expect from a series of opinions.[77] Instead, although the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[78] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Fur-*

[77] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See*, *e.g.*, Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[78] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder where defendant aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place). *Compare Enmund* with Tison v. Arizona, 481 U.S. 137 (1987) (death sentence upheld where defendants did not kill but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking statute, 49 U.S.C. § 46502, imposes the death penalty only when a death occurs during commission of the hijacking. By contrast, the treason statute, 18 U.S.C. § 2381, permits the death penalty in the absence of a death, and represents a situation in which great and fatal danger might be present. But the treason statute also constitutes a crime against the state, which may be significant. In Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."