — intentionally or not — against the defendant.


247. See 408 U.S. at 384 (Burger, C.J., dissenting); *id.* at 412-13 (Blackmun, J., dissenting); *id.* at 433 (Powell, J., dissenting); *id.* at 469-70 (Rehnquist, J., dissenting).

248. *Id.* at 401 (Burger, C.J., dissenting).

249. *Id.* at 462 (Powell, J., dissenting).
in *Trop* recognized this fact. The real issue should not be whether the Court engaged in an act of legislation, but whether the plurality accurately reflected the view of society.\(^{250}\) This question is presently unanswerable.

V. Conclusion: Ramifications of *Furman*

The immediate effect of *Furman* is, of course, to remove over 600 prisoners from death row. Beyond that, it is clear that juries vested with discretion may no longer impose the death sentence.\(^{251}\) Unfortunately, the long-term effect of *Furman* will not be known for some time. The passage of time should offer a clearer picture of what the alleged deterrent effect had actually accomplished. In the interim, there will, in all likelihood, be a substantial reactionary movement in many state legislatures since public opinion polls (for what they are worth) show that most Americans\(^{252}\) actually favor the death penalty. It would seem that the legislature may opt for one of two courses of action: (1) to retain the discretionary sentence but impose upon juries definite guidelines and standards which must be followed in sentencing; or (2) to abolish discretionary sentences and impose instead mandatory death sentences for specific crimes.

---

\(^{250}\) It is frivolous to argue that the Court has no role in the area of capital punishment. The very fact that there is an eighth amendment compels acknowledgment and examination of the issue. Moreover, to argue that only the legislature is the mirror of the people's will is, it is submitted, a theoretically correct but practically absurd statement. The legislatures of most states have not reconsidered capital punishment in decades, completely ignoring all the factual information that investigators have compiled. The Chief Justice implicitly recognized this situation when he stated:

> [1] am not altogether displeased that legislative bodies have been given the opportunity, and indeed the unavoidable responsibility, to make a thorough reevaluation of the entire subject . . . .

*Id.* at 403.

It is important to keep in mind that had the legislatures of the various states shown any interest in the problems raised by capital punishment, and done something to remedy them, the decision in the instant case might have been quite different.\(^{251}\) While discretionary sentences are no longer valid, courts redetermining vacated sentences have been thrown into a state of flux. In State v. Dickerson, 298 A.2d 761 (Del. 1973), the Supreme Court of Delaware held invalid a mercy statute which was appended to a mandatory death statute. The court then held that because of the ex post facto clause, the death statute, now mandatory, could only be prospectively applied. This left the problem of what to do with the defendant since there was no other statutory penalty, but the court left this issue for another day.

History shows that the mandatory death sentence for first degree murder is also open to caprice and discrimination in the imposition of the death penalty. The jury's route for the exercise of such caprice and discrimination . . . is to return a verdict for lesser-included offenses . . . .

*Id.* at 769-70. The court noted the distinct possibility that the result under the mandatory death statute might be the same as under the discretionary statute. If so, the statute would be invalid. Thus, the court recommended legislative reevaluation of capital punishment in light of *Furman*. *Id.* at 770.

In Bartholomew v. State, 267 Md. 175, 297 A.2d 696 (1972), the court did not agonize. It merely held the discretionary statutes invalid and imposed a mandatory sentence of life imprisonment on all whose death sentences had been vacated. This sentence of life imprisonment was to be automatic with no need for the sentencing judge to reconsider any facts. *Id.* at 702.

\(^{252}\) See note 228 supra.
A. Discretionary Sentences with Legislative Standards

That the immediate effect of *Furman* is to eliminate discretionary juries in capital cases is ironic, since discretionary juries have long been thought of as a hallmark of judicial reform. The discretionary jury was able to take into account not only guilt, but also community feelings and the desire to show mercy to the individual. The question, therefore, is whether a legislative enactment could provide the requisite factors which a jury should consider and in this manner overcome the finding that death has been arbitrarily and irrationally imposed.

However, *McGautha*, decided but one year prior to *Furman*, made clear that there was no mandate under the due process clause to provide such standards. Further, the Court, in dicta, asserted that no such standards could be devised. Justice Harlan stated:

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

Thus, the state legislators are faced with an unsolvable problem. On the one hand, juries exercising their discretion without standards violate the letter of *Furman*. On the other hand, it is quite impossible to devise a set of standards which would provide rationality and fairness to the sentencing process. Any system of standards would be prone to attack on due process grounds in that they are too inhibitive and withhold from the jury their traditional right to find fact, or so loose as to provide virtually unfettered discretion, which is what *Furman* is all about. Therefore, it is submitted that discretion, vested in a sentencing jury, is closed to the states, as long as *Furman* retains vitality.

B. Mandatory Sentences

There is a current trend to circumvent *Furman* by the establishment of mandatory sentences of death for certain specific crimes. Pennsylvania
offers a good example of this trend. Several months after Furman, the Pennsylvania House of Representatives passed a bill which provides for a mandatory sentence of death for seven enumerated types of murder. Although the bill was introduced prior to Furman in order to change the method of execution in Pennsylvania from electrocution to cyanide gas, it manifested a legislative belief in the efficacy of the death penalty.

The Pennsylvania legislature is obviously reading Furman as the Chief Justice did; that is, a narrow interpretation is given the opinions of Justices Stewart, White, and Douglas. It has already been noted, however, that a close reading of these opinions suggests that a mandatory death sentence, unless a valid penal purpose other than retribution is served, might also fail to pass the constitutional test. Notwithstanding this caveat, there are several other problems raised by mandatory sentencing.

First, a mandatory death sentence is indicative of regressive penology. Manifest in our penal system is the desire to reform a criminal; man-

258. This bill is the product of the Philadelphia District Attorney’s Office which officially is quite vocal in its support of the death penalty. In fact, the First Assistant District Attorney has been adamant in his position that Furman does not apply to Pennsylvania. He argues that a “careful reading” of Furman would disclose that it applies only to states where the death sentence is applied arbitrarily. Therefore, since he believes that Pennsylvania does not apply death in an arbitrary manner, Furman does not apply. Further, he argues, Pennsylvania is not bound by Furman until the state has been given a full hearing on the merits before the Supreme Court. There seems to be little possibility of this argument carrying any weight since it would require the Court to hear arguments on whether the death penalty is applied arbitrarily in all of the retentionist states except Texas and Georgia. See Evening Bulletin (Phila.), Oct. 19, 1972, at 4, col. 2.

The bill provides:
Whenever any person is hereafter convicted of the crime of murder in the first degree, a mandatory sentence to suffer death in the manner provided shall be imposed:

1. If the victim of the crime was a police officer or prison guard who was killed in the performance of duty.
2. If the victim of the crime was killed during the hijacking of an aircraft, train, ship, or any commercial vehicle.
3. If the victim of the crime was killed during the perpetration of the crimes of arson, rape, robbery, burglary or kidnapping and the person convicted of murder in the first degree had previously been convicted of one of the crimes enumerated in this clause.
4. If the victim of the crime was being held hostage by the person convicted of murder in the first degree.
5. If the victim of the crime was at the time of his death an elected or appointed public officer of the Federal, State or Local government and was assassinated by the person convicted of the offense of murder in the first degree.
6. If the person convicted of the crime of murder in the first degree was at the time of the commission of said offense then undergoing imprisonment for life by reason of a sentence previously imposed for any other offense.
7. If the person convicted of the crime of murder in the first degree was paid or had contracted to be paid or to pay or had conspired to be paid or to pay for the killing of the victim.

H.B. 884, Pa. Gen. Assembly, 1971 Sess., § 2, as amended, Sept. 12, 1972. It should be noted that the bill apparently removes the death penalty from those in the class of murderers who are first offenders and who do not fall into one of the seven enumerated categories.

259. See notes 178–95 & 242–45 and accompanying text supra.
datory death is the antithesis of this desire. Moreover, under a mandatory scheme, a jury could simply refuse to convict on the main charge and convict on a lesser included charge. This, of course, would again raise eighth amendment problems since there would presumably be little, if any, rational basis for imposing the mandatory sentence on some while convicting others on a lesser charge. Chief Justice Burger recognized that this problem could be alleviated if the statute provided that the jury could not return a verdict on a lesser charge. But to this end he noted:

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge . . . . If this is the only alternative that the legislatures can safely pursue . . . . I would have preferred that the Court opt for total abolition. 261

This introduces a second problem. Under a system of mandatory sentences with no possibility of conviction on a lesser charge, juries may simply fail to convict, or conversely, may convict in an arbitrary manner. It has already been noted that just such a system led to the introduction of the discretionary jury. 262 By failing to convict where the crime falls within the legislative scheme, the jury would flout the legislative determination that all who commit a certain crime, regardless of the factual setting, should be sentenced to death. Moreover, such a result is tantamount to the jury assuming the discretion to impose sentence whereas no such discretion has been provided. It would seem, therefore, that mandatory death sentences, even if permissible, would be of little utility.

It is certain that many will condemn Furman as the work of five men sheltered from reality, and yet many will praise the decision as an indicium of a society ever questing for perfection in its criminal justice system. The debate over capital punishment, which has stirred the hearts, more often than the minds, of men, has not been concluded. With Furman, the United States has qualifiedly joined approximately 70 other jurisdictions throughout the world 263 which have abolished capital punishment. Whatever the outcome, this much is true: society has the opportunity, now more than ever, to concern itself with reform and rehabilitation of capital offenders. 264 The state can no longer simply remove from existence the manifestations of society’s failures. It must now afford them the dignity inherent in their humanity and the privileges that accompany it. Perhaps this will be the real service of Furman.

James M. Papada, III

261. 408 U.S. at 401 (Burger, C.J., dissenting).
262. See notes 84–88 and accompanying text supra.
264. See generally Burger, Our Options are Limited, 18 Vill. L. Rev. 165 (1972).
THE ANTITRUST IMPLICATIONS OF RESTRICTIVE COVENANTS IN SHOPPING CENTER LEASES

I. INTRODUCTION

America's changing residential pattern, particularly the growth of suburbia, has, quite naturally, increased the importance of the regional and neighborhood shopping center. Developers, quick to respond to the need for such centers, have been faced with the problem of obtaining the necessary financing. The lending institutions to which the developers have turned, have, in order to protect their investments, required long-term commitments from the prime tenants of the shopping centers such as department stores and supermarkets. In order to protect their long-term leases, the department stores and supermarkets have, in turn, demanded provisions in their leases which give them the right to reject prospective tenants of the shopping center and, occasionally, even the right to veto expansion by current tenants. Until recently, such restrictive covenants have been regarded as legitimate business agreements, subject only to the limitations of property and contract law. Lately, however, suits attacking these covenants as violative of the federal antitrust laws have been initiated both by individuals and governmental agencies. When the validity of restrictive covenants is questioned in an antitrust context, courts must balance the public's interest in a competitive market, as secured by the antitrust laws, against the lessees' and the lending institutions' legitimate interests in protecting their investments. That delicate policy determination is further complicated by the conflicting public interest in the maintenance of a competitive marketplace, on the one hand, and in the creation of an atmosphere conducive to the continued development of shopping centers on the other. Some generally accepted antitrust theories may need re-evaluation before the courts apply them in this situation.

1. The large regional shopping center is the more spectacular of such centers, designed to attract traders from various areas and providing up to one million square feet of floor space, with parking facilities for thousands of cars. However, the backbone of trading in most urban areas is the smaller neighborhood shopping center. It is designed to serve a minimum of one thousand families and includes approximately fifteen stores. The principal tenants of the neighborhood center are the supermarket and drug stores; the remainder of the center usually includes a filling station and other satellite stores. See N. Penney & R. Broude, CASES AND MATERIALS ON LAND FINANCING 604 (1970).

2. Cf., e.g., note 6 and accompanying text infra.

3. See, e.g., Friedman Textile Co. v. Northland Shopping Center, Inc., 321 S.W.2d 9 (Mo. App. 1959); Great Atl. & Pac. Tea Co. v. Bailey, 421 Pa. 540, 220 A.2d 1 (1966). Such restraints are normally considered valid because the covenant is incidental or secondary to the main purpose of the contract. For example, in the sale of a small business, it is customary to include a covenant not to compete. This covenant, if reasonably restricted in time and geographic area, is subordinate to the main purpose of the transaction — the sale of a business — and is, therefore, legal. See generally Note, Restrictive Covenants in Shopping Center Leases, 34 N.Y.U.L. REV. 940 (1959).

This Comment will examine judicial decisions which have treated this antitrust question, evaluate the application of antitrust theories to the shopping center situation, and present current developments in the area.

II. JURISDICTION

The commerce clause of the United States Constitution provided the authority under which Congress enacted the Sherman Antitrust Act. Accordingly, jurisdiction must be based either on acts occurring in interstate commerce or on local, intrastate acts which have a substantial effect on interstate commerce. Despite recent expansive readings, to be discussed below, with respect to the reach of the commerce clause, plaintiffs' abilities to meet jurisdictional requirements have caused several district courts to dismiss complaints which have charged that the enforcement of a restrictive covenant by a tenant of a shopping center resulted in a restraint of trade or commerce under section 1 of the Sherman Act.

In Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., a covenant in a lease to defendant supermarket prohibited the plaintiff lessor, a shopping center developer and owner, from leasing or selling space to another food supermarket within the shopping center or on any other property within 2,500 feet of the center. The plaintiff, wishing to lease space to another supermarket, brought suit claiming that the restrictive covenant was an unreasonable restraint of trade in violation of section 1. The district court, finding that the retail sale of food was essentially an intrastate operation and that any effect on interstate commerce would be incidental or far-removed, granted summary judgment for the defendant.

The court interpreted its jurisdictional reach not to include this case, in spite of the fact that the defendant supermarket received 80 per cent to 90 per cent of its goods, an annual volume of $1,800,000, directly from interstate commerce. However, since the court believed that the defendant was benefited by the restrictive covenant, it could have easily concluded that the covenant caused an increased amount of supplies to flow in interstate commerce and, thereby, substantially affected interstate commerce.

5. U.S. CONST. art. I, § 8, granted Congress power to regulate interstate commerce. The same phraseology is used in the section 1 of the Sherman Act, which provides in pertinent part:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .


6. 316 F. Supp. 1045 (D. Minn. 1970). The court noted that plaintiff financed the shopping center with loans, some of which were granted on the basis of the security of defendant's 21-year lease. Id. at 1046.

7. Id. at 1047.

8. Id. at 1048-49. Lack of jurisdiction based on an insubstantial impact on interstate commerce is a well-established limitation to Sherman Act jurisdiction. See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).


10. Id. at 1048-49.
Moreover, the court could have found that the restrictive covenant denied the plaintiff the opportunity to lease space to another supermarket, thus substantially affecting any future flow of goods in interstate commerce.

In an analogous situation, a federal district court in Maryland, in Savon Gas Stations No. 6, Inc. v. Shell Oil Co., also granted a defendant's motion for summary judgment. There, a lease between Middlesex Shopping Center and defendant gas station contained a provision that Middlesex would not use its property for the purpose of a gas station that would compete with the defendant. The plaintiff, a competitor of the defendant, acquired land and built a gas station immediately adjacent to Middlesex. Patrons of Middlesex were able to cross directly from the shopping center to the plaintiff's station without traveling onto the main thoroughfare. At defendant's request, Middlesex erected a barrier between the entrance to plaintiff's station and the shopping center thereby causing a substantial reduction in plaintiff's business. Finding that the retail sale of gas was essentially intrastate in character, the court held that the effect upon interstate commerce was incidental and inconsequential, and that the court, therefore, lacked jurisdiction.

The Savon court's holding, like that of the court in Saint Anthony-Minneapolis, was based upon a narrow interpretation of federal jurisdictional requirements. Prior to the erection of the barrier by Middlesex, plaintiff had sold approximately 300,000 gallons of gasoline per year, totaling $75,000 in sales. After the barrier was erected, plaintiff's gasoline sales dropped to between 180,000 and 240,000 gallons per year, with a resulting loss of $20,000. In addition, all of the plaintiff's gasoline came from out-of-state sources, and various items of service station equipment were purchased directly from out-of-state suppliers. It might have been reasonable to conclude that the restraint imposed by the defendant, which caused serious loss to plaintiff's business and a considerable reduction in the flow of supplies across state lines, had a substantial effect upon interstate commerce.

In contrast to those district court decisions, other courts, particularly courts of appeal, have held that the Sherman Act's jurisdictional pre-

12. Id. at 533.
13. Id. at 534.
14. Although the holding of the district court in Savon is that the plaintiff did not meet the jurisdictional requirements necessary to sustain a federal antitrust action, there is significant dicta relating to the merits of the case. The court noted that restrictive covenants were a common feature of shopping center financing and that commitments by tenants, such as the defendant, are virtually required by professional lenders. Following this justification, the court stated that the covenant was too limited in geographic scope to be illegal. Id. It is unclear how much influence this preliminary estimate of the merits had on the court's finding of no jurisdiction. See notes 27-38 and accompanying text infra.
15. 203 F. Supp. at 533.
16. Still another court, under a different antitrust statute, has stated that local real estate transactions do not come within the purview of the antitrust laws. In Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center,
requisites have been met in cases where restrictive covenants were held by large tenants of shopping centers. The court of appeals, in Savon Gas Stations, passed quickly over the jurisdictional reasoning of the lower court by stating that the Shell Oil Company was engaged in interstate commerce on a national and international scale. The court went on to decide the case on its merits, thereby overruling, sub silentio, the district court’s holding.

In Dalmo Sales Co. v. Tysons Corner Regional Shopping Center—the only other case which has specifically considered the antitrust implications of restrictive covenants in shopping center leases—both the district and the circuit courts summarily found that the jurisdictional requirements were satisfied. Dalmo, representing a group of seven affiliated corporations which owned and operated retail electrical appliance and television stores, brought an antitrust action against a shopping center owner and two of his tenants to invalidate restrictive covenants in their leases. Dalmo alleged that the tenants’ exercise of their veto against its presence in the shopping center contravened section 1, and therefore, it was entitled to a preliminary injunction against the granting of the desired lease to someone else. Both the district and circuit courts based jurisdiction on the fact that the conduct of plaintiff’s business involved receipt of goods shipped in interstate commerce. Thus, as in the circuit court’s opinion in Savon, the district and circuit courts in Dalmo used generalities as to the nature of plaintiff’s business to support jurisdiction, in lieu of an extended analysis of the effect that the restraint, the restrictive covenant, had on interstate commerce. Apparently, the courts implicitly concluded that both past and future shipments of goods across state lines were substantially affected whenever a large retail operation could enhance its sales by denying a competitor the opportunity to do business.

This conclusion is in accord with the rationale which courts have advanced in other contexts in finding the requisite jurisdiction for antitrust

---

Inc., 219 F. Supp. 400 (W.D. Pa. 1963), the court granted summary judgment for defendant, rejecting plaintiff’s allegations that sections 2(a) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (e) (1970), had been violated. Miracle Mile owned and operated a shopping center in which J. C. Penney was the largest tenant. Penney’s lease granted it the right to veto proposed expansions of present tenants. Penney used this provision to veto a requested expansion by Gaylord, a competitor of Penney’s. The court held that real estate was not a “commodity” within the meaning of the Robinson-Patman Act and that section 2 applied only to “sales” and not to leases. Id. at 404. The court also stated that real estate transactions were strictly local in nature and that, even if both lessor and lessee were engaged in interstate commerce, the restrictive covenant did not occur in the course of inter-state commerce. Id. at 403. This dicta, however, may be distinguishable since the basis of the Robinson-Patman Act is the Clayton Act, whose “commerce” may be interpreted differently from “commerce” under the Sherman Act. See E. Kintner, An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen 61-62 (1964).

17. 309 F.2d at 308.
19. Id. at 989.
20. Id.
21. Cf. id. at 989; 429 F.2d at 207.
actions. For example, in *Bratcher v. Akron Area Board of Realtors*, a group of individuals and real estate brokers wishing either to buy or lease property, sought to enjoin persons from refusing to sell or rent to Negroes, alleging that the refusal was an unreasonable restraint of trade. The court found that they had jurisdiction to hear the matter, apparently accepting appellants' contention that the restraint impeded persons, mortgage financing, and building materials from moving in interstate commerce. Similarly, in *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*, the owner of a bowling alley brought an action against a local association because of its rule disqualifying bowlers from participation in association-sponsored tournaments if the bowler competed in tournaments sponsored by plaintiff's bowling alley. The court found that this "eligibility rule" substantially affected interstate commerce by reducing plaintiff's ability to attract out-of-state bowlers, by reducing its ability to conduct tournaments that would attract interstate audiences, and by causing a reduction of interstate rental payments and a reduction in the sale of bowling goods that would have been occasioned by an established and thriving business.

Thus, it seems clear that prime tenants of shopping centers will find little success in asserting the defense of lack of jurisdiction due to insufficient impact upon interstate commerce.

III. VALIDITY OF RESTRICTIVE COVENANTS IN SHOPPING CENTER LEASES UNDER THE RULE OF REASON

No court has, as yet, clearly answered the question of whether it is lawful under section 1 of the Sherman Act for prime tenants of a shopping center to use their powers under a restrictive covenant to deny a lease to a competitor solely for anticompetitive reasons. Nevertheless, two courts have come sufficiently close to the question to suggest what the answers are likely to be in the future.

In the *Savon Gas Station* case, the defendant made use of a restrictive covenant in its lease to have a barrier erected, thereby denying the plaintiff a right-of-way from the shopping center to his property. The plaintiff alleged that defendant's actions violated section 1, and the issue, as framed by the court of appeals, was whether defendant's actions constituted an unreasonable or undue restraint upon interstate commerce. The *Savon* court premised its analysis by observing:

22. 381 F.2d 723 (6th Cir. 1967) (per curiam).
23. Id. at 724.
25. Id. at 374.
26. Id. at 379-80.
27. See notes 11-17 and accompanying text supra.
28. 309 F.2d at 309. The standard of reasonableness is well established for section 1 actions. See Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911). The rule of reason, which is used to determine the legality of most alleged antitrust infractions, involves a balancing of (1) the anticompetitive effects of the action, and (2) the personal or business need to employ some form of restraint. Cf. id. at 58.
It is well known that the success of a shopping center depends upon the gathering together in one area of a variety of enterprises which are able to serve the needs of the general public and that this end can often be best accomplished by offering to the individual merchant the exclusive right to sell in the center the kind of merchandise he handles.\textsuperscript{29}

Next, the court noted that in the instant situation there was merely an indirect interference with Savon's business, and that there was no restraint upon the competitive sale of gasoline in the neighborhood. After making this finding, the court concluded that the restraint imposed by the shopping center at the request of the defendant was reasonable.\textsuperscript{30}

Analysis of the Savon court's attempt to distinguish \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{31} a case urged by Savon as support for a finding of unreasonableness, is revealing. The Supreme Court's decision in \textit{Klor's} is frequently cited for the proposition that group boycotts, or concerted refusals to deal, which injure a competitor's business are per se violations of section 1.\textsuperscript{32} In \textit{Klor's}, several wholesalers, at defendant's urging, effectively destroyed plaintiff's retail business by refusing to sell him the appliances which he had been marketing. The Savon court distinguished \textit{Klor's} on two grounds: (1) in \textit{Klor's} the "agreements were obviously designed . . . to restrict and injure a merchant's business"\textsuperscript{33} and, therefore, were clearly unreasonable; and (2) \textit{Klor's} involved the denial to plaintiff of supplies necessary for the operation of his business.\textsuperscript{34}

It is difficult to understand the court's first distinction, since the arrangement in Savon was clearly designed to restrict and injure a competitor's business. Nevertheless, it is important to note that the Savon court, in alluding to the motive behind the alleged group boycott, considered significant not only the purpose of the defendant's action, but also its effect.\textsuperscript{35} The court's second distinction was probably the basis which truly distinguished \textit{Klor's} from Savon. By restating the specific facts in the \textit{Klor's} decision, the court obviously intended to show that \textit{Klor's} involved a concerted refusal to deal, that is, a concerted refusal to allow plaintiff...

\textsuperscript{29} 309 F.2d at 309 (footnote omitted).
\textsuperscript{30} Id. at 310.
\textsuperscript{31} 359 U.S. 207 (1959).
\textsuperscript{32} See, e.g., United States v. General Motors Corp., 384 U.S. 127, 145-47 (1966). The per se test invalidates certain types of restraints, regardless of their justification. Per se violations are, by their very nature, deemed "unreasonable." Examples of restraints that have been declared per se illegal are: price fixing, see, e.g., United States v. Trenton Potteries Co., 273 U.S. 392 (1927); division of markets, see, e.g., United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); modified, 175 U.S. 211 (1899); and tying arrangements, see, e.g., International Salt Co. v. United States, 332 U.S. 392 (1947).
\textsuperscript{33} 309 F.2d at 310.
\textsuperscript{34} Id.
\textsuperscript{35} Under the usual application of the per se test, group boycotts are deemed illegal because, by their "nature or character," they unduly restrict competition. See \textit{Klor's, Inc. v. Broadway-Hale Stores}, 359 U.S. 207, 212 (1959). However, \textit{Klor's} per se test has not always been strictly applied. See notes 75-103 and accompanying text supra.
to continue in business, whereas the joint action in Savon, although hindering the operation of plaintiff's business and based on an exclusionary covenant, merely denied a right-of-way and did not eliminate him as a competitor. Accordingly, the plaintiff's burden of proving unreasonableness was, from a practical standpoint, much greater than in a situation of direct interference with the conduct of a competitor's business. In view of this distinction, it is unlikely that Savon will be considered compelling authority in cases involving a direct refusal to lease to a competitor solely for anticompetitive purposes — a joint action which effectively eliminates the competitor. However, the Savon decision is indicative of the tendency of courts to consider the pragmatic aspect of a business situation, and to overlook some rather serious anticompetitive effects when determining the antitrust impact of certain actions.

In the Dalmo case, the United States District Court for the District of Columbia considered important implications of antitrust theory in the context of an action for a preliminary injunction to prevent the defendant from leasing the shopping center space requested by plaintiff to someone else. The plaintiff alleged that the restrictive covenant on which the refusal to lease to him was based violated section 1. The district court denied plaintiff's request for relief, stating that plaintiff had not met his burden of showing substantial likelihood of success at trial on the merits. The court of appeals, stated that the district court acted within its discretion and that there was no clear error or arbitrary action, and therefore affirmed the district court's decision.

36. *Klor's*, the Supreme Court's most forceful statement on concerted refusals to deal, is the mainstay of the attack on restrictive covenants. The *Klor's* situation involved the denial to plaintiff of the items which were essential in carrying on a retail selling business. Without these items to sell, plaintiff was absolutely eliminated as a competitor. However, the shopping center presents a slightly different problem from that in *Klor's*. Refusal to lease space in the shopping center to a competitor will bar that person from the center, but, in some cases, it may not bar him from competing. Whether a denial to lease shopping center space will totally eliminate a particular competitor will depend on both the availability and proximity of other premises and the peculiar shopping habits of customers. Cf. Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952). See notes 158-64 and accompanying text infra.

37. The Savon court also distinguished American Fed'n of Tobacco Growers, Inc. v. Neal, 183 F.2d 869 (4th Cir. 1950), on the same ground. 309 F.2d at 310. That case concerned the right of a farmer's cooperative association to prescribe membership rules for its organization when the membership rules were used to deny plaintiff access to the market. The court held such rules to be an unreasonable restraint of trade. See notes 140-44 and accompanying text infra.

38. This remark assumes that a shopping center represents a market such that exclusion may represent elimination. See note 36 supra. It may be noted that elimination of a right-of-way will, in some cases, be as effective an anticompetitive act as refusal to deal with a competitor. For example, if a gas station's sole means of access to the main thoroughfare is eliminated, the resulting inconvenience of entry and exit may cause prospective customers to forego that station.

39. See notes 18-21 and accompanying text supra.

40. 308 F. Supp. at 989.

41. Id. at 993-94.

42. 429 F.2d at 209.
The factual situation, as developed before the district court, was somewhat complex. In 1961, the developers of Tysons Corner sought leases from the Hecht Company and from Woodward & Lothrop, two large, competing department stores. Obtaining appropriate leases from these two stores was considered essential to the success of the center, since only stores of their status would provide the needed “outside” financing and the “drawing power” to attract both smaller stores and customers. In 1965, substantially identical leases were executed by Hecht and Woodward, each lease being for a minimum of 30 years and requiring a minimum rent of $500,000 per year. In these leases, an approved list of 465 potential lessees, including a wide variety of stores selling virtually all kinds of merchandise, was agreed upon by the parties. Both department stores had the right to disapprove any tenant not on the approved list, provided such approval was not unreasonably withheld. Approximately one-half of all specialty stores which eventually leased space in the center were not on the approved list, and only two applicants had been disapproved, both restaurants. One of the restaurants had not been approved by Hecht when after a personal inspection, Hecht decided that the restaurant would not be “good” for the center. When Dalmo Sales Company applied for a lease, both Hecht and Woodward disapproved the application. Hecht claimed that it vetoed Dalmo’s application after Hecht’s president had visited Dalmo’s other stores and “found them dirty, the salesmen were dirty, the “signing” in the windows were [sic] huge and [he] could not envision this kind of operation in Tysons Corner.” Woodward, acting without knowledge of Hecht’s decision, disapproved of Dalmo because Dalmo “was not in keeping with the character of the Center as it was conceived and as it currently exists.” Dalmo, on the other hand, claimed that both Hecht and Woodward disapproved because of Dalmo’s policy of discount pricing and discount advertising.

Dalmo claimed that defendant’s actions were a per se violation according to Klor’s condemnation of group boycotts resulting in the elimination of competitors. The district court adhered to the rule of reason standard, however, stating:

Where there is absence of an anti-competitive motive, or where the anti-competitive motive is not clearly demonstrable, the legality of a

---

43. See 308 F. Supp. at 990-93.
44. A third identical lease to Lansburgh Department Store was also executed at this time. Lansburgh, however, did not exercise its power under the restrictive covenant to exclude Dalmo. Id. at 990, 993.
45. This restaurant was later approved by Hecht because of “other considerations.” Id. at 991.
46. Id. at 992.
47. Id.
48. Id. at 993.
49. Id. at 989.
50. See notes 31-38 and accompanying text supra & 61-67 and accompanying text infra.
group boycott under the Sherman Act may very well be subject to test under the rule of reason.51

Considering the financial commitment by the department stores, the peculiar nature of a shopping center, and the non-anticompetitive motive of the exclusion, the court further reasoned that the defendants might well be able to prove that their disapproval of Dalmo was a reasonable restraint of trade.52

Although Dalmo involved an action for a preliminary injunction,53 the rules of law upon which the Dalmo decision was based are significant. First, since the court's rationale centered on the absence of "significant anticompetitive motives,"54 the court clearly implied that a restrictive covenant between a shopping center owner and a prime tenant, when used to eliminate a competitor for anticompetitive reasons would constitute a concerted refusal to deal and, thereby, be a per se violation under Klor's. Second, if the Dalmo reasoning requiring an anticompetitive motive is followed in future decisions, actions by prime tenants of shopping centers who wish to preserve the "fashion image" of their centers by imposing non-anticompetitively motivated restrictions upon entrants will be judged by their reasonableness rather than be prohibited per se.

Thus the Savon and Dalmo cases suggest that the rule of reason will be applied where the motive is not anticompetitive or where the harm to the competitor is not so direct or severe as to threaten elimination of the competitor. Both cases also suggest that in such circumstances the business position of the lessor may be looked at sympathetically, in order that restrictive covenants will not always be declared invalid.55

IV. VALIDITY OF RESTRICTIVE COVENANTS IN SHOPPING CENTER LEASES UNDER THE PER SE RULE

A. Group Boycotts and the Per Se Test of Illegality

As previously noted, the plaintiffs in both the Savon and the Dalmo cases asserted that the joint action of the shopping center owner and the tenant exercising their rights under a restrictive covenant resulted in a group boycott, or concerted refusal to deal, and consequently was a per se violation of section 1 of the Sherman Act. The Savon court distinguished the group boycott cases from the situation there presented on the basis of the degree of restraint imposed while, at the same time, alluding to a sup-

51. 308 F. Supp. at 994.
52. Id. at 994-95.
53. Id. at 995.
54. Id. at 994. The court spoke at some length about the fact that each department store acted independently of one another in its veto of Dalmo. The significance of the court's concern is unclear, since the combination or conspiracy (see note 5 supra) necessary for a Sherman Act violation is supplied by the joint action of developer and prime tenant.
55. Cf. notes 35-37 & 52 and accompanying text supra.
posd difference in the motives of the defendants in the two types of cases.\textsuperscript{56} In \textit{Dalmo}, the court explicitly interpreted the group boycott cases as applying only to those cases in which an anti-competitive motive or purpose was demonstrated. Clearly then, the validity of the \textit{Savon} and \textit{Dalmo} rationales depends upon a current and much debated issue, namely, whether recent Supreme Court cases which have condemned group boycotts, notwithstanding their reasonableness or their justification, were meant to include all group boycotts, regardless of their motive or effect.\textsuperscript{57}

Several Supreme Court decisions, with holdings that invite speculation with respect to their reach, form the basis for the present controversy. In \textit{Fashion Originators' Guild of America, Inc. v. FTC},\textsuperscript{58} a group of dress manufacturers who designed and marketed original fashions in ladies wear refused to sell to retailers who sold copies of their originals manufactured by "style pirates." Noting that the group was engaged in a concerted refusal to deal and was acting like an extra-governmental agency in policing it regulation, the Court declared that the group's acts unreasonably suppressed competition and were, therefore, violations of section 1.\textsuperscript{59} More important for present purposes, however, was the Court's statement that the actual reasonableness of defendants' acts was as irrelevant as is reasonableness in a price-fixing case — the most elemental of the per se violations.\textsuperscript{60}

The most prominent Supreme Court case dealing with group boycotts is the previously mentioned \textit{Klor's} case.\textsuperscript{61} \textit{Klor's} was a small retail store situated next to Broadway-Hale, one of a chain of department stores. \textit{Klor's} and Broadway-Hale competed in the sale of radios, television sets, refrigerators, and other appliances.\textsuperscript{62} \textit{Klor's} alleged that manufacturers and distributors, at the insistence of the Broadway-Hale, conspired to refuse to sell to it, thereby denying it the supplies needed to conduct its business.\textsuperscript{63} The court of appeals granted summary judgment stating that there was no "public injury," only a "private wrong."\textsuperscript{64} In reversing the circuit court's holding, the Supreme Court delineated two types of offenses: (1) unreasonable restraints and (2) those restraints which by their "nature or character" were unduly restrictive and, therefore, illegal.\textsuperscript{65} Group boycotts or concerted refusals to deal were, the Court continued, offenses of the latter type and, thus, the fact that they were "reasonable" was no defense.\textsuperscript{66}

\begin{thebibliography}{99}
\bibitem{} See notes 27-38 and accompanying text \textit{supra}.
\bibitem{} For a listing of the many cases which discuss this question, see S. Oppenheim & G. Weston, \textit{Federal Antitrust Laws: Cases and Comments} 530-32 (3d ed. 1968); \textit{Trade Reg. Rep. ¶¶ 2450-70} (1972).
\bibitem{} 312 U.S. 457, 461 (1941).
\bibitem{} \textit{Id.} at 465.
\bibitem{} \textit{Id.} at 468. The Court thus implied that it was applying a per se rule.
\bibitem{} See notes 31-38 & 49-50 and accompanying text \textit{supra}.
\bibitem{} 359 U.S. at 208.
\bibitem{} \textit{Id.} at 208-09.
\bibitem{} 255 F.2d at 231.
\bibitem{} 359 U.S. at 211.
\bibitem{} \textit{Id.} at 212.
\end{thebibliography}
all pervasive language of Klor's created a blanket classification which condemned the group boycott as a means of accomplishing any goal.67

The Supreme Court also dealt with the relationship between the group boycott and the per se test in United States v. General Motors Corp.68—a classic instance of an anticompetitive concerted refusal to deal. In this case, General Motors and several local retail dealers agreed not to sell automobiles to discounters after several dealers had complained to the manufacturer of a loss in sales due to the activities of discounters.69 The Supreme Court found that this joint, collaborative action denied discounters access to the market and was, therefore, a per se violation.70 This result followed easily from the principle of the group boycott cases, which the Court stated as:

[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct.71

It is clear from these cases that joint action to eliminate a competitor from the market, undertaken for the purpose of directly reducing competition, is anticompetitive by nature and a per se violation of the Sherman Act.72 Such was the easily identifiable purpose and effect of the defendants' actions in each of these three group boycott cases. Commentators and courts alike have recognized the legitimate condemnation of these so-called "commercial" boycotts.73 It is submitted that a strict application of the group boycott theory would likewise condemn the use of a restrictive covenant by a prime tenant of a shopping center when the sole motivation for the exclusion of the proposed tenant is the elimination of competition.74

B. Subsequent Application of the Group Boycott Cases

Assuming, then, that adherence to the clear precedent of the group boycott cases would prohibit lessees from excluding a competitor from the shopping center by enforcing restrictive covenant provisions when the

67. For a leading article espousing this point of view, see Handler, Recent Developments in Antitrust Law: 1958-1959, 59 COLUM. L. REV. 843, 863-64 (1959).
69. Id. at 133-35.
70. Id. at 145.
71. Id. at 146.
72. See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). Apparently, it is this point that opponents of restrictive covenants press in their attempts to analogize the shopping center to the Klor's-type situation. Thus, though Klor's involved the denial of items considered essential in conducting a business and the use of the restrictive covenant merely denies a particular location, the effect of each is the elimination of a competitor from the market. But see note 36 supra.
73. Cf. notes 58 & 68 and accompanying text supra & note 83 infra.
74. An example of such a case might be a restrictive covenant which by its terms gave veto power over the leasing of space to competitors of prime tenants. However, this Comment presents the contention that a concerted refusal to deal which does not have as its purpose the elimination of competition may escape condemnation under the per se rule. Cf. notes 75-103 and accompanying text infra.
sole motive for exclusion is to eliminate competition, it is submitted that tenants may still exercise discretion when helping to choose their fellow tenants. Moreover, even if an exclusion has an anticompetitive effect, but is not anticompetitively motivated, the more flexible rule of reason will replace the unyielding per se rule as the test of illegality.

The decision in Silver v. New York Stock Exchange provides some evidence that the Supreme Court did not intend to classify all concerted refusals to deal in the same category as the commercial boycotts with which the Court dealt in the group boycott cases discussed above. Silver, an over-the-counter broker-dealer who was not a member of the New York Stock Exchange, received permission from the Exchange to install a private wire service connecting his operation with the Exchange. The service was considered essential to the successful conduct of an over-the-counter business. The Exchange's Department of Member Firms suddenly discontinued this service without prior notification, hearing, or explanation. The Court began its analysis by stating that:

[R]emoval of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act. The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.

Because the Exchange was federally regulated, however, the dominant issue was the latitude allowed the self-regulatory power of the Exchange before it lost its exemption from the federal antitrust laws. Based on this issue, the somewhat ambiguous holding of the Court appears to have been that the Exchange's privilege of exemption from the antitrust laws ended when it failed to provide the petitioner with the basic elements of procedural due process, such as notice, hearing, and explanation. Despite the possible distinguishing factor that Silver involved a question of exemption from the antitrust laws, proponents of a less restrictive attitude toward business

76. Id. at 344.
77. Id. at 348.
78. Id. at 344.
79. Id. at 347.
80. Id.
81. Self-regulatory bodies, such as a stock exchange, act as officially sanctioned, extra-governmental agencies. Since important private rights are concerned, the procedural safeguards afforded by due process seem applicable to these agencies.

Although the Silver Court spoke of the plaintiff's inability to compete effectively as a broker-dealer without the private wire connections, no mention was made of a possible anticompetitive motive for the Exchange's discontinuance of the lines. Apparently then, the Court might have been willing to find a per se violation where defendant's acts had the effect of totally eliminating plaintiff from business, even though defendant was not motivated by any anticompetitive purposes. However,
judgments affecting competition have interpreted *Silver* as a retreat from the blanket classification of group boycotts as found in *Klor’s*. Significantly in the *Silver* opinion was the Court statement that the effect of the Exchange’s action was a group boycott and “[h]ence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act.” This language has supplied the basis of a distinction in several lower court decisions between commercial and “noncommercial” boycotts.

Just this approach was taken in *Tropic Film Corp. v. Paramount Pictures Corp.*, wherein the federal district court disregarded the per se rule in a non-commercial concerted refusal to deal and invoked, instead, the approach mentioned in the *Dalmo* and *Savon* cases — a consideration of the motives behind defendant’s actions. In *Tropic Film*, plaintiff sought a preliminary injunction that would have prohibited Paramount from continuing an industry-wide policy of not showing, distributing, or advertising any movie without a rating which determined whether children were eligible to view the film. Relying upon the group boycott cases, *Tropic Film* claimed a per se violation of section 1. The court, looking to the “or otherwise” language of *Silver*, while distinguishing *Klor’s* and *Fashion Originators Guild* because those cases involved anticompetitive motives, concluded that there were no anticompetitive motives or effects shown since the Court’s holding was based on the lack of procedural due process, the significance of the Court’s finding a group boycott absent anticompetitive motives is questionable.

83. In fact, the Court’s decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), also seems to reflect a somewhat restrictive attitude toward *Klor’s*. That is, in stating the principle of the group boycott cases, the *General Motors* Court emphasized the anticompetitive motive and effect of the group boycott. For a discussion of the effect that the *Silver* decision had on the per se rule, see Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1497-1504 (1966). See generally *Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247.

84. 373 U.S. at 348-49 (emphasis added).

85. Describing boycotts as “noncommercial” may be somewhat ambiguous. The true noncommercial boycott is, for example, a labor union boycotting its employer. There the refusal to deal is not, in any sense, anticompetitive; in fact, the purpose of the boycott is to impose limited injury and thereby gain bargaining leverage and generally never has as its intent the elimination of the employer from competition. Of course, employees would regret any permanent disadvantage to their employer. “Noncommercial” boycotts, as used in the antitrust context discussed in this Comment, are all concerted refusals to deal that are not primarily motivated by anticompetitive reasons, but yet have definite economic overtones. For example, if the department stores in *Dalmo* could prove that they excluded Dalmo because that store was dirty and did not meet the shopping center’s “fashion image,” then their action would be considered noncommercial. Thus, although defendants’ action in *Dalmo* might have been motivated by their desire to have the shopping center become a financial success, their actions were not directed against competition. The underlying distinction, then, is between competitors who rely primarily upon their ability to offer better, cheaper, more attractive products and those who gain control of the market through elimination of their competitors. This latter practice is referred to as being anticompetitive.” See text accompanying notes 54-55 *supra*.


87. *Id.* at 1248.
and that defendants might well prove at trial that "the Program is justified and hence legal, in view of its purposes and effects." 88

Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association 89 provides another example of the tendency in lower courts to look beyond the per se rule and consider the motives for the group boycott in determining illegality. In that case, plaintiff formed a new organization which competed with the business of Florists' Telegraph Delivery (FTD) in "telegraphing" flowers from one city to another. 90 Because FTD believed that plaintiff's organization constituted a boycott of FTD members by one specific member and that plaintiff was using deceptive and misleading advertising, defendant's association adopted a series of regulations prohibiting its members from doing business with plaintiff. 91 At the trial, plaintiff won a substantial monetary judgment, but the case was appealed on grounds that the trial court had refused to instruct the jury that FTD's motives for adopting these rules were pertinent in determining the legality of its acts. 92 The circuit court reversed, refusing to apply the per se rule and stating that:

[1]f the rules were adopted and published with specific intent to destroy plaintiff's business such intent would convert the adoption and publication from lawful to unlawful acts, and ... while trade associations may not adopt protective rules when the purpose or direct affect is to force competitors out of business, the antitrust laws do not prevent the adoption of reasonable rules and regulations to protect against destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis. 93

A final example of avoidance of the per se rule is Beckman v. Walter Kidde & Co. 94 There, the district court granted summary judgment for defendants, a manufacturer and a distributor of fire extinguishers, because plaintiff had raised no genuine issue of fact regarding, inter alia, any restraint of trade. 95 As support for his claim of a per se violation, plaintiff had relied exclusively upon the fact that defendants had simultaneously stopped dealing with him. 96 Although the court acknowledged the validity of the per se rule in certain situations, it rejected plaintiff's contention that a concerted refusal to deal was, by itself, a per se violation under Klor's 97 The court noted that such an interpretation of Klor's

88. Id. at 1255.
89. 371 F.2d 263 (7th Cir. 1967).
90. Id. at 266-67.
91. Id. at 267.
92. Id. at 266, 267.
93. Id. at 269-70.
95. Id. at 1328.
96. Id. at 1327-28.
97. Id. at 1327. The court recognized that horizontal price-fixing, division of markets, and resale price maintenance were per se violations, as was "a refusal to deal which is in furtherance of one of these illegal objectives ...." Id. This view, however, probably represents an interpretation of the per se rule which is too
would cause all exclusive franchises to be invalid and, therefore, qualified *Klor's* by limiting it to a situation where there is an effort to drive a competitor out of business by eliminating his sources of supply.  

The foregoing cases clearly show a reluctance by courts to adopt an interpretation of *Klor's* so as to amount to a blanket condemnation of group boycotts. Instead, an examination of the motivation behind the group boycott has been considered essential to the determination of illegality. In the absence of an illegal motive, the general rule of reason has been applied. Thus, when the *Dalmo* court considered the motive behind the defendant's group boycott and when the *Savon* court alluded to a supposed difference between the motive of the defendants in that case and those of the defendants in *Klor's*, they were not molding a novel interpretation of the per se rule, but were merely following a line established in prior cases. Granting, then, that the group boycott cases did not eliminate the need for those courts to examine the purpose of the group boycott, the question remains whether a non-anticompetitively motivated boycott in future shopping center cases will escape the condemnation of the per se rule.

Because of the peculiar nature and problems of the shopping center, it is submitted that the legality of restrictive covenants in shopping center leases should not automatically be subject to the per se prohibition of *Klor's*. If group action can be justified by valid and necessary business criteria and if the resulting effect on competition, as opposed to the effect on a particular competitor, is not actually exclusionary, concerted refusals to deal should be allowable as an element essential to the continued survival of the shopping center. Furthermore, viewing exclusionary practices by tenants under the rule of reason would not detract from the over-

---

98. Id. Cf. notes 139-51 and accompanying text infra.


100. This approach would necessitate a finding as to the motivation behind the group boycott. If the group boycott was anticompetitively motivated, the court would be required to condemn the action as a per se violation. However, if the group's motive for instituting the boycott was not anticompetitive, the defendants' actions would be judged under the more liberal rule of reason.

101. It is submitted that the considerations which prompt exclusion from a shopping center are too complex and too intertwined with social and economic values to be treated categorically under the per se rule.

102. For a discussion of potentially valid business reasons for excluding a competitor, see notes 154-67 and accompanying text infra.
all objectives of the Sherman Act. Since courts would consider the effect on both consumers and competitors when evaluating the validity of a proposed tenant's exclusion, the public interest would be adequately protected. Adoption of the rule of reason might also give businesses and courts the flexibility necessary to ensure adaptation of the law to new and changing economic situations.

V. THE SHOPPING CENTER AS A JOINT VENTURE

Conceivably, the fundamental cause of the antitrust dilemma — the problem of amassing sufficient capital for the development of the shopping center — may well indicate the most palatable legal solution to that dilemma. As noted earlier, developers are unable to finance the building of the shopping center without assistance. Consequently, developers have enlisted the aid of lending institutions which have, in turn, required security for their loans. In like manner, prime tenants are compelled to protect their own substantial investment through restrictive covenants. Clearly, the situation requires interdependence and cooperation among all parties involved. Accordingly, such a business arrangement may fairly be described as a "joint venture." Generally speaking, a joint venture is "a group which undertakes an economically productive activity in concert in order to overcome the impracticability of any one member's amassing sufficient capital for the project . . . ." The economic function of the group is to increase its members' market share through efficiency and not to augment their market control.

Joint ventures appear to be inherent in certain industries, such as commodity exchanges and professional sports, which could not operate unless there was interdependence and cooperation among their members. Since the success of a joint venture depends upon the qualifications of each individual member, it is reasonable to expect organizers to require potential members to comply with certain business, ethical, or eligibility standards before they are admitted to the business arrangement. These entrance requirements serve the dual purpose of furthering both public policy goals and the individual members' own interests. The joint venture

103. See notes 158-64 and accompanying text infra.
104. A joint venture theory is an alternative defense that prime tenants of a shopping center may advance in their attempt to escape the per se rule. Accordingly, if courts confronted with the antitrust validity of restrictive covenants in shopping center leases fail to accept a limitation on the Klor's rule, these restrictive covenants may still be subject to the rule of reason under a joint venture analysis.
105. See notes 1 & 2 and accompanying text supra.
108. Id. at 1537. Cf. note 85 supra.
109. See Comment, supra note 83, at 1488.
is characterized by a mutual limiting by the parties of their ability to deal with outsiders, and by an intention to further their own business aims rather than to coerce action by third parties. Courts have not judged the validity of such arrangements or of their membership standards by the per se rule; rather, they have applied the rule of reason.

The origin of the joint venture theory may be found in *Associated Press v. United States.* The Associated Press (AP), a cooperative association with approximately 1200 members — the largest news gathering agency in the country — prohibited, in its by-laws, the selling of news to nonmembers and imposed extremely onerous entrance requirements upon applicants to insure that competitors of members were excluded. The Supreme Court found that the by-laws hindered and restrained the sale of news to nonmembers, seriously limited new entrants, inhibited competition, and, therefore, on their face, unreasonably restrained trade. Accordingly, the Court affirmed the district court's decree which enjoined AP from observing those by-laws. More importantly, for present purposes, the Court also affirmed that part of the district court's decree which stated that the association could adopt new by-laws which restricted membership, provided that: (1) members who competed with applicants did not have the power to veto those applicants; and (2) the ability of nonmember applicants to compete with members was not considered as a factor in the admission of that applicant. Apparently, the Court believed that the "[e]conomic realities in the newsgathering industry" would not allow the imposition of the per se rule which it had applied in the commercial boycott situation of *Fashion Originators Guild.* By affirming the district court's decree, the Supreme Court tacitly approved that court's reasons for distinguishing the latter case. Learned Hand, speaking for the district court, had stated that, since the purpose of the association was not to injure third parties, the court must evaluate the advantages gained by such an association in the gathering, assembly, and distribution of news against the injury done to the consuming public by the association's boycott of members not satisfying the association's standards. In other words, since the refusals to deal were wholly subordinate to the main purpose of newsgathering, the rule of reason was the appropriate gauge of validity.

Another illustration of the joint venture concept may be seen in cases involving the professional sports industry. As previously noted, the struc-


111. 326 U.S. 1 (1945).

112. *Id.* at 9-11.

113. *Id.* at 12-13.

114. *Id.* at 21.


117. This approach parallels historical property analysis. *See* note 3 *supra.*
ture of the sports industry easily fits within the joint venture framework. Since success in the industry requires that each member of an association conform to certain standards, courts have been quick to accept the appropriateness of rules limiting membership in different professional associations to persons having suitable ability and character. Consequently, the rule of reason has become the almost exclusive test of validity when rules governing the industry have been challenged as antitrust violations.

The Ninth Circuit, in the case of Deesen v. Professional Golfers' Association of America,\textsuperscript{118} examined one such rule and decided that a liberal approach to antitrust questions was justified in the sports industry. The Professional Golfers' Association (PGA) either sponsored or co-sponsored most of the professional golf tournaments in the United States, and approval by the PGA was necessary before a golfer could compete in those tournaments.\textsuperscript{119} Because the number of golfers wishing to enter the PGA-sponsored tournaments far exceeded the number that could efficiently compete in a properly conducted tournament, it became necessary for the PGA to establish eligibility requirements in order to control the number of participants.\textsuperscript{120} Plaintiff, a professional golfer, was denied recognition as an approved tournament player when PGA officials found that he did not have the ability to finish among the money-winning players.\textsuperscript{121} In plaintiff's antitrust action against the PGA, the court first found that the eligibility requirements were designed for the legitimate purpose of allowing only the best players to compete in the professional tournament.\textsuperscript{122} After considering both the purpose of the eligibility requirements, which was "not to destroy competition but to foster it by maintaining a high quality of competition,"\textsuperscript{123} and the practical problem of controlling the number of entrants, the court concluded that the rules constituted a reasonable restraint of trade. The court's approach focused on the net effect achieved by the rules, rather than on the means — a group boycott — used to reach that end. The court recognized the need for craft regulation and held that, although the rules affected the ability of players to compete, since they were essential to the continued operation of the golfing industry, they were valid as long as reasonably applied.\textsuperscript{124}

Since the success of the sporting industry depends upon the honesty of the athletes and the confidence that the public has in them, the character and integrity of professional sports figures has been the subject of association regulation. In Molinas v. National Basketball Association,\textsuperscript{125} the district court confronted an association rule prohibiting basketball players from betting on basketball games. Molinas, a professional basketball player,

\textsuperscript{118} 358 F.2d 165 (9th Cir.), \textit{cert. denied}, 385 U.S. 846 (1966).
\textsuperscript{119} \textit{Id.} at 166-67
\textsuperscript{120} \textit{Id.} at 167.
\textsuperscript{121} \textit{Id.} at 168.
\textsuperscript{122} \textit{Id.} at 170.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 171-72.
\textsuperscript{125} 190 F. Supp. 241 (S.D.N.Y. 1961).
placed several bets that his team would win certain games by a particular point spread.\textsuperscript{126} Because he violated the regulation,\textsuperscript{127} Molinas was suspended and later was refused re-instatement, thereby having his professional basketball career ended.\textsuperscript{128} When Molinas brought suit claiming that the regulation — a form of group boycott by the teams in the league — was an unreasonable restraint of trade, the court found that neither the rule itself nor its application to Molinas was such a restraint.\textsuperscript{129} The basis of the court's holding was that the rule appeared "not only reasonable, but necessary for the survival of the league."\textsuperscript{130} Thus, when the structure of a business arrangement required that the members of the group command a certain level of public confidence, the court acknowledged the need for the group to act in concert to eliminate unworthy elements.\textsuperscript{131}

A far more elaborate set of procedures used to screen the character and integrity of sports figures prior to their admission into a joint venture was considered and accepted in \textit{United States v. United States Trotting Association}.\textsuperscript{132} The United States Trotting Association (USTA) had adopted rules and standards of competence for participating officials and drivers. USTA-member tracks allowed only members of the association to race at their meets. Some of the stated reasons for disqualification from membership were: past connections with crime, breach of the by-laws, and a determination that "the applicant's membership in the Association would not be in the best interests of the sport of harness racing or would be detrimental to or reflect adversely or unfavorably upon harness racing or the Association."\textsuperscript{133} The court refused to grant summary judgment for the United States, rejecting its contention that the USTA's rules and regulations established a group boycott to be condemned under the \textit{Klor's rule}.\textsuperscript{134} As to the merits, the court held that the rules and regulations governing the USTA were not unreasonable, but rather that they regulated and standardized harness racing and promoted competition.\textsuperscript{135} The court apparently cast aside the per se rule when it found that the United States had not proved that defendant's stated purposes — the preservation of the integrity

\begin{itemize}
\item \textsuperscript{126} \textit{Id.} at 242.
\item \textsuperscript{127} Molinas' betting also violated a provision of his contract with his particular team. \textit{Id.}
\item \textsuperscript{128} \textit{Id.} Although Molinas' career as a professional basketball player was ended, he was fortunate enough to obtain another job. However, it is possible that, in a given case, the penalty of exclusion imposed by the president of the basketball league could mean the elimination of a primary opportunity to earn a livelihood. In that sense, the application of such rules is far more severe than a refusal to obtain a lease for certain space in a shopping center, and consequently, a higher degree of necessity might be required to prove reasonableness.
\item \textsuperscript{129} \textit{Id.} at 243-44.
\item \textsuperscript{130} \textit{Id.} at 243.
\item \textsuperscript{131} \textit{Id.} at 244.
\item \textsuperscript{132} 1960 \textit{Trade Cas.} \textit{f} 69,761, at 76,954 (S.D. Ohio 1960).
\item \textsuperscript{133} \textit{Id.} at 76,959-60. It should be noted that this regulation had not been used to exclude any person in the five years during which the rule had been in effect.
\item \textsuperscript{134} \textit{Id.} at 76,955-56.
\item \textsuperscript{135} \textit{Id.} at 76,957.
\end{itemize}
of harness racing and the registration and identification of horses — were anticompetitive. Considering the legitimacy of the organization's purposes, the court formulated its test:

[W]hether the restraint imposed, if any, is such as "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."\textsuperscript{136}

The analyses of these courts suggest a clear differentiation between a "commercial" group boycott and a concerted refusal to deal undertaken in a joint venture context. Once it had been established that the professional sports industry could not survive without collective action by competitors, group boycotts were no longer subject to the \textit{Klor's} per se test. Instead, reasonable restraints used to promote legitimate professional industry interests were deemed valid despite the elimination of certain persons from these arrangements.\textsuperscript{137}

In addition to its application to the sports industry, the joint venture concept appears well-adapted to commodity exchanges. Those exchanges have been recognized as the only practical and economic method of organizing certain types of markets, since the duplication of facilities otherwise necessary would cause excessive economic waste.\textsuperscript{138} To achieve an efficiently operated commodity exchange, not only must merchants cooperate with one another, but standards regulating the admission of competitors must be formulated. In addition, the primary purpose of the exchange is not to exclude others, but rather to further the business of the members directly, and any effect on third parties is incidental to this main objective.\textsuperscript{139}

\textit{American Federation of Tobacco Growers v. Neal}\textsuperscript{140} may be taken as illustrative. There, plaintiff, a farmers' cooperative association, applied for membership and selling time in the local market, the area's only selling place for tobacco. The application was refused by defendant, a tobacco board of trade whose members were other tobacco sellers and which controlled the particular market. The effect of the exclusion was to eliminate plaintiff as a competitor in that market.\textsuperscript{141} The Fourth Circuit refused to accept the reasons for the rejection offered by defendant\textsuperscript{142} and found an

\textsuperscript{136} \textit{Id.} (citation omitted).

\textsuperscript{137} \textit{But see} Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966), in which the court found per se illegal "eligibility rules" promulgated by the association and defended as reasonable and necessary to prevent cheating or "sandbagging" in its bowling tournaments.

\textsuperscript{138} \textit{See} Comment, \textit{supra} note 83, at 1492 n.47.

\textsuperscript{139} \textit{See} Barber, \textit{supra} note 99, at 877.

\textsuperscript{140} 183 F.2d 869 (4th Cir. 1950).

\textsuperscript{141} \textit{Id.} at 871.

\textsuperscript{142} The reason which defendant offered for the exclusion was that the board's charter would not allow it to admit warehouses located outside the city limits. The court rejected this explanation, stating that the charter covered the "auction market" and not the city limits. \textit{Id.} at 871-72. The district court's acceptance of this particular restraint as reasonable was based on the fact that plaintiff, because he was located outside the city limits, had to pay lower taxes and had lower construction
antitrust violation. It should be noted that the court considered the reasons advanced for rejection and did not condemn the promulgation of the exchange membership rules per se. Thus, the court did not prohibit the exchange from rejecting applicants for other than anticompetitive reasons.

In the later case of *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, the First Circuit was more explicit in delineating the discretion allowed commodity exchanges when excluding competitors. Gamco, a wholesale purchaser of fruit and produce, had been leasing space from defendant lessor of the Providence Building, the area's most advantageous dealing location for fruit and produce wholesalers and retailers. When Gamco became affiliated with an out-of-state dealer, this affiliation violated a lease provision and renewal of Gamco's lease was refused. Relying upon section 2 of the Sherman Act because the defendant enjoyed the position of a natural monopolist, the court stated that defendant need not accept all who asked to lease space in the building. But, the court added, exclusion would be valid only if based on reasonable criteria, such as lack of available space, financial unsoundness, or low business or ethical standards. The court cautioned that:

> [T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified.

143. *Id.* at 486.
144. The court stated that a sufficient answer to defendant's claim that its exclusion was reasonable would be that the exclusion of a competitor is unreasonable per se. *Id.* at 873. However this dicta is the only mention of a per se rule in the opinion. *Id.* at 874. Moreover, this case has not been cited by later courts as holding defendant's actions unreasonable per se. *Cf.* Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 309 F.2d 306, 310 (4th Cir. 1962); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 487 (1st Cir. 1952). In any event, since this case involved the exclusion of a competitor for solely anticompetitive reasons, an application of the per se rule would not detract from this Comment's analysis of the joint venture theory.
145. 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).
146. Apparently, the out-of-state dealer was a lower priced competitor of defendants. *Id.* at 488.
147. *Id.* at 486.
148. 15 U.S.C. § 2 (1970). This section provides in pertinent part:
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

*Id.*
149. 194 F.2d at 487.
150. *Id.*
by reasonable business requirements establishes a prima facie case of purpose to monopolize.\textsuperscript{151}

Rejecting the alleged basis for the exclusion offered by defendants, namely, that plaintiff was financially unsound, the court held that the defendants had not met their burden of proving that the basis for the exclusion was innocent of the economic consideration which plaintiff had alleged as the reason for the termination.\textsuperscript{152} However, the court apparently accepted the need of those controlling a joint venture to be able to exercise some discretion in the selection of persons wishing to become associated with the business arrangement.

Despite the fact that several commentators have formulated the general principles of the joint venture theory from the common elements of the foregoing cases,\textsuperscript{153} the joint venture principle remains judicially unarticulated. It seems clear, however, that courts have been willing to circumvent the per se prohibition against group boycotts when a particular industry has demonstrated sufficient need for a reasonable use of cooperative action. In this context, therefore, the question focuses on the applicability of the joint venture theory to the shopping center situation. Obviously, the shopping center could not begin, nor could it continue to operate effectively, unless all parties cooperated with one another for their mutual benefit. This interdependence, combined with the fact that shoppers are likely to evaluate the desirability of a shopping center by the composite of stores located there, produces the need for present tenants to select carefully those who wish to be associated with the center. In addition, the entrance requirements imposed by present tenants, while benefiting the business of these tenants, also aid the public policy admittedly served by efficient shopping centers. It would, therefore, appear that the joint venture theory could have peculiar applicability in the shopping center situation. In any event, the attempt to fit the shopping center within the joint venture framework is likely to be presented for final determination in upcoming antitrust cases.

VI. \textbf{LEGAL BUSINESS CRITERIA FOR EXCLUDING TENANTS FROM SHOPPING CENTERS}

If courts find that a shopping center is a joint venture or that it should, in any event, be afforded the more liberal antitrust treatment of the rule of reason, appropriate criteria for evaluating the reasonableness

\begin{itemize}
\item \textsuperscript{151} Id. at 488.
\item \textsuperscript{152} Id. It would be virtually impossible for persons having the power to veto the admission of their competitors into an association to prove that their actions were totally innocent of anticompetitive motivations. The standard then could not be innocence from anticompetitive motives, but rather the likelihood that the acceptable criteria which defendant asserted were, in fact, the primary basis for exclusion.
\item \textsuperscript{153} See Barber, supra note 99, at 877; Bird, supra note 83, at 272; Comment, supra note 83, at 1488.
\end{itemize}
of certain exclusions must be developed. Courts viewing the shopping center situation are likely to borrow several of these criteria from the "joint venture cases" of the sports and commodity exchange fields.

The first criterion might be that the membership rules must bear a sufficient relationship to the joint venture's objectives. As was seen in *Gamco* and *Tobacco Growers*, rules which cannot be justified by other than anticompetitive reasons are clearly unreasonable. Non-anticompetitive reasons for exclusion, however, such as that the proposed tenant is "dirty" and that his tenancy will detract from the "fashion-image" and, consequently, the financial success of the shopping center, may well prove legitimate. Also, participants might be able to exercise their veto because they believe that a particular store does not have the drawing power necessary to bring customers into the center. Considering that the success of the shopping center depends largely on the ability of each store to complement the other stores, and that there are a considerable number of stores vying for space in the center, courts may conclude that an exclusion based on lack of drawing power is reasonable.

A second criterion, to temper the first, should require that the competitive harm inflicted be no greater than is necessary to protect the joint venture's interests. For example, in a situation like that in *Dalmo*, the court would have to be convinced that a merchants' association could not effectively police the cleanliness of the applicant's stores, or alternatively, that other stores owned by the applicant were beyond the control of a merchants' association and that the public's distaste for the other stores would degrade the public's image of the shopping center. The adoption of this second requirement would afford an applicant the opportunity to offer to the controlling tenants appropriate changes that would bring its store up to the level considered acceptable by the members of the shopping center. Refusal to accept an applicant as a tenant after he offered to remedy his "faults" would weigh heavily against any attempt to justify his exclusion.

A third, related criterion could be based on the particular business circumstances, such as the ability of the excluded party to find an alternate place in the proximity and the ability of the consumer to go elsewhere despite the particular loss of competition. However, the availability of alternate business sites should not be sufficient to legalize an otherwise anti-

154. See Bird, supra note 83, at 272.
155. For discussion of these cases, see notes 140-52 and accompanying text supra.
156. See Rowley & Donohoe, supra note 106, at 910.
158. See Bird, supra note 83, at 272–73.
159. See notes 39–55 and accompanying text supra.
160. See Rowley & Donohoe, supra note 106, at 910.
161. See Bird, supra note 83, at 278. This criterion would aid in determining whether a total exclusion from the market was effected or whether merely a limited adverse effect resulted. Cf. note 36 supra.
competitive exclusion. Courts have long subscribed both to the property principle that a particular piece of real property is unique\(^1\) and to the antitrust principle that manifestly anticompetitive practices will not be excused because there is no substantial public injury, but merely a private wrong.\(^2\) Nevertheless, if space is available nearby, the burden of justifying an exclusion, both in terms of injury to a competitor and injury to competition, would be correspondingly decreased in practice. Harm to the consumer\(^3\) would be similarly judged by the specific facts of each case. As background, courts should take into account the fact that the shopping center is a convenience to the consumer which may require him to forego some of the choice normally fostered by competition, particularly where competing goods are available in satellite stores in the center, in alternate shopping centers, or in retail stores within the consumer’s reach.

A fourth criterion, far more difficult to apply than the relatively objective criteria mentioned heretofore, is the excluding tenant’s true motivation. Preliminary consideration should be given to the absolute exclusionary power of the lessee holding a restrictive covenant,\(^4\) since retention of such tremendous power should alert courts to scrutinize its application and guard against its unreasonable or arbitrary use. However, the mere fact that one or two of the largest tenants of a shopping center hold this power should not automatically invalidate the restrictive covenant.\(^5\) Although the prime tenant is the tenant most likely to possess such power, it must be remembered that he is the backbone of, and has the largest stake in, the shopping center. Furthermore, his actions, if used illegally to exclude an acceptable tenant, are reviewable and reversible in a suit for damages or injunctive relief brought by the excluded party under antitrust law. The threat of a treble damage action will most probably provide an effective deterrent against arbitrary, anti-competitive uses of such power.

When searching for the motivation behind an exclusion, the obvious starting point is the status of the person excluded. The simplest type of

---


164. While the protection to competition afforded by the Sherman Act is generally presumed to benefit the consuming public indirectly, courts have, at times, considered the direct benefit or harm to the public when assessing the reasonableness of business conduct. Cf., e.g., FTC v. Proctor & Gamble Co., 386 U.S. 568, 588-89 (1967) (Harlan, J., concurring).

165. See Rowley & Donohoe, supra note 106, at 909.

166. The fact that power is concentrated in the hands of one or two tenants of the shopping center may provide a distinction between this situation and a commodity exchange’s board of trade or the sports league, wherein each member has a voice in matters affecting the group. However, assuming that a court finds a particular exclusion reasonable, the mere fact that one tenant, and not several, reached this conclusion should not invalidate an otherwise legitimate business judgment.
case is one where the excluded party is a noncompetitor, for example, if the excluded party in *Dalmo* were a bank.\(^{167}\) When dealing with a noncompetitor, the tenant's burden of justifying an exclusion based on legitimate business reasons would be relatively light, and wide latitude might be given the tenant's discretion. At the other extreme, when the excluded party is a competitor of the prime tenant, the burden of justification would be substantial. The middle ground between these two extremes, the area occupied by the "partial" or "limited" competitor, will present the most trouble in the application of a standard of reasonableness. But, this problem may not be as difficult as it first appears because a court can look to the likely business interests of the tenants. A successful shopping center demands a complete array of varied and diversified satellite stores. As was the case in *Dalmo*, the prime tenants were willing to approve hundreds of such stores for admission to the center. Consequently, a court may take notice that it is unlikely that a prime tenant will exclude a satellite store merely because the store is a partial competitor.

As has been seen, precise precedents and standards for judging the antitrust impact of restrictive covenants in shopping center leases are lacking. Although the shopping center defies easy categorization under established antitrust theory, a start has been made toward defining its role within the antitrust framework. The validity and appropriateness of the *Savon* and *Dalmo* courts' reasoning will undoubtedly soon be tested.

### VII. Recent Developments

In order to project the kinds of issues and answers likely to be presented in the near future, several actions currently in varying states of litigation must be reviewed. In February 1969, the Bureau of Competition within the Federal Trade Commission (FTC) began an investigation of leasing practices in shopping centers.\(^{168}\) At the completion of the study, the Bureau's staff recommended that restrictive covenant provisions in shopping center leases be given top priority.\(^{169}\) The Justice Department agreed with the Bureau's recommendation, and the Bureau's attorneys turned their attention to Gimbel Brothers department stores and Tysons Corner.\(^{170}\) Consequently, on May 8, 1972, subsequent to the *Dalmo* decision, the FTC filed a complaint against the Tysons Corner Regional Shopping Center and the three department store tenants that had been involved in the prior *Dalmo* case.\(^{171}\) On the same day, the FTC filed a

---

\(^{167}\) Another example would be if a restaurant were excluded by one of the defendants in *Dalmo*. The defendant department store would clearly have no anti-competitive purpose in excluding.

\(^{168}\) Tysons Corner Regional Shopping Center v. FTC, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 74,091, at 92,488 (D.D.C., filed July 13, 1972).

\(^{169}\) Id.

\(^{170}\) Id.

\(^{171}\) In re Tysons Corner Regional Shopping Center, No. 8886 (FTC, filed May 8, 1972).
complaint against Gimbel Brothers, alleging antitrust violations arising from twenty-four separate shopping center leases.\textsuperscript{172}

The FTC's complaint against Tysons Corner specifically attacked those lease provisions which gave the department store respondents (1) the right to veto the leases of proposed tenants, (2) the right to limit the floor space available to other tenants, (3) the power to require other tenants to join an approved merchant association, and (4) the power to exercise continuing control over the conduct of other tenants' businesses.\textsuperscript{173} The FTC claimed that these lease provisions constituted an unfair method of competition within the meaning of section 5(a) of the Federal Trade Commission Act\textsuperscript{174} because they had the following anticompetitive effects: (1) price-fixing; (2) allowing the department store tenants to exclude their competitors; (3) eliminating discount advertising and selling; (4) denying the public the benefit of price competition; (5) boycotting potential entrants to the center; and (6) restricting the developer in his choice of tenants.\textsuperscript{175}

Accordingly, the order requested by the FTC would require the department stores to make no effort to enforce these provisions, to cease and desist from using, directly or indirectly, any device to control the admission of other tenants, and to cease and desist from entering into any course of action, understanding, combination, contract, or the like with any person or entity for the purpose or with the effect of raising or stabilizing prices or other conditions of sale.\textsuperscript{176} The proposed order also would require Tysons Corner, the developer, to cease operating under any agreements which limit the price range or general quality of merchandise to be sold. In addition, the order would require each respondent to notify each smaller or satellite tenant of the content of the order and to supply each satellite store with a copy of the order within thirty days.\textsuperscript{177}

The complaint and order filed against Gimbels is quite similar to that filed against Tysons Corner.\textsuperscript{178} Gimbels answered, denying all charges and asserting that enforcement of the proposed FTC order would not be in the public interest, since it would effectively eliminate the building of shopping centers and/or the participation of department stores in future


\textsuperscript{173} FTC Complaint at 7, In re Tysons Corner Regional Shopping Center, No. 8886 (FTC, filed May 8, 1972).

\textsuperscript{174} 15 U.S.C. § 45(a)(1) (1970). This section provides:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

\textsuperscript{175} FTC Complaint at 7-8, In re Tysons Corner Regional Shopping Center, No. 8886 (FTC, filed May 8, 1972).

\textsuperscript{176} Id. at 12-13.

\textsuperscript{177} Id. Tysons Corner and the FTC could not agree on a consent decree. See Tysons Corner Regional Shopping Center v. FTC, 5 \textit{TRADE REG. REP.} (1972 Trade Cas.) ¶ 74,091, at 92,489 (D.D.C., filed July 13, 1972) (propriety of complaint against Tysons Corner questioned since the then Director of the Bureau of Competition was the attorney for Dalmo in Dalmo's private antitrust action against Tysons Corner).

\textsuperscript{178} In re Gimbel Brothers, Inc., No. 8885 (FTC, May 8, 1972).
shopping center developments. Consequently, Gimbels claimed, since competition is promoted and not restrained by restrictive covenant provisions, the complaint should be dismissed because its leases are fair and reasonable and, therefore, valid.

If this extremely broad FTC order were given full effect, all restrictive covenant provisions in shopping center leases would be absolutely banned. Since the FTC order covers all direct and indirect uses of the restrictive covenant, as well as any course of action with the purpose or effect of stabilizing prices or other conditions of sale, the current actions are distinguishable from both the Savon case — an indirect interference — and the Dalmo case — which looked to the purpose of the tenant’s action. More important, however, is the FTC’s attempt even to prohibit the prime tenant from requiring prospective tenants to join an approved merchants association. If this provision of the order were accepted, the viability of the suggested application of the joint venture theory would be seriously threatened. The FTC’s distaste for the joint venture theory was further shown by its attempt to outlaw any regulation of the quality of merchandise sold. Again, if judicially adopted, this attitude would virtually eliminate the possibility of a prime tenant enforcing any “reasonable” exclusion.

If the FTC’s stance on the anticompetitive impact of restrictive covenants in shopping center leases is approved by the courts, the antitrust laws would completely envelop any property law analysis previously considered valid. That is, even a non-competitive type agreement limited by a certain number of years and limited to a certain geographical area could not be considered reasonable. This approach would discredit the dicta in the district court’s opinion in Savon which stated that the restraint there was valid because reasonably restricted to a specific area.

179. Gimbels stated that the proposed FTC order would, inter alia: (1) compel Gimbels and other large department stores to channel future expansions to freestanding stores without adjacent competitive establishments; (2) deter Gimbels and other large department stores from making long-term financial commitments essential to the creation and the development of shopping centers; (3) impede and limit shopping center developers in obtaining the financing essential to the creation and the development of retail shopping centers; (4) deprive consumers of the convenience, economy, and benefits of competition to be derived from retail shopping centers; and (5) destroy the investment of both large and small tenants in existing retail shopping centers which was made in reliance on the expected success of a venture based on a broad mix of competing tenants. See BNA TRADE REG. REP. No. 573, at A-22 (July 24, 1972).

180. Id.

181. Without the formation of a merchant’s association, the organizers of the shopping center would be unable to impose any form of objective eligibility requirements for admission of tenants to the center. They could keep unwanted merchants from the center only by individually — and arguably more arbitrarily — exercising covenant rights.

182. If restrictive covenants are found violative of section 5 of the Federal Trade Commission Act, their validity under section 1 of the Sherman Act would become academic, since the possibility of a prosecution under section 5 would, probably, effectively deter lessors from including these provisions in shopping center leases.

183. For a discussion of the property law concept, see note 3 and accompanying text supra.

184. See note 14 supra.
In addition to the FTC, the Justice Department has also sought to eliminate restrictive covenants in shopping center leases. In June 1971, the Justice Department filed a complaint which challenged a shopping center lease agreement in which the largest commercial bank in North Carolina was given the exclusive right to install and maintain a night depository on shopping center premises. The case was settled by a consent decree in which the bank was enjoined from enforcing its right under the lease to restrict any other banking facilities from locating in the shopping center.

In addition to governmental attacks on shopping center leases, several private suits have recently been filed. In November 1971, Plum Tree, a national franchiser of gift stores, filed a class action for damages against the Rouse Company, a shopping center developer, and seven of its centers throughout the country. Plaintiff contended that the antitrust laws were violated by defendant's lease which prohibited discounting, limited hours of operation, restricted advertising, and prohibited plaintiff from operating any other stores within a certain distance of the centers. The action, although unsuccessful, also alleged a conspiracy between Rouse and certain department stores within the center with which the defendant consulted regularly in making decisions regarding the operation of the centers. If a class action as filed by Plum Tree were permitted, shopping center developers and prime tenants of the center would be exposed to devastating civil liability.

Finally, a private antitrust action has been brought by a tenant in Wee Three Records v. Plymouth Meeting Mall, Inc. There, the plaintiff sought a preliminary injunction, alleging violations based on a conspiracy, independent of the lease agreement, between the shopping center and certain competitors of plaintiff in the center. Plaintiff's request for a preliminary injunction was denied because it failed to meet its burden of showing substantial likelihood of success at a trial on the merits.

Although neither was successful, both the action by Wee Three Records and Plum Tree's class action evidence a willingness on the part of plaintiffs to bring antitrust actions, notwithstanding the absence of express exclusionary lease provisions. This dual attack by private parties and government agencies will result eventually in a more definitive resolution of problems posed by restrictive covenant leasing.

186. Id. at 92,629–30.
188. Because of a conflict of interests, Plum Tree was denied maintenance of the suit as a class action. See BNA TRADE REG. REP. No. 589, at A–9 (Nov. 21, 1972).
VII. Conclusion

Presently, the inclusion of restrictive covenants in leases granted to prime tenants of shopping centers remains a keystone in the development of the center. However, the firm legal footing upon which these covenants once stood is currently being vigorously contested by both private parties and government agencies. Hopefully, a clear answer as to their antitrust implications and the applicable standards by which they are to be judged will soon be forthcoming, in order that participants in million-dollar shopping center ventures will know where they stand; however, judicial analysis must proceed deliberately, building on established antitrust doctrine, while mindful of the new economic context of modern-day retail business.

Nicholas Scafidi