

Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment

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ARTICLE

**SOBER SECOND THOUGHTS: REFLECTIONS ON TWO
DECADES OF CONSTITUTIONAL REGULATION OF
CAPITAL PUNISHMENT**

Carol S. Steiker and Jordan M. Steiker

“Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society’s demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of ‘sober second thought.’” *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)).

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SOBER SECOND THOUGHTS: REFLECTIONS ON TWO DECADES OF CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT

Carol S. Steiker and Jordan M. Steiker***

I. INTRODUCTION

We stand poised between two important anniversaries. Slightly more than twenty years ago, in 1972, the Supreme Court in *Furman v. Georgia*¹ abolished the death penalty as it was then administered in the United States. Slightly less than twenty years ago, in 1976, the Court in *Gregg v. Georgia*² and its quartet of accompanying cases³ sustained some new death penalty statutes that appeared to address many of the concerns voiced in *Furman*. In doing so, the Court embarked on a course of continuing constitutional regulation of capital punishment in America.

Virtually no one thinks that the constitutional regulation of capital punishment has been a success.⁴ But oddly, and we think significantly, critics of the Court's death penalty jurisprudence fall into two

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¹ 408 U.S. 238 (1972).

² 428 U.S. 153 (1976).

³ See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁴ See, e.g., SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 9-10 (1989) (claiming that the federal courts are devoted to a "fiction of their own invention" that procedural capital sentencing reforms have been effective); Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 487 (1989) (contending that capital punishment doctrine includes "some of the most complicated, dynamic, and at times inconsistent bodies of law that exist"); Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 416-18 (1990) (describing capital punishment doctrine as a "confusing array of ill-defined concepts, conflicting pronouncements, ipse dixits and short-lived precedents" (footnotes omitted)). But see Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1649 (1993) (arguing, in opposition to the above-described consensus, that "a meaningful Eighth Amendment death penalty jurisprudence lives on, that it is a quite intelligible jurisprudence, and that it is driven by a coherent methodology").

diametrically opposed camps. On the one hand, some critics claim that the Court's work has burdened the administration of capital punishment with an overly complex, absurdly arcane, and minutely detailed body of constitutional law that, in the words of Learned Hand in a slightly different context, "obstructs, delays, and defeats"⁵ the administration of capital punishment.⁶ This set of critics notes the sheer volume of death penalty litigation, the labyrinthine nature of the doctrines that such litigation has spawned, the frequency with which federal courts overturn state-imposed death sentences, and the lengthy delays that occur between the imposition of death sentences and their execution.⁷ On the other hand, a different set of critics claims that the Supreme Court has in fact turned its back on regulating the death penalty and no longer even attempts to meet the concerns about the arbitrary and discriminatory imposition of death that animated its "constitutionalization" of capital punishment in *Furman*.⁸ These critics note that the Court's intervention has done little or nothing to remedy the vast overrepresentation on death row of the young, poor, and mentally retarded⁹ or the continuing influence of race on the capital sen-

⁵ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (criticizing constitutional criminal procedure generally).

⁶ See, e.g., 141 CONG. REC. S4593 (daily ed. Mar. 24, 1995) (statement of Sen. Specter) ("Federal habeas corpus is a complex and arcane subject. Its difficult and restrictive rules simply delay imposition of the death penalty and render it useless as a deterrent."); Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21 ("[T]he jurisprudence of death is so complex, so esoteric, so harrowing, this is the one area where there aren't nearly enough lawyers willing and able to handle all the current cases.").

⁷ See, e.g., H.R. REP. NO. 23, 104th Cong., 1st Sess. 10 (1995) ("The result of this system [of federal review of capital punishment] has been the virtual nullification of state death penalty laws through a nearly endless review process."); William F. Buckley, Jr., *The War Against Capital Punishment*, NAT'L REV., June 25, 1990, at 62, 62 (opining that America's enthusiasm for execution "has generated the longest juridical foreplay in history").

⁸ See, e.g., DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 419 (1990) (noting the "Supreme Court's significant withdrawal from the field"); RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA at xv (1991) ("[A] substantial number of death sentences continue to be imposed in a fashion that can only be described as 'freakish.'"); WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 207 (1991) (concluding that "the present Court holds that maintaining the smooth functioning of our system of capital punishment is a higher priority than protecting the rights of capital defendants").

⁹ See, e.g., PATERNOSTER, *supra* note 8, at 95 (reporting that at the end of September, 1990, 32 of 2393 persons on death row were under the age of 18 at the time of their offenses); EMILY F. REED, THE PENNY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 39 (1993) (reporting that while persons with mental retardation make up roughly 2 to 3% of the population and do not commit crimes or murders at higher rates than others, they constitute an estimated 12 to 20% of those under death sentences); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1840 (1994) ("[A] large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received.").

tencing decision.¹⁰ Under this view, in the anguished words of Justice Blackmun, who twenty years after his dissent in *Furman* radically changed course and argued for the abolition of the death penalty altogether under the Eighth Amendment, the Court has done no more than “tinker with the machinery of death.”¹¹

The volume and, more significantly, the cacophony of the criticisms directed at the Court’s work has prompted us to take a sustained and systematic look at the constitutional regulation of capital punishment over the past two decades. Somewhat to our surprise, we conclude that both sets of criticisms of the Court’s work are substantially correct: the death penalty is, perversely, both over- and under-regulated. The body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern; yet, it remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-*Furman* world of capital sentencing.

How and why did the Court create a body of law at once so messy and so meaningless? We attempt to answer the “how” question in Part II by systematically canvassing the development of capital punishment law over the past two decades in light of the concerns of *Furman* and *Gregg* (which we develop in Part I). We demonstrate that almost all of the complexity that the Court has injected into death penalty law concerns relatively few aspects of state death penalty practices; important aspects of those practices remain essentially unregulated. We address the “why” question in Part III by exploring two plausible theories that might account for the colossal failure of current death penalty law. One account is the now-familiar story of the Court’s institutional incompetence, told more often in the contexts of *Brown* and *Roe*. The other account focuses not on the limits of the Court, but on the special nature of the capital sentencing decision as one that defies “doctrinalization.” We conclude that although both accounts have considerable power, neither is ultimately fully convincing, in large part because each account suggests that the Court’s failure was in some important sense predetermined.

We resist that conclusion in Part IV by suggesting avenues for constitutional regulation of the death penalty left unexplored by the

¹⁰ See, e.g., H.R. REP. NO. 458, 103d Cong., 2d Sess. 3 (1994) (“There is compelling evidence from certain jurisdictions that the race of the defendant may be a factor governing the imposition of the death sentence.”); BALDUS, WOODWORTH & PULASKI, *supra* note 8, at 400–01 (noting the persistence of race-of-victim discrimination in Georgia, even while race-of-defendant discrimination has been reduced); GROSS & MAURO, *supra* note 4, at 212 (concluding that “de facto racial discrimination in capital sentencing is legal in the United States”).

¹¹ *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

Court. We identify two general types of “roads not taken.” First, despite the concern voiced in *Furman* about the patterns of death penalty imposition discernible at the time, the Court has always focused on refining the legal process that leads to the sentencing decision and has steadfastly resisted regulation that would look to actual outcomes or patterns of outcomes. We explore the possible contours of such “outcome-based” regulation. Second, despite its putative commitment to special procedures that address the need for heightened reliability in capital sentencing, the Court has never truly insisted on what Margaret Radin has aptly termed “super due process for death.”¹² We explore what real “super due process” might look like.

We do not proffer these possibilities as fully realized proposals for doctrinal change, not least because we remain profoundly agnostic about the likelihood that these (or any other) strategies could rationalize to an acceptable degree the administration of capital punishment in America. Rather, our purpose is to debunk systematically the notion that the Supreme Court’s chosen doctrinal path was in any strong sense predetermined or that the Court’s regulation of the death penalty could not have been radically different.

By emphasizing the notion of choice and alternatives, we hope to call attention to a substantial hidden cost of the Court’s chosen path of death penalty regulation, which creates an impression of enormous regulatory effort but achieves negligible regulatory effects. Although perhaps not intended by any member of the Court or by any advocate before it, the Court’s current approach to regulating the death penalty has the effect of legitimating the use of capital punishment as a penal sanction in the eyes of actors within the criminal justice system and the public at large. The aura of science and shared responsibility created by the Court’s doctrine comforts actors within the system who have the discretion to bring capital charges, impose the death penalty, or commute a capital sentence. The public at large likewise presumes that the highly visible continuing involvement of the Supreme Court in regulating capital punishment insures — perhaps *over-insures* — against arbitrary or unjust executions. We conclude, with gloomy irony, that the Supreme Court’s Eighth Amendment jurisprudence, originally promoted by self-consciously abolitionist litigators and advanced by reformist members of the Court, not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States.

¹² See Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

II. BEGINNING AT THE BEGINNING: THE CONCERNS OF *FURMAN* AND *GREGG*

Ascribing beginnings is always artificial, in the sense of requiring human agency and artifice. Beginnings are never “out there” waiting patiently to be discovered; they are always imposed upon the continuous flow of time as a framing and ordering device. Thus, where to begin a story is one of the most important narrative decisions to be made.

In asking whether the Supreme Court has succeeded or failed on its own terms in regulating capital punishment in America, it is only fair to ask why the Court began its regulatory regime in the first place. But when was “the first place”? One could argue that the first truly important decisions regulating the administration of the death penalty came in 1968 with *United States v. Jackson*¹³ and *Witherspoon v. Illinois*,¹⁴ both of which affected the conduct of capital trials throughout the country.¹⁵ Or one could start in 1971 with *McGautha v. California*,¹⁶ the Court’s rejection — never to this day overruled — of systematic challenges to capital punishment mounted under the Due Process Clause; or in 1972 with *Furman v. Georgia*,¹⁷ when the Court accepted systematic challenges to capital punishment framed in terms of the Eighth Amendment; or in 1976 with *Gregg v. Georgia*¹⁸ and its quartet of accompanying cases,¹⁹ when the Court upheld three and struck down two state statutory schemes passed in response to *Furman*; or in 1978 with *Lockett v. Ohio*,²⁰ when the Court strongly sounded the theme of individualized sentencing as opposed to, and in some significant tension with, its *Furman* theme of limiting sentencer discretion; or as late as 1983 when the Court revisited the three state

¹³ 390 U.S. 570, 572 (1968) (striking down the capital punishment provisions of the Federal Kidnaping Act on the ground that they burdened the right to trial by making the death penalty available only after a trial by jury). Later cases limited the scope of *Jackson*. See *Parker v. North Carolina*, 397 U.S. 790, 794–95 (1970); *Brady v. United States*, 397 U.S. 742, 746–47 (1970).

¹⁴ 391 U.S. 510, 522 (1968) (reversing a death sentence when the state was permitted to strike for cause all jurors having conscientious scruples against the infliction of the death penalty). The Court later limited the scope of *Witherspoon* in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

¹⁵ See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 115–25 (1973) (describing *Jackson* and *Witherspoon*); *id.* at 124 (documenting the fact that “[a]lmost everyone questioned [about *Witherspoon*] believed the decision meant the end of capital punishment in the United States”).

¹⁶ 402 U.S. 183 (1971).

¹⁷ 408 U.S. 238 (1972).

¹⁸ 428 U.S. 153 (1976).

¹⁹ See *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (striking down a statute that provided for a mandatory death penalty in certain circumstances); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (same); *Jurek v. Texas*, 428 U.S. 262, 276–77 (1976) (upholding a statute that guided sentencer discretion through the use of “special issues”); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (upholding a statute that guided sentencer discretion through the use of aggravating and mitigating factors).

²⁰ 438 U.S. 586 (1978).

statutes which it had upheld in 1976 and again validated them,²¹ recasting its aspirations in the process.

Our decision to begin with *Furman* is fairly conventional. *Furman* dominates the legal landscape in both its unexpectedness (it was decided only one year after *McGautha*) and its scope: *Furman* had the effect of invalidating capital statutes passed by thirty-nine states, the District of Columbia, and the federal government.²² Whatever crude gauge one employs — be it the size and placement of the headlines in the *New York Times*²³ or the number of citations by other courts and commentators²⁴ — *Furman* easily wins as the landmark Supreme Court decision regarding capital punishment. But identifying the “concerns” of *Furman* is a daunting task. The longest decision ever to appear in the *U.S. Reports*, the majority “opinion” in the case is a one-paragraph per curiam invalidating under the Eighth Amendment the death sentences imposed on the three petitioners in the case. Each of the five Justices in the majority then appended his own opinion, none of which was joined by any other Justice. Each of the four dissenters wrote his own opinion as well, although some of them joined in each other’s dissents. The opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction, of determining which arguments would dominate in the decision of any future cases.

Indeed, the main question left in the wake of *Furman* was whether there would be any future cases. Only Justices Brennan and Marshall argued in *Furman* that the death penalty was per se cruel and unusual punishment;²⁵ Justices Douglas, Stewart, and White expressly left open the question whether a more structured capital sentencing regime might someday pass constitutional muster.²⁶ Some participants in the

²¹ See *Barclay v. Florida*, 463 U.S. 939, 956–58 (1983) (revisiting Florida’s post-*Furman* statute and upholding a death sentence even though the trial judge considered an aggravating factor not authorized by state law in overriding a jury recommendation for life imprisonment); *Barefoot v. Estelle*, 463 U.S. 880, 889, 906 (1983) (revisiting Texas’s post-*Furman* statute and upholding the use of summary procedures for appellate review of denials of federal habeas corpus relief); *Zant v. Stephens*, 462 U.S. 862, 890–91 (1983) (revisiting Georgia’s post-*Furman* statute and upholding a death sentence even though one of the aggravating circumstances found by the sentencing jury was invalid).

²² See *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting). Only Rhode Island’s capital punishment law was left untouched by *Furman* in 1972, because it was wholly nondiscretionary and thus not invalidated until the Court later rejected mandatory sentencing in 1976.

²³ See Fred P. Graham, *Supreme Court, 5–4, Bars Death Penalty as It Is Imposed Under Present Statutes*, N.Y. TIMES, June 30, 1972, at A1 (two-line banner headline).

²⁴ There are approximately 2500 citations to *Furman* in Shepard’s (through June 1995).

²⁵ See *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

²⁶ See *id.* at 257 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310–11 (White, J., concurring).

debate, both on and off the Court, no doubt believed that *Furman* was the end, not the beginning, of the Supreme Court's involvement in the issue of capital punishment. For example, Justice White noted that the infrequent imposition of the death penalty by capital juries in the period leading up to *Furman* indicated that "capital punishment . . . has for all practical purposes run its course."²⁷ And Michael Meltsner, one of the Legal Defense Fund (LDF)²⁸ lawyers involved in the *Furman* litigation, introduced his 1973 book chronicling the *Furman* case — either naively or strategically — as a celebration of the Fund lawyers who led the Court to "abolish" the death penalty and thus "right a deeply felt, historic wrong."²⁹ Yet, in the weeks and months immediately following the *Furman* decision, state and federal lawmakers across the country geared up to revamp and revitalize the death penalty.³⁰

It is important to add *Gregg v. Georgia* and its accompanying cases to the picture in order to gain some perspective on the "concerns" of *Furman*. The extent to which *Furman* was a beginning and not an end to constitutional regulation of the death penalty became clear only in 1976, when the *Gregg* Court considered five new state statutory schemes in light of its decision in *Furman*. *Gregg* and its accompanying quartet clarified that the death penalty was not per se invalid under the Eighth Amendment and that the Court would now be involved in the ongoing business of determining which state schemes could pass constitutional muster. Indeed, the very nature of its 1976 opinions made clear that the Court was assuming a stance of continuing supervision. The *Gregg*, *Proffitt*, and *Jurek* opinions did not attempt to list in any definitive fashion the prerequisites for a valid capital punishment regime; rather, they simply upheld each particular scheme presented on the basis of its own peculiar mix of procedural protections.³¹ Hence, the 1976 opinions established the essentially "provisional"³² nature of the Supreme Court's capital punishment jurisprudence and thus marked the clear commencement of the Court's ongoing regulatory role. The 1976 opinions also help us "read" *Furman* by speaking in a more coherent and consistent voice about

²⁷ *Id.* at 313 (White, J., concurring).

²⁸ The full name of the Legal Defense Fund is the NAACP Legal Defense and Educational Fund, Inc.

²⁹ MELTSNER, *supra* note 15, at xi.

³⁰ *See id.* at 306–09.

³¹ *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell & Stevens, JJ.) ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis." (footnote omitted)).

³² *See* Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1145 (1993).

Furman's objectives than the badly splintered *Furman* Court was itself able to do. The five 1976 opinions from *Gregg* to *Roberts* were all dominated by the same three-Justice plurality, which selected certain themes of the vast *Furman* morass to represent the Court's central concerns.

We thus have chosen to read *Furman* and *Gregg* et al. together as a way of identifying the Supreme Court's concerns and goals regarding its constitutional regulation of capital punishment. We stop with *Gregg* and its companion cases, however, because the seeds of all of the rest of the Court's capital jurisprudence can be traced to the themes that it sounded in 1972 and 1976. Since 1976, the Supreme Court's pronouncements on capital punishment have been essentially backward-looking; majority and dissenting Justices alike have cast their positions in terms of what *Furman* and *Gregg* command and permit.³³ This is not to deny that the morass of *Furman* and the tentative, provisional tone of the 1976 decisions left future Justices a wide margin of deniability; nonetheless, it seems likely that the Court itself would think it fair to measure the success of its capital punishment jurisprudence against the concerns articulated in *Furman* and *Gregg* et al. Given that our critique of the Court is an internal one, identifying these concerns becomes a crucial part of our project. We think that these concerns can fairly be grouped around four ideas: desert (the problem of overinclusion), fairness (the problem of underinclusion), individualization, and heightened procedural reliability.

A. Desert

At the time of the Court's decision in *Furman*, virtually every death penalty jurisdiction in the United States afforded sentencers absolute discretion to impose either death or life imprisonment (or sometimes merely a term of years) for certain crimes. For instance, the Georgia statute reviewed in *Furman* afforded the jury full discretion to sentence a defendant convicted of forcible rape to death, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years."³⁴ Similarly, the Texas rape law,

³³ For example, Justice Scalia's concurrence and Justice Stevens's dissent in *Walton v. Arizona*, 497 U.S. 639 (1990), each argue directly about the meaning of *Furman* and *Gregg*. Compare *id.* at 656 (Scalia, J., concurring) (arguing that the *Furman* requirement that sentencer discretion be constrained is inconsistent with doctrine forbidding constraint of sentencer discretion not to impose the death penalty) with *id.* at 708 (Stevens, J., dissenting) (arguing that under *Furman*, the sentencer may be given unlimited discretion once the size of the death-eligible class has been sufficiently narrowed). Even more striking is the way in which the majority and dissenting opinions in *McCleskey v. Kemp*, 481 U.S. 279 (1987), frame themselves around the "[t]wo principal decisions" of *Furman* and *Gregg*. *Id.* at 301.

³⁴ *Furman v. Georgia*, 408 U.S. 238, 308 n.8 (1972) (Stewart, J., concurring) (quoting GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969)) (internal quotation marks omitted).

also reviewed in *Furman*, allowed the jury to impose punishment “by death or by confinement in the penitentiary for life, or for any term of years not less than five.”³⁵ The language of a 1962 Florida decision holding that the decision to impose death or a lesser punishment for murder was to be “determined purely by the dictates of the consciences of the individual jurors”³⁶ exemplifies the kind of discretion given to pre-*Furman* juries.

One problem with such broad discretionary schemes identified by the *Furman* and *Gregg* Courts was that the state and federal legislatures that drafted such statutes were never required to articulate a theory about the most death-worthy crimes or defendants. The Justices in *Furman* repeatedly noted that the number of those actually sentenced to death represented only a tiny fraction of those eligible to be executed by the broad net cast by the state statutes at issue in the case.³⁷ Such sentencing systems provide no guarantee that each imposition of the death penalty reflected the larger community’s considered judgment — as articulated through its elected representatives — about who deserved to die. This failure can be thought of as a problem of “overinclusion”: without narrower statutory mandates, individual sentencers might return sentences of death in otherwise “ordinary” cases and thus perhaps run afoul of the larger community’s moral standards. This fear was clearly a subtext in *Furman* itself: of the three petitioners, two had been sentenced to death for rape, which raised the possibility that the penalty was being applied when a community consensus was lacking.³⁸ Indeed, four years later in *Gregg*, one reason given by all of the Justices in the majority for upholding the revised Georgia statute was the fact that the Georgia Supreme Court had used its new power of broad appellate review to strike down the imposition of the death penalty for armed robbery as “disproportionate” to the crime.³⁹ Hence, the brief flirtation by the three crucial concurring Justices in *Furman* (Douglas, Stewart, and White, who joined abolitionists Brennan and Marshall to make up the *Furman* majority) with mandatory sentencing schemes:⁴⁰ if state or federal legislatures

³⁵ *Id.* (quoting TEX. PENAL CODE art. 1189 (1961)).

³⁶ *Baugus v. State*, 141 So. 2d 264, 266 (Fla.), cert. denied, 371 U.S. 879 (1962).

³⁷ See, e.g., *Furman*, 408 U.S. at 291 (Brennan, J., concurring) (“The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it.”); *id.* at 309 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

³⁸ See *Coker v. Georgia*, 433 U.S. 584, 592–97 (1977) (plurality opinion) (emphasizing the widespread consensus that the death penalty is excessive for rape in support of a holding that the death sentence is unconstitutional in such cases).

³⁹ See *Gregg v. Georgia*, 428 U.S. 153, 205–06 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 224 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

⁴⁰ See *Furman*, 408 U.S. at 257 (Douglas, J., concurring) (leaving open the possible constitutionality of a mandatory death penalty); *id.* at 308 (Stewart, J., concurring) (“[T]he Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape.”); *id.* at 311 (White, J., concurring) (“The narrower question to

could agree on circumstances that would require, not merely permit, the imposition of the death penalty in certain cases, such schemes would manifest the crucial missing ingredient of “legislative will”⁴¹ — and, by implication, community approval.

B. *Fairness*

Related to, but conceptually distinct from, the concern about desert in capital sentencing is the concern about fairness. Even if every defendant sentenced to death under a capital sentencing scheme “deserved” to die according to the larger community’s considered judgment, the scheme could still be subject to challenge on the basis that it treated others, just as “deserving” as the condemned defendant, more leniently for no reason, or for invidious reasons. Thus, a sentencing scheme could avoid the problem of “overinclusion” (the failure to distinguish the deserving from the undeserving), but still present the problem of “underinclusion” (the failure to treat equally deserving cases alike).

The problems of overinclusion and underinclusion are related at a general conceptual level in that both are concerned with treating like cases alike. Overinclusion (the execution of a defendant in the absence of expressed legislative will) treats the defendant more harshly than he deserves, whereas underinclusion (the failure to execute some other defendants in the presence of expressed legislative will) treats other defendants more leniently than they deserve. The problems are related at a practical level as well: both overinclusion and underinclusion are necessarily aggravated by the kind of wholly discretionary, completely standardless decisionmaking that prevailed in the capital sentencing context prior to *Furman*. Moreover, the most obvious remedies for overinclusion will also help ameliorate the problem of underinclusion (and vice versa).⁴²

Despite these connections, desert and fairness concerns remain conceptually and practically distinct, as the *Furman* and *Gregg* Courts recognized. The problem of ascribing desert, and thus avoiding over-

which I address myself concerns the constitutionality of capital punishment statutes under which . . . the legislature does not itself mandate the penalty in any particular class or kind of case.”)

⁴¹ *Id.* at 311 (White, J., concurring) (noting that under discretionary capital punishment schemes, “legislative will is not frustrated if the penalty is never imposed”). *But see* *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (striking down mandatory capital sentencing schemes under the Eighth Amendment as violative of an overwhelming national consensus in favor of individualized capital sentencing); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (same).

⁴² For example, when legislatures set careful standards for determining who “deserves” to die, they obviously reduce overinclusion by establishing a theory of who the worst murderers are, but they also reduce underinclusion by inhibiting opportunities for arbitrary or invidious action by the sentencers who must implement those standards. Similarly, if states carefully circumscribe sentencer discretion in order to ameliorate the problem of arbitrary or discriminatory underinclusion, the ways in which they curb that discretion must necessarily reflect some theory of who deserves to die and thus tend to reduce overinclusion as well.

inclusion, is largely the realm of the legislature, which speaks as the voice of the larger community. The *Furman* Court fueled its concerns about desert by observing the sheer infrequency with which sentencers imposed the death penalty: such rarity of imposition, the Court observed, suggested that the death penalty was not serving any useful function in society and that it no longer reflected any considered community judgment or "legislative will."⁴³ But even if death penalty statutes on the books could be said to reflect community judgment and legislative will, the problem of translating that will into practice would still remain. In this process of translation arises the inevitable possibility of arbitrary or even discriminatory enforcement of community norms by the sentencer (usually a jury), in whom resides the ultimate power to pronounce life or death. Unlike its concerns about desert, the *Furman* Court's concerns about fairness were fueled not by the sheer infrequency of the imposition of the death penalty, but rather by the *patterns* of its imposition.

Justice Douglas's concurring opinion in *Furman* presents the clearest expression of the fairness concern — what he himself called the "equal protection" theme "implicit" in the Eighth Amendment proscription of cruel and unusual punishments.⁴⁴ In sounding this theme, Douglas used anecdotal and statistical evidence⁴⁵ to demonstrate that the death penalty in the United States was visited disproportionately upon the "poor, young, and ignorant"⁴⁶ and upon "the Negro, and the members of unpopular groups."⁴⁷ He noted explicitly what was largely a subtext for the other concurring Justices — in each of the three cases before the Court in *Furman* the defendant was black, and in the two rape cases the victims were white.⁴⁸ Douglas decried what he evocatively termed the "caste" aspect⁴⁹ of the imposition of the death penalty and argued that the discretionary capital sentencing schemes at issue were "pregnant with discrimination."⁵⁰ At no point did Douglas attempt to argue that the defendants before the Court (or the largely poor, young, ignorant, black, or unpopular defendants who had previously been executed) did not "deserve" the death penalty, by

⁴³ *Furman*, 408 U.S. at 311 (White, J., concurring).

⁴⁴ *Id.* at 249 (Douglas, J., concurring).

⁴⁵ *See id.* at 249–53.

⁴⁶ *Id.* at 250 (quoting Rupert C. Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 *CRIME & DELINQ.* 132, 141 (1969)).

⁴⁷ *Id.* (quoting THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967)).

⁴⁸ *See id.* at 252–53. The race of *Furman*'s murder victim is not apparent from the published opinions in the case.

⁴⁹ *See id.* at 255 (quoting Guy B. Johnson, *The Negro and Crime*, 217 *ANNALS AM. ACAD. POL. & SOC. SCI.* 93 *passim* (1941)).

⁵⁰ *Id.* at 257. Justices Marshall and Stewart also sounded the "equal protection" theme, *see id.* at 310 (Stewart, J., concurring); *id.* at 366 & n.155 (Marshall, J., concurring), but Justice Douglas is the only Justice to have built his entire opinion around this idea.

reference either to internal community norms or to some external, Court-imposed notion of proportionality. Rather, Douglas's concern was quite clearly with those who got away: "A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same."⁵¹

This focus on fairness, as distinct from desert, was apparent again four years later in *Gregg*: the plurality upheld Georgia's new capital sentencing scheme partly on the basis that the new statute provided "clear and objective standards" that would "control[]" sentencer discretion "so as to produce non-discriminatory application."⁵² The *Gregg* plurality went on to praise the "important additional safeguard against arbitrariness and caprice"⁵³ afforded by Georgia's automatic appellate review and comparative proportionality determination, which required the Georgia Supreme Court to compare each sentence of death with sentences imposed in "similar" cases and permitted it to reference those cases in which the death penalty had not been imposed.⁵⁴ Indeed, the new Georgia statute most explicitly addressed the *Furman* Court's concerns about discrimination by calling upon the state's highest court to determine in each capital case "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," based partly on a questionnaire filled out by the trial judge that disclosed whether race played a role in the case.⁵⁵

Although the *Furman* and *Gregg* Courts did distinguish "equal protection" (underinclusion) problems from "legislative will" (overinclusion) problems in assessing the shortcomings of the pre-*Furman* capital sentencing regime, the Supreme Court failed to recognize one crucial point. Although many types of sentencing reforms would ameliorate both shortcomings at once,⁵⁶ some reforms would ameliorate one type of problem only at the expense of exacerbating the other. For instance, we have argued elsewhere that providing for discretionary grants of mercy based on individualized consideration of defendants ameliorates overinclusion while exacerbating underinclusion.⁵⁷ The Supreme Court appeared to reject this argument in 1976,⁵⁸ but that

⁵¹ *Id.* at 256 (Douglas, J., concurring) (footnote omitted).

⁵² *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

⁵³ *Id.*

⁵⁴ See *id.* at 204-05 & n.56.

⁵⁵ *Id.* at 211-12 (White, J., concurring) (quoting GA. CODE ANN. § 27-2537(a) (Supp. 1975)).

⁵⁶ See *supra* note 42 and accompanying text.

⁵⁷ See Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out?: Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 862-66 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)).

⁵⁸ See *Gregg*, 428 U.S. at 199 (plurality opinion).

rejection came long before the Court had fully fleshed out its theory of individualized sentencing, to which we now turn.

C. *Individualization*

Ironically, the *Furman* and *Gregg* Courts' commitment to individualized sentencing began not in contrast to, but rather as an outgrowth of, their concerns about desert and fairness. Each of the three concerns or commitments (desert, fairness, and individualization) reflects different facets of the basic norm of equal treatment, the idea that like cases should be treated alike. As the pluralities explained in *Woodson v. North Carolina*⁵⁹ and *Roberts v. Louisiana*,⁶⁰ the third and fourth companion cases to *Gregg*, mandatory (that is, non-individualized) death penalty statutes run afoul of the basic norm of equal treatment because they erroneously rely on the flawed belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."⁶¹ In other words, in order to treat like cases alike, sentencers must have access to information about relevant likenesses and differences.

Obscured by the prominence of the argument about equal treatment is another important idea — that the Constitution defines what is "relevant" to the imposition of a sentence of death, and that this definition includes more than merely the nature of the underlying offense. This second idea obviously cannot be derived from the norm of equal treatment; the idea of equality does not contain within it a method for determining which cases are "like" enough such that they must be treated "equally." Thus, the *Woodson* and *Roberts* pluralities located the source of the constitutional standard for relevant capital sentencing information in the "evolving standards of decency that mark the progress of a maturing society."⁶² In applying such "evolving standards of decency" to the context of capital punishment, the Justices explained both that they detected an overwhelming societal consensus against the imposition of mandatory death sentences⁶³ and that the "fundamental respect for humanity underlying the Eighth Amendment" required consideration of "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁶⁴

⁵⁹ 428 U.S. 280 (1976) (plurality opinion).

⁶⁰ 428 U.S. 325 (1976) (plurality opinion).

⁶¹ *Id.* at 333 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)) (internal quotation marks omitted).

⁶² *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁶³ See *Woodson*, 428 U.S. at 289–301 (plurality opinion).

⁶⁴ *Id.* at 304.

This latter “respect for humanity” argument built on Justice Brennan’s opinion in *Furman*, in which he tried to construct an argument against the death penalty based on the idea that “[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”⁶⁵ Ultimately, Justice Brennan failed to convince his brethren that respect for humanity required the abolition of capital punishment altogether. However, his lengthy *Furman* concurrence did begin to develop a notion of human dignity that formed the basis of the Court’s requirement of individualized sentencing — a requirement that later became a pillar of Eighth Amendment law separate and distinct from, and in some tension with, the *Furman* Court’s predominant concerns about desert and fairness.

D. Heightened Procedural Reliability

Like its commitment to individualized capital sentencing, the Court’s concern for heightened procedural reliability in capital cases built on Justice Brennan’s solo concurrence in *Furman*. Just as Justice Brennan elaborated the notion of “human dignity” implicit in the Court’s “evolving standards of decency” formulation of the Eighth Amendment, he also singlehandedly constructed the now-familiar “death is different” argument. Arguing that death as a punishment differs in kind, and not merely degree, from all other punishments, Justice Brennan attempted to demonstrate that its “uniqueness” as a punishment, both in severity and finality, rendered it cruel and unusual in all circumstances.⁶⁶ No other Justices in *Furman* joined in that conclusion (although, arguably, Justice Marshall agreed with it⁶⁷).

Four years later, however, a plurality of the Court echoed Brennan’s *Furman* concurrence in *Woodson* when it noted, in language that would be repeated many times in future cases:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁶⁸

The Court thus concluded that although the practice of individualized sentencing “generally reflects simply enlightened policy rather than a constitutional imperative,”⁶⁹ the Eighth Amendment requires individualized sentencing in capital cases.

⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

⁶⁶ *See id.* at 286–91.

⁶⁷ *See id.* at 345–46, 369 (Marshall, J., concurring) (arguing that if members of the public were fully informed, the death penalty would be shocking to their consciences, and that it is therefore unconstitutional in all circumstances).

⁶⁸ *Woodson*, 428 U.S. at 305 (plurality opinion).

⁶⁹ *Id.* at 304.

The *Woodson* plurality's willingness to require a special decision-making process in capital cases that is clearly not necessary in non-capital proceedings⁷⁰ was generated by its concern about the "reliability" of death verdicts. What did the *Woodson* plurality mean by "reliability"? Accuracy, perhaps? But what does accuracy mean in the context of capital sentencing? By referencing "the fundamental respect for humanity underlying the Eighth Amendment,"⁷¹ the *Woodson* plurality seemed to suggest that reliability in capital sentencing has something to do with respecting and confronting the humanity of the individual defendant. And by speaking of the "appropriate[ness]" of death as punishment, the plurality implied that reliability is tied to strong notions of desert and fairness among defendants. Hence, one can view the Court's commitment to heightened procedural reliability as its *manner* of making good on its three substantive commitments — to desert, fairness, and individualization in capital sentencing.

III. ENDING BACK AT THE BEGINNING: THE RETURN TO PRE-*FURMAN* CAPITAL SENTENCING

We now turn to the current regulatory approach that has emerged from *Furman* and the 1976 decisions. It is undeniably true, as many critics have claimed, that the Court's death penalty doctrine is complex, arcane, and minutely detailed. But this complexity does not translate, as the critics seem to assume, into significant impediments to states' efforts to impose the death penalty. Instead, much of the recent capital litigation in the federal courts concerns statutory provisions that state legislatures could readily remedy or that in fact have already been repealed. Indeed, if a state sought to design a capital statute from scratch today, it could easily avoid federal constitutional difficulties and, perhaps more tellingly, could do so without departing significantly from the statutory schemes struck down in *Furman*.

To illustrate the complexity of current doctrine as well as its relatively minimal demands on states seeking to administer the death penalty, we organize the Court's jurisprudence around four doctrinal areas that correspond to the concerns of *Furman* and the 1976 cases that we described above. The Court's efforts to ensure that the death penalty is reserved for the most deserving defendants — its concerns about "desert" from a retributive perspective — are reflected in its proportionality decisions as well as in the requirement that states narrow death-eligibility through the use of "aggravating" circumstances or their functional equivalent. The equality and fairness concerns of *Furman* are addressed by doctrines focusing on the related effort to

⁷⁰ The mandatory Federal Sentencing Guidelines (and other state mandatory sentencing schemes) abundantly demonstrate this point.

⁷¹ *Woodson*, 428 U.S. at 304 (plurality opinion).

channel sentencer discretion at all stages of the decisionmaking process. The Court's insistence on "individualized" sentencing is matched by a series of doctrines concerning a defendant's right to present and have considered mitigating evidence that may call for a sentence less than death. The remainder of the Court's death penalty decisions collectively define the requirement of "heightened reliability" in capital proceedings (including, among other things, the selection of the capital jury, the cognizability of "innocence" claims, and the permissibility of certain kinds of prosecutorial argument).

This organization enables us to perform three important tasks. First, it allows us to rise above the morass of extraordinarily complicated doctrine and get a "bird's-eye view" of the entire landscape of constitutional death penalty regulation. Only by doing so can we see clearly the entirety of what states *must* do to impose the death penalty within the bounds of current constitutional constraints. Second, examining doctrine within our framework helps explain why so much capital litigation persists despite the limited nature of the Court's actual demands. Within each of our categories, we trace the distinctive misunderstandings and evasions that account for ongoing, yet avoidable constitutional litigation. Third, and finally, by examining the Court's present doctrines in light of the concerns reflected in the early death penalty decisions, we are able to perform an internal critique of the Court's capital jurisprudence — to evaluate its success in light of its own purported goals.

A. *Narrowing*

One body of doctrine is designed to ensure that only those who are most deserving of the death penalty are eligible to receive it. Given the observed rarity of death sentences in relation to serious violent crimes, including murder, this doctrine — which we call "narrowing" — seeks to force communities, speaking through state legislatures, to designate in advance those offenders most deserving of death. By forcing states to articulate their theories of the "worst" offenders, the narrowing doctrine purportedly guards against "overinclusion" — that is, the application of the death penalty in circumstances in which, notwithstanding the sentencer's decision, the sentence is not deserved according to wider community standards.

As the Court has elaborated this idea, state legislatures can narrow the class of the death-eligible in one of two ways. First, statutes can fulfill this narrowing requirement at the penalty phase of a capital trial by requiring the prosecution to prove the existence of some "aggravating factor" beyond what is required for conviction of capital murder. Second, statutes can narrow at the guilt phase of the capital trial by confining their definitions of capital murder to a certain subset

of offenses more serious than the class of all murders.⁷² Finally, as an additional fail-safe beyond these forms of legislative narrowing, courts can further narrow the class of the death-eligible through some sort of post-sentencing proportionality review.⁷³ Courts can either perform this review “wholesale” by excluding entire groups of offenders or offenses from the ambit of the death penalty based on insufficient culpability or harm,⁷⁴ or they can undertake case-by-case examinations of facts to ensure that each sentence imposed is actually deserved in light of a particular jurisdiction’s general sentencing practices.⁷⁵

Despite the promise that the narrowing doctrine would significantly reduce the problem of overinclusion, the doctrine as elaborated by the Court has done no such thing. As the following section will illustrate, death-eligibility remains remarkably broad — indeed, nearly as broad as under the expansive statutes characteristic of the pre-*Furman* era.

1. *Aggravating Circumstances.* — In evaluating the states’ approaches, the Court has insisted that a state scheme “must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”⁷⁶ This language, however, has been more bark than bite. First, the Court has approved aggravating circumstances that arguably encompass every murder, such as Arizona’s circumstance that asks whether the defendant committed the offense in an “especially heinous, cruel or depraved manner”⁷⁷ and Idaho’s circumstance that asks whether “[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.”⁷⁸ In approving both of these circumstances, the Court relied on the state courts’ adoption of limiting constructions that purportedly offered further, more definitive content than the concededly broad language of the statutes.⁷⁹ The states’ limiting constructions, however, appear no less encompassing than the facially vague statutory circumstances. Arizona’s supreme court, for

⁷² See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

⁷³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 204–06 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (describing Georgia’s proportionality review as a means of assuring that the death penalty is reserved for the most deserving defendants).

⁷⁴ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is grossly disproportionate for the crime of rape).

⁷⁵ See, e.g., *Zant v. Stephens*, 462 U.S. 862, 880 n.19 (1983) (describing Georgia’s mechanism for proportionality review).

⁷⁶ *Lowenfield*, 484 U.S. at 244 (quoting *Stephens*, 462 U.S. at 877).

⁷⁷ ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989).

⁷⁸ IDAHO CODE § 19-2515(g)(6) (1987).

⁷⁹ See *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993) (sustaining a limiting construction adopted by the Idaho Supreme Court); *Walton v. Arizona*, 497 U.S. 639, 655 (1990) (concluding “that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer”).

example, initially concluded that a crime could fairly be regarded as “especially heinous, cruel or depraved” if the perpetrator relished the killing or inflicted gratuitous violence on the victim, if the victim was helpless or needlessly mutilated, or if the crime was senseless.⁸⁰ Moreover, the Arizona Supreme Court did not regard these possibilities as exclusive, and subsequently ruled that prosecutors could establish heinousness or depravity by a whole new range of factors, including the age of the victim, the type of weapon used by the defendant, and the purpose of the killing.⁸¹ The Idaho Supreme Court, meanwhile, defined the “utter disregard” circumstance as applying to “cold-blooded, pitiless slayer[s].”⁸² Far from ensuring that the class of the death-eligible is meaningfully narrowed, factors that focus on whether an intentional murder was committed “senselessly” or “pitilessly” invite an affirmative answer in every case.

A second, and more significant, failing of the Court’s approach is that the Court has placed no outer limit on the number of aggravating factors that a state may adopt. Thus, even if a state adopts aggravating factors that, taken individually, meaningfully narrow the class of the death-eligible, the factors collectively might render virtually all murderers death-eligible. This concern is not merely an idle possibility. Several states have enumerated ten or more aggravating circumstances, each individually sufficient to support a capital sentence.⁸³ Indeed, most states adopting capital statutes after *Furman* have looked for guidance to the Model Penal Code, which lists eight aggravating circumstances, including the notoriously vague “especially heinous, atrocious or cruel” factor⁸⁴ that has generated litigation in numerous jurisdictions.⁸⁵ At the same time, few states have sought to narrow the class of the death-eligible at the guilt phase, as definitions of capital murder remain extraordinarily broad.⁸⁶

The experience in Georgia (whose statutes were the focus of *Furman* and *Gregg*) reflects the general failure of states to achieve any

⁸⁰ See *State v. Gretzler*, 659 P.2d 1, 11–12 (Ariz. 1983), discussed in *Walton*, 497 U.S. at 694 (Blackmun, J., dissenting).

⁸¹ See *Walton*, 497 U.S. at 695–96 (Blackmun, J., dissenting) (collecting Arizona Supreme Court cases that expanded the circumstances in which a finding of heinousness or depravity could be sustained).

⁸² *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981), discussed in *Creech*, 113 S. Ct. at 1541.

⁸³ See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F) (1989) (listing 10 aggravating circumstances); COLO. REV. STAT. § 16-11-103(5) (Supp. 1994) (listing 13 aggravating circumstances); FLA. STAT. ANN. § 921.141(5) (West Supp. 1995) (listing 11 aggravating circumstances).

⁸⁴ MODEL PENAL CODE § 210.6(3)(h) (1980).

⁸⁵ See, e.g., *Stringer v. Black*, 503 U.S. 222 (1992) (addressing the factor in the Mississippi scheme); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (addressing the factor in the Oklahoma scheme); *Henderson v. Dugger*, 925 F.2d 1309 (11th Cir. 1991) (addressing the factor in the Florida scheme), cert. denied, 113 S. Ct. 621 (1992).

⁸⁶ See, e.g., ALA. CODE § 13A-5-40(a) (Supp. 1994) (enumerating 18 kinds of capital murder); UTAH CODE ANN. § 76-5-202(1) (Supp. 1995) (enumerating 17 kinds of capital murder).

meaningful narrowing through the enumeration of aggravating circumstances. The most detailed study of death-eligibility within a state — conducted by the famous Baldus group — found that approximately eighty-six percent of all persons convicted of murder in Georgia over a five year period after the adoption of Georgia's new statute were death-eligible under that scheme.⁸⁷ Perhaps more revealing is the Baldus study's conclusion that over ninety percent of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.⁸⁸ The Baldus group's work strongly suggests that Georgia has not articulated a carefully circumscribed theory of what the state might regard as the "worst" murders. Quite the contrary, Georgia has simply described the various factors that collectively account for the circumstances surrounding *most* murders. Instead of achieving the narrowing function suggested in the *Furman* and *Gregg* decisions, these aggravating factors merely give the sentencer the illusion that the offense at issue truly falls within the select set of crimes that justifies imposition of the death penalty. The Baldus study itself suggests that higher death-sentencing rates after *Furman* may be the result of precisely this dynamic, with jurors giving special weight in sentencing decisions to Georgia's adoption and endorsement of statutory aggravating circumstances.⁸⁹

Accordingly, as in the pre-*Furman* regime, thousands of murderers are death-eligible, yet few receive death sentences and fewer still are executed. If, as some of the Justices in *Furman* maintained, the relative rarity of death sentences confirms that our society does not regard the death penalty as appropriate for all murders,⁹⁰ the continuing failure of states to narrow the class of the death-eligible invites the possibility that some defendants will receive the death penalty in circumstances in which it is not deserved according to wider community standards (overinclusion).

2. *Proportionality Review.* — One important qualification should be made to the general observation that meaningful narrowing is neither required by Court decisions nor secured by state statutory schemes. The most significant source of narrowing in current doctrine stems not from the enumeration of aggravating circumstances (or from more limited definitions of capital offenses) but rather from the Court's proportionality decisions, which preclude the imposition of the death penalty when the Court has discerned an overwhelming societal consensus against that punishment for particular crimes. Most nota-

⁸⁷ See BALDUS, WOODWORTH & PULASKI, *supra* note 8, at 268 n.31. The Baldus study is discussed in Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 413-16 (1994).

⁸⁸ See BALDUS, WOODWORTH & PULASKI, *supra* note 8, at 102.

⁸⁹ See *id.* at 102-03.

⁹⁰ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

bly, in *Coker v. Georgia*,⁹¹ the Court ruled only one year after the 1976 decisions that the Eighth Amendment barred states from imposing the death penalty for the crime of rape.⁹² This decision remains the most significant source of protection against overinclusion in the administration of the death penalty.

Prior to *Furman*, experience had demonstrated that the availability of the death penalty for rape was inextricably linked to race — prosecutors rarely asked for and juries seldom returned a capital verdict without the combination of an African-American defendant and a white victim.⁹³ Indeed, the precursor to the Court's contemporary efforts to regulate the death penalty can be found in Justice Goldberg's dissent from a denial of certiorari in a 1963 capital case involving an interracial rape.⁹⁴ Although Justice Goldberg did not mention race in the dissent,⁹⁵ he would have granted certiorari to decide whether the death penalty was an excessive or disproportionate punishment for the crime of rape.⁹⁶ *Furman*, too, seemed to raise the possibility that the death penalty was not truly being reserved for the "worst" defendants, given that two of the petitioners before the Court in *Furman* were African-Americans convicted of rape.⁹⁷ By placing an absolute boundary on states' efforts to impose the death penalty, proportionality review, as envisioned in *Coker*, contributes in a concrete and meaningful way to the goal of reserving the death penalty for the most deserving defendants.

Coker, though, stands as an exception to the Court's general reluctance to narrow the class of death-eligible defendants through constitutionally imposed proportionality limitations. Although the Court held in 1982 that the death penalty was disproportionate as applied to a perpetrator who had not killed, attempted to kill, or intended to kill,⁹⁸ the Court subsequently retracted that standard and sustained the proportionality of the death penalty for major participants in dangerous

⁹¹ 433 U.S. 584 (1977).

⁹² See *id.* at 597.

⁹³ See MELTSNER, *supra* note 15, at 74–78 (discussing statistical data regarding the disproportionate charging and sentencing of African-American men who had allegedly raped white women).

⁹⁴ See Rudolph v. Alabama, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting from denial of certiorari).

⁹⁵ See *id.* Somewhat surprisingly, the Court did not mention race in its decision in *Coker* either.

⁹⁶ See *id.*

⁹⁷ The two companion cases to *Furman* — Jackson v. Georgia, No. 69-5030, and Branch v. Texas, No. 69-5031 — involved interracial rapes. See Jackson v. State, 171 S.E.2d 501, 504 (Ga. 1969) (rejecting defendant's claim that "there exists a discriminatory pattern whereby the death penalty is consistently imposed upon Negro defendants convicted of raping white women" (internal quotation marks omitted)); Branch v. State, 447 S.W.2d 932, 934 (Tex. Crim. App. 1969) (identifying "Negro defendant" and "Caucasian complaining witness").

⁹⁸ See *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

felonies who exhibit reckless indifference to human life.⁹⁹ Thus, the death penalty remains available for persons convicted of felony-murder regardless whether the defendant intended to commit, attempted to commit, or actually committed murder. Indeed, states have executed several “non-triggermen” since *Furman*,¹⁰⁰ and a substantial number of states presently make the death penalty available for participants in dangerous felonies in which an accomplice intentionally or even accidentally kills.¹⁰¹

In addition to its reluctance to narrow the availability of the death penalty based on mitigating aspects of the *offense*, the Court has declined to exempt certain classes of *offenders* from death-eligibility based on personal characteristics — such as youth and retardation — that tend to lessen culpability. In *Stanford v. Kentucky*,¹⁰² the Court rejected the claim that an emerging national consensus precluded the imposition of the death penalty for offenders who were sixteen or seventeen years old at the time of the offense.¹⁰³ Conceding that few juvenile offenders had been sentenced to death over the past several decades, the Court maintained that such evidence could not support the proposition that society overwhelmingly disapproved of the death penalty’s application to juveniles.¹⁰⁴ Rather, contemporary practices reflected a more limited consensus that the death penalty should *rarely* be imposed against juveniles, and the requirement of individualized sentencing afforded a constitutionally satisfactory vehicle for identifying those cases in which the death penalty was truly deserved.¹⁰⁵

On the same day that it refused to exempt juveniles from the death penalty, the Court also found insufficient evidence of a consensus against executing mentally retarded offenders.¹⁰⁶ Although the Court acknowledged that society has long believed that mental retardation (like youth) lessens an offender’s culpability for criminal conduct,¹⁰⁷ the Court found no consensus in state legislative acts, jury decisions, or expert opinion that mentally retarded persons as a class “inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.”¹⁰⁸

⁹⁹ See *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

¹⁰⁰ See 1994 DEATH ROW U.S.A. REPORTER CURRENT SERVICE (NAACP Legal Defense and Educ. Fund, Inc.), Summer 1994, at 648–52 (indicating that states have executed 10 non-triggermen since 1977).

¹⁰¹ See *Enmund*, 458 U.S. at 789–92 (discussing state statutes, most of which remain in force).

¹⁰² 492 U.S. 361 (1989).

¹⁰³ See *id.* at 380.

¹⁰⁴ See *id.* at 373–74.

¹⁰⁵ See *id.* at 374–75 (plurality opinion).

¹⁰⁶ See *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

¹⁰⁷ See *id.* at 322–23.

¹⁰⁸ *Id.* at 338 (opinion of O’Connor, J.).

Apart from *Coker*, then, the Court's proportionality decisions suggest strongly that the "narrowing" of the class of offenders and offenses subject to the death penalty should be accomplished primarily, as in the pre-*Furman* regime, by sentencer discretion guided by statutory criteria rather than court mandate. Given that the statutory criteria (in the form of aggravating and mitigating circumstances) do not themselves accomplish any significant narrowing, this approach is essentially indistinguishable from the standardless discretion embodied in the pre-1972 statutes. Minor participants in crime, severely retarded or youthful offenders, and other defendants who may appear less deserving of the death penalty must rely on the discretionary decision-making of prosecutors and sentencers to protect them from a punishment that the broader community might deem excessive as applied to them. In this respect, the fear of overinclusive application of the death penalty that accounted in part for the Court's decision to enter the constitutional thicket remains quite justified.

B. Channeling

As discussed above, *Furman* and the 1976 decisions sought not merely to ensure that the death penalty was imposed only on deserving offenders, but also to ensure that similarly situated offenders would be treated equally. Overinclusion, of course, constitutes one kind of inequality (because it subjects some offenders to the death penalty who are by definition not as deserving as others), but it is not the only kind. Inequality also results if some — but not all — deserving offenders receive the death penalty, especially if there is no principled basis for distinguishing between those who receive the penalty and those who do not.

The 1976 decisions appeared to suggest that the most promising means of avoiding this sort of inequality was to focus, or "channel," the sentencer's discretion on the relevant decisionmaking criteria. In this respect, the 1976 decisions seemed to reject Justice Harlan's insistence in *McGautha v. California*¹⁰⁹ that efforts to channel discretion are doomed to fail because of both the difficulty of cataloging the appropriate considerations and the uselessness, in terms of channeling, that a truly exhaustive list would represent.¹¹⁰ Notwithstanding the 1976 decisions' seeming endorsement of channeling as a separate constitutional requirement,¹¹¹ subsequent doctrine has veered sharply in

¹⁰⁹ 402 U.S. 183 (1971).

¹¹⁰ See *id.* at 204-08.

¹¹¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

the direction of Justice Harlan. The Supreme Court has emphatically disclaimed any separate requirement to channel discretion apart from the requirement that states narrow the class of death-eligible offenders. Accordingly, under current doctrine, once a state has limited the death penalty to some sub-class or sub-classes of murderers, the state can give the sentencer absolute and unguided discretion to decide between death and some lesser punishment. Indeed, a state could constitutionally achieve the "narrowing" function at the guilt phase of a capital trial and ask one simple question at the punishment phase: life or death?

The rejection of channeling as an independent constitutional requirement was not inevitable. Four years after the 1976 decisions, in *Godfrey v. Georgia*,¹¹² the Court reversed the death sentence of a Georgia inmate whose sentence rested solely on the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."¹¹³ The vague language of this circumstance, coupled with the state courts' failure to adopt and apply a limiting construction in the defendant's case, led the Court to conclude that the aggravating circumstance failed to "provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'"¹¹⁴

In discussing the inadequacy of the aggravating circumstance, the Court¹¹⁵ appeared to criticize both the circumstance's failure to narrow the class of the death-eligible (by limiting in absolute terms the number of murderers eligible for the death penalty) and its failure to channel jury discretion (by focusing the jury on the relevant sentencing considerations). As to the narrowing function, the Court concluded that "[a] person of ordinary sensibility could fairly characterize almost every murder as [falling within the circumstance]."¹¹⁶ Hence, application of the circumstance in this case gave no assurance that the defendant was within a class of defendants particularly deserving of the death penalty.

The Court's opinion, though, focused more significantly on the circumstance's inability to channel or guide sentencer discretion. Quoting the 1976 cases, the Court insisted that "if a State wishes to authorize capital punishment . . . [i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and

¹¹² 446 U.S. 420 (1980) (plurality opinion).

¹¹³ *Id.* at 422 (citing GA. CODE § 27-2534.1(b)(7) (1978)).

¹¹⁴ *Id.* at 427 (quoting *Gregg*, 428 U.S. at 188 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)) (internal quotation marks omitted)).

¹¹⁵ The lead opinion in *Godfrey* is technically a plurality opinion (joined by four Justices), as Justices Marshall and Brennan concurred only in the judgment. See *id.* at 433 (Marshall, J., concurring in the judgment).

¹¹⁶ *Godfrey*, 446 U.S. at 428-29.

detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'¹¹⁷ Accordingly, the Court strongly suggested that one role of aggravating circumstances, apart from their narrowing function, is to ensure some equality in sentencing decisions by keeping the sentencer focused on clearly defined criteria: "As was made clear in *Gregg*, a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.'¹¹⁸

Three years after *Godfrey*, though, the Court revisited the Georgia scheme in *Zant v. Stephens*,¹¹⁹ a case involving a death sentence supported by two permissible aggravating circumstances and one unconstitutionally vague aggravator.¹²⁰ The defendant argued that the inclusion of the impermissible factor in the jury's deliberations undermined the "channeling" function of aggravating circumstances.¹²¹ Relying on *Furman*, *Gregg*, and *Godfrey*, the defendant insisted that states must do more than simply limit death-eligibility; they must provide a clear and workable set of criteria to channel the sentencer's discretion at all points in its decisionmaking process. The state, on the other hand, argued that the finding of one valid aggravating circumstance was constitutionally sufficient to support the sentence. In an unusual procedural twist, the Supreme Court certified a question to the Georgia Supreme Court seeking a more detailed explanation of its practice of affirming death sentences when one of the statutory aggravating circumstances that the jury found was later deemed invalid.¹²²

The Court's subsequent decision was surprising in its stark repudiation of channeling as a separate constitutional requirement. The Georgia Supreme Court had stated that its statute required the class of the death-eligible to be limited by the finding of at least one aggravating circumstance.¹²³ Once such narrowing was accomplished, the Georgia scheme afforded the jury "absolute discretion" to determine whether the death penalty should be imposed. Such discretion would involve consideration of not only statutory aggravating circumstances, but also non-statutory evidence that had either aggravating or mitigat-

¹¹⁷ *Id.* at 428 (quoting, respectively, *Gregg*, 428 U.S. at 198 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); and *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell & Stevens, JJ)).

¹¹⁸ *Id.* (quoting *Gregg*, 428 U.S. at 195 n.46).

¹¹⁹ 462 U.S. 862 (1983).

¹²⁰ *See id.* at 864.

¹²¹ *See id.* at 885.

¹²² *See id.* at 870 n.11 (describing the certified question).

¹²³ *See Zant v. Stephens*, 297 S.E.2d 1, 3 (Ga. 1982) (opinion answering the question certified by the U.S. Supreme Court).

ing import.¹²⁴ Given this structure, the Georgia Supreme Court informed the U.S. Supreme Court that the inclusion of an invalid aggravating circumstance in the jury's deliberations *after* death-eligibility had been established could have had only an "inconsequential impact" on the jury's death penalty decision.¹²⁵

In sustaining the constitutionality of Georgia's approach, the Court conceded that the Georgia scheme did not channel the jury's discretion at the critical moment when it decided whether to impose a death sentence. Indeed, the Court maintained that *Gregg* itself had recognized that channeling was not a function of the new Georgia statute.¹²⁶ In so doing, the Court redefined the channeling function that it had developed in *Gregg* and *Godfrey* as nothing more than a means of narrowing the class of the death-eligible. According to the Court, the difficulty with "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries" was that such standards would not "genuinely narrow the class of persons eligible for the death penalty."¹²⁷ The goal of channeling discretion ceased to be an independent constitutional requirement.

The collapsing of the channeling requirement into the narrowing function fundamentally ignores a crucial concern of *Furman*. As argued above, it is undoubtedly true that narrowing the class of the death-eligible was a central goal of *Furman* because it addressed the problem of overinclusion — imposition of the death penalty in a particular case in which the defendant did not deserve death in light of general community standards. But *Furman* was at least equally concerned with *underinclusion* — the failure of juries to impose death in cases in which it is truly deserved. Indeed, underinclusion, rather than overinclusion, was the principal target of the NAACP's pre-*Furman* efforts to subject state capital punishment statutes to constitutional scrutiny.¹²⁸

Narrowing the class of the death-eligible in no way addresses the problem of underinclusion, because open-ended discretion after death-eligibility permits, even invites, the jury to act according to its own

¹²⁴ See *id.*

¹²⁵ *Id.* at 4.

¹²⁶ See *Stephens*, 462 U.S. at 875 ("For the Court [in *Gregg*] approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances.").

¹²⁷ *Id.* at 877.

¹²⁸ See Steiker & Steiker, *supra* note 57, at 863 & n.141 (citing Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent at 13–14, *McGautha v. California*, 402 U.S. 183 (1971) (No. 71-203) (describing the problem of underinclusion)). Of course, there is an important connection between underinclusion and overinclusion: underinclusive application of the death penalty may be strong evidence of overinclusiveness, because the fact that the state selects only a few out of many eligible to bear a burden often reveals that the state's purported interest in imposing the burden is illusory. See *id.* at 863 n.140.

unaccountable whims. Without guiding the sentencer at all points of its decisionmaking, there simply is no guarantee that the “equal protection” concerns highlighted in *Furman* will be meaningfully addressed. As we have argued elsewhere:

If we are worried that the failure to provide precise guidance to capital sentencers may lead them to use irrelevant characteristics (like physical attractiveness) or impermissible ones (like race or class) to determine who should live and who should die from among the equally eligible, this problem is not resolved merely by narrowing the range of persons among whom the sentencer can discriminate.¹²⁹

The abandonment of channeling as a distinct constitutional requirement is unsurprising given that genuine channeling cannot be achieved by focusing solely on aggravating factors. One of the fundamental conclusions of the 1976 decisions — particularly *Woodson v. North Carolina*¹³⁰ — was that capital sentencing proceedings must be “individualized” so as to permit a capital defendant to present mitigating evidence about his background, his character, or the circumstances of the crime that might offer a basis for a sentence less than death.¹³¹ As a matter of doctrine, this individualization requirement ultimately evolved into a capital defendant’s virtually unconstrained right to present any conceivably mitigating evidence that might influence the sentencer’s punishment decision.¹³² Thus, state efforts to channel consideration of mitigating evidence, far from being constitutionally required, became constitutionally impermissible.

Once channeling the sentencer’s consideration of mitigating evidence becomes impermissible, it is difficult to see a basis to insist on channeling the sentencer’s consideration of aggravating evidence. If the sentencer may refuse to impose a death sentence for any reason or no reason at all (and nothing guides the sentencer in that decision), there is no effective means of preventing underinclusion. In such circumstances, guiding the sentencer in its consideration of aggravating evidence will not meaningfully contribute to “equality” in sentencing, because the absolute discretion afforded the sentencer at the critical moment of decision will render insignificant whatever guidance has been achieved on the aggravating side.

This tension between *Gregg*’s seeming insistence on channeling and *Woodson*’s seeming insistence on uncircumscribed consideration of mitigating evidence constitutes the central dilemma in post-*Furman* capital punishment law. Although two Justices have sought to resolve the dilemma by abandoning the individualization requirement,¹³³ and

¹²⁹ *Id.* at 863 (footnote omitted).

¹³⁰ 428 U.S. 280 (1976) (plurality opinion).

¹³¹ *See id.* at 304.

¹³² *See infra* pp. 390–91 (discussing the individualization requirement).

¹³³ *See Graham v. Collins*, 113 S. Ct. 892, 912 (1993) (Thomas, J., concurring) (arguing that courts have pushed the individualization requirement too far given that “the power to be lenient

at least one other has explicitly argued that the incommensurate pressures of these two doctrines reveal the impossibility of administering the death penalty in a constitutional fashion,¹³⁴ the Court's basic approach is reflected in its decision to require narrowing but not channeling. Hence, Georgia's failure to channel the jury's consideration of aggravating evidence (because of the inclusion of an invalid aggravator) could not, in the Court's view, be constitutional error given that Georgia did not channel the jury's consideration of mitigating evidence *at all*. The Georgia scheme that the Court approved in *Gregg* did not enumerate mitigating factors, but instead simply instructed the jury to determine its sentence in light of the aggravating evidence (including enumerated statutory aggravating circumstances) and "any mitigating circumstances."¹³⁵

The Court's abandonment of channeling was qualified somewhat by its emphasis on a separate mechanism in Georgia's scheme, apart from sentencing instructions, that was directed toward ensuring non-arbitrary results in the administration of the death penalty.¹³⁶ In its post-*Furman* statute, Georgia required its supreme court to engage in mandatory comparative proportionality review of each sentence.¹³⁷ Such review would presumably forestall applications of the death penalty that were permissible under the statute (because of the finding of at least one aggravating circumstance) but that were nonetheless anomalous given sentencing practices within the state. In conducting such comparative review, the Georgia Supreme Court considered "not only similar cases in which death was imposed, but similar cases in which death was not imposed."¹³⁸ One could regard such review either as an additional protection against overinclusion or as an additional means of promoting overall equality in the sentencing scheme.

Soon after *Stephens*, however, the Court rejected the view that such proportionality review is constitutionally mandated. In *Pulley v. Harris*,¹³⁹ a California inmate argued that the California scheme insufficiently protected capital defendants against arbitrary sentencing and

[also] is the power to discriminate" (quoting *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (quoting *KENNETH C. DAVIS, DISCRETIONARY JUSTICE* 170 (1973))) (internal quotation marks omitted); *Walton v. Arizona*, 497 U.S. 639, 670-73 (1990) (Scalia, J., concurring) (maintaining that because the channeling concerns of *Furman* are "arguably supported" by the text of the Constitution, whereas the concern for individualized capital sentencing bears "no relation whatever" to the Eighth Amendment, the individualization requirement should be abandoned).

¹³⁴ See *Callins v. Collins*, 114 S. Ct. 1127, 1136 (1994) (Blackmun, J., dissenting from denial of certiorari) ("All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.").

¹³⁵ *Gregg v. Georgia*, 428 U.S. 153, 211 (1976) (White, J., concurring) (quoting GA. CODE ANN. § 27-2534.1(b) (Supp. 1975)) (internal quotation marks omitted).

¹³⁶ See *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

¹³⁷ See *id.*

¹³⁸ *Stephens v. State*, 227 S.E.2d 261, 263 (Ga. 1976).

¹³⁹ 465 U.S. 37 (1984).

maintained that the 1976 decisions — as well as the Court's subsequent decision in *Stephens* — should be read to require appellate proportionality review.¹⁴⁰ In sustaining the California scheme against this challenge, the Court relied primarily on its approval of the Texas statute in *Jurek v. Texas*,¹⁴¹ which likewise did not provide for any comparative proportionality review.¹⁴² In its decision, the Court made clear that once a state has limited the class of the death-eligible “to a small sub-class” of defendants, the state has no further obligation to ensure equality in sentencing.¹⁴³ Narrowing thus clearly emerged as the sole and decisive constitutional obligation. Moreover, as in the Georgia scheme, one could hardly describe the California statute's purported narrowing of the class of the death-eligible as limiting the availability of the death penalty to a “small sub-class”: it rendered seven separate classes of murderers death-eligible, including all those who committed murder in the course of any of five felonies.¹⁴⁴ Under California's current statute, the legislature has expanded the list of the death-eligible to nineteen categories, encompassing murders as varied as those occurring in the context of a train wrecking and those involving formerly appointed state officials.¹⁴⁵

The Court's focus on narrowing as the sole constitutionally required means of addressing arbitrariness in capital sentencing — to the exclusion of both channeling and proportionality review — has yielded an additional significant consequence for death penalty doctrine. Because states need not channel sentencing discretion (and need not require sentencers to explicitly weigh enumerated aggravating and mitigating factors), the punishment decision need not have any structure at all. Under current doctrine, a state could choose to limit death-eligibility through its definition of capital murder (as several states have),¹⁴⁶ and then simply ask the sentencer to decide punishment in light of any aggravating or mitigating factors that the sentencer deems significant. Although no state has yet chosen to leave the punishment phase unstructured to this degree, such a scheme would clearly withstand constitutional scrutiny given current doctrine. Indeed, such a scheme would also avoid much of the complicated litigation that has arisen as a result of states' decisions to design more elaborate sentencing proceedings.

¹⁴⁰ See *id.* at 44–50.

¹⁴¹ 428 U.S. 262 (1976).

¹⁴² See *Pulley*, 465 U.S. at 48.

¹⁴³ *Id.* at 53.

¹⁴⁴ See *id.* at 51 n.13.

¹⁴⁵ See CAL. PENAL CODE § 190.2(13) (West 1995) (concerning appointed officials); *id.* § 190.2(17)(ix) (concerning murders in the course of a train wrecking).

¹⁴⁶ The Court has indicated that both the Texas and Louisiana schemes adequately narrow the class of the death-eligible in their definitions of capital murder. See *Lowenfield v. Phelps*, 484 U.S. 231, 245–46 (1988).

The apparent constitutional permissibility of such a scheme seems odd given the Court's strong emphasis in the 1976 decisions on the creation of a separate structured punishment phase in the post-*Furman* statutes it sustained. In those decisions, the Court did not explicitly indicate that a bifurcated proceeding with a carefully designed punishment phase was constitutionally indispensable. Nonetheless, a casual (and even a careful) observer of the interaction between the Court's decisions and statutory developments following *Furman* would likely have regarded such a proceeding as the new hallmark of permissible death penalty schemes. That current doctrine would permit a state to enact a statute defining nineteen or so categories of capital murder and to provide for a punishment phase structured around one general question — life or death — reveals the extent to which the Court has retreated from the more ambitious regulatory efforts that its 1976 decisions seemed to embrace and indeed to require.

If, as we have argued, the Court now demands so little of states in terms of guiding sentencer discretion, what accounts for the extensive and complex litigation surrounding states' use of aggravating circumstances? Over the past fifteen years, the Supreme Court has issued opinions in more than a dozen cases involving constitutional challenges to states' efforts to guide sentencing discretion.¹⁴⁷ Notwithstanding our claim that compliance with current doctrine is relatively simple, many inmates have prevailed in such challenges, and litigation concerning states' efforts to guide sentencer discretion remains substantial.

Some of this litigation is based on the very minimal requirement that states narrow the class of the death-eligible through some non-vague factor or aggravating circumstance. For example, in *Godfrey v. Georgia*, the challenged aggravating circumstance provided the sole basis for the sentencer's death-penalty decision.¹⁴⁸ In such cases, if the challenged circumstance is impermissibly vague, the sentence must be reversed. Invalidation of the vague aggravating circumstance leaves nothing to support the death sentence other than the defendant's con-

¹⁴⁷ Cases in which the Court has addressed the constitutional adequacy of states' efforts to guide sentencer discretion include: *Arave v. Creech*, 113 S. Ct. 1534, 1538 (1993); *Espinosa v. Florida*, 112 S. Ct. 2926, 2929 (1992) (per curiam); *Sochor v. Florida*, 504 U.S. 527, 529–30 (1992); *Stringer v. Black*, 503 U.S. 222, 228–29 (1992); *Lewis v. Jeffers*, 497 U.S. 764, 789 (1990); *Walton v. Arizona*, 497 U.S. 639, 652–53 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988); *Lowenfield v. Phelps*, 484 U.S. 231, 245–46 (1988); *Barclay v. Florida*, 463 U.S. 939, 956–58 (1983); *Zant v. Stephens*, 462 U.S. 862, 864 (1983); and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

¹⁴⁸ See *Godfrey*, 446 U.S. at 426 (reversing a sentencing decision that rested solely on the aggravating circumstance "that the offense of murder was outrageously or wantonly vile, horrible and inhuman").

viction for murder, and the requisite “narrowing” has not been accomplished.

Many of the remaining cases, including *Zant v. Stephens*,¹⁴⁹ involve verdicts in which the sentencer relied on both permissible and impermissible aggravating circumstances.¹⁵⁰ As discussed above, the sentencer’s reliance on an impermissibly vague aggravating circumstance does not mandate reversal in a scheme such as Georgia’s, which affords the sentencer absolute discretion once the defendant has become death-eligible (based on the sentencer’s identification of at least one satisfactory aggravating circumstance).¹⁵¹

The doctrine has become more intricate, though, in cases in which the state has structured its punishment phase so that the sentencer is required to weigh aggravating and mitigating factors against each other to determine the appropriate sentence. Under such schemes, the Court has held that the sentencer’s reliance on an invalid aggravating circumstance requires the state courts either to reweigh aggravating and mitigating factors (excluding the improper aggravating factor) or to determine whether the sentencer’s consideration of the improper factor was “harmless” beyond a reasonable doubt if the sentence is to be sustained.¹⁵² Thus, even though states can entirely forego “structured” sentencing phases that involve the explicit weighing of aggravating and mitigating factors, the Court has insisted that once a state has adopted such a scheme, it may not ignore the sentencer’s reliance on an improper factor in that structured decisionmaking process.

This departure from *Stephens* generates substantial, highly technical litigation, because it requires courts to assess whether a given scheme is “weighing” or “non-weighing,” and, if “weighing,” whether the state courts have appropriately reweighed the relevant factors or adequately applied harmless error analysis. Moreover, the different doctrinal approaches to “weighing” and “non-weighing” schemes are difficult to justify given that the sentencer’s decisionmaking process is

¹⁴⁹ 462 U.S. 862 (1983).

¹⁵⁰ See, e.g., *id.* at 864; *Clemons v. Mississippi*, 494 U.S. 738, 742 (1990) (reviewing a case in which the sentencer considered one permissible aggravating circumstance — that the murder was committed during the course of a robbery — and one impermissibly vague aggravating circumstance — that the killing was “especially heinous, atrocious or cruel”); *Barclay v. Florida*, 463 U.S. 939, 944–46 (1983) (involving sentencer consideration of valid aggravating circumstances, including that the defendant had committed the murder while engaged in a kidnapping, as well as a non-statutory aggravating circumstance that was improper under state law).

¹⁵¹ *But cf.* *Tuggle v. Netherland*, 116 S. Ct. 283 (1995) (per curiam) (holding that constitutional error that prevented the defendant from responding to a non-vague aggravating circumstance argued by the prosecution required reversal of the defendant’s death sentence despite the presence of an additional aggravating factor found by the jury).

¹⁵² See, e.g., *Clemons*, 494 U.S. at 754 (holding that states with “weighing” schemes must “engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding” if the sentence is to be sustained).

likely to be similar under either scheme.¹⁵³ In any event, despite the Court's closer supervision of "weighing" schemes, a majority of state death penalty statutes require some sort of balancing or weighing of factors at the punishment phase.¹⁵⁴

Two significant observations about these developments emerge. First, the extensive litigation concerning the adequacy of particular aggravating circumstances continues only because many states have failed to purge dubious aggravating factors from their statutes.¹⁵⁵ The

¹⁵³ The difference appears to rest on the belief that sentencers in non-weighing states will place no special emphasis on the aggravating circumstances that they have found in determining the ultimate sentence; once a defendant has become death-eligible, the sentencer is "cut loose" from those circumstances and has absolute discretion to decide between life and death. It seems likely, though, that even in self-described "non-weighing" states, most sentencers will approach their decision by considering the extent to which aggravating factors outweigh mitigating factors. Once the sentencer has been instructed to think about the appropriate punishment in terms of aggravating and mitigating circumstances, the decisionmaking process seems inevitably driven to some sort of balancing or weighing. Indeed, in fashioning its doctrinal approach, the Court has offered no clear statement concerning its view of how decisionmaking could proceed in non-weighing states apart from some sort of makeshift balancing or weighing. A critical examination of the Court's doctrine in this area is offered in Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 455-57 (1994).

¹⁵⁴ Of the 36 death penalty jurisdictions, 21 are weighing states. See *id.* at 448 n.38 (listing weighing states and their corresponding statutory provisions).

¹⁵⁵ In some cases, the Court has upheld the use of a general factor for "heinous, atrocious, or cruel" crimes when those terms have been narrowed by either state courts or legislatures. Nonetheless, the retention of such language by many states invites litigation. State statutes that still contain vague aggravating factors include: ALA. CODE § 13A-5-49(8) (1994) ("capital offense was especially heinous, atrocious or cruel compared to other capital offenses"); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (Supp. 1994) ("defendant committed the offense in an especially heinous, cruel or depraved manner"); ARK. CODE ANN. § 5-4-604(8) (Michie 1993) ("capital murder was committed in an especially cruel or depraved manner," which includes those offenses in which torture is inflicted on the victim or in which the defendant "relishes" the murder); CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1995) ("murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity," which is defined as a "conscienceless, or pitiless crime which is unnecessarily torturous to the victim"); COLO. REV. STAT. § 16-11-103(5)(j) (Supp. 1994) ("defendant committed the offense in an especially heinous, cruel, or depraved manner"); CONN. GEN. STAT. § 53a-46a(h)(4) (1995) ("defendant committed the offense in an especially heinous, cruel or depraved manner"); DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (Supp. 1994) ("murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him"); FLA. STAT. ch. 921.141(5)(h) (1993) ("capital felony was especially heinous, atrocious, or cruel"); GA. CODE ANN. § 17-10-30(b)(7) (1990) ("offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); IDAHO CODE § 19-2515(g)(5) (Supp. 1995) ("murder was especially heinous, atrocious or cruel, manifesting exceptional depravity"); ILL. COMP. STAT. ANN. ch. 720, para. 5/9-1(b)(7) (West 1994) ("murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty"); KAN. STAT. ANN. § 21-4625(6) (Supp. 1994) ("defendant committed the crime in an especially heinous, atrocious or cruel manner"); LA. CODE CRIM. PROC. art. 905.4(A)(7) (West Supp. 1995) ("offense was committed in an especially heinous, atrocious or cruel manner"); MISS. CODE ANN. § 99-19-101(5)(h) (1994) ("capital offense was especially heinous, atrocious or cruel"); MO. REV. STAT. § 565.032(2)(7) (1994) ("murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind"); NEB. REV. STAT. § 29-

Court has made clear that aggravating factors that are evaluative as opposed to objective are vulnerable to constitutional attack. Thus, Georgia's factor asking whether the crime was "outrageously or wantonly vile,"¹⁵⁶ Oklahoma's factor asking whether the murder was "especially heinous, atrocious, or cruel,"¹⁵⁷ and Idaho's factor asking whether the defendant exhibited an "utter disregard for human life"¹⁵⁸ raise reasonable concerns that even the minimal "narrowing" function has not been achieved because such factors could fairly encompass all murders.

The vast majority of aggravating circumstances have not and will not encounter this sort of challenge. States can, for example, fully satisfy the narrowing requirement by establishing aggravating circumstances that focus on the presence of a separate felony, the killing of more than one person, the killing of a peace officer, or the commission of the crime while in prison. The requirement that states limit their aggravating circumstances (or definitions of capital murder) to objective factors does not significantly inhibit a state's ability to render vir-

2523(1)(d) (1989) ("murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence"); NEV. REV. STAT. § 200.033(8) (1991) ("murder involved torture, depravity of mind or the mutilation of the victim"); N.H. REV. STAT. ANN. § 630:5(VII)(h) (Supp. 1994) ("defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim"); N.J. STAT. ANN. § 2C:11-3(c)(4)(C) (West 1995) ("murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim"); N.C. GEN. STAT. § 15A-2000(e)(9) (Supp. 1994) ("capital felony was especially heinous, atrocious, or cruel"); OKLA. STAT. tit. 21, § 701.12(4) (1991) ("murder was especially heinous, atrocious, or cruel"); S.D. CODIFIED LAWS ANN. § 23A-27A-1(6) (Supp. 1995) ("offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); TENN. CODE ANN. § 39-13-204(i)(5) (Supp. 1994) ("murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death"); UTAH CODE ANN. § 76-5-202(1)(q) (1995) ("homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death"); VA. CODE ANN. § 19.2-264.2(1) (Michie 1995) ("[defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"); WYO. STAT. ANN. § 6-2-102(h)(vii) (Michie Supp. 1995) ("murder was especially atrocious or cruel, being unnecessarily torturous to the victim").

¹⁵⁶ GA. CODE ANN. § 17-10-30(b)(7) (1990); *see* *Godfrey v. Georgia*, 446 U.S. 420, 431-33 (1980) (sustaining a challenge to this aggravating circumstance as applied by state courts).

¹⁵⁷ OKLA. STAT. tit. 21, § 701.12(4) (1991); *see* *Maynard v. Cartwright*, 486 U.S. 356, 363-65 (1988) (sustaining a challenge to this aggravating circumstance as applied by state courts).

¹⁵⁸ IDAHO CODE § 19-2515(g)(6) (Supp. 1995); *see* *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993) (upholding the statute against a vagueness challenge on the ground that the aggravating circumstance as interpreted by state courts focused on a factual determination of defendant's state of mind rather than on a "subjective determination" (quoting *Creech v. Arave*, 947 F.2d 873, 884 (9th Cir. 1991)) (internal quotation marks omitted)).

tually all murderers death-eligible; it simply obligates states to establish the breadth of their statutes in unmistakably clear terms.¹⁵⁹

The second observation relates to the first. Even if a state chooses to persist in its use of a vague aggravating circumstance, it could avoid a substantial amount of litigation by restructuring its punishment phase along the lines of Georgia's "non-weighing" approach. As stated above, a sentencer's reliance on an impermissibly vague aggravating circumstance in a non-weighing scheme will not require reversal of the sentence if a separate, permissible aggravating factor supports the verdict. States need resort to appellate reweighing and harmless error analysis only if they have gratuitously conferred greater procedural protections in the sentencing phase than current doctrine presently requires. Accordingly, much of the intricate litigation concerning whether a state's scheme is weighing or non-weighing, whether a state court has appropriately reweighed aggravating and mitigating factors, and whether a state court's limiting construction "genuinely" narrows the class of the death-eligible is entirely avoidable.

C. *Mitigation*

In its rejection of mandatory sentencing in the 1976 decisions, the Court made clear that a defendant was entitled to an "individualized" proceeding that would facilitate the sentencer's consideration of mitigating evidence.¹⁶⁰ Those opinions did not, however, answer two crucial questions concerning the scope of that right. First, the opinions did not specify what kinds of evidence could be regarded as "mitigating" so as to trigger the defendant's right to offer the evidence as a basis for a sentence less than death. Thus, litigation was inevitable in those states that through statute or practice limited the sentencer's consideration to certain kinds of mitigating evidence. Second, the opinions did not define the extent to which states are permitted to structure the sentencer's consideration of mitigating evidence. Most states, including Georgia, invited the sentencer to evaluate mitigating evidence at the end of the decisionmaking process in answering the

¹⁵⁹ Of course, much of the current litigation involves the review of sentences rendered before some states ceased using patently invalid aggravating circumstances. To the extent that existing litigation falls within this category, it does not reflect pervasive regulation of state capital schemes as much as the enforcement of one easily met (though perhaps belatedly discovered) constitutional requirement. Other litigation, though, involves state efforts to save facially vague aggravating circumstances through judicially applied limiting constructions. In such states, the continued use of problematic factors absolutely invites future litigation and likewise cannot be said to reflect significant court intrusion into state capital schemes. As early as 1973, a report prepared by the National Association of Attorneys General evaluated various "aggravating factors" and designated as "poor" in terms of likely court approval the "heinous, atrocious, or cruel" factor that ultimately generated an extraordinary amount of litigation. See NATIONAL ASS'N OF ATTORNEYS GEN., SUMMARY OF PROCEEDINGS 61 (1973).

¹⁶⁰ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion).

fundamental question of life or death.¹⁶¹ Other states, such as Texas and Oregon, permitted the sentencer to consider mitigating evidence only in the context of answering specific fact-based questions.¹⁶²

Current doctrine has rendered both of these uncertainties moot, because all death-penalty schemes presently permit unconstrained consideration of mitigating evidence. Accordingly, virtually all of the current litigation concerning the individualization requirement is backward-looking, gauging the constitutionality of statutory provisions and state practices that are no longer in force. Ironically, then, the past twenty years of intricate litigation over states' fulfillment of the individualization requirement is coming to an end only because states have voluntarily reproduced the open-ended consideration of mitigating factors that was a central feature of the pre-*Furman* statutes.

1. *What Evidence Counts as Mitigating?* — After *Furman*, many states sought to avoid the charge of "standardless discretion" by limiting the sentencer's consideration of mitigating evidence. *Woodson v. North Carolina*¹⁶³ and *Roberts v. Louisiana*¹⁶⁴ invalidated the most extreme means of constraining discretion: a mandatory death penalty for certain crimes.¹⁶⁵

In the decade that followed, the Court overturned death sentences when state law authorized consideration of some but not all potentially mitigating factors. In *Lockett v. Ohio*,¹⁶⁶ for example, the Court held that Ohio's exclusive list of mitigating factors unconstitutionally precluded the sentencer from considering mitigating evidence regarding the defendant's lack of specific intent to cause death, minimal participation in the crime, and age at the time of the offense.¹⁶⁷ In reversing *Lockett's* sentence, the Court did not attempt to define the range of mitigating evidence encompassed by the individualization requirement; instead, the Court simply asserted that "a death penalty statute must not preclude consideration of relevant mitigating factors."¹⁶⁸ Subsequently, the Court likewise invalidated sentences when a state judge refused to assign any mitigating weight to the defendant's turbulent

¹⁶¹ See, e.g., Act of Mar. 28, 1973, No. 74, sec. 3, § 27-2534.1(b), 1973 Ga. Laws 157, 163-65 (codified at GA. CODE ANN. § 17-10-30(b) (1990)); Act of Aug. 5, 1976, No. 694, 1976 La. Acts 1771 (current version at LA. CODE CRIM. PROC. ANN. arts. 905-905.9 (West 1984 & Supp. 1995)); Act of Mar. 29, 1977, ch. 492, art. 4.1, §§ 19.2-264.2 to .4, 1977 Va. Acts 733, 735 (current version at VA. CODE ANN. §§ 19.2-264.2 to -264.5) (Michie 1995)).

¹⁶² See OR. REV. STAT. § 163.150(b) (1990); Act of June 14, 1973, ch. 426, art. 37.071(b), 1973 Tex. Gen. Laws 1122, 1125 (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (West Supp. 1995)).

¹⁶³ 428 U.S. 280 (1976).

¹⁶⁴ 428 U.S. 325 (1976).

¹⁶⁵ See *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 305.

¹⁶⁶ 438 U.S. 586 (1978).

¹⁶⁷ See *id.* at 608.

¹⁶⁸ *Id.*

family history and emotional disturbance¹⁶⁹ and when state case law precluded consideration of the defendant's good behavior while awaiting trial.¹⁷⁰

In sustaining challenges to state-imposed limitations on the presentation or consideration of particular mitigating evidence, the Court seems to have concluded that *all* potentially mitigating factors fall within the individualization requirement. Although the Court has occasionally voiced skepticism about the relevance of some evidence offered as mitigating,¹⁷¹ it has yet to develop a theory about which aspects of the individual are indispensably relevant to the death penalty decision. We have argued elsewhere that a more circumscribed theory of individualized sentencing can be drawn from the Court's own Eighth Amendment methodology; such a theory, reflected in current state statutes as well as in historical practices, would properly focus on mitigating evidence concerning a defendant's reduced culpability.¹⁷² Nonetheless, the Court's emerging doctrine has motivated every death penalty jurisdiction to permit the introduction and consideration of "any" mitigating factor, and the Court will therefore have little occasion to develop a more refined theory of individualization.

The Court's all-inclusive approach to individualization has two obvious consequences. It simplifies the doctrine (because it discourages piecemeal evaluation of the relevance of particular kinds of mitigating evidence) and it exacerbates the tension between *Woodson's* insistence on individualized sentencing and the concern in *Furman* and *Gregg* for focused death-penalty decisionmaking. By making constitutionally relevant any and all traits or experiences that distinguish one individual from another, the Court invites arbitrary and even invidious decisionmaking.

As *Furman* recognized, the greater the discretion afforded the decisionmaker, the less accountable the decisionmaker will be to public values. If standardless discretion is problematic because it gives those with a mind to discriminate the opportunity to discriminate, unconstrained consideration of any kind of mitigating evidence is problematic for precisely the same reason. Although such discretion cannot be used to render a defendant death-eligible contrary to community standards, it can be used to exempt favored defendants from the death penalty or to withhold severe punishment for crimes against despised

¹⁶⁹ See *Eddings v. Oklahoma*, 455 U.S. 104, 112-15 (1982). The trial judge refused to consider such mitigating evidence, notwithstanding the broad language of the Oklahoma statute, which authorized the sentencer to consider "any mitigating circumstances." *Id.* at 115 n.10 (quoting OKLA. STAT. tit. 21, § 701.10 (1980)).

¹⁷⁰ See *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).

¹⁷¹ See, e.g., *Boyd v. California*, 494 U.S. 370, 382 n.5 (1990) (expressing doubts about the mitigating significance of the prize for dance choreography that the defendant won while in prison).

¹⁷² See Steiker & Steiker, *supra* note 57, at 858-59.

victims. And if, as we have argued, *Furman*'s equal protection concerns relate to both overinclusion and underinclusion, the Court's insistence that the individualization requirement encompasses all conceivably mitigating evidence undermines its effort to achieve equality in the administration of the death penalty. We still think that the NAACP Legal Defense Fund said it best in its brief in *McGautha*: "Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."¹⁷³

Although compliance with the individualization requirement has become straightforward in that the Court requires states to allow defendants to introduce any potentially mitigating evidence, litigation over the scope of the individualization requirement has been substantial. Many states, remembering the critique of open-ended discretion in *Furman*, did not read *Woodson* to require such a complete return to unfettered sentencer consideration of mitigating factors. Eleven years passed before the Court revisited the Florida statute that it had provisionally approved in the 1976 decisions¹⁷⁴ and ruled that the statute's refusal to permit consideration of unenumerated mitigating factors violated the Eighth Amendment.¹⁷⁵ Despite the Court's insistence in *Lockett* that six members of the 1976 Court had "assumed, in approving the [Florida] statute, that the range of mitigating factors listed in the statute was not exclusive,"¹⁷⁶ it was far from obvious that the individualization requirement would be read so broadly.¹⁷⁷ Accordingly, the perception that the death penalty is extensively regulated in this area stems not from intricate or stringent regulation so much as from a miscommunication between the Court and the states regarding the near completeness of the return to pre-*Furman* discretion with respect to mitigating factors. The significance of this miscommunication was heightened by the fact that Florida, the second most active state in administering the death penalty since *Furman*,¹⁷⁸ was among the

¹⁷³ Brief Amici Curiae of the NAACP Legal Defense and Educ. Fund, Inc. and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 71-203), quoted in Steiker & Steiker, *supra* note 57, at 864.

¹⁷⁴ See *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (plurality opinion).

¹⁷⁵ See *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

¹⁷⁶ *Lockett v. Ohio*, 438 U.S. 586, 606 (1978).

¹⁷⁷ Nowhere in *Proffitt*, the 1976 decision concerning the Florida statute, did the Court insist that the state courts construe the statute so as to permit consideration of unenumerated mitigating circumstances. In a footnote in the plurality opinion, three Justices observed that the statute did not appear to limit sentencer consideration to statutory mitigating factors. See *Proffitt*, 428 U.S. at 250 n.8 (opinion of Stewart, Powell & Stevens, JJ.). But this observation seems unconnected to any claim that such open-ended consideration of mitigating factors was constitutionally required.

¹⁷⁸ See *Capital Punishment 1993*, in JAMES STEPHAN & PETER BRIEN, DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1993, at 11 tbl.10 (1994) (reporting that Florida has ranked second in number of executions since 1977); see also *id.* at 1 (reporting that as of December, 1993, Florida ranked third in number of prisoners under sentence of death).

states that sought to confine sentencer consideration to particular mitigating circumstances.

2. *Channeling Consideration of Mitigating Evidence.* — Two states responded to *Furman's* critique of standardless discretion not by limiting the *kinds* of mitigating evidence that the sentencer could consider, but by structuring the sentencer's consideration of concededly relevant mitigating evidence around particular fact-based questions. Texas and Oregon authorized the defendant to present any mitigating evidence at the punishment phase but permitted the consideration of such evidence only as the sentencer decided whether the crime was committed deliberately, whether the defendant would be dangerous in the future, and whether the defendant had been provoked into committing the crime.¹⁷⁹ The Court provisionally approved the Texas special issue scheme in the 1976 decisions,¹⁸⁰ but later expressed doubts about whether the special issues would adequately facilitate sentencer consideration of certain kinds of mitigating evidence.¹⁸¹

The Court subsequently concluded, in *Penry v. Lynaugh*,¹⁸² that the special issue scheme was unconstitutional as applied to a mentally retarded defendant who had a history of being abused.¹⁸³ The Court reasoned that, under the Texas scheme, the defendant's mitigating evidence of reduced culpability would likely have *increased* the probability of a capital verdict because it supported rather than undermined a finding of future dangerousness.¹⁸⁴ At the same time, the Texas courts had narrowly construed the special issue regarding the "deliberateness" of a defendant's actions so as to preclude a more encompassing moral inquiry into the appropriateness of the death penalty based on a defendant's limited capacity to exercise judgment and self-restraint.¹⁸⁵

Two years after *Penry*, and fifteen years after the Court's provisional approval of the Texas scheme in 1976, Texas revised its statute by adding a separate question that authorizes unstructured consideration of mitigating evidence as the jury decides between life and

¹⁷⁹ See OR. REV. STAT. § 163.150(1)(b) (1993); Act of June 14, 1973, ch. 426, Art. 3, sec. 1, art. 37.071(a)-(b), 1973 Tex. Gen. Laws 1122, 1125 (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1995)).

¹⁸⁰ See, e.g., *Jurek v. Texas*, 428 U.S. 262, 271-72 & n.7, 276 (1976).

¹⁸¹ See *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in the judgment). Justice O'Connor noted:

If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Id.

¹⁸² 492 U.S. 302 (1989).

¹⁸³ See *id.* at 328.

¹⁸⁴ See *id.* at 324.

¹⁸⁵ See Steiker, *supra* note 32, at 1150.

death.¹⁸⁶ Both before and after this statutory change, the question whether the special-issue scheme adequately satisfies the individualization requirement has generated enormous, and enormously complicated, litigation in state and federal courts, including the U.S. Supreme Court.

One central threshold question concerns which types of mitigating evidence are “*Penry* problematic” so as to trigger a defendant’s right to an additional instruction beyond the special issues. After *Penry*, the Texas state courts and the lower federal courts ruled that evidence of abuse alone, as well as evidence of youth, could be adequately considered as mitigating under the old special issues.¹⁸⁷ Defendants, on the other hand, maintained that, although such mitigating evidence arguably bears on future dangerousness (because a defendant might mature with age or become less abusive when he is no longer subject to abuse himself), the special issues did not permit consideration of such evidence in its most significant and fundamental aspect — its lessening of a defendant’s culpability for the crime already committed. Hence, defendants argued, the special-issue scheme precluded a jury from giving a life sentence to an admittedly dangerous offender who nonetheless was less deserving of death because of impaired judgment, immaturity,

¹⁸⁶ Act of June 16, 1991, ch. 838, sec. 1, art. 37.071(e), 1991 Tex. Gen. Laws, 2898, 2899 (codified at TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon Supp. 1995)) mandated the following additional special issue that focuses on mitigating evidence:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Oregon had already revised its statute, adding as its fourth question: “Whether a sentence of death be imposed.” Act of July 24, 1989, ch. 790, sec. 135b, § 163.150(1)(b)(D), 1989 Or. Laws 1301, 1327 (current version at OR. REV. STAT. § 163.150(1)(b)(D) (1993)).

¹⁸⁷ For representative decisions in the Texas courts, see *Kemp v. State*, 846 S.W.2d 289, 310 (Tex. Crim. App. 1992) (refusing to extend *Penry* to encompass mitigating evidence relating solely to a defendant’s youth), *cert. denied*, 113 S. Ct. 2361 (1993); *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1992) (holding that defendant’s childhood abuse could be adequately addressed within the Texas special issues and therefore did not merit a special jury charge as in *Penry*); and *Cantu v. State*, 842 S.W.2d 667, 693 (Tex. Crim. App. 1992) (holding that a twenty-year-old defendant was not entitled to a *Penry* instruction based upon youth as a mitigating factor), *cert. denied*, 113 S. Ct. 3046 (1993). For federal decisions, see *Drew v. Collins*, 964 F.2d 411, 420–21 (5th Cir. 1992) (rejecting a *Penry* claim based upon defendant’s youth and troubled childhood), *cert. denied*, 113 S. Ct. 3044 (1993); *Bridge v. Collins*, 963 F.2d 767, 770 (5th Cir. 1992) (holding that because the defendant’s youth could be taken into account under the question of “future dangerousness” in Texas’s capital punishment scheme, the defendant was not entitled to a special *Penry* instruction), *cert. denied*, 113 S. Ct. 3044 (1993); *White v. Collins*, 959 F.2d 1319, 1324 (5th Cir.) (holding that Texas’s first and second statutory punishment issues offered “a constitutionally adequate vehicle by which the jury could give mitigating effect to [a defendant’s] age”), *cert. denied*, 503 U.S. 1001 (1992); and *Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) (stating that a defendant must show that his difficult childhood experiences had a psychological effect upon him before they could be invoked in support of *Penry* relief), *cert. denied*, 113 S. Ct. 990 (1993).

or inability to control behavior because of previous experiences as a victim of abuse.

The Supreme Court subsequently addressed the adequacy of the special issues with respect to youth in two separate decisions.¹⁸⁸ In the first case, the Court ultimately refrained from deciding the question because the petitioner sought relief on federal habeas corpus.¹⁸⁹ Applying its newly developed non-retroactivity doctrine,¹⁹⁰ the Court determined that its prior decisions had not decisively established the inadequacy of the Texas scheme with respect to evidence, such as youth, that could be given *some* mitigating weight under the old special issues.¹⁹¹ In the second case, taken on direct review of a defendant's conviction from the highest state criminal court, the Court rejected the *Penry* claim on the merits, finding "no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth."¹⁹²

That the Supreme Court reviewed the Texas special-issue scheme on four separate occasions¹⁹³ in five years itself generates the perception that the Court is micromanaging states' death penalty schemes and imposing complicated requirements in capital cases. This perception, though, is unjustified. As the Texas experience illustrates, states can fully satisfy the individualization requirement by simply returning to the uncircumscribed consideration of mitigating evidence that characterized virtually all pre-*Furman* sentencing schemes. Moreover, the "bottom line" of the four decisions is that the former Texas scheme, even though it substantially limited sentencer consideration of certain kinds of evidence, is constitutional as applied to the vast number of Texas defendants who did not have evidence of mental retardation. Thus, the Court seems to have concluded that states *may*, but need not, channel sentencer consideration of mitigating evidence.

This doctrinal conclusion should look familiar. Just as states need not channel sentencer consideration of aggravating evidence (and need only narrow the class of the death-eligible), states may return (and, indeed, are encouraged to return) to unstructured consideration of mitigating evidence. The limited intrusion into state practices that *Penry* represents occurred only because *Jurek*, the 1976 decision concerning the Texas statute, did not clearly specify the consequences of the newly emerging individualization requirement for the special-issue scheme. Had *Jurek* indicated that an additional special issue would be

¹⁸⁸ See *Johnson v. Texas*, 113 S. Ct. 2658 (1993); *Graham v. Collins*, 113 S. Ct. 892 (1993).

¹⁸⁹ See *Graham*, 113 S. Ct. at 903.

¹⁹⁰ See *Teague v. Lane*, 489 U.S. 288, 310 (1989) (narrowing the applicability of "new" law on federal habeas).

¹⁹¹ See *Graham*, 113 S. Ct. at 902-03.

¹⁹² *Johnson*, 113 S. Ct. at 2669.

¹⁹³ See *Johnson v. Texas*, 113 S. Ct. 2658 (1993); *Graham v. Collins*, 113 S. Ct. 892 (1993); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

essential in some circumstances, or had Texas responded more quickly to the expansion of the individualization requirement in *Lockett* and other early cases, an overwhelming number of Texas convictions would have been unaffected by the *Penry* decision.

Even as it stands, very few inmates have prevailed on *Penry* grounds.¹⁹⁴ Nonetheless, the litigation of *Penry* issues, including questions of procedural default,¹⁹⁵ retroactivity,¹⁹⁶ interaction between *Penry* and Sixth Amendment ineffectiveness of counsel claims,¹⁹⁷ and the necessity of introducing mitigating evidence to preserve *Penry* challenges,¹⁹⁸ has generated a *Penry* sub-specialty in death penalty law. It would be a mistake, though, to conflate the intricacy and frequency of this litigation in the Texas and federal courts (which continues unabated to this day) with substantial regulation of state death penalty schemes. Compliance with the individualization requirement remains straightforward, and all of this backward-looking litigation is merely the natural consequence of the Court's inability to communicate the simple requirement clearly until decades after it entered the constitutional fray.

¹⁹⁴ The Fifth Circuit has granted relief under *Penry* in only one case. See *Mayo v. Lynaugh*, 893 F.2d 683, 684 (5th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991). For an illustrative collection of cases in which the Fifth Circuit has rejected *Penry* claims, see *Allridge v. Scott*, 41 F.3d 213, 222-23 (5th Cir. 1994) (concluding that petitioner's evidence regarding parole ineligibility, mental illness, and previous abuse could be adequately considered pursuant to the special issue scheme), *cert. denied*, 115 S. Ct. 1959 (1995); *Jacobs v. Scott*, 31 F.3d 1319, 1326-28 (5th Cir. 1994) (holding that the special issues regarding deliberateness and future dangerousness permitted jurors to give adequate mitigating effect to petitioner's non-triggerman status, his troubled childhood, and his positive personality traits), *cert. denied*, 115 S. Ct. 711 (1995); *Lackey v. Scott*, 28 F.3d 486, 488-90 (5th Cir. 1994) (rejecting petitioner's *Penry* claims based upon his intoxication at the time of the offense, his drinking problem, his low intelligence, and his childhood abuse), *cert. denied*, 115 S. Ct. 743 (1995); *Madden v. Collins*, 18 F.3d 304, 306-08 (5th Cir. 1994) (rejecting a *Penry* claim based upon petitioner's personality disorder, learning disability and troubled childhood because such information was not "constitutionally relevant mitigating evidence" (emphasis omitted)), *cert. denied*, 115 S. Ct. 1114 (1995); and *Russell v. Collins*, 998 F.2d 1287, 1291-93 (5th Cir. 1993) (denying *Penry* relief in a case in which the sentencing jury heard evidence of petitioner's troubled childhood and severe beating suffered as a teenager), *cert. denied*, 114 S. Ct. 1236 (1994).

¹⁹⁵ See, e.g., *Selva v. Lynaugh*, 842 F.2d 89, 93-94 (5th Cir. 1988) (applying procedural default doctrine to an unreserved *Penry* claim); *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (dispensing with the procedural default bar to *Penry* claims), *cert. denied*, 504 U.S. 992 (1992).

¹⁹⁶ See, e.g., *Motley v. Collins*, 18 F.3d 1223, 1234-35 (5th Cir.) (applying the nonretroactivity bar to a *Penry* claim based on severe abuse), *cert. denied*, 115 S. Ct. 418 (1994).

¹⁹⁷ See, e.g., *Marquez v. Collins*, 11 F.3d 1241, 1248 (5th Cir.) (rejecting a claim that the statutory scheme unconstitutionally interfered with counsel's decision whether to present mitigating evidence at a capital trial), *cert. denied*, 115 S. Ct. 215 (1994).

¹⁹⁸ See, e.g., *id.* at 1248 (rejecting a *Penry* claim based on failure to present evidence of retardation at trial); *Barnard v. Collins*, 958 F.2d 634, 637, 639 (5th Cir. 1992) (rejecting a non-record *Penry* claim), *cert. denied*, 113 S. Ct. 990 (1993); *May v. Collins*, 904 F.2d 228, 232 (5th Cir. 1990) (requiring introduction of mitigating evidence at trial to preserve a *Penry* claim), *cert. denied*, 498 U.S. 1055 (1991).

D. *Death is Different*

One of the central themes of *Gregg* and its companion cases concerned the need for “heightened reliability” in capital cases.¹⁹⁹ According to the Court, the qualitative difference between death and all other punishments justifies a corresponding difference in the procedures appropriate to capital versus non-capital proceedings. The Court echoed the “death is different” principle in a number of subsequent cases, but close examination of the Court’s decisions over the past twenty years reveals that the procedural safeguards in death cases are not as different as one might suspect. Although the Court has carved out a series of protections applicable only to capital trials, it has done so in an entirely ad hoc fashion and left untouched a substantial body of doctrine that relegates capital defendants to the same level of protection as non-capital defendants.

The Court has invoked the notion of heightened reliability to permit voir dire concerning racial prejudice in cases involving interracial murders;²⁰⁰ to invalidate a death sentence based in part on a pre-sentence report that was not made available to defense counsel;²⁰¹ to prevent prosecutors from deliberately misleading jurors about the consequences of their decision by misstating the scope of appellate review;²⁰² to require the inclusion of a lesser-included offense instruction in cases in which the evidence would support a guilty verdict for a non-capital offense;²⁰³ and to permit the defendant to inform the jury of the real consequences of a “life” sentence when the state argues that the defendant would be dangerous in the future and “life” means life without possibility of parole as a matter of state law.²⁰⁴ The Court also has invoked the “death is different” doctrine in post-trial proceedings to overturn a sentence based on a prior conviction that was later invalidated,²⁰⁵ and to suggest that some post-trial judicial consideration of newly-discovered evidence of innocence may be mandated when the inmate makes a “truly persuasive” showing of actual (as opposed to legal) innocence.²⁰⁶

The decisions described above, taken together with the cases elaborating the requirement of individualized sentencing,²⁰⁷ represent the sum total of the Court’s applications of its death-is-different doctrine. It should be apparent from the brief summary of these decisions that

¹⁹⁹ See *supra* pp. 370–71.

²⁰⁰ See *Turner v. Murray*, 476 U.S. 28, 37 (1986).

²⁰¹ See *Gardner v. Florida*, 430 U.S. 349, 357–62 (1977).

²⁰² See *Caldwell v. Mississippi*, 472 U.S. 320, 328–30 (1985).

²⁰³ See *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980).

²⁰⁴ See *Simmons v. South Carolina*, 114 S. Ct. 2187, 2193–94 (1994).

²⁰⁵ See *Johnson v. Mississippi*, 486 U.S. 578, 584–87 (1988).

²⁰⁶ See *Herrera v. Collins*, 113 S. Ct. 853, 869 (1993).

²⁰⁷ See *supra* pp. 389–91.

the doctrine does not reflect a systematic effort to regulate the death penalty process so much as a series of responses to particular circumstances in which the Court deemed a state rule or practice manifestly unreliable or unfair. Although certain themes unite some of the decisions, such as “truth” in sentencing and the need for collateral procedures in extraordinary cases, the Court has not explained precisely how death is different from all other punishments other than to reassert that death is final and severe. As a result, the Court appears to invoke the death-is-different principle on a case-by-case basis without a more general theory of the fundamental prerequisites to a fair and principled death penalty scheme.

More important, that these decisions exhaustively account for the Court’s death-is-different doctrine reveals the extent to which the death penalty is not in fact different. Although Justice Scalia describes the most recent of the heightened reliability decisions as proof of the increasing success of a “guerrilla war” waged by “[t]he heavily outnumbered opponents of capital punishment,”²⁰⁸ it is worth noting the numerous contexts in which capital defendants receive no special safeguards.

As an initial matter, courts judge counsel in capital cases according to the same standard applicable to all criminal cases: in order to demonstrate ineffective assistance of counsel, a death penalty inmate must show both that counsel’s performance was “deficient” according to prevailing standards and that the defendant suffered concrete “prejudice” as a result of the deficiency.²⁰⁹ In applying this standard, the Court has emphasized the “highly deferential” posture that federal courts must assume in evaluating attorneys’ effectiveness in particular cases.²¹⁰

Partly as a result of this deferential standard, representation in capital trials remains notoriously poor, especially for indigent defendants.²¹¹ Many states, including Texas, rely on court appointments

²⁰⁸ *Simmons*, 114 S. Ct. at 2205 (Scalia, J., dissenting).

²⁰⁹ See *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

²¹⁰ See *id.* at 689.

²¹¹ See Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 602–09 (1994) (citing inadequate, inexperienced trial counsel in death penalty cases as the main reason for the large number of federal habeas corpus petitions that are filed each year); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 14–27 (1990) (reporting the American Bar Association’s recommendations for improved death penalty litigation based upon a finding that current trial representation is inadequate); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 29–35 (1991) (discussing several factors that contribute to poor representation in capital trials, including statutory ceilings on the fees awarded to capital trial attorneys, limited state funding available for expert witnesses and investigators, and the appointment of counsel who are unable to handle complicated death penalty cases); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924–25 (1994) (criticizing the

rather than a specialized defense organization to provide representation to indigent defendants. Attorneys appointed under such schemes are frequently underfunded, inexperienced, unsympathetic to their clients, and thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital trial.²¹² Adhering to the Supreme Court's admonition that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation,"²¹³ state courts and lower federal courts have shown extraordinary reluctance to grant relief on the basis of ineffective counsel, even in compelling cases.²¹⁴

One obvious consequence of the Court's undemanding standard for capital representation is the perpetuation of the "caste" system that Justice Douglas criticized in *Furman*.²¹⁵ Moreover, when courts tolerate such an extraordinarily "wide range" of representation in capital cases, resulting sentencing decisions are more likely to reflect a divergence in representation than a divergence in the circumstances of the offense and offender.²¹⁶ Thus, the Court's decision not to impose special representational requirements in the capital context undermines considerably the aspiration of "heightened reliability" espoused elsewhere in the Court's capital jurisprudence.

Capital defendants also lack any distinctive protections in the availability of postconviction proceedings.²¹⁷ Under the Court's current doctrine, states need not provide any postconviction proceedings in criminal cases, including capital cases.²¹⁸ In addition, the Court has recognized that this "greater" power to deny any mechanism for postconviction relief permits a state to exercise the "lesser" power of denying counsel to indigent inmates should the state choose to establish collateral proceedings.²¹⁹ Capital defendants likewise fare no better

quality of representation provided to death penalty defendants and explaining that the problem is particularly acute in the Southern states, which are often referred to as the "death belt").

²¹² See Bright, *supra* note 9, at 1845-47.

²¹³ *Strickland*, 466 U.S. at 689.

²¹⁴ Bright's article documents numerous cases in which the adversary process broke down, including cases in which defense counsel referred to their clients by racial slurs, slept through trial, were intoxicated at trial, or filed appeal briefs that contained less than five pages of argument. See Bright, *supra* note 9, at 1843 & nn.51-55.

²¹⁵ See *supra* pp. 367-68.

²¹⁶ See, e.g., Marcia Coyle, Fred Strasser & Marianne Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30 (concluding that results in capital trials in six Southern states are "more like the random flip of a coin than a delicate balancing of the scales"); see also Bright, *supra* note 9, at 1841-42 & nn.47-48 (citing studies of representation in capital cases).

²¹⁷ The sole exception appears to be the Court's apparent recognition of "actual innocence" claims in which a capital defendant makes a "truly persuasive" showing that he is actually innocent of the underlying offense. *Herrera v. Collins*, 113 S. Ct. 853, 869 (1993).

²¹⁸ See *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

²¹⁹ See *Murray*, 492 U.S. at 13 (O'Connor, J., concurring); *Finley*, 481 U.S. at 555.

than other defendants in federal habeas proceedings. Over the past fifteen years, the Court has imposed substantial barriers to all habeas petitioners, erecting virtually insurmountable bars to claims defaulted in state court,²²⁰ same-claim²²¹ and new-claim successive petitions,²²² and claims seeking the benefit of “new” law.²²³ These bars apply equally to death-sentenced inmates, with the result that an increasing number of these inmates’ constitutional claims are rejected on procedural grounds. Given that constitutional rights are no more effective than the means of their enforcement, the Court’s “equal” treatment of capital and non-capital defendants in postconviction proceedings has the effect of diluting whatever “heightened reliability” is sought by other death-penalty doctrines.

Perhaps the most promising gauge of “heightened reliability” in capital sentencing can be found in the actual sentencing patterns of the various states that provide for capital punishment. Although evaluating the fairness and reliability of state schemes is concededly difficult even using the most sophisticated multivariate techniques, several researchers have sought to examine the role of race in post-*Furman* sentencing practices. The leading study in this area, conducted by the Baldus group, concluded that continued sentencing disparities in Georgia in the post-*Furman* period are likely attributable to racial discrimination.²²⁴ Similar studies have uncovered race-based sentencing disparities in Florida, Illinois, and Georgia.²²⁵

Several capital inmates, relying on these studies, invoked the “death-is-different” principle, in addition to the Equal Protection Clause, as a basis for overturning their sentences.²²⁶ According to standard equal protection doctrine, an individual claiming harm as a result of state-sponsored race discrimination ordinarily must prove “intentional” discrimination.²²⁷ Confronted with a constitutional challenge based on the Baldus study in *McCleskey v. Kemp*,²²⁸ the Court disposed of the equal protection claim on the ground that the peti-

²²⁰ See *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 86–90 (1977).

²²¹ See *Kuhlmann v. Wilson*, 477 U.S. 436, 452–54 (1986) (plurality opinion).

²²² See *McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991).

²²³ See *Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (plurality opinion).

²²⁴ See BALDUS, WOODWORTH & PULASKI, *supra* note 8, at 185.

²²⁵ See, e.g., GROSS & MAURO, *supra* note 4, at 69 (finding that “the killing of a white victim increased the odds of a death sentence by an estimated factor of 4 in Illinois, about 5 in Florida, and about 7 in Georgia”).

²²⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 299 (1987); *Wainwright v. Adams*, 466 U.S. 964, 964–66 (1984) (Marshall, J., dissenting) (objecting to the lifting of the stay of execution of an inmate challenging race discrimination in sentencing).

²²⁷ See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

²²⁸ 481 U.S. 279 (1987).

tioner failed to demonstrate that the jury in *his* case had intentionally discriminated against *him* on the basis of race.²²⁹

In rejecting the Eighth Amendment death-is-different challenge to the sentencing disparities, the Court seemed to disavow any authority to recognize one rule in the death penalty context and another for all other punishments. According to the Court, taking McCleskey's claim "to its logical conclusion [would] throw[] into serious question the principles that underlie our entire criminal justice system."²³⁰ Given that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties," the Court worried that "if [it] accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, [it] could soon be faced with similar claims as to other types of penalty."²³¹

The Court's answer to McCleskey's challenge, in perhaps the most provocative test of the reach of its death-is-different principle, was thus to deny that the Eighth Amendment permits a distinctive set of rules in the capital context.²³² In this respect, *McCleskey* confirms that the Court's death-is-different doctrine does not authorize any far-reaching challenges to states' ability to administer the death penalty. In evaluating potential attacks on the death penalty, the Court simply will not construe the Constitution to place "totally unrealistic conditions on its use,"²³³ notwithstanding the Court's expressed commitment to "heightened reliability" in capital proceedings.

In sum, despite Justice Scalia's protestations that the Court has embarked on an elaborate scheme of death-penalty regulation — what he termed in one opinion a "Federal Rules of Death Penalty Evidence"²³⁴ — the Court's death-is-different doctrine is nothing more than a modest, ad hoc series of limitations on particular state practices. As with the Court's other death penalty doctrines, the seemingly intricate and demanding constraints appear quite marginal upon closer inspection.

²²⁹ See *id.* at 297 ("[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

²³⁰ *Id.* at 314–15. The court noted that there were already studies "allegedly" demonstrating racial disparities in sentencing. See *id.* at 315 n.38.

²³¹ *Id.*

²³² The Court emphasized the "sameness" of the death penalty in its concluding paragraphs: "The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system *that includes capital punishment.*" *Id.* at 319 (emphasis added).

²³³ *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion)) (internal quotation marks omitted).

²³⁴ *Simmons v. South Carolina*, 114 S. Ct. 2187, 2205 (1994) (Scalia, J., dissenting).

* * *

It is quite understandable that advocates of capital punishment, as well as institutional actors charged with implementing state capital schemes, would look at the past twenty-five years of federal constitutional regulation and see an obstructionist Court imposing a confusing morass of hyper-technical rules. Judged by the volume of cases the Court has heard, the intricacy of the Court's resulting opinions, and the malleability of the emerging doctrines, the Court has assumed a prominent and seemingly powerful role in regulating the death penalty. As in other areas of extensive public law litigation, the Court appears also to have institutionalized a role for highly specialized lawyers who, in this context, regard a conviction and sentence of death as merely the beginning of an intensive and time-consuming process of state and federal appeals.

Despite this perception, contemporary death penalty law is remarkably undemanding. The narrowing, channeling, and individualization requirements can be simultaneously and completely satisfied by a statute that defines capital murder as any murder accompanied by some additional, objective factor or factors and that provides for a sentencing proceeding in which the sentencer is asked simply whether the defendant should live or die. No longer can death be imposed for the crime of rape, but beyond that, the state can seek the death penalty against virtually any murderer. As for the requirement of heightened reliability, it surfaces unpredictably at the margins of state capital schemes. Ironically, in the post-*Furman* regime, the doctrine of heightened reliability, rather than the death penalty itself, seems to strike like lightning, randomly and with little effect.

The resemblance of this hypothetical scheme to the pre-*Furman* regime is striking in itself, but all the more striking because of the widespread perception that death penalty law is extremely demanding. Our fundamental claim is that virtually all of the complexity of death penalty law over the past twenty years stems from a failure in translation rather than an insistence on fulfilling the ambitious goals of *Furman* and the 1976 decisions. This communication gap, in which the Court rarely identified in clear and unanimous terms the minimal obligations of states in the post-*Furman* era, and in which states failed to respond quickly (or in some cases at all) to obvious, correctable defects in their statutes in light of those minimal obligations, has left us with the worst of all possible regulatory worlds. The resulting complexity conveys the impression that the current system errs, if at all, on the side of heightened reliability and fairness. And the fact of minimal regulation, which invites if not guarantees the same kinds of inequality as the pre-*Furman* regime, is filtered through time-consuming, expensive proceedings that ultimately do little to satisfy the concerns that led the Court to take a sober second look at this country's death

penalty practices in the first place. In short, the last twenty years have produced a complicated regulatory apparatus that achieves extremely modest goals with a maximum amount of political and legal discomfort.

IV. FATED FAILURE?

Our elaboration and evaluation of the Supreme Court's constitutional regulation of capital punishment reveals that the Court's intervention has been a stunning failure on the Court's own terms. This failure leads us to ask why, despite two decades of multiple, yearly pronouncements on capital punishment, the Court has made so little progress toward achieving its purported goals. We explore two general answers to this question, both of which are at once familiar and powerful. One answer has to do with the limits of the Court as an institution. A great deal of thought has been given in the post-Warren Court era to the question whether courts in general, federal courts in particular, and the Supreme Court most particularly can effect large-scale institutional change without the assistance — and despite the resistance — of legislative majorities.²³⁵ Does the now-familiar story of judicial impotence, told most often in the context of latter-day assessments of *Brown v. Board of Education*²³⁶ and *Roe v. Wade*,²³⁷ explain the Court's failure to make good on its commitments in the area of capital punishment? The second answer has to do with the limits of the legal process, with its focus on fact-finding and the application of legal norms to "found" facts, when it is brought to bear on the capital sentencing decision. Does the irreducibly moral (as opposed to factual or legal) nature of the capital sentencing decision prevent its rationalization through the refinement of legal procedures?

Although we recognize the power of these two ways of answering our question, we find each answer incomplete and ultimately unconvincing as an account of the path of death penalty law. Most important, we find both answers far too deterministic, too resistant to the idea that things might have developed along any radically different path. Although we remain profoundly agnostic on the issue whether other approaches to rationalizing capital punishment in America

²³⁵ Compare GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–43 (1991) (arguing that the Supreme Court is much less able to effect social change than is conventionally believed) and Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 546–47 (1989) (comparing the Justices of the Supreme Court to brakemen sitting in the caboose of a train, able to make it stop but not to make it go) with LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY*, 299–312 (1992) (arguing that the Court is an important source of social change) and Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 5–17 (1979) (same).

²³⁶ 347 U.S. 483 (1954).

²³⁷ 410 U.S. 113 (1973).

would actually work, we are convinced that despite the limits of the Court and the legal process, the law might have developed — been developed by the Court — along very different lines.

What most distinguishes *Furman* from *Brown* and *Roe* is the fact that capital punishment is regulated entirely by legal procedures in the courtroom, while education and abortion services necessarily implicate the participation of extra-legal institutions. On the one hand, this difference underscores the Supreme Court's relative freedom to transform the nature of capital punishment in America; the constraints on the Court that scholars have observed in the *Brown* and *Roe* contexts do not map well onto the distinctive terrain of the death penalty. On the other hand, however, the court-centered nature of capital punishment regulation may also operate to limit the possibilities for doctrinal change: the Supreme Court may be more reluctant either to admit defeat or to change radically the direction of its Eighth Amendment jurisprudence because to do so would be to acknowledge a failure that could only be its own. That is, the Court may find the issue of the fair administration of the justice system to be peculiarly within its bailiwick and thus necessarily amenable to reform from above. As a result, the Court may doggedly pursue a reformist agenda even in the face of compelling evidence of failure. Consequently, other actors within the justice system (such as jurors and lower court judges) and the public at large may be lulled into complacency about the fairness of "the system" of capital punishment.²³⁸

A. *The Limits of the Court*

1. *Furman as Brown.* — When Abram Chayes named and described the phenomenon of "public law litigation" in his oft-cited article,²³⁹ he did so with an enthusiasm and a hope that has now become fashionable to eschew. A cottage industry has developed questioning the capacity of judges (and of the Justices of the Supreme Court in particular) to effect social change in the absence of the kind of widespread popular (and therefore legislative) support that would render judicial intervention almost superfluous.²⁴⁰ Judges, according to this recent account,²⁴¹ lack the time, the resources, the foresight, and the coercive power to implement successfully institutional change. The

²³⁸ We explore these ideas further below in Part VI, Final Reflections.

²³⁹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284–1304 (1976).

²⁴⁰ See, e.g., ROSENBERG, *supra* note 235 (addressing the inability of the Supreme Court to implement politically unpopular judgments).

²⁴¹ Of course, the recent account is partly a pendulum swing — versions of the same story have been told before. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 239 (1962) (arguing that the Supreme Court "must pronounce only those principles which can gain 'widespread acceptance'"); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 220–31 (1960) (concluding that despite the noise generated

very nature of public law litigation described by Chayes — its widespread effects, its forward-looking nature, and its requirement of continuing supervision by courts — render courts largely ineffectual in achieving the ends of such litigation.

Ironically, *Brown v. Board of Education* — to many, the very icon of successful judicial activism — is now cited as the paradigmatic example of judicial impotence. Cass Sunstein has called *Brown* “the most conspicuous confirmation of the point” that “judicial decisions are of limited efficacy in bringing about social change.”²⁴² One recent symposium has been devoted in large part to exploring Michael Klarman’s thesis discounting “the relative contribution to racial change of *Brown* as compared with the plethora of social, political, economic, and other forces” tending in the same direction.²⁴³ And Gerald Rosenberg’s recent book, *The Hollow Hope: Can Courts Bring About Social Change?*²⁴⁴ develops its largely negative answer to the title question by using *Brown* as its primary example.²⁴⁵

The evidence offered by these various commentators regarding the failure of *Brown* runs along three main lines. First, they all describe the war of attrition that the South cohesively waged against *Brown*’s implementation. Mark Tushnet has aptly termed the various forms of battle in this war as “passive,” “massive,” and “violent” resistance,²⁴⁶ using Alabama, Virginia, and Little Rock, Arkansas, as respective examples.²⁴⁷ The South’s opposition was not only cohesive, but also long-lasting and fairly successful. Litigation regarding the nature of the remedy for segregation and its implementation went on for years, and indeed, still goes on today. Moreover, in the ten years immediately following the Supreme Court’s pronouncement in *Brown*, “virtually nothing happened”:²⁴⁸ as of 1964, only about two percent of black children in the South attended desegregated schools.²⁴⁹ Second, the commentators note that significant racial change did not occur until the federal legislature and executive branch became involved in the

by certain decisions, the Court has never been either too far ahead of or too far behind American popular sentiment).

²⁴² Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 765 (1991).

²⁴³ Michael J. Klarman, *Brown v. Board of Education, Facts and Political Correctness*, 80 VA. L. REV. 185, 185 (1994) (replying to symposium commentators on his main article, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994)); see also Symposium, *Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall*, 61 FORDHAM L. REV. 1 (1992) (offering a tribute to *Brown*’s foremost champion, but revealing a strong strand of pessimism in the comments of many contributors).

²⁴⁴ See ROSENBERG, *supra* note 235.

²⁴⁵ See *id.* at 52.

²⁴⁶ Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 FORDHAM L. REV. 23, 23 (1992).

²⁴⁷ See *id.* at 23–24.

²⁴⁸ ROSENBERG, *supra* note 235, at 52 (emphasis omitted).

²⁴⁹ See Sunstein, *supra* note 242, at 765.

Civil Rights Movement in the 1960s, years after the Supreme Court initially jumped in.²⁵⁰ Finally, and most controversially, *Brown*'s detractors question *Brown*'s influence, either direct or indirect, on the all-important legislative and executive engagement with the Civil Rights Movement.²⁵¹

In light of this account of *Brown*, the failure of the Supreme Court to achieve the goals that it set out for itself in *Furman* and *Gregg* seems explainable in similar terms. As with school desegregation, the Court attempted in the capital punishment context to impose a constitutional mandate on a reluctant and cohesive South.²⁵² One could argue that the Court's attempt to dismantle segregation was more intrusive (and thus more fated to fail) than its rejection of the death penalty in that segregation was a pervasive and deeply rooted social practice as compared to merely an alternative penal sanction that was used only rarely even in its heyday. This argument, however, ignores the popularity of the death penalty, the genuine outrage that was voiced at its purported abolition by the Court, and its significance as a symbol of social hatred of and power over violent crime.

As in the desegregation context, the South mounted a highly effective effort to lessen the impact of the Court's functional abolition of capital punishment in 1972. Some of the most vocal and indignant opposition to *Furman* came from Southern politicians and law enforcement officers.²⁵³ Immediately following *Furman*, Southern legislatures led the charge to redraft their capital punishment schemes in an effort to preserve as much of their authority to impose capital punishment as they could;²⁵⁴ it is not accidental that the five new state schemes reviewed by the Court four years later were from Georgia, Florida, Texas, North Carolina, and Louisiana.²⁵⁵ Indeed, by the time of *Furman*, the South's experience with desegregation litigation had

²⁵⁰ See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 510–11 (2d ed. 1991); see also ROSENBERG, *supra* note 235, at 52 (noting that after 1964 desegregation “took off,” reaching 91.3% by 1972). Even celebrants of *Brown* as a watershed are quick to note the significance of the 1964 Civil Rights Act. See Constance B. Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 17 (1992) (“With congressional enactment of the Civil Rights Act of 1964, legal segregation in America died.”) (footnote omitted).

²⁵¹ See, e.g., ROSENBERG, *supra* note 235, at 155–56 (asserting that *Brown* may have actually delayed the achievement of civil rights).

²⁵² It is fair to say that the South formed a sort of “death belt” geographically: between 1935 and 1969, more executions took place in the South than in the rest of the country combined. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 30 (1986).

²⁵³ See MELTSNER, *supra* note 15, at 290 (offering pungent quotes from Georgia's Lieutenant Governor Lester Maddox, Alabama's Lieutenant Governor Jere Beasley, Atlanta Police Chief John Inman, and Memphis Police Chief Bill Price).

²⁵⁴ See *id.* at 306–07 (describing numerous efforts by states to bring back the death penalty, including a special session of the Florida legislature).

²⁵⁵ See *supra* notes 2–3.

demonstrated that intransigence would work: in 1972, the Supreme Court was still deeply mired in post-*Brown* litigation.²⁵⁶

Most significant, the central lesson of *Brown* was that the Court's attempts to impose institutional reform under the Constitution required substantial legislative and executive commitment to succeed. It was exactly this commitment that was clearly lacking in the context of capital punishment. No majority has ever been galvanized in the United States against capital punishment, and politicians of all stripes have embraced the death penalty as a matter of sheer political necessity.²⁵⁷ Moreover, the possibility that the Court as a moral force might prod the more popular branches of government toward engagement was notably less likely in the capital punishment context than it was in the desegregation context: the *Furman* Court was badly splintered, in terms of both votes and rationales; it did not speak with the same clear tone of moral authority sounded in the unanimous *Brown* opinion.

Thus, the account of *Brown* as an example of judicial impotence has some powerful force in explaining the Court's failure to achieve its goals in the capital punishment context. The most powerful and least controversial part of that account — the need for substantial engagement by the more popular branches of government in order to achieve institutional transformation — has particular applicability to the capital punishment context.

Nonetheless, despite its acknowledged force, this account is not wholly satisfactory in explaining the failure of the Court's capital punishment jurisprudence. Unlike the desegregation context and many other settings of institutional reform, in the context of capital punishment, the "institution" subject to reform was the legal process itself — the criminal justice system. Despite the fact that the institution of capital punishment includes legislative and law enforcement processes as well as purely adjudicative processes, the administration of capital punishment is much more court-centered than the education of children, the provision of health care, or the management of environmental hazards, to name just a few classic examples of institutional reform litigation. When the Supreme Court speaks to the reformation of the legal process, it speaks with special experience and legitimacy. Moreover, the Supreme Court and federal courts in general have ongoing opportunities for supervision and adjustment of their reform efforts through direct and collateral review of criminal convictions. And unlike the civil context, criminal defendants are provided with free coun-

²⁵⁶ See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 191 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5 (1971).

²⁵⁷ See, e.g., Jordan Steiker, *Judging the Executioners: Progressive Politicians and the Death Penalty*, 2 RECONSTRUCTION 112, 112 (1993) (discussing the pro-death penalty stance of "progressive" politicians, such as former Democratic Governor Ann Richards, in death penalty states).

sel (at least through their first appeal as of right)²⁵⁸ and with strong incentives, especially in capital cases, to raise all possible challenges to the status quo.

Indeed, the possibilities for transformation of the judicial process are best illustrated by the Warren Court's "revolution" in criminal procedure in spite of strong popular opposition. Despite the frequency with which "Impeach Earl Warren" stickers appeared, and despite such legislative moves as the congressional "repeal" of the 1966 *Miranda* decision,²⁵⁹ in one short decade the Supreme Court transformed the administration of criminal justice by incorporating the right to counsel²⁶⁰ and the exclusionary rule,²⁶¹ and by creating new limits on police interrogations²⁶² and pretrial identification procedures.²⁶³ Furthermore, despite widespread opposition both on and off the Court, much of the work of the Warren Court in criminal procedure remains entrenched today.²⁶⁴ Because the Warren Court's criminal procedure revolution is the best counter-example to the judicial impotence account of *Brown*, we do not find that account entirely convincing when applied to the context of capital punishment.

2. *Furman as Roe*. — Another strand of the judicial impotence argument is a more subtle variant of the crude adage that "the Supreme Court follows the election returns."²⁶⁵ The more subtle account maintains that the Supreme Court must restrain itself from "getting out ahead" of popular majorities and attempting to lead them to new modes of social organization under the Constitution. This strand of the judicial impotence argument emphasizes not the *inability* of the Court to implement social change (as in the *Brown* context), but the *undesirability* for the Court and the country of such top-down implementation, even if it were feasible.

Such leadership is undesirable for the Court, the argument goes, because the Court would rapidly lose its legitimacy should it too frequently attempt such action. Stanley Ingber has evocatively described what he calls the Court's "legitimacy account," into which deposits are made when the Court decides cases "consistent with popularly embraced values," and from which withdrawals are made when the

²⁵⁸ See *Evitts v Lucey*, 469 U.S. 387, 391-400 (1985).

²⁵⁹ See Crime Control Act of 1968, 18 U.S.C. § 3501(b) (1994) (purporting to repeal *Miranda v. Arizona*, 384 U.S. 436 (1966)).

²⁶⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁶¹ See *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

²⁶² See *Miranda*, 384 U.S. at 473-74; *Massiah v. United States*, 377 U.S. 201, 206 (1964).

²⁶³ See *Stovall v. Denno*, 388 U.S. 293, 298-99 (1967). Congress also attempted to "repeal" *Stovall* in the Crime Control Act of 1968. See 18 U.S.C. § 3502 (1994).

²⁶⁴ For example, despite the extreme unpopularity of the exclusionary rule, manifest in recent congressional attempts to "repeal" it, see Jackie Frank, *House Votes to Ease Rules of Crime Evidence*, REUTERS, Feb. 8, 1995, available in LEXIS, Nexis Library, Reuters File, the rule continues to be enforced in judicial proceedings.

²⁶⁵ FINLEY P. DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1938).

Court attempts “to educate and direct society rather than conform to and follow it.”²⁶⁶ If the Court should overdraw its account, it would “lose its legitimacy and become ineffectual.”²⁶⁷ On this view, judicial leadership is undesirable for the country in that it tends to provoke popular backlash and impede the dialogue and compromise that would lead to more moderate efforts toward social change by the political branches.²⁶⁸

Roe is often offered as the paradigmatic example of this version of the judicial impotence thesis. According to some critics of *Roe*, the Court misjudged the extent to which its decision reflected popular will. Mary Ann Glendon has argued that:

There is no evidence at all that “conventional moral culture” validates the fundamental and radical message of *Roe* . . . that *no* state regulation of abortion in the interest of preserving unborn life is permissible in approximately the first six months of pregnancy, and that such regulation in the last trimester is permissible only if it does not interfere with the woman’s physical and mental well-being.²⁶⁹

The same critics of *Roe* argue that this failure not only forced the Court to overdraw its account of legitimacy (in Ingber’s terms), but also cut off political dialogue and the possibility of more gradual compromise solutions to an intractable public debate.²⁷⁰ They attribute the current divisive, even violent climate surrounding the debate over abortion to the Court’s absolutist, rights-based position.²⁷¹

On these terms, *Furman* bears a strong resemblance to *Roe*. Indeed, it is even more plausible to argue that the Court misread popu-

²⁶⁶ Stanley Ingber, *The Interface of Myth and Practice in Law*, 34 VAND. L. REV. 309, 339–40 (1981).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 177 (1988) (offering as one “important reason why non-originalist constitutional adjudication must be moderate rather than immoderate, molecular rather than molar” the likelihood that “constitutional dialogue between the judiciary and the political community as a whole will proceed more productively if the judiciary acts cautiously and incrementally rather than radically or imperially”).

²⁶⁹ MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 45 (1987) (quoting Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 733 (1976)) (emphasis in original).

²⁷⁰ See, e.g., *id.* at 45–50 (arguing that compromise abortion legislation would have been enacted in the absence of judicial intervention). But see LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 49–51 (1992) (challenging Glendon’s assertion that states would have liberalized their abortion laws in the absence of a Supreme Court decree). See generally GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 109–10 (1985) (arguing for the importance of dialogue and compromise in the abortion context); Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 488 (1984) (emphasizing the importance of the “dialogic process” in the context of the abortion-rights debate).

²⁷¹ See, e.g., Gregory C. Sisk, *Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Discourse*, 46 RUTGERS L. REV. 1691, 1734 (1994) (noting that rights discourse in constitutional litigation “does not foster a balanced and measured response to conflict”).

lar sentiment in *Furman* than in *Roe*. In 1972, the execution rate in the United States had fallen to its lowest point since 1930, when the Bureau of Justice Statistics first began to keep count; indeed, no one had been executed since 1967.²⁷² Public opinion, too, had recently hit an all-time low regarding the death penalty: in 1966, for the first time since Gallup began polling on the subject in 1936, more people opposed than favored the death penalty for murder.²⁷³ Justice White, one of the five Justices in the *Furman* majority, could be excused for asserting what most of them likely believed: that the death penalty “ha[d] for all practical purposes run its course.”²⁷⁴

It turned out, of course, that Justice White was way off the mark. The dearth of executions in the years preceding *Furman* was more likely a product of the NAACP Legal Defense Fund’s “moratorium” litigation strategy than it was an indication of popular attitudes about capital punishment. In fact, at the time of *Furman*, there were over 600 condemned inmates who had been sentenced to death during the 1960s and who had simply piled up on death rows across the country as a result of the LDF’s moratorium strategy.²⁷⁵ Moreover, the 1966 Gallup poll turned out to be the *only* Gallup poll on the death penalty question out of 21 such polls conducted between 1936 and 1986 in which more people opposed than supported the death penalty for murder.²⁷⁶ Indeed, two Gallup polls conducted in 1972 (one before and one after *Furman*) both indicated majority support for the death penalty.²⁷⁷ Finally, the strongest evidence that the Court had misread prevailing political winds is the immediate legislative reaction to *Furman*: by 1976, 35 states and the federal government had redrafted their capital punishment statutes in order to maintain their authority to execute post-*Furman*.²⁷⁸ Thus, the judicial impotence theory of the *Roe* variety would hold that the Supreme Court soon realized that its commitments to rationalizing the death penalty expressed in *Furman* and *Gregg* were simply too costly in terms of institutional legitimacy and backed off in its attempts to make good on those commitments.

Under the same theory, the Court’s sweeping edict in *Furman*, which eliminated in one fell swoop almost every extant death penalty

²⁷² See ZIMRING & HAWKINS, *supra* note 252, at 27.

²⁷³ The Gallup Poll conducted in 1966 revealed that 47% opposed and 42% favored the death penalty for murder, while 11% were undecided. See Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113, 116 (Robert M. Bohm ed., 1991).

²⁷⁴ *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

²⁷⁵ See MELTSNER, *supra* note 15, at 106-25 (describing the moratorium and its effects). As a result of the moratorium, the number of prisoners on death row skyrocketed to 607 by the end of 1970. See ZIMRING & HAWKINS, *supra* note 252, at 34.

²⁷⁶ See Bohm, *supra* note 273, at 116.

²⁷⁷ See *id.* (finding 50% “for” to 42% “against” pre-*Furman* and 57% to 32% post-*Furman*).

²⁷⁸ See PATERNOSTER, *supra* note 8, at 59.

law in the United States, galvanized massive public outcry and political opposition and thus rendered impossible public dialogue and more moderate avenues of capital punishment reform through the politically accountable branches of government. This theory gains some credence from the fact that executive clemency was used with some regularity prior to *Furman*, but declined considerably after the Court's ruling.²⁷⁹ This trend seems to support the strand of the judicial impotence thesis that maintains that social change by judicial fiat stifles the impetus toward shared responsibility for reform in other branches of government.

Nonetheless, as with the *Brown* analogy, we believe that the *Roe* analogy fails as a fully persuasive explanation of the Court's failure to address the concerns it articulated in *Furman*. The idea that the Court could not make good on its commitments in *Furman* and *Gregg* because it feared the loss of its institutional legitimacy does not explain why the Court did not simply repudiate *Furman* as either hopelessly muddled in rationale or just plain wrong. Instead, the Court went on purporting to adhere to *Furman* while re-creating, step-by-step, the pre-*Furman* universe. Surely, the dissonance between what the Court purported to be doing and what it was in fact doing created a threat to the Court's "legitimacy" at least as great as did the unpopular mandate of *Furman* itself.²⁸⁰

Moreover, the idea that the Court's position in *Furman* blocked more moderate paths of political reform seems much less plausible than the same claim made about *Roe*. First, the Court's position in *Furman* was never as absolute — as grounded in the notion of individual "right" — as was its decision in *Roe*. From the start, the Court never held that the death penalty in all cases, or even in many categories of cases,²⁸¹ was per se unconstitutional; rather, it focused on the process by which the penalty was imposed and called upon the states to administer the punishment more fairly.²⁸² Moreover, although it

²⁷⁹ See Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 263 (1990–1991) (compiling statistics from the United States Department of Justice that demonstrate a sharp decline in the granting of death sentence commutations after *Furman* and *Gregg*); Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992) (noting that "[e]xecutive clemency all but disappeared in the United States in the era of hands-on federal court involvement").

²⁸⁰ This loss of legitimacy is illustrated by the scathing scholarly criticism of the Court's death penalty jurisprudence from all sides.

²⁸¹ The Court exempted only rape from the ambit of the death penalty. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (opinion of White, J.). One could construe the Court's remand order in *Eberheart v. Georgia*, 433 U.S. 917 (1977), in which the defendant had been sentenced to death for rape and kidnapping, as an exemption of kidnapping as well, but this interpretation, which we endorse, has not yet been tested.

²⁸² See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (promising analysis of state capital punishment schemes on an individual basis); *Furman v. Georgia*, 408 U.S. 238, 403–04 (1972) (Burger, C.J., dissenting) (suggesting state legislative action).

seems fair to say that *Furman* galvanized political opposition to abolition,²⁸³ it seems highly implausible that in the absence of *Furman*, the states would have moved on their own toward either abolition or some greater rationalization of the death penalty. There is simply no good evidence of a trend toward “liberalization” of the death penalty;²⁸⁴ indeed, there has *never* been a period in American history in which any points could be scored in the political world by opposing the death penalty.

B. The Limits of Legal Process: Death is Different (Reprise)

If explanations for the development of the Court’s death penalty jurisprudence are difficult to ground completely in accounts of the Court’s institutional limitations, perhaps an explanation lies in the distinctive nature of the capital sentencing decision. Indeed, in *McGautha v. California*,²⁸⁵ *Furman*’s 1971 alter ego, Justice Harlan rejected a due process challenge to standardless capital sentencing on the ground that any attempt to impose standards on the death penalty decision was simply predestined to fail: “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”²⁸⁶

On the one hand, it is possible to read Justice Harlan’s admonition in *McGautha* as nothing more than a rhetorical bow in the direction of the familiar rules versus standards debate,²⁸⁷ in which the limits of legal language inevitably require the lodging of discretionary judgment somewhere. Justice Harlan himself gives us reason to believe that he is speaking generally, because he adverts to similar problems of precision in the history of the substantive law of homicide and in non-capital sentencing procedures.²⁸⁸ In other words, the problem of legislative foresight and drafting comes up everywhere, and we should not be surprised to see that it comes up in capital sentencing as well.

On the other hand, it is possible to read Justice Harlan’s warning, as Robert Weisberg has done quite persuasively, in light of “the inevitably unsystematic, irreducibly personal moral elements of the choice

²⁸³ See MELTSNER, *supra* note 15, at 306–09; Bohm, *supra* note 273, at 116.

²⁸⁴ See *supra* p. 410 (explaining why falling execution rates and 1966 poll data are not good evidence of a liberalizing trend).

²⁸⁵ 402 U.S. 183 (1971).

²⁸⁶ *Id.* at 204.

²⁸⁷ See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

²⁸⁸ See *McGautha*, 402 U.S. at 204–05, 207 n.18.

to administer the death penalty.²⁸⁹ If the capital punishment decision can be neither “true” or “false” (as facts are said to be) nor “correct” or “incorrect” (as legal judgments are said to be), but instead represents “an existential moment of moral perception,”²⁹⁰ then refining the directions given to the decisionmakers (the jurors) cannot assist, but rather will merely obscure the fundamentally moral choice that they must make. Weisberg perceptively traced the Court’s ambivalence about the nature of the capital sentencing decision across cases,²⁹¹ and he did so long before the Court began to wrestle with the question of what it means to be “actually innocent of the death penalty” so as to qualify for an exception to procedural default rules on federal habeas review.²⁹² As Weisberg noted, if we recognize the irreducibly moral aspect of capital sentencing, all that refining directions to the sentencer can do is reduce sentencer anxiety about the decision, thereby, perhaps, distorting moral sensibilities.²⁹³

The foregoing might suggest that the Supreme Court has not succeeded in rationalizing the administration of capital punishment the way it thought it might in *Furman* and *Gregg* simply because the decision to impose the death penalty *cannot* be rationalized, however hard and in good faith we might try. Under this account, the Court has settled, either naively or disingenuously, for the alleviation of anxiety that rule-like proceedings offer actors within the legal system.

Although we agree with part of this account — that the Court’s development of formal, rule-like, quasi-scientific procedures for imposing the death penalty has had a significant “anxiety-alleviating” effect on capital sentencers²⁹⁴ — we do not agree that the essentially moral dimension of the decision to impose a sentence of death cannot be rationalized beyond what the Court has currently done. We do believe that “the sentencing moment” has just such an essentially moral dimension and that, in light of this recognition, it has been a mistake for the Court to spend so much of its rationalizing energy on shaping the thought processes of the sentencer at the moment of decision. But we think that other means exist for the Court to rationalize the administration of capital punishment — to render it as a system less arbitrary

²⁸⁹ Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 393.

²⁹⁰ *Id.* at 353.

²⁹¹ See *id.* at 342–43, 353 (noting especially Justice Powell’s dissent in *Bullington v. Missouri*, 451 U.S. 430, 447 (1981) (Powell, J., dissenting), and then-Justice Rehnquist’s concurring opinion in *Zant v. Stephens*, 462 U.S. 862, 893 (1983) (Rehnquist J., concurring in the judgment), as classic examples of the “existential moment” theory of capital sentencing).

²⁹² See *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992) (struggling with the issue of how to define “innocen[ce] of the death penalty” for purposes of the miscarriage-of-justice excuse for procedural default on federal habeas corpus review).

²⁹³ See Weisberg, *supra* note 289, at 391–92 (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 138–43 (1974) (illustrating the dangers of obscuring individual moral choice by deference to the perceived authority of scientific method)).

²⁹⁴ See *infra* Part VI, Final Reflections.

and more reliable — than merely to think of new ways to exhort and “channel” sentencers’ inevitable discretion at the moment of decision.

At the end of this Article, we will offer some more convincing explanations for the Court’s unfated failure in regulating the administration of capital punishment. But first, we now attempt to sketch some of those roads not taken.

V. ROADS NOT TAKEN

One of the central lessons of two decades of death penalty regulation is that “channeling” sentencer discretion is a hopeless task in a regime that values and requires individualized sentencing. Moreover, we believe that the current commitment to individualized sentencing, although not fully explained and defended in the Court’s decisions, has strong constitutional foundations.²⁹⁵ Accordingly, “equality” in the administration of the death penalty can be advanced, if at all, only by considering means other than controlling sentencer discretion at the moment of decision.

We see two possible strategies for addressing the significant arbitrariness of the current system that do not focus on this uncontrollable moment. First, regulatory efforts could focus on the substantive outcomes of the death-penalty decisionmaking process. An outcome-oriented approach could involve stricter proportionality limits on the availability of the death penalty, fashioned either by the courts or by state legislatures. A focus on substantive outcomes could also include greater solicitude to claims based on statistical evidence that reveals unexplained, severe disparities in the application of the death penalty within a particular jurisdiction. A second approach could focus on procedures in death penalty decisionmaking that, unlike sentencer discretion, are amenable to court supervision. Such an approach could make good on the principle of “heightened reliability” by insisting on greater procedural safeguards in those aspects of the death penalty process, such as quality of counsel and the availability of postconviction review, that contribute most significantly to both the appearance and the reality of fairness in the administration of the death penalty.

Given our discussion above of the Court’s regulatory efforts over the past two decades, it should be apparent that these approaches represent not merely roads not taken but roads deliberately forsaken. In our view, it is worth examining whether the rejection of these paths has contributed significantly to the unsatisfactory regulatory regime that is now in place. In evaluating whether the Court simply took “wrong turns” or whether regulatory failure was inevitable, we ask whether the forsaken approaches would adequately respond to the concerns of *Furman* and at what cost.

²⁹⁵ See Steiker & Steiker, *supra* note 57, at 844.

A. Regulation of Outcomes

As we demonstrated above, current doctrine permits the death penalty to be imposed upon virtually any offender involved in an offense that results in death.²⁹⁶ Although states must “narrow” the class of the death-eligible through aggravating circumstances or limited definitions of capital murder, states can ensure (and in many cases have ensured) that virtually all murderers are death-eligible by simply expanding the number and breadth of those circumstances and definitions.²⁹⁷ As *Furman* recognized, such broad death-eligibility essentially guarantees that some defendants caught in the net will not be among the truly “worst” offenders, especially when societal practices indicate that the death penalty should be reserved for such a small percentage of offenders who commit violent crimes resulting in death.²⁹⁸ The wrongful inclusion of such undeserving offenders is problematic in terms of both proportionality (excessive punishment) and equality (random inclusion of undeserving defendants when similarly situated offenders, and even more deserving offenders, do not get the death penalty).

1. “Real” Narrowing by State Legislatures. — The Court could address these proportionality and equality concerns in two ways. First, the Court could require states to genuinely narrow the class of the death-eligible by adopting more limited definitions of capital murder and by restricting both the number and breadth of aggravating circumstances. The Court need not specify what *kinds* of offenses or offenders are most deserving of the death penalty so much as insist that the *absolute number* of death-eligible offenders corresponds in some meaningful sense to the proportion of offenders who will actually receive the death penalty. Thus, if experience over the past two decades reflects that one percent of all murders results in a death sentence, the class of the death-eligible should not be tremendously greater than, say, five or ten percent of all murderers. What was intolerable at the time of *Furman* and what remains intolerable today is that the ratio of death-eligibility to offenses-resulting-in-death is much closer to ninety-to-one than five- or ten-to-one.

Forced narrowing of the class of the death-eligible in this way has two distinct advantages. First, it leaves to the states the ultimate deci-

²⁹⁶ See *supra* pp. 373–75.

²⁹⁷ See *supra* p. 374.

²⁹⁸ See, e.g., Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 665–66 (1993–1994) (lamenting the failure of current doctrine to ensure that states truly limit the pool of the death-eligible); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1169–70 (1990) (criticizing the broad death-eligibility of persons convicted pursuant to the felony-murder rule); Tamar Lewin, *Who Decides Who Will Die? Even Within States, It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1 (noting that “[i]n every state with the death penalty . . . prosecutors seek capital punishment in only a tiny fraction of the cases in which it is allowed”).

sion of which offenses and offenders are most deserving of death, and simply requires states to specify in advance which offenses and offenders call for such punishment. In this respect, such forced narrowing follows through on *Furman*'s demand that the decision to retain the death penalty — and to retain it only in limited circumstances — must be reflected in legislative decisionmaking rather than in the uncontrolled and arbitrary practices of prosecutors and sentencers within the system. The second advantage of forced narrowing is that it is a relatively easy doctrine to apply. Rather than speculating whether sentencers will understand the meaning of vague aggravators, the Court would demand that states enumerate objective factors that are susceptible to empirical study. Thus, a state might choose to limit the availability of the death penalty to murders involving police officers or prison guards, murders in the course of certain felonies, or murders committed by offenders who have killed previously. If the sum total of death-eligible offenders reasonably corresponded to the number of persons that were actually sentenced to death, the state would fulfill the narrowing requirement.

The central drawback to such forced narrowing is that it might force states to exclude factors from their definitions of capital murder that actually do capture the worst offenses and offenders. This could be true either because the “worst” murders according to community standards fall within a wide range of different types of murder or because cataloging the worst murders cannot be accomplished through the use of “objective” factors. As to the first concern, suppose the “worst” murders occur within all categories of murder (e.g., some of the worst murders are kidnapping-murders, some are murders of more than one person, some are murders committed for pecuniary gain), such that any forced legislative narrowing of death-eligibility would fail to capture community standards. The narrowed category of death-eligible murders would be underinclusive in that many deserving murderers would be spared the death penalty. The second possibility is that what makes a murder “worse” according to community standards is something hopelessly vague, such as “especially heinous” crimes or crimes reflecting a “depraved heart.” Although we might all mean something different when invoking such language, it may be our intuitive sense of depravity or heinousness, rather than some objective factor, that accounts for our view that some murders justify the death penalty.

These concerns are serious ones, because they suggest the possibility that we really cannot decide in advance who deserves the death penalty and must rely instead on subjective judgments by institutional actors. If this is true, though, it is not merely an indictment of the strategy of forced narrowing; it is a concession that administration of the death penalty is inevitably arbitrary. In any case, we are not en-

tirely convinced by this objection because we believe that the underinclusion resulting from the imperfect match between narrowed state schemes and community standards would likely be outweighed by the reduced overinclusion that forced narrowing promises to accomplish. Forced narrowing would thus genuinely contribute to the overall equality of state death penalty schemes by ensuring that those executed are truly selected from a small group of offenders. Of course, forced narrowing cannot resolve the inevitable difficulties associated with prosecutorial and sentencer discretion to choose who receives death within that narrowed group.²⁹⁹

2. “*Real*” Narrowing by the Court: Proportionality. — The Court could also address the proportionality and equality concerns of *Furman* and the 1976 cases by expanding its categorical exclusions to death eligibility. As discussed above, current doctrine prohibits imposition of the death penalty for crimes other than murder,³⁰⁰ but places no other meaningful limits on death eligibility. Offenders who do not intend to kill, attempt to kill, or actually kill can still be subject to the death penalty based on their participation in a dangerous felony.³⁰¹ Youthful and mentally retarded offenders must rely on prosecutorial and sentencing discretion to avoid execution.

In rejecting categorical exclusions for these classes of offenders, the Court has emphasized the possibility that some small number of offenders within these classes might truly deserve the death penalty according to community standards, and that therefore such exclusions would arbitrarily limit states’ efforts to identify the worst offenses and offenders.³⁰² The problem with this argument is that it recognizes the risk of underinclusion that follows from Court intervention without acknowledging (much less comparing) the risk of overinclusion that accompanies broad death eligibility.

If the death penalty is in fact reserved for an extremely small percentage of deserving murderers, it seems exceedingly unlikely that, of this select group, a substantial number would be youthful, mentally retarded, or minimal participants in the crime. Hence, the risk that categorically excluding such persons from death-eligibility will lead to substantial underinclusion is quite small. On the other hand, allowing

²⁹⁹ See Steiker & Steiker, *supra* note 57, at 863–64.

³⁰⁰ See *supra* p. 376 (discussing *Coker v. Georgia*, 433 U.S. 584 (1977)). The crime of treason may be an exception to this general prohibition against punishing crimes other than murder with death.

³⁰¹ See *supra* pp. 376–77 (discussing *Tison v. Arizona*, 481 U.S. 137 (1987)).

³⁰² See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 338–39 (1989) (opinion of O’Connor, J.) (“In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.”); cf. *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (opinion of Scalia, J.) (refusing to use “socio-scientific” evidence to exempt sixteen- and seventeen-year-olds from the death penalty).

states to seek the death penalty against *all* offenders in these categories presents a real and substantial danger that many offenders will be selected for execution who do not “deserve” it (and who will therefore be treated more harshly than many offenders who do “deserve” death). Accordingly, the problem with failing to restrict death-eligibility through categorical exclusions is not merely that it is obviously “worse” to execute someone who is undeserving of the death penalty than to spare someone who is deserving but that the *likelihood* of arbitrary results is much greater when the Court chooses *not* to regulate (overinclusion) than when it chooses to impose limits on death-eligibility (underinclusion).

The most obvious drawback of Court-imposed categorical exclusions on death-eligibility is the difficulty of drawing lines that accurately reflect insufficient harm or culpability to justify the death penalty. If “youthful” offenders are to be exempted, at what age should death-eligibility begin? What standard should be applied to gauge “mental retardation” or “minimal involvement” in the offense?

Although this objection is substantial, it is answered by the same considerations that lend support to categorical exclusions in the first place. Arbitrary line-drawing will necessarily result in some underinclusion, but the risk of such underinclusion is less substantial than the gains in terms of reducing overinclusion. Limiting the death penalty to persons over the age of eighteen, or to persons whose full-scale IQ is above 70, will undoubtedly cast the “exclusion” net too wide and give refuge to some very small number of deserving offenders. But failing to cast that exclusion net at all will render thousands of undeserving offenders subject to the death penalty and risk massive overinclusion in the administration of the death penalty. This risk is borne out in the numbers of mentally retarded and youthful offenders that occupy seats on what remains a relatively small death row.³⁰³ As in many areas of the law, line-drawing is cumbersome and inevitably arbitrary at the margin, but often tremendously fairer than drawing no lines at all.

3. *Challenging Disparities.* — The third possibility for policing outcomes in death penalty decisionmaking is to preclude the imposition of the death penalty in jurisdictions whose sentencing disparities exceed some threshold of acceptability. In *McCleskey*, of course, the Court seemed unwilling to embrace constitutional challenges based solely on statistical evidence.³⁰⁴ As the Court emphasized, states’ in-

³⁰³ See Jamie M. Billotte, Student Article, *Is It Justified? — The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 333, 337 (1994) (suggesting that approximately 12% of the death-row population consists of persons with mental retardation); John H. Blume, *Representing the Mentally Retarded Defendant*, THE CHAMPION, Nov. 1987, at 32 (estimating that 250 people with mental retardation were on death row in 1987).

³⁰⁴ See *supra* pp. 400–01 (discussing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

ability to control sentencer discretion introduces an inevitable level of arbitrariness into capital decisionmaking.³⁰⁵ Nonetheless, it is one thing to recognize, as the Court did, that some inevitable unpredictability remains in capital sentencing as a result of the individualization requirement;³⁰⁶ it is quite another thing to hold that whatever level of arbitrariness thereby results must be constitutionally tolerable because otherwise the death penalty could not be administered at all.

In short, the Court could insist that the Eighth Amendment death-is-different principle mandates some review of the actual outcomes of state schemes. Of course, as with Court-imposed proportionality limits on the death penalty, administering Court-imposed limits on arbitrariness creates difficult line-drawing problems. What kinds of statistical evidence demonstrate, for example, that race plays “too” significant a role in capital sentencing? Disparate impact litigation is notoriously difficult to administer in the Title VII context, the one major statutory area in which plaintiffs need not demonstrate discriminatory intent.³⁰⁷

The answer to such line-drawing problems ultimately rests upon an account of the “difference” of death. If, as *Furman* and the 1976 decisions suggest, the death penalty must be administered fairly if at all, the Court could insist that tolerable inequalities in non-capital sentencing become intolerable when life is at stake. Of course, jurisdiction-by-jurisdiction litigation concerning racial equality in capital sentencing raises the specter of excessive Court intrusion into state affairs. But if we take seriously the sentiment in *Furman* that a caste system of capital punishment renders the punishment “cruel and unusual,”³⁰⁸ litigation over the “bottom line” of states’ efforts to administer the death penalty seems preferable to tolerating a caste system solely because we cannot precisely identify how the system operates.

One important objection to this sort of “outcome” regulation is that it provides the wrong remedy to the kind of discrimination that is most pervasive in current state systems. The Baldus study itself revealed that the race of the victim is a more potent predictor of sentencing decisions than is the race of the defendant.³⁰⁹ If this is true, and the disparity reflects the unwillingness of states or sentencers to

³⁰⁵ See *McCleskey*, 481 U.S. at 311–12.

³⁰⁶ See *id.* at 312 & n.35.

³⁰⁷ See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656–58 (1989) (requiring proof that “specific” policies or practices resulted in “significant” disparate outcomes); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (recognizing a Title VII claim without proof of discriminatory intent).

³⁰⁸ See *Furman v. Georgia*, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring); see also *supra* pp. 367–68.

³⁰⁹ See BALDUS, WOODWORTH & PULASKI, *supra* note 8, at 160, 185 (suggesting that a post-*Furman* decline in race-of-defendant discrimination compared with relatively constant race-of-victim discrimination has resulted in “the principal beneficiaries of . . . race-of-victim discrimination being black defendants”).

impose the death penalty in cases involving minority victims,³¹⁰ abolishing or limiting the use of the death penalty would “level down” the protections afforded by the state (in terms of providing “death penalty services”) rather than “ratcheting up” state vindication of minority victims.³¹¹ According to this critique developed by Randall Kennedy, rather than leveling down the protection afforded all citizens, the state should provide to minorities the protection it currently affords members of the majority race.³¹²

The “ratchet-up” response is simply unavailable, however, because legislators and courts cannot, consistent with the Constitution, *mandate* that prosecutors seek and sentencers return a death verdict in cases involving minority victims. The individualization requirement necessarily grants an unaccountable veto of the death penalty from which the state cannot appeal.

This critique suggests an additional, more subtle difficulty with recognizing “outcome-based” challenges to the death penalty. If the background rule requires states to generate “equal” outcomes in death penalty decisions, states may attempt to comply with this requirement by undertaking special efforts to secure the death penalty in cases involving historically underprotected groups. This kind of “quota system” in prosecuting murders raises problems of its own. First, it is doubtful whether state actors can constitutionally attempt to compensate for anticipated sentencer discrimination by reacting differently to murders based on the race of the victim. Second, especially vigorous enforcement of murders involving minority victims will disproportionately affect minority defendants, since the vast number of murders are intra- rather than interracial.³¹³ Thus, a “quota approach” in the death penalty context will inevitably compel states to invest more resources in cases involving minority defendants, an odd result given the underpinnings of *Furman* and the 1976 decisions.

Of course, the Court might regard some “affirmative action” efforts in capital sentencing as the appropriate corrective to longstanding prosecutorial and sentencer indifference to the plight of minority victims. Nonetheless, even if the Court were to regard such efforts as impermissible, it would not logically follow that outcome regulation must be abandoned. Ultimately, the Court could insist on *both* non-arbitrary outcomes in death cases and evenhandedness in state efforts to secure capital verdicts. If it turns out that sentencers will inevitably

³¹⁰ See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1390–91 (1988).

³¹¹ See *id.* at 1433–34.

³¹² See *id.*

³¹³ See Givelber, *supra* note 87, at 417 n.222 (citing statistics indicating that in 1991, 4838 white offenders killed 4399 white victims and 347 African-American victims, while 5778 African-American offenders killed 691 white victims and 5035 African-American victims, in cases involving a single victim and a single defendant).

discriminate on the basis of race, the Court could refuse to allow states to “even the score” by injecting “affirmative” racial considerations into their own decisionmaking processes.

B. “*Super Due Process*”

An alternative road not taken would involve a greater focus on procedural aspects of death penalty systems that contribute significantly to arbitrariness. As discussed above, the “heightened reliability” decisions issued by the Court thus far do not target the most obvious sources of inequality.³¹⁴ Rather, the Court’s death-is-different doctrine seems to demand only that states *refrain* from certain objectionable practices, such as engaging in prosecutorial misconduct or promulgating misleading sentencing instructions. These types of painless intervention may well be justified, but they do not represent a comprehensive effort to equalize defendants’ opportunities in their efforts to escape death. A more encompassing “heightened reliability” requirement would insist on *affirmative* (or “proactive”) efforts on the part of states to ensure that similarly-situated defendants have roughly equal chances of prevailing at trial and vindicating their constitutional rights.

1. *Representational Equality*. — Perhaps the most significant source of inequality in the administration of the death penalty is the unevenness of representation. As discussed above, the Court has sought to address the representation issue solely by providing for post-trial, extraordinarily deferential review of counsel’s performance.³¹⁵ The obvious alternative to policing counsel in this manner is to establish firm guidelines for representation in capital cases that would include, among other things, minimum standards for appointment, adequate compensation for both counsel and experts, and presumptions about certain fundamental aspects of death-penalty preparation and presentation. Such presumptions might include investigation of both guilt-innocence and punishment phase defenses, consultation with appropriate experts regarding physical evidence and psychiatric issues, thorough cross-examination of state witnesses, and research and advocacy regarding potential inadequacies of the state capital scheme, including on appeal.

As it stands, it is commonplace in many states for trial counsel to fail to present any evidence or argument at all during the punishment phase of a capital trial.³¹⁶ Attorneys on direct appeal also routinely

³¹⁴ See *supra* Part III.D.

³¹⁵ See *supra* pp. 398–99 (discussing the ineffectiveness standard of *Strickland v. Washington*, 466 U.S. 668 (1984)).

³¹⁶ See, e.g., *Dufour v. Mississippi*, 479 U.S. 891, 892–94 (1986) (Marshall, J., dissenting from denial of certiorari) (criticizing the failure of petitioner’s trial counsel to present any mitigating evidence during the punishment phase); *Hamilton v. Zant*, 466 U.S. 989, 991 (1984) (Marshall, J.,

fail to attend oral argument at the one post-trial hearing in which all state law issues are subject to review. Notwithstanding these sorts of practices, federal and state courts have consistently rejected ineffectiveness of counsel claims.³¹⁷

Of course, mandating representational standards and levels of compensation in capital proceedings represents a significant departure from the Court's otherwise "costless" regulatory approach. Virtually all of the death-is-different decisions involve particular prohibitions rather than court-mandated expenditures of states' time and money. Such a departure would necessarily involve the federal courts in a more direct and substantial way in the ongoing administration of states' criminal justice systems, with all of the hazards that federal court supervision of state institutions has wrought in other contexts.

On the other hand, as we have argued above, the Court's current approach is hardly "costless" when one accounts for both the erosion of the Court's legitimacy and the failure to redress the inequalities of post-*Furman* capital sentencing. If it is true, as one commentator has argued, that the Court expends "legitimizing" capital from its limited reserve each time it construes the Constitution against deeply-held public values,³¹⁸ then the Court's extensive and highly-visible regulation of the death penalty represents a substantial withdrawal. To the extent such regulation has sought to address the concerns of *Furman* and the 1976 decisions, the investment has been disastrous. Enforcing high standards of representation — and the close supervision of states' systems that such enforcement entails — would undoubtedly result in yet another substantial "withdrawal" from the bank of legitimacy, but with a potentially higher return. Virtually all of the current "heightened reliability" doctrines, including accuracy in sentencing instructions and curbs on prosecutorial misconduct, have little value in a proceeding in which the adversarial process has broken down and no one invokes on behalf of the defendant the protections that the Court has elsewhere elaborated.

If this interventionist approach were pursued, a further means of assuring adequate representation would involve extending the right of effective death-penalty representation to state postconviction proceedings. The lack of a guaranty of adequate state habeas counsel has resulted in tremendously unequal opportunities for enforcement of state and federal rights. For example, in Texas, the most active death-

dissenting from denial of certiorari) (same); *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir.) (holding that a capital defendant was not denied effective assistance of counsel despite counsel's failure to present any evidence during the punishment phase), *cert. denied*, 116 S. Ct. 144 (1995); *Romero v. Lynaugh*, 884 F.2d 871, 876-77 (5th Cir. 1989) (holding that a lawyer was not ineffective despite his failure to offer any evidence at all at the punishment phase of his client's capital trial), *cert. denied*, 494 U.S. 1012 (1990).

³¹⁷ See Bright, *supra* note 9, at 1857-62.

³¹⁸ See Ingber, *supra* note 266, at 339-40.

penalty state since *Furman*, the state did not establish any mechanism for providing postconviction counsel to death-row inmates until this year,³¹⁹ even though the state afforded postconviction proceedings as a matter of right. A recent independent report (commissioned by the State Bar) assessing the quality of Texas's death-penalty representation concluded that the state's failure to provide postconviction representation generated a "crisis" and resulted in widely uneven assistance to capital defendants.³²⁰ Moreover, this inequality in state proceedings is exacerbated in subsequent litigation. Under current federal habeas doctrine, inadequate representation in state habeas not only denies the petitioner a potential remedy in the state courts, but also impairs the petitioner's right to merits review of federal constitutional claims in subsequent federal habeas proceedings.

2. *Expanding Postconviction Opportunities.* — Although it is commonly assumed that death-row inmates have numerous postconviction opportunities in both federal and state courts to challenge the legality of their convictions and sentences, the availability of such opportunities is in fact quite limited in many circumstances. As for state habeas, the Court has firmly rejected the proposition that states must provide any collateral mechanism for challenging criminal convictions, capital or otherwise.³²¹ Indeed, the Court has never disavowed its century-old pronouncement that states need not provide *appeals* in criminal cases.³²² At least one death-penalty state has recently abolished state collateral review of most federal claims,³²³ and many other states have tightened or are tightening procedural rules regarding the filing of state habeas petitions.³²⁴

³¹⁹ See Act of June 7, 1995, ch. 319, sec. 1, art. 11.071(2)(b), 1995 Tex. Sess. Law Serv. 2764, 2764 (Vernon) (providing for the appointment of counsel to represent indigent death-row inmates in state postconviction proceedings).

³²⁰ See SPANGENBERG GROUP REPORT, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 151-53 (1993).

³²¹ See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987)).

³²² See *McKane v. Durston*, 153 U.S. 684, 687-88 (1894).

³²³ See *Whitmore v. State*, 771 S.W.2d 266, 267 & n.1 (Ark. 1989) (limiting collateral review of state convictions "to questions of whether the commitment is valid on its face or whether the convicting court had proper jurisdiction").

³²⁴ See, e.g., Cal. A.B. 570, 1995-96 Reg. Sess. (1995) (introduced) (seeking to amend the California Penal Code and setting forth time constraints on the filing of habeas corpus petitions); Ga. S.B. 113, 143rd Gen. Assembly, Reg. Sess. (1995) (enacted) (limiting the availability of habeas corpus relief); Idaho S.B. 1084, 53rd Leg., 1st Reg. Sess. (1995) (enacted) (prohibiting successive postconviction petitions in many circumstances); Ohio S.B. 4, 121st Gen. Assembly, Reg. Sess. (1995) (introduced) (requiring that petitions for postconviction relief be filed within 90 days of when the trial transcript is filed with the direct appeal of the judgment); Pa. S.B. 81, 1st Spec. Sess. (1995) (introduced Mar. 15, 1995) (providing unitary review in postconviction death penalty cases); Tex. S.B. 440, 74th Leg., Reg. Sess. (1995) (enacted) (establishing unitary procedure for direct appeal and postconviction petitions and limiting the cognizability of successive petitions); see also Ill. H.B. 1636, 89th Gen. Assembly, Reg. Sess. (1995) (introduced) (revoking 180 days of good conduct credit for inmates who file "frivolous" lawsuits as a litigation deterrent).

A death-is-different theory might reduce arbitrariness in capital cases by requiring states to provide meaningful postconviction opportunities for litigating constitutional claims. Guaranteeing postconviction review is especially essential to the fair resolution of non-record claims, such as ineffectiveness of trial counsel, that cannot reasonably be litigated on direct appeal. Of course, one important aspect of "meaningful" postconviction litigation is adequate representation, such that any Court-imposed requirement of state postconviction review should be accompanied by a requirement that indigent petitioners receive counsel as well.

Although altering existing practice in this manner would be only modestly intrusive, given that most states have established postconviction fora (and a substantial majority provide for some type of representation to death-row petitioners), it is likely to be only modestly effective as well. Even in states that provide for plenary collateral review of federal and state constitutional issues, the reality remains that state courts are simply not as zealous in their vindication of criminal defendants' rights as are the federal courts.³²⁵ Some of this dynamic is no doubt attributable to political pressures in states that elect judges.³²⁶ Special institutional arrangements also account for the difference in certain states. For instance, Texas requires an inmate to return to the trial court of conviction with the daunting task of persuading the judge that constitutional error occurred in the trial over which that judge presided.³²⁷

A more ambitious death-is-different doctrine would alter existing doctrines concerning the availability of federal habeas, which has become, for all practical purposes, the most important source of constitutional protection for state prisoners. Under current doctrine, death-row inmates are afforded no special exemption from the elaborate array of procedural hurdles that substantially restrict petitioners' efforts to vindicate constitutional rights. A wealth of commentary, largely critical, has explored the complexity of the newly-emerging federal habeas doctrine.³²⁸ The essential point of this criticism is that inmates should not lose their opportunities for federal review on the basis of

³²⁵ See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 907-08 (1994).

³²⁶ See Stephen P. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 779 (1995) (discussing the political pressures facing elected judges in capital cases and noting that 32 of the 38 death penalty states select or retain judges through elections).

³²⁷ See TEX. CODE CRIM. PROC. ANN. art. 11.07 § 2(b) (West Supp. 1995).

³²⁸ See, e.g., Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252-53 (1988) (decrying the complexity wrought by the Court's new doctrines); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 362-63 (1991) (arguing that the Rehnquist Court "has quietly eviscerated, if not interred, federal habeas corpus"); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 308-09 (1993) (discussing the Court's common-law approach to habeas).

matters entirely beyond their control, such as attorney failure to make proper objections at trial,³²⁹ the timing of the favorable constitutional decisions on which they rely,³³⁰ or attorney error in failing to raise a meritorious claim in a prior petition.³³¹

However compelling these criticisms are in the non-capital context, they have special force in capital litigation given that federal habeas provides, for better or worse, the sole opportunity as of right for federal review of federal claims. Just as elaborate procedural protections are valueless to the unrepresented or poorly represented defendant, so are such protections valueless if no forum exists for their enforcement.

Of course, concerns for the finality of state judgments and timely litigation of constitutional issues counsel against wholesale repudiation of procedural rules in capital cases. Nonetheless, it seems odd for a system that espouses a commitment to heightened reliability to maintain extraordinary limitations on capital defendants' ability to correct errors that concededly undermine such reliability. This is especially true given that virtually all of the limitations on habeas have been Court-driven,³³² and that the habeas statute itself seems, as a matter of text, to impose less onerous restrictions than many of those established in current doctrine.³³³ If there is sufficient play in the habeas statute to accommodate procedurally hampered claims of capital defendants, then the constitutional concerns animating the death-is-different doctrine could likewise support such accommodation. Accordingly, an additional road not taken would involve careful review and resolution of constitutional claims on the merits rather than rigid adherence to the rules that promote procedural regularity in non-capital cases.

* * *

We do not view rules regarding representation and the availability of postconviction review as the sole examples of a "super due process" approach to the administration of the death penalty. We offer them only as illustrations of how the concern for heightened reliability might have been better served by focusing on those aspects of the system that practicing lawyers and the public at large would recognize as fundamental to fairness. Meticulous rules regarding sentencing instructions and prosecutorial argument have not and will not guarantee

³²⁹ See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 87–91 (1977) (announcing a procedural default doctrine that is less favorable to habeas petitioners).

³³⁰ See, e.g., *Teague v. Lane*, 489 U.S. 288, 305–10 (1989) (plurality opinion) (limiting retroactive application of new constitutional decisions on federal habeas).

³³¹ See *McCleskey v. Zant*, 499 U.S. 467, 488–96 (1991) (substantially restricting opportunities for filing new-claim successive petitions).

³³² See Steiker, *supra* note 328, at 352–53.

³³³ See, e.g., *id.* at 363–65.

nonarbitrary outcomes. Hence, one path not taken would involve a “second look” at those procedures outside of controlling sentencer discretion that account for inequality in the present regulatory world.

VI. FINAL REFLECTIONS

We have argued that the Supreme Court’s chosen path of constitutional regulation of the death penalty has been a disaster, an enormous regulatory effort with almost no rationalizing effect. Moreover, we have suggested alternative paths, largely ignored by the Court, that offer some possibility of greater impact. If both of these claims are true (or even somewhat persuasive), one has to wonder why the Court has neither abandoned its efforts altogether nor pursued one of the alternatives.

Indeed, the attractiveness to the Court of abandoning altogether the effort to implement *Furman* seems increasingly plausible in light of our review of the enormous costs of time, energy, and legitimacy that the Court’s regulatory efforts have thus far incurred for minimal regulatory returns. After all, the decision in *Furman* itself was only 5–4 even at a time when strong vestiges of the Warren Court still remained,³³⁴ the rationale of *Furman* was hopelessly muddled by the badly splintered Court; the decision was widely criticized at the time and remains unpopular today; and no strong constituency has ever supported restricting the use of the death penalty except for a few increasingly marginalized groups devoted to abolition or racial equality.

On the other hand, if the Court remains committed to addressing in some significant sense the concerns that originally animated it in *Furman* and *Gregg*, it is hard to see why the Court has not attempted to flesh out the ideas for alternative regulatory regimes that we have sketched. It is difficult to imagine a body of doctrine that is much worse — either in its costs of implementation or in its negligible returns — than the one we have now.

One answer, perhaps, is that the Court has never paused to take systematic account of its death penalty jurisprudence. The current body of doctrine has grown like a house without a blueprint — with a new room here, a staircase there, but without the guidance of a master builder to ensure that the finished product is structurally sound. Perhaps each of the Justices has become attached emotionally or intellectually to his or her own small contribution and is thus unwilling to scrap the larger project.

This hypothesis may have considerable explanatory force for the foundation-building first decade or so of the Court’s death penalty jurisprudence. But it fails to account for the more recent attacks made

³³⁴ Cf. *Payne v. Tennessee*, 501 U.S. 808, 829 (1991) (suggesting that “narrow[] . . . margins” and “spirited dissents” affect the precedential weight of constitutional decisions).

by individual members of the Court on the integrity of the edifice as a whole. For example, Justice Scalia has argued that the “inherent tension” between the twin pillars of the Court’s death penalty jurisprudence — the requirements that states both channel sentencer discretion and ensure open-ended sentencer consideration of mitigating evidence — has developed into irreconcilable incompatibility.³³⁵ As a result, he has called (unsuccessfully) for a radical curtailment of the scope of the Court’s death penalty regulation.³³⁶ At the other extreme, shortly before his retirement from the Court in 1994, Justice Blackmun comprehensively canvassed the structural failings of the Court’s work and as a result advocated (likewise unsuccessfully) constitutional abolition of the death penalty.³³⁷ These sweeping challenges have forced the Court to confront its death penalty doctrine as an integrated whole, and thus the perpetuation of that doctrine cannot be written off as an inadvertent failure to recognize the instability of the ultimate structure created by years of building without a blueprint.

Instead, the persistence of the Court’s death penalty doctrine despite its structural failings can perhaps be better explained by the existence of inconsistent blueprints drafted by warring architects. From the time of *Furman* itself, two minority absolutist views of the Eighth Amendment have been competing for the votes of the center. On the one hand, Justices Brennan and Marshall formed the abolitionist wing of the Court, contending in every death penalty case that any and all executions constituted cruel and unusual punishment. At the very end of his career, Justice Blackmun, originally a *Furman* dissenter, essentially converted to this view.³³⁸ On the other hand, former Chief Justice Burger and current Chief Justice Rehnquist advocated abolition not of the death penalty, but of the Supreme Court’s regulation of the death penalty through the Eighth Amendment. Justice Scalia and Justice Thomas are contemporary heirs to this view. Left in the middle were those — like Justice Stevens, the only member of the *Gregg* plurality who remains on the Court today — who attempted to mediate between these positions. Justice Powell, originally a *Furman* dissenter, joined Justice Stevens in the *Gregg* plurality, and Justice O’Connor is his closest contemporary counterpart in Eighth Amendment matters.

³³⁵ See *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment) (maintaining that to acknowledge “that there is perhaps an inherent tension” between these two strands of death penalty jurisprudence “is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II” (quoting *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, Jr., dissenting)) (internal quotation marks omitted).

³³⁶ See *id.* at 671–73.

³³⁷ See *Callins v. Collins*, 114 S. Ct. 1127, 1128–38 (1994) (Blackmun, J., dissenting from denial of certiorari).

³³⁸ See *id.*

Thus, despite the changing membership of the Court, the basic configuration on Eighth Amendment issues remained constant for two decades after *Furman*: two unwavering poles competed for the center.³³⁹ The center, however, has always lacked a distinctive vision of its own about the nature and scope of Eighth Amendment regulation of capital punishment. On the one hand, the center has been unwilling to abandon altogether *Furman*'s reforming mission. In part, this reluctance has stemmed from the center's prudential commitment to the doctrine of *stare decisis*.³⁴⁰ But beyond such prudential concerns, the center has always been the home of cautious meliorism; it has likely believed that something as court-focused as the fair administration of capital punishment must be amenable to amelioration through law. At the same time, the center has been reluctant to adhere to *Furman*'s reforming commitments in a manner that would place "totally unrealistic conditions" on the use of the death penalty.³⁴¹ In its attempt to chart a middle course, the center has been forced to paper over the inconsistencies of post-*Furman* death penalty doctrine, because to acknowledge such incoherence would require the Court to give up its meliorism and choose between the extremes of abandoning constitutional regulation of the death penalty and abandoning the death penalty itself. Thus, it was Justice Stevens, one of the original death penalty centrists, who attempted to mediate between the conflicting impulses in post-*Furman* doctrine toward both fairness and individualization³⁴² — conflicts that have been noted and condemned by Justices at both poles of the Court.³⁴³ The center's attempts to avoid sliding toward one or the other of the two poles has created a death penalty doctrine whose only affirmative commitment seems to be to the old adage that a good compromise is one that pleases nobody. This account of the internal political dynamics of the Court, evoked by the image of "warring architects," provides a plausible explanation

³³⁹ With the retirements of Justices Brennan, Marshall, and Blackmun in 1990, 1991, and 1994, respectively, there is no longer an abolitionist pole on the Court.

³⁴⁰ This centrist commitment was perhaps most powerfully illustrated by the Court's decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992), in which the centrist coalition formed by Justices O'Connor, Kennedy, and Souter adhered to *Roe v. Wade*, 410 U.S. 113 (1973), as precedent while reworking its particular doctrinal implications.

³⁴¹ *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion)).

³⁴² See, e.g., *Walton v. Arizona*, 497 U.S. 639, 714–19 (1990) (Stevens, J., dissenting) (attempting to explain why the requirement that sentencer discretion be channeled is consistent with unlimited sentencer discretion to exempt defendants from the death penalty based on mitigating evidence).

³⁴³ Justice Scalia noted this conflict in *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part and concurring in the judgment), and called for the abandonment of an entire line of cases demanding individualized sentencing in capital cases. See *id.* at 671–73. Justice Blackmun later called attention to the same conflict in his dissent from denial of certiorari in *Callins v. Collins*, 114 S. Ct. 1127 (1994), and argued for the constitutional abolition of the death penalty altogether.

for the erection and maintenance of a doctrinal structure so functionally and aesthetically unsatisfying.

Yet the building metaphor also suggests a third and altogether different potential explanation for the persistence of the Court's deeply flawed Eighth Amendment jurisprudence. Perhaps the Justices have retained current death penalty doctrine despite its failings as a house because at some level they appreciate its success as a facade. The Court's doctrine can be said to work as a facade to the extent that it is successful — and we argue below that it is³⁴⁴ — at making participants in the criminal justice system and the public at large more comfortable with the death penalty than they otherwise would be or should be.

This argument is of a kind that legal scholars designate, not always with completely shared definitions, as “legitimation” theory.³⁴⁵ The use of the verb “to legitimate” in this context is distinct from the two primary dictionary definitions of the word — the first being what one might call “formal” legitimation (“to give legal status or authorization to”³⁴⁶), as in “the Supreme Court *legitimated* an act of Congress by upholding it against constitutional challenge”; and the second being what one might call “normative” legitimation (“to show or affirm to be justified”³⁴⁷), as in “the Supreme Court’s documentation of coercive police interrogation techniques *legitimated* its conclusion that *Miranda* warnings were necessary to prevent involuntary confessions.” Rather, the distinctive sense of legitimation to which we refer derives from the work of the sociologist Max Weber, and it might best be described as an “empirical”³⁴⁸ or “phenomenological”³⁴⁹ sense of the word. The Weberian idea of legitimation focuses on an individual’s (or a group’s) experience of *belief* in the normative legitimacy of a social phenomenon, such as a set of relationships, a form of organization, or an ongoing custom or practice, whatever might “really” be the case. Thus, the Weberian definition of legitimation might be, in *Webster’s* dictionary parlance, “to induce the belief of normative justification.” We use it in the more particular sense of inducing a *false or exaggerated* belief in the normative justifiability of something in the social world — that is,

³⁴⁴ See *infra* pp. 433–37.

³⁴⁵ See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 262–95 (1987); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 *passim*. Despite often significant variations in the way different theorists define “legitimation,” we attempt to sketch the idea in a fashion general enough to have widespread acceptance.

³⁴⁶ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1291 (1986) (first definition).

³⁴⁷ *Id.* (second definition).

³⁴⁸ This was Weber’s own description of his special sense of legitimation. See MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY 73 (H.P. Secher trans., 1962).

³⁴⁹ See HANNA F. PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT 283 (1993).

of inducing belief in the absence of or in contradiction to evidence of what the phenomenon is “really” like.³⁵⁰

This particular sense of legitimation derives not only from the work of Weber, but also from the ideas of Antonio Gramsci, an early twentieth-century theorist who, inspired by the Russian Revolution, attempted to explain the failure of similar Marxist insurrections in Western Europe, particularly his native Italy.³⁵¹ Gramsci developed the idea of “hegemony” as the principal means by which the ruling class in a capitalist society maintains its dominance; he theorized that the structure of civil society is maintained not merely by state power, but also by people’s internalization of certain ideas and attitudes that make challenges to the existing order literally unthinkable.³⁵² Legal scholars who write about legitimation concern themselves with the “hegemonic” power and function of legal discourse and doctrine; they focus on the various ways in which law in all of its manifestations helps to generate ways of thinking that reinforce numerous aspects of social life that might otherwise be considered normatively undesirable.³⁵³

These scholars write about legitimation at one of three basic levels of generality. First, some scholars focus on what we call “internal” legitimation — that is, the extent to which legal discourse and doctrine affect the way actors within the legal system perceive the system and their role within it. Second, other scholars focus on what we call “particular external” legitimation — that is, the extent to which legal discourse and doctrine affect the way people in general (not just those

³⁵⁰ This particular spin on the Weberian concept of legitimation is common among legal scholars who write about the “legitimizing” or “legitimizing” power and effect of law. See, e.g., KELMAN, *supra* note 345, at 269 (arguing that “legal thinking” legitimates, at least in part, by “giving the appearance that the system is less harshly oppressive or biased than it could readily be”); FREEMAN, *supra* note 345, at 1052 (arguing that legal doctrine legitimates when it convincingly “holds out a promise” but “refrain[s] from delivering on the promise”).

³⁵¹ See Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 304, 304 (David Kairys ed., 1982).

³⁵² See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & Geoffrey N. Smith trans., 1971). In describing the imperviousness of the Italian state to Russian-style revolution, Gramsci observed that “when the State trembled a sturdy structure of civil society was at once revealed. The State was only an outer ditch, behind which there stood a powerful system of fortresses and earthworks . . .” *Id.* at 238. In the more down-to-earth language of legal historian Robert Gordon:

This is Antonio Gramsci’s notion of “hegemony,” *i.e.*, that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.

Robert Gordon, *New Developments in Legal Theory,* in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE,* *supra* note 351, at 281, 286.

³⁵³ Many legal scholars who write about legitimation directly acknowledge their debt to Gramsci. See, e.g., Gordon, *supra* note 352, at 286–87; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,* 62 *MINN. L. REV.* 265, 268 n.12 (1978).

who play a particular role in the legal system) view a specific social practice. Finally, still other scholars emphasize what we call “general external” legitimation — that is, the extent to which legal discourse and doctrine affect the way people in general view the social structure writ large (not just some particular social practice or practices).

The work of Robert Cover best exemplifies the first “internal” level of generality. Cover’s own participation in the civil rights and anti-war movements of the 1960s permitted him to observe the self-avowed helplessness of the judiciary to respond to the moral claims of protesters and led him to undertake an inquiry into the mindset of pre-Civil War judges who enforced the fugitive slave laws despite their own moral opposition to slavery.³⁵⁴ In the book that resulted from this inquiry, *Justice Accused: Antislavery and the Judicial Process*,³⁵⁵ Cover explores how ideas about the nature of law in general and of the judge’s role in a constitutional system in particular helped the antebellum judge suppress his own antislavery convictions and thus alleviate profound psychological “dissonance.”³⁵⁶ In a later essay entitled “Violence and the Word,” which similarly focuses on the mindset of the judge in the act of adjudication, Cover explores how “the organization of the legal system” helps to overcome judges’ ordinary, human “inhibitions against . . . violence,”³⁵⁷ examining in particular the role of the judge in capital sentencing.³⁵⁸ Although these works by Cover discuss the psychological effects of law on the mindset of judges, one could also make “internal” legitimation arguments about other actors in the legal system, such as jurors, lawyers, law enforcement officers, prison wardens, parole boards, and governors.³⁵⁹

The second level of generality appears to be the most common one in legal scholarship. A good example is Alan Freeman’s “Legitimizing Racial Discrimination Through Antidiscrimination Law,”³⁶⁰ which argues that the Supreme Court’s interpretation of antidiscrimination law has worked to legitimate the racial inequalities in employment, education, housing, and political power that still persist in our society. Free-

³⁵⁴ See Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER I* (Martha Minow, Michael Ryan & Austin Sarat eds., 1992).

³⁵⁵ ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

³⁵⁶ See *id.* at 226–29.

³⁵⁷ Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1614 (1986).

³⁵⁸ See *id.* at 1622–28.

³⁵⁹ Some other “internal” legitimation arguments have focused, like those of Cover, on the mindset of judges, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 670–73 (1981) (arguing that judges manipulate legal argument to avoid having to make difficult choices between rules and standards), while others have addressed more broadly “the lawyer class,” Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 205, 353 (1979) (arguing that Blackstone’s work was “designed to convince the lawyer class, and vaguely reassure the public, that all was well in the crucial legal bailiwick”).

³⁶⁰ Freeman, *supra* note 345.

man's article exemplifies the "particular external" type of legitimation argument by focusing on how a particular body of legal ideas (in this case, constitutional and statutory antidiscrimination law) affects the way the community in general views a particular social practice or structure (in this case, pervasive racial inequality across many social spheres). Freeman argues that legal ideas play a role in "the process of forming or crystallizing [dominant societal moral] positions"³⁶¹ — in this case, the morality of persistent material inequality between the races in a purportedly equal society.³⁶²

The third level of generality is legitimation theory at its most provocative. This "general external" type of legitimation argument is exemplified by historian Douglas Hay's essay on the function of capital punishment in eighteenth-century England.³⁶³ Hay argues that the system of expansive applicability of the death penalty (to over 200 offenses, most of them crimes against property)³⁶⁴ coupled with frequent opportunities for and grants of mercy at all stages of the criminal justice system³⁶⁵ supported a credible "ideology of justice" that "made it possible to disguise much of the class interest of the law."³⁶⁶ Hay contends that legal institutions (in particular, the criminal justice system) encouraged the public to hold exaggerated or even false beliefs in the fairness of *the social order as a whole*. Or, to use Hay's own words, legal institutions sustained "the hegemony of the English ruling class."³⁶⁷ Such whole-order legitimation arguments have been developed in the American legal context as well.³⁶⁸

³⁶¹ *Id.* at 1051.

³⁶² Other examples of this type of legitimation argument abound. See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1285 (1984) (arguing that administrative and corporate law legitimate bureaucracy as an organizational form by telling "a series of stories that assure us about the acceptability of bureaucratic organizations"); Klare, *supra* note 353, at 268 (chronicling how "legal consciousness, legal institutions, and legal practice" in the area of labor law contributed to the "deradicalization" of the working class); Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years, 1962-1987*, 37 AM. U. L. REV. 41, 51 (1987) (contending that "the principal achievement of prison law is the legitimation of American prisons").

³⁶³ See Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17 (1975).

³⁶⁴ See *id.* at 18.

³⁶⁵ See *id.* at 40-49.

³⁶⁶ *Id.* at 55.

³⁶⁷ *Id.* at 56.

³⁶⁸ See, e.g., KELMAN, *supra* note 345, at 269 (arguing that "legal thinking is prone to be an effective justificatory ideology" and thus makes "counterhegemonic thoughts . . . harder to think"); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, in CRITICAL LEGAL STUDIES 303, 303 (Allan C. Hutchinson ed., 1989) (arguing that "the legal system works at many different levels to shape popular consciousness toward accepting the political legitimacy of the status quo"); Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* 427 (May 18, 1995) (unpublished manuscript, on file with the Harvard Law School Library) (arguing that adjudication helps to legitimate "the particular set of hierarchies that constitute our social arrangements").

We think that legitimation arguments at all three levels of generality can be made about the Supreme Court's Eighth Amendment jurisprudence. These arguments range from the powerful to the plausible to the speculative, in inverse relation to the level of generality. At the most specific "internal" level of generality, powerful evidence suggests that death penalty law makes actors within the criminal justice system more comfortable with their roles by inducing an exaggerated belief in the essential rationality and fairness of the system. At the next level of generality, we believe it is plausible, even probable, that death penalty law makes members of the public at large more comfortable with the use of capital punishment than they would be in the absence of such law. At the greatest level of generality, one could speculate that if death penalty law legitimates capital punishment as a social practice, then it also legitimates the social order as a whole by making palatable the most awesome exercise of state power. We will consider each of these arguments in turn.

Two separate compelling arguments support the claim that the Court's death penalty law has an "internal" legitimation effect. First, the Court's focus on controlling the discretion of capital sentencers creates a false aura of rationality, even science, around the necessarily moral task of deciding life or death. Robert Weisberg has argued convincingly that the Court's attempt to tame the "existential moment"³⁶⁹ of decision in the capital sentencing process has had the effect of reducing the anxiety that judges and juries feel about exercising their sentencing power. The Court's current capital punishment law thus permits such institutional actors "to reassure themselves that the sanctions they inflict follow inevitably from the demands of neutral, disinterested legal principles, rather than from their own choice and power."³⁷⁰ Weisberg powerfully, if anecdotally, illustrates this point by comparing jury instructions and closing arguments in capital sentencing hearings before and after the innovations of *Furman* and *Gregg*. Whereas pre-*Furman* jury instructions "aggressively reinforced the notion that the jury could not look to the law for any relief from the moral question of the death sentence,"³⁷¹ post-*Furman* instructions and prosecutorial arguments urge capital jurors to "realize that their apparently painful choice is no choice at all — that the law is making it for them"³⁷² through a form of "legal arithmetic" that tallies aggravating and mitigating circumstances.³⁷³ Weisberg's impressionistic account is bolstered by the empirical work of the Baldus group, whose study of sentencing patterns in Georgia reveals a higher per capita sentencing

³⁶⁹ Weisberg, *supra* note 289, at 353.

³⁷⁰ *Id.* at 385.

³⁷¹ *Id.* at 364.

³⁷² *Id.* at 376.

³⁷³ *Id.* at 377.

rate after the Supreme Court's "reform" of capital sentencing schemes.³⁷⁴

The second "internal" legitimation argument focuses on how the Court's constitutionalization of capital punishment has diluted sentencing judges' and jurors' sense of ultimate responsibility for imposing the death penalty. The Supreme Court's Eighth Amendment jurisprudence has itself recognized the ways in which knowledge of a lack of final responsibility for imposing the death sentence can impermissibly bias a sentencing jury's decision. In *Caldwell v. Mississippi*,³⁷⁵ for example, the Court reversed a death sentence imposed after the prosecutor was permitted to argue to the sentencing jury that its decision to impose the death sentence would be reviewed by the state supreme court. Such an argument, opined the Court, impermissibly denigrated the jury's sense of "awesome responsibility"³⁷⁶ for imposing the death penalty, especially because it was simply not true that appellate courts could redo the moral calculus assigned to the sentencing jury. Yet what the Court's Eighth Amendment law forbids the prosecutor or judge to tell a seated sentencing jury is exactly what the law itself "tells" every potential juror. The Court's constitutionalization of capital punishment under the Eighth Amendment has necessarily entailed systematic federal review of all capital cases and has prompted much greater state appellate review in order to preempt further constitutional challenges. Given the wide coverage of such review in the popular press³⁷⁷ and the number of capital cases that come to juries as retrials of earlier convictions or sentences,³⁷⁸ capital sentencing juries (not to mention judges!) must know that their imposition of a death sentence is not the end of the matter, but rather the beginning of a lengthy chain of review.³⁷⁹ Yet this "fact," of which we presume a large number of jurors are aware, is no more "true" than is the prosecutor's argument in *Caldwell*; appellate courts do not generally review the moral appropriateness of the imposition of the death penalty. Rather, as we have demonstrated, the vast majority of the Court's de-

³⁷⁴ See *supra* p. 375.

³⁷⁵ 472 U.S. 320 (1985).

³⁷⁶ *Id.* at 329 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)) (internal quotation marks omitted).

³⁷⁷ See, e.g., David G. Stout, *The Lawyers of Death Row*, N.Y. TIMES, Feb. 14, 1988, § 6, at 46.

³⁷⁸ See Bedau, *supra* note 279, at 269 (noting that "half or more of all death sentences are reversed in state or federal appellate courts").

³⁷⁹ The Supreme Court recently acknowledged the legal sophistication of sentencing juries when it held that a capital defendant has a right to counter arguments about his future dangerousness with an instruction, when appropriate, that a verdict of "life imprisonment" means "without possibility of parole." See *Simmons v. South Carolina*, 114 S. Ct. 2187, 2196 (1994). The possibility that jurors would bring in their outside knowledge about parole, despite the seeming clarity of the term "life imprisonment," demonstrates the sort of widespread basic knowledge that we posit.

cisions regulating state death penalty practices touch peripheral, rather than core issues. The Court's death penalty law thus leaves sentencing judges and juries with a false sense that their power is safely circumscribed.

Each of these two "internal" legitimation arguments made about capital sentencers can fairly be extended to other actors within the criminal justice system. Just as sentencers may be comforted by the apparent mathematical precision of the new capital sentencing regimes, prosecutors may feel emboldened in seeking the imposition of the death penalty.³⁸⁰ And just as sentencers may be reassured by the existence of layers of review between their sentence and the moment of execution (if it ever comes), state appellate courts may be reassured by the existence of federal habeas review, and governors may feel that any sentence that survives both state and federal review is not an appropriate vehicle for exercising the power of clemency. Two death penalty scholars have made this type of argument in attempting to account for the drastic post-*Furman* decline in the use of the clemency power. Hugo Bedau has argued that the decline in clemency resulted from by "the perception . . . that death sentences are now meted out by trial courts with all the fairness that is humanly possible, even if in the dark pre-*Furman* past they were not."³⁸¹ Franklin Zimring has made a similar argument, observing that in the post-*Furman* world of capital punishment, executions are regarded "as the moral responsibility of Supreme Court justices" rather than of state governors.³⁸² The diffusion of moral responsibility that occurs when a decision is perceived (correctly or not) to be divided among a number of participants — the aptly described "problem of many hands"³⁸³ — affects all participants in the decisionmaking process, which in the capital context may include everyone from law enforcement agents to the actual executioner.

We think that some of the arguments we have made about "internal" legitimation carry over to the next level of generality and support an argument about "external" legitimation of capital punishment in society at large. Weisberg, one of the strongest proponents of the "internal" legitimation argument, doubts this broader legitimating effect on the grounds that "[m]ost Americans are probably only barely aware how capital punishment operates or fails to operate, much less how

³⁸⁰ Cf. Weisberg, *supra* note 289, at 376–79 (describing a standard post-*Furman* prosecutorial argument).

³⁸¹ Bedau, *supra* note 279, at 268.

³⁸² Zimring, *supra* note 279, at 17.

³⁸³ Dennis F. Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905, 905 (1980).

the law of capital punishment has developed.”³⁸⁴ Alan Hyde has generalized this objection to apply to “external” legitimization arguments of all sorts: “If legal decisions and rules are largely unknown to the population, not well-regarded when known, and cannot be shown to influence belief or behavior in the absence of sanction, how could they, by projecting particular values, legitimate an order?”³⁸⁵ Although Weisberg and Hyde are probably correct that members of the general public do not know much about the intricacies of the Court’s death penalty doctrine, our guess is that they *think* they know a great deal. We have already argued that they know about the existence of extensive review of capital sentences, and that their ignorance about the precise nature of such review actually enhances the legitimating effect of such “knowledge.”³⁸⁶ Similarly, the delays that occur between death sentence and execution are matters of common popular knowledge; indeed, the past decade has seen increasingly strident attempts by state and federal legislators to address exactly this issue, in response, no doubt, to perceived popular pressure.³⁸⁷ Public perceptions about the nature of death penalty regulation legitimate *not* because such regulation is “well-regarded” (in Hyde’s parlance), but rather because the elaborateness of the Court’s death penalty jurisprudence fuels the public’s impression that any death sentences that are imposed and finally upheld are the product of a rigorous — indeed, *too* rigorous — system of constraints.

The public’s vague and incomplete knowledge about an intricate scheme of constitutional regulation of the death penalty thus acts as a society-wide *Caldwell* argument. The public develops a strong but false sense that many levels of safeguards protect against unjust or arbitrary executions. They are thus likely to accept any executions that finally make it through the system as being more than fair enough. The Supreme Court’s death penalty law, by creating an impression of enormous regulatory effort while achieving negligible regulatory effects, effectively obscures the true nature of our capital sentencing system, in which the pre-*Furman* world of unreviewable sentencer discretion lives on, with much the same consequences in terms of arbitrary and discriminatory sentencing patterns.

We can only hypothesize about the third and most general level of legitimization argument. If we are right that the Supreme Court’s death penalty law legitimates the imposition of capital punishment both for participants in the legal system and for the public at large, it might

³⁸⁴ Weisberg, *supra* note 289, at 384 (citing Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116 (1983)).

³⁸⁵ Hyde, *supra* note 345, at 414.

³⁸⁶ See *supra* notes 377–379 and accompanying text.

³⁸⁷ See *supra* notes 6–7 and accompanying text.

also legitimate the larger social order. Arguably, by legitimating the most naked use of physical force by the state, law might go a long way toward legitimating state power generally.³⁸⁸ But any such argument depends on a theory about how people's perceptions of the fairness of criminal justice institutions relate to their perceptions of the "rightness" of the social structure as a whole. Such a theory is far beyond the scope of this Article.

We began our exploration of legitimation theory in an effort to support the idea that the Court's deeply flawed death penalty law persists because of its success as a "facade" that creates an appearance of stringent regulation but hides the incoherence and ineffectiveness of the underlying structure. Ultimately, we reject the crudest form of this hypothesis. It is simply not plausible to suggest that the Court "intended" its doctrine to deceive or mislead. Such an argument would make two important mistakes. First, it would reify the Court by positing a single "will" or "intent" — a description that can never come close to capturing the ever-shifting amalgam of (at least) nine separate wills and intents. Second, it would resort to a crudely functionalist account of the role of adjudication as ever in the service of some potentially disguised extra-legal agenda. The most plausible explanation for the persistence of the Court's flawed doctrine is not some Machiavellian one, but rather lies in the complicated political struggle for the soul of the Court's centrist Justices that we described above with the "warring architects" metaphor.³⁸⁹

Nonetheless, the legitimating *effect* of the Court's Eighth Amendment jurisprudence is very real and leads us to think that we may have started with the wrong question. Instead of asking why the Court's doctrine has persisted despite its failure as regulation, perhaps we should be asking whether that doctrine has any effect *besides* its failure as regulation. After all, as one legal scholar has quipped, "[Y]ou can't know that a thing is not being done well until you know what it is that is being done."³⁹⁰ In this light, the Court's death penalty doctrine can be seen to play a significant legitimating role in our society, despite the fact that no one "intended" it to do so.

The short history of death penalty law thus illustrates in a profound way how institutions — even institutions as young and as frequently scrutinized as the constitutional regulation of capital punishment under the Eighth Amendment — can take on lives of their own and find a place for themselves different from the one envisioned

³⁸⁸ See generally Hay, *supra* note 363 (contending that the ruling class in eighteenth-century England was able to maintain its dominance by creating an ideology of justice in the application of capital punishment).

³⁸⁹ See *supra* pp. 427–28.

³⁹⁰ Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 466 (1974).

by their creators. Both the death penalty abolitionists who self-consciously litigated *Furman* and *Gregg*, believing that their arguments would lead to the end of capital punishment in America, and the coalition of centrist Justices who took on a more limited reformist mission post-*Furman* and *Gregg*, would no doubt be surprised to observe the extent to which current death penalty law acts to legitimate capital punishment — by denying contradictions between individualized consideration and fairness over a range of cases, by masking the moral choice and wide discretion of capital sentencers, and by promoting the appearance of intensive regulation despite its virtual absence. It is deeply ironic that the impulse to abolish and reform the death penalty has produced a body of law that contributes substantially to the stabilization and perpetuation of capital punishment as a social practice. We are left with the worst of all possible worlds: the Supreme Court's detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts — much less “sober” ones — our profoundly failed system of capital punishment.