

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

Is it possible to guide jury discretion in capital cases toward the most “death-worthy” cases, or is the task beyond human ability, as Justice Harlan argued?

Rate each of the following hypotheticals from 1 to 10, with one being the most “death-worthy” and 10 being the least “death-worthy.” (No ties; you must use all 10 rankings.)

- A. Foster mother neglect: A middle-aged woman with no substantial criminal record completely neglects a 3-year-old child who is placed with her for foster care, for which the foster mother receives a stipend sufficient to care for the child. The foster mother spends the stipend on her opioid addiction rather than the child, and the child slowly starves to death over a period of months.
- B. Alcoholic armed robber: A 30-year-old alcoholic with a substantial record of theft offenses commits an armed robbery of a liquor store. When the store clerk reaches for the alarm button, the defendant shoots him once in the chest, killing him.
- C. Abused wife: A woman who has been repeatedly physically abused by her husband (that is, badly beaten up, but not to the point of being in danger of death) hires a hit man, who kills her husband. The defendant to be sentenced is the wife.
- D. Sex offender rape in desert: A repeat sex offender—a 25-year-old of low intelligence (though not intellectually disabled) who was himself sexually abused as a child—kidnaps a college-age woman, drives her into the desert, and then rapes her, beats her, and leaves her there. She dies of exposure to the elements when she can’t find her way out of the desert before nightfall.
- E. Suicide bomber accomplice: A suicide bomber detonates a bomb in a public place, killing 5 and injuring 12. Although the bomber himself is killed in the attack, the members of the radicalized religious “cell” who helped to plan the attack and make the bomb are arrested. They are two men in their late 20s and one 19-year-old, who has no prior record of adult or juvenile offenses. The defendant to be sentenced is the 19-year-old.
- F. Father killer: A middle-aged man with no criminal record kills his elderly father who is in a permanent vegetative states in order to inherit his father’s estate.
- G. Intentional killing of fetus: A man beats up his pregnant ex-girlfriend with the express intent of killing her unborn child by another man, with whom she is 8-months pregnant. The mother lives, but the fetus dies. Note: this prosecution takes place in a state that designates the intentional killing of a fetus without the mother’s consent as first-degree murder.
- H. Young car thief kills police officer: An 18-year-old car thief is driving a stolen car when he is stopped by the police. When the officer approaches the driver-side window, the defendant shoots him. The defendant has a juvenile record of theft, assault, and weapons possession.
- I. Drug addict arson: A drug addict burns down the triple-decker home that he inherited from his parents for the fire insurance. Four members of the family that rented the apartment on the third floor die in the fire. The defendant knew that the rental unit was occupied, but it’s not clear whether he knew that the renters were home at the time of the arson.
- J. Prison race riot: A large-scale fight breaks out between warring racial gangs in prison, during which a white supremacist gang member kills a Hispanic gang member. The defendant was serving time for armed robbery at the time of the riot.

(Courtesy: Prof. Carol Steiker, Harvard Law School)