

2007

Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006

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James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV 1 (2007).

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ARTICLE

SLOW DANCING WITH DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT, 1963–2006

*James S. Liebman**

This Article addresses four questions:

Why hasn't the Court left capital punishment unregulated, as it has other areas of substantive criminal law? The Court is compelled to decide the death penalty's constitutionality by the peculiar responsibility it bears for this form of state violence.

*Why didn't the Court abolish the death penalty in *Furman v. Georgia* after finding every capital statute and verdict unconstitutional? The Cruel and Unusual Punishment Clause was too opaque to reveal whether the death penalty was unlawful for some or all crimes and, if not, whether there were law-bound ways to administer it. So the Court abolished the penalty as then problematically administered to see whether States could do without it or find ways to improve it. The experiment revealed that the nation had not evolved beyond the death penalty for deliberate murder but had for lesser crimes, and that by sharing constitutional responsibilities with local democratic actors, the Court and the actors might together identify the murders for which death was and was not disproportionate.*

Once it chose to regulate rather than abolish the penalty, why did the Court do so via contradictory constitutional requirements to narrow the death penalty and make death verdicts more numerous? Doctrinal incoherence arose from the Court's abdication of even the abbreviated responsibilities it retained under its system of shared constitutional decisionmaking.

*Is coherent regulation possible? Maybe. *Furman* provoked useful feedback from state legislatures about the proportionality of death for particular crimes. Before the Court abdicated its monitoring role, its post-*Furman* procedures had provoked useful information from juries and state appellate courts about the proportionality of death for particular deliberate murders and murderers. These successes seemed to portend an effective process for interpreting the Cruel and Unusual Punishment Clause and a partial solution to the difficulty courts have in forthrightly justifying or banning state violence. The Court's inability to implement even this promising system of*

* This article has been long in the making, and numerous Columbia Law students and other colleagues have contributed to it. I am especially indebted to Brian Goldberg, Chaundra King, Jon Moses, Deborah Perlstein, Sally Pritchard, Chuck Sabel, Anne Voights, and Noah Weiss. I am also grateful to Christine DeMaso for her superb editing.

shared constitutional decisionmaking, however, is good evidence that constitutional regulation of the death penalty is impossible and that the Court should abolish it.

INTRODUCTION	3
I. POCKETFUL OF POSIES: RUNNING DEATH PENALTY DOCTRINE IN CIRCLES	7
II. A MENU OF APPROACHES TO ADJUDICATING OR NOT ADJUDICATING THE DEATH PENALTY'S CONSTITUTIONALITY ..	14
III. LOOKING FOR TROUBLE BUT TEMPORARILY ELUDING IT (1963–1971)	16
IV. TAKING ON RESPONSIBILITY, GINGERLY (1972–1979)	23
A. <i>Furman</i>	23
B. <i>The July 2 Cases</i>	28
1. Guided Discretion Affirmed	29
2. Mandatory Death Sentencing Rejected	34
C. The Late 1970s	37
V. TAKING ON RESPONSIBILITY VIGOROUSLY, CONTROVERSIALLY (1980–1982)	41
A. Vigor	41
B. Controversy	45
VI. FEAR OF RESPONSIBILITY AND FLIGHT (1983–2006)	50
A. Stopping Short (1983)	50
1. <i>Barefoot</i>	50
2. <i>Stephens</i>	52
3. <i>Barclay</i>	57
4. Deceleration and Decentralization, Not Deregulation	58
B. Stasis, Delegation, and Insulation (1984–1999)	60
1. Appellate Review	60
2. Jury Versus Judge Sentencing	62
3. Aggravation	63
4. Mitigation	65
5. Aggravation Versus Mitigation	67
6. Capital Trial Procedures	69
C. New Offshore Sites (1986–1989)	70
1. Judgment by Legislative Consortium	70
2. State Appellate Review Redux	73
D. Lapses (1987–1993)	78
1. Mitigation	78
2. Innocence and Death	79
3. Patterns and Race	80
E. A Little Less Is Better (2000–2005)	87
F. Summary	89
1. Mandating the Unconstitutional Status Quo 1972 ..	89
2. Dance and Demurral	90

VII.	ROBERT COVER ON JUDICIAL REGULATION OF STATE VIOLENCE: DETACHMENT WITH EXCUSES OR DEPLOYMENT WITH EXPLANATIONS	91
	A. <i>Justice Accused</i>	91
	B. <i>Nomos and Narrative</i>	93
	C. <i>Violence and the Word</i>	94
VIII.	THE FAILURE OF DETACHMENT AS A WAY OUT OF THE COURT'S DISCOMFORT WITH CAPITAL VIOLENCE	98
	A. Evidence of Discomfort	98
	1. Ambivalence	98
	2. Inflexibility	99
	3. Anger, Provocation, and Personalization	99
	4. Defensiveness and Over-Rationalization	100
	5. Regret	100
	B. Efforts at Detachment	100
	1. Not Deciding	101
	2. Mechanical Analysis	102
	3. Transforming Substantive into Procedural Review; Ascribing Responsibility to Others	102
	4. Insulation as Trump	103
	5. Inflating the Formal Stakes	104
	C. The Inevitability of Responsibility	105
IX.	THE COURT'S NEAR SOLUTION TO THE DIFFICULTY OF DEPLOYMENT WITH EXPLANATIONS	106
	A. The Court's Compulsion to Explain the Death Penalty	106
	1. Supreme Perspective	106
	2. Supreme Pressure	107
	B. The Court's Innovative Solution to Dissonance and Deployment with Explanations	111
	1. Supreme Sharing	111
	2. Supreme Experimentation	113
	C. The Court's Cowardice and Collapse	118
	1. Supreme Surrogation	118
	2. Supreme Futility	119
	SUMMARY AND CONCLUSION	122

INTRODUCTION

In his famous book on the death penalty, Charles Black argued that the choice between life and death is too important and difficult to entrust to fallible human decisionmakers, referring mainly to frontline capital decisionmakers—legislators, prosecutors, juries, and sentencing judges.¹ The same claim has been presented to the Supreme Court as a reason for

1. Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* 46–78 (2d ed. augmented 1981).

holding that those decisionmakers will inevitably impose the death penalty in ways that deny due process or impose cruel and unusual punishment.²

This Article asks whether the claim of irreparably fallible death penalty decisionmaking applies to the Supreme Court itself. It argues that the best evidence that human institutions cannot cope with the enormity of capital decisions is the Court's own stance on the penalty. For forty years, the Court has recognized the need to set complex constitutional standards to govern frontline death penalty decisionmaking and yet has refused to apply those standards to review the resulting decisions and patterns of decisions, instead shunting off that responsibility to the very actors the Court claims the constitutional need to regulate. Having accepted the responsibility that comes with refusing either to wipe the death penalty off the nation's agenda by abolishing it or to wipe the penalty off its own agenda by letting States deliberately take life whenever the defendant did so, the Court has found it impossible to carry out the duties entailed by the intermediate approach it has taken. Among the unhappy results of the Court's compulsion to be, and not be, responsible for the legality of capital punishment is glaring doctrinal incoherence—which many modern commentators on the death penalty have decried,³ but whose persistence none have explained.

2. See Brief for Petitioner at 29–30, *Roberts v. Louisiana*, 428 U.S. 325 (1976) (No. 75-5844); Brief for Petitioners at 22–24, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (No. 75-5491); Brief for Petitioner at 22–24, *Jurek v. Texas*, 428 U.S. 262 (1976) (No. 75-5394); Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae at 19–21, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706); Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae at 68, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257); Motion for Leave to File Brief as Amici Curiae & Brief Amici Curiae of the NAACP et al. at 7, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003); Motion for Leave to File Brief Amici Curiae & Brief Amici Curiae of the NAACP Legal Defense & Educational Fund, Inc., & the National Office for the Rights of the Indigent at 2, *McGautha v. California*, 402 U.S. 183 (1971) (No. 203); see also *infra* notes 414–438 and accompanying text (discussing arguments and opinions in *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

3. See, e.g., John D. Bessler, *Kiss of Death: America's Love Affair with the Death Penalty* 55–64 (2003); *Beyond Repair? America's Death Penalty* (Stephen P. Garvey ed., 2003); Mark Costanzo, *Just Revenge: Costs and Consequences of the Death Penalty* 156–57 (1997); Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted* (2000); Mike Gray, *The Death Game: Capital Punishment and the Luck of the Draw* (2003); Craig Haney, *Death by Design: Capital Punishment as a Social Psychological System* 12–19 (2005); Austin Sarat, *Mercy on Trial* 80–93 (2005); Franklin E. Zimring, *The Contradictions of American Capital Punishment* 67–88 (2003); Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *Debating the Death Penalty* 15, 23–26 (Hugo Adam Bedau & Paul G. Casell eds., 2004); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1764–66 (1987); David R. Dow, *How the Death Penalty Really Works*, in *Machinery of Death* 11, 11–42 (David R. Dow & Mark Dow eds., 2002); Jack Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908 (1982) [hereinafter Greenberg, *Capital Punishment*]; Samuel R. Gross, *Keynote Address, Still Unfair, Still Arbitrary—But Do We Care?*, 26 Ohio N.U. L. Rev. 517, 523–25 (2000); Carol

A way around the problem of the death penalty's distorting effect on the Court's decisionmaking is the solution long urged on the Court as an implication of the penalty's distorting effect on other decisionmakers—to abolish it. That outcome is a reasonable response to the distortion and many other problems discussed below and elsewhere.⁴ But it is not the outcome urged here in the first instance. Instead, this Article discovers hidden within the Court's struggle with the death penalty a potential for significantly more doctrinal coherence than has been assumed and a way for the Court to domesticate somewhat the excruciatingly difficult responsibility for deciding who the State may and may not constitutionally kill. Realizing this potential requires something like the opposite of the Court's current stance. Instead of independently formulating complex guidelines while fobbing off their application on the actors whose untrustworthiness requires them, this mechanism would have the Court set general standards and use frontline actors' patterns of reaction to those standards to guide the Court to progressively more refined and democratic constraints on state killing.

This Article thus proposes an experiment, building on one the Court itself conducted in the decision it treats as its death penalty lodestar, *Furman v. Georgia*.⁵ Along with addressing *Furman*'s question whether the frontline actors in the criminal justice system are capable of administering a lawful death penalty, this Article asks whether the Court is capable of enforcing the legal standards its *Furman* experiment revealed. Only if it is not, is abolition a constitutional imperative.

This Article begins by revisiting the common claim that the Court's modern death penalty jurisprudence is built on a glaring contradiction between desires for objective legal constraint (sometimes called "narrowing") and for merciful subjective discretion (sometimes called "individu-

S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355, 412–13 (1995); Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, *Nat'l L.J.*, June 11, 1990, at 30.

4. See, e.g., Ian Gray & Moira Stanley, *Amnesty Int'l U.S.A., A Punishment in Search of a Crime: Americans Speak Out Against the Death Penalty* (1989) (including interviews with death penalty opponents); Robert Jay Lifton & Greg Mitchell, *Who Owns Death? Capital Punishment, the American Conscience, and the End of Executions* (2000) (examining American popular sentiment regarding capital punishment and predicting its abolition); Michael A. Mello, *Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment* (1997) (criticizing mechanics of death penalty and calling for its abolition); Helen Prejean, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (2005) (recounting personal observations of two executions and arguing for reform in capital punishment system); Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (2001) (arguing that state killing distracts from, and contributes to, many societal problems); Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* (2003) (narrating personal experience serving on Illinois Commission on death penalty reform).

5. 408 U.S. 238.

alization").⁶ Drawing on an earlier article, Part I points out that the contradiction is not between narrowing and individualization, but between two visions of the defects of the death penalty as applied when the Court invalidated it in *Furman*.⁷ In Justice White's view, now largely discredited by events on the ground, the death penalty needed to be more frequently imposed.⁸ In Justice Stewart's, and later Justice Stevens's, view, the penalty needed to be imposed more discriminately.⁹ In order to understand the contradictory doctrinal choices the Court made, Part II of the Article steps back and examines the range of jurisprudential choices the Court has faced in its death penalty cases since the 1960s. By isolating the options available to the Court in dealing with capital punishment and the choices it made in a number of chronologically and thematically linked sets of cases, Parts III–VI discover an obsessive oscillation in the Court's cases between a compulsion to take responsibility for justifying capital punishment and an equally powerful revulsion at responsibility once taken.

The remainder of the Article attempts to explain the distortion of death penalty law and the intense discomfort the Court feels when it avoids, and when it exercises, capital responsibility. Although one might conclude that doctrinal failure leads to jurisprudential discomfort,¹⁰ Part VII finds the opposite, drawing upon Robert Cover's work to explain the Court's behavior. State violence triggers dissonance in judges who by profession are nonviolent legal creators. But as Part VIII describes, the extreme violence of court-administered state killing permits neither of the judicial cures for dissonance that Cover identified—detachment with excuses or deployment with explanations. Rather, in its dance with death, the Court has remained trapped in an obsessive vacillation between impulses to embrace and escape.

In fact, the Court nearly solved its problem, while also nearly solving the countermajoritarian dilemma. The Court almost accomplished this feat by blending both Coverian solutions—excused detachment and justified deployment—into an ingenious system for sharing constitutional

6. See, e.g., Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. Pa. L. Rev. 795, 815 (1998); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1110 (1990); Steiker & Steiker, *supra* note 3, at 386–87; Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147, 1165–67 (1991); Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 388; David S. Friedman, *The Supreme Court's Narrow Majority to Narrow the Death Penalty*, Hum. Rts. Mag., Summer 2001, at 4, 4–6. But cf. James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607 (2006) (describing and disputing this common claim).

7. See Liebman & Marshall, *supra* note 6, at 1608–11.

8. See *id.* at 1610; *infra* notes 21–22, 27–36, 125–134, 614–616 and accompanying text.

9. See Liebman & Marshall, *supra* note 6, at 1610; *infra* notes 19–20, 27–36, 135–144, 439–441 and accompanying text.

10. See Steiker & Steiker, *supra* note 3, at 414.

decisionmaking with capital sentencing juries, state appellate courts, and state legislatures. To achieve its objective, however, the Court needed to exercise residual responsibility for assuring the integrity of hundreds of local proportionality decisions while using the aggregate results of these democratic decisions to inform its own constitutional judgment. Regrettably, as Part IX demonstrates, the Court found even these residual responsibilities too painful to exercise, if too indispensable to put aside.

The Article concludes by encouraging the Court to make a choice. Forty years of exertions, however, have narrowed the Court's options. Those options, it is now clear, do not include deregulating the death penalty. Nor, however, need the Court singlehandedly justify the death penalty in all its manifestations. The Court's own fitful but pathbreaking innovations provide a serviceable way to share substantive constitutional decisionmaking authority with jurors, state appellate judges, and legislators.

The Court's choice, therefore, is between abolition and fulfilling the partial and supervening review functions its novel system of shared responsibility requires. The Court's innovations considerably ease the difficulty of the latter option by enabling the Court to use the mini-constitutional proportionality judgments made daily by local democratic actors throughout the nation to inform its own, constitutionally crucial sense of evil versus extenuation, proportionality, and cruel and unusual punishment. Asking the Court to perform only this backup role is not asking too much. If the Court cannot manage even this limited task, its failure is proof enough that the choice between life and death is too difficult to entrust to the Court's own humanly fallible decisionmaking and that the death penalty cannot coexist with the rule of law.

I. POCKETFUL OF POSIES: RUNNING DEATH PENALTY DOCTRINE IN CIRCLES

In *Furman v. Georgia*, the Court considered the constitutionality of death sentences imposed under discretionary death sentencing statutes similar to those in effect in all of the nation's forty-plus death sentencing jurisdictions.¹¹ Under those statutes, jurors were presented with evidence that the defendant did or did not commit a capital crime (but with no evidence specific to sentencing) and told to make two judgments, the first based on the usual instructions, the second based on no instructions at all: (1) whether the defendant committed a capital crime, and if so, (2) whether or not to pronounce the verdict of guilt "with mercy" or "without mercy."¹² A five-person majority ruled invalid every existing capital stat-

11. 408 U.S. 238 (1972).

12. See, e.g., Fla. Stat. Ann. § 921.141 historical note (West Supp. 1971-1972) (repealed 1972) ("A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury."); Tex. Penal Code Ann. art. 1189 (Vernon 1961), invalidated by *Furman*, 408 U.S. 238.

ute and verdict. Each Justice wrote a separate opinion; no opinion was signed by more than one Justice.

An earlier article uses Figure 1 to depict the pattern of death sentences the Justices in the *Furman* majority believed the discretionary death penalty statutes were generating.¹³ The circle in Figure 1 represents all capital crimes of which a defendant has been found guilty. Each black dot inside the circle represents a capital offense that a jury decided to punish with death. The white areas in the circle represent capital crimes that were committed and led to convictions but were not punished by death. As indicated by the arrow, as one moves from the circumference to the center of the circle, the crimes represented by each point become relatively more aggravated, with the dot at the center representing the very worst crime. The wedge at the top represents crimes committed by defendants with particular traits—say, poor African American defendants.

In Justice Brennan's and Justice Marshall's view, the death penalty was unconstitutional under any circumstances, in part because they believed the penalty would inevitably generate patterns, like those in Figure 1, which they viewed as unconstitutionally arbitrary.¹⁴ The dissenting Justices largely agreed with Brennan and Marshall that the patterns were inevitable, but reasoned that the patterns could not be unconstitutional, because the Constitution assumes the State's power to impose death and thus cannot be read to invalidate patterns the punishment inevitably entails.¹⁵ The three remaining Justices, Douglas, Stewart, and White, agreed with Brennan and Marshall that the pattern in Figure 1 was unconstitutional but disagreed with the bare assumption that the pattern was inevitable.¹⁶ As a result, their opinions controlled the outcome. The death penalty as then administered was unconstitutional, but the same was not necessarily true of death sentences imposed under different standards or procedures.

Furman thus "held" that the death penalty may not be imposed constitutionally if it generates the pattern depicted in Figure 1. But confounding the holding, each of the three plurality Justices offered a different rationale for why the pattern was unconstitutional, and the reasons conflicted.¹⁷ Justice Douglas criticized capital outcomes as invidiously discriminatory, given the disproportionately higher death sentencing rate

13. See Liebman & Marshall, *supra* note 6, at 1616.

14. See *Furman*, 408 U.S. at 293 (Brennan, J., concurring); *id.* at 367–68 (Marshall, J., concurring).

15. See *id.* at 411 (Blackmun, J., dissenting); *id.* at 417–28 (Powell, J., dissenting); *id.* at 468 (Rehnquist, J., dissenting).

16. See *id.* at 257 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

17. See Liebman & Marshall, *supra* note 6, at 1616–18.

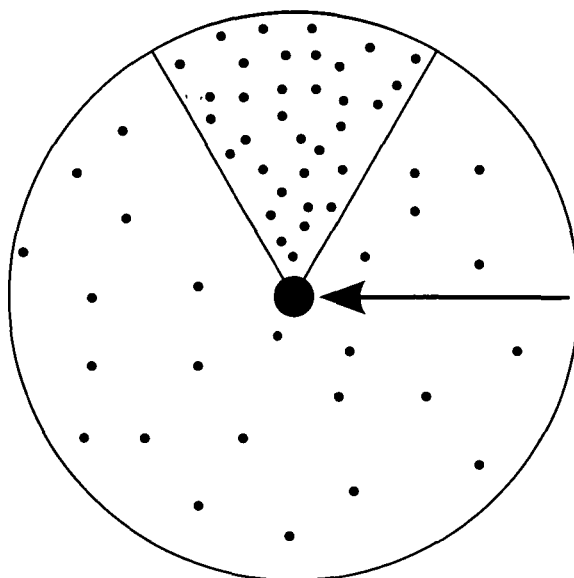


FIGURE 1

for African American defendants.¹⁸ Justice Stewart criticized death verdicts for being capriciously indiscriminate—for being about as likely near the unaggravated circumference of the circle as at the aggravated core.¹⁹ To be constitutionally proportionate, he believed, death sentences had to be concentrated in cases near the aggravated core and rare in cases near the circumference.²⁰ Justice White criticized the death decisions as arbitrarily infrequent throughout the entire circle.²¹ There were too few death verdicts to provide either a deterrent or retributive justification for state killing.²²

18. *Furman*, 408 U.S. at 255 (Douglas, J., concurring) (“[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused . . .”).

19. *Id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”).

20. See Liebman & Marshall, *supra* note 6, at 1617–18 (discussing Justice Stewart’s opinion in *Furman*).

21. *Furman*, 408 U.S. at 311–12 (White, J., concurring) (“[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution[,] . . . society’s need for specific deterrence[,] . . . or . . . community values are measurably reinforced by authorizing a penalty so rarely invoked.”).

22. See Liebman & Marshall, *supra* note 6, at 1617–18 (discussing Justice White’s opinion in *Furman*).

Most States with the death penalty responded to *Furman* by enacting a new capital statute.²³ A large minority made the death penalty mandatory for certain categories of murder.²⁴ A larger number of States retained, but sought to guide, jury discretion. Some limited death eligibility to first degree murders (or any murder) committed in one of a finite number of ways identified in the statute as particularly aggravated; others allowed any fact about the crime or criminal that placed it "above the norm" of first degree murders to make the crime death eligible.²⁵ When at least one such "statutory aggravating circumstance" was present, some States required the statutorily enumerated aggravating factors—or, in some places, those plus all nonstatutorily enumerated aggravating factors—to be weighed against the mitigating factors in the case. Some "weighing States" required, while others merely permitted, a death sentence if the relevant aggravating factors substantially outweighed, or (in some States) were equal to any of a statutorily specified set of mitigating circumstances or to any and all factors that the jurors, or (in some States) at least one juror, thought was present and mitigating even if the factor was not enumerated in the statute. Other States required jurors, after taking note of the relevant aggravating factors, simply to "consider" the relevant mitigating factors in deciding for themselves whether the particular configuration of factors warranted death.²⁶

In evaluating the States' post-*Furman* innovations, the Court vacillated between Justice Stewart's and Justice White's approaches. The Court went with Justice Stewart in ruling mandatory death sentences unconstitutional.²⁷ Notwithstanding the larger number of death sentences mandatory statutes would generate, their overall pattern might still be capriciously (i.e., evenly) distributed across different levels of aggravation because jurors would retain the unguided discretion to nullify mandatory capital sentencing laws by convicting defendants who committed capital crimes of lesser offenses.²⁸ But the Court went with Justice White in holding that States could premise death eligibility on any aggravating factor that was more likely to persuade jurors to impose death than to tempt

23. See *id.* at 1619–20 (describing aftermath of *Furman*).

24. See, e.g., La. Rev. Stat. Ann. § 14:30(2) (1974) (making death penalty mandatory for deliberate killing of police officer), invalidated by *Roberts v. Louisiana*, 428 U.S. 325 (1976). For a more extensive discussion of mandatory death sentencing statutes passed in the wake of *Furman*, see Liebman & Marshall, *supra* note 6, at 1622–23; John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 *Ariz. L. Rev.* 143, 200–26 (1986).

25. See Liebman & Marshall, *supra* note 6, at 1622–23, 1635–38 (citing and discussing state statutes); *infra* notes 167–172, 292–304 and accompanying text.

26. See Liebman & Marshall, *supra* note 6, at 1627–28, 1631–32, 1639–41; *infra* notes 252–254, 317–324, 353–376 and accompanying text.

27. See Liebman & Marshall, *supra* note 6, at 1623–28; *infra* Part IV.B.2.

28. Historically, American juries had a tendency to convict defendants of less serious crimes than were actually committed in order to avoid mandatory death sentencing laws. See *Woodson v. North Carolina*, 428 U.S. 280, 289–90, 302–03 (1976) (plurality opinion) (discussing additional authority for this proposition).

them to grant mercy—even if the factor was likely to be present in nearly all capital murders.²⁹ Yet the Court went with Justice Stewart in forbidding States to limit mitigation to equally clear and specific mitigating circumstances, instead requiring States to allow juries to decline to impose death based on “any aspect” of the crime or criminal that at least one juror believed was present in the case and qualified as “mitigating.”³⁰ And the Court went with Justice White in letting States give jurors a similar discretion (once they found at least one statutory aggravating factor) to rely on any “nonstatutory aggravating factors” they discerned in the case. It also allowed States to mandate death sentences even when jurors believed there was only a minute, or possibly no, difference in the overall weight of the aggravation and mitigation.³¹

In the midst of all of this oscillation, the Court was presented with strong evidence that the new “guided discretion” statutes were still generating death sentencing patterns explicable only on the basis of race (in this case the race of the victim). Yet contrary to the views of Justice Douglas in *Furman*, the Court found no constitutional problem with these patterns.³²

The accepted diagnosis of the flaw in the Court’s guided discretion jurisprudence is that it contradictorily demands both the guiding objectivity of rules and the individualizing discretion of mercy.³³ But that diagnosis is wrong. In fact, both Justice White and Justice Stewart advocated coherent, noncontradictory mixtures of objective standards and discretion, and no Justice on the Court since *Furman* has ever advocated rules to the exclusion of discretion, or vice versa.³⁴ Justice White’s “the more death sentences the better” view invited States to require sentencers to focus on powerfully objective, statutorily enumerated reasons to punish murderers; give sentencers discretion to consider other, nonstatutorily enumerated factors that might lead to the same outcome; allow sentencers to consider a small set of carefully cabined mitigating circumstances; and either require or allow sentencers discretion to impose death if the weight of the aggravating factors is at least equal to that of the mitigating factors.³⁵ Justice Stewart’s “condemn only the worst of the worst” view invited a different combination of rules and discretion. Under that view, States should “narrow” death eligibility to a small set of statutorily enumerated situations in which a high, morally and factually unequivocal, threshold of evil has been crossed; give each juror discretion to impose life based on any mitigating factor he or she alone finds pre-

29. See Liebman & Marshall, *supra* note 6, at 1628–29, 1635–38; *infra* Part VI.B.3.

30. See Liebman & Marshall, *supra* note 6, at 1627–32, 1639–41; *infra* Part VI.B.4.

31. See Liebman & Marshall, *supra* note 6, at 1633–34; *infra* Part VI.B.5.

32. See Liebman & Marshall, *supra* note 6, at 1643–46; *infra* Part VI.D.3.

33. See Liebman & Marshall, *supra* note 6, at 1634 & n.122; *supra* note 6 and accompanying text.

34. See Liebman & Marshall, *supra* note 6, at 1634–35.

35. See *infra* notes 125–130, 159–160, 271–281, 292–304, 317–324, 387–391 and accompanying text.

sent; and require jurors to impose life sentences unless they conclude that aggravation net of mitigation is "substantial" enough to warrant death.³⁶ A measure of the effectiveness of doctrines implementing either of these views should have been, à la Justice Douglas, that something besides race or other invidious factors could explain the pattern of death sentences, be it any amount of distinguishing aggravation (as Justice White proposed) or a high degree of aggravation net of mitigation (as Justice Stewart preferred).

What confounds the Court's doctrine is not a mixture of rules and discretion, but a combination of rulings that half the time promotes one clear vision of what constitutional death sentencing requires (the more death sentences the better) and the rest of the time promotes another clear but contradictory vision (only the worst of the worst should be executed). What is striking is not the Court's adoption of doctrines that fail to put a single, pristine theoretical view into clean operation, but rather its persistent and advertent³⁷ vacillation between two starkly contradictory views. State officials and legal doctrines aiming to do both of these things will inevitably fail at both.³⁸

Ironically, therefore, the best depiction of the capital sentencing pattern the Court's doctrine currently requires under the so-called "rule of *Furman v. Georgia*"—the pattern in Figure 2—is virtually identical to the pattern *Furman* ruled unconstitutional.³⁹ The only difference is that today's better-documented racial pattern, depicted by the upper wedge, is defined by the race of the victim, not the race of the defendant. And, à la Justice White, there is a slightly higher chance that any person convicted of capital murder will be sentenced to die—although the increase is not enough to make a difference even to Justice White.⁴⁰

Adding to the puzzle is the fact that the Court persists in pursuing contradictory goals despite evidence that one of the competing views—the "more is better" approach—is demonstrably inferior to the other. Policies encouraging sentencers to impose death verdicts in large proportions of eligible cases are especially prone to racial disparities, prejudicial error, and execution of the innocent.⁴¹

36. See *infra* notes 135–144, 167–175, 176–180, 213–217, 317–322, 439–454 and accompanying text.

37. Even if the inconsistencies had not been obvious, White on the one hand and Stewart and Stevens on the other were quick to point them out in strongly worded dissents whenever they were on the losing side.

38. See *infra* notes 459–460 and accompanying text.

39. See Figure 1, *supra* Part I.

40. Liebman & Marshall, *supra* note 6, at 1647 (noting "things are much as they were in 1972" except that circle has shrunk with removal of nonhomicidal capital offenses, a few more murderers receive death penalty, and wedge is based on race of victim rather than defendant).

41. See *id.* at 1648 ("Numerousness [in number of death sentences] breeds racial disparity, invites error, risks execution of the innocent, and overtakes the system. Narrowing mitigates these problems."); *infra* notes 614–616 and accompanying text.

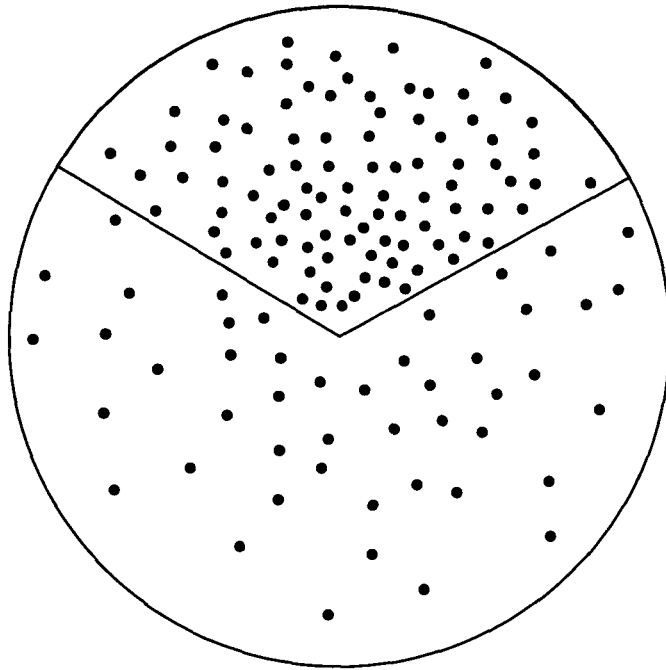


FIGURE 2

The interesting question, then, is why, when presented with choices between constitutional rulings adopting White's coherent "more is better" approach and Stewart's and Stevens's coherent (and, from a policy perspective, superior) "less is better" approach, the Court has incoherently opted for the former in some cases and the latter in others. What hidden principle or unprincipled influence, more compelling than either the White or the Stewart/Stevens view, explains the choices the Court has made?

To help solve the riddle of the Court's capital cases, this Article provides a comprehensive inventory of the jurisprudential options the Court had before it in its capital cases and the choices it made in those decisions. The inventory covers all of the Court's modern death penalty decisions, going back to the mid-1960s when the Court first confronted the possibility that the Constitution might forbid the punishment of death. This review reveals that the most consequential decision the Court faced in its modern capital cases was whether to take responsibility for constitutionally reviewing the penalty at all. Only after exploring the Court's nonobvious—indeed, almost baffling—choice to exercise responsibility is it sensible to examine the Court's choices in regard to how it would exercise that responsibility. Disaggregating the Court's options and choices reveals an interesting pattern that helps explain the Court's puzzling con-

struction of a body of doctrine that vacillates between contradictory approaches.

II. A MENU OF APPROACHES TO ADJUDICATING OR NOT ADJUDICATING THE DEATH PENALTY'S CONSTITUTIONALITY

Prior to the early 1970s, the Court rarely made capital constitutional law. Since then, it has seldom gone a Term without doing so repeatedly.⁴² Its decisions over the last forty years have used six distinct modes of analyzing (or not) the constitutionality of death sentences. This Part traces the Court's choices among the six options:

A. Forgo review, leaving capital punishment to legislatures and the States.

B. Conduct substantive, categorical review of the constitutionality of the death penalty for all, or particular classes of, crimes and criminals.

C. Conduct substantive review of the consistency of capital sentencing patterns with constitutional values.

D. Conduct substantive, case-by-case review of the constitutionality of the death penalty for the particular offense before the Court.

E. Review the process used to impose death to determine whether any procedures the Constitution requires exclusively in capital cases were omitted.

F. Review the process used to impose death to determine whether any procedures the Constitution requires at the guilt phase of criminal trials were unconstitutionally omitted from the capital sentencing phase of the trial.

Option A (or A-type analysis) eschews constitutional review altogether. Because both Due Process Clauses assume that, from time to time, the federal government and States will deprive criminals of their "life"⁴³ and because the Court has typically avoided trenching on the prerogatives of the political branches and the States in designing and implementing substantive criminal law,⁴⁴ there are strong doctrinal and pru-

42. Between 1937 and 1967, the Court issued two decisions addressing the constitutionality of a death sentence or execution. See *Solesbee v. Balkcom*, 339 U.S. 9 (1950) (allowing governor to determine inmate's sanity where finding inmate insane would prevent execution); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (permitting State to attempt second execution by electrocution after first attempt failed). Between 1972 and 2006, the Court issued at least 209 opinions in capital cases in which capital-specific issues were raised. See S. Ctr. for Human Rights, *Significant U.S. Supreme Court Decisions in Capital Cases Since 1970* (2005), available at http://schr.org/death_penalty/US%20Sup%20Ct%20capital%20cases.pdf (on file with the *Columbia Law Review*).

43. U.S. Const. amend. V ("No person shall . . . be deprived of life . . . without due process of law . . ."); id. amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life . . . without due process of law . . .").

44. See, e.g., *United States v. Lopez*, 514 U.S. 549, 558–68 (1995) (invalidating federal criminal statute on grounds that Congress exceeded its authority and infringed on matters traditionally left to States); *Younger v. Harris*, 401 U.S. 37, 43–45 (1971) (finding "longstanding public policy against federal court interference with state court

dential reasons for the Court to treat the death penalty (if imposed with what otherwise counts as due process) as beyond its constitutional control.

Option B—Option A's opposite—calls for broad substantive and categorical analysis of death as a punishment for all, or particular categories of, offenses or offenders. As the Cruel and Unusual Punishment Clause seems on its face to require, substantive analysis focuses on sentences, not sentencing procedures.⁴⁵ B-type analysis is categorical in that it considers types of sentences rather than the sentence meted out to a given offender under the circumstances of a single case.

Option C, a slightly less ambitious form of substantive review, considers whether a capital statute produces patterns of sentencing outcomes that violate a constitutional norm such as rationality, social utility, or equality. Unlike B-type review, which analyzes the abstract fit between a punishment and the crimes for which it is imposed, C-type review scrutinizes actual sentencing patterns in light of values less central to the Eighth Amendment than punishment-fits-crime proportionality. Justices Stewart, White, and Douglas engaged in different forms of C-type analysis in *Furman*, seemingly prophesying more such analysis to come.

Option D, still less ambitious, is to analyze sentences substantively but on a case-by-case basis. One could analyze sentences on the basis of the norms (such as rationality, social utility, and equality) used in C-type analysis. But the Court's D-type analysis has instead focused on Eighth Amendment proportionality concerns similar to those motivating B-type review, but concentrated in this context on a comparison of the aggravation and mitigation present in particular cases.

Options E and F are even less ambitious because they substitute procedural for substantive analysis. E-type analysis asks whether sentences were imposed in accordance with procedural norms more exacting than those the Constitution imposes in criminal cases generally—norms that apply only in capital cases. F-type analysis assesses adherence at the sentencing stage of capital trials to procedural requirements that have long applied at all guilt/innocence trials.

Proceeding in partly chronological and partly thematic order, Parts III–VI of this Article analyze the choices the Court made among these six modes of analysis during its forty-year encounter with the jurisprudence of death. This analysis discovers a Court fitfully and futilely climbing up, then down the ladder of responsibility, never quite reaching the top but

proceedings"); *Powell v. Texas*, 392 U.S. 514, 532–33 (1968) (plurality opinion) (refusing to become "ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country").

45. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Solem v. Helm*, 463 U.S. 277, 290, 296–300, 303 (1983) (finding that life sentence for crime of uttering "no account" check for \$100 following six minor prior convictions violates Eighth Amendment).

never stepping off to safety. Parts VII–IX then identify the dissonance and discomfort that seem to account for the Court’s obsessive and destructive ambivalence; discuss the Court’s brilliant solution to the difficulty and regrettable failure of will in implementing the solution; and the conclusion identifies two ways out of the Court’s dilemma.

III. LOOKING FOR TROUBLE BUT TEMPORARILY ELUDING IT (1963–1971)

Even by the Warren Court’s interventionist standards of the 1960s, the death penalty was not an inviting context for intensive judicial oversight. The Fifth and Fourteenth Amendments assume the validity of the State’s taking life.⁴⁶ The Constitution’s allocation to the States and the political branches of responsibility for the “police powers” and criminal law also counseled against intervention.⁴⁷ Legislatures and the States had exercised considerable and, by most accounts, increasingly compassionate oversight of the ultimate sanction. Throughout the nineteenth century, mandatory capital punishment for all or most felonies gave way to statutes limiting the death penalty to first degree murder. As juries rebelled against mandatory death sentences for even this small class of offenses, legislatures gave them discretion to grant mercy.⁴⁸ Methods of execution became progressively more “humane.”⁴⁹ Executions dwindled in number so steadily after reaching their apogee in the 1930s and be-

46. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 282–83 (1972) (Brennan, J., concurring) (“Death, of course, is a ‘traditional’ punishment We can . . . infer [from the text of the Bill of Rights] that the Framers recognized the existence of what was then a common punishment.” (citations omitted)); *id.* at 380 (Burger, C.J., dissenting) (“[T]he explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment”); *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring in the judgment) (concluding that no provision of Bill of Rights, including Eighth Amendment, can “be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted”).

47. See, e.g., *Furman*, 408 U.S. at 417, 431 (Powell, J., dissenting) (discussing “shattering effect . . . on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers” of view that Court has constitutional power to regulate and limit death penalty, and noting that strong impetus for “judicial self-restraint arises from a proper recognition of the respective roles of the legislative and judicial branches,” particularly given that “designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies” (citations omitted)); *id.* at 466 (Rehnquist, J., dissenting) (“How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid [death penalty] laws duly enacted by the popular branches of government?”); *infra* note 195.

48. See *McGautha*, 402 U.S. at 198–201 (noting that legislatures gave jurors discretion to grant mercy in capital cases to curb jury nullification).

49. See, e.g., *In re Kemmler*, 136 U.S. 436, 444 (1890) (upholding electrocution, “the most humane and practical method [of execution] known to modern science” (internal quotation marks omitted)); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 *Iowa L. Rev.* 319, 388–89 (1997) (“Legislatures and courts have consistently insisted that the primary reason states change from one execution method to

came so rare by the mid-1960s that the penalty's extinction seemed likely without a judicial nudge.⁵⁰ Nor were the condemned—heinous murderers with a sprinkling of aggravated rapists and robbers—a generally attractive constituency.⁵¹ The Court might well have thought it had done all it could for them through the burgeoning body of criminal procedure protections it was announcing in criminal and sometimes capital cases.⁵²

Yet after years of temporizing,⁵³ the Court did intervene in the capital arena. Indeed, members of the Court solicited an invitation to intervene. In 1963, Justice Goldberg published a dissent from the denial of certiorari in *Rudolph v. Alabama* identifying three questions about the death penalty's constitutionality that were not presented by the petitioner but that Goldberg thought "relevant and worthy of argument and consideration" by the Court.⁵⁴ Goldberg spoke only for himself and Justices Douglas and Brennan, and he had religious beliefs not shared by others on the Court.⁵⁵ But he may have expected some receptivity from his colleagues, none of whom rebutted his opinion, and some of whom may have been moved by an internal memorandum he circulated arguing that, by affirming capital convictions, the Court was complicit in executions.⁵⁶ When the invitations Goldberg solicited arrived, the Court repeatedly accepted.

the next is to ensure greater humaneness and standards of decency for those awaiting execution.").

50. Bureau of Prisons, U.S. Dep't of Justice, National Prisoner Statistics Bulletin No. 42, Executions 1930–1967, at 7 (1968) (noting that number of executions reached peak in 1935 with 199, dropping steadily to 117 in 1945, 76 in 1955, and 7 in 1965).

51. See *Furman*, 408 U.S. at 315 (Marshall, J., concurring) ("The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot . . . be minimized.").

52. A number of the foot soldiers in the Criminal Procedure Revolution of the 1960s were condemned defendants. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711 (1969) (granting relief based on capital prisoner's challenge to procedures used to determine guilt); *Boykin v. Alabama*, 395 U.S. 238 (1969) (same); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (same); *Giles v. Maryland*, 386 U.S. 66 (1967) (plurality opinion) (same); *Spencer v. Texas*, 385 U.S. 554 (1967) (same); *Griffin v. California*, 380 U.S. 609 (1965) (same); *Brady v. Maryland*, 373 U.S. 83 (1963) (same); *Fay v. Noia*, 372 U.S. 391 (1963) (same); *Irvin v. Dowd*, 366 U.S. 717 (1961) (same).

53. See, e.g., *Alexander Bickel*, *The Least Dangerous Branch* 242 (1962) (noting that Court "wilfully passed up" repeated opportunities to address capital punishment from late 1940s to 1960).

54. 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting from denial of certiorari) (questioning whether death penalty for rape was unconstitutional because (1) it was inconsistent with evolving standards of decency; (2) taking life to protect less than life was excessive; and (3) penalty's purposes could be achieved by lesser punishment).

55. See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 32 (1973) (noting that Justice Goldberg—expressing views shared by his law clerk Alan Dershowitz—"personally believed that the death penalty was an abomination" and "was fond of pointing out that . . . ancient Israel had abolished it in fact, if not in theory").

56. See Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment*, 27 S. Tex. L. Rev. 493, 499 (1986). For further background on Goldberg's

Justice Goldberg's cue had an immediate effect. Lawyers for the NAACP Legal Defense Fund (LDF), joined by a former federal prosecutor named Anthony Amsterdam, devised a strategy for achieving a de facto moratorium on executions and eventually convincing the Court to invalidate the penalty.⁵⁷ In the summer of 1966, Justice White granted a last minute stay of execution so LDF's client, Billy Maxwell, could seek review of the Eighth Circuit's refusal to hear an appeal from the denial of a habeas corpus challenge to Arkansas's death penalty.⁵⁸ In early 1967, the Court granted certiorari and summarily ordered the circuit court to hear the appeal, which alleged C-type systematic racial bias in the penalty's application.⁵⁹ Later that year, the Court granted review in two other cases raising death penalty questions, both decided in 1968.

In *United States v. Jackson*, the Court held unconstitutional the capital punishment provisions of the federal kidnapping statute because they reserved the death penalty for defendants who went to trial instead of pleading guilty.⁶⁰ Using F-type analysis applying established criminal procedure concepts—here, the requirement of voluntary guilty pleas—to a problem arising only in capital cases, the Court concluded that making death eligibility the price of choosing to go trial made resulting guilty pleas involuntary in violation of due process.⁶¹

In *Witherspoon v. Illinois*, the Court granted review of the pattern-focused (C-type) question whether excluding potential jurors who could follow the law at the guilt stage but had moral scruples against the death penalty produced capital juries uncommonly—and unconstitutionally—prone to convict.⁶² Taking LDF's advice as *amicus curiae*, the Court laid aside that guilt/innocence-focused question for lack of "factual information" and granted relief only from the death penalty because the trial judge had stricken all potential jurors with scruples against death, including some who said they could follow the law notwithstanding their doubts

opposition to the death penalty, see generally Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773 (1970) (arguing that death penalty is unconstitutional); Arthur J. Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 Hastings Const. L.Q. 7 (1982) (criticizing Court for rapidly vacating stay of execution via conference call).

57. See Jack Greenberg, *Crusaders in the Courts* 440–60 (1994) [hereinafter Greenberg, *Crusaders*]; Meltsner, *supra* note 55, at 30–34; cf. *Graham v. Collins*, 506 U.S. 461, 481 (1993) (Thomas, J., concurring) (describing abolitionist campaign "waged by a small number of ambitious lawyers and academics"). The author of this Article worked in the Legal Defense Fund's Capital Punishment Project from 1979 until 1985, and has represented capital inmates since then, including in the Supreme Court.

58. *Maxwell v. Bishop*, 398 F.2d 138, 139–41 (8th Cir. 1968) (tracing procedural history of case); see Meltsner, *supra* note 55, at 103.

59. *Maxwell v. Bishop*, 385 U.S. 650 (1967) (per curiam).

60. 390 U.S. 570, 572 (1968).

61. *Id.* at 583 ("[T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them.").

62. 391 U.S. 510, 512–13 (1968).

about the penalty.⁶³ In doing so, the Court passed up C-type, pattern-focused analysis in favor of F-type analysis of the consistency of the procedures used to select the capital sentencing jury with norms the Court had developed for selecting fair adjudicators at other stages of criminal cases. Relying on a prior decision holding that petit juries drawn entirely from elite segments of the community were unconstitutionally “‘organized to convict,’” the Court held that stripping capital juries of a segment of the community that could deliberate fairly produced juries unconstitutionally “‘organized to return a verdict of death.”⁶⁴

In separate opinions, Justices Douglas and White pointed out that by letting States exclude the important segment of the community that unequivocally opposes death in all cases, *Witherspoon* frustrated the majority’s goal of capital juries that express “the conscience of the community on the ultimate question of life or death.”⁶⁵ Attaining that end meant barring death qualification entirely—the solution Justice Douglas favored.⁶⁶ Doing that would have effectively abolished the death penalty by letting a single juror’s opposition to it dictate a life verdict. That result led Justice White to conclude that if the death penalty was constitutional, unlimited death qualification was as well.⁶⁷

Both 1968 cases are notable for the modesty of their (F-type) analysis. Both simply extended established constitutional controls to procedures used exclusively in capital cases.⁶⁸

On the same day in March 1969, the Court heard argument in *Boykin v. Alabama*⁶⁹ and *Maxwell v. Bishop*.⁷⁰ The former presented a direct substantive and categorical (i.e., B-type) challenge to the death penalty, at least for robbery. The latter raised the (E-type) question whether capital cases require special sentencing procedures. The Court’s decisions followed the less interventionist course set in *Witherspoon*. *Boykin* also presented the narrower, F-type question whether a guilty plea, made in the absence of notice that the accused could face the death penalty, was

63. *Id.* at 516–18 & nn.10–11.

64. *Id.* at 521 (quoting *Fay v. New York*, 332 U.S. 261, 294 (1947)).

65. *Id.* at 519.

66. *Id.* at 528 (Douglas, J., writing separately) (“I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. . . . [Doing so] results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision . . .”).

67. *Id.* at 542 (White, J., dissenting) (“If the Court can offer no better constitutional grounds for today’s decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members . . . have an authority not extended to this Court.”).

68. Although jurisprudentially modest, *Witherspoon* led to the reversal and retrial of more than one hundred death sentences. See Greenberg, *Crusaders*, *supra* note 57, at 448–49.

69. 395 U.S. 238 (1969).

70. 398 U.S. 262 (1970) (per curiam).

knowing and voluntary.⁷¹ LDF filed an amicus curiae brief making its first frontal assault on the death penalty, claiming it was (1) vestigial and too rarely employed to serve valid goals or suggest a national consensus favoring its use; (2) abhorrent to the evolving standards of decency the Court had consulted in prior Eighth Amendment cases; and (3) racially discriminatory.⁷² The Court decided the case on the guilty-plea ground. In so doing, it did not even engage in F-type analysis—extending existing rules to capital sentencing proceedings—and instead announced new rules for taking guilty pleas in all criminal cases.⁷³

Maxwell also dodged the capital issues the Court had undertaken to decide. After granting certiorari and summarily ordering the Eighth Circuit to hear Maxwell's appeal, granting certiorari again from that court's denial of the appeal, and ordering reargument, the Court declined to resolve the two E-type issues on which it had granted review—whether due process required a capital sentencing trial separate from the guilt/innocence trial and the specification of capital sentencing standards.⁷⁴ Instead, the Court again remanded to the circuit court, this time to consider a *Witherspoon* claim that the Court itself had raised for the first time at the first oral argument.⁷⁵

Having avoided Maxwell's attacks on capital sentencing conducted without standards and simultaneous with the guilt determination, the Court immediately granted review and a third argument on those issues.⁷⁶ LDF again was counsel in the case *McGautha v. California*.⁷⁷ LDF's brief was premised on an E-type claim that standardless capital sentencing violated the Due Process Clause's procedural component and on what amounted to a C-type (pattern-focused) assault on the rationality of the death penalty under the Clause's substantive component. By leading to death verdicts for "far fewer than half the defendants found guilty of

71. *Boykin*, 395 U.S. at 242–44.

72. See Brief for the NAACP Legal Defense & Educational Fund, Inc., & the National Office for the Rights of the Indigent, as Amici Curiae at 46–55, *Boykin*, 395 U.S. 238 (No. 642) [hereinafter *Boykin* Brief]; *infra* Part IX.A.2.

73. *Boykin*, 395 U.S. at 242–43 ("The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." (citation omitted)).

74. See *Maxwell v. Bishop*, 385 U.S. 650 (1967) (per curiam) (granting certiorari and requiring Eighth Circuit to rehear case); *Maxwell v. Bishop*, 393 U.S. 997 (1968) (mem.) (granting certiorari again); *Maxwell*, 398 U.S. at 267 (per curiam) (remanding without resolving questions on which review had been granted in second certiorari petition); Meltsner, *supra* note 55, at 103, 198.

75. *Maxwell*, 398 U.S. at 266–67; see Meltsner, *supra* note 55, at 211 (discussing political considerations affecting Court).

76. See *Maxwell*, 398 U.S. at 267 n.4 (noting Court's grant of certiorari in *McGautha* and companion case on same day it remanded Maxwell's case). Because Justice Fortas's replacement, Justice Blackmun, had ruled on Maxwell's case in the Eighth Circuit and had to recuse himself, the Court may have remained evenly divided. See Meltsner, *supra* note 55, at 197–98.

77. 402 U.S. 183 (1971).

capital crimes,” discretionary capital sentencing exposed a need for sentencing standards “to provide a rational basis” for patterns of jury verdicts identifying the many allowed to live and the few selected to die.⁷⁸

Judgment day came on the third try. The judgment, however, was not the one the Court had been reaching out to make since Justice Goldberg issued his request for proposals for constitutional review. According to Justice Harlan, speaking for five members of the Court, American history showed that most States wanted the death penalty and wanted it in the discretionary and standardless form that “compassionate” considerations had prompted.⁷⁹ Seemingly reaching out to reject a per se substantive, or B-type, challenge to death sentencing that the petitioners had not made, Harlan took a strongly hands-off, or A-type, stance: “In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution,” including assumedly the Cruel and Unusual Punishment Clause.⁸⁰ In a concurring opinion, Justice Black likewise rejected all constitutional challenges to the death penalty given the Due Process Clauses’ textual approval of the penalty.⁸¹

The Court also held that neither the defendant’s right not to testify at the guilt phase nor his right to testify in support of mercy on sentencing required States to separate the guilt and sentencing aspects of capital trials.⁸² Still in an A-type mode, Justice Harlan concluded that it was not the Court’s role to “guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court” but only to assure that the States had respected the “guaranteed rights of defendants” generally.⁸³

Justice Harlan’s analysis was unconvincing in places. In finding no constitutional requirement of death sentencing standards, Harlan concluded that, “[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to

78. *Id.* at 203–04 (summarizing petitioners’ arguments).

79. *Id.* at 197–203, 221.

80. *Id.* at 207; see also *id.* at 203 (“[I]t requires a strong showing to upset [the] settled [capital punishment] practice of the Nation on constitutional grounds.”).

81. *Id.* at 226 (Black, J., concurring in the judgment) (“In my view, [the Eighth Amendment] cannot be read to outlaw capital punishment It is inconceivable to me that the framers intended to end capital punishment by the Amendment.”); see supra note 43 and accompanying text.

82. *Id.* at 210–14 (majority opinion).

83. Justice Harlan continued:

From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury’s attention solely on punishment after the issue of guilt has been determined.

Id. at 221–22.

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."⁸⁴ This conclusion gave surprisingly short shrift to standards Herbert Wechsler had included in the Model Penal Code.⁸⁵ And Harlan gave no explanation for his faith that a most "human" of institutions, juries, could intuitively make the necessary distinctions in each case.⁸⁶ By dismissing McGautha's arguments as based "only" on "the peculiar poignancy of the position of a man whose life is at stake," Harlan also devalued the high stakes that he and the Court had previously seen as reason enough for special constitutional protections in death cases.⁸⁷

Nonetheless, it is hardly surprising that the Court reached Harlan's and Black's A-type bottom line—that the Constitution gives judges no leeway to constrain a penalty that the document itself contemplates, that American history had both blessed and compassionately modulated, and that the States and legislatures were best able to evaluate. The puzzle of *McGautha* and the cases leading up to it, therefore, is the Court's circuitous route to an obvious conclusion. Why had the Court opened the issue of capital constitutional lawmaking, only to avoid it repeatedly in *Witherspoon*, *Boykin*, and *Maxwell* and close it predictably in *McGautha*?

Two months later the Court posed a still more perplexing question by granting review in four cases limited to the question whether "the imposition and carrying out of the death penalty in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁸⁸ All four cases had been held up

84. *Id.* at 204.

85. Harlan dismissed Model Penal Code section 210.6 as "provid[ing] no protection against the jury determined to decide on whimsy or caprice." *Id.* at 207.

86. *Id.* at 221 (arguing that "[t]he ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is . . . illustrated by the discriminating verdict of the jury in McGautha's case" which spared the less culpable defendant's life).

87. *Id.* at 214, 216; cf. *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in the result) ("[C]apital cases . . . stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness . . ."); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (noting special procedural protections are due defendants "in deadly peril of their lives").

88. *Aikens v. California*, 403 U.S. 952, 952 (1971) (mem.). The California Supreme Court mooted one of the cases by invalidating the State's death penalty under its constitution. On the perplexing juxtaposition of *McGautha* and *Furman*, see *Furman v. Georgia*, 408 U.S. 238, 427 (1972) (Powell, J., dissenting) (noting that *McGautha* was a "singularly academic exercise[]" if the members of this Court were prepared . . . to find in the Constitution the complete prohibition of the death penalty" (quoting Brief for the Respondent at 6, *Branch v. Texas*, 404 U.S. 812 (1971) (No. 69-5031))). Although Justices Black and Harlan left the Court between the announcement of the decisions in *McGautha* and *Furman*, both were on the Court when it granted certiorari in *Furman*, and both were replaced by Justices who considered *McGautha* binding on the death penalty's constitutionality. See *id.* at 414 (Powell, J., dissenting, joined, inter alia, by Rehnquist, J.).

in the Court for nearly two years awaiting the decisions in *Maxwell* and *McGautha*.⁸⁹

IV. TAKING RESPONSIBILITY, GINGERLY (1972–1979)

A. Furman

Dicta and concurring opinions aside, *McGautha*'s due process decision did not foreclose the cruel and unusual punishment issue the Court undertook to review in *Furman v. Georgia* and three companion cases.⁹⁰ Moreover, *McGautha*'s obeisance to history's negative verdict on mandatory death sentencing,⁹¹ and its own negative verdict on the possibility that standards could meaningfully constrain discretion, meant that a persuasive Eighth Amendment attack on the only remaining option, wholly discretionary capital sentencing, would seal the punishment's fate.

On its face, the Court's 5-4 decision in *Furman* was a blockbuster, overturning every death sentence and capital statute in the nation on the grounds that discretionary death sentencing procedures violated the Eighth Amendment. Justice Powell described its "effect . . . on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers" as "shattering."⁹² The case also shattered the Court, which produced no majority view and nine separate opinions. It divided some Justices within themselves. Chief Justice Burger noted in dissent that, "[i]f we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [in opposing the death penalty for all crimes] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."⁹³ Only by "divorc[ing]" the "constitutional inquiry" from his "personal feelings as to the morality and efficacy of the death penalty" could he conclude that the penalty passed constitutional muster.⁹⁴ Justice Powell "regret[ted] the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness."⁹⁵ Justice Blackmun went further:

In the two months between *McGautha* and the certiorari grants, LDF prepared for the collapse of the moratorium on executions and for what some predicted would be "mass slaughter." Meltsner, *supra* note 55, at 240, 245–46 (citing Anthony Lewis, A Legal Nightmare, N.Y. Times, Mar. 22, 1971, at 33).

89. See Meltsner, *supra* note 55, at 239–41, 246.

90. 408 U.S. 238; see *id.* at 310 n.12 (Stewart, J., concurring) ("In *McGautha*, the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments." (citation omitted)).

91. *McGautha*, 402 U.S. at 198–99.

92. *Furman*, 408 U.S. at 417–18 (Powell, J., dissenting).

93. *Id.* at 375 (Burger, C.J., dissenting).

94. *Id.*

95. *Id.* at 465 (Powell, J., dissenting). On Powell's personal opposition to the death penalty, see Stuart Taylor Jr., Powell on His Approach: Doing Justice Case by Case, N.Y. Times, July 12, 1987, at 1; see also Joan Biskupic & Fred Barbash, Retired Justice Lewis Powell Dies at 90, Wash. Post, Aug. 26, 1998, at A1 ("[Justice Powell] was the author of a

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty [But it is t]here—on the Legislative Branch . . . , and secondarily, on the Executive Branch . . . where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.⁹⁶

For all its practical impact and divisiveness, *Furman* was a doctrinal underachiever. It was of a piece with the anticlimactic decisions in *Witherspoon*, *Boykin*, *Maxwell*, and *McGautha*. The trouble began with the limited question the Court granted certiorari to decide: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"⁹⁷ The press, parties, and amici assumed the question was of the B-type—whether death was a cruel and unusual punishment for rape or murder.⁹⁸ So did six members of the Court. Justices Brennan and Marshall pronounced the death penalty unconstitu-

1987 five-Justice ruling rejecting arguments that a state's capital punishment system be struck down because statistics suggested blacks were more likely to get the death penalty than whites. After he stepped down . . . [he] said he regretted [this decision.]; infra notes 238, 630.

96. *Furman*, 408 U.S. at 405–06, 410 (Blackmun, J., dissenting); see also *Gregg v. Georgia*, 428 U.S. 153, 174–75 (1976) (plurality opinion) (expressing view that judges should not act as legislators).

97. *Furman v. Georgia*, 403 U.S. 952, 952 (1971) (mem.).

98. See, e.g., *Furman*, 408 U.S. at 397 (Burger, C.J., dissenting) (noting that proceduralist tack taken by plurality Justices was "not urged in oral arguments or briefs"); Brief Amicus Curiae of Theodore L. Sendak, Attorney General of Indiana at 4, *Furman*, 408 U.S. 238 (No. 69-5003) ("The issue involves a question of whether capital punishment is in violation of the 'cruel and unusual punishment' clause of the U.S. Constitution, Eighth Amendment."); Brief Amici Curiae & Motion for Leave to File Brief Amici Curiae of the Synagogue Council of America et al. at 8, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027) ("Imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment as made applicable to the states by the Fourteenth, and especially so in cases of non-homicidal rape."); Motion of State of Alaska for Leave to File Brief & Brief as Amicus Curiae at 1, *Aikens*, 406 U.S. 813 (No. 68-5027) ("The minimum requirements of the Eighth Amendment measured by an 'objective' test, the needs of society, render the death penalty unconstitutional as 'cruel and unusual punishment.'"); Richard Halloran, *Death Penalties Argued in Court*, N.Y. Times, Jan. 18, 1972, at 1.

tional for all offenses;⁹⁹ Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist hewed to *McGautha's* A-type, hands-off answer.¹⁰⁰

In fact, the question referred to the death penalty “in this case.” And the Court granted certiorari in four cases, as if the answer might vary from State to State, crime to crime, or case to case.¹⁰¹ The question thus invited the lesser form of review that the three “plurality” Justices—Douglas, Stewart, and White—actually provided.¹⁰² Justice White’s opinion best describes the C-type analysis each Justice applied to the death sentencing patterns that each had observed over “years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.”¹⁰³ Parts of Justice Douglas’s opinion also suggested a D-type conclusion that the particular crimes and criminals did not warrant death and that other, illegitimate factors drove the outcomes.¹⁰⁴ And the Justices’ attacks on “untrammelled discretion” suggested an E-type concern for fair capital sentencing procedures.¹⁰⁵

The plurality’s dodging of “the ultimate question [that a majority of the Court] would decide” could not be anchored as firmly as Justice Stewart thought on the prudential value of deciding as little as possi-

99. *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (“The punishment of death is . . . ‘cruel and unusual,’ and the States may no longer inflict it as a punishment for crimes.”); *id.* at 363–66 (Marshall, J., concurring) (concluding that death penalty is unconstitutional *per se* because its burden falls upon “the poor, and the members of minority groups who are least able to voice their complaints against capital punishment . . . [thus] leav[ing] them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape” (citation omitted)).

100. *Id.* at 404 (Burger, C.J., dissenting) (“The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.”); *id.* at 410–11 (Blackmun, J., dissenting) (“[W]ere I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. . . . I do not sit on these cases, however, as a legislator Our task . . . is to pass upon the constitutionality of legislation that has been enacted”); *id.* at 464–65 (Powell, J., dissenting) (“[I]mpatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers.”); *id.* at 470 (Rehnquist, J., dissenting) (“The very nature of judicial review . . . makes . . . judicial self-restraint . . . an implied, if not an expressed, condition of the grant of authority of judicial review. The Court’s holding in these cases has been reached, I believe, in complete disregard of that implied condition.”).

101. The cases involved a multiple murder, a single homicide by a mentally deficient defendant, rape by force, and rape by threat. All the defendants were black, the victims white. Meltsner, *supra* note 55, at 246–47.

102. See *supra* notes 17–22 and accompanying text.

103. *Furman*, 408 U.S. at 313 (White, J., concurring).

104. See *id.* at 252–53 (Douglas, J., concurring) (describing petitioners’ crimes and circumstances, noting, for example, that *Furman*, a black man with “[m]ental [d]eficiency” who suffered psychotic episodes, shot his victim through a closed door).

105. See, e.g., *id.* at 248 (criticizing unrestrained freedom of juries to choose whether to impose death).

ble.¹⁰⁶ The passive virtues¹⁰⁷ hardly justified a decision wiping out hundreds of judgments and scores of state and federal statutes and forcing States to adopt new laws—while obliging them to await further pronouncements from the Court that might render the effort a colossal waste of time. Nor was it clear what was gained by temporizing, given how frequently and thoroughly the Court had considered the death penalty's constitutionality in the preceding years and given the clarity of the available options: mandatory, wholly discretionary, guided, or no death sentencing.¹⁰⁸

Moreover, sidestepping the central question required the Court to make new constitutional law. By its terms, the Cruel and Unusual Punishment Clause requires substantive and facial (B-type) analysis of punishments, at least when applied to given crimes.¹⁰⁹ The Court had to break new legal ground to conclude that the constitutionality of the death penalty could turn on something other than the attributes of death as a punishment and murder as a crime, such as racial patterns in the imposition of the penalty (C-type analysis), or how aggravated a particular murder was (D-type), or the fairness of the procedures used to mete out the sanction (E- and F-type). The plurality's turn toward procedural analysis was particularly odd, given *McGautha*'s rejection of all pressing procedural claims under the provision of the Constitution that governs such matters. Justice Douglas could call his *McGautha* dissent and *Furman* opinion consistent, but he aptly questioned how Justices Stewart and White, who were "imprisoned in the *McGautha* holding," could justify their procedural tack in *Furman*.¹¹⁰

106. See *id.* at 306 (Stewart, J., concurring).

107. See Bickel, *supra* note 53, at 242–43 (“[The] Court has missed or has willfully passed up its most signal opportunities to shape and reduce the [death penalty].”).

108. See *supra* notes 53–91 and accompanying text.

109. The Court has always treated the question this way outside the capital context. See, e.g., *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“[A] criminal sentence must be proportionate to the crime for which the defendant has been convicted.”); *Rummel v. Estelle*, 445 U.S. 263, 265 (1980) (assessing whether “life imprisonment was ‘grossly disproportionate’ to the three felonies that formed the predicate for [Rummel’s] sentence”); *Woodson v. North Carolina*, 428 U.S. 280, 323–24 (1976) (Rehnquist, J., dissenting) (pointing out that conclusion that category of punishment is not cruel and unusual “has traditionally ended judicial inquiry in our [Eighth Amendment] cases” and collecting cases).

110. *Furman*, 408 U.S. at 248 & n.11 (Douglas, J., concurring). Justice Stewart claimed that *McGautha*'s Fourteenth Amendment holding was irrelevant to the Court's later, Eighth Amendment decisions. See *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (plurality opinion) (“*McGautha* was not an Eighth Amendment decision.”); *Furman*, 408 U.S. at 310 n.12 (Stewart, J., concurring) (noting that *McGautha* “expressly declined” to consider Eighth Amendment claims). As Justice Douglas pointed out, however, *McGautha*'s resolution of all relevant procedural questions under the provision of the Constitution that governs process undermined this claim. *Id.* at 248 & n.11 (Douglas, J., concurring); see *Woodson*, 428 U.S. at 324 (Rehnquist, J., dissenting) (observing that imposition of “procedural guarantees” on punishment that “concededly [is] not cruel and unusual . . . is squarely contrary to *McGautha*”).

Most peculiarly, the *Furman* plurality reached a conclusion that appeared to establish the death penalty's unconstitutionality as a whole. From *McGautha* forward, the Court had assumed there were only three types of capital sentencing—mandatory, legally guided, and discretionary. *McGautha* ruled out the first two sentencing options—mandatory given history's negative verdict¹¹¹ and legally guided because it could not be humanly realized.¹¹² Though *Furman* may have done nothing else, it clearly ruled out the remaining discretionary method. All that needed to be done to declare the penalty unconstitutional, therefore, was to draw a deductively obvious conclusion.

There was a reason to proceed the way the plurality Justices chose, but it was not the virtue of passivity. It was nearly the opposite: Forcing States to engage in an onerous legislative redrafting exercise might generate information the Court could use to improve its own constitutional decisionmaking. A chief abolitionist argument in *Boykin*, *McGautha*, and *Furman* was that the death penalty was so rarely carried out and so evidently on its way to extinction that the “‘evolving standards of decency that mark the progress of a maturing society’” had left the death penalty behind.¹¹³ *Furman* tested this argument, using state legislatures, prosecuting offices, and juries as the laboratory. If States wanted the death penalty, they could prove it by drafting and applying new, more careful, and more costly provisions.¹¹⁴ If most failed to reinstate, they thereby would bless the alleged abolitionist trend and enable the Court thereafter, if called on to invalidate a small number of vestigial statutes, to share responsibility with a majority of legislatures.¹¹⁵

111. See *McGautha v. California*, 402 U.S. 183, 198 (1970) (describing historical “rebellion” of American jurors against mandatory capital punishment); see also *Woodson*, 428 U.S. at 295–97 (plurality opinion) (describing American jurisdictions’ evolution away from mandatory death sentences); *Furman*, 408 U.S. at 339 (Marshall, J., concurring) (same); *id.* at 402–03 (Burger, C.J., dissenting) (highlighting “American abhorrence” of mandatory death penalty).

112. *McGautha*, 402 U.S. at 204 (“[C]hanneling capital sentencing discretion [appears to involve] tasks which are beyond present human ability.”); see *supra* notes 76–92 and accompanying text.

113. See *Boykin* Brief, *supra* note 72, at 24–25, 32, 40–43 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)) (arguing that capital punishment is inconsistent with modern values as documented by dwindling number of executions); see also *Furman*, 408 U.S. at 335–41 (Marshall, J., concurring) (finding trend toward lenience in history of death penalty in America).

114. See *Furman*, 408 U.S. at 385 (Burger, C.J., dissenting) (considering whether existing death sentencing statutes were untrustworthy “indicia of contemporary attitude” and whether “legislatures ha[d] abdicated their essentially barometric role with respect to community values” by letting statutes fall into desuetude); see also John Hart Ely, *Democracy and Distrust* 65, 173 (1980) (arguing that “post-*Furman* spate of reenactments” belied argument that death penalty was “out of accord with contemporary community values”).

115. This is not an argument that the Court meant to lead public opinion, but that the Court was looking for a more discerning way to follow the public. Cf. Burt, *supra* note

The plurality Justices' experiment in *Furman* was not one the abolitionists had suggested, and it did not prove their thesis. Within months, Congress and thirty-five of the pre-*Furman* capital States reinstated the death penalty.¹¹⁶ A substantial minority bucked the historical trend that had overwhelmed death sentencing in the nineteenth century and adopted mandatory death sentences for capital murders; a smaller minority permitted death for rape, robbery, and kidnapping.¹¹⁷ Within three years, prosecutors had sought, juries had imposed, and state high courts had affirmed numerous new-style death verdicts, and dozens of condemned defendants were on the Court's doorstep seeking review. In deciding what to do next, the Court closely followed the returns on the nationwide referendum it had organized.¹¹⁸

B. *The July 2 Cases*

The Court quickly granted certiorari in five cases, each involving a statute representative of those adopted after *Furman*. Taking the *Furman* plurality at its word, one might have expected the Court to defer deciding the B-type constitutionality per se question until the new statutes generated enough of a track record to allow C-type, pattern-focused analysis of their application. But *Furman* itself made that route impractical. Waiting for sentencing patterns to develop would have required the Court either to grant stays indefinitely, extending the moratorium on executions for perhaps another decade, or to signal the moratorium's end and the onset of harm that later B- or C-type rulings could not repair. The Court had no choice but to postpone the lesser, C-type question and address only the petitioners' B-type challenges to the death penalty in the abstract.

3, at 1766 (characterizing post-*Furman* reenactments as "response to the provocation from the Court").

116. *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

117. See *Roberts v. Louisiana*, 428 U.S. 325, 361–62 & n.8 (1976) (White, J., dissenting) (citing Louisiana and North Carolina's return to mandatory death sentences); Greenberg, *Crusaders*, supra note 57, at 452 (discussing legislative response to *Furman*, including adoption of mandatory capital statutes by minority of States and strong trend away from death penalty for rape).

118. See *Gregg*, 428 U.S. at 179–80 (plurality opinion) (noting that, contrary to "asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated . . . , it is now evident that a large proportion of American society continues to regard [death] as an appropriate and necessary sanction," as was "marked[ly] indicat[ed] by . . . the legislative response to *Furman*"); *Roberts*, 428 U.S. at 351–53 (White, J., dissenting) (concluding that "recent events" "foreclosed" claim "that the death penalty had become unacceptable to the great majority of the people of this country and for that reason . . . was invalid"). Particularly striking is Justice Stewart's change in tone over the six years between his decision for the Court in *Witherspoon* and his joint plurality opinion in the *July 2 Cases*, quoted above. Cf. *Witherspoon v. Illinois*, 391 U.S. 510, 519–20 (1968) ("[I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of . . . people [who favor the death penalty] cannot speak for the community . . . [but] only for a distinct and dwindling minority."). Notably, the referendum the Court provoked coincided with another—Richard Nixon's landslide conservative victory over George McGovern in the 1972 presidential election.

Likewise, in addressing the petitioners' E-type attacks on the new sentencing procedures and standards, the Court limited its ruling to strictly facial review of the statutes. Reversing the usual order, the Court put off any challenge to the statutes' application in the particular cases before it.¹¹⁹

1. *Guided Discretion Affirmed.* — The Court decided the five cases on Friday, July 2, 1976.¹²⁰ Thirteen years after Justice Goldberg first posed the B-type question and nine years after the Court first took certiorari to answer it, the Court issued a decision claiming to do so. The answer the Court gave, however, was a question—the (E-type) question the Court supposedly had resolved in *McGautha*.¹²¹ In deciding whether the Constitution lets States execute people, the Court said, “Maybe.” The death penalty may be constitutional if, upon future consideration, it turns out that standards of the sort the Court in *McGautha* rejected as inevitably ineffective, but which Georgia, Florida, and Texas adopted after *Furman*, provide a workable way to distinguish criminals who deserve to die from those who do not.

Something slightly more than this question was necessary, however, to explain how the Court got from *Furman* and *McGautha* to its conclu-

119. *Gregg v. Georgia*, 423 U.S. 1082 (1976) (mem.) (limiting question to whether imposition of death penalty generally under Georgia's new statute violated Eighth Amendment); see *Gregg*, 428 U.S. at 201 n.51 (plurality opinion) (noting Georgia's statute was only under review schematically, not as applied); *Proffitt v. Wainwright*, 685 F.2d 1227, 1233 n.2 (11th Cir. 1982) (granting habeas review of as-applied challenges to death penalty in one of *July 2 Cases*, because prior Supreme Court opinion in same case addressed only facial attacks). Upon subsequent review in the courts, two of the three death sentences affirmed in the *July 2 Cases* were overturned on as-applied grounds. *Id.* at 1269–70 (overturning *Proffitt*'s sentence because it was based on evidence he had no opportunity to rebut and on invalid nonstatutory aggravating factors); *Jurek v. Estelle*, 623 F.2d 929, 941–42 (5th Cir. 1980) (invalidating death sentence because it was based in part on involuntary confession). The third inmate, Troy Gregg, was killed after escaping from death row, and judicial review of his death sentence was never completed. William McFeely, *When the State Kills*, Hist. News Network, July 16, 2001, available at <http://hnn.us/articles/printfriendly/147.html> (on file with the *Columbia Law Review*) (“Gregg later died in a shooting following a prison break.”).

120. *Gregg*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts*, 428 U.S. 325. Justices Stewart, Powell, and Stevens cowrote the plurality opinion in all five cases. Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgments in *Gregg*, *Jurek*, and *Proffitt*, which upheld legally guided statutes, and dissented in *Woodson* and *Roberts*, which barred mandatory death sentencing. Justice Blackmun reached the same conclusions as Justice White in one-sentence opinions citing his *Furman* dissent. Justices Brennan and Marshall dissented in the legally guided cases and concurred separately in the mandatory cases on the basis of the death penalty's invalidity in all circumstances.

121. See James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the “Boiler Plate”*: Mental Disorder as a Mitigating Factor, 66 *Geo. L.J.* 757, 778 (1978) (“The Supreme Court has unequivocally held that standardless death sentencing is unconstitutional, and yet in the *July 2 Cases* it failed to provide much direction concerning what the source of standards should be. . . . Consequently, lawmakers and jurists face a series of confounding questions . . .” (citations omitted)).

sion in the *July 2 Cases*. Recall the *Furman-McGautha* syllogism the death sentenced inmates advanced in the *July 2 Cases*: (1) “[D]iscretion to impose or not to impose the death penalty” assures that it will be “imposed discriminatorily, wantonly and freakishly, and so infrequently that any death sentence [is] cruel and unusual.”¹²² (2) The statutory criteria the post-*Furman* statutes adopted from the Model Penal Code are so “vague” that death “will inexorably be imposed” in a discretionary manner, and thus “in as discriminatory, standardless, and rare a manner,” as before.¹²³ Therefore, (3) death sentences produced by the new criteria are “invalid.”¹²⁴

Justice White rejected this syllogism in a concurring opinion in the lead *July 2 Case*, *Gregg v. Georgia*, which upheld Georgia’s guided discretion statute.¹²⁵ In doing so, White deemed unproven as of 1976 the premise drawn from *McGautha*¹²⁶—a premise White had endorsed when that case was decided five years earlier.¹²⁷ Although standards might indeed turn out to be “meaningless ‘boilerplate,’”¹²⁸ White was no longer willing to “assume” they would be. Instead, their adoption by a large number of States in the wake of *Furman* left him cautiously optimistic that standards could work. Georgia has tried “to guide the jury in the exercise of its discretion while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail.”¹²⁹ On the contrary, as aggravating factors limit the “types of murders for which

122. *Gregg*, 428 U.S. at 220–21 (White, J., concurring in the judgment) (citations omitted) (summarizing petitioner’s argument based on *Furman*); see *supra* notes 17–22, 111–115 and accompanying text (discussing Court’s analysis in *Furman*).

123. *Gregg*, 428 U.S. at 221 (White, J., concurring in the judgment) (summarizing petitioner’s argument that guided discretion statutes could not effectively restrain jury discretion). On the Court’s conclusion in *McGautha* that written guidelines would not likely constrain jury discretion, see *supra* notes 84–91 and accompanying text.

124. *Gregg*, 428 U.S. at 221 (White, J., concurring in the judgment).

125. *Id.* at 220–21.

126. See *id.* at 221–22 (refusing to “accept the naked assertion that [statutory sentencing standards are] bound to fail” to “guide the jury in the exercise of its discretion”).

127. *McGautha v. California*, 402 U.S. 183, 202–03 (1971) (majority opinion, in which White, J., concurred) (“The infinite variety of cases and facets of each case would make general standards either meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.”).

128. *Id.* In a concluding passage in *Gregg*, Justice White restated—in strikingly similar terms—Justice Harlan’s conclusion for the majority in *McGautha*, then deemed its implications so extreme that it must be untrue:

Petitioner’s argument that there is an unconstitutional amount of discretion in the system . . . seems to be in final analysis an indictment of our entire system of justice . . . [and a claim] that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law.

Gregg, 428 U.S. at 225–26 (White, J., concurring in the judgment).

129. *Gregg*, 428 U.S. at 222 (White, J., concurring in the judgment).

the death penalty may be imposed . . . , it becomes reasonable to expect that juries" will impose death often enough to avoid "freakish[]" or "infrequent[]" sentencing.¹³⁰

Moreover, "the Georgia Legislature was not satisfied with a system [of standards] which might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency for certain serious murders."¹³¹ The legislature additionally required the Georgia Supreme Court to "decid[e] whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion," by comparing each death sentence imposed to "penalties imposed in 'similar cases' [to determine] whether the penalty is 'excessive or disproportionate.'"¹³² Absent an "attempt[] to establish" its incapacity, Justice White would "not assume" the Georgia high court would fail.¹³³ "There is," he repeated, "reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman*."¹³⁴ Optimism aside, however, Justice White clearly implied that the Court would remain open, at the least, to C-type challenges to sentencing patterns the Georgia statute generated and E-type challenges to particular standards and appellate review procedures on the ground that they were unable, as applied, to provide the promised guidance and proportionality.

The plurality opinion, jointly written by Justices Stewart, Powell, and Stevens, gave a similarly question-begging answer to the B-type query as to whether Georgia's new guided discretion statute was constitutional. "Yes on its face," the plurality seemed to say, "but only given the availability of future E-type adjudication to determine the propriety or necessity of each particular standard and procedure." Not unlike Justice White's opinion, the plurality's began by attributing to an unnamed "some" a "suggest[ion]" that Justice Stewart himself had joined in making in *McGautha*: "[S]tandards to guide a capital jury's sentencing deliberations are impossible to formulate."¹³⁵ The plurality turned this suggestion aside based

130. *Id.*

131. *Id.*

132. *Id.* at 222–23.

133. *Id.* at 224 (noting that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside" and that "[p]etitioner has . . . not . . . attempted to establish that the Georgia Supreme Court failed properly to perform its task in this case, or that it is incapable of performing its task . . . ; and this Court should not assume that it did not do so").

134. *Id.* at 222; see *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (White, J., concurring in the judgment) (upholding Florida's death penalty statute because, like Georgia's, it avoids "freakish[]" imposition of death penalty).

135. *Gregg*, 428 U.S. at 193 (plurality opinion). In a footnote, the plurality implied that the "some" making the suggestion were the *McGautha* majority, Justices Stewart and White included. *Id.* at 193 n.43 (citing *McGautha v. California*, 402 U.S. 183, 204–07 (1971)). Like Justice White, the plurality denigrated the suggestion as "virtually unthinkable" given its implications for the "rule[] of law." *Id.* at 193.

on the obvious "fact" (lost on the Court five years earlier) "that such standards *have* been developed . . . [by] the drafters of the Model Penal Code."¹³⁶

The plurality acknowledged that "such standards are by necessity somewhat general."¹³⁷ It gave as an example Georgia's statutory aggravating factor that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery"—a factor arguably present "in any murder case."¹³⁸ The problem was not fatal, however, because the "language need not be construed in this way, and there is no reason to *assume* that the Supreme Court of Georgia will adopt such an open-ended construction."¹³⁹ The Court noted that "there is no claim that the jury *in this case* relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance" and that, "[i]n light of the limited grant of certiorari . . . , we review . . . statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing *scheme* invalid."¹⁴⁰ Impliedly, a jury's actual reliance on an open-ended circumstance would be the (E-type) basis for reviewing the factor's application in particular cases to see if it indeed unconstitutionally failed to guide the jury's sentencing discretion and, if so, for overturning the sentence.¹⁴¹

Through a remarkable succession of double negatives in its closing paragraphs, the plurality hinted that, short of a B-type attack on the constitutionality of death for any and all deliberate murders, every challenge to the death penalty remained fair game. First, the Court invited C-type, pattern-focused review:

Considerations of federalism, as well as respect for the ability of a legislature to evaluate . . . the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.¹⁴²

Then it opened the door to other types of review:

But . . . when a life has been taken deliberately by the offender [inviting B-type, categorical review of the death penalty for other offenses], we cannot say that the punishment is invariably disproportionate to the crime [inviting D-type, case-by-case review of the proportionality of death in particular deliberate-

136. *Id.* (emphasis added).

137. *Id.* at 193–94.

138. *Id.* at 200–01 (acknowledging that on its face "vile, horrible or inhuman" factor might "fail[] to reduce sufficiently the risk of arbitrary infliction of death sentences").

139. *Id.* at 201 (emphasis added).

140. *Id.* at 200, 201 n.51 (emphasis added).

141. See *California v. Ramos*, 463 U.S. 992, 1000 (1983) ("In *Gregg* . . . the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*.").

142. *Gregg*, 428 U.S. at 186–87 (plurality opinion).

murder cases]. It is an extreme sanction, suitable to the most extreme crimes [same]. We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense [or] of the character of the offender [same], and regardless of the procedure followed in reaching the decision to impose it [inviting E- and F-type review].¹⁴³

The Court did, however, reject the petitioners' broadest B-type claims that death as a punishment is unconstitutional in all cases or at least when imposed using standards and procedures that permit sentencing discretion. In doing so, the Court fell back on A-type arguments for deference that might well have caused it to abstain from addressing the death penalty in the first place—and might well justify it in recoiling from further adjudication in the future. The penalty is endorsed in “the text of the Constitution itself”; executions have long been an accepted part of the nation's criminal justice systems; precedents “repeatedly . . . recognize[] that capital punishment is not invalid”; and courts have a “limited role to . . . play[]” in reviewing this and other punishments, given both the presumption of validity attached to legislation adopted and revisable through “normal democratic processes” and the difference between “act[ing] as judges [and acting] as legislators.”¹⁴⁴

In sum, after a decade or more of trying, the Court could do no better than a predictable, but double-negative-tempered and adverbially qualified, response to the B-type question that explicitly begged all manner of C-, D-, E-, and F-type questions. It remained to be seen whether the Court was simply displacing to the retail level of case-by-case (D-type) or at least pattern-focused (C-type) analysis the wholesale B-type question it had only weakly decided in the *July 2 Cases*, or was replacing all types of substantive review with close statute-by-statute or case-by-case procedural

143. *Id.* at 187. Other aspects of the opinions invite E-type review of the constitutionality of particular standards and procedures as applied. First is the Justices' focus on the statutes' promised “guidance regarding the factors about the crime and the defendant that the State . . . deems particularly relevant to . . . sentencing.” *Id.* at 192; see *id.* at 222 (White, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion). Second is the emphasis on the statutes' supposed “narrowing [of] the categories of murders for which a death sentence may ever be imposed.” *Jurek*, 428 U.S. at 270 (plurality opinion). Third is the fact that the statutes allow for “consider[ation] on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.” *Id.* at 271. Fourth, the Justices note the statutes' “careful instructions on the law and how to apply it.” *Gregg*, 428 U.S. at 193 (plurality opinion). Finally, the Justices rely on statutory promises of “meaningful appellate review,” by “compar[ing] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.” *Id.* at 195, 198; see also *Proffitt*, 428 U.S. at 253 (plurality opinion) (relying on statute's promise that state high court would “review[] and reweigh[]” all “aggravating and mitigating circumstances”).

144. *Gregg*, 428 U.S. at 174–78 (plurality opinion); see *id.* at 226 (White, J., concurring in the judgment) (referencing *Roberts v. Louisiana*, 428 U.S. 325, 350–56 (1976) (White, J., dissenting)).

scrutiny of the E- or at least F-type, or truly was intending to resurrect the A-type option of blanket deference to state legislatures.

2. *Mandatory Death Sentencing Rejected.* — The Court hinted at where it was headed in two *July 2 Cases* overturning mandatory death sentences. The Court's first two reasons for doing so did not indicate its future intentions; the third did.

Retracing Justice Harlan's historical analysis from *McGautha*, the Stewart-Powell-Stevens plurality relied initially on history's rejection of mandatory death sentencing.¹⁴⁵ It discounted the countervailing evidence of several States' post-*Furman* enactment of mandatory sentencing as an understandable but misguided effort to follow the Court's "multi-opinioned" decision in *Furman*.¹⁴⁶ *McGautha* had rejected legally guided sentencing as unworkable, and *Furman* had rejected discretionary sentencing as arbitrary, leaving only the mandatory approach that *McGautha* had criticized but not forbidden.¹⁴⁷ Mandatory death sentences for all murderers were also directly responsive to Justice White's infrequency concerns in *Furman*.¹⁴⁸ Notwithstanding the false positives generated by *McGautha* and *Furman*, the plurality viewed mandatory sentencing as atavistic and inconsistent with "evolving standards of decency."¹⁴⁹ Moving from categorical to pattern-focused analysis, the plurality next relied on *McGautha*'s description of the historical foibles of mandatory sentencing to predict that it would invite standardless jury nullification, replicating the arbitrary, capricious, and discriminatory sentencing patterns invalidated in *Furman*.¹⁵⁰

145. *Woodson v. North Carolina*, 428 U.S. 280, 288–301 (1976) (plurality opinion); see also *id.* at 305–06 (Brennan, J., concurring in the judgment) (referencing his dissent in *Gregg*); *id.* at 306 (Marshall, J., concurring in the judgment) (same); *Roberts*, 428 U.S. at 332–34 (plurality opinion) (tracing history of substitution of discretionary for mandatory death sentencing); *supra* notes 27–28, 48, 91 and accompanying text.

146. *Woodson*, 428 U.S. at 298–99 (plurality opinion) ("The fact that some States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.").

147. See *McGautha v. California*, 402 U.S. 183, 199 (1971) (criticizing mandatory death sentencing in part because of its history of juror nullification).

148. See *Roberts*, 428 U.S. at 345 (White, J., dissenting) (describing concern that "seldom" and "freakishly" imposed death penalty violated Eighth Amendment); Liebman & Marshall, *supra* note 6, at 1621–23, 1627–28 (noting Justice White's concern and describing how mandatory death sentences would address it); *supra* notes 21–22 and accompanying text.

149. *Woodson*, 428 U.S. at 293 (plurality opinion). The plurality found evidence in "[t]he actions of sentencing juries . . . that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers" and noted the Court's own recognition of "our society's aversion to automatic death sentences." *Id.* at 295–96.

150. *Id.* at 302–03 ("Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly.").

As the dissenting Justices noted, the plurality's B- and C-type analyses did not explain why the deference it gave the "guided discretion" statutes on separation of powers and federalism grounds, notwithstanding *McGautha's* recent criticism of them, did not extend to mandatory statutes and their potential to generate outcomes different from those mandatory sentencing produced when it was last in vogue.¹⁵¹ Still, the plurality's decision was noncommittal about how interventionist it intended to be in the aftermath of *Furman's* pulse-taking. Refusing to set the country back 150 years because of misunderstandings about the modesty of its intentions in *Furman* and *McGautha* did not commit the Court to intrusive regulation of statutes that honored *Furman* by abandoning unalloyed discretion. Nor did the historical ground ensnare the Court very deeply in the doctrinal difficulties created by Justice White's and Justice Stewart's contradictory, more-is-better versus less-is-better analyses in *Furman*.¹⁵²

The plurality's final reason for rejecting mandatory sentencing, however, drew the Court directly into that doctrinal thicket. History aside, the plurality concluded, mandatory death sentencing is unconstitutional because it takes no account of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁵³ At the least, this conclusion embodied an E-type requirement that mitigating factors be considered in capital cases though no such requirement applied in noncapital cases.¹⁵⁴ Portending more intervention in the future is a passage supporting this conclusion—a passage the Court has cited more frequently than any other in the *July 2 Cases*: Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."¹⁵⁵

151. *Id.* at 307–08 (Blackmun, J., dissenting); *id.* at 312–13 (Rehnquist, J., dissenting); *Roberts*, 428 U.S. at 348–49 (White, J., dissenting).

152. See Liebman & Marshall, *supra* note 6, at 1620–29 (describing contradiction between Stewart's and White's understandings of *Furman*); *supra* notes 19–22 and accompanying text. Justice White acknowledged that mandatory sentencing might cause some jury nullification but predicted it nonetheless would lead to more frequent imposition of the death penalty than either wholly discretionary sentencing or guided discretion. See *Roberts*, 428 U.S. at 348–49, 360–61 (White, J., dissenting). The plurality agreed with White's belief that, nullification notwithstanding, mandatory death sentencing would increase numerosness, but made clear that it considered narrowing, not numerosness, to be the key constitutional goal. See *Woodson*, 428 U.S. at 303 (plurality opinion) ("While a mandatory death penalty statute may . . . increase the number of persons sentenced to death, it does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.").

153. *Woodson*, 428 U.S. at 303–05 (plurality opinion).

154. *Cf. Williams v. New York*, 337 U.S. 241, 251–52 (1949) (ruling that there is no general constitutional requirement that sentencers consider mitigating factors).

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

Insisting upon "particularized consideration of relevant aspects of the character and record of each convicted defendant" as a "constitutionally indispensable" mechanism for achieving "reliability"¹⁵⁶ had three broad implications. First, it suggested that the Eighth Amendment required not just that the penalty of death generically fit the crime of deliberate murder, but that each application of the penalty reliably fit the aggravating and mitigating "facets of the character and record of the individual offender or the circumstances of the particular offense."¹⁵⁷ The suggestion that the Constitution required D-type constitutional analysis of the proportionality of the death penalty in each case was evident.

Second, the assumption that "there are murderers" for whom death is appropriate and "many others" for whom it is not,¹⁵⁸ and the demand that capital sentencing statutes establish procedures requiring sentencers to reliably identify the factors pulling in either direction in each case, suggested a desire to transform each sentencing jury into a mini-Supreme Court charged with assuring that any death sentence it imposed was proportionate to the particularized aggravating and mitigating factors. Delegating the D-type constitutional analysis to the jury might get the Court off the hook for that kind of analysis, but the delegation seemed to commit the Court to ongoing E-type scrutiny of specialized death sentencing standards and procedures to make sure that they channeled jury decision-making into the requisite constitutional judgment. The delegation also implied a need for ongoing C-type scrutiny of the pattern of outcomes the Court's surrogates were generating.

As Justice White and his more-is-better allies pointed out in the most strident portions of their angry dissents,¹⁵⁹ the plurality's reasoning portended review of every statute, procedure, and pattern of sentencing outcomes for consistency with Justice Stewart's less-is-better approach. The plurality's reasoning compelled the B-, C-, and E-type questions whether each statute and its component standards and procedures can target, and whether over time they effectively have targeted, death sentences on the relatively small number of deliberate murders in which aggravation net of mitigation is high.¹⁶⁰ The Court's decision to make

156. *Id.* at 303-05.

157. *Id.* at 304.

158. *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976) (plurality opinion).

159. *Woodson*, 428 U.S. at 316 (Rehnquist, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (White, J., dissenting).

160. See Liebman & Marshall, *supra* note 6, at 1626-27, 1631 (detailing how Stewart-Stevens less-is-better view leads to requirement of careful consideration of all mitigation in order to be able to calculate amount of net aggravation and thus to determine whether case is sufficiently close to aggravated core of deliberate murders to warrant death penalty). This interpretation of this aspect of the *July 2 Cases* illustrates why the plurality did not contradict itself when it criticized mandatory statutes for imposing too little control on mercy via jury nullification but too much control on mercy via mitigating factors. Cf. *Woodson*, 428 U.S. at 321 (Rehnquist, J., dissenting) (maintaining that plurality contradicts its own requirement of "'particularized consideration'" by reserving question of constitutionality of extremely narrow mandatory death penalty statutes (quoting *id.* at 303

this third intervention-inviting argument when the other two less ambitious points sufficed poses anew the overarching question we have been considering. Repeatedly, in *Boykin*, *Witherspoon*, *Maxwell*, *McGautha*, *Furman*, and the *July 2 Cases*, the Court found the death penalty waters uncomfortably cold whenever it dipped in its toe. Why, then, did the Court keep promising, and pantomiming, a swan dive?

C. *The Late 1970s*

During the late 1970s, the Court continued making capital constitutional law. A number of its decisions were terse summary per curiam reversals that advanced only modest E- and F-type propositions and revealed no major effort to expand the Court's role.¹⁶¹ Two late-1970s decisions did, however, take on broader issues.

In *Coker v. Georgia*, a four-person plurality ruled that Georgia's reinstated death penalty for rape violated the Eighth Amendment because Georgia was one of only a few States permitting death for nonhomicidal rape,¹⁶² thus violating the evolving standards of decency and the Justices' "own judgment" that death was excessive for offenders who did not

(plurality opinion)); *Roberts*, 428 U.S. at 348 (White, J., dissenting) (arguing that plurality's toleration of unfettered mitigation contradicted its attack on unfettered jury nullification); sources cited infra notes 315, 439–440. Nullification is uncontrolled because it occurs without full information about the defendant and without instructions making aggravation and mitigation determinative (thus allowing reliance on invidious or irrelevant factors); sentencing on the basis of all mitigating (and aggravating) factors has the opposite effect. See Liebman & Marshall, *supra* note 6, at 1628–31.

161. See *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (reaching F-type conclusion that Sixth Amendment right to present defensive evidence on determinative issues applies at capital sentencing); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (per curiam) (making F-type extension to sentencing determinations of due process right to appellate affirmance on basis of finding made by trial-level decisionmaker, not on basis of different finding made at appellate level); *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam) (forbidding mandatory capital sentences even when applied to narrow, highly aggravated categories of murder and reiterating E-type insistence on consideration of "whatever mitigating circumstances may be relevant"); *Davis v. Georgia*, 429 U.S. 122, 123 (1976) (per curiam) (extending *Witherspoon's* F-type ban on exclusion of fair jurors due to generalized scruples against death penalty to new, legally guided capital sentencing regimes); see also *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion) (signed opinion reaching E-type conclusion that capital sentencer may not act on basis of confidential presentence report).

162. 433 U.S. 584, 592–96 (1977) (plurality opinion). The Court limited its ruling to the imposition of the death penalty for the "rape of an adult woman." *Id.*; see also *id.* at 595–96 (noting that only Georgia imposes death penalty for this crime). Nothing in the Court's subsequent case law has turned on the qualification. Louisiana, however, continues to treat the aggravated rape of a victim under age twelve as a capital crime, see La. Rev. Stat. Ann. § 14:42(C) (1997), and has sentenced a defendant to die for that crime. See Adam Liptak, Louisiana Sentence Renews Debate on the Death Penalty, *N.Y. Times*, Aug. 31, 2003, at N20 (discussing Patrick O. Kennedy's death sentence for raping eight-year-old girl and his pending legal challenges).

kill.¹⁶³ Whether the Court's apparently intrusive, B-type review presaged more of the same was unclear. Although nothing was said about it in *Coker*, a C-type worry about the historically disproportionate use of the death penalty to punish black men for raping white women almost certainly motivated the Court's decision.¹⁶⁴ Moreover, there are important strains of D-type (substantive case-by-case) review in the decision. Justice White's plurality opinion and especially Justice Powell's concurring opinion contain passages suggesting that it was only because *Coker*'s victim was an adult who sustained no serious injuries that death was disproportionate; the constitutionality of the death penalty for aggravated rape of a child was left open.¹⁶⁵ *Coker* was an easy case for another reason. Given how infrequent, capricious, and racially skewed death sentences for rape were, they replicated all three of the competing views of the "problem" identified in *Furman*.¹⁶⁶

The Court's other significant decision of the period, *Lockett v. Ohio*,¹⁶⁷ was more divisive. Ohio sentenced Sandra Lockett, a young woman of possibly limited intelligence, to die for her role as a reluctant getaway driver in an armed robbery ending in an apparently unplanned killing.¹⁶⁸ Her case addressed the constitutionality of a statute that restricted the mitigating factors the jury could consider. Ohio's statute did not treat as mitigating the defendant's limited mental functioning, her modest role in the robbery, or the fact that the ringleader of the robbery, who was also the triggerman, received a life sentence.¹⁶⁹ Because death

163. *Coker*, 433 U.S. at 595-96 (plurality opinion); see also *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977) (per curiam) (applying *Coker* to death sentence for kidnapping, rape, and armed robbery); cf. *Coker*, 433 U.S. at 618-19 (Burger, C.J., dissenting) (questioning Court's authority to rely on its own judgment, in addition to "objective" indicia of community values). Justices Brennan and Marshall concurred in the judgment in *Coker* on the broader ground that the death penalty is unconstitutional for any crime. *Id.* at 600 (Brennan, J., concurring in the judgment); *id.* at 600-01 (Marshall, J., concurring in the judgment).

164. See Jack Greenberg, *Capital Punishment*, supra note 3, at 912 ("Between 1930 and the present, of the 455 persons executed for rape, 405 were black and two were members of other minorities. Almost 90% of those executed were black men convicted for the rape of white women." (footnotes omitted)).

165. *Coker*, 433 U.S. at 592 (plurality opinion); *id.* at 601 (Powell, J., concurring in the judgment) (concluding that "death is disproportionate punishment for the crime of raping an adult woman" and, as in *Coker*'s case, when "there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury," but refusing to hold "that capital punishment *always* . . . is a disproportionate penalty for the crime of rape"); see also supra notes 162-163 and accompanying text (discussing Justice White's opinion).

166. See Liebman & Marshall, supra note 6, at 1613 (outlining *Furman*'s three competing views); supra notes 17-22 and accompanying text.

167. 438 U.S. 586 (1978).

168. *Id.* at 589-92 (discussing circumstances of crime). On Lockett's reluctant participation in the offense and her borderline intelligence, see Brief for Petitioner at 11 n.3, 104-05, *Lockett*, 438 U.S. 586 (No. 76-6997).

169. *Lockett*, 438 U.S. at 593-94 (listing mitigating factors available under Ohio law).

sentences in Ohio were not required in all cases of aggravated murder, its statute did not violate the first two of the *July 2 Cases*' reasons for rejecting mandatory capital sentences: history and a fear of unguided nullification. Ohio's limitation on the mitigating factors juries could consider did, however, implicate the *July 2 Cases*' third rationale, that "individualization" is necessary to assure an "especially reliable" determination that the punishment of death was proportioned to the particular crime and criminal:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.¹⁷⁰

Lockett made explicit three conclusions implicit in the mandatory death penalty cases. First, although death is not a per se unconstitutional sentence for aggravated murder, neither is it per se constitutional. Rather, for some but not all death-eligible murders, death is an unconstitutionally disproportionate sentence. Second, disproportionality depends on the extent to which all of the aggravating circumstances of the crime and criminal (or at least all of those recognized by state law) are neutralized by all of the mitigating circumstances in the case. At some point, aggravation net of mitigation is low enough that the defendant has a constitutional right to a penalty "less severe" than death.¹⁷¹ Third, even a high "risk" of disproportionate death sentencing violates the Constitution.¹⁷²

The majority's decision to limit death sentences to a small number of cases at or near the aggravated core sharply divided the Court by seemingly endorsing the Stewart-Stevens view that the Constitution requires States to narrow death sentencing.¹⁷³ As divisive as the majority's conclusion was, its method of enforcing the conclusion was unobtrusive. The Court did not undertake a systematic, C-type analysis of Ohio's sentencing pattern for murder and strike down the State's statute because death sentences did not congregate near the aggravated core. Nor did the Court strike down Sandra Lockett's death sentence because a D-type case-specific analysis of all the aggravating and mitigating factors located her case too far away from the aggravated core of the capital circle. Instead, the Court imposed an E-type, procedural requirement: Capital sentencers must be permitted to hear and consider evidence of "any aspect of a defendant's character or record and any of the circumstances of

170. *Id.* at 605 (plurality opinion); see also *supra* Part IV.B.1.

171. *Lockett*, 438 U.S. at 605 (plurality opinion).

172. *Id.*

173. See Liebman & Marshall, *supra* note 6, at 1628–29 (discussing Stewart's *Furman* position); *supra* notes 19–20 and accompanying text.

the offense that the defendant proffers as a basis for a sentence less than death.”¹⁷⁴ This approach invalidated the Ohio statute, but only on the easily remedied basis that it was procedurally flawed for lack of a mechanism for considering the full range of available mitigating evidence.

The *Lockett* majority did not explain why it chose this form of review. But whether ingeniously or accidentally, the approach had a dramatic effect on the way constitutional decisions would thereafter be made in capital cases. *Lockett* turned every capital sentencing judge or jury into a miniature constitutional court. It supplemented the sentencer’s usual responsibility for determining whether the punishment of death was deserved under state criminal law with a new responsibility for determining whether the punishment of death was appropriate under federal constitutional law by assuring that death was proportionate to the amount of aggravation remaining after being discounted by available mitigation.

In place of the categorical, B-type judgment the Court evidently was incapable of making as to the constitutionality of death as a punishment for all deliberate murders, the *Lockett* majority concluded that the substantive constitutional question of the death penalty’s proportionality had to be adjudicated on a D-type basis in each case. The answer had to turn on an analysis of aggravation net of mitigation. And States had to structure the penalty phase of capital trials so the verdict the jury reached embodied that D-type constitutional proportionality decision in each case.¹⁷⁵ What remained to be seen was whether the Court would oversee this system of radically decentralized constitutional decisionmaking via any mechanism other than E-type examination of penalty-phase proce-

174. *Lockett*, 438 U.S. at 604 (plurality opinion).

175. For language embodying a duty to use sentencing proceedings that generate reliable D-type proportionality determinations by the jury, see, e.g., *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (“A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender.”); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (“[O]nly when the jury is given a ‘vehicle for expressing its ‘reasoned moral response’ to [aggravating and mitigating] evidence’ . . . can [we] be sure that the jury ‘has treated the defendant as a ‘uniquely individual human being[.]’ and has made a reliable determination that death is the appropriate sentence” (citations omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319, 328 (1989))); *Graham v. Collins*, 506 U.S. 461, 468 (1993) (“States must confer on the sentencer sufficient discretion to take account of the ‘character and record of the individual offender and the circumstances of the particular offense’ to ensure that ‘death is the appropriate punishment in a specific case.’” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion))); *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (“What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.”); *Lockett*, 438 U.S. at 601 (plurality opinion) (requiring individualized consideration of offender and offense “in order to ensure the reliability . . . of the determination that ‘death is the appropriate punishment in a specific case’” (quoting *Woodson*, 428 U.S. at 305 (plurality opinion))); *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (plurality opinion) (“[T]he trial court’s sentencing discretion [must be] guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.”).

dures. Would the Court, as in *Furman*, periodically conduct C-type constitutional review of the patterns of death sentences these mini-constitutional tribunals were generating to see if they conformed to the constitutional narrowing requirement or, on the other hand, revealed an unacceptable “risk” of death sentences being imposed in cases outside the core? Or, still more intrusively, would the Court conduct its own D-type constitutional review of the proportionality of particular capital verdicts? The question then was whether the Court would match its divisive substantive conclusions about which death sentences are constitutionally proportionate with similarly controversial modes of review.

V. TAKING ON RESPONSIBILITY VIGOROUSLY,
CONTROVERSIALLY (1980–1982)

A. *Vigor*

In the early 1980s, the Court was poised to conduct energetic, substantive inquiries of the categorical (B-type), systematic (C-type), and case-specific (D-type) constitutionality of death verdicts; to determine the constitutional adequacy of the States’ specialized procedures for imposing death (E-type); and to decide whether standard guilt-phase constitutional protections had to be extended to the capital penalty phase (F-type). The Court thus suggested that the tough procedural requirements it had adopted in service of the proportional outcomes the Constitution required were a prelude and aid to, not a substitute for, the Court’s own substantive review of capital outcomes. And the Court indeed began conducting its own substantive review.

In *Godfrey v. Georgia*, the Court reviewed a death sentence based on a jury’s finding of the statutory aggravating circumstance that the killing was “outrageously or wantonly vile, horrible and inhuman.”¹⁷⁶ Georgia conceded that the factor was unconstitutionally vague on its face and had not been limited by the jury charge at trial, but defended on the ground that the Georgia Supreme Court knew the factor had to be narrowed, had narrowed it in prior cases, and must be presumed to have applied a narrowing construction sub silentio in upholding Godfrey’s death sentence.¹⁷⁷ Justice Stewart’s plurality opinion ruled that the Georgia Supreme Court could not have applied a valid narrowing construction because, in the Court’s implicit but clear D-type judgment, the facts were not aggravated enough to deserve death.¹⁷⁸ “[I]n light of the facts and circumstances of the murders that [Godfrey] was convicted of committing,” the Georgia courts could not have sufficiently narrowed the circumstance because “[his] crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder.

176. 446 U.S. 420, 426 (1980) (plurality opinion) (quoting aggravating circumstance based on which jury sentenced defendant to death).

177. Brief for Respondent at 23–33, *Godfrey*, 446 U.S. 420 (No. 78-6899).

178. *Godfrey*, 446 U.S. at 432 (plurality opinion).

His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility¹⁷⁹ Hinting at C-type (pattern-focused) review, the Court added that “[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”¹⁸⁰

In *Eddings v. Oklahoma*, the Court again seemed to reach a D-type conclusion that the aggravation net of mitigation in the case did not warrant a death sentence, while it ostensibly conducted lesser, E-type review of the State’s application of the capital-specific procedures *Lockett* had required.¹⁸¹ Eddings, then sixteen years old, killed an Oklahoma Highway Patrolman who pulled him over for a traffic violation. Moments before firing the fatal shotgun blast, Eddings said to a passenger in the car “that if the ‘mother . . . pig tried to stop him he was going to blow him away.’”¹⁸² Eddings asserted as mitigating factors his lack of supervision and ill treatment by his divorced parents and his impaired emotional development and emotional disturbance. In a terse statement, affirmed in an equally opaque appellate decision, the sentencing judge found that mitigation, which clearly included Eddings’s young age but did not as clearly include his background and emotional difficulties, did not outweigh aggravation.¹⁸³ Writing for the Court, Justice Powell acknowledged that Oklahoma law required capital sentencers to consider “any mitigating circumstances,”¹⁸⁴ but read a statement in the appellate court’s opinion that Eddings’s emotional problems fell short of establishing an insanity defense as proof that the state courts had entirely “exclud[ed] . . . from their consideration” the evidence of Eddings’s background.¹⁸⁵ In dissent, Chief Justice Burger preferred to assume, consistent with state law, that the state courts “had taken account of Eddings’ unfortunate childhood” but had found it worthy of “relatively little weight” and not “sufficient to offset the aggravating circumstances.”¹⁸⁶

179. *Id.* at 432–33 (footnotes omitted).

180. *Id.* at 433; see also Liebman & Marshall, *supra* note 6, at 1628 (“In overturning the application of this factor, Justice Stewart’s plurality opinion . . . suggested that the Court was now prepared to invalidate a death sentence on the ground that the mix of aggravating and mitigating factors placed the case unconstitutionally close to the periphery of the death-eligible circle.”).

181. 455 U.S. 104 (1982). Reaching this conclusion enabled the majority to avoid having to decide the B-type question on which it originally granted certiorari, namely, the constitutionality of condemning a juvenile. See *id.* at 110 n.5 (“Because we decide this case on the basis of *Lockett v. Ohio*, we do not reach the question of whether—in light of contemporary standards—the Eighth Amendment forbids the execution of a defendant who was 16 at the time of the offense.”).

182. *Id.* at 125 n.7 (Burger, C.J., dissenting).

183. See *id.* at 108–09 (majority opinion) (discussing lower court opinions).

184. *Id.* at 115 n.10 (quoting Okla. Stat. tit. 21, § 701.10 (1980)).

185. *Id.* at 112–15.

186. *Id.* at 125–26 (Burger, C.J., dissenting).

The majority did not explain why it denied the state courts the usual benefit of the doubt, but the reason seems plain. In its (substantive, D-type) view, examining Eddings's background at all required that it be given weighty, perhaps decisive, consideration. Family history and emotional disturbance often are introduced in mitigation and "[i]n some cases . . . may be given little weight."¹⁸⁷ But in Eddings's case, this evidence was "*particularly* relevant"—"a relevant mitigating factor of *great weight*"—because of how "serious" his emotional problems were and how badly his "neglectful, sometimes even violent, family" had "deprived [him] of the care, concern, and paternal attention that children deserve."¹⁸⁸

The clarity of the majority's view about the extent of the mitigation in Eddings's case and its effect on the appropriateness of a death sentence was striking. It directly undermined the strong tendency of the criminal law to limit exculpating principles to "[s]tark, tangible factors that differentiate the actor from another, like his . . . health" and to exclude "[m]atters of temperament" that apply to all offenders to one degree or another.¹⁸⁹

In *Enmund v. Florida*, the entire Court favored intrusive review, disagreeing only on what kind.¹⁹⁰ Reaching a question avoided in *Lockett* and engaging in vigorous categorical (B-type) review, Justice White's majority opinion ruled death disproportionate to accessory felony murder.¹⁹¹ Unlike in the rape context in *Coker*, the Court bucked the basic

187. *Id.* at 115 (majority opinion).

188. *Id.* at 115–16 (emphases added); see also *id.* at 117–18 (O'Connor, J., concurring) ("Because sentences of death are 'qualitatively different' . . . , this Court has gone to extraordinary measures to ensure that the . . . process . . . [imposing death] will guarantee . . . that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor." (citation omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion))).

189. Model Penal Code § 2.09 cmt. at 375 (Proposed Official Draft 1962); see *Eddings*, 455 U.S. at 109–10 (discounting power of Eddings's claim that "his family history" contributed to "severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised," as merely evidence of "a personality disorder" that "'does not excuse his behavior'" because Eddings "'knew the difference between right and wrong at the time he pulled the trigger, [which] is the test of criminal responsibility in this State'" (quoting *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980))); cf. John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 555, 565–70 ("[T]he more closely one examines [defendants'] backgrounds and what has happened to them as they were growing up, the less one feels that it is morally necessary to kill them.").

190. 458 U.S. 782 (1982).

191. *Id.* at 801 ("Putting Enmund [the getaway driver] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts."); see also *Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978) (plurality opinion) (reserving question later decided in *Enmund*).

proportionality notion of “‘life for life, eye for eye, tooth for tooth’”¹⁹² and could not rely on an all-but-unanimous legislative consensus against the death penalty or a well known history of racial bias. In reaching its own judgment,¹⁹³ the Court again committed itself and the Constitution to controversial positions on age-old criminal law questions: (1) whether subjecting accessorial felony murder to harsh punishment deters killings by leading felons to leave their guns behind (the Court thought not), (2) whether harm or (as the Court held) subjective culpability constitutes the main attribute of blameworthiness, and (3) what subjective mental state separates those who deserve to die from those who do not (the Court chose intent to kill).¹⁹⁴ *Enmund* arguably constituted the Court’s strongest stand yet on a question of constitutional criminal law.¹⁹⁵

Justice O’Connor criticized the Court’s B-type ruling.¹⁹⁶ She too would have given *Enmund* relief, but on a ground reminiscent of *Eddings*’s D-type (substantive, case-by-case) review masquerading as E-type analysis of the procedures used to condemn *Enmund*. Joined by Chief Justice Burger and Justices Powell and Rehnquist, Justice O’Connor noted that the sentencing judge and Florida Supreme Court said “there [were] ‘no mitigating circumstances.’”¹⁹⁷ Justice O’Connor noted, however, that the Florida high court had rejected the sentencing judge’s finding that *Enmund* fired the fatal shots because “‘the only evidence’” placed *Enmund* “‘a few hundred feet away’” in the getaway car.¹⁹⁸ From this, Justice O’Connor concluded that at least one mitigating factor was present—*Enmund*’s “‘relatively minor’” participation in the killing—and that he may have been condemned despite being “undeserving of the

192. *Coker v. Georgia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting).

193. *Enmund*, 458 U.S. at 797 (“Although the judgments of legislatures . . . weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund* . . .”).

194. See *id.* at 798–801; cf. *id.* at 824–25 (O’Connor, J., dissenting) (criticizing Court for not explaining “why the Eighth Amendment . . . reject[s] . . . standards of blameworthiness based on other levels of intent, such as . . . intent to commit an armed robbery coupled with the knowledge that armed robberies involve substantial risk of death” or on “the harm for which [*Enmund*] admittedly is at least partly responsible”).

195. The Court’s constitutional rulings limiting the bases for criminal liability tend to be narrow, tentative, and ad hoc. See, e.g., *Robinson v. California*, 370 U.S. 660, 677–78 (1962) (finding unconstitutional state statute that punishes defendants for being addicted to narcotics); *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (ruling unconstitutional ordinance that punishes former felons for failing to register without showing of actual or probable knowledge of ordinance). See generally *Montana v. Egelhoff*, 518 U.S. 37, 54–56 (1996) (plurality opinion) (noting that Constitution imposes few constraints on substantive criminal law).

196. *Enmund*, 458 U.S. at 830–31 (O’Connor, J., dissenting).

197. *Id.* at 829, 831 n.46 (“The Florida Supreme Court[] . . . simply repeats three times, without any discussion of the evidence, that there are ‘no mitigating circumstances.’ In light of the court’s dramatically different factual findings, this review is inadequate to satisfy the *Lockett* principle.” (citation omitted) (quoting *Enmund v. State*, 399 So. 2d 1362, 1373 (Fla. 1981))).

198. *Id.* at 829 (quoting *Enmund*, 399 So. 2d at 1370).

death penalty” due to proceedings that “effectively prevented . . . consideration” of that factor.¹⁹⁹

Although not as intrusive as the B-type review the majority provided, the review the four dissenters conducted was still muscular. Couched as a consequence of the Florida courts’ procedural failure to consider a mitigating factor, the dissenters’ vote “for a new sentencing hearing” in fact proceeded from a robust substantive (D-type) judgment that the Constitution required the sentencer to treat Enmund’s particular crime as substantially mitigated.²⁰⁰ Justice O’Connor had no procedural quarrel with the Florida Supreme Court, which in applying a statute that clearly required consideration of all mitigation had carefully reviewed the facts and thrice found none.²⁰¹ The disagreement had to be substantive. The Florida Supreme Court felt that Enmund’s substantial role in planning a robbery in which he knew guns would be used made his participation in the killing major. Justice O’Connor felt that because Enmund was not present and did not pull the trigger, his participation was sufficiently “minor” that proper consideration of the factor would have created a more than “negligible” possibility of a different outcome.²⁰²

B. *Controversy*

The majority’s clearly, if not avowedly, substantive review in cases such as *Godfrey* and *Eddings* cost the Court, as may be discerned from dissents in those cases. In *Godfrey*, Justice White got angry. In *Eddings*, Chief Justice Burger agonized.

In *Godfrey*, Justice White thought the Court had no business conducting D-type review or, as he put it, “supplant[ing]” the state courts and “assum[ing] the role of a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors.”²⁰³ In his anger, however, Justice White did just what he said could not legitimately be done. He conducted his own D-type review and found that *Godfrey* got just what he deserved. White recited the facts of the crime three times, after the ma-

199. *Id.* at 829–30.

200. *Id.* at 831.

201. See *id.* at 830–31 & n.46.

202. *Id.* at 829–31 (concluding that, because trial judge “erroneous[ly] belie[ved]” Enmund “shot both of the victims while they lay in a prone position in order to eliminate them as witnesses,” judge had a “fundamental misunderstanding of the petitioner’s role in the crimes [that] prevented the . . . court from considering the [crucial] ‘circumstances of the particular offense,’” namely, “that the petitioner’s role in the capital felonies was minor, undeserving of the death penalty, because the petitioner was in the car when the fatal shots were fired” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion))).

203. *Godfrey v. Georgia*, 446 U.S. 420, 456 n.6 (1980) (White, J., dissenting); accord *id.* at 443 (Burger, C.J., dissenting) (“More troubling . . . is the new responsibility [the Court] assumes . . . today[:] . . . the task of determining on a case-by-case basis whether a defendant’s conduct is egregious enough to warrant a death sentence.”).

jority had done so once. He described in detail what he acknowledged could “only be described in the most unpleasant terms”—how Godfrey “in a coldblooded executioner’s style, murdered his wife and his mother-in-law and, in passing, struck his young daughter on the head with the barrel of his gun”; his use of a “weapon, a shotgun, [that] is hardly known for the surgical precision with which it perforates its target”; and the precise damage the weapon caused to the body parts of both victims and in turn the floor, fixtures, and furniture of the cramped quarters where the crime occurred.²⁰⁴ “[W]ho among us,” Justice White concluded,

can honestly say that Mrs. Wilkerson did not feel “torture” in her last sentient moments. Her daughter, an instant ago a living being sitting across the table from Mrs. Wilkerson, lay prone on the floor, a bloodied and mutilated corpse. The seconds ticked by; enough time for her son-in-law to reload his gun, to enter the home, and to take a gratuitous swipe at his daughter. What terror must have run through her veins as she first witnessed her daughter’s hideous demise and then came to terms with the imminence of her own.²⁰⁵

Chief Justice Burger’s dissent in *Eddings* was as mild as Justice White’s in *Godfrey* was enraged. But in its way it revealed as much discomfort. Burger noted that the majority’s D-type “opinion makes clear that some Justices who join it would not have imposed the death penalty had they sat as the sentencing authority” but admitted he was unsure he “would have done so” himself.²⁰⁶ “It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one.”²⁰⁷ “However, there comes a time in every case when a court must ‘bite the bullet’”; it must look beyond “whether sentences imposed by state courts are sentences we consider ‘appropriate’” and “decide whether they are constitutional under the Eighth Amendment.”²⁰⁸

Chief Justice Burger’s dissent in *Eddings* is no less at war with itself than Justice White’s dissent in *Godfrey*. In arguing that a remand for resentencing was wasteful because it had little hope of achieving a different outcome and that the Court should not, in any event, be concerned about the “‘appropriate’” outcome, Chief Justice Burger was at pains not only to voice the majority’s unstated belief that the appropriate outcome of a second proceeding should differ from that of the first, but also to suggest that he agreed. He made this suggestion in *favorem vitae* only moments after exhorting the Court to “‘bite the bullet’” on capital judgment by letting death sentences stand.²⁰⁹

204. *Id.* at 449 (White, J., dissenting).

205. *Id.* at 450–51.

206. *Eddings v. Oklahoma*, 455 U.S. 104, 127–28 (1982) (Burger, C.J., dissenting).

207. *Id.* at 127.

208. *Id.* at 127–28.

209. If Chief Justice Burger (joined by Justice Rehnquist) were right in *Eddings* that the Court could not give more mitigating weight to a factor than the state courts did, it is

Discomfort caused by (even surreptitious) substantive review may also be inferred from proposals to raise the procedural ante. If capital sentencing procedures were so exacting that States would impose death only when it was clearly proportioned to net aggravation, the Court would no longer have to conduct substantive review. Concurring in *Eddings* and *Enmund*, Justice O'Connor called for "extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of . . . mistake."²¹⁰ In this view, reversal was required whenever a State's procedures or those used in a particular case created an appreciable "risk that . . . death [was] imposed in spite of factors which might call for a less severe penalty."²¹¹ This rule made *Eddings* and *Enmund* easy cases: Although the state courts had probably followed state law and considered *Eddings*'s background and *Enmund*'s limited participation, the modest risk that they had not required reversal.²¹²

Similarly, in an opinion on denial of certiorari in *Smith v. North Carolina*, Justice Stevens proposed a "beyond a reasonable doubt" test to reduce the risk of executing the undeserving and "assure[] reliability in the determination that 'death is the appropriate punishment in a specific case.'²¹³ Before sentencing a defendant to death, the sentencer would have to accept three propositions "beyond a reasonable doubt"—that at least one aggravating circumstance was present; that aggravation outweighed mitigation; and that the "aggravating circumstances, [after being] discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty."²¹⁴ In other words, a jury could impose death only if it was convinced beyond a reasonable doubt that net aggravation was so high that the crime and criminal fell near the aggravated core of the State's death-eligible offenses.

Demanding procedures that left the sentencer and Court without any doubt that death was proportionate to net aggravation might avoid uncomfortable substantive review duties. But it risked demanding the impossible (a mandate Justices O'Connor and Stevens both disclaimed, in identical words), a "perfect procedure for deciding in which cases governmental authority should be used to impose death," a procedure with such

hard to explain the separate opinion he (and Justice Rehnquist) joined in *Enmund*, which proposed just that. See *supra* notes 196–202 and accompanying text.

210. *Eddings*, 455 U.S. at 118–19 (O'Connor, J., concurring) (emphasis added); see *Enmund v. Florida*, 458 U.S. 782, 830–31 (1982) (O'Connor, J., concurring) (arguing that reversal was required because trial court's error "was not so insignificant that we can be sure its effect on the sentencing judge's decision was negligible").

211. *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)).

212. See *Enmund*, 458 U.S. at 830–31 (O'Connor, J., concurring); *Eddings*, 455 U.S. at 118–19 (O'Connor, J., concurring).

213. 459 U.S. 1056, 1057 (1982) (Stevens, J., respecting the denial of the petitions for writ of certiorari) (quoting *Lockett*, 438 U.S. at 601 (plurality opinion)).

214. *Id.* at 1056–57.

high trial, appellate, and retrial costs that few death sentences would result.²¹⁵ The Court only increased the costs of this proceduralist tack when it held in Justice Stevens's E-type majority opinion in *Beck v. Alabama* that guilt-phase procedures had to be more reliable in capital than in other cases²¹⁶ and, in three F-type decisions, extended yet more guilt-phase constitutional protections to the capital sentencing phase.²¹⁷

In *Coleman v. Balkcom*, in April 1981, Justice Rehnquist proposed some capital review perfectionism of his own, hoping, he said, to rub the Court's nose in the responsibility its perfectionism bore for the dearth of executions.²¹⁸ Coleman's 1973 conviction for methodically murdering six members of a family had been affirmed by a succession of state courts, prompting Coleman's certiorari petition.²¹⁹ Justice Marshall dissented from the denial of certiorari on Coleman's claim that the jurors seated at his trial were biased.²²⁰ Justice Rehnquist saw no issue "suitable . . . for the exercise of our discretionary jurisdiction"²²¹—in keeping with the Court's general refusal to grant certiorari following state post-conviction proceedings and with the Court's preference for leaving such matters to federal habeas review.²²² For just that reason, Justice Rehnquist facetiously argued, the Court should grant review, deny Coleman's claims, and in that way preclude subsequent proceedings and hasten Coleman's execution.²²³ Otherwise, Justice Rehnquist warned, the result would be

a stalemate in the administration of federal constitutional law. Although this Court has determined that capital punishment statutes do not violate the Constitution, and although 30-odd States have enacted such statutes, apparently in the belief that

215. *Id.* at 1056 n.1 (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)); *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)).

216. 447 U.S. 625, 637–38 (1980) (holding that trial courts in capital cases may not deny lesser included offense instructions because juries unable to convict of lesser crimes may convict of capital crime to avoid complete acquittal).

217. See *Estelle v. Smith*, 451 U.S. 454, 469 (1981) (applying Fifth Amendment privilege and *Miranda* rule to statements obtained from defendant for use at death penalty phase); *Bullington v. Missouri*, 451 U.S. 430, 446–47 (1981) (holding that double jeopardy protection bars death sentence on retrial if first jury imposed life sentence); *Adams v. Texas*, 448 U.S. 38, 45–46 (1980) (confirming *Witherspoon's* requirement of neutrally composed capital sentencing juries).

218. See 451 U.S. 949, 956–60 (1981) (mem.) (Rehnquist, J., dissenting from denial of certiorari).

219. See *id.* at 956–57.

220. *Id.* at 953–56 (Marshall, J., dissenting).

221. *Id.* at 956 (Rehnquist, J., dissenting).

222. See 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* §§ 2.4b n.21, 6.4b (5th ed. 2005) (citing cases); see also *Coleman v. Kemp*, 778 F.2d 1487, 1543 (11th Cir. 1985) (granting habeas corpus relief), cert. denied, 476 U.S. 1164 (1986).

223. See *Coleman*, 451 U.S. at 963–64 (Rehnquist, J., dissenting from denial of certiorari); see also 28 U.S.C. § 2244(c) (2000) (barring habeas proceedings on claims Supreme Court previously addressed on merits).

they constitute sound social policy, the existence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet virtually nothing happens except endlessly drawn out legal proceedings [I]n the five years since *Gregg v. Georgia*, there has been only one execution of a defendant who has persisted in his attack upon his sentence.²²⁴

At stake, Justice Rehnquist argued, was the survival of the social order: “When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching [a] state of savagery”²²⁵ After stopping to wave aside any anxious questions on his part about what awaits a hanging judge in the next life,²²⁶ Justice Rehnquist made perfectly clear who was at fault—who the modern-day “sentimental[]” “ladies” were “who carry flowers and jellies to criminals”:²²⁷ “[T]his Court, by constantly tinkering with the principles laid down in the [*July 2 Cases*], together with the natural reluctance of . . . judges to rule against an inmate on death row, has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes.”²²⁸

With brutal accuracy, Justice Rehnquist noted the ironies of the Court’s capital punishment jurisprudence, including the *Enmund* concurring opinion he joined. “[W]e have upheld the constitutionality of capital punishment statutes” but “have . . . sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs.”²²⁹ The “Court surrounds capital defendants with numerous procedural protections unheard of for other crimes” but uses rules that obscure its role in the process, as when it “pristinely denies a petition for certiorari in a case such as this.”²³⁰ Although Justice Rehnquist’s proposal to stop the Court from “continu[ing] to evade . . . responsibility” was crude and unmanageable—the Court could not possi-

224. *Coleman*, 451 U.S. at 957–58 (Rehnquist, J., dissenting from denial of certiorari) (citation omitted).

225. *Id.* at 961–62.

226. Justice Rehnquist approvingly quoted the deathbed views of a “hanging judge” in western Arkansas when it was on the edge of the frontier:

It did not seem to Judge Parker to be an act of cruelty to sentence such blood-thirsty men to die. “I never hanged a man,” he said when lying on his death bed, “I never hanged a man. It is the law. The good ladies who carry flowers and jellies to criminals mean well. There is no doubt of that, but what mistaken goodness! Back of the sentimentality are the motives of sincere pity and charity, sadly misdirected. They see the convict alone, perhaps chained in his cell; they forget the crime he perpetrated and the family he made husbandless and fatherless by his assassin work.”

Id. at 962 n.3 (quoting Jack Gregory & Rennard Strickland, *Hell on the Border* 28 (1971)).

227. *Id.*

228. *Id.* at 958–59.

229. *Id.* at 958.

230. *Id.* at 960.

bly grant certiorari on all claims in all capital cases, and if it did, it often might grant relief, not deny it as Rehnquist hoped—his point was made.²³¹

VI. FEAR OF RESPONSIBILITY AND FLIGHT (1983–2006)

A. *Stopping Short* (1983)

Just as a 1970s withdrawal from per se review of the death penalty followed the Court's 1960s invitation of it, so a mid- and late-1980s withdrawal from retail responsibility followed an early 1980s dalliance with it. After a seven-year period in which fifteen of its sixteen capital decisions favored the condemned inmate, the Court, in a two-week stretch in the spring of 1983, decided four cases against capital prisoners. The catalyst appears to have been a set of events—as jarring at the time as they became routine thereafter—that accomplished Justice Rehnquist's goal of rubbing the Court's nose in its capital responsibilities. The Court could issue "pristine" certiorari denials to avoid responsibility for capital cases as they made their way through state and into federal habeas proceedings, but it could not avoid excruciatingly mortal and public rulings on stay applications marking the endgame of habeas cases in which lower federal courts had denied relief.²³²

1. Barefoot. — The first post-*Furman* nonconsensual execution was Florida's of John Spenkelnik in 1979, after a flurry of failed stay requests in the Supreme Court.²³³ Two and a half years elapsed before the next nonconsensual execution—Texas's late November 1982 electrocution of Charlie Brooks. Unlike Spenkelnik's isolated case, Brooks's was sandwiched between two near misses. A month earlier Texas failed to convince the Fifth Circuit and the Supreme Court to compress into four days the appellate stages of Ronald O'Bryan's habeas proceeding so the State could execute him on Halloween 1982 for fatally lacing his son's candy with cyanide in a life insurance scam on Halloween 1974.²³⁴ In *Brooks*, however, the Fifth Circuit agreed to a compressed schedule, ordering briefs on the stay and merits, hearing oral argument, and summarily affirming the lower court's summary denial within ten days of the stay request. When new counsel filed a more extensive petition, the same process, plus a written opinion and Supreme Court denial of certiorari, took

231. *Id.* at 958, 963–64; see also *id.* at 949–50 (Stevens, J., concurring in the denial of certiorari) (discussing unmanageability of Rehnquist's proposal).

232. See Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 Fla. St. U. L. Rev. 7, 16–18 (1992) [hereinafter Zimring, *Inheriting*].

233. See *Wainwright v. Spenkelnik*, 442 U.S. 901 (1979) (mem.); *Spenkelnik v. Wainwright*, 442 U.S. 1301 (Rehnquist, Circuit Justice 1979). See generally Ramsey Clark, *Spenkelnik's Last Appeal*, 229 Nation 386 (1979).

234. *O'Bryan v. Estelle*, 691 F.2d 706, 707–08 (5th Cir.) (per curiam), motion to vacate stay denied, 459 U.S. 961 (1982).

four days.²³⁵ But when the Fifth Circuit whittled the process down to three days in Thomas Barefoot's case in mid-January 1983, the Supreme Court granted his stay application, treated it as a certiorari petition, and ordered review of the Fifth Circuit's truncated capital habeas review procedures.²³⁶ While Barefoot's case was pending, however, the Court vacated a lower court stay of Alabama's March 1983 execution of John Evans, the third nonconsensual execution in the last sixteen years, but the second in four months.²³⁷

The events of 1982–1983 made manifest to the Court that it was the last stop on the road to a truly final judgment and that it could expect a lot of traffic. That the pileup of cases was more than the Court could comfortably bear was suggested by a speech Justice Powell gave that May seconding Justice Rehnquist in *Coleman* and criticizing federal courts for delaying executions.²³⁸

Barefoot revealed that a majority now took the same view. Justice White's decision affirmed the Fifth Circuit in all respects in an opinion salted with admonitions against excessive federal court intrusion.²³⁹ Ironically, in letting the Fifth Circuit limit its capital responsibilities, the Court exacerbated its own, giving Barefoot all the relief he sought on his procedural claim via a five month process of briefing, oral argument, and decision on his constitutional claim.²⁴⁰ Perhaps in recognition of the expanded role the Fifth Circuit's approach foisted on the Court, it deemed the lower court's procedure "tolerable" but not "preferred";²⁴¹ required

235. *Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir.), stay and cert. denied, 459 U.S. 1061 (1982).

236. *Barefoot v. Estelle*, 459 U.S. 1169, 1169 (1983) (mem.). The Court also agreed to review Texas's practice of premising death sentences on predictions of future dangerousness by psychiatrists who had never examined the defendant. See *Barefoot v. Estelle*, 463 U.S. 880, 887–88, 896 (1983) (describing issues on which Court granted certiorari).

237. *Alabama v. Evans*, 461 U.S. 230, 233–34 (1983) (per curiam).

238. Anthony G. Amsterdam, In *Favorem Mortis: The Supreme Court and Capital Punishment*, 14 Hum. Rts. 14, 50–52 (1987) (quoting Justice Powell's speech given before Eleventh Circuit Judicial Conference in Atlanta, Georgia in May 1983). The Court was inundated with applications to stay executions during this period. See, e.g., *Stephens v. Kemp*, 469 U.S. 1043, 1043 (1984) (mem.); *Dobbert v. Wainwright*, 468 U.S. 1231, 1231 (1984) (mem.); *Antone v. Dugger*, 465 U.S. 200, 200 (1984) (per curiam); *Woodard v. Hutchins*, 464 U.S. 377, 377 (1984) (per curiam) (granting State's application to vacate lower court's stay); *Smith v. Kemp*, 464 U.S. 1032, 1032 (1983) (mem.) (same); *Maggio v. Williams*, 464 U.S. 46, 46 (1983) (per curiam); *Autry v. Estelle*, 464 U.S. 925, 925 (1983) (mem.) (upholding stay).

239. See, e.g., *Barefoot*, 463 U.S. at 887 ("Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.").

240. See id. at 906 (Stevens, J., concurring in the judgment) (concluding "that the Court of Appeals made a serious procedural error in this case" by denying Barefoot review on the merits of his substantial federal claims, but joining the Court's judgment "[n]evertheless, since *this Court* has now reviewed the merits of petitioner's appeal, and" properly concluded that claims lacked merit (emphasis added)).

241. Id. at 892 (majority opinion).

stays and full review in cases presenting issues “‘debatable among jurists of reason’”;²⁴² told courts to warn litigants of the likelihood of expedited procedures and to “consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review”;²⁴³ and then, having opened up the lower courts a bit, made clear that its door would be all but barred by its own application of the tough stay standard it applied in noncapital cases.²⁴⁴

In a striking departure from the Court’s longstanding preference for specialized E-type procedures in capital cases in *favorem vitae*, the *Barefoot* Court not only resolved itself to employ the stay standard it applied in “two-dollar social security case[s]”²⁴⁵ but also approved the truncated capital-specific procedures the Fifth Circuit adopted in *favorem mortis* for only capital cases.²⁴⁶ The *Barefoot* holding let Texas condemn individuals on the basis of future dangerousness predictions and an evaluative technique (diagnosis without examination) that mental health professionals considered wholly unreliable, thus replacing its super-reliability requirement with a rule validating capital sentencing techniques that are almost entirely unreliable.²⁴⁷ In the latter regard, the Court noted that future dangerousness predictions were a prominent and explicitly approved feature of the Texas statute it had upheld on its face in the *July 2 Cases*, albeit in a case in which no expert testimony had been received.²⁴⁸

2. *Stephens*. — The next two *Spring 1983 Cases*, *Zant v. Stephens*²⁴⁹ and *Barclay v. Florida*,²⁵⁰ also rejected E-type, capital-specific constraints on aggravating factors. *Stephens* is particularly interesting because of its multiple possible meanings and transitional position between the Court’s expansive, late 1970s decisions and the more buttoned-down cases to come.

In *Stephens*, the Georgia Supreme Court had ruled a statutory aggravating factor unconstitutionally vague but had affirmed the death sentence anyway for two reasons. The jury had found two other valid statutory aggravating factors, and it was permissible for the jury to consider the

242. *Id.* at 893 n.4 (quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

243. *Id.* at 894–95.

244. *Id.* at 895 (requiring reasonable probability that four members of Court would vote to grant certiorari and significant possibility of reversal of lower court’s decision).

245. *Amsterdam*, *supra* note 238, at 54. Relying on *Barefoot*, the Court repeatedly has “refused to hold that the fact that a death sentence has been imposed requires a different standard of review of federal habeas corpus.” *Herrera v. Collins*, 506 U.S. 390, 405 (1993) (quoting *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)).

246. See *Amsterdam*, *supra* note 238, at 52–53; see also Julia E. Boaz, Note, Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts, 95 *Yale L.J.* 349, 352–53 (1985) (“[T]he Court’s commitment to speed in the disposition of capital appeals distorts the adjudicative processes that normally attend the administration of justice in the federal courts.”).

247. *Amsterdam*, *supra* note 238, at 53–54.

248. *Id.*

249. 462 U.S. 862 (1983).

250. 463 U.S. 939 (1983).

prior crimes evidence used to establish the vague factor as a non-statutorily enumerated basis for a death sentence. On certified question from the Supreme Court, the Georgia Supreme Court for the first time explained what was required to obtain a death sentence in Georgia. To justify death, crimes had to cross three planes—Plane 1, established by the elements of simple “malice” murder; Plane 2, established by the requirement of one statutory aggravating factor; and Plane 3, established by the jury in each case, in its “‘*absolute discretion*,’” after hearing all the evidence in support of all aggravating and mitigating factors (including those not set out in the statute) and deciding whether the evidence was sufficient to warrant death.²⁵¹

Georgia did not constrain the jury’s Plane 3 discretion to impose death, even by a requirement to balance aggravation against mitigation, much less by a requirement that aggravation predominate.²⁵² Although one might assume that, in default of any other suggestion, jurors would instinctively balance aggravation and mitigation and condemn prisoners only when aggravation was greater, the Georgia scheme created a risk that different juries would decide that question differently.²⁵³ Using the schema developed above,²⁵⁴ once malice murder moved a crime onto the circumference of the capital circle and a statutory aggravating factor moved it inside the circumference, Georgia juries had total discretion to impose death based on all the aggravation and mitigation. Absent any instructions about where within the circle the case had to be to justify a capital verdict, the statute created a higher risk of death sentences outside the aggravated core than *Eddings* and the *Enmund* concurrence would seem to allow.

The risk the Court was prepared to tolerate is highlighted by its rejection of Stephens’s F-type argument to extend the rule of *Street v. New York* to his case.²⁵⁵ *Street* reversed a conviction that, because of unclear instructions, a jury may have premised on conduct protected by the First Amendment. The Court held the risk to First Amendment values too great to permit the state court’s affirmance of the conviction after concluding that the jury had probably found Street guilty of only unpro-

251. *Stephens*, 462 U.S. at 871 (emphasis added) (quoting *Zant v. Stephens*, 297 S.E.2d 1, 3 (Ga. 1982)).

252. See *id.* at 873–74 (“In Georgia . . . , the jury is not instructed . . . to balance aggravating against mitigating circumstances”); see also *Buchanan v. Angelone*, 522 U.S. 269, 272–73 (1998) (describing nonweighing aspects of Virginia’s three-step capital jury instructions).

253. See *Stephens*, 462 U.S. at 888–89 (“[T]he statutory label ‘aggravating circumstance’ . . . might have caused the jury to give somewhat greater weight to respondent’s prior criminal record than it otherwise would have given.”); see also *infra* notes 371–376 and accompanying text (discussing Court’s recent acknowledgement that, whether or not instructed to do so, jurors probably balance aggravation against mitigation).

254. See *supra* Part I (discussing schema developed after *Furman*).

255. *Stephens*, 462 U.S. at 882–84; see *Street v. New York*, 394 U.S. 576, 594 (1969).

tected conduct. A retrial before a properly charged jury was required to avoid that risk.²⁵⁶ Noting how reliable *Woodson* and *Lockett* required sentencing outcomes to be, Stephens argued that the trial court's instruction to consider the invalid "substantial history of assaultive behavior" factor created a similarly intolerable risk that his crime was pushed across Plane 3 by the imprimatur the jury thought the statute gave to the invalid factor. Although acknowledging that the invalid instruction may have led the jury to give "somewhat greater weight to [Stephens's] prior criminal record" than it otherwise would have, the Court affirmed.²⁵⁷ Declining to take the F-type bait, the Court limited *Street* to First Amendment cases and accepted the Georgia Supreme Court's view that the risk that the sentence was tainted by the invalid instruction was "inconsequential."²⁵⁸ The Court premised this conclusion on the Georgia high court's assurance of specialized comparative review of sentencing patterns in factually similar offenses "to avoid arbitrariness and to assure proportionality."²⁵⁹

Stephens also argued that the Georgia statute, as newly interpreted by its high court in response to the Supreme Court's certified question, ran afoul of *Furman* itself. Georgia's new interpretation of its statute presented an especially difficult case under *Furman* because of the State's unusually expansive definition of capital murder. In Georgia, any malice murder was sufficient to cross Plane 1. In contrast, virtually all other States defined first degree murder to require not only malice but also premeditation and deliberation or a killing in connection with a serious felony. In Georgia, an accompanying serious felony was a statutory aggravating factor that moved the case across Plane 2. In this way, Georgia very nearly replicated the prevailing pre-*Furman* approach to death sentencing: absolute life or death discretion upon a finding of what in most other States constituted only bare (i.e., unaggravated) first degree felony murder. The only differences between the modal statutes struck down in *Furman* and Georgia's statute were that Georgia bifurcated the guilt and

256. *Street*, 394 U.S. at 588, reasoned that:

[W]hen a single-count indictment . . . charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together.

257. *Stephens*, 462 U.S. at 888.

258. *Id.* at 883-85, 889-90 (quoting *Zant v. Stephens*, 297 S.E.2d 1, 4 (1982)); see also *Baldwin v. Alabama*, 472 U.S. 372, 389 (1985) (holding that, despite risk that jury's verdict affected judge's sentencing determination, "Alabama's requirement that the jury return a 'sentence' of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed after independently considering petitioner's background and character and the circumstances of his crime").

259. *Stephens*, 462 U.S. at 890 ("We accept . . . [the Georgia high] court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal . . . , having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious.").

sentencing trials and required the state high court to conduct comparative proportionality review on direct appeal. Because some of the discretionary statutes struck down in *Furman* had likewise bifurcated the guilt and penalty trials,²⁶⁰ the latter difference seemed to be the crucial one.

The Supreme Court rejected Stephens's E-type challenge to procedures that permitted total discretion without first requiring more narrowing than had occurred at the time of *Furman*. Passing up a case-specific (D-type) explanation based on the aggravated nature of Stephens's own crime,²⁶¹ the Court focused on "two features of [Georgia's] scheme: that the jury was required to find at least one valid statutory aggravating circumstance . . . and that the State Supreme Court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate" to penalties imposed under similar circumstances.²⁶²

In the first regard, the Court emphasized "the fundamental requirement that each statutory aggravating circumstance . . . genuinely narrow the class of persons eligible for the death penalty" and promised to invalidate allegedly aggravating behavior that is constitutionally protected, irrelevant, or (in truth) mitigating.²⁶³ As is noted above, however, *Stephens* itself gave the narrowing requirement short shrift by permitting Georgia to satisfy it with the "serious accompanying felony" factor that in virtually every other State was an element of death-eligible murder itself. In other words, the Court let Georgia use a factor to place crimes inside the capital circle that in virtually all other States sufficed only to get the crime to the circle.²⁶⁴

Again, therefore, the single saving attribute of Georgia's post-*Furman* statute was the obligation it gave the state supreme court to conduct "comparative proportionality review." In emphasizing this procedure, *Stephens* harked back to, and extended, *Woodson's* and *Lockett's* radical de-

260. See Weisberg, *supra* note 6, at 309 & n.14 (identifying five States, including California, that prior to *Furman* reserved capital punishment for first degree murders (i.e., murders aggravated by deliberation or by commission of violent felony) and bifurcated guilt and sentencing trials).

261. Stephens's two valid aggravating circumstances—an accompanying major felony (robbery and kidnapping) and a prior capital conviction—drew *his* case above the plane of most States' first degree murder statutes and into the realm of genuine narrowing. See *infra* note 269 (referencing facts of *Stephens*). Compare *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (explaining that conviction of "capital murder," defined as first degree murder plus additional element of causing risk to more than one victim, satisfies narrowing requirement, though sentencing phase aggravating factor simply replicated "great risk" element of capital murder), with *Tennessee v. Middlebrooks*, 510 U.S. 124, 125 (1993) (*per curiam*) (dismissing case without deciding granted question whether homicide's commission in course of serious felony could suffice both to raise offense to first degree murder and serve as single aggravating factor).

262. *Stephens*, 462 U.S. at 876.

263. *Id.* at 876; see *id.* at 885 (providing examples of constitutionally protected behavior that cannot be considered aggravating).

264. See *supra* note 260 and accompanying text.

centralization of constitutional decisionmaking,²⁶⁵ except that here state high courts, not juries, became surrogate constitutional decisionmakers. This feature helps explain why Justice Stevens joined and wrote the decision in *Stephens*, though it validated a statute that required less narrowing than his "less is better" approach would seem to have dictated.

Indeed, Justice Stevens cited *Woodson* and *Lockett* in upholding the jury's reliance, in deciding whether Stephens's crime crossed Plane 3, on an aggravating factor not enumerated in the statute.²⁶⁶ Under *Woodson* and *Lockett*, Stevens wrote, "[w]hat is important at the [Plane 3] stage is an *individualized* determination," i.e., a reliable estimate of aggravation net of mitigation.²⁶⁷ How, though, did the Georgia statute assure reliable individualization, given (1) the limited narrowing the statute accomplished at the second, statutory aggravating factor stage, (2) the risk the statute created that jurors in their "absolute discretion" at the third stage would fail to discount aggravation accurately based on the mitigation, and (3) the absence of the Court's own D-type analysis of the facts of the case? Justice Stevens responded that whenever any jury idiosyncratically failed to confine death verdicts to the aggravated core, the Georgia Supreme Court had a statutory responsibility to overturn the outlier death sentence through a version of C-type review of the pattern of sentences imposed in similar cases. Unlike in *Godfrey v. Georgia*,²⁶⁸ moreover, nothing in the highly aggravated facts of *Stephens* indicated that the Georgia high court had dropped the ball.²⁶⁹

Crucial to the outcome of *Stephens*, therefore, was the promise that in carrying out its state law duty to assure proportionality across like cases, the Georgia Supreme Court would perform the same constitutional function on appeal as the sentencing juries contemplated by *Lockett*. In good D-type fashion, both procedures would identify murders for which death was and was not substantively constitutional, based on whether death was or was not proportionate to the amount of aggravation discounted by mitigation. Comparative proportionality review was particularly important in Georgia, given the thinness of its narrowing requirement and the discretion it gave jurors to decide how to process aggravating and mitigating factors. The procedure could also be useful elsewhere, however, given the discretion *Woodson* and *Lockett* gave all juries to decide, inter alia, how much more aggravation than mitigation was enough to justify death. In fact, in the wake of *Stephens*, many States and analysts assumed that com-

265. See *supra* notes 153–160, 167–175 and accompanying text.

266. See Liebman & Marshall, *supra* note 6, at 1633–34 (discussing Justice Stevens's opinion in *Stephens*).

267. *Stephens*, 462 U.S. at 878–79 (citing, inter alia, *Lockett v. Ohio*, 438 U.S. 586, 601–05 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (plurality opinion)); see also Liebman & Marshall, *supra* note 6, at 1633–34.

268. See *supra* notes 176–180 and accompanying text.

269. See *Stephens*, 462 U.S. at 864–65 (describing Stephens's many crimes, culminating in murder).

parative proportionality review was constitutionally required.²⁷⁰ As in *Lockett*, however, the *Stephens* Court left in doubt whether it was even conscious of its innovation, much less how far the Court meant to carry it. *Stephens* did not actually hold that comparative proportionality review was constitutionally required, even in Georgia. Nor did the Court indicate what role it would play in assuring that its surrogate constitutional decisionmakers were doing their jobs.

3. *Barclay*. — *Barclay v. Florida* also affirmed a death sentence based on nonstatutory aggravating evidence, notwithstanding Florida's practice of limiting aggravating factors to those in the statute.²⁷¹ In affirming, Justice Rehnquist's plurality opinion assumed that the Florida Supreme Court, without saying so, had noticed the trial court's error but had not reversed because it found the error harmless.²⁷² As in *Barefoot* and *Stephens*, the *Barclay* plurality concluded that the faith it had reposed in the particular statutes and procedures upheld in the *July 2 Cases* overcame the risk of an unreliable outcome in the case in question.²⁷³

Justice Stevens concurred in the judgment, and his opinion tracked his analysis in *Stephens*. He focused on C-type evidence that "in its regular practice" the Florida Supreme Court exercised careful review to overturn outlier death verdicts not warranted by the mix of aggravation and mitigation.²⁷⁴ Justice Stevens's emphasis on the Florida high court's appellate review for proportionality—in a State that, unlike Georgia, required a fair bit of narrowing and directed the sentencer to balance aggravation and mitigation—further indicated an intent to delegate C-type substantive constitutional review to state high courts across the board.²⁷⁵

270. See, e.g., *State v. Webb*, 680 A.2d 147, 205 (Conn. 1996) ("[I]t was generally believed that any capital punishment statute that did not provide for proportionality review was constitutionally vulnerable." (quoting *State v. Cobb*, 663 A.2d 948, 954 (Conn. 1995))); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg*, Only "the Appearance of Justice"?, 87 *J. Crim. L. & Criminology* 130, 154 (1996) ("State legislatures enacted proportionality review procedures because they believed, on the basis of language in [Supreme Court decisions] that state capital punishment statutes lacking proportionality review provisions would be declared unconstitutional . . .").

271. See *Barclay v. Florida*, 463 U.S. 939, 956–58 (1983) (plurality opinion).

272. *Id.* at 958; cf. *supra* notes 181–202 and accompanying text (discussing Court's opposite assumption in *Eddings* and *Enmund*).

273. *Barclay*, 463 U.S. at 950–51 (plurality opinion).

274. *Id.* at 973–74 (Stevens, J., concurring in the judgment) (rejecting reliance on "single case" before Court and concluding, based on comprehensive analysis of Florida Supreme Court's "regular practice," that it had not "become a rubber stamp for lower court death-penalty determinations" and had affirmed only 120 of 212 death sentences reviewed (citing *Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976) (plurality opinion))).

275. In the remaining *Spring 1983 Case*, *California v. Ramos*, 463 U.S. 992, 1013–14 (1983), the Court found no constitutional infirmity in an instruction telling the jury that the governor could commute a "life without parole" sentence—the statutory alternative to death—to a sentence *with* the possibility of parole. The Court acknowledged that no other State so informed capital jurors and that they might draw inaccurate inferences from the instruction (e.g., that commutation of "life without parole" sentences *often* returned

4. *Deceleration and Decentralization, Not Deregulation.* — The *Spring 1983 Cases* were famously described as deregulating American death sentencing,²⁷⁶ but they more accurately may be viewed as having brought to a screeching halt the accretion of new E- and F-type procedural regulations. As the Court was at pains to emphasize, its decisions overruled no previously imposed capital sentencing limitations. It was simply “[b]eyond these limitations” that the Court refused to go.²⁷⁷ True, *Barefoot* failed to bar appellate procedures giving capital litigants less process than others. But the Court itself gave *Barefoot* all the process he thought the Fifth Circuit owed him, and it encouraged lower courts to give more process in the future. True, *Barefoot*, *Stephens*, and *Barclay* failed to limit aggravating factors to the ones in a capital sentencing statute and the ones that could be factually proven, and narrowed, with some certainty. But, as the Court pointed out, it had implicitly approved the relevant aggravating circumstance procedures in the *July 2 Cases*, and the logic of its intervening expansion of juror access to mitigating evidence strongly supported broad access to aggravating evidence. In numerous later decisions, moreover, the Court carried out its promise in *Stephens* to impose at least modest substantive limits on aggravating factors.²⁷⁸

dangerous felons to the street or that death sentences could not also be commuted), but the Court, through Justice O'Connor, found tolerable the added risk of an unreliable outcome. For further discussion of *Ramos* and the issues it raised, see *infra* notes 325–331 and accompanying text.

276. Weisberg, *supra* note 6, at 305.

277. *Ramos*, 463 U.S. at 1001 (emphasis added).

278. See *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam) (concluding that permissible aggravating factors cannot neutralize sentencer's consideration of invalid factor if evidence supporting invalid factor was itself unconstitutional and prejudicial); *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (plurality opinion) (holding that State may not treat future dangerousness as aggravating factor while keeping defendant from informing jury that, if not sentenced to death, he would be confined to prison without possibility of parole); *Espinosa v. Florida*, 505 U.S. 1079, 1080–81 (1992) (per curiam) (striking down “especially heinous” aggravating circumstance for doing too little narrowing); *Sochor v. Florida*, 504 U.S. 527, 540–41 (1992) (concluding that Florida's “coldness” aggravating factor was unconstitutional and that sentencing judge's reliance on it along with other factors required remand for resentencing); *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (forbidding State to rely on inmate's membership in unpopular organization as aggravating factor); *Stringer v. Black*, 503 U.S. 222, 228–29 (1992) (invalidating Mississippi's “especially heinous, atrocious, or cruel” aggravating circumstance for being too “vague and imprecise” and holding that in weighing State this invalid factor could “infect” sentencing); *Shell v. Mississippi*, 498 U.S. 1, 1 (1990) (per curiam) (holding that trial court's use of limiting instruction did not save “especially heinous” aggravating factor from constitutional invalidity); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (plurality opinion) (forbidding State to treat mitigating factor as if it were aggravating); *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (forbidding State to rely on invalid prior conviction as aggravating factor); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (overturning Oklahoma's “especially heinous, atrocious, or cruel” aggravating factor as vague and rejecting State's contention that “factual circumstances” may “plainly characterize” killing as within this category); see also *Loving v. United States*, 517 U.S. 748, 773–74 (1996) (affirming capital sentence imposed by court martial of soldier for murder after executive order of President listed aggravating factors and required at least one of

It is true, finally, that the *Spring 1983 Cases* (all joined by Justice O'Connor, one written by her) affirmed death sentences despite a risk that the sentencer gave too much weight to an aggravating factor. In doing so, the Court tempered O'Connor's view in *Eddings* that "any risk" requires reversal.²⁷⁹ The Court's assumption in *Barclay* that the Florida Supreme Court, without saying so, had followed its practice of carefully reweighing aggravation and mitigation exclusive of improperly admitted aggravating evidence also sharply contrasts with earlier opinions in which the Justices refused to assume that narrowing procedures were followed sub silentio.²⁸⁰

Even here, however, the Court arguably followed the logic of its prior decisions. By letting States expose capital sentencers to the widest range of aggravating factors, *Barefoot*, *Stephens*, and *Barclay* replicated the effect of *Woodson*, *Roberts*, and *Lockett* in regard to mitigating factors. The decisions prodded sentencers to make the reliable D-type substantive proportionality judgment in each case that the Court seemed to be substituting for its own B-type substantive judgment about death as a penalty in all or classes of cases. To like effect was the C-type comparative proportionality review of sentencing patterns in similar murder cases that *Stephens* praised the Georgia Supreme Court for conducting. Moreover, unlike in *Enmund*, *Godfrey*, and *Eddings*, aggravation rather clearly surpassed mitigation in the four *Spring 1983 Cases*, thus removing any D-type basis to doubt the sentencer's or appellate court's proportionality determination.²⁸¹ Arguably, therefore, all of the Court's decisions since *Furman* turned on the outcome of a valid C- or D-type conclusion that death was

them to be unanimously found by members of court martial before sentencing defendant to die). But cf. *infra* Part VI.B.3 (discussing Court's focus on aggravating factors that were entirely illegitimate or identified nothing specific about crime or criminal that was aggravating, while allowing factors that, while specific, did little or no narrowing or, overall, applied to all or nearly all cases).

279. See *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) ("[Previous cases] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court."); see also *Enmund v. Florida*, 458 U.S. 782, 830–31 (1982) (O'Connor, J., dissenting) (arguing that reversal is required if error in defendant's case "was not so insignificant that we can be sure its effect on the sentencing judge's decision was minimal"); *supra* note 188.

280. For example, the *Godfrey* plurality refused to assume that the Georgia Supreme Court had silently applied previously announced limits on "outrageously vile" factor. See *supra* notes 176–180 and accompanying text. The *Eddings* majority refused to assume that the Oklahoma courts considered but gave little weight to (as opposed to failing to consider) the mitigating potential of defendant's violent family history and emotional disturbance. See *supra* notes 184–189 and accompanying text. Finally, the dissenting Justices in *Enmund* refused to assume that the Florida Supreme Court had carefully reweighed the mitigating effect of defendant's nonparticipation in killing. See *supra* notes 190–202 and accompanying text.

281. See *Ramos*, 463 U.S. at 994–95 (describing execution-style killing in course of robbery); *Barclay v. Florida*, 463 U.S. 939, 942–44 (1983) (plurality opinion) (noting that defendants selected white victim in hopes of fomenting "racial war" (quoting *Barclay v. State*, 343 So. 2d 1266, 1267–69 (Fla. 1977))); *Barefoot v. Estelle*, 463 U.S. 880, 883 (1983)

or was not a constitutionally proportional sentence. In the earlier cases, the Court made the substantive judgment itself. In the later cases, through a series of E-type procedural rulings, the Court outsourced substantive constitutional review to state juries and appellate courts. What remained unclear was how much C- and D-type oversight the Court meant to exercise over these decentralized decisionmakers.

The most remarkable attribute of the *Spring 1983 Cases* thus is not how much they undid, but how abruptly they stopped the Court's forward progress. A clue to the peremptory nature of the Court's declaration, "this far but no farther," may lie, however, in its continuing experiment with procedures that radically decentralized its substantive constitutional responsibilities.

B. *Stasis, Delegation, and Insulation (1984–1999)*

During the next fifteen years, three principles drove the Court's jurisprudence and gave limiting answers to open questions about the Court's substantive role. (1) Constitutional protection would not exceed the status quo as of 1983 (the "stasis" principle). (2) That protection entailed E-type procedural rules that effectively delegated D-type, case-specific constitutional proportionality judgments to state juries and C-type constitutional comparative proportionality judgments to state appellate judges (the "delegated proportionality review" principle). (3) The Court henceforth would insulate itself from substantive C- and D-type proportionality judgments of the sort it had made in *Godfrey*, *Eddings*, and *Enmund*—even if doing so stopped it from assuring the accuracy of proportionality judgments it delegated to other actors or required it to weaken or abandon E-type procedural delegations it otherwise would have made and previously had made (the "insulation" principle). Whether addressing appellate review, the proper sentencing authority, the content and interaction of aggravating and mitigating factors, or trial procedures, the Court walled in its capital doctrine as of 1983 and walled out from itself the substantive judgments about who deserves to die that it read the Constitution to require and continued ordering other actors to make.

1. *Appellate Review*. — In its next major decision, *Pulley v. Harris*, the Court immediately faced the question of how much substantive review it would carry out, including as needed to facilitate the decentralization of substantive review to other institutions.²⁸² Death row inmate Robert Alton Harris argued that the California Supreme Court improperly affirmed his death sentence without reviewing it for consistency with sentences in similar cases.²⁸³ Noting that the *July 2 Cases* treated compar-

(detailing murder of police officer); *Zant v. Stephens*, 462 U.S. 862, 864–65 (1983) (describing beating and execution-style killing in midst of prison escapee's crime spree).

282. 465 U.S. 37, 38–40 (1984).

283. *Id.*

ative proportionality review as constitutionally significant, the Ninth Circuit granted habeas relief, holding that such review was constitutionally required.²⁸⁴

Although acknowledging that passages in the *July 2 Cases* “made much of the statutorily-required comparative proportionality review,” Justice White concluded for the Court that such review was not constitutionally required.²⁸⁵ Relying on little more than “this far but no farther” reasoning, Justice White noted that the passages *Harris* and the Ninth Circuit cited from the Court’s prior decisions were not part of the doctrinal status quo 1983; none was a formal “hold[ing] that comparative review was constitutionally required.”²⁸⁶

Given the strong statements in the *July 2 Cases* and *Stephens*, the stasis principle confining the Court to the status quo 1983 need not have barred relief for *Harris*. *Lockett’s* and *Stephens’s* practice of delegating substantive constitutional adjudication responsibilities by embedding them in constitutionally required state court sentencing and review procedures also supported relief, because comparative review enlisted state appellate courts in assuring that sentencers’ proportionality judgments were reliable.²⁸⁷ But the Court’s disposition to insulate itself from substantive review obligations cautioned against relief. An across the board E-type comparative review requirement for state high courts risked imposing a C- or D-type proportionality review obligation on the Supreme Court. Because only “meaningful” comparative review would suffice, the Supreme Court would have to decide whether state appellate review was adequate by examining for itself the resulting pattern of death sentences. By creating a conflict with the California Supreme Court that the U.S. Supreme Court had to resolve, the Ninth Circuit’s habeas decisions highlighted the need for the Court’s substantive oversight that would arise from a constitutional requirement of comparative proportionality review by state appellate courts. Locating substantive review duties at the appel-

284. See *Harris v. Pulley*, 692 F.2d 1189, 1196–97 (9th Cir. 1982), rev’d, 465 U.S. 37 (1984); supra notes 131–134, 260–273 and accompanying text.

285. *Harris*, 465 U.S. at 45.

286. *Id.* at 45, 50; see also *Maggio v. Williams*, 464 U.S. 46, 50–52 (1983) (per curiam) (vacating stay of execution while *Harris* was pending in Court and holding that Williams’s challenge to Louisiana’s system of only parishwide, not statewide, comparative proportionality review did not raise viable constitutional claim). Justice Stevens concurred in the judgment in *Harris*, concluding that some form of appellate review might well be required in capital cases in particular States, but declining to require comparative proportionality review in California. See *Harris*, 465 U.S. at 59 (Stevens, J., concurring in part and concurring in the judgment). This approach was consistent with an interpretation of *Stephens* as requiring comparative proportionality review only in Georgia, given that its statute, unlike most others (including California’s), did little narrowing and did not use balancing procedures that made the jury into the Court’s constitutional surrogate, thus requiring the state supreme court to serve that function. See supra notes 252–260 and accompanying text.

287. See supra notes 167–175, 252–270 and accompanying text.

late, as opposed to trial, level placed those duties too close to the Court for comfort.

2. *Jury Versus Judge Sentencing*. — The principle of delegated proportionality review may have played a role in *Spaziano v. Florida*,²⁸⁸ decided the same term as *Harris*. There the Court rejected an E-type claim that the Eighth Amendment creates a capital-specific right to jury sentencing to permit the necessary moral judgments that can best be made by a microcosm of the wider community.²⁸⁹ Acknowledging that jurors may be better factfinders and moral compasses, the Court concluded that jurors are not better sentencers in a regime that resists giving “free rein” to decisionmakers and instead requires them to “weigh[] . . . aggravating and mitigating circumstances.”²⁹⁰ Recognizing that the role capital sentencers are constitutionally required to play in weighing aggravation against mitigation is qualitatively different from the factfinding and community-representing roles jurors usually play, and that judges can perform the role at least as effectively as jurors, is at least consistent with understanding the sentencers’ role in the post-*Furman* regime as novel

288. 468 U.S. 447 (1984).

289. See *id.* at 461. As was permitted by Florida law, the trial judge had overridden the jury’s recommendation that Spaziano be sentenced to life. *Id.* at 451–52.

290. *Id.* at 462. *Spaziano* also relied on the stasis principle, treating the Court’s affirmance of the Florida statute in one of the *July 2 Cases*, *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (plurality opinion), as largely decisive. See *Spaziano*, 468 U.S. at 464–65. The stasis principle also hampered the Court’s subsequent efforts to resolve the related F-type question whether there is a Sixth Amendment right to a jury determination of purely factual questions that determine death eligibility, that is, whether a statutory aggravating factor is present. Compare *Walton v. Arizona*, 497 U.S. 639, 647–48 (1990) (treating decision in *Spaziano* as foreclosing Walton’s F-type claim that Sixth Amendment right to jury trial on factual elements of crimes should extend to functionally equivalent factual elements of aggravating factor findings at capital sentencing phase), with *Ring v. Arizona*, 536 U.S. 584, 598–609 (2002) (overruling *Walton* and concluding, based on intervening decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that capital defendants have Sixth Amendment right to jury determination of all factual questions, including in Arizona existence of at least one statutory aggravating factor, that raise maximum possible punishment to death). Other F-type decisions extending standard guilt/innocence rights to the capital sentencing phase include *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (applying to capital penalty phase longstanding due process limits on unnecessarily requiring criminal defendants to appear at trial in shackles); *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002) (reiterating rule of *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (plurality opinion), which held that defendant whom State claimed posed violent risk to society unless executed had due process right to inform jury that alternative to death sentence was life imprisonment without possibility of parole); *Morgan v. Illinois*, 504 U.S. 719, 728–29 (1992) (deciding that right to neutral decisionmaker requires that, if courts remove prospective jurors whose anti-death penalty views keep them from voting for death, they also must remove those whose pro-death penalty views keep them from considering mitigating factors); *Lankford v. Idaho*, 500 U.S. 110, 120–28 (1991) (determining that defendant informed before trial by court order that prosecutor would not seek death penalty had due process right not to be sentenced to die); *Strickland v. Washington*, 466 U.S. 668, 684–87 (1984) (applying protection against ineffective legal assistance to capital sentencing phase).

and composed of the delegated substantive constitutional judgments that are postulated here.²⁹¹

3. *Aggravation*. — In *Maynard v. Cartwright*, stasis, delegated proportionality review, and isolation benefited the prisoner.²⁹² In overturning a death sentence based on a facially overbroad “heinousness” aggravating factor, Justice White structured his unanimous opinion as a routine application of a “delegated proportionality” rule derived from *Godfrey*. Under that rule, aggravating factors are invalid if they are too indiscriminate to give sentencers a meaningful basis for concluding that death is a proportionate penalty in a particular case.²⁹³ In fact, *Cartwright* reversed a central aspect of *Godfrey*. That accomplishment explains Justice White’s endorsement of an outcome he dissented from in *Godfrey*, notwithstanding that Cartwright’s crime was considerably more aggravated than Godfrey’s.²⁹⁴ In a clever sleight of hand, Justice White read his highly aggravated view of *Godfrey*’s facts into *Cartwright* and on that basis interpreted *Godfrey* to forbid the Court to conduct its own substantive D-type analysis of net aggravation. Had the Court conducted such analysis in *Godfrey*, White reasoned, the egregious facts would have required it to affirm the death verdict. Henceforth, *Godfrey* embodied only a requirement that, in making their own, delegated D-type proportionality judgments, state sentencers find at least one highly aggravated factor before imposing death.²⁹⁵

Justice White’s makeover of *Godfrey* in accordance with the insulation principle continued in *Walton v. Arizona*²⁹⁶ and *Lewis v. Jeffers*.²⁹⁷ Again interpreting *Godfrey* as the opposite of what it was, Justice White read the Court to have presumed that state judges adhered to state definitions of aggravating factors no matter how little evidence they gave of doing so.²⁹⁸ If a single prior state precedent had limited the factor’s reach, and if at

291. See *Spaziano*, 468 U.S. at 459 (concluding that “[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant” to determine “appropriate punishment to be imposed on an individual”).

292. 486 U.S. 356 (1988).

293. *Id.* at 363–64.

294. Cartwright’s killing involved psychological torture much like that in *Godfrey* and physical torture not present in Godfrey’s instantaneous shotgun killings. See *id.* at 358 (describing how Cartwright shot first victim, killed second victim, then, finding first victim still alive, slit her throat).

295. See *id.* at 363 (“[*Godfrey*] plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.”); Liebman & Marshall, *supra* note 6, at 1635–36 (discussing Justice White’s recasting of *Godfrey* in *Cartwright*); *supra* notes 203–205 and accompanying text (discussing Justice White’s dissent in *Godfrey*).

296. 497 U.S. 639 (1990).

297. 497 U.S. 764 (1990).

298. See *id.* at 780–81 (holding that Ninth Circuit engaged in inappropriate review of state sentence after Arizona Supreme Court had approved sentencer’s “heinousness” finding); *Walton*, 497 U.S. at 653 (“If the Arizona Supreme Court has narrowed the

least one judicial decision in the case formally imposed or upheld the factor, the Court would conclusively presume that the decision properly applied the limitation. No longer would *Godfrey* tempt the Court to use D-type substantive assessments of death's desert to test the state courts' adherence to state and federal definitional requirements—even if such adherence was necessary to the integrity of the Court's system of delegated substantive proportionality judgments.

Cartwright, *Walton*, *Jeffers*, and a later case, *Arave v. Creech*,²⁹⁹ confirmed that the insulation principle trumped the “delegated proportionality review” principle. The first three cases ruled out the Court's D-type peek at the facts of particular cases to test whether state courts had applied a narrow enough definition of the questionable sentencing factor to assure reliable proportionality judgments. *Creech* similarly eliminated the Court's C-type look at the faithfulness of the state court's application of the factor across a range of cases.³⁰⁰ All four cases concluded that aggravating factors did enough narrowing as long as they did any.³⁰¹ Thus, in order to absolve itself of substantive, B-type judgments about how much narrowing any given statutory factor accomplished, and how much was enough, the Court found it necessary to approve aggravating factors that did almost no narrowing. *Creech* allowed Idaho to treat “cold, calculated” killings as a sufficiently aggravated subcategory of premeditated and deliberate killings, though the part admittedly was only marginally smaller than the whole.³⁰² *Walton* and *Jeffers* permitted Arizona to subdivide its “above the norm of first-degree murders” factor into multiple parts, each of which applied to less than all defendants, though the sum of all parts encompassed all defendants.³⁰³ In these ways, the Court opted to risk sham proportionality judgments by its delegates rather than become involved in substantively deciding whether death was proportionate.³⁰⁴

definition of the ‘especially heinous, cruel or depraved’ aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition.”).

299. 507 U.S. 463 (1993).

300. See *id.* at 476–77 (rejecting defendant's argument that Idaho courts' inconsistent application of aggravating factor rendered it invalid).

301. See, e.g., *id.* at 474 (finding aggravating factors acceptable as long as they do not “appl[y] to every defendant eligible for the death penalty”).

302. See *id.* at 475–76 (concluding that Idaho “has narrowed in a meaningful way” because “a sentencing judge reasonably could find that not all Idaho capital defendants are ‘cold-blooded’”: “[S]ome within the broad class of first-degree murderers do exhibit feeling”; “[s]ome . . . kill with anger, jealousy, revenge, or . . . other emotions.”).

303. See *Jeffers*, 497 U.S. at 783–84; *Walton*, 497 U.S. at 655–56; Liebman & Marshall, *supra* note 6, at 1637.

304. See *Creech*, 507 U.S. at 474–76 (refusing to make substantive judgment whether aggravating factors accomplish enough—as long as they do some, albeit minimal—narrowing); see also *Jones v. United States*, 527 U.S. 373, 398–400, 404–05, 420 (1999) (permitting jury to weigh two potentially overlapping, nonstatutory aggravating factors—victim's (1) “‘young age, her slight stature, her background, and her unfamiliarity with’” area where crime occurred, and (2) victim's “‘personal characteristics and the effect of the instant offense on [her] family’”—because of their tendency to draw jury's attention to two different relevant matters in aggravation, and because overlap was harmless in view of

4. *Mitigation*. — Stasis and delegated proportionality review led the Court throughout the 1980s to reject limits on the mitigating evidence sentencers considered.³⁰⁵ In *Mills v. Maryland*, the latter principle trumped the former, prompting a new E-type rule that States must exempt jurors' mitigation findings from the usual unanimity rule.³⁰⁶ Each juror must make his or her own independent judgment about the presence and weight of mitigating factors.³⁰⁷ Again defying Justice White's concern that making death sentences rare would keep them from deterring crime and projecting a retributive message, *Mills* increased the number of hung juries, and thus the number of life sentences that most States impose when the jurors cannot agree.³⁰⁸ Especially if understood to permit juror-specific consideration of nonstatutory aggravating, as well as all mitigating, factors, *Mills* enhanced juries' sensitivity to the range of factors determinative of D-type substantive proportionality. It also moved

overall aggravation (quoting *United States v. Jones*, 132 F.3d 232, 250 (5th Cir. 1998)); *Tuilaepa v. California*, 512 U.S. 967, 977–80 (1994) (upholding statutory requirement that jury consider circumstances of crime, use (or not) of force or violence, and age of defendant, without specifying whether such circumstances are aggravating or mitigating or how they factor into sentencing decision because they draw jury's attention to information relevant to overall aggravation and mitigation); *id.* at 982–83 (Stevens, J., concurring in the judgment) (concluding that reliance on “potentially ambiguous, but clearly relevant, factors” such as defendant's age and circumstances of crime, even when not denominated as aggravating or mitigating, “actually reduces the risk of arbitrary capital sentencing” because they promote “informed, individualized sentencing decision[s]” and reduce danger of bias); *Payne v. Tennessee*, 501 U.S. 808, 839 (1991) (Souter, J., concurring) (reasoning that *Lockett's* open-ended authorization to consider mitigation justifies broadly defining aggravation to include offense's unanticipated effects on victim's family); *id.* at 858–59 (Stevens, J., dissenting) (decrying majority's abandonment of *Enmund's* linkage of aggravation to subjective culpability and abdication of such judgments to States); *Lowenfield v. Phelps*, 484 U.S. 231, 244–46 (1988) (permitting State to require jury to make statutory aggravating circumstance findings at guilt/innocence phase, then to weigh aggravating factors it previously found in penalty-phase balance of aggravation and mitigation).

305. See *Penry v. Lynaugh*, 492 U.S. 302, 319–28 (1989) (requiring explicit instructions identifying mental retardation as mitigating circumstance, given probability jurors otherwise will consider it only as aggravating factor on question of future dangerousness); *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (voiding instruction indicating that jurors may consider only statutory mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (overturning rule barring mitigative evidence of good behavior in jail after defendant's arrest for capital crime).

306. 486 U.S. 367, 384 (1988).

307. The *Mills* Court said:

[T]here is a substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Id.; accord *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (“[The] unanimity requirement impermissibly limits jurors' consideration of mitigating evidence.”).

308. See, e.g., *Kubat v. Thieret*, 867 F.2d 351, 373–74 (7th Cir.), cert. denied, 493 U.S. 874 (1989).

that D-type proportionality judgment still further from the Court toward the individual juror.

When delegated proportionality and insulation conflicted, the latter prevailed. In *Johnson v. Texas*, the Court affirmed a significant limit on the use of mitigating evidence.³⁰⁹ Johnson was nineteen years old at the time of the crime. As required by Texas law, he was sentenced to die when the jury determined that the killing was deliberate and that Johnson posed a threat of continued violence if allowed to live. Johnson argued that this scheme unduly limited the jury's consideration of mitigating evidence by allowing his young age to support a sentence less than death only if it led jurors to think he would mature out of his violent proclivities, but not if it prompted the more usual—but in Texas irrelevant—inference that he was less culpable than an adult offender because he was less able to control himself.³¹⁰

The Court accepted Johnson's understanding of state law but not of the Constitution. It rigidly read *Lockett* to forbid only procedures that gave no weight to particular mitigating evidence and thus to allow procedures providing an outlet for some proportion of the extenuating force of the evidence, even if the proportion was small.³¹¹ The Court did not explain how it could forbid sentencers to give no weight to a weakly extenuating factor,³¹² but let them give no weight to powerfully extenuating aspects of factors that mitigate in multiple ways. The stasis principle required no such parsimonious interpretation of *Lockett*, especially one that subverted the delegated proportionality principle by coaxing death sentences out of jurors forced to ignore factors (or aspects of factors) calling for less severe punishment.³¹³ What the *Johnson* rule did accomplish was insulation, given how well it removed the temptation to which the Court had succumbed in *Eddings* to rely on D-type judgments about the weight due mitigating factors. If any mitigating consideration suffices, it is nearly impossible for the Court to make the substantive judgment—on which *Eddings* turned—that the mitigating evidence warranted so much more consideration than the sentencer seemed to have given that the sentencer can be assumed to have given none. As the Court later realized, however, the decision undermined the principle of delegated proportionality review by tolerating highly unreliable calculations of aggravation net of mitigation.³¹⁴

309. 509 U.S. 350 (1993).

310. *Id.* at 369–70.

311. *Id.* at 371–72; see also *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion) (upholding instruction permitting jury to consider Franklin's good behavior in jail only on question of future dangerousness, not as evidence of general good character).

312. See *Skipper v. South Carolina*, 476 U.S. 1, 14 & n.3 (1986) (Powell, J., concurring in the judgment) (objecting to majority's extension of *Lockett* to defendants' postarrest behavior because compliance with incentive to "behave like Eagle Scouts" before trial has almost no mitigating value).

313. See *Johnson*, 509 U.S. at 375–77, 379–81 (O'Connor, J., dissenting).

314. See *infra* notes 442–447 and accompanying text.

Insulation explains what the Court did in *Johnson*, but only a combination of stasis, delegated proportionality review, and insulation can explain what it did not do. If the Court wanted to abandon *Lockett*, there were better ways than a risible distinction between giving no consideration to extremely weak mitigating factors (unconstitutional) and giving extremely weak consideration to powerful factors (constitutional). As Justices Scalia and Thomas passionately urged in a series of separate opinions recapitulating Justices White's and Rehnquist's dissents in *Woodson* and *Lockett*, the Court could simply have abandoned the rule requiring consideration of all mitigating factors on the ground that it offended *Furman's* demand for guided discretion and numerosness in capital sentencing.³¹⁵ Doing so, however, would have scrapped both the status quo 1983 and a regime of E-type rules turning sentencers into D-type proportionality judges. Contrary to the insulation principle, abandoning *Lockett* might also have put pressure on the Court to conduct substantive review of each State's limited set of mitigating (and aggravating) factors on which capital sentences then would turn. Even Chief Justice Rehnquist and Justice White preferred to trump the delegated proportionality principle only to the albeit illogical extent needed to keep the Court insulated from substantive review responsibilities.³¹⁶

5. *Aggravation Versus Mitigation*. — Stasis, delegated proportionality review, and insulation also explain three 1990 cases rejecting Justice Stevens's suggestion in *Smith v. North Carolina* that death be forbidden if aggravation net of mitigation is not "substantial."³¹⁷ *Blystone v. Pennsylvania* let States mandate death if the jury found one aggravating and no mitigating factor but did not additionally find that aggravation was severe enough to warrant execution.³¹⁸ In classic "this far but no farther" style, the Court upheld the procedure solely because it violated neither

315. See, e.g., *Graham v. Collins*, 506 U.S. 461, 478–500 (1993) (Thomas, J., concurring); *Espinosa v. Florida*, 505 U.S. 1079, 1083 (1992) (Scalia, J., dissenting); *Sochor v. Florida*, 504 U.S. 527, 553 (1992) (Scalia, J., concurring in part and dissenting in part); *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment); *Lockett v. Ohio*, 438 U.S. 586, 621–28 (1978) (White, J., concurring in part, dissenting in relevant part, and concurring in the judgment); *id.* at 628–36 (Rehnquist, J., concurring in part and dissenting in relevant part); *Woodson v. North Carolina*, 428 U.S. 280, 321 (1976) (Rehnquist, J., dissenting); Liebman & Marshall, *supra* note 6, at 1634 & n.122 (discussing Scalia-Thomas view); *supra* note 6 and accompanying text; *infra* note 439 and accompanying text.

316. A classic of the Court's stasis/insulation/trumping jurisprudence is *Harris v. Alabama*, 513 U.S. 504, 514–15 (1995), which, absent a contrary case barring the procedure, permitted Alabama trial judges, in deciding whether to override the jury's sentence, to treat a life verdict as a mitigating factor and give it whatever weight the judge felt was appropriate. The Court declined to use D-type review to determine whether the trial judge gave no weight to the factor or C-type review of all "judge overrides" to see if Alabama judges routinely gave jury life verdicts no or too little weight, despite showing that Alabama judges often overturn life, but rarely death, verdicts. *Id.* at 513.

317. See *supra* notes 213–214 and accompanying text.

318. 494 U.S. 299, 305 (1990).

the rule that aggravating factors must narrow the class of death-eligible offenders nor the rule that mitigating evidence must be freely admissible.³¹⁹ The Court simply ignored Justice Stevens's point that a mere particle of aggravation beyond that present in all murders does not ensure that the ultimate sanction is proportional.

Boyde v. California extended *Blystone* to an instruction requiring death despite substantial mitigating evidence, as long as aggravation outweighed mitigation by some amount.³²⁰ And *Walton v. Arizona* upheld a statute the state courts had interpreted to require death as long as mitigation (minus factors the defendant could not establish by a preponderance) did not outweigh aggravation.³²¹ In *Walton*, the Court relied entirely on the stasis principle, citing *Blystone* and *Boyde* without confronting a crucial difference: Unlike *Blystone* and *Boyde*, *Walton* may have been condemned although mitigation entirely offset aggravation. Whereas *Blystone* and *Boyde* rejected Justice Stevens's presumption of life, *Walton* approved Arizona's presumption of death.³²² Again, the primacy of the insulation principle explains *Blystone*, *Boyde*, and *Walton*. All three decisions risked a wholly unreliable system of delegated proportionality judgments to keep the Court from having to say how much net aggravation is enough to warrant death.

Notice the explanation beginning to appear for a jurisprudence that half the time seemed to follow Justices Stewart's and Stevens's "less is better" approach to capital sentencing and the rest of the time seemed to follow Justice White's opposite, "more is better," approach.³²³ Although the competing views underpinned the decision in *Furman*, the Court's wavering choices between the two thereafter were driven by two other contradictory principles: The constitutionality of death as a penalty for murder depends on a case-by-case proportionality judgment about the amount of aggravation net of mitigation. But the Court—the Constitution's supreme expositor—would not make that constitutional judgment itself and instead would delegate it to other actors. When delegation and insulation clashed, the latter prevailed, shielding the Court at the expense of what it read the Constitution to require.³²⁴

319. *Id.* at 307–09.

320. 494 U.S. 370, 377 (1990).

321. 497 U.S. 639, 649–51 (1990) (plurality opinion).

322. See Liebman & Marshall, *supra* note 6, at 1639 (discussing *Walton*'s presumption of death). But cf. *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) (ruling that States may not "entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death").

323. See Liebman & Marshall, *supra* note 6, at 1608–12; *supra* notes 19–22, 27–31 and accompanying text.

324. In *Kansas v. Marsh*, 126 S. Ct. 2516 (2006), the Court reviewed the decision in *State v. Marsh*, 102 P.3d 445 (Kan. 2004), which distinguished *Walton* and concluded that Kansas may not constitutionally require jurors to impose death when aggravating and mitigating circumstances are in "equipoise." In defending the Kansas Supreme Court's decision, *Marsh*'s brief argues that the Court's contrary decisions in *Blystone*, *Boyde*, and

6. *Capital Trial Procedures*. — Three cases governing capital trial procedures also reveal the power of the insulation principle. In one of the *Spring 1983 Cases*, the Court had approved instructions informing capital jurors that they share responsibility for the ultimate outcome with the governor who could commute a jury's "life without parole" sentence to a sentence permitting parole.³²⁵ *Caldwell v. Mississippi*, however, forbade judges and prosecutors to tell jurors they share responsibility with the state "supreme court," which could overturn death sentences on appeal—because doing so might undermine the jurors' sense of responsibility (as the plurality concluded) or mislead them into thinking that appellate courts make de novo sentencing determinations (as Justice O'Connor concluded in concurrence).³²⁶ Under either view, *Caldwell* worked a capital-specific (E-type) innovation because it exposed capital instructions to a stiffer standard of review than the usual one voiding instructions only if they "infect[] the trial with unfairness."³²⁷ In *Romano v. Oklahoma*, however, the stasis principle dictated that Justice O'Connor's narrower, accuracy-focused view be treated as the rule of *Caldwell*³²⁸ (though no other Justice had accepted it). This principle required the Court to affirm the death verdict of a jury that had been informed accu-

Walton should be narrowly construed to keep from destroying the integrity of the Court's system of delegated D-type proportionality:

A death sentence returned . . . by a jury in equipoise [i.e., that believes aggravation and mitigation are equal] . . . expresses nothing about an individual defendant's "personal responsibility and moral guilt" except that s/he is somewhere within the class of death-eligible murder convicts. The State argues that Kansas' [requirement of a death sentence when the jury is in] equipoise . . . assures that "similar results will be obtained under similar circumstances." But as this Court's Eighth Amendment decisions teach, "a consistency produced by ignoring individual differences is a false consistency."

Brief for Respondent at 36–37, *Marsh*, 126 S. Ct. 2516 (No. 04-1170) (citations omitted) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981)). In rejecting this argument and overturning the Kansas Supreme Court's decision, the Supreme Court reaffirmed its withdrawal from the delegation principle. See *Marsh*, 126 S. Ct. at 2525, 2526–27, 2529 (reaffirming *Blystone*, *Boyd*, and *Walton*, and holding that "the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional"); cf. *id.* at 2543 (Souter, J., dissenting) (criticizing majority decision for undermining "object of the structured sentencing proceeding required in the aftermath of *Furman* . . . to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty" by requiring jurors to limit death sentences to "the worst of the worst").

325. See *California v. Ramos*, 463 U.S. 992, 1013–14 (1983); *supra* note 275 and accompanying text.

326. 472 U.S. 320, 341 (1985) (plurality opinion); *id.* at 343 (O'Connor, J., concurring in part and concurring in the judgment).

327. *Id.* at 337–40 (majority opinion) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); see also *id.* at 341 (O'Connor, J., concurring in part and concurring in the judgment) (concurring in plurality's application of stiffer standard of review); cf. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (applying usual rule limiting reversal based on improper instructions to cases where improper charge infected entire proceeding).

328. 512 U.S. 1, 14–15 (1994) (O'Connor, J., concurring).

rately, but in violation of state law, that it effectively shared responsibility for the defendant's fate with another jury, which had already sentenced him to die.³²⁹

It is hard to see why jurors told that the state supreme courts can overturn death sentences, as state high courts often do,³³⁰ are more likely to be misled about their verdict's lack of finality than jurors told to take account of a power to commute that governors almost never exercise. Nor is it clear why hearing that the defendant might win an appeal more effectively lightens the jurors' moral load than knowing that he already has a death sentence in another case. There is, however, one deficiency in the statements to the *Caldwell* jury that was not present in the other cases. Only the *Caldwell* statements suggested that the authorities with whom the jurors shared substantive capital responsibility were appellate courts—the United States Supreme Court included³³¹—rather than actors removed from the Court. Only the *Caldwell* statements suggested a responsibility from which the Court was committed to insulating itself, namely that it and courts like it passed substantive, life or death judgments.

C. *New Offshore Sites (1986–1989)*

Even as the Court blockaded itself against substantive review obligations, it assigned those duties to new offshore sites. It delegated B-type judgments to a consortium of state legislatures. And it devised E- and F-type rules that encouraged state appellate courts to make D-type proportionality judgments without committing the Court itself to any substantive review of the validity of those state court judgments.³³²

1. *Judgment by Legislative Consortium.* — By the late 1980s, the Court had largely succeeded in relocating the systemic and case-by-case (C- and D-type) review of death verdicts for murder that it read the Constitution to require. But as in *Coker* and *Enmund*, it continued to face the responsibility the Cruel and Unusual Punishment Clause had long been understood to impose of B-type substantive review of the proportionality of death as a penalty for particular categories of crimes and criminals.³³³

329. *Id.* at 21–23 (Ginsburg, J., dissenting).

330. See 2 James Liebman et al., *A Broken System: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 122 fig.12 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> (on file with the *Columbia Law Review*) (showing that Mississippi Supreme Court overturned nearly sixty percent of all death verdicts reviewed on direct appeal between 1973 and 1995).

331. The offending prosecutorial remark—"the decision you render is automatically reviewable by the Supreme Court," *Caldwell*, 472 U.S. at 325–26—might have been taken to mean the United States or the state supreme court.

332. *Cf. supra* Part VI.B.1 (discussing Court's rejection of state appellate review responsibilities that committed Court to supervisory substantive review).

333. See, e.g., *Solem v. Helm*, 463 U.S. 277, 303 (1983) ("The Constitution requires [the Court] to examine Helm's sentence to determine if it is proportionate to his crime."); *cf. Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (determining if sentence was cruel and

Here too, however, the Court found ways to substitute the decisions of other legal actors for its own. Using a device it had developed following *Furman* to help determine the proportionality of the death penalty per se, it made the constitutionality of the penalty for categories of crimes and criminals turn on a headcount of state legislatures.

In *Ford v. Wainwright* in 1986, a strong common law tradition and a unanimous contemporary legislative judgment led the Court to hold that States could not execute prisoners who were then insane.³³⁴ In the absence of a legislative consensus, however, the Court split badly on the procedures due a prisoner whose counsel claimed he was insane and on the insanity standard.³³⁵ Also operating in the absence of a legislative consensus, the Court waffled on the minimum level of accessorial felony murder liability needed for the death penalty. *Enmund* had held that an accessory to a felony in which someone else took life could not be condemned unless he “intended to kill.”³³⁶ In 1987, however, *Tison v. Arizona* lowered the standard to a mix of gross recklessness as to the killing and major participation in the felony.³³⁷ In these cases, as previously in *Coker* and *Enmund*, the Court counted legislative heads and sided with the majority.³³⁸ But it was also at pains, as in the earlier cases, to describe the ultimate decision as its “own judgment.”³³⁹

Thereafter, however, a core of Justices argued that the Court did not have the authority to render its own judgment and instead could overturn a State’s use of the death penalty for a category of crimes or criminals only if the use was contrary to a clear consensus of all States or, on one view, all capital States. In *Thompson v. Oklahoma*, a four-Justice plurality used a legislative headcount of all States (with abolitionist States counted as “against”) as one basis for its own judgment that the Eighth Amendment does not permit fifteen-year-olds to be executed.³⁴⁰ Three other

unusual); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“[T]he power to punish . . . [must] be exercised within the limits of civilized standards.”); *Weems v. United States*, 217 U.S. 349, 381 (1910) (considering whether crime “is repressed by penalties of just, not tormenting, severity”).

334. 477 U.S. 399, 408–10 (1986).

335. The Court split on whether due process required a full-blown judicial “sanity trial,” id. at 413–15 (plurality opinion); or instead only a summary judicial proceeding, id. at 425–27 (Powell, J., concurring in part and concurring in the judgment), at which the narrow insanity test applied, id. at 422 & n.3; a hearing before the governor, id. at 429–30 (O’Connor, J., concurring in the result in part and dissenting in part); or any procedure the governor offered, id. at 433–35 (Rehnquist, J., dissenting).

336. See supra notes 190–202 and accompanying text.

337. 481 U.S. 137, 157–58 (1987).

338. See supra notes 162–166, 190–202 and accompanying text.

339. See *Tison*, 481 U.S. at 155–57 (using legislative headcount as “backdrop” against which Court “consider[ed] the proportionality of the death penalty in these midrange felony-murder cases”); supra notes 163, 193 and accompanying text.

340. 487 U.S. 815, 823–29 (1988) (plurality opinion) (expressing Justices’ own judgment, informed by legislative headcount that included States without death penalty and gave less weight to States with no express lower age limit).

Justices, however, denied the Court's authority to make its own judgment and found inconclusive a headcount including only death penalty States.³⁴¹ In determining the outcome, Justice O'Connor sought instead to clarify the legislative count. In her view, the legislative consensus against imposing the death penalty on fifteen-year-olds was not clear enough to bar States from choosing to condemn fifteen-year-olds, but it was strong enough to require a State to make that choice explicit. Because Oklahoma had no express statutory lower bound on the age of condemned offenders, the State had reached no apparent and collective consensus on the matter and thus could not constitutionally impose the death penalty on fifteen-year-olds.³⁴²

A year later, *Stanford v. Kentucky* upheld death sentences for offenders sixteen and older, even if the statutes set no explicit lower bound.³⁴³ The three Justices who dissented in *Thompson*, along with Justice Kennedy, comprised the plurality, adding weight to their view that the Court could resolve B-type questions only by legislative tally and not by exercising its own judgment. The plurality also took the view that only death States count³⁴⁴ and that the Constitution barred the death penalty for a particular crime or type of offender only if the legislative count weighed heavily against that use of the penalty.³⁴⁵ On the same day, the same alliances and views led the Court in *Penry v. Lynaugh* to permit the execution of mentally retarded offenders.³⁴⁶ Although in both cases five Justices (four in dissent, Justice O'Connor otherwise siding with the majority) reiterated the Court's obligation to exercise its own judgment,³⁴⁷ the replacement of Justice Marshall by Justice Thomas two years later suggested that the plurality's view had become the Court's.

Notably, although the Court moved away from full scale B-type judgments, no Justice advocated *McGautha's* A-type ban on any review of the death penalty. This was noteworthy given that members of the *Stanford/Penry* plurality were simultaneously reading the Cruel and Unusual

341. *Id.* at 867–75 (Scalia, J., dissenting) (finding no consensus against executing fifteen-year-olds because more death States failed to forbid their execution than explicitly barred practice; criticizing plurality for relying on “its [own] views regarding the desirability of ever imposing capital punishment for a murder committed by a 15-year-old”).

342. *Id.* at 857–58 (O'Connor, J., concurring in the judgment).

343. 492 U.S. 361, 380 (1989) (plurality opinion).

344. *Id.* at 370 n.2 (majority opinion) (describing disagreement on Court as to whether non-death States should be counted).

345. *Id.* at 370–73.

346. 492 U.S. 302, 340 (1989) (O'Connor, J.); *id.* at 351 (Scalia, J., concurring in part and dissenting in part); *id.* at 346–48 (Brennan, J., concurring in part and dissenting in part) (disagreeing with Court's holding and concluding that executing mentally retarded violates Eighth Amendment).

347. *Id.* at 335 (O'Connor, J.); *id.* at 342–43 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part); *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 393 (Brennan, J., dissenting).

Punishment Clause to forbid “cruel and unusual punishment” review of any use of a noncapital punishment that a state legislature had duly authorized—regardless of the views of other States.³⁴⁸ By unanimously endorsing stricter methods for resolving the constitutionality of the death penalty—though death is one of the few penalties the Constitution actually recognizes³⁴⁹—the Court persisted in its odd approach to the death penalty. While requiring substantive constitutional review, the Court refused to conduct the review itself and instead located the responsibility offshore. It did so in this case by taking referenda of the legislatures of all States—or all with the death penalty.³⁵⁰

2. *State Appellate Review Redux*. — In *Pulley v. Harris* in 1984, the Court was not confident enough in its ability to resist substantive review temptations to order adjacent appellate courts to monitor trial-level proportionality judgments via C-type “comparative proportionality review.”³⁵¹ By 1990, however, it was ready to designate state appellate courts as the site of a much more modest form of backup D-type review. Doing so required the Court to enforce an E-type requirement similar to one it rejected in *Stephens* and, seemingly, in *Barclay*.³⁵²

As had *Barclay*, four cases beginning with *Clemons v. Mississippi* presented challenges to death verdicts imposed under statutes that determine whether a crime crosses the third death sentence plane (after conviction and the finding of a single aggravating factor bring it across the first two planes) by balancing aggravation against mitigation.³⁵³ As in both *Stephens* and *Barclay*, the sentencer in all four cases had found multiple aggravating factors, one of which was overturned on appeal. Contrary to *Stephens* and *Barclay*, however,³⁵⁴ the Court did not conclude that the remaining valid aggravating factor(s), together with free consideration of mitigating factors, satisfied all constitutional requirements. Instead, the Court overturned all four death sentences as the tainted products of invalid aggravating factors.³⁵⁵

348. See *Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991) (refusing to extend “‘individualized capital sentencing doctrine’” to noncapital context). But see *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality opinion) (rejecting plurality view in *Harmelin* and holding that Eighth Amendment imposes at least weak proportionality constraint on noncapital penalties).

349. See *supra* note 43 and accompanying text.

350. See Stephen P. Garvey, Note, Politicizing Who Dies, 101 *Yale L.J.* 187, 190–91, 194 (1991).

351. See *supra* Part VI.B.1.

352. See *supra* Parts VI.A.2–3.

353. 494 U.S. 738, 745 (1990); see *Richmond v. Lewis*, 506 U.S. 40, 47–48 (1992); *Sochor v. Florida*, 504 U.S. 527, 529 (1992); *Stringer v. Black*, 503 U.S. 222, 229 (1992); see also *supra* notes 271–275 and accompanying text.

354. See *Stringer*, 503 U.S. at 244–45 (Souter, J., dissenting) (comparing *Stringer* holding with *Stephens* and *Barclay*).

355. See *Richmond*, 506 U.S. at 52; *Sochor*, 504 U.S. at 540–41; *Stringer*, 503 U.S. at 232; *Clemons*, 494 U.S. at 751–54.

The Court distinguished *Stephens* because, under Georgia's capital statute, formally adjudicated aggravating factors affected only the decision whether Plane 2 was crossed and played no legal role in the jury's discretionary third determination, whether, based on all the evidence, death was appropriate. No violation arose because the valid aggravating factors were sufficient to bring the crime across Plane 2, and the invalid factor exposed the jury to no evidence that was not properly before it when it adumbrated Plane 3. By contrast, in States where a formally adjudicated aggravating factor not only brought the crime across the second plane but also weighed in the balance that decided if the case crossed the third plane, the invalidity of any such factor always spoiled the outcome. In "weighing" States, that is, the integrity of each adjudicated aggravating factor and not that of the evidence as a whole determined the integrity of the delegated proportionality decision.³⁵⁶ Although *Barclay* arose in a weighing State, the Court distinguished it based on its conclusion that the Florida Supreme Court had affirmed only after silently finding that the invalid factor had not tipped the balance against *Barclay*.³⁵⁷

The *Clemons* rule was oddly invasive and effete at the same time. First, it had a distinct "no good deed goes unpunished" quality. In States like Georgia that did nothing to guide the Plane 3 decision, a jury's finding of at least one valid statutory aggravating factor absolved the appellate court of even having to review the rest of the statutory aggravating circumstances the jury found. But in States like Mississippi that constrained the Plane 3 decision with a balancing rule, appellate courts had to review every adjudicated factor and resentence if any invalid factor was found. The distinction's artificiality was particularly clear given (as was recognized in *Stephens*³⁵⁸) that, even absent guidance, jurors instructed to find statutory aggravating factors and then to base their sentencing discretion on all of the aggravating and mitigating evidence almost certainly would conduct some kind of balancing in which all the statutory circumstances they found, including invalid ones, would carry weight.

Moreover, *Clemons* did what *Barclay* refused to do.³⁵⁹ It required state appellate courts to make explicit any finding that an invalid factor was harmless.³⁶⁰ And the *Clemons* line of cases made federal constitutional violations turn on the existence of violations of state law—that is,

356. See *Stringer*, 503 U.S. at 231–32; *Clemons*, 494 U.S. at 751–52.

357. See *Stringer*, 503 U.S. at 231; see also *supra* Part VI.A.3 (discussing *Barclay*).

358. See *supra* note 253 and accompanying text; see also *Brown v. Sanders*, 126 S. Ct. 884, 899 (2006) (Breyer, J., dissenting) ("In reality, all sentencers *weigh*." (emphasis added) (quoting Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 4, *Brown*, 126 S. Ct. 884 (No. 04-980))). For criticism of the "weighing"/"nonweighing" distinction, see Steiker & Steiker, *supra* note 3, at 386–87; Marcia A. Widder, Comment, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 Tul. L. Rev. 1341, 1343–44 (1994).

359. See *supra* Part VI.A.3 (describing *Barclay*).

360. See *Clemons*, 494 U.S. at 750–54.

on aggravating factor findings that violate state, even if not federal, law and on sentences that offend the logic of state law weighing procedures that the Federal Constitution does not require.³⁶¹

On the other hand, the obligations imposed on weighing States by *Clemons* were weak. Denying *Clemons* most of the relief he sought, the Court held that he had no right to a new trial-level sentencing proceeding, but only to a determination somewhere, including on appeal, that the invalid factor did not tip the Plane 3 balance.³⁶²

By undermining *Barclay*, the *Clemons* line of cases threatened the stasis principle. The Court also threatened the insulation principle by multiplying the number of aggravating factors requiring review of the sort it found so painful in *Godfrey* and by receding from *Harris's* refusal to delegate that scrutiny to adjacent appellate courts. Why take these controversial steps in service of a rule with no teeth? Evidently, the Court was strongly motivated by concerns about the integrity of its system of delegated proportionality judgments, which, in weighing States, depended on the integrity of each aggravating factor finding. The Court's focus on the integrity of state procedures also explains *Clemons's* unusual extension of the constitutional appellate review requirement to aggravating factor findings that violate state, but not federal, law.

By this point, moreover, the Court may have hoped that *Barefoot*, *Stephens*, *Cartwright*, *Walton*, and *Jeffers* had built a firewall between the Court and substantive assessment of aggravating factors.³⁶³ The Court may have thought it could require many such assessments in nearby courts without being tempted into its own substantive life versus death decisionmaking. Taking no chances, the Court insisted that state courts, not federal courts on habeas or the Court itself on direct review, conduct the necessary reweighing.³⁶⁴ This rule tracked one the Court had developed in *Cabana v. Bullock* for cases in which the guilt and aggravating factor findings did not satisfy *Enmund's* minimum culpability requirement.³⁶⁵ Rejecting a claim that only juries can make that minimum culpability finding, the Court authorized state judges to make it on ap-

361. See *Sochor v. Florida*, 504 U.S. 527, 539–41 (1992) (voiding death sentence based on aggravating factor found invalid as matter of state, but not federal, law).

362. See *Clemons*, 494 U.S. at 741 (allowing state appellate court to uphold tainted death sentence “either by reweighing of the aggravating and mitigating evidence or by harmless-error review”).

363. See *supra* Parts VI.A.1–2, VI.B.3.

364. See, e.g., *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (“Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.”); *Stringer v. Black*, 503 U.S. 222, 229–30 (1992) (requiring state appellate courts to engage in “thorough analysis of the role an invalid aggravating factor played in the sentencing process” before affirming death sentence).

365. 474 U.S. 376 (1986); see *supra* notes 190–202 and accompanying text (discussing *Enmund*).

peal.³⁶⁶ In all these ways, the Court strengthened *Spaziano's* suggestion that the determinations the Court demanded in capital cases are not analogous to the elemental factfindings on which criminal convictions turn or the purely moral judgments to which pre-*Furman* capital sentencing had aspired, and instead are quasi-constitutional conclusions that judges are well equipped to make.³⁶⁷

By treating *Clemons's* reweighing requirement and *Enmund/Bullock's* minimum culpability requirement as procedural (E-type), not substantive, the Court immunized federal courts from reviewing those determinations de novo. The question for the federal courts was not whether the new balance of aggravation and mitigation warranted death nor whether the crime revealed the minimum level of culpability required by the Constitution to warrant death, but whether the appropriate state appellate court had expressly undertaken to make the requisite judgment.³⁶⁸ Perfectly meshing its delegated proportionality review and insulation principles, the Court read the Constitution to impose an E-type procedural requirement on state juries and appellate judges to conduct substantive D-type review of the constitutional proportionality of death sentences. The Court thus could review the existence of the E-type procedures without itself making the D-type substantive judgments it deemed constitutionally necessary.

But problems remained. The Court was plagued by the question whether state sentencing procedures qualified as “weighing” or “non-weighing” when they in fact populated the “full range of possibilities]” in between the two poles.³⁶⁹ And in “weighing” States, as implicitly in *Clemons* itself, the harmless error analysis required state reviewing courts—and thus potentially the Supreme Court itself—to decide whether, even absent the admission of otherwise inadmissible evidence, a jury instruction identifying an invalid aggravating factor as a consideration important in the sentencing balance put “‘a thumb [on] death’s side of the scale,’ thus ‘creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty’” than the aggravation in the case actually warranted.³⁷⁰

366. *Bullock*, 474 U.S. at 384–89.

367. See *id.* at 398–99 & n.1 (Blackmun, J., dissenting); *supra* Part VI.B.2.

368. See *Bullock*, 474 U.S. at 390–91 (“[I]t is [the] Mississippi [courts] . . . , not the federal habeas corpus court, which should first provide *Bullock* with that which he has not yet had and to which he is constitutionally entitled—a reliable determination as to whether he is subject to the death penalty.”).

369. *Brown v. Sanders*, 126 S. Ct. 884, 891 (2006).

370. *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (alterations in original) (citations omitted) (quoting *Stringer v. Black*, 503 U.S. 222, 232, 235 (1992)); see also *Sanders*, 126 S. Ct. at 903 (Breyer, J., dissenting) (criticizing Court for failing to address danger of improper emphasis on aggravating factors caused by faulty jury instructions); *Pensinger v. California*, 502 U.S. 930, 931 (1991) (O’Connor, J., dissenting from denial of certiorari) (observing that problem is one of faulty instructions, not admissibility of evidence).

True to form, therefore, the Court in its recent decision in *Brown v. Sanders* undertook to simplify its doctrine in a way that made it irrelevant whether reference to an invalid aggravating factor may have prejudicially contributed to the imposition of a death sentence not warranted by actual aggravation net of mitigation.³⁷¹ Jettisoning the weighing/nonweighing distinction, the Court made its holding in *Stephens* the law across the board: A jury's reliance on an invalid aggravating factor violates the Constitution only insofar as it permits the jury to consider "facts and circumstances" that "would not otherwise have been before it."³⁷² If, however, as in *Stephens* and *Sanders*, the evidence admitted under the invalid factor was also admissible in support of "one of the other [valid sentencing] factors," there is never a constitutional error.³⁷³ This is true, the Court ruled, no matter how much "special emphasis" was placed on the evidence in the jury instructions and closing arguments by the fact that the evidence related to the sentencing factor later held invalid.³⁷⁴ Harmless error analysis thus may no longer consider whether instructions or argument gave undue emphasis to aggravating evidence—a judgment that begs substantive analysis of whether there was enough valid aggravation to warrant the death penalty. Instead, harmless error analysis may focus only on the question whether improperly admitted evidence was cumulative of, or added something significant to, evidence properly in the record.

As in *Stephens*, *Sanders*'s focus on whether aggravating evidence was properly before the jury is consistent with the principle of delegated proportionality judgments—the more accurate evidence the jury has to evaluate in assessing aggravation net of mitigation, the more reliable its judgment will be. A combination of stasis and insulation explains the Court's refusal to consider the real possibility that a jury might be unreliably swayed in the direction of death by being told improperly that admissible evidence had "special" force because it satisfied a statutory sentencing factor later held invalid. The sole reason the Court gave for ignoring the possibility of unreliable death sentences imposed under the influence of "special emphasis" on factors later deemed invalid was that *Stephens* had ignored that same possibility³⁷⁵—albeit in the context of a nonweighing statute and under the silly assumption, largely repudiated by *Sanders*, that jurors told to "consider" but not to "weigh" aggravating and mitigating

371. *Sanders*, 126 S. Ct. at 892 (undertaking to "clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighting States").

372. *Id.*

373. *Id.* at 893.

374. *Id.* at 894.

375. *Id.* (rejecting *Sanders*'s argument that instruction identifying invalid factor as statutory "'special circumstance[]'" "skewed" "the weighing process" because "[v]irtually the same thing happened in *Zant [v. Stephens]*," where the Court "assumed" that "the erroneous instruction . . . 'caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given,'" but found the "impact . . . 'inconsequential,' and . . . [t]he same is true here" (citations omitted)).

factors would somehow find something to do with the factors besides weighing them.³⁷⁶ The only apparent explanation for so mechanistic a decision is that it insulated the Supreme Court from substantive judgments about whether the aggravating evidence in the case was strong enough to justify a death sentence apart from undue "special emphasis" on the invalid factor. To this extent, stasis and insulation again trumped the principle favoring reliable delegated proportionality judgments.

D. *Lapses (1987–1993)*

Despite its best efforts, the Court's blockade against substantive review responsibility was not impenetrable. Twice in the early 1990s, the Court let its guard down. Even one of its most notoriously callous decisions revealed the power of the demand for some logic in decisions to take life.

1. *Mitigation*. — In *Parker v. Dugger*,³⁷⁷ Justice O'Connor used *Clemons's* mandatory reweighing rule to raise the ghost of *Godfrey* and *Eddings*³⁷⁸—provoking Justice White to object in the angry spirit of his *Godfrey* dissent. In *Parker* a jury had recommended a life sentence for each of Parker's two murders. Finding five aggravating factors in the first killing, six in the second, and no statutory mitigating factors—and not mentioning Parker's nonstatutory mitigating evidence that he "was under the influence of large amounts of alcohol and various drugs" during the murders—the trial judge overrode the life recommendation as to the second killing because "'no mitigating circumstances . . . outweigh the aggravating circumstances.'"³⁷⁹ After overturning two of the six aggravating factors, the Florida high court reimposed death for the second murder because "'[t]he trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied.'"³⁸⁰

The Court reversed. It did so based on a concededly "unusual" effort "to reconstruct that which we are to review"³⁸¹—"a reconstruction of the record," Justice White fretted, "the likes of which has rarely . . . been performed . . . in this Court."³⁸² "It must be," the Court said, that the trial court had silently "found nonstatutory mitigating factors," because the evidence warranted such a finding, "every court to have reviewed the record here has determined that the evidence supported [that] finding," and the judge's acceptance of a life verdict as to the only slightly less aggravated first killing could be explained only by "nonstatutory mitigat-

376. See *supra* notes 253, 358 and accompanying text.

377. 498 U.S. 308 (1991).

378. See *supra* notes 176–189 and accompanying text.

379. *Parker*, 498 U.S. at 311, 314 (quoting case appendix).

380. *Id.* at 311 (quoting *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984)).

381. *Id.* at 313.

382. *Id.* at 323 (White, J., dissenting); see *id.* at 313 (majority opinion) ("[W]e are required to reconstruct that which we are to review.").

ing evidence . . . directed to both murders.”³⁸³ True, when the Florida high court reweighed based on four valid factors, it made “a determination . . . of historical fact,” due substantial federal court “deference,” that the trial court had found no mitigating factors.³⁸⁴ But the Court refused to defer because the finding was “not ‘fairly supported by the record.’”³⁸⁵ Because the Florida high court had ignored the extant mitigation, its “reweighing” amounted to “no[] review . . . at all,” in violation of *Clemons’s* requirement of “meaningful” review after an aggravating factor is voided.³⁸⁶

Justice White assailed the majority opinion on several fronts. Most importantly, the majority “second guess[ed] state supreme courts” in regard to whether and how much mitigation existed and whether death was deserved—substantive review “[t]he Court long ago gave up.”³⁸⁷ In addition, the Court invented a “new and unexplained ‘meaningful appellate review’ standard,” inviting habeas relief whenever “a federal court decides that a state appellate court has . . . not rigorously followed some state appellate procedure”;³⁸⁸ ignored the presumption that state courts follow state law;³⁸⁹ and gave an egregiously wrong answer to the substantive (D-type) question the Court had no business answering.³⁹⁰ Given White’s annoyance, it is not surprising that he led the way, two years later, when the Court, in *Johnson v. Texas*, placed off limits any substantive review by the Court of mitigating factors.³⁹¹

2. *Innocence and Death*. — Also eluding the Court’s blockade against deciding for itself whether death was proportionate were claims based on a credible showing of innocence. In *Herrera v. Collins*, the Court found no due process right to a state court hearing on newly discovered evidence of innocence.³⁹² But a majority of Justices in separate opinions concluded that federal habeas relief from a death sentence is available under the Eighth Amendment if the prisoner can decisively show (as most thought *Herrera* could not) that he is innocent.³⁹³ That a federal court must halt an execution if the prisoner can conclusively show he is innocent, though it cannot stop States from sending defendants to prison

383. *Id.* at 316–17 (majority opinion).

384. *Id.* at 320.

385. *Id.* (quoting 28 U.S.C. § 2254(d)(8) (1992)).

386. *Id.* at 321.

387. *Id.* at 323 (White, J., dissenting).

388. *Id.* at 326–27.

389. *Id.* at 324.

390. *Id.* at 328.

391. See *supra* notes 309–316 and accompanying text.

392. 506 U.S. 390, 411 (1993).

393. See *id.* at 418–19; *id.* at 419 (O’Connor, J., concurring); *id.* at 429 (White, J., concurring in the judgment); *id.* at 437 (Blackmun, J., dissenting); cf. *House v. Bell*, 126 S. Ct. 2064, 2086–87 (2006) (concluding that capital prisoner’s evidence of actual innocence was not strong enough to meet *Herrera’s* narrow “actual innocence” test for avoiding execution, but was strong enough to satisfy slightly broader “actual innocence” exception to procedural default rule in habeas corpus cases).

for life despite their innocence, reveals the power of the death penalty to pierce the Court's armor against substantive review.

In *Kyles v. Whitley*, the issue addressed was so routine—whether evidence the State suppressed was “material” under the longstanding rule of *Brady v. Maryland*³⁹⁴—that the Court had to resurrect the almost forgotten “death is different” slogan to justify hearing the case.³⁹⁵ The fact that a respected federal judge in the nation's “death belt” had dissented from the denial of habeas relief because “[f]or the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to death the right man” probably contributed to the certiorari grant.³⁹⁶ In identifying “[t]he greatest puzzle of today's decision [i.e.,] what could have caused *this* capital case to be singled out for favored treatment,”³⁹⁷ Justice Scalia thought he heard the siren's call of substantive capital responsibility. And he hoped that public exposure of what he thought was the Court's hypocrisy would relash it to the mast:

Perhaps [this case] has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. . . . [I]f we . . . tried to consider . . . whether [constitutionally] correct principles had been applied, not merely plausibly, but accurately, to the particular facts of each case, we would . . . do[] nothing else [R]esponsibility for factual accuracy, in capital cases as in other cases, rests elsewhere . . . ; we do nothing but encourage foolish reliance to pretend otherwise.³⁹⁸

3. *Patterns and Race*. — *Furman's* C-type analysis of the impermissible sentencing patterns produced by wholly discretionary capital sentencing touched off nearly all aspects of the Court's subsequent capital constitutional jurisprudence. But like other revolutions revered as legally foundational while their recurrence is forbidden, *Furman's* “holding” gets the homage and obeisance of all subsequent decisions even though they ban its pattern-focused method.³⁹⁹

Lockhart v. McCree first suggested a change in the Court's attitude toward pattern-focused review.⁴⁰⁰ In *Witherspoon*, the Court had tabled

394. 373 U.S. 83, 87–88 (1963).

395. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (“Because ‘[o]ur duty to search for constitutional error . . . is never more exacting than it is in a capital case,’ . . . we granted certiorari, . . . and now reverse.” (citation omitted)); *id.* at 455–56 (Stevens, J., concurring).

396. *Id.* at 431–32 (majority opinion) (quoting *Kyles v. Whitley*, 5 F.3d 806, 820 (5th Cir. 1993) (King, J., dissenting)).

397. *Id.* at 457 (Scalia, J., dissenting).

398. *Id.* at 457–58; cf. *Dobbs v. Zant*, 506 U.S. 357, 363 (1993) (Scalia, J., concurring in the judgment) (concurring in grant of additional habeas proceedings to review newly discovered transcript, although case “has been suspended within [the] Court's ‘death is different’ time warp since 1974”).

399. See *supra* notes 282–287, 299–304, 316 and accompanying text (discussing *Pulley v. Harris*, *Arave v. Creech*, and *Harris v. Alabama*).

400. 476 U.S. 162 (1986).

the question whether the practice of excluding jurors who opposed the death penalty produces juries unduly disposed to convict.⁴⁰¹ Resolution of that question, the Court ruled, had to await further scientific study of whether “death qualification” systematically skewed guilt decisions.⁴⁰² The Court instead reached the more modest judgment that States could not constitutionally exclude jurors with conscientious scruples against the death penalty who nonetheless could set aside their views and follow the law.⁴⁰³ In form, *Witherspoon* was an F-type extension of an earlier decision barring the use of “blue ribbon” juries drawn from elite segments of the community to the death sentencing context.⁴⁰⁴ But *Witherspoon*’s holding in fact depended on an unproven, if not very controversial, C-type judgment of its own: Removing potential jurors who had scruples against the death penalty but were willing to follow the law produced juries more strongly disposed “to return a verdict of death” than juries drawn from among all citizens who could follow the law.⁴⁰⁵

McCree presented the Court with the scientific evidence that had been missing at the time of *Witherspoon*. It showed with remarkable robustness what everyone knew. Excluding prospective jurors who can fairly determine guilt but cannot impose death: (1) systematically removes prospective jurors who are more likely to believe the defendant, disbelieve police officers, honor the right to remain silent, and set a high threshold for proof beyond a reasonable doubt; (2) produces juries substantially more likely to convict than juries drawn from the pool of all people who can fairly determine guilt; and (3) requires a jury selection process that makes all jurors, including those who support the death penalty, more prone to convict by asking them to assume the defendant will be convicted and predict their behavior at a penalty trial.⁴⁰⁶ On these bases, McCree argued that death qualification violates the *Witherspoon* principle because it “entrust[s] the determination of whether a man is innocent or guilty to a tribunal ‘organized to convict.’”⁴⁰⁷

401. See *supra* notes 62–64 and accompanying text.

402. *Witherspoon v. Illinois*, 391 U.S. 510, 517–18 & n.11 (1968); see *supra* notes 62–64 and accompanying text.

403. *Witherspoon*, 391 U.S. at 522–23 (“[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”).

404. *Id.* at 520–21 (citing *Fay v. New York*, 332 U.S. 261 (1947)).

405. *Id.* at 521.

406. See *Grigsby v. Mabry*, 758 F.2d 226, 227 (8th Cir. 1984) (holding that allowing jurors who oppose death penalty to be challenged for cause in capital case violates defendant’s Sixth Amendment right to representative jury); *Grigsby v. Mabry*, 569 F. Supp. 1273, 1323 (E.D. Ark. 1983) (“[I]f prospective jurors in capital cases are barred over the defendant’s objection . . . because of their views on capital punishment on any broader basis than inability to follow the law or to abide by their oaths, the guilty verdict must be set aside.”).

407. *Witherspoon*, 391 U.S. at 521 (quoting *Fay*, 332 U.S. at 294).

Notwithstanding this evidence, the Court rejected McCree's challenges to death qualification. All that defendants deserve, Justice Rehnquist reasoned, is a jury of twelve impartial citizens from which no cognizable class had been systematically excluded.⁴⁰⁸ Although Justice Rehnquist acknowledged that *Witherspoon* had required more than this in the way of a neutral jury, he distinguished that case as involving "the special context of capital sentencing."⁴⁰⁹ In that context, "an 'imbalanced' jury" causes "greater concern" because jurors have such a wide "range of . . . discretion" and "'do little more—and must do nothing less—than express the conscience of the community.'"⁴¹⁰ Given post-*Furman* constraints on the discretion of capital sentencing jurors and *Spaziano's* view of post-*Furman* capital sentencers as less the conscience of the community and more the makers of constrained proportionality judgments,⁴¹¹ *McCree* came closer to overruling *Witherspoon* than distinguishing it.⁴¹² In any event, *McCree* resisted the idea that the Constitution posits an ideal pattern of "neutral" outcomes to which C-style comparisons of the outcomes of actual juries can be made, and instead limited review to the F-type requirement of impartial individual jurors.⁴¹³

The Court's classic withdrawal from pattern-focused, C-type review came in *McCleskey v. Kemp*.⁴¹⁴ The Court let stand McCleskey's death sentence for shooting a white police officer despite proof that the murder of a white victim in Georgia is four and one-half times more likely to provoke a death sentence than the otherwise identical murder of a black victim.⁴¹⁵ In fact, *McCleskey* may be the Court's most agonizing foray *into* substantive review; it was only the Court's reaction to what its review admittedly found that prompted it to withdraw from further review.

In rejecting McCleskey's claim, Justice Powell reasoned as follows: As interpreted in *Furman*, the Eighth Amendment cannot tolerate the irrational pattern of death verdicts that wholly discretionary death sentenc-

408. See *Lockhart v. McCree*, 476 U.S. 162, 172–73 (1986) ("[T]he Constitution does not prohibit the States from 'death qualifying' juries in capital cases.").

409. *Id.* at 182.

410. *Id.* (quoting *Witherspoon*, 391 U.S. at 519).

411. See *supra* Part VI.B.2.

412. A year earlier, in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), the Court, through Justice Rehnquist, had relaxed *Witherspoon's* limits on the removal of death-scrupled jurors and had redefined the controlling determination as one of fact not law, requiring deference that substantially undermined the enforceability of the *Witherspoon* rule.

413. See *McCree*, 476 U.S. at 182–84 ("[A] jury selected from a fair cross section of the community is impartial . . . so long as the jurors can conscientiously and properly carry out their sworn duty . . .").

414. 481 U.S. 279 (1987); see Burt, *supra* note 3, at 1817–18 (arguing that *McCleskey* ended effective constitutional review of death penalty).

415. *McCleskey*, 481 U.S. at 319 (discussing Professor David C. Baldus's study, which found racial disparity in administration of Georgia's death penalty); *id.* at 328–29 (Brennan, J., dissenting) ("The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations.").

ing had produced. By rejecting mandatory death sentencing while reaffirming *Furman*, the *July 2 Cases* determined that discretion nonetheless plays a “fundamental role” in death sentencing and is permissible as long as it is controlled by “‘objective standards’” that produce “‘non-discriminatory application.’”⁴¹⁶ Although there are good reasons to let juries be the agency that exercises controlled discretion, jurors’ “uniquely human judgments” often are “difficult to explain,” and pose a “risk of racial prejudice.”⁴¹⁷ The imperative to avoid that risk commits the Court to “‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”⁴¹⁸ “[T]he Baldus study indicates a discrepancy that appears to correlate [death sentencing] with race” and could not be explained by any other factors the State or Court could identify.⁴¹⁹ “In light of” the above, “we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.”⁴²⁰

As this summary reveals and as Lawrence Marshall and I note elsewhere, Justice Powell’s analysis supports the opposite of the conclusion he reaches.⁴²¹ Because the Baldus study found “a discrepancy that appears to correlate with race” and cannot otherwise be explained, it reveals the continued existence of the “discriminatory application” of the death penalty that discretionary jury decisionmaking invites, at least absent “unceasing” countermeasures, and that the Eighth Amendment forbids.⁴²² A footnote to the Court’s conclusion recapitulates the non sequitur by criticizing Justice Brennan’s “eloquent” statement of the constitutional problem because Brennan offered no solution besides abolition.⁴²³ This was no answer unless Justice Powell meant what he was at pains to avoid saying—that the Court’s “‘unceasing efforts’ to eradicate racial prejudice in our criminal justice system” cease when necessary to let the States continue carrying out unavoidably race-based executions.⁴²⁴

416. *Id.* at 303, 311 (majority opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 197–98 (1976) (plurality opinion)).

417. *Id.* at 308, 311.

418. *Id.* at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).

419. *Id.* at 312.

420. *Id.* at 313.

421. See Liebman & Marshall, *supra* note 6, at 1645 (“Justice Powell’s argument . . . build[s] inexorably to the opposite of the conclusion that his last sentence asserts.”).

422. Reinforcing the tenuousness of the Court’s conclusion, McCleskey had presented the Court with a far stronger and more scientifically unimpeachable picture of offensive death sentencing patterns than the picture the Court relied upon to reverse hundreds of death sentences in *Furman*. See *supra* notes 106–110 and accompanying text (discussing impact of and basis for *Furman* decision). Notably, Justice Powell had dissented in *Furman* for lack of a scientifically rigorous demonstration of racial discrimination. *Furman v. Georgia*, 408 U.S. 238, 448–50 (1972) (Powell, J., dissenting).

423. *McCleskey*, 481 U.S. at 313 n.37.

424. In an internal memorandum announcing he would join Justice Powell’s majority opinion, Justice Scalia made clear he had none of Justice Powell’s compunctions about premising the decision on the inevitability of racial influences: “[I]t is my view that the

The Court blinked. It surveyed death sentencing outcomes, saw the pattern Justice Douglas had seen in *Furman*, granted that the Eighth Amendment does not tolerate the pattern, and held the pattern tolerable. There are three signs that the Court knew that it blinked and was irresponsibly shirking responsibility for the relief its substantive review required.

First, the *McCleskey* term produced a rare post-1983 burst of E-type innovation, all aimed at racial bias in black-accused/white-victim cases. *Turner v. Murray* held that capital defendants have a constitutional right, not available to noncapital defendants, to question potential jurors about bias in cases involving African American defendants and white victims.⁴²⁵ Justice Powell's short-lived decision for the Court in *Booth v. Maryland* forbade States to treat "victim impact" as an aggravating factor in death cases because it invited jurors to treat murders of "valued" white victims as more worthy of the death penalty than murders of minority victims.⁴²⁶ The rush to innovate procedurally—but only in "black on white" cases—and the subsequent treatment of one of the innovations as unworthy of stare decisis respect⁴²⁷—indicated a good deal of defensiveness on the *McCleskey* issue, especially by Justice Powell himself.

McCleskey's conspicuously free-floating final section also signaled a realization that its conclusion needed more defense. The section argues that a different conclusion would subject "our entire criminal justice system"—indeed, every state institution—to constitutional attack as racist, and that "McCleskey's arguments are best presented to the legislative bodies."⁴²⁸ Arguing that racial discrepancies are crucial to the survival of all our social systems was (among other problems) another non sequitur. The Court's undefended conclusion addressed an Eighth Amendment claim under *Furman*. Because rules derived from *Furman* are of the E-type and apply only in capital cases, a ruling for *McCleskey* would have exempted other parts of the criminal justice system. Citing the *Furman* dissent's "tell it to the legislature" argument to defeat a claim based on the *Furman* majority's holding that the Eighth Amendment trumps legis-

unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable" Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) (on file with the *Columbia Law Review*); see also David A. Schultz & Christopher E. Smith, *The Jurisprudential Vision of Justice Antonin Scalia* 195 (1996) (describing Justice Scalia's tolerance for state action that may have been motivated by racial considerations).

425. 476 U.S. 28, 35–36 (1986) (distinguishing *Ristaino v. Ross*, 424 U.S. 589, 595 n.6, 598 (1976)).

426. 482 U.S. 496, 509 (1987) (reading Eighth Amendment to invalidate Maryland statute permitting introduction of victim impact evidence), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991).

427. See *Payne*, 501 U.S. at 825–28 (listing "numerous infirmities in the rule created by *Booth*" as basis for denying stare decisis effect).

428. *McCleskey*, 481 U.S. at 315–19.

lative control—in an opinion that otherwise paid homage to *Furman*⁴²⁹—did little to dispel the unsavory sense that, as between racism and capital punishment, the Court chose the former.

Finally, as Justice Stevens's *McCleskey* dissent made plain, the continuation of capital punishment did not depend on ignoring the racial patterns the Baldus study showed. Because those patterns appeared only in cases in which aggravation and mitigation were close to even, the Court could avoid the problem by narrowing the range of constitutionally permissible aggravating factors or otherwise requiring significant aggravation net of mitigation.⁴³⁰ The Court's response to Justice Stevens was a set of rhetorical queries that boils down to one: How would the Court know whether an aggravating factor on which the State premised a death sentence was aggravating enough?⁴³¹ The Court could know that in the same (D-type) way it knew in *Godfrey* that Georgia's "outrageously vile" factor had not narrowed death eligibility enough to exclude Godfrey's nonaggravated murders, and in *Eddings* and *Parker* that the mitigating factors were weightier than the state courts thought, and in *Coker* and *Enmund* that death was disproportionate to rape and accessorial felony murder. As Justice Powell himself notes, parading as a horrible what in fact was the Court's seminal methodology in *Furman*, the Court could know by occasionally conducting pattern-focused (C-type) review based on a more "current, Baldus-type study"⁴³²—or based on the fruits of the comparative proportionality review by state high courts that *Stephens* had seemed to require but *Harris* ruled unnecessary.⁴³³

McCleskey granted substantive review of death sentencing patterns but denied relief. In support of that result, it could only muster an argument compelling the opposite conclusion or, less charitably, one valuing

429. Compare *id.* ("It is not the responsibility . . . of this Court to determine the appropriate punishment for particular crimes. It is the legislatures . . . that are 'constituted to respond to the will . . . of the people.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))), with *id.* at 301 (describing *Furman* as one of "[t]wo principal decisions [that] guide our resolution of *McCleskey's* Eighth Amendment claim").

430. See *id.* at 367 (Stevens, J., dissenting) (noting that Baldus study taught that "there exist . . . categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender").

431. See *id.* at 318 n.45 (majority opinion) (questioning whether prosecutors and courts are capable of identifying standards to distinguish highly from moderately aggravated crimes).

432. *Id.* Indeed, the Baldus study itself suggested that the *Furman* reforms had decreased discrimination based on the race of the *defendant* in Georgia, suggesting that additional reforms might do the same for discrimination based on the race of the victim. See David Baldus et al., *Equal Justice and the Death Penalty* 97, 147–50 (1990); see also Raymond Paternoster et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction: Executive Summary* 26 (2003), at <http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf> (on file with the *Columbia Law Review*) ("[W]e have found no evidence that the race of the defendant matters in the processing of capital cases in the state." (emphasis omitted)).

433. See *supra* Parts VI.A.2, VI.B.1.

the State's prerogative to kill over the rule banning the exercise of state prerogatives based on race. *McCleskey's* riddle is why it reached that untenable conclusion when it could instead have preserved capital punishment and enforced the anti-bias principle by requiring super-aggravation. By adopting that rule—one several States follow,⁴³⁴ consistent with the Anglo-American trend toward increasingly narrow categories of death-eligible offenses⁴³⁵—the Court could have reduced the costs of the death penalty without ending its use.⁴³⁶

The Court's fealty to Justice White's more-is-better approach to the death penalty is one explanation for *McCleskey's* refusal to require super-aggravation.⁴³⁷ But that explanation begs the question of why the Court continued enforcing the *Woodson-Lockett* doctrine that was anathema to Justice White's approach—and, more broadly, why the Court would prefer broad death sentencing to death sentencing free of racial bias. The insulation principle solves the riddle. A super-aggravation rule would require the Court to engage in serious substantive review—either B-type review of aggravating factors themselves or C- and D-type review of the patterns and individual sentences the factors produced. As we have seen, the Court repeatedly allowed its desire to insulate itself from substantive review to trump the substantive outcomes it read the Constitution to require. The Court could hardly continue paying homage to *Furman* while refusing to consider whether the evils it identified remained. So it did the next best thing—it granted review once and ruled that the claim must fail. Although that solution mercifully reinstated the insulation principle after the Court inoculated itself, its single bout of substantive review cost the Court dearly. Its “unceasing” commitment to end state racism was in shambles, as was its system of delegated proportionality review and the proportionality principle itself, and, evidently, its author's self-respect.⁴³⁸

434. See, e.g., N.Y. Crim. Proc. Law § 400.27 (McKinney 2004); N.C. Gen. Stat. Ann. § 15A-2000 (West 2001); Utah Code Ann. § 76-3-207 (West 1973); see also *State v. McDougal*, 301 S.E.2d 308, 325 (N.C. 1983) (forbidding death sentence unless jury finds net aggravation to be “substantial”); *State v. Wood*, 648 P.2d 71, 82–83 (Utah 1982) (“After considering the totality of the aggravating and mitigating circumstances, [jury] must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and . . . must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.”); *State v. Olsen*, 67 P.3d 536, 588 (Wyo. 2003) (“To return a judgment of death, you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death . . .”).

435. See *supra* notes 47–52, 79 and accompanying text.

436. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 30–32 (1995) (advocating super-aggravation rule because it would avoid excessive costs while preserving death penalty).

437. See Liebman & Marshall, *supra* note 6, at 1644–46; see also *supra* Part VI.B.3 (citing cases treating any, even minimal, narrowing as constitutionally sufficient).

438. Cf. John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 451 (1994) (noting that, when asked post-retirement which of his votes he would change, Justice Powell answered “*McCleskey*”); *supra* note 95; *infra* note 630.

E. *A Little Less Is Better* (2000–2005)

Also refuting the hypothesis that Justice White's more-is-better approach to the death penalty can explain the Court's post-*Furman* or post-1983 jurisprudence is the trend of the Court's decisions between 2000 and at least 2005. True, Justices Scalia and Thomas continued urging the Court to overrule its decisions delegating aggravation-net-of-mitigation judgments to juries and appellate courts because of the discretion given jurors to vote against death.⁴³⁹ And in two Virginia cases, the Court allowed instructions juxtaposing lengthy information on aggravation with puny references to mitigation—at great risk to the system of delegated proportionality judgments and slight gain in insulation.⁴⁴⁰ The preponderance of the Court's recent jurisprudence has been in the opposite direction, however, toward reliable delegated proportionality judgments based on a netting-out of aggravation and mitigation. The result has been a jog in the less-is-better direction advocated by Justices Stewart and Stevens.⁴⁴¹

In one set of cases, the Court all but overruled its 1993 holding in *Johnson v. Texas* that, as long as the jurors could credit a part of the extenuating force of a mitigating factor, the State could forbid them to consider the rest of the factor's mitigating force.⁴⁴² In *Penry v. Johnson*, Justice O'Connor derived the opposite majority rule from her dissenting opinion in *Johnson v. Texas*: “[A] sentencer [must] be allowed to give

439. See, e.g., *Smith v. Texas*, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting); *Tennard v. Dretke*, 542 U.S. 274, 293–94 (2004) (Scalia, J., dissenting); *id.* at 294–95 (Thomas, J., dissenting); *Penry v. Johnson (Penry II)*, 532 U.S. 782, 807 n.3 (2001) (Thomas, J., dissenting); *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring); *Tuilaepa v. California*, 512 U.S. 967, 980 (1994) (Scalia, J., concurring) (“It is my view that once a State has adopted a methodology to narrow the eligibility for the death penalty, thereby ensuring that its imposition is not ‘freakish,’ the distinctive procedural requirements of the Eighth Amendment have been exhausted.” (citation omitted)); cases cited *supra* note 315 and accompanying text.

440. See *Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (upholding death verdict imposed by jury given extensive instructions on aggravation and only terse, potentially misleading, and underinclusive instructions on mitigation, despite juror confusion about mitigation and request for additional guidance to which trial judge responded by rereading original instruction); *Buchanan*, 522 U.S. at 272–73 & n.1 (approving instructions that made no mention of mitigation or extenuation and instead said only: “If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the [aggravating factors], then you may fix the punishment . . . at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life.”); see also *Boyde v. California*, 494 U.S. 370, 373–76 & n.1 (1990) (upholding instruction with single reference to nonstatutory mitigating factors relating to crime and no mention of mitigating circumstances relating to defendant).

441. See Liebman & Marshall, *supra* note 6, at 1620–29. On the Court's 2006 cases, which hint at a jog in the more-is-better direction, see *supra* notes 324, 369–376, 393 and accompanying text; *infra* note 598 and accompanying text.

442. See *Johnson v. Texas*, 509 U.S. 350, 372–73 (1993); *supra* notes 309–316 and accompanying text.

full consideration and full effect to mitigating circumstances.’”⁴⁴³ In the Court’s next decision, *Tennard v. Dretke*, Justice O’Connor defined “mitigating evidence” in “the most expansive terms” to encompass all evidence that “tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.”⁴⁴⁴ Applying these principles, the Court rejected (1) instructions telling jurors to consider mitigating factors only if the factors suggested the defendant would not be a danger in the future and not insofar as the factors lowered the defendant’s culpability;⁴⁴⁵ (2) instructions telling jurors to consider mitigating factors beyond those relevant to future dangerousness but, contrarily, making them swear to impose death whenever they thought the defendant was a future danger;⁴⁴⁶ and (3) Fifth Circuit rules giving mitigating evidence full constitutional effect only if the evidence revealed “a ‘uniquely severe permanent handicap with which the defendant was burdened through no fault of his own’” and only then if the crime was “‘attributable’” to that handicap.⁴⁴⁷ Perhaps confident, by now, that it could enforce these kinds of E-type procedural rules without being tempted to conduct its own B-, C-, or D-type review of the substantive value of the relevant mitigating evidence, the Court took steps to revive its system of delegated proportionality review.

In a separate line of cases, the Court on three occasions between 2000 and 2005 did what it had been asked to do many hundreds of times in the preceding quarter century, but had always refused to do. Via F-type review, it found that defense lawyers had rendered ineffective assistance of counsel in violation of the Constitution by failing to discover mitigating evidence that was crucial to a reliable proportionality judgment.⁴⁴⁸

The Court’s most dramatic less-is-better holdings, however, were of the B-type. In *Atkins v. Virginia*, the Court ruled the death penalty unconstitutional for mentally retarded offenders.⁴⁴⁹ *Roper v. Simmons* then did

443. *Penry II*, 532 U.S. at 797 (quoting *Johnson*, 509 U.S. at 381 (O’Connor, J., dissenting)); accord *Smith*, 543 U.S. at 46 (per curiam) (quoting same passage from Justice O’Connor’s dissent in *Johnson*); see *id.* at 42 (holding that jury must be given “an adequate vehicle for expressing a ‘reasoned moral response’ to all of the evidence relevant to the defendant’s culpability”).

444. 542 U.S. at 284 (citations and internal quotation marks omitted).

445. *Smith*, 543 U.S. at 48; *Penry II*, 532 U.S. at 803–04.

446. See *Smith*, 543 U.S. at 46 (“[J]urors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a ‘true verdict.’” (quoting *Penry II*, 532 U.S. at 800)); *Penry II*, 532 U.S. at 803–04.

447. *Tennard*, 542 U.S. at 281–84 (quoting *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002)); *id.* (criticizing Fifth Circuit’s “nexus” and “severe permanent handicap” requirements as having “no foundation” in Court’s decisions); see also *Smith*, 543 U.S. at 45–49.

448. See *Rompilla v. Beard*, 125 S. Ct. 2456, 2467–69 (2005); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (plurality opinion).

449. 536 U.S. 304, 321 (2002).

the same for offenders under the age of eighteen.⁴⁵⁰ Both cases overruled 1989 precedents based primarily on increases since 1989 in the headcount of state legislatures barring death sentences for the two categories of offenders and decreases in the number of death sentences jurors had imposed on them.⁴⁵¹ The Court thus persisted in allocating much of the responsibility for the decision to other legal institutions. But contrary to the trend in the late 1980s⁴⁵²—with Justice Kennedy changing sides on the issue—the Court insisted in both cases that the decision was ultimately a matter for the Court’s own judgment, which it informed not only by counting legislative heads and jury verdicts, but also by assessing culpability, other moral factors, and the views of foreign legal systems.⁴⁵³ In addition, as Elizabeth Emens has shown, Justice Kennedy’s decision in *Simmons* seems to have been motivated in part by doubts about the integrity of delegated proportionality judgments involving juvenile offenders, given stereotypes that lead jurors to treat some of the mitigating—but frightening—aspects of youth as aggravating.⁴⁵⁴ Again, therefore, these decisions tended modestly to shore up the integrity of the Court’s system of delegated constitutional proportionality judgments.

F. Summary

1. *Mandating the Unconstitutional Status Quo 1972.* — Throughout the 1960s, the Supreme Court obsessively sought but deflected constitutional responsibility for the death penalty.⁴⁵⁵ In 1971 and 1972, the Court renounced all such responsibility in *McGautha*,⁴⁵⁶ then exercised it in *Furman* to overturn every capital statute in the nation.⁴⁵⁷ When most jurisdictions reinstated the death penalty, the Court, between 1976 and 1982, read the Cruel and Unusual Punishment Clause to impose three requirements: Death sentences for aggravated murder had to be proportionate to aggravation net of mitigation; initial constitutional proportionality decisions would be made by juries and appellate courts in each case; and the Court had the final say over the constitutionality of the death penalty for categories of crimes and criminals and as applied in all and in individual cases.⁴⁵⁸

450. 543 U.S. 551, 578–79 (2005).

451. See *Simmons*, 543 U.S. at 568–75 (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989), discussed supra notes 343–350 and accompanying text); *Atkins*, 536 U.S. at 315–17 (overruling in part *Penry v. Lynaugh*, 492 U.S. 302 (1989), discussed supra notes 346–347 and accompanying text).

452. See supra Part VI.C.1.

453. See *Simmons*, 543 U.S. at 575–78; *Atkins*, 536 U.S. at 313–14.

454. See Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 Sup. Ct. Rev. 51, 72–81.

455. See supra notes 53–75 and accompanying text.

456. See supra notes 76–89 and accompanying text.

457. See supra Part IV.A.

458. See supra Parts IV.B–C, V.

After 1983, via its principle of delegated proportionality review, the Court continued reading the Eighth Amendment to impose novel procedural requirements that shifted the substantive decisions needed to enforce the general constitutional requirement of proportionality to local actors—juries imposing sentences, appellate courts reviewing death verdicts, and state legislators enacting capital laws. It also became clear that the Court was motivated by a desire to insulate itself from the discomfort and discord the exercise of its own substantive review responsibilities provoked. The desire for insulation was so strong that it, along with a stasis principle resisting new constraints on the States, took precedence whenever those dispositions clashed with the demands of the Court's system of delegated proportionality judgments. This trumping in turn kept the Court from exercising the substantive oversight needed to assure that the procedures local actors were required to follow were in fact generating reliable proportionality judgments.⁴⁵⁹

This combination of practices led in two ways to a vexed, decades-long process in which the Court designed doctrines to avoid, which instead ended up institutionalizing, the constitutionally offensive capital sentencing patterns discovered in *Furman*.⁴⁶⁰ First, when the Court defaulted on its monitoring duties, local actors were allowed to behave much as they had in the pre-*Furman* era of absolute discretion. Second, the Court's warring impulses to assure substantive proportionality, but eschew its own substantive review, led its doctrine in contradictory directions. For every zig in the direction of rigorous delegated proportionality judgments requiring substantial aggravation net of mitigation to justify a death sentence (the Stewart-Stevens view that the Constitution requires a severely narrowed death penalty), there was a zag away from its own substantive responsibility via doctrines that, by decreasing the net aggravation required for, increased the number of death verdicts (Justice White's contrary view that the Constitution requires exceptionally numerous death verdicts). By giving the Court's surrogate constitutional decisionmakers contradictory instructions while absolving the Court of meaningful monitoring duties, the Court's post-*Furman* capital jurisprudence not surprisingly left capital sentencing very near its untenable status quo 1972.

2. *Dance and Demurral*. — The Supreme Court's encounter with constitutional review of the death penalty is often described as a captivating but ill-fated marriage that lasted a decade or so after 1972 and has languished in messy divorce proceedings ever since.⁴⁶¹ The analysis here suggests a different romantic metaphor: not love giving way to hate, but the excruciating coexistence of attraction and revulsion—an awkward

459. See *supra* Part VI.

460. See *supra* notes 13–22 and accompanying text.

461. See Burt, *supra* note 3, at 1795–819 (arguing that *McCleskey* marked demise of constitutional review of capital punishment); Weisberg, *supra* note 6, at 305–06, 343–58 (arguing that Court “deregulated” death penalty in *Spring 1983 Cases*).

slow dance with an at once alluring and alarming partner, kindling equal impulses to embrace and to escape.

The next part of this Article explains the Court's opposing compulsions to seize and to spurn constitutional responsibility for the death penalty. Help in doing so is sought in Robert Cover's celebrated writings on the problems judges face when asked to commit to legal meanings that validate or void state violence. Help in understanding the failure in the capital context of the Coverian solutions judges usually employ—detachment with excuses and deployment with explanations—is found in the crude and court-focused nature of the violence the death penalty entails. A way forward is found, finally, in the Court's own nearly, but not quite, successful innovation in sharing substantive constitutional decisionmaking with, while also supervising, the very state institutions the Cruel and Unusual Punishment Clause regulates.

VII. ROBERT COVER ON JUDICIAL REGULATION OF STATE VIOLENCE:
DETACHMENT WITH EXCUSES OR DEPLOYMENT
WITH EXPLANATIONS

The Court's obsessive vacillation between seeking and shedding responsibility for the death penalty demands an explanation. Help in providing one is sought in the writings of Robert Cover, who was fascinated by judges' reaction when asked to interpose themselves and the Constitution between the State and potential victims of state power and violence. Cover's writings explore the responses of judges who find themselves in one of three relations to the state violence they are asked to regulate—judges who are morally opposed to the state violence; judges who are less intensely but more broadly discomfited by the prospect of facilitating or resisting violence of any sort; and judges who are players in the State's use of violence.⁴⁶² In each situation, Cover found that judges—who by moral or professional disposition are peacemakers—develop an elaborate and effective set of jurisprudential techniques to avoid or cope with their disconcerting responsibility. In the capital context, however, the Supreme Court finds itself in all three situations at once. As is discussed below, this combination of pressures confounds the Coverian avoidance and coping mechanisms and traps the Court between equal and opposite compulsions to seize and to shed responsibility.

A. Justice Accused

In *Justice Accused*, Cover studied the decisions of antislavery judges who returned escaped slaves to bondage under the fugitive slave laws.

⁴⁶². See Robert M. Cover, *Justice Accused* 229–38 (1975) [hereinafter Cover, *Justice Accused*]; Robert M. Cover, *Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983), reprinted in *Narrative, Violence, and the Law* 95 (Martha Minow et al. eds., 1992) [hereinafter Cover, *Nomos*]; Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986), reprinted in *Narrative, Violence, and the Law*, supra, at 203 [hereinafter Cover, *Violence*].

Cover found that these judges intensely felt the dissonance between their personal morality and accepted interpretations of positive law. Some expressed this discomfort outright. Justice McLean confessed that “it is difficult to deliberate without feeling—exertions to suppress every emotion would be in vain.”⁴⁶³ Despite his “known antislavery views,” Justice McLean “never wavered from his often eloquent calls to stand by the obligation to obey the law.”⁴⁶⁴ Other judges exhibited their feeling less directly, through patterns of analysis and decisionmaking that suggested “distress, helplessness, and, indirectly, guilt.”⁴⁶⁵

Drawing upon cognitive dissonance theory—which holds that inconsistency among consciously articulated principles generates tension and efforts to reduce the inconsistency—Cover found that antislavery judges resolved “moral-formal” conflict using three “responsibility-mitigation mechanisms” that let them follow the law while downplaying responsibility for the results.⁴⁶⁶ They “elevat[ed] . . . the formal stakes,” imagining consequences of a decision against the State that were so dire that most people would want to avoid them even at significant moral cost; resorted to “mechanistic . . . decision making,” using methods of legal analysis that made the law favoring the State seem more “crystal clear” and its application more “mechanical” and “inexorable” than was justified; and “ascrib[ed] . . . responsibility elsewhere,” identifying an authority other than the judge who bore responsibility for the State’s violence.⁴⁶⁷

“The more aggravated the conflict between moral and formal demands on the judge, the more pronounced” were responsibility-mitigating efforts.⁴⁶⁸ In periods of “systemic convergence,” when the trend of the law seemed to be approaching the judges’ antislavery views, their rulings for the State and against their morality rarely resorted to responsibility-moderating tropes.⁴⁶⁹ Distress and avoidance peaked in times of “systemic divergence,” when the legal system’s trend toward facilitating slavery clashed with the judge’s libertarian ideals.⁴⁷⁰ Dialectical factors also affected the intensity of the moral-formal conflict. Judges more often resorted to dissonance-avoiding techniques when ideological issues were close to the surface—as when lawyers or the public emphasized moral over legal arguments or principle over expedience.⁴⁷¹

463. Cover, *Justice Accused*, *supra* note 462, at 244 (quoting *Ohio v. Carneal* (Ohio Sup. Ct. 1817), in *Ohio Unreported Judicial Decisions Prior to 1823*, at 139 (Ervin H. Pollack ed., 1952)).

464. *Id.* at 244–45.

465. *Id.* at 208.

466. *Id.* at 227, 199.

467. *Id.* at 199, 231–36.

468. *Id.* at 199.

469. *Id.* at 202 (“[T]he perception that the ‘gap’ [between the law and morality] was only a temporary phenomenon reduced any incipient degree of moral anguish and the motivation to ‘solve’ the [dissonance] problem.”).

470. *Id.* at 210.

471. *Id.* at 211–25.

B. Nomos and Narrative

In *Nomos and Narrative*, Cover widened his study of judicial behavior to encompass judges tugged not by personal morality, but by a general role morality—a disposition to resolve disputes and preserve the law and thus to resist violence.⁴⁷² In Cover's view, constitutional law in heterogeneous polities committed to tolerance is "jurisgenerative";⁴⁷³ it invites committed communities to derive their own legal meanings from the nation's foundational text and principles.⁴⁷⁴ But if constitutional law is jurisgenerative, constitutional judging is "jurispathic." When a judge authoritatively ascribes one meaning to the Constitution, she often invalidates the committed community's contrary interpretation.⁴⁷⁵ Constitutional adjudication may do double violence. When judges refuse to interpose the Constitution between law generating communities and the State's coercive acts, judges serve both as handmaidens to the State's violence against the community and as assassins in their own right of the community's contrary legal meaning.⁴⁷⁶ Judicial dispassion aggravates the tension between judges' "regulative" disposition to "permit [] a life of law rather than violence" and their murderous role, by making them less deeply committed to the legal meanings they choose on behalf of everyone than "smallish groups" are to the meanings they generate for themselves.⁴⁷⁷

Nor can judges easily avoid the dissonance between their lawmaking and peacemaking inclinations and their violence-abetting and law-killing roles by obstructing state violence and endorsing the alternative community's legal vision. Doing so creates another conflict, between the judicial branch and the more powerful ones: "It entails commitment to a struggle, the outcome of which—moral and physical—is always uncertain."⁴⁷⁸ Accordingly, although dissonance remains at a lower level than when the judge's personal morality is contested, judicial review of state and jurispathic violence always demands dissonance-reduction techniques.⁴⁷⁹

Cover identifies two categories of jurisdictional dodges. "Strong" equity justifies rulings in favor of the State's legal meaning.⁴⁸⁰ Through it, courts elevate the formal stakes of a decision against the State by reason-

472. See Cover, *Nomos*, supra note 462, at 155.

473. *Id.* at 120–21.

474. *Id.* at 121, 139.

475. *Id.* at 155.

476. *Id.*; see also Cover, *Violence*, supra note 462, at 205 ("'Interpretation' suggests a social construction of an interpersonal reality through language. But pain and death [which judges permit by refusing to interfere with coercive state action] have quite other implications. Indeed, pain and death destroy the world that 'interpretation' calls up.").

477. Cover, *Nomos*, supra note 462, at 155–56; Cover, *Violence*, supra note 462, at 204 n.2.

478. Cover, *Nomos*, supra note 462, at 160, 163.

479. *Id.* at 156–57 (noting that some of these techniques are so routinized that they have become established jurisdictional doctrines).

480. *Id.* at 158.

ing that a contrary decision would damage the social order. Courts often resort to strong equity when they see themselves as direct implementers of state violence.⁴⁸¹ By taking the role of “guarantor of the social order, who must have nearly absolute authority to put a stop to the ‘disorders’ of collective action guided by law or interests other than those of the state,” courts deflect attention away from the State’s and their own violence and toward a pressing social necessity.⁴⁸² In the end, they do not say that the State’s legal meaning is correct, but that the petitioning community’s meaning is too risky.

“Weak” equity positions courts as observers, not implementers, of state violence. Whereas strong equity relies on “the most basic of the texts of jurisdiction,” such as “the ideology of social contract,” weak equity relies on workaday jurisdictional notions such as federalism, the political question doctrine, and separation of powers.⁴⁸³ These doctrines lead courts to avoid any legal decision by locating responsibility elsewhere. Even when a court sympathizes with the petitioner’s legal vision, it throws up its hands, saying there is nothing it can do.⁴⁸⁴

Cover criticizes weak and strong equity as masks for cowardice.⁴⁸⁵ In place of equity, Cover advocates “aggressive, articulate judicial review”⁴⁸⁶ and encourages judges to look state violence in the eye and justify or condemn it.⁴⁸⁷ Doing so requires a “committed constitutionalism” that overcomes judges’ abhorrence for state violence when they uphold it and neutralizes their fear of provoking the stronger branches when they invalidate it.⁴⁸⁸ Cover does not say what judges should do when neither the State’s nor the petitioner’s legal meaning clearly overmatches the other’s.

C. Violence and the Word

In *Violence and the Word*, Cover analyzes the legal interpretations made by judges with direct roles in the State’s “infliction of pain.”⁴⁸⁹ Cover takes as his text the “most routine of acts performed by judges,” that of sentencing a convicted defendant.⁴⁹⁰ In these mundane acts, Cover finds the world he longed for in *Nomos*, a world of forthright judicial justification of the pain judges, avowedly, allow and inflict. The act of inflicting violence through sentencing “is and long has been a *judicial* one, . . . requir[ing] no strange or new modes of interaction with other

481. See Cover, *Justice Accused*, supra note 462, at 229–38.

482. Cover, *Nomos*, supra note 462, at 157.

483. *Id.* at 156–59.

484. *Id.* at 158.

485. *Id.* at 163–64 (“The courts may well rely upon the jurisdictional screen and rules of toleration But they cannot avoid responsibility for applying or refusing to apply power to fulfill [a petitioner’s] redemptionist vision.”); see *id.* at 159–63.

486. *Id.* at 160 n.158.

487. *Id.* at 162.

488. *Id.* at 159–60 & n.158; see Cover, *Violence*, supra note 462, at 229–30.

489. Cover, *Violence*, supra note 462, at 218, 223–25.

490. *Id.* at 210.

officials or citizens.”⁴⁹¹ These judges have no jurisdictional dodges at their disposal and must provide a legal meaning—“the word”—that directly and convincingly justifies the violence.⁴⁹²

How, then, is legal interpretation “transformed into a violent deed despite general [judicial] resistance to such deeds”? And how does “the judge’s interpretative act authorize [] and legitimate []” violent deeds?⁴⁹³ To answer these questions, Cover fleshes out the body of jurisdictional doctrine introduced in *Nomos* with rules that, instead of enabling judges to avoid responsibility for state violence, conjoin the judges’ inescapable responsibility for violence with the power to order it, the will to justify it, and the administrator’s willingness to carry it out.

The translation of interpretation into violence is not automatic. Violence inflicts frightening harms at the same time as it “fascinate[s] and attract[s],” prompting “evolutionary, psychological, cultural and moral” inhibitions against its infliction.⁴⁹⁴ As Milgram’s experiments showed, however, “social cues may overcome or suppress the revulsion to violence,” making the translation of legal interpretations into violent state action possible.⁴⁹⁵ The jurisdictional (here, meaning power-conferring) rules that concern Cover in *Violence* accomplish this feat in two ways. They tell the judge that “others, occupying preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge’s [violence-deploying] interpretation.”⁴⁹⁶ And they enable administrators to read the judge’s interpretation and discern that the proper authority has issued the proper order to the proper official, thus triggering the “agentic” State that lets officials “act violently without experiencing the normal inhibitions . . . which regulate [] the behavior of those who act autonomously.”⁴⁹⁷

Cover’s great insight, and his great rebuke to most theories of legal interpretation, is how much more there is to judges’ interpretive acts than finding “the legal meaning that some hypothetical Hercules . . . might construct out of the sea of our legal and social texts,” and how much of the balance has to do with effectuating state violence.⁴⁹⁸ From the standpoint of the “victim of organized violence,” the meaning of the

491. *Id.* at 225 (emphasis added).

492. *See id.* at 203.

493. *Id.* at 218–19.

494. *Id.* at 218.

495. *Id.* at 218–20.

496. *Id.* at 216; *see id.* at 225–26.

497. *Id.* at 218–23. But *see* Carroll Pickett with Carlton Stowers, *Within These Walls* 175–79 (2002) (describing traumatic stress that guards and other routine state participants in executions come to feel).

498. Cover, *Violence*, *supra* note 462, at 223; *see, e.g., id.* at 210 & n.15 (arguing that “legal interpretation . . . is part of the *practice* of political violence” and that “this embedding of an understanding of political text in institutional modes of [violent] action . . . distinguishes *legal* interpretation from the interpretation of literature . . . and from constitutional criticism”).

judge's act has little to do with the judge's legal interpretation and everything to do with something the judge "almost never ma[kes] a part of the . . . opinion": "the overwhelming reality of the pain and fear that is suffered."⁴⁹⁹ From the administrator's standpoint, the validity of the judge's interpretation is measured not by its persuasiveness but by how clearly it demonstrates its "provenance," and that the authority ordering violence takes full responsibility for it, relieving the administrator of inhibitions that otherwise would stop him from inflicting it.⁵⁰⁰ The order must give "the warden and his men . . . [the] capacity to shift to the judge primary moral responsibility for the violence which they themselves carry out."⁵⁰¹

Sometimes, however, the intellectual and emotive power of the judge's interpretation does matter. Just as *Nomos* argued that judges should, *Violence* discovered contexts in which they do curb dissonance by giving the best possible legal justification for state violence. Here, "domesticating . . . violence"—keeping the judge from overusing it—requires that she recognize the link between her interpretative acts and the State's violent deeds.⁵⁰² When a judge sees that the State's violence is, inescapably, her violence, she can overcome her personal and professional inhibitions against it and fulfill her crucial role in its imposition only by making interpretations that not only cause, but also "constitute justifications for violence."⁵⁰³ The fact that she makes an authoritative interpretation enables others to carry it out but does her little good; only the order's persuasiveness gives her what the order gives others.⁵⁰⁴ "[F]or [judges] who impose the violence," its interpretive "justification is important, real and carefully cultivated."⁵⁰⁵

499. *Id.* at 238; see *id.* at 205–07, 213.

500. *Id.* at 232–33.

501. *Id.* at 235. Markus Dirk Dubber, *The Pain of Punishment*, 44 *Buff. L. Rev.* 545, 596–605 (1996), and Steiker & Steiker, *supra* note 3, at 431, cite Cover to support a claim that diffused responsibility makes it easy for judges to order executions they do not have to carry out. But neither Cover nor Milgram claimed that the diffusion of responsibility has as powerful an inhibition-dampening effect on the actor ordering the violence as the one told to inflict it. As is discussed just below, the importance judges attach to their interpretations' ability to justify violence suggests that diffused responsibility does not effectively relieve judges of a sense of responsibility for violence they sanction.

502. Cover, *Violence*, *supra* note 462, at 236; see *id.* at 203 (describing sentencing judge's dissonance-causing recognition that she "articulates her understanding of a text, and as a result, somebody loses his freedom, . . . even his life"); *id.* at 229 ("Our judges do not *ever* kill the defendants themselves. They do not witness the execution. Yet, they are intensely aware of the deed their words authorize.").

503. *Id.* at 203.

504. See, e.g., *id.* at 225.

505. *Id.* at 238; see Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *Law's Violence* 211, 246 (Austin Sarat & Thomas R. Kearns eds., 1992) (discussing judges' "difficulty . . . in marshaling the conviction necessary to use and deploy law's violence" and "need," in Cover's view, "to provide compelling reasons and justifications—for themselves and within their own

For Cover, capital sentencing provides the acid test of this system for judicially deploying and domesticating state violence. That context requires every bit of the judge's capacity to generate explanations convincing enough to cause her to take responsibility for the order to kill and thus to produce orders authoritative enough to cause an official to open a prisoner's vein.⁵⁰⁶ Given the resistance capital systems provoke, Cover marvels at how well ours works to make deadly violence "constitutional."⁵⁰⁷ Unlike other judicially ordered punishments, capital sentences do not become immediately effective, but are stayed pending a long process of legal challenges that signify their constitutionality in two ways. A succession of courts declares the sentence constitutional in response to a set of constitutional challenges. And the medium for giving the final order to kill—the court's telephone call to the warden announcing the denial or lifting of a stay—dramatically "renders the execution constitutional violence" by showing the violence to be the judge's, not the executioner's.⁵⁰⁸

Cover's footnotes recognize that this system puts the Supreme Court under the greatest "pressure for more certain justification of the death sentence."⁵⁰⁹ The Court provides the most authoritative interpretation of the "constitutional . . . texts" identifying "permissible occasions for imposition of a capital sentence" and often issues the last minute order allowing the execution.⁵¹⁰ Cover vacillates on where these pressures had left the Court as of 1986 when he wrote. Sounding a bit like Justice Rehnquist in *Coleman*,⁵¹¹ Cover attributed "[t]he decade-long moratorium on death sentences" after 1967 to the Court's "failure of will" and came close to attributing "[t]he confused and emotional situation which now prevails with respect to capital punishment in the United States" to the Court's having flunked the "especially powerful test of the faith and commitment of the interpreters" that capital punishment poses.⁵¹² But he also thought the Court's "squeamishness" in "facing the implications" of its constitutional validation of the death penalty in the *July 2 Cases* had given way in the *Spring 1983 Cases* to a new "hostility to . . . delays" and a

interpretive communities—for the violence that they authorize. Without such reasons and justifications, law's violence could or would not be effectively organized and deployed.”).

506. Cover, *Violence*, supra note 462, at 229–30 (“To any person endowed with the normal inhibitions against the imposition of pain and death, . . . capital punishment entails a special measure of the reluctance and abhorrence which . . . must be bridged between interpretation and action[, placing] pressure . . . on . . . the legal justification for the act.”).

507. See *id.* at 230–32 (noting that “near perfect coordination” between judge and executioner is “an achievement” and describing location of “constitutional interpretation at the heart of th[e fatal] deed” and location of that “deed, the death, at the heart of the Constitution”).

508. *Id.* at 229–31.

509. *Id.* at 230–31 nn.50–54 (detailing Court's discomfort at managing death penalty).

510. *Id.* at 229.

511. See supra notes 218–231 and accompanying text.

512. Cover, *Violence*, supra note 462, at 229–30 & n.51.

“reversal of the trend to permit or encourage” ever more challenges to capital sentences.⁵¹³

VIII. THE FAILURE OF DETACHMENT AS A WAY OUT OF THE COURT'S DISCOMFORT WITH CAPITAL VIOLENCE

In *Justice Accused* and *Nomos*, Cover discovered judges trying to reduce dissonance by detaching themselves from state violence ordered by other officials. In *Violence*, he studied sentencing judges who order the violence themselves and can reduce the discomfort it causes only by supplying strong legal justifications. Cover clearly included Supreme Court Justices among judges taking the former stance, but was less clear about the stance the Justices took in regard to the ultimate state violence of capital punishment. In fact, as is next discussed, the Court has simultaneously taken both stances—detachment with excuses and deployment with explanations.

A. Evidence of Discomfort

Capital punishment is tailor-made for judicial detachment. First, dissonance and discomfort are high. Using agonistic language remarkably like that of the antislavery judges, several modern Justices have announced their moral scruples against the death penalty while voting to permit it.⁵¹⁴ Even Justices without moral objections undoubtedly have had to struggle with its conspicuous violence and its destruction of appealing legal meanings associated with the value of human life and civilizing trends that brought abolition to most Western democracies after World War II.⁵¹⁵ Palpable signs of detachment and distress are described below.

1. *Ambivalence*. — The Court's cases are replete with internal contradictions revealing its members being pulled in opposite directions at the same time. When Justices expressly solicited substantive challenges to the death penalty in *Rudolph*, litigants promptly obliged, and the Court promptly granted review. But when the death penalty's constitutionality was argued in *Boykin* and twice in *Maxwell*, the Court could not decide.⁵¹⁶ Trying again in *McGautha*, the Court flatly disavowed any constitutional ability to intervene against the death penalty.⁵¹⁷ Two months later, it re-

513. *Id.* at 230 n.51, 231 n.53.

514. Compare *supra* notes 463–464 and accompanying text (quoting Justice McLean addressing prospect of returning slaves to South), with *supra* note 96 and accompanying text (quoting Justice Blackmun explaining vote to uphold death penalty in *Furman*), and *supra* notes 93–95, 206–208 and accompanying text (discussing similar expressions of ambivalence about death penalty by Chief Justice Burger and Justice Powell).

515. See *Evans v. Bennett*, 440 U.S. 1301, 1306 (Rehnquist, Circuit Justice 1979) (granting stay of execution “as surrogate for the Court” and “because of the obviously irreversible nature of the death penalty”).

516. See *supra* notes 69–75 and accompanying text.

517. See *supra* notes 76–89 and accompanying text.

vived the issue in *Furman* and reached the opposite result: Every capital sentence and statute in the country was unconstitutional. Yet *Furman*'s reasoning—a pastiche of opinions by Justices in the middle of a fragmented Court—was opaque and contradictory and, if anything, suggested only the procedural solutions (standards and bifurcation) that the Court specifically rejected in *McGautha*.⁵¹⁸ On the substantive question of the penalty's constitutionality, the Court remained indecisive and in the *July 2 Cases* could muster only a double-negative-filled and adverbially qualified conclusion that the death penalty is not invariably unconstitutional.⁵¹⁹ Ambivalence suffuses the Court's capital cases.⁵²⁰

2. *Inflexibility*. — Almost uniquely across the Court's entire jurisprudence, the death cases are full of instances in which Justices refused to accept the will of the Court. Justices Brennan, Marshall, and later Blackmun refused to accept the majority judgment that the death penalty is constitutional. Justices Scalia and Thomas refuse to accept the majority judgment that, to be constitutional, decisions to impose death must be individualized.⁵²¹

3. *Anger, Provocation, and Personalization*. — Anger, provocation, and personalization⁵²² are additional indicia of dissonance that Cover identified or are similar to traits he discussed. And all can be found in abundance in the Court's capital cases, including, for example, in Justice White's passionate dissents in *Godfrey* and *Parker*,⁵²³ Brennan's in *McCleskey*,⁵²⁴ and Scalia's in *Kyles*,⁵²⁵ and in Justice Rehnquist's patently

518. See supra Part IV.A.

519. See supra Part IV.B.

520. See, e.g., supra note 186 (noting Chief Justice Burger's argument in *Eddings* that Court had no business suggesting to sentencer on remand that life sentence was required, while pointedly expressing his own doubts about executing *Eddings*); supra notes 203–205, 387–391 and accompanying text (discussing Justice White's vehement denial in *Godfrey* and *Parker* of Court's power to review appropriateness of death sentences while powerfully arguing that death was only appropriate verdict for *Godfrey* and *Parker*); supra notes 309–316, 442–447 and accompanying text (contrasting *Franklin* and *Johnson-Graham*, which in 1987 and 1993 upheld Texas's limitation on mitigating evidence to its bearing on three narrow questions that treated some mitigating factors as aggravating, with *Penry II-Tennard-Smith*, which in 2001–2005 held this aspect of Texas statute unconstitutional); supra notes 337–339, 369–376, 426–434, 449–451 and accompanying text (describing *Tison*'s retreat from *Enmund*; *Sanders*'s abandonment of crux of *Clemons*, *Sochor*, *Stringer*, *Richmond*, and *Parker* decisions; *McCleskey*'s effective overruling of itself; *Payne*'s overruling of *Booth*; *Atkins*'s overruling of *Penry I* and *Simmons*'s overruling of *Stanford* on death penalty for mentally retarded and juvenile offenders).

521. See supra notes 315, 439 and accompanying text.

522. See supra notes 465–466 and accompanying text.

523. See supra notes 203–205, 381–391 and accompanying text.

524. See *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (“Warren *McCleskey* doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing . . . compel[ling] the disclosure that it was more likely than not that . . . race . . . would determine whether he received a death sentence . . .”).

525. See supra notes 397–398 and accompanying text.

unmanageable, hence only provocative, proposal that the Court review every state capital decision to truncate the review process.⁵²⁶

4. *Defensiveness and Over-Rationalization.* — Defensiveness and over-rationalization, additional indications of discomfort, are present in the “protests too much” quality of *McCleskey*’s last section and in the Court’s ill-starred experiment in *Booth* with special procedural rules to moderate the racial disparities that *McCleskey* found to be “not significant.” Similar traits are also apparent in Justice White’s repetitive statements of the gruesome facts in *Godfrey*.⁵²⁷

5. *Regret.* — Further proof of discomfort is evident in the Justices’ unusually frank expression of after-the-fact doubts about their capital decisions. Examples are Justice Powell’s post-retirement regrets about his votes in *McCleskey* and in favor of the death penalty in the *July 2 Cases*; Justice Blackmun’s immediately pre-retirement adoption of an abolitionist view notwithstanding his dissenting argument in *Furman* that the Court had no business intervening in the area; and Justice O’Connor’s recent speeches worrying that the Court’s decisions and denials of review were causing innocent people to die.⁵²⁸ Although pitched in the opposite direction, then-Justice Rehnquist’s suggestion in *Coleman v. Balkcom* that he was prepared to meet his maker despite a scorecard full of executions at least hints at the longer view the Justices’ participation in capital violence seems to inspire.⁵²⁹

B. *Efforts at Detachment*

Capital cases also are subject to the dissonance-enhancing situational and dialectical factors that dispose judges to avoid responsibility.⁵³⁰ Since *Furman*, the Court has constantly been reminded of how dramatically public sentiment and the courts’ acts have diverged from judicial scruples—reinforced by international, religious, and moral scruples—against state killing.⁵³¹ The Court never escapes knowing that the pub-

526. See *supra* notes 218–231 and accompanying text. Consider also the effect on relations on the Court when Justice Powell abandoned his practice of switching his vote on stays of execution from “deny” to “grant” when five Justices voted to deny a stay but the other four voted to grant certiorari. As a result, several prisoners have been executed for lack of a stay following the Court’s formal vote to hear their petitions. See 2 Hertz & Liebman, *supra* note 222, § 38.2c, at 1858–59 & n.52.

527. See *supra* notes 203–205 and accompanying text; see also *Darden v. Wainwright*, 477 U.S. 168, 171–73 (1986) (describing gruesome facts of crime repeatedly and unnecessarily).

528. See *supra* notes 96 and accompanying text; *infra* note 630 and accompanying text.

529. See *supra* note 226 and accompanying text.

530. See *supra* Part VII.

531. Compare, e.g., Peter Applebome, *Arkansas Execution Raises Questions on Governor’s Politics*, N.Y. Times, Jan. 25, 1992, at A8 (discussing presidential candidate Bill Clinton’s refusal to grant clemency to suspend execution of severely mentally impaired man), and Katharine Q. Seelye, *Bob Dole: A Get-Tough Message at California’s Death Row*, N.Y. Times, Mar. 24, 1996, at A29 (“Mr. Dole’s visit to San Quentin, home to the 424

lic's attention is focused squarely on it and that the public is likely to interpret any decision it reaches as condoning violence, be it the State's or the capital prisoner's.⁵³²

Not surprisingly, then, the Court's death cases also bristle with detachment techniques.

1. *Not Deciding*. — The Court often detaches itself by simply not deciding the question it granted review to decide. *Boykin* avoided the question of the constitutionality of the death penalty by declaring a new due process right in guilty plea cases. *Maxwell* dodged the question by finding a procedural error no party had asserted. *Furman* avoided the “per se constitutionality” question and could not muster even a plurality opinion on its “as applied” basis of decision. Instead, by combining ambiguity on both questions with a ruling overturning all existing death statutes, *Furman* provoked a grand legislative referendum on whether society was converging on abolition and, if not, whether a mechanism besides total jury discretion was available to decide who dies. Based on the results of the referendum, the *July 2 Cases* did decide that the death penalty was not per se unconstitutional, but only weakly, with a “not [invariably] unconstitutional” holding.⁵³³

men on California's death row, was meant to dramatize his support for measures to speed up executions.”), and Alan Berlow, *Bush's Big Lie*, Salon, Oct. 3, 2000, at <http://www.salon.com/politics/feature/2000/10/03/bush/> (on file with the *Columbia Law Review*) (discussing presidential candidate George W. Bush's denial of clemency to Gary Graham and David Spence despite serious questions about their guilt of offenses charged), with Death Penalty Info. Ctr., *The Death Penalty: An International Perspective* (2006), at <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30> (on file with the *Columbia Law Review*) (providing statistics indicating strong international disagreement with use of death penalty in United States), and People of Faith Against the Death Penalty, at <http://www.pfadp.org/> (last updated Aug. 22, 2006) (discussing religious scruples against death penalty). Lawyers on each side have inflexibly followed the logic of their competing moral arguments—defense lawyers emphasizing the brutality inhering in judges' complicity in capital punishment and successively attacking impending executions until judges almost literally have to padlock the courthouse door; States' attorneys larding their briefs with descriptions of prisoners' sickening offenses and persistently asking to vacate lower court stays of execution when doing so keeps the courts and the public in high anxiety for days on end for no reason other than to speed up a man or woman's death by a few weeks. See, e.g., *Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992) (mem.) (terminating string of Ninth Circuit orders staying Robert Alton Harris's execution, all overturned by Supreme Court, with order forbidding Ninth Circuit to grant any further stays, no matter what law and facts might be); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 *Yale L.J.* 205, 205, 214 (1992) (calling procedures leading to Harris's execution “ugly, cruel, injudicious” and questioning whether it was “proper for the Supreme Court to issue an order denying all other federal courts the ability to exercise the power given them, not by the Supreme Court, but by law”); *infra* Part IX.A.2 (describing Professor Amsterdam's argument in *Boykin*).

532. See Zimring, *Inheriting*, *supra* note 232, at 18 (describing intense American public interest in executions).

533. See *supra* notes 69–73 and accompanying text (*Boykin*); *supra* notes 74–75 and accompanying text (*Maxwell*); *supra* Part IV.A (*Furman*); *supra* Part IV.B (*July 2 Cases*). Later, *Eddings* dodged the minimum age question the Court subsequently ruled on one

2. *Mechanical Analysis*. — The Court's capital cases are replete with mechanistic analysis, a classic form of weak equity that makes tough decisions seem easy, while often making them unpersuasive.⁵³⁴ In the *July 2 Cases*, the Court claimed that it did not overrule *McGautha* when it mandated the very procedures *McGautha* had refused to require, because *McGautha* addressed the procedures under the Due Process Clause, and the later cases mandated them under the Cruel and Unusual Punishment Clause.⁵³⁵ Then, in deciding how much process was due under the Eighth Amendment, the Court adhered to the "stasis" principle that the Constitution extended only to procedural requirements discovered between July 2, 1976 and early July 1983.⁵³⁶ In *Creech*, the Court approved the imperceptible "narrowing" accomplished by a statutory aggravating factor based on the Venn diagram logic that the factor created a subcategory of "capital" murders that in theory was minutely smaller than the category of all murders.⁵³⁷ In *Walton*, the Court approved a statutory factor that did apply to all murders because the State had diced it into multiple subfactors, no one of which covered all murders.⁵³⁸ *Johnson* let States honor the rule requiring jurors to consider all mitigating factors by instructing them to consider only a minuscule, and to ignore the remaining, part of a factor's extenuating force.⁵³⁹ And in *Sanders*, by citing a decision doing the same thing in a much narrower context, the Court categorically blinded itself to the patent possibility that jurors told to consider admissible evidence in support of a statutory aggravating circumstance later held invalid might have imposed death solely because of the emphasis given the evidence by instructions connecting it to the invalid statutory circumstance.⁵⁴⁰

3. *Transforming Substantive into Procedural Review; Ascribing Responsibility to Others*. — The Court's sleight of hand in moving from *McGautha* (ruling that the Due Process Clause did not require certain capital procedures) to *Furman* and the *July 2 Cases* (mandating the same procedures under the Cruel and Unusual Punishment Clause) provides more evidence of detachment than is noted above. The Cruel and Unusual

way in *Stanford* and a different way in *Simmons*. See supra notes 181-189, 343-345, 450-451 and accompanying text. *Lockett* avoided the minimum culpability issue later decided in *Enmund* and decided differently in *Tison*. See supra notes 167-175, 190-202, 337 and accompanying text; see also supra notes 62-64 and accompanying text (discussing *Witherspoon's* sidestepping question on which review was granted to await more social scientific evidence and adopting less intrusive rule proposed only in amicus brief).

534. See supra notes 483-484 and accompanying text.

535. See *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (plurality opinion) ("*Furman* did not overrule *McGautha* . . ."); supra notes 76-89, 119-160 and accompanying text.

536. See, e.g., supra Parts IV.C-V (discussing Court's decisions in *Stephens*, *Barclay*, *Ramos*, *Harris*, *Spaziano*, *Johnson*, *Blystone*, *Boyd*, and *Walton*, inter alia).

537. See supra notes 299-304 and accompanying text.

538. See supra notes 296-304 and accompanying text.

539. See supra notes 309-316 and accompanying text.

540. See supra notes 371-376 and accompanying text.

Punishment Clause is one of the few constitutional provisions requiring genuinely substantive review, and the Clause has long been understood to require the Court to decide the substantive humaneness of challenged punishments based on evolving values.⁵⁴¹ *Furman* and the *July 2 Cases* transformed the Clause in two ways, each detaching the Court from responsibility. First, transforming a substantive requirement into a procedural one let the Court avoid the substantive decisions the Clause otherwise requires.

Second, the procedures the Court adopted had the effect of ascribing the Court's substantive constitutional responsibilities elsewhere. Of course, as in other contexts where the Court was asked to intervene against the State, its death penalty decisions sometimes used standard weak equity doctrines—separation of powers, federalism, and originalist interpretation—to shift responsibility to the States, political branches, lower courts, and the Framers.⁵⁴² But in capital cases, the Court was not satisfied with these usual alternative loci of authority and invented new ones. Driven by strong impulses to insulate itself from substantive decisions, the Court read the Cruel and Unusual Punishment Clause to require capital procedures that in effect delegated to sentencing juries and to state appellate courts the duty to make substantive case-by-case and comparative constitutional proportionality determinations.⁵⁴³

Also insulating itself from substantive decisions while delegating its constitutional decisionmaking to the supposed objects of constitutional scrutiny, the Court based proportionality decisions about the death penalty for particular crimes and types of offenders on headcounts of state legislatures.⁵⁴⁴ And it forbade trial officials to tell jurors they share substantive review duties with the Court and other judges, though they do in most cases, but let jurors be told they share sentencing responsibility with governors, who rarely exercise the power.⁵⁴⁵

4. *Insulation as Trump.* — Exposing the primary impulse behind the Court's detachment devices is its behavior when the devices clashed. The logic of the Court's system of delegated proportionality review dictated that it sometimes conduct supervisory substantive review. But when faced with that imperative, the Court instead chose to insulate itself—often for mechanical reasons—though doing so left delegated proportionality judgments without any integrity. Prior to 1983, the Court used “extraordinary” procedural requirements to prompt juries to generate such

541. See Ely, *supra* note 114, at 13–14 (discussing Eighth Amendment's “open-ended” invitation to substantive review); see also *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

542. See *supra* notes 80–81, 92–96, 142, 144, 218–231, 239–248, 398, 428–429 and accompanying text.

543. See *supra* notes 153–160, 165–175, 258–269, 288–295, 305–308, 442–446 and accompanying text.

544. See *supra* notes 343–350 and accompanying text (*Stanford, Penry I*).

545. See *supra* notes 275, 326–331 and accompanying text (*Ramos, Caldwell, Romano*).

perfect outcomes in individual cases that the Court's substantive scrutiny would be unnecessary.⁵⁴⁶ When *Godfrey* and *Eddings* revealed that assuring the reliability of those procedures still required residual substantive review by the Court, it demurred, transforming extremely demanding procedural mandates into extraordinarily empty ones.⁵⁴⁷

Insulation also explains the Court's risible treatment of aggravating factors as sufficiently narrowing (*Walton*, *Jeffers*, *Creech*) and mitigating factors as sufficiently consequential (*Johnson*) as long as States gave each even the most minute effect. Especially telling was *McCleskey*'s refusal to require aggravating factors to narrow substantially despite studies showing that meaningful narrowing largely neutralizes the invidious impact of race on death sentencing. In all these cases, the Court was explicit about why it adopted these grudging rules: It did not want to conduct—in some cases it outright banned—any substantive review of how aggravated or mitigated particular factors were in the abstract and in practice.⁵⁴⁸ *McCleskey* epitomized the lengths to which the Court went to insulate itself. In the name of a jurisprudence constructed since *Furman* entirely in order to avoid arbitrary capital sentencing patterns, *McCleskey* precluded review of sentencing patterns.

5. *Inflating the Formal Stakes*. — Further evidence of the Court's impulse to "not decide" is Justice Powell's strange reasoning in *McCleskey*. The penultimate section of his opinion built systematically and powerfully toward the conclusion that death sentencing patterns explainable on no basis besides race cannot satisfy the Eighth Amendment. But the sentence ending the section recited the opposite holding—as if the Court could not bear to reach the decision its analysis compelled.⁵⁴⁹ Then, in a classic use of the strong equity tool of inflated formal stakes barring a decision against state violence, *McCleskey*'s final section advanced the proposition that racial influences are so pervasive that steps to remove them from capital cases would "throw[] into serious question the principles that underlie our entire criminal justice system."⁵⁵⁰ As Justice Stevens pointed out in dissent, the pretextual nature of the exaggerated stakes was obvious given the Baldus study before the Court, which revealed a proven method of moderating racial influences while preserving the criminal justice system and the death penalty: careful substantive re-

546. See *supra* notes 210–217 and accompanying text.

547. Illustrative is comparative proportionality review of sentencing patterns by state appellate courts, which the *July 2 Cases* and *Stephens* endorsed but *Harris* abandoned (on a mechanistic reading of the earlier cases) when it became clear the Court would have to conduct residual pattern-focused review to police lower court review. See *supra* Parts IV.B, VI.A.2, VI.B.1.

548. See *supra* Parts VI.B.3–4.

549. See *supra* notes 416–424 and accompanying text.

550. *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987); see *supra* notes 428–429 and accompanying text.

view of aggravating factors to be sure they truly narrow.⁵⁵¹ What actually was at risk in *McCleskey*, therefore, was only the Court's own insulation from substantive review of aggravating factors.

C. *The Inevitability of Responsibility*

It is no surprise that the Court's capital cases are suffused with "indications of distress . . . and, indirectly, guilt" and with techniques for avoiding the discomfort.⁵⁵² Judicial abdication of responsibility for facilitating or forbidding state violence is the "cognitive avenue of least resistance," one antislavery judges "almost uniformly applied" and constitutional judges of all stripes use liberally to elude blame for state violence.⁵⁵³

What is surprising is how much easier detachment should have been than the Court made it, and, all things considered, how infrequently and ineffectively the Court adopted an observer's stance toward state killing. That stance should have come naturally in the capital context, where the Court is insulated from obligation by a set of other actors to which it can easily ascribe responsibility.⁵⁵⁴ Yet the Court repeatedly went looking for capital constitutional obligations.⁵⁵⁵

Indeed, the Court has supercharged its responsibility in capital cases. Under its jurisprudence, every execution "constitutes an important form of constitutional interpretation,"⁵⁵⁶ which no court can supply as authoritatively as the Supreme Court. Additionally, the Court remains committed to a violence-validating process that entails "coordinated cooperation in securing all plausible judicial interpretations on the subject" from itself and numerous local actors.⁵⁵⁷ For these reasons, the Court often is the

551. See *supra* notes 430–433 and accompanying text. The Court also often inflated the stakes through detailed and repetitive statements of the gruesome facts of the killing, making weakness in response to brutality the price of ruling against the State. See *supra* notes 203–205, 387–391, 527 and accompanying text (discussing opinions of Justice White in *Godfrey* and *Parker* and of Justice Powell in *Darden*).

552. Cover, *Justice Accused*, *supra* note 462, at 207–10 (discussing antebellum judges' use of these techniques in fugitive slave cases).

553. *Id.* at 199, 230; see Cover, *Nomos*, *supra* note 462, at 156–58 (arguing that courts seek to avoid responsibility for state violence by invoking jurisdictional principles).

554. Among these are the Framers of the Fifth and Fourteenth Amendments who assumed the State would take life; the States whose "police" powers classically include defining the substantive criminal law; and centuries of legislators who have repeatedly reaffirmed their commitment to, and moderated, the death penalty. See *supra* notes 46–50 and accompanying text. Also included are trial judges whose job it is to explain a death sentence to the public and defendant before invoking God's mercy on his soul, see *supra* notes 502–508 and accompanying text; and appellate judges, whom nearly all States now require to approve a death sentence substantively before it can be carried out, see *Whitmore v. Arkansas*, 495 U.S. 149, 173–75 & n.1 (1990) (Marshall, J., dissenting).

555. After "deregulating death" in 1983, the Court has continued granting certiorari in death cases at a rate of about six per year. See *supra* note 42 and accompanying text.

556. Cover, *Violence*, *supra* note 462, at 231.

557. *Id.* at 232.

appeal of last resort, the authoritative source of the order to stay or proceed with the execution.⁵⁵⁸

IX. THE COURT'S NEAR SOLUTION TO THE DIFFICULTY OF DEPLOYMENT WITH EXPLANATIONS

A. *The Court's Compulsion to Explain the Death Penalty*

1. *Supreme Perspective.* — Why, then, is the Court's stance toward the death penalty one of both detachment and deployment? Why not one or the other? Why, in its dance with death, is the Court suspended between near-embrace and near-escape? A hint of an answer is in Justice White's description in *Furman* of the "data" that convinced him that discretionary procedures produced too few death sentences to justify state killing: "I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty."⁵⁵⁹ Nearly all of the "hundreds and hundreds" of capital and potentially capital cases Justice White mentioned were ones in which the Court exercised its power to deny review. Even as the Court formally averted its eyes from the many capital cases coming before it, Justice White could not avoid thinking of the punishments imposed in "state and federal criminal cases" for "crimes for which death is the authorized penalty" as a category of state violence that demanded his and the Court's attention and a constitutional justification. As Justice Goldberg's solicitation of a certiorari petition attacking capital punishment confirmed, even when the Court was so thoroughly detached from state killing that no one was asking it to intervene, it experienced its role as a deployer of the violence, which it then felt compelled to justify.⁵⁶⁰

Cover suggests a reason the Court saw its role in this way: "[J]udges deal pain and death. . . . From John Winthrop through Warren Burger they have sat atop a pyramid of violence. . . ."⁵⁶¹ Although, in discussing judicial sentencing, Cover mainly saw the lines of violent communication running down a pyramid from trial judges to an array of prison officials, his metaphor also aptly describes the Supreme Court's position. Even while a trial judge's order to execute the prisoner is running down a pyramid to warden and guards, the defendant also may run the order up a pyramid of state and federal courts to test its validity. It is exactly the view from atop that pyramid, looking down on the topography formed by the sentences in all potentially capital cases, that Justice White described in *Furman*. Evidently, the Justices' position astride the system of judicially

558. See, e.g., *supra* Part VI.A.1 (discussing pressures placed on Court by requests to grant or vacate last-minute stays of execution).

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

560. See *supra* notes 53–56 and accompanying text.

561. Cover, *Violence*, *supra* note 462, at 213–14.

deployed state killing created a strong sense of superintending the violence. That feeling in turn aroused a strong need to be sure the violence was justified and, if so, to proclaim a message saying so.

Of course, other legal interpreters impose, uphold, and can justify the deadly violence in each case. But there are two aspects of judicially deployed capital violence for which only the Supreme Court could provide the interpretive justification needed to relieve the deployer's discomfort. First is the question whether, apart from each individual manifestation of the violence, the form of violence itself is justified. Second is the question whether the pattern of uses of the violence conforms to the explanation used to answer the first question, or whether the pattern has no explanation, or an improper one.

On these two questions, the Court could not look to state trial and appellate judges to supply a sufficient justification for state killing. Even state judges who sense their broader implication in the decision to use killing as a social tool have difficulty, from their vantage point lower down on the pyramid, providing a justification commensurate with what, from the Supreme Court's perspective, is the national magnitude of the collective violence. And they have trouble surveying its overall pattern of deployment by what, from the Court's perspective, is a nationally integrated judiciary. Almost by constitutional definition, therefore, the overarching view of judicially imposed violence needed to confront these questions—the view Justice White took in *Furman*—was available only to the Supreme Court.⁵⁶²

2. *Supreme Pressure.* — Lest these points be lost on the Court, committed lawyers poignantly reminded the Court of them. One of the first to do so was Anthony Amsterdam in a 1968 masterpiece—an amicus curiae brief he authored in *Boykin v. Alabama* on behalf of the NAACP Legal Defense Fund.⁵⁶³ The brief is worth examining because of how effectively it located the Court in responsible relation to state killing.⁵⁶⁴

“We come,” Amsterdam's key argument began, “to the question whether Edward Boykin's sentence of death by electrocution for simple

562. Reinforcing the Court's sense of superintendence of the nation's system of capital violence are: “Our Federalism” and the allocation of police power to the States, which together with the Supremacy Clause leaves the Court as the only entity of government with a responsible national vantage point over this form of state violence; the criminal procedure revolution, which magnified the Court's consciousness of its responsibility for an (in some sense) nationally integrated system for dispensing justice; and the Cruel and Unusual Punishment Clause, which almost uniquely demands the Court's *substantive* justification for (expressly punitive) state violence. See *supra* Part VIII.C.

563. *Boykin* Brief, *supra* note 72; see Meltzer, *supra* note 55, at 170 (confirming that Amsterdam was brief's principal author).

564. Even the brief's statement of the amici curiae's interest emphasized the Court's responsibility: “The issues . . . are of literally vital significance to the more than 400 men on death row in the United States The lives of each of these men may well turn on what the Court decides and says—or *does not decide or does not say*—in the present case.” *Boykin* Brief, *supra* note 72, at 9–10 (emphasis added).

robbery violates the Eighth Amendment prohibition of cruel and unusual punishment.⁵⁶⁵ Immediately, the brief complicated the question of who the “we” was, “ventur[ing] to suggest” how “easy” the answer to that question would be were the relevant decisionmaker “a student of Anglo-American history and contemporary culture, untrained in the law.”⁵⁶⁶ Making a straightforward, B-type argument that the death penalty is cruel and disproportionate, the brief discussed seven philosophical, penological, and psychological “considerations which would affect the thinking of our hypothetical non-legal scholar.”⁵⁶⁷

Anticipating Cover’s point that “provenance” is everything, that “[n]o wardens, guards or executioners wait for a telephone call from the latest . . . scholar, jurisprude or critic before executing prisoners,” and instead “jump to the judge’s tune,”⁵⁶⁸ the brief abruptly ended these ruminations by reminding the Court that *it* is the “we” whom the Cruel and Unusual Punishment Clause requires to come to the question of the death penalty’s constitutionality:

Aye, but there’s of course the rub. Our hypothetical student of culture is free to reach his own independent conclusions about the death penalty in a manner that would be altogether inappropriate as a principle for decision by this Court . . . For this Court does not sit to make the personal views of its Justices the rule of the Eighth Amendment. . . .

[Even so,] the Amendment plainly is a restriction upon the legislative enactment of cruel penalties, as well as upon the judicial imposition of them. This Court has so held by voiding statutes under the Cruel and Unusual Punishment Clause . . . [that offend] “the evolving standards of decency that mark the progress of a maturing society.”⁵⁶⁹

Having thus foregrounded the Court’s position atop society’s system for deploying and justifying capital violence and the weak equity escape he knew the Court would seek, Amsterdam held the Court’s feet to the fire. Acknowledging the “extraordinary” dissonance the Court felt, faced with the choice of allying itself with the State’s capital solution or setting itself against the judgment of forty-odd state legislatures, he told the Court there was no escape.⁵⁷⁰ This “dilemma . . . is inherent in the Eighth Amendment.”⁵⁷¹

To help manage the dilemma posed by the pure B-type question—“will contemporary standards of decency allow the existence of [a capital] law on the books?”—the brief collapsed it into another: “[W]ill contem-

565. *Id.* at 24.

566. *Id.*

567. *Id.* at 25–35 & nn.22–32.

568. Cover, *Violence*, *supra* note 462, at 231–33.

569. *Boykin* Brief, *supra* note 72, at 35–36 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

570. *Id.* at 37.

571. *Id.* at 36.

porary standards of decency allow the execution of the law's penalty *in fact*?"⁵⁷² This question, the Court was assured, did not demand D-type, case-by-case analysis. But it did demand C-type, pattern-focused analysis, a kind of analysis Amsterdam may have hoped would evoke less discomfort while still being a kind of review the Court might feel properly placed and obliged to conduct. The brief thus forcefully argued that the issue was not what was said about capital punishment by the "legislature" or a "penal statute" or "'our history,'" but rather what authorities actually do with the death penalty when implementing it. This enabled the brief, in the process of making an argument about what the Constitution forbids, to progressively transform the crucial authority from "the law," to "government," to "a legislator," to "courts" interpreting "the Eighth Amendment," to, finally, "this Court."⁵⁷³

572. *Id.* at 38.

573. The passage is set out in full to show the drama with which it briefly fixes the beam of responsibility on each of these alternative authorities while inexorably moving it toward the Court:

By this we do not mean that the Court is to review the penalty decision of the sentencing judge or jury in particular cases. Our concentration upon the question whether public conscience will support **the law's application in fact** . . . means to draw the distinction between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a **government** to put on its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few freak cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general application, would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.

. . . A **legislator** may not scruple to put a law on the books whose general, even-handed, non-arbitrary, application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a **court cannot sustain such a law under the Eighth Amendment** . . . because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity—even as a sop to public conscience.

. . . .
 [On the question whether the death penalty, if generally applied, would affront the public conscience,] [w]e disagree not with the reasoning process, but rather with the factual premise, of a statement made by **this Court** ten years ago in *Trop v. Dulles*.

The brief then took twenty pages to document the penalty's "actual usage" in the courts—rampant discretion prompting rare imposition except against racial minorities, the mentally infirm, and the unlucky.⁵⁷⁴ In this additional way, Amsterdam anticipated three Coverian factors likely to provoke dissonance and then a dissonance-reducing effort to confront and justify the system of state killing or, failing that, shut the system down: (1) A network of judges atop which the Court sat was responsible for the death penalty's "application in fact"; (2) those judges, and the Court, thus played a crucial role in transforming the violence "in fact" into something very different from and less attractive than the violence projected by the authorizing legislation; (3) the transformed nature of that violence—and any justification for it, or lack of a justification—consequently was visible only to the Court from its superior vantage point.

In a short concluding section left palpably disconnected from all that had come before, the brief offered a separate "submission": Alabama's "totally unguided, unprincipled, unconstrained, uncontrolled, and unreviewable" discretion to choose between life and death violated the Due Process Clause.⁵⁷⁵ Explicitly representing the interests of many prisoners facing imminent execution across the country, the amicus brief had no alternative but to offer this less invasive, E-type way out of the pressure it had created to decide the conjoined B- and C-type question. But by acknowledging that procedural "[w]ays may be found to . . . bring a grant of discretion within constitutionally tolerable limits" and by suggesting that the Court could displace its felt need to provide a global justification onto individual sentencers charged with providing better, more transparent, more "legal" justifications for each individual death sentence, the section almost certainly worked against the broad substantive relief its principal argument sought.⁵⁷⁶

We think that today it is simply not correct that the death penalty is "still widely accepted." We speak, for the reasons which we have just stated in detail, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied.

Id. at 38–41 (emphasis in bold added) (footnote and citation omitted) (quoting *Trop*, 356 U.S. at 99 (plurality opinion)). Among its other remarkable attributes, the passage anticipates by a decade a whole generation of equal protection scholarship. See, e.g., Ely, supra note 114, at 170–71 ("The function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves.").

574. *Boykin* Brief, supra note 72, at 41–61.

575. Id. at 62–63.

576. Id. at 67 (citing, e.g., Model Penal Code § 210.6 (Proposed Official Draft 1962) (suggesting capital sentencing procedures)). When *McGautha* later presented only the E-type procedural argument with which the *Boykin* brief ended, with no B- or C-type substantive issue in the foreground, the Court treated the claim as questioning the validity of the violence deployed against each petitioner, rather than of the court system's overall role in and pattern of deploying that violence. See supra notes 76–87 and accompanying text. Doing so made it easier for the Court to take the observer's role because there was a serviceable authority at hand to which to attribute the case-specific decision to deploy the

The *Boykin* analysis also helps solve the dual riddle of the *Furman* certiorari grant—why the Court granted review so soon after *McGautha* had reinstalled the Court behind the observer’s screen, and why the seemingly B-type question presented focused on “the imposition and carrying out of the death penalty *in this case*.”⁵⁷⁷ Furman’s lawyers—the same ones who represented Boykin’s amici—again sought to steer away from a pure B-type test of the death penalty against enlightened public opinion (an irresistible invitation to weak equity deference to the legislature) and from D-type review of the death penalty imposed by the actual sentencer (to whom the Court also surely would defer) by instead presenting the *Boykin* brief’s conjoined B- and C-type question: Whether the death penalty, not as defined by the forty statutes adopting it but instead by its pattern of judicial deployment, was cruel and unusual.⁵⁷⁸

The question Furman’s lawyers posed thus put the Court back on the hook. It portrayed the death penalty as a single “capital solution” demarcated entirely by its national pattern of deployment at the hands of an integrated system of courts that the Court alone superintended. The question presented rendered the Court helpless to retreat from the violence to an observer’s outpost and maximized the judicial deployer’s discomfort and need to justify the violence or, if not, overthrow it.

B. *The Court’s Innovative Solution to Dissonance and Deployment with Explanations*

1. *Supreme Sharing*. — If dissonance and discomfort got Furman’s lawyers in the door, distance and detachment sent them away with only half a loaf. Bucking the votes of four Justices to ascribe responsibility to the usual others, and of two Justices to ban capital punishment entirely for lack of an availing justification by the Court, and bucking *McGautha*’s conclusion that meaningful capital standards were humanly possible, the three plurality Justices attributed offensive sentencing patterns to a now humanly curable lack of standards.⁵⁷⁹ Under pressure to justify the death penalty and realizing it could not be justified when applied through standardless procedures—but also under the ever-ready judicial temptation to displace the justificatory duty onto another authority—the

State’s violence and provide the needed justification—the jurors who chose and trial judge who pronounced the sentence. In good strong equity style, therefore, the Court said it had no choice but to find for the State because the relief requested—reliable death sentencing standards—was “beyond” its, the legislatures’, and indeed, “human” capacity. See *supra* notes 76–87 and accompanying text. Contrarily, but in good weak equity style, the Court also ruled that history and uniform American practice identified jurors as the appropriate decisionmaker and blessed them with a near perfect ability to intuit standards in each case. See *supra* notes 76–87 and accompanying text.

577. *Furman v. Georgia*, 403 U.S. 952 (1971) (mem.) (emphasis added); see *supra* notes 88–89 and accompanying text.

578. See *supra* Part IX.A.2.

579. See *supra* notes 76–87, 109–118 and accompanying text.

plurality Justices abruptly declared death sentencing standards to be humanly possible enough to let the States give them a try.

As we have seen, the plurality Justices took these steps as part of a broader experiment to see if the public would countenance the death penalty when applied through such standards to the "us" as well as the "them."⁵⁸⁰ The Court thus did not shed responsibility. Indeed, it emptied hundreds of death row cells, razored forty-some capital statutes out of the books, and promised to review a new generation of sentences and statutes. Instead, the Court sought to share responsibility. Placing the public under threat of an evenhandedly applied death penalty might cause the public to take the rest of the responsibility for abolishing the sanction. If not, and if legislatures could not devise workable standards, those authorities would share responsibility with the Court for a decision to shut down the death machine. If those authorities could devise effective standards, those standards properly applied would carry much of the justificatory burden.

Revealingly, the overwhelming legislative endorsement of the death penalty in reaction to *Furman* did not convince the Court that its constitutional scrutiny of the penalty and impulse to justify or abolish it posed too risky a challenge to the political branches. Nor did the Court accept the outpouring of reform legislation as proof that the public was ready to apply the death penalty to the "us" as well as the "them" or as a reason, à la *McGautha*, to resume its observer status. On the contrary, the *July 2 Cases* overturned many mandatory death sentencing statutes without, for example, giving North Carolina the chance to prove that it would indeed, evenhandedly, execute every first degree murderer.⁵⁸¹ Clearly, though, the Court was buoyed by the system of shared constitutional responsibilities that *Furman* initiated. More to its liking, therefore, were the guided discretion statutes most States adopted after *Furman*, which it facially upheld in the *July 2 Cases*. Through them, the Court shared responsibility with sentencers for ensuring that every death sentence was constitutionally proportioned to aggravation net of mitigation.

The Court reinforced this approach by requiring proof in every case of at least one aggravating factor making the murder objectively worse than the run of all murders and requiring the sentencer to net out aggravation against all mitigating factors. If all went according to plan, each death verdict would convey a clear justificatory message, as if under the Cruel and Unusual Punishment Clause, that the sentence was proportioned to the evil of the crime. The aggregate of all these proportioned penalties would likewise justify the system of judicially deployed state killing. Best of all, most of the responsibility for Eighth Amendment proportionality checking would be delegated to actors other than the Court. Its

580. See *supra* notes 113–118, 574 and accompanying text; *infra* notes 589–590 and accompanying text.

581. See *supra* Part IV.B.2.

role was limited to oversight through targeted categorical and spotty pattern-focused and case-specific analysis of whether all was going according to plan.

Additionally, the “comparative proportionality review” provisions the Court emphasized in upholding guided discretion statutes in the *July 2 Cases* and in *Stephens* enabled the Court to share with state high courts its backup responsibility for monitoring the run of a State’s cases for proportionality.⁵⁸² Finally, through the legislative headcount the Court used in the *July 2 Cases*, *Coker*, and *Enmund*, and more recently in *Atkins* and *Simmons*, to inform its own constitutional judgments without supplanting them, the Court shared its backup categorical-review responsibilities with state legislators.⁵⁸³

The Court thus set out to enlist the States’ legally guided sentencing and appellate procedures—which originally were designed to generate capital sentences on the basis of aggravating and mitigating factors of the legislatures’ choosing—for its own, different purpose of assuring constitutionally proportionate sentencing based on *all* such factors.⁵⁸⁴ Through this ingenious system of delegated proportionality judgments, the Court decentralized Eighth Amendment decisionmaking by sharing it with a variety of local actors.

2. *Supreme Experimentation*. — More than ingenious, the system the Court initiated was a paragon of democratic experimentalist jurisprudence,⁵⁸⁵ which went a long way toward solving the constitutional interpretive conundrums that so obsessed Cover and generations of judges and scholars.⁵⁸⁶ To summarize those conundrums in a few sentences,

582. See *supra* Parts IV.B, VI.A.2.

583. See *supra* notes 162–166, 190–202, 449–451 and accompanying text; *supra* Part VI.C.1.

584. See *supra* Parts IV.B.1, VI.B.1, VI.C.2. Thus, apart from the threshold “statutory aggravating factor” requirement, this was not mainly a system for limiting sentencer discretion to legislatively specified “standards.” It limited sentencer discretion mainly by requiring sentencers to consider and net out all relevant aggravation and mitigation and (if all went according to plan) impose sentences that achieved case-by-case (D-type) and aggregate (C-type) proportionality. See Liebman & Marshall, *supra* note 6, at 1620–29 (describing Court’s “avid[] endorse[ment of] guided discretion as a way to assure that death sentences congregated towards the aggravated center”).

585. For overviews of democratic experimentalism, see, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 314–16 (1998) [hereinafter Dorf & Sabel, *Democratic Experimentalism*]; Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 *Harv. L. Rev.* 4, 36–37 (1998); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 *Yale L. & Pol’y Rev.* 261, 276–78 (2004).

586. Even a representative listing of this scholarship is impossible in any reasonable amount of space. Classic examples include Raoul Berger, *Government by Judiciary* (2d ed., Liberty Fund 1997) (1977); Bickel, *supra* note 53; Charles Black, *Structure and Relationship in Constitutional Law* (Ox Bow Press 2000) (1969); Philip Bobbitt, *Constitutional Interpretation* (1991); Robert H. Bork, *The Tempting of America* (1990); Jesse H. Choper, *Judicial Review and the National Political Process* (1980); Ronald Dworkin, *Law’s Empire* (1986); Ely, *supra* note 114; Richard H. Fallon, Jr., *How to Choose*

many provisions of the Constitution are notoriously difficult to interpret, none more so than the Cruel and Unusual Punishment Clause. Even when the words are clear, trusting them to the exclusion of all else requires us to ascribe an omniscience to their drafters and an omniscience to language that are not deserved across the unpredictable sweep of history. Yet, every alternative interpretive refuge is likewise uncertain and even more difficult to legitimize democratically. In Coverian terms, a mechanistic resort to the words themselves is an irresponsible interpretive dodge. But a conscientious effort (and more so, a self-serving effort) to give the provision meaning inevitably evokes judges' instincts to minimize state and jurispathic violence while still allowing social institutions to promote public welfare, and accordingly is so fraught with dissonance and discomfort that the results are certain to be distorted and democratically suspect. Interpreting the Constitution is hard to do—at least with democratic legitimacy.

Democratic experimentalism is a technique for making public problem solving easier in a democratically legitimate way. It accomplishes this through two governance tools. First is the delegation of front line authority to make decisions and innovate to a diverse array of decentralized public institutions (hence the reference to experimentation) that are as close to the public as possible (hence the reference to democracy). Second, these local experimenters must answer for their results to a central authority with the power to enforce accountability, but not to dictate the methods used to obtain results. Initially, the center may prescribe only the most general and widely accepted goal for the local experiments. It also must have the institutional perspective needed to comprehend and compare outcomes generated by the many local experimenters, exercise enough control over incentives to hold local innovators accountable for achieving outcomes similar to or better than those that are shown to be possible by other experimenters in like situations, and use the fruits of local experience to refine and make more specific the goals local experiments are obliged to pursue. Finally, the center must have the institutional expertise—influenced by the results of many experiments—to help struggling local entities learn how to emulate or surpass more successful peers.⁵⁸⁷

a Constitutional Theory, 87 Cal. L. Rev. 535 (1999); Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993); Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1 (1998); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989).

587. See, e.g., Michael C. Dorf & Charles F. Sabel, Drug Treatment Courts and Emergent Experimentalist Government, 53 Vand. L. Rev. 829 (2000); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1 (1997); Brandon Garrett, Remedying Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41 (2001); Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 Geo. L.J. 257 (2001); James S. Liebman & Charles F. Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform, 28 N.Y.U. Rev. L. & Soc. Change 183, 300 (2003);

When applied to the problem of interpreting Delphic constitutional provisions, democratic experimentalism imagines a Supreme Court that prescribes a general constitutional goal, leaves local authorities free to adopt their own methods of achieving the goal, then subjects the methods they adopt and results they achieve to comparative review by courts informed about results obtained elsewhere. The results to be compared may include ones obtained from a “default” mechanism imposed on jurisdictions that choose not to innovate.⁵⁸⁸ In this way, the high Court establishes the basic constitutional goal and retains the final say about what protection the Constitution requires and whether States are providing it. But the Court leaves the mechanism for achieving the requisite protection to the States in the first instance. And the Court’s evolving judgment about the requisite degree of protection demanded by the Constitution is democratically informed by the range of moral and policy judgments local public innovators make and by the quantum of protection (in the face of competing policies) that their innovations prove to be possible.

The Court’s ingenious set of post-*Furman* proposals for sharing constitutional decisionmaking with local institutions was a striking example of democratic experimentalism. It is not surprising that the Court innovated in this way in a doctrinal setting posing an especially difficult interpretive problem—the meaning of “cruel and unusual punishment”—where the black letter rule required the Court to look for meaning

Julissa Reynoso, Putting Out Fires Before They Start: Community Organizing and Collaborative Governance in the Bronx, U.S.A., 24 *Law & Ineq.* 213 (2006); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 *Harv. L. Rev.* 1015, 1062–73 (2004); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 *Colum. L. Rev.* 458 (2001); Note, After *Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 *Harv. L. Rev.* 1774 (2003). See generally William H. Simon, Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism, 46 *Wm. & Mary L. Rev.* 127, 173–81 (2004) (describing new school of pragmatist thought that advocates carefully monitored problem solving, in lieu of enforcement of fixed entitlements, as most effective means of reforming social institutions and responding to needs of disadvantaged communities); Richard B. Stewart, Administrative Law in the Twenty-First Century, 78 *N.Y.U. L. Rev.* 437, 448–50 (2003) (“Various forms of flexible agency-stakeholder networks for innovative regulatory problem-solving have developed in order to avoid the limitations of top-down command regulation and formal administrative law procedures.”).

588. The Court proposed exactly this kind of experimentalist regime in *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966), but the default rule it imposed was so weak and inexpensive that it failed to create an incentive for local entities to innovate their way out of the default rule. See Dorf & Sabel, Democratic Experimentalism, *supra* note 585, at 452–53 (noting that *Miranda* does not read Fifth Amendment protection against coerced self-incrimination to require police to incant decision’s famous warnings to arrested suspects and instead identifies those warnings as default rule that permits “[e]xperimentation by law enforcement authorities . . . only if the alternative procedures they developed proved to be at least as effective as those prescribed by the Court in [the] baseline that has since become familiar”).

outside the Constitution and the Court itself, namely, in “the evolving standards of decency that mark the progress of a maturing society.”⁵⁸⁹

The Court’s scheme began with a general constitutional goal: Death must be “proportional” to each instance of deliberate homicide; it must be commensurate with the amount of evil done after evil is discounted by extenuation. Surely this required net aggravation greater than zero, and surely it forbade patterns of verdicts explainable on no basis other than race or on no basis at all, but many questions remained.⁵⁹⁰

The Court recognized the impossibility of definitively answering these questions by interpreting the Cruel and Unusual Punishment Clause unaided. Instead, it interpreted the Clause to embody procedural—or governance—requirements (E-type) that in the first instance delegated all the remaining interpretive questions to local democratic institutions. It was understood that in many situations the local judgments would be final. But in cases close to the line, especially where the legislative category, sentencing pattern, or case outcome was different from those generated by most other local actors, the Court’s scheme contemplated that it would review the matter for itself. In doing so, however, the Court’s judgments would be deeply informed and made easier by the range of moral and policy determinations and of reasonably attainable outcomes, revealed by the nationwide experience of myriad local democratic actors.

Comparative proportionality review of sentences in potentially capital cases provides a good example. State supreme courts that took seriously the comparative review the Court promoted in the *July 2 Cases* and *Stephens* used trial outcomes to inform their substantive review in a manner very like the Supreme Court’s plan to use trial and appellate outcomes to inform its own constitutional review.

The best elaborated state regimes for comparative proportionality review—particularly New Jersey’s—included some or all of the following experimentalist attributes. Capital juries filled out verdict forms listing the aggravating and mitigating factors found in cases in which death was imposed. State trial judges filled out forms recording additional information about the crime, offender, and victim in all potentially capital cases.

589. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion). Scholars have proposed and officials have adopted other potentially experimentalist methods for structuring the experience and monitoring the outcomes of trial and appellate proceedings as a way of identifying workable limits on discretion. See Brian Goldberg et al., *Experimentalist Review of Capital, Criminal, and Civil Trial Outcomes* 62–64, 70–91, 98–107, 113–40 (May 2004) (unpublished manuscript, on file with the *Columbia Law Review*) (discussing state and federal sentencing guidelines and controls on forfeitures, damages, remittitur, and prosecutorial charging decisions).

590. These questions included the following: What counts as aggravating and mitigating? How much aggravating and mitigating force do particular factors have, and how much aggravation relative to mitigation is enough? How much deviation in similar cases is tolerable? How thoroughly must considerations such as race be wrung out of the system?

Simultaneously, an administrator identified provisional, a priori categories of comparable cases based on aggravating factors in the state statute and other recognized factors, and ranked the categories on a provisional scale of aggravation. State appellate courts used those rankings as presumptive guides in assessing proportionality, while also making qualitative comparisons of the capital outcome of each case under review to the outcomes of other potentially capital cases that struck the court and the parties as similar, with the goal of overturning outlier death sentences, and more generally “determin[ing] whether . . . death . . . is imposed in a category of comparable cases often enough to create confidence in the existence of a societal consensus that death is the appropriate remedy.”⁵⁹¹ Using the progressively accreting experience from jury verdicts, other trial outcomes, and appellate courts’ qualitative comparative review of death sentences, the administrator’s original categories and scales were revised based on the frequency with which capital sentences were actually imposed and upheld in each category. After adding new categories and omitting or collapsing old ones, the new categories were rescaled. The effect on the probability of a death sentence of the raw number of aggravating and mitigating factors was also studied. Over time, data from judge and jury forms and appellate decisions could be subjected to multiple regression analysis to reveal hidden factors associated with the probability of a death sentence.⁵⁹²

Writing before the New Jersey Supreme Court made him a special master to design its proportionality review plan, Professor Baldus summarized the promise of such techniques:

[T]he success that some state supreme courts have . . . displayed in connection with the proportionality-review process, together with our own efforts to systematize techniques of drawing the line, . . . persuades us that identifying the worst cases, while difficult, is not necessarily impossible. . . . To be sure, there would always be hard cases at the borderline of the worst-case category, but the level of arbitrariness involved in drawing that line would pale when compared to the arbitrariness of the current system.⁵⁹³

Recasting this assessment a decade later, David Baime, New Jersey’s second special master, concluded that, albeit crudely at first, the system gave the state supreme court “‘a bird’s eye view of what society views as particularly evil and subject to the highest penalty.’”⁵⁹⁴ The system thus directly and factually informed the state supreme court about the “evol-

591. *State v. Martini*, 651 A.2d 949, 963 (N.J. 1994); see also David Baldus, *Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court* 25 & n.23 (1991) (“[Proportionality review] insures that death sentences are only imposed in categories of cases on which there is clear societal consensus as to their death-worthiness.”).

592. See Goldberg et al., *supra* note 589, at 25–35.

593. Baldus et al., *supra* note 432, at 385–86.

594. Goldberg et al., *supra* note 589, at 34 (quoting interview with David Baime).

ing standards of decency" that are supposed to govern judgments about the constitutionality of death as a penalty.

The Court's system of delegated proportionality judgments might have worked for it too, had it not felt compelled to supplant its original logic of shared responsibility with a system of entirely surrogated duties.

C. *The Court's Cowardice and Collapse*

The problem was that considerations of dissonance, detachment, and deployment, and not of doctrinal innovation, led the Court to formulate its novel system and controlled the system's implementation. And those same considerations continued to make the Court's exercise of its crucial substantive oversight responsibilities painful, whether its review was categorical (B-type), pattern-focused (C-type), or case-by-case (D-type).

1. *Supreme Surrogation*. — Although the Court kept the delegated review system going, it did so only insofar as it could see its task as finding E-type mechanisms for displacing onto others its compulsion and responsibility to justify the existence and pattern of capital violence. Because it experienced paralyzing dissonance every time it exercised that justificatory responsibility, it set out in the *Spring 1983 Cases* to make its insulation from substantive responsibility complete. Via the stasis and insulation principles, the Court exhibited a pathological mistrust of any innovation that might later imply an obligation.⁵⁹⁵ Recently the Court has exercised more of a backup substantive role, chiding Texas for its derisory treatment of mitigating factors (*Penry II, Tennard, Smith*) and voiding the death penalty for mentally retarded and juvenile offenders (*Atkins, Simmons*).⁵⁹⁶ But the Court has yielded to the temptation of justificatory review before, and every time, the result has been the same kind of agitated responses that its recent decisions have engendered on the Court, and then a hasty retreat to the insulation princi-

595. Examples include the Court's "any amount is enough" approaches to narrowing through aggravation (*Cartwright, Walton, and Creech*) and individualization through mitigation (*Johnson*), which trivialized both requirements, and the Court's abdication of categorical proportionality judgments to headcounts of state legislatures (e.g., *Stanford*). See supra Parts VI.B.2-3, VI.E.

596. See supra Part VI.E; see also Liebman & Marshall, supra note 6, at 1650-53, 1665-68 (noting this trend and suggesting it tracks public opinion influenced by evidence of high error rates in capital trials).

ple.⁵⁹⁷ The Court's 2006 decisions suggest that the next retreat has already begun.⁵⁹⁸

2. *Supreme Futility*. — From its position atop the court systems that dispense the death penalty, the Supreme Court has found it impossible to ignore its own role in that violence. The crudeness of the violence has been too much for the Justices to join in without providing an equally potent justification for it. Yet the enormity of the violence has been too much for the supreme judicial dispenser to justify on its own, or even to contemplate coolly enough to justify with the help of other democratic actors. The Court repeatedly asks its deadly partner to slow dance, then recoils at the contact. Though it pushes death away, it just as ardently refuses to let go. Clearly, the Court can't live without responsibility for the death penalty, but neither can it live with the responsibility.

Some good has come of the Court's capital jurisprudence. By rejecting wholly discretionary death sentencing, *Furman* moderated the worst attribute of the prior system, chasing racial bias underground and focusing it mainly on the race of the victim, not the race of the defendant.⁵⁹⁹ Abolishing the death penalty for rape and other nonhomicidal felonies, accessory murder, mentally retarded and juvenile offenders, and individuals insane at the time of the execution has probably better aligned the penalty with a public that seems to want the death penalty, but isn't bloodthirsty. Most promising, the Court's scheme of

597. See supra notes 203–209, 387–391, 394–398 and accompanying text (discussing Justices White's, Burger's, and Scalia's reactions to Court's interventions in *Godfrey*, *Eddings*, *Parker*, and *Kyles*). Justice Scalia's reaction in *Simmons* is the most recent example of the agitation the Court's substantive review triggers:

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment." But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. . . . The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our . . . Constitution should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

Roper v. Simmons, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting) (citations omitted).

598. See supra notes 324, 358, 369–376, 393, 441 and accompanying text; infra note 621 and accompanying text (discussing Court's 2006 decisions in *Kansas v. Marsh*, 126 S. Ct. 2516 (2006); *House v. Bell*, 126 S. Ct. 2064 (2006); *Oregon v. Guzek*, 126 S. Ct. 1226 (2006); and *Brown v. Sanders*, 126 S. Ct. 884 (2006)).

599. See Baldus et al., supra note 432; cf. Joshua Marquis, *The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 506–07 (2005) (citing study claiming that white defendants were twice as likely to be sentenced to death as black defendants).

post-*Furman* delegated proportionality review showed how to employ jurors, appellate judges, and state legislators to help provide a legal justification for individual death sentences, the pattern of sentences, and the penalty itself.

But at least since *Furman*, the result of the Court's paralysis in the clutches of competing compulsions to intervene and escape has been futility. For thirty years, the Court has decided more capital cases per term than any other type of case.⁶⁰⁰ But its progress has been more in circles than forward. Its jurisprudence has veered wildly between the contradictory visions of constitutional capital sentencing held by Justice Stewart and Justice White. The explanation for each zig and zag is its ability to help the Court flee substantive responsibility for state killing while trying to justify it.

Led by Justice Stewart, the Court began by resting the justification of the death penalty for murder on a finding of proportionality measured by aggravation net of mitigation.⁶⁰¹ Once the Court began exercising the categorical, pattern-focused, and case-by-case substantive review this design demanded, it found the difficult interpretive exertions, in service of justifying this rawest kind of state violence, to be painfully dissonant with its peaceful and "jurisgenerative" instincts. This of course is the reaction Cover predicts.⁶⁰² The step the Court took to alleviate dissonance was also predictable: It ascribed responsibility elsewhere. But because the usual dodges would not suffice in the capital context, the Court's way of doing so was novel. The Court could not avoid its anguish by marshaling jurisdictional and prudential reasons to decline to rule at all and leave the matter entirely in the hands of other authorities, because the other authorities were subordinate institutions for which the Court was responsible and whose products it reviewed on a daily basis. So instead of entirely offloading lawmaking responsibility, the Court devised an ingenious system for sharing responsibility with jurors, lower court judges, and drafters of the criminal law.

Even the residual substantive monitoring of subordinates that made up the Court's share of the justificatory load proved unbearably dissonant with the Court's instincts to shun violence. Whenever that happened, the Court abandoned its backup responsibility for the underlying proportionality based doctrines and dared States to execute enough people to provide the brutally clear retributive and deterrent justification for state killing that Justice White's competing approach required.⁶⁰³ The incoherence of the Court's jurisprudence thus is not (as the standard explanation goes) a result of the Court's inability to choose between dis-

600. See *supra* note 42 and accompanying text.

601. See *supra* Part VI.B.5.

602. See *supra* Part VII.

603. On the failure of this justification, given the small and declining number of death verdicts and executions in the United States, see Liebman & Marshall, *supra* note 6, at 1653-60; *infra* note 616 and accompanying text.

cretion and rules.⁶⁰⁴ On the contrary, the Court devised a brilliant system for harnessing discretionary decisions by jurors, judges, and legislators to inform its constitutional rulemaking. The system came apart because the Court refused to play its own substantive part in the justificatory exercise.

The worst result of the Court's paralysis, however, is not doctrinal incoherence, or the Justices' unhappiness with each other and all this doctrinal churning; it is the failure to provide the proportionality based justification for state killing that the Court recognizes is indispensable. Clearly, the Court has failed to provide that justification on its own. In the *July 2 Cases* and *Lockett*, the Court held directly that it could not provide a blanket (B-type) justification for executing all, or subcategories of, deliberate murderers.⁶⁰⁵ In cases like *Cartwright* and *Johnson*, it declined to do so case-by-case (D-type review). And in *McCleskey* and *Creech*, it declined even to repeat *Furman's* pattern-focused (C-type) justificatory exercise that lies at the source of the Court's entire capital jurisprudence.

Nor, however, did the necessary justification emerge from the Court's decentralized system of constitutional interpretation. Rather, the Court's withdrawal from the substantive monitoring that system required caused its delegates to default as well. There are three reasons the Court had this influence: It exercised firm control over procedural requirements in the area; those requirements were demanding insofar as they compelled local actors to provide serious proportionality judgments; and the Court's holdings were mediated by two sets of well organized and committed legal adversaries. Given these circumstances, the Court's directives to local officials were ferociously enforced both ways. If the Court ruled that a particular procedure was required, hundreds of capital defendants immediately demanded the procedure. Likewise, the moment the Court held that a particular procedure, however advisable, was not constitutionally mandated, the message the States heard was that the Supreme Court strongly advised against the procedure. Because the trend of the Court's moods was strongly toward relaxing justificatory demands on its delegates and thus itself, the result was a systemwide withdrawal from serious proportionality judgments.⁶⁰⁶

The overall result of the Court's waffling was to cause just enough narrowing to occur along Justice Stewart's (later Justice Stevens's) lines and just enough numerosness along Justice White's lines to replicate almost perfectly the arbitrary, capricious, and discriminatory patterns of death verdicts the Court condemned in *Furman*. True, the circle of

604. See authority cited *supra* note 6 and accompanying text.

605. See *supra* Part IV.B; *supra* notes 167–175 and accompanying text.

606. See, e.g., Bienen, *supra* note 270, at 158 (“The overwhelming response to [Harris's] withdrawal of the federal constitutional requirement of [comparative] proportionality review [by state appellate courts] . . . was the concomitant withdrawal of the state requirement, either through legislative action . . . or through the action or inaction of the state supreme court.”).

capital-eligible offenses and offenders is slightly smaller now than in 1972, the density of death sentences within the circle is slightly greater (though, for reasons described below, the number of executions is small), and the pockets of discriminatory oversentencing are defined by the race of the victim, not (as before) the race of the defendant.⁶⁰⁷ But otherwise, the Court's waffling has brought it full circle back to the patently unjustifiable pattern of state violence that it found in its most forceful, if partial, fit of justificatory decisionmaking in *Furman*.

SUMMARY AND CONCLUSION

Two powerful and opposite impulses have paralyzed the Supreme Court in its capital jurisprudence. The deployer's role, thrust on the Court by its superintendence of the tribunals that dispense the death penalty and eloquently reinforced by a committed defense bar, has compelled the Court to provide a convincing justification for the fact, pattern, and each instance of state killing. In struggling to do so, the Court has made the measure of that justification the proportionality of punishment and crime. But the Court has been tormented by the difficult interpretive questions posed by any substantive test of "cruel and unusual punishment," the cognitive dissonance entailed in peaceloving judges' attempts to justify this particularly raw form of state violence, and the struggle with the political branches that banning the violence would ignite. Thus buffeted, the Court has been unable to back away from its interpretive responsibilities, to justify the penalty in a manner convincing to itself, or to abolish it.

The Court's massive forty-year effort was not entirely futile. In the process, the Court devised an imaginative scheme for sharing its justificatory burden with local democratic institutions. The system provided the Court with a passable, if perilous, way between the horns of the dilemma Robert Cover described. By pressing local democratic institutions into service as provisional interpreters and implementers of the Constitution, subject to the Court's supervision and final say, the system could satisfy two otherwise elusive interpretative goals. It could generate the responsible, head-on justifications for state violence that the Court's role in this violence and the Cruel and Unusual Punishment Clause irresistibly demand. And it could ease the unbearable dissonance that "jurispathic" approval of state violence visits on judges.

More specifically, after soliciting certiorari petitions raising constitutional challenges to the death penalty (*Rudolph*), then repeatedly granting review but sidestepping the issues (*Boykin*, *Witherspoon*, and *Maxwell*), the Court interpreted the Constitution, in quick succession, to deny it the power to review the death penalty (*McGautha*), then to require it to void all extant capital statutes and sentences (*Furman*). *Furman's* nine separate opinions identified three troubling patterns generated by the wholly

607. See Figure 1, *supra* Part I.

lawless death sentencing procedures it struck down: racial disparity (Justice Douglas's focus), the absence of any connection between how aggravated an offense was and the probability of a death sentence (Justice Stewart's focus), and the deterrence- and retribution-destroying rarity with which the penalty was imposed for nominally capital crimes (Justice White's focus). The decision triggered a three-question national referendum. Was the public committed enough to the death penalty to reinstate it under the constitutional cloud *Furman* created? If so, what crimes did state legislatures believe were capital? And could the States devise law-bound methods for imposing the penalty that somehow avoided the troubling patterns found in *Furman*?⁶⁰⁸

Richly informed by the responses *Furman* elicited from state legislators, jurors, and state appellate judges, the Court concluded that the death penalty was "not unconstitutional" for deliberate murder, but was unconstitutionally "excessive" for rape and other nonhomicidal crimes as well as for homicides the defendant did not personally commit and as to which he was not at least grossly reckless.⁶⁰⁹ In 1989, the trend of the States' and juries' treatment of mentally retarded and sixteen- and seventeen-year-old offenders led the Court to approve the death penalty for them.⁶¹⁰ But in 2002 and 2005, after being informed differently by changing patterns of legislation and jury verdicts, the Court held the death penalty "disproportionate" for both categories of offenders.⁶¹¹

As for deliberate homicides, the Court—still informed by the States' responses to *Furman* but exercising its own judgment—reversed a third of the new statutes outright and parts of most others. Most crucially, death could not be mandatory. The penalty instead was constitutional only when a jury pronounced it proportionate under the circumstances by finding enough aggravation net of mitigation to warrant death.⁶¹²

Backup appellate review was also required. Minimally, this called for appellate courts to reassess aggravation net of mitigation in each case. But the Court additionally seemed to require "comparative proportionality review" of the sentence at hand to identify the State's "going rate" for imposing death sentences in recurring situations.⁶¹³ Over time, such systems could hone in on the State's communal definition of evil and extenuation, and thus of proportionality and cruel and unusual punishment. The state statute could then be refined accordingly, and outlier death sentences could be reversed.

Such systems also could respond to changes in communal judgments over time. Recent events, for example, have documented the impossibility of Justice White's proposal to increase the death penalty's use enough

608. See *supra* Part IV.A.

609. See *supra* Part IV.C; *supra* notes 337–339 and accompanying text.

610. See *supra* Part VI.C.1.

611. See *supra* notes 449–451 and accompanying text.

612. See *supra* Part VI.B.5.

613. See *supra* Parts VI.A.2, VI.B.1, VI.C.2.

to give it a clear retributive and deterrent justification.⁶¹⁴ Although some States flirted with this approach during the 1990s, the approach hit a brick wall in 2000. High exoneration and capital error rates made clear that the cost of high rates of capital punishment was a high risk of executing the innocent and, as a result, neutralizing the retributive and deterrent justification that otherwise might emerge.⁶¹⁵ In reaction, public support for the death penalty declined as did the number of death verdicts and executions.⁶¹⁶

The logic of the Court's system of shared constitutional responsibility also entailed, and the Court intermittently exercised, its own backup review. In cases such as *Coker*, *Enmund* (majority), *Adkins*, and *Simmons* the Court used the aggregate of all state legislative judgments about the "deathworthiness" of particular offenses and offenders to help it decide when death was constitutionally excessive and on that basis invalidate outlier statutes.⁶¹⁷ The Court also reviewed state capital sentencing procedures and overturned those that did not generate reliable case-by-case proportionality judgments by jurors imbued with a sense of responsibility.⁶¹⁸ The Court sometimes made its own case-specific proportionality judgments—as in *Godfrey*, *Eddings*, *Enmund* (concurrency), and *Parker*—that aggravation was so minuscule or mitigation so great that the death sentence was unconstitutional.⁶¹⁹

The system also entailed comparative review as in *Furman*. This review was meant to identify death sentencing patterns that were unacceptably linked to race or insufficiently tied to aggravation net of mitigation and to supervise state appellate review to be sure it was effectively disposing of outlying verdicts.⁶²⁰ At its limit, such review would use the aggregate of all States' common laws of aggravation, mitigation, and proportionality to identify outlying aggravating factors the States may not use,

614. See Liebman & Marshall, *supra* note 6, at 1617 (detailing Justice White's position); *supra* note 8 and accompanying text.

615. See Liebman & Marshall, *supra* note 6, at 1650–53 (“[T]he capital punishment system . . . had in fact led to a series of death sentences for demonstrably innocent individuals.”).

616. See *id.* at 1653–58; After Tookie: The Wrong Decision in California, but America May Be Changing Its Mind, *Economist*, Dec. 17, 2005, at 12, 12–13 (“After steadily rising to a rate of 98 a year in 1999, the number of executions has fallen—to 59 last year and probably about the same this year Of the 38 states that retain the death penalty, 16 have not used it in the past two years.”); Charles Lane, Changing Attitudes About the Death Penalty, *Wash. Post*, Jan. 2, 2006, at A11 (reporting that only 96 individuals were sentenced to die in 2005, down from 320 in 1996); Juan-Carlos Rodriguez, Death Sentences Nationwide Fall for a Sixth Year, *Phila. Inquirer*, Apr. 26, 2005, at A4 (noting large recent declines in death sentencing rate).

617. See *supra* Part VI.C.1.

618. See *supra* Part VI.B.6.

619. See *supra* Parts V, VI.D.1.

620. See *supra* Parts IV.A, VI.A.2, VI.B.1, VI.C.2.

“in-lying” mitigating factors they must recognize,⁶²¹ and common groups of factors as to which the national “going rate” excludes the death penalty. Informed by each State’s jurisprudence of death, the Court could craft its own, helping to tame the unruly Cruel and Unusual Punishment Clause. Most importantly, by providing a democratic basis for abolishing the death penalty in part and substantively justifying the rest, the Court’s system of shared constitutional responsibilities could help domesticate the painful dissonance created by the Court’s inescapable role in a crude and jurispathic kind of violence.

But the Court lost heart. Still tormented by the face to face encounters with state violence that its supervisory and residual justificatory roles required, the Court renounced its procedural dictates, monitoring, and attention to the information that local proportionality decisions were generating. It denied its authority to make its own categorical proportionality judgments, informed by state legislative judgments, and instead simply counted legislative heads. It allowed States to use factors applicable to nearly all murders to “narrow” the range of death-eligible murders, to instruct jurors to give mitigating factors only a small proportion of their extenuating value, to order jurors to impose death when no net aggravation remained after mitigation was factored in, and to diminish jurors’ sense of responsibility by saying that the governor could clean up their mistakes via a clemency power governors almost never exercise. It vowed never again to examine case-specific proportionality. It jettisoned the requirement of comparative proportionality review by state appellate courts in favor of toothless harmless error review applicable only to errors involving aggravating factors and only then in a subset of States. It refused to repeat *Furman*’s review of capital sentencing patterns after attempting it in *McCleskey*, finding racial influences, and allowing them to stand because the only known palliative was to insist on a high degree of aggravation net of mitigation. Overall, the Court surrendered the capacity that might have been supplied by its occasional review of the proportionality of individual death sentences and by comparisons of States’ sentencing patterns and capital common laws to generate its own proportionality based jurisprudence.

These rulings destroyed the reliability of the Court’s system of shared constitutional decisionmaking. They generated a set of contradictory doctrines that veered wildly between Justice Stewart’s proportionality based justification for the death penalty and Justice White’s contradictory retribution- and deterrence-based justification. As a direct consequence,

621. States disagree, for example, on whether “residual doubt” about guilt or lesser sentences imposed on codefendants are “mitigating,” but the Court has refused to limit States’ ability to go either way on these questions. See, e.g., *Oregon v. Guzek*, 126 S. Ct. 1226, 1231–32 (2006) (concluding that Constitution does not require States to treat residual doubt as mitigating); *Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (plurality opinion) (expressing doubt that Eighth Amendment entitled defendant to cast residual doubt on conviction as basis for sentence less than death).

the pattern of death verdicts the Court's modern jurisprudence has generated is nearly identical to the pattern it ruled unconstitutional in its most powerful and generative justificatory exercise in *Furman v. Georgia* in 1972.⁶²² Yet, for all its backtracking, the Court remained tormented by the need, but inability, to justify the death penalty.⁶²³

* * *

These circumstances give the Court a clear choice: remain in the limbo created by its chronic inability to ignore or justify the death penalty or, instead, summon up some un-judge-like courage. Forty years of exertions, however, have narrowed the Court's options.⁶²⁴

Among the options no longer realistically open is complete deregulation. Even before the public and committed lawyers came to expect the Court to regulate the death penalty, the Court's members felt that obligation themselves, even soliciting petitions to act.⁶²⁵ Sitting atop the pyramid of courts that impose and order the taking of life, the Court could not avoid responsibility for subjecting the penalty to law and trying to justify it.⁶²⁶

Today, the justificatory pressures on the Court are even greater. After decades of regulating the death penalty at the behest of a committed and sophisticated capital defense bar on behalf of thousands of death row inmates, everyone looks to the Court to provide overarching direction for the capital system, its legal justification, and even the final order letting the execution proceed.⁶²⁷ Congress's recent expansion of the federal death penalty and stringent limitation of lower federal court review of state capital cases on habeas corpus create additional pressures on the Court to conduct its own supervisory review of capital cases.⁶²⁸

Not surprisingly, therefore, whenever death penalty crises arise, it is the Court to which the public looks for explanations and solutions. And there is ample evidence that the Court responds to the attention. The last several years' uptick in the Court's scrutiny of capital cases appears to

622. See Liebman & Marshall, *supra* note 6, at 1608–18 (arguing that Court's decisions have resulted in “incoherent jurisprudence that . . . has essentially made constitutionally mandatory what *Furman* found constitutionally abhorrent”); *supra* Part VI.F.1.

623. See *supra* Part VI.F.2.

624. For the menu of options originally open to the Court, see *supra* Part II.

625. See *supra* notes 53–56 and accompanying text.

626. See *supra* Part IX.A.

627. See *supra* Part IX.A.

628. See, e.g., 18 U.S.C. §§ 3591, 3595(c) (2000); *Jones v. United States*, 527 U.S. 373, 398–405 (1999) (exercising constitutional review of federal death penalty); *Spencer v. Georgia*, 500 U.S. 960, 960–61 (1991) (Kennedy, J., concurring in denial of certiorari) (noting that Court properly bases decisions on certiorari to review state capital decisions on whether subsequent federal habeas corpus review is available); see also *Felker v. Turpin*, 518 U.S. 651, 658–62 (1996) (indicating that Congress's withdrawal of federal habeas corpus remedies may expand Court's obligations under its residual power to hear “original” habeas petitions).

be a direct result of mounting numbers of death row prisoners being released based on proof that they were not guilty.⁶²⁹ Members of the Court have said as much in an unusual flurry of statements off the Court about the troubling questions the death penalty presents.⁶³⁰ These pressures will only increase as credible evidence begins to emerge that States have executed innocent men in the recent past.⁶³¹

629. See Liebman & Marshall, *supra* note 6, at 1650–58 (attributing shrinking public and political support for death penalty in part to proof that States have sentenced innocent people to death); *supra* Part VI.E (documenting trend in Court’s decisions between 2000 and 2005 toward greater supervision of delegated proportionality judgments and its abolition of death penalty for mentally retarded and juvenile offenders). But cf. *supra* notes 324, 596–598 and accompanying text (noting evidence in Court’s 2006 decisions of recoil from prior years’ spate of substantive death penalty review). The blame directed at the Court for delays gripping the administration of the death penalty in the 1980s and early 1990s—especially after Justice Rehnquist pinned a target on the Court in *Coleman v. Balkcom*—is another example of this phenomenon. In that case, the Court’s reaction was to broaden the death penalty and curb its review. See *supra* notes 218–231 and accompanying text.

630. See, e.g., Associated Press, Justice Backs Death Penalty Freeze, Apr. 10, 2001, at www.cbsnews.com/stories/2001/04/10/deathpenalty/main284850.shtml (on file with the *Columbia Law Review*) (“saying that accused murderers with good lawyers ‘do not get the death penalty’” and “criticiz[ing] the often ‘meager’ amount of money spent to defend poor people, [Justice Ginsburg said she] would be ‘glad to see’ Maryland become the second state after Illinois to pass a moratorium on the imposition of the death penalty”); Biskupic & Barbash, *supra* note 95 (discussing Justice Powell’s post-retirement expression of doubts about death penalty and regret about his most important decision upholding it); Gina Holland, Associated Press, Stevens Focuses on Death Penalty Flaws, Aug. 7, 2005, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/N/a/2005/08/07/national/w120758D23>. DTL (on file with the *Columbia Law Review*) (discussing Justice Stevens’s criticism of death penalty in public speeches); Charles Lane, O’Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed, Wash. Post, July 4, 2001, at A1 (“Speaking to a meeting of Minnesota Women Lawyers in Minneapolis, O’Connor said that ‘serious questions are being raised’ about the death penalty . . . [S]he said that ‘the system may well be allowing some innocent defendants to be executed.’”); *supra* note 238 and accompanying text (discussing Justice Powell’s speech about death penalty at Eleventh Circuit Judicial Conference); see also *Callins v. Collins*, 510 U.S. 1141, 1145–56 (1994) (Blackmun, J., dissenting from denial of certiorari) (cataloguing defects in current administration of death penalty as reason for his decision to dissent from all decisions imposing death penalty); Gina Holland, Associated Press, Scalia Questions Catholic Stance on Death Penalty, Feb. 4, 2002, at <http://www.usatoday.com/news/washington/2002/02/04/scalia.htm> (on file with the *Columbia Law Review*) (reporting that “Scalia told Georgetown students that the church has a much longer history of endorsing capital punishment” than of opposing it, as it has done in recent years); Interview by Larry King with Justice Stephen Breyer, on Larry King Live (CNN television broadcast Nov. 23, 2005) (stating in response to inquiry about evidence that “an innocent person was put to death” in Texas in 1993, that the Court “look[s] very carefully, . . . very carefully” at capital cases).

631. See, e.g., Associated Press, Witness Clears Man Executed in Texas for 1985 Slaying, Wash. Post, Nov. 22, 2005, at A2; Lise Olsen, The Cantu Case: Death and Doubt/Did Texas Execute an Innocent Man?, Houston Chron., Nov. 20, 2005, at A1; Maurice Possley & Steve Mills, ‘I Didn’t Do It. But I Know Who Did’: New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity, Chi. Trib., June 24, 2005, at A1, available at <http://www.chicagotribune.com/news/specials/chi-tx-1-story,0,4563517>.

Given these pressures, even powerful strong and weak equity reasons for the Court to stop regulating the death penalty provide the Court with no realistic escape from interpretive and justificatory responsibilities. No wonder, then, that, for over thirty years, no Justice has urged the Court to leave the field.⁶³²

Nor, however, is the Court's choice today between abolition and taking full responsibility for justifying the death penalty for all categories of capital offenses and offenders, sentencing patterns in dozens of States, and thousands of death verdicts in prospect and under review. Just as the Court in the capital context has found no solace in detachment with excuses, neither has the Court found respite in the rarer technique preferred by Robert Cover, deployment with convincing explanations.⁶³³

The justificatory task is enormous. Much capital legislation is passed each year, and thousands of capital cases are in the pipeline at any given time.⁶³⁴ Even worse is the vexing nature of the interpretive task. The Cruel and Unusual Punishment Clause is a notoriously confounding substantive text to interpret,⁶³⁵ and interpreting it to curtail the death penalty commits the Court to a political "struggle[] the outcome of which—moral and physical—is always uncertain."⁶³⁶ The theme of the attack on the Court in such cases is the "mockery" it makes of our democracy when "the meaning of our Eighth Amendment . . . [is] determined by the subjective views of five Members of this Court";⁶³⁷ and yet when the Court validates this rawest form of state violence, doing so ignites equally disturbing dissonance in judges disposed toward protecting, not destroying, lives and legal meanings.⁶³⁸

The Court's best reason not to bear the full burden of singlehanded, democratically dubious interpretations of the Constitution as barring or justifying capital punishment is that it is no longer necessary. The Court itself developed a better democratic justificatory technique, by treating the Cruel and Unusual Punishment Clause as initially imposing only a general substantive goal: proportionality between crime and punishment. *Furman* then wiped the slate clean of all existing capital statutes and sentences because no reasonable variation of the proportionality principle could justify them. Together with its bold stroke, *Furman's* flamboyant ambiguity as to what else the Eighth Amendment required

htmlstory (on file with the *Columbia Law Review*); Jim Salter, Execution Case Revisited, *Miami Herald*, July 13, 2005, at 5A.

632. Even Justices Scalia and Thomas see a need for constitutional scrutiny of the death penalty beyond that applied to other penalties. See *supra* notes 315, 398, 439, 521 and accompanying text.

633. See *supra* Part VII.

634. See Liebman & Marshall, *supra* note 6, at 1658–60 & n.224 (discussing recent capital legislation).

635. See *supra* notes 541, 586–587 and accompanying text.

636. Cover, *Nomos*, *supra* note 462, at 60.

637. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

638. See *supra* Part VII.

forced a national referendum on whether and how to administer the death penalty. Informed by the democratic returns this experiment generated, the Court was in a much better position to hold the death penalty unconstitutional for crimes short of deliberate homicide and “not unconstitutional” for aggravated homicide—while leaving open the many questions these double negatives begged.⁶³⁹

To determine when aggravated homicides were and were not proportional, the Court next read the Cruel and Unusual Punishment Clause to impose a set of procedural requirements that provoked “reliable” proportionality judgments from sentencing juries in each case. Death could not be imposed unless jurors imbued with a full sense of responsibility and informed by all relevant aggravating and mitigating evidence found the penalty proportional because aggravation net of mitigation was sufficiently above the baseline of evil of all capital murders to warrant execution. The Court also promoted a system of comparative proportionality review through which state appellate judges used the democratic returns from juries in the State to identify the State’s going rate for sentencing murders with common collections of circumstances, and on this basis to overturn outlying death sentences and revise statutory standards and procedures.

The logic of the new system dictated, finally, that the Court itself use the returns from juries, courts, and legislatures nationwide to help identify a national going rate for death, and on that basis overturn outlying statutes, sentencing patterns, and individual death verdicts. Although the ultimate, substantive interpretation of the Cruel and Unusual Punishment Clause would be the Court’s own, its decisions to allow or abolish the penalty to any extent would be bolstered by the democratically legitimized local verdicts and norms the Court used to inform its reading of the Constitution. The Court would not bear the full brunt of, but neither would it avoid, the interpretive and justificatory responsibilities the death penalty imposes. Nor would the Court bear the full brunt of, though neither could it entirely avoid, the dissonance and conflict that decisions for and against state violence entail.

As this Article documents, the Court ultimately found unbearable even this reduced share of justificatory responsibility. Even democratically armed against the most compelling attractions and revulsions its dance with death aroused, it could not safely embrace—or elude—the task.

The Court’s only alternative to abolition thus is not to accept the full justificatory burden, but instead to use the imperfect armor its “shared review” innovations provide. The option is to do what it set out to do in *Furman* and the *July 2 Cases*, only to retreat in the *Spring 1983 Cases* and *McCleskey*. The option is to insist that aggravating factors meaningfully aggravate; that jurors consider mitigating factors for all their mitigating

639. See *supra* Part IV.

worth and accept full responsibility for the consequences of their proportionality judgments; that those judgments be premised on reliable conclusions that aggravation net of mitigation is substantial and greater than the baseline of capital murder; that state appellate courts backstop jurors' proportionality judgments and compare the results of cases across the State to identify outlier death verdicts and the outlier procedures and standards that led jurors astray; and that the Court itself use the aggregate of these many democratic judgments to inform its own jurisprudence of proportionality and death.⁶⁴⁰

Under current circumstances, the Court's only alternative to thus imperfectly arming itself is to admit its own inability to do what long experience has shown it must: to acknowledge that it cannot interpret the Constitution convincingly enough to justify for itself, the public, and the executioner the crude violence administered every day by courts the Supreme Court oversees. If that justificatory task is indeed "beyond present human ability,"⁶⁴¹ then the Court itself is condemned. It is trapped in the perpetual futility of its four-decades-long minuet with death, paralyzed by contrary compulsions to embrace and to escape. Unless. Unless the Court can somehow muster the strength to face up to the public and political branches and announce what its failings and those of its innovative review technologies would then prove: The Constitution cannot be interpreted to justify the death penalty, and the penalty must be abolished. Unless the Court has the courage to slay its deadly partner.

640. For congruent proposals, see Kozinski & Gallagher, *supra* note 436, at 28–30 (imploring Court to limit capital punishment to cases involving extreme aggravating factors); Steiker & Steiker, *supra* note 3, at 414–26 (urging Court to scrutinize aggravating factors carefully, require comparative review, conduct periodic pattern-focused review to weed out systemic racial and other disparities, and make greater use of super due process in capital cases).

641. *McGautha v. California*, 402 U.S. 183, 204 (1971).