University of Michigan Journal of Law Reform

Volume 40

2007

# *Furman*'s Mythical Mandate

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# *FURMAN*'S MYTHICAL MANDATE

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*This Article argues for the rescue and reform of Supreme Court doctrine regulating capital sentencing trials under the Eighth Amendment. Many legal commentators, both liberal and conservative, including several members of the Supreme Court, have concluded that the Court's regulation of capital sentencing trials is a disaster. The repeated criticisms rest on a commonly accepted view about a principal goal of capital sentencing regulation. The prevailing account, fueled by the rhetoric of the Justices, stems from the notion that* Furman v. Georgia, *408 U.S. 208 (1972), revealed a mandate of consistency in the use of the death penalty that the Court has struggled to fulfill. However, this Article shows that consistency is implausible as an Eighth Amendment aspiration and that the Court has never seriously pursued consistency after* Furman. *The Court has focused almost entirely on promoting expansive individualized consideration of capital offenders, a goal at odds with consistency. The problem is that the Court's continuing rhetorical commitment to* Furman's *mythical mandate has cast doubt on the value and legitimacy of individualization and has diverted attention from efforts to clarify why individualization serves Eighth Amendment ends. In defense of the doctrine, the Article provides an Eighth Amendment theory for individualization—one founded on avoiding retributive excess. The Article also shows, however, that this theory calls for reforms that could further assure that only the deserving receive the death penalty.*

Since *Furman v. Georgia*[1] prohibited standardless capital sentencing, the Supreme Court has regulated capital sentencing primarily under the Eighth Amendment. According to the Court, a principal aim of this regulation is to reduce arbitrariness or inconsistency in the use of the death penalty.[2] Before *Furman*, no satisfactory

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I thank Celestine Richards McConville and Steven Semeraro for helpful comments on an earlier draft and Jetty Maria Howe for assistance and encouragement at all stages of the project.

1. Furman v. Georgia, 408 U.S. 238 (1972).

2. The Court has declared that the purpose of the doctrine is to make the process for imposing death "rationally reviewable," *see, e.g.*, Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion)), and to ensure that the sentencer is guided by "clear and objective standards," *see, e.g.*, *Godfrey*, 446 U.S. at 428 (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion)), with the ultimate goal of regularizing the decision of whether to impose death, *see* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion) (asserting that *Furman* required states to replace "arbitrary and wanton jury discretion with objective standards" to, among other things, "regularize" the sentencing process); *Gregg*, 428 U.S. at 222

explanation could rationalize the selection of a few hundred people for execution from among the many thousands who had committed capital crimes each year.[3] Consequently, in the three decades after *Furman*, the Court has devoted great efforts to articulating and refining doctrines that purport to ensure that death-selection systems provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[4]

While consistency may sound preferable to arbitrariness in capital selection, this asserted goal of the Court's regulation poses problems. First, a consistency mandate does not comport with the language of the Eighth Amendment.[5] The prohibition on cruel and unusual punishments implies substantive limits on decisional standards rather than merely a requirement of regularity.[6] At the same time, the clause seems only to forbid the imposition of the death penalty where it is unwarranted,[7] unlike a consistency man-

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(White, J., concurring) (asserting that *Furman* required a death sentencing scheme to "result in death sentences being imposed with reasonable consistency").

3. *See, e.g.*, Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1791–92 (1970) (noting that only a small percentage of the thousands of persons who were convicted of capital crimes were sentenced to death and asserting that "[m]ost commentators describe the imposition of the death penalty as not only haphazard and capricious, but also discriminatory").

4. *Godfrey*, 446 U.S. at 427 (quoting *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))). *See also* McCleskey v. Kemp, 481 U.S. 279, 301 (1987) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

5. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

6. To require a state to act consistently or nonarbitrarily is to allow the state to specify even a draconian decisional standard as long as it follows that standard. *Cf.* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543–48 (1982) (contending that equality is a vacuous concept because its meaning relies on the importation of some external substantive standard).

The important Eighth Amendment question that the consistency or nonarbitrariness goal ignores is this: what substantive standard defines for a capital sentencer, or for a reviewing court, when a death sentence is acceptable? *See* Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795, 861 (1998) ("Unless a substantive Eighth Amendment standard exists by which to distinguish among capital offenders . . . one cannot complain on consistency grounds about the offenders' uniformly harsh treatment.").

7. Many believe that arbitrariness in the distribution of punishment does not render a deserved punishment unjust. *See, e.g.*, Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) ("Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality."). Absent intentional discrimination, this view of justice may survive even in the face of racial disparities as long as those who received the death penalty actually deserved that punishment. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 160 (1996) (asking "[i]f Allen [an African American] really deserves to die, why should he be spared simply because Bob [a white man] has wrongly beaten the system?"); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1614 (2004) ("[G]eneralized race disparity alone cannot

date which would also forbid unwarranted reprieves.[8] Second, the Court's capital sentencing doctrine does not appear designed to achieve consistency. The Court has mandated expansive individualized consideration—requiring that capital sentencers remain free to reject the death penalty based on any evidence proffered concerning the offender's character, record, or crime[9]—which seems to thwart rather than to promote consistency. Finally, capital selection remains arbitrary in fact.[10] Many studies suggest that racial biases continue to influence outcomes.[11]

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logically require dismissal of deserving capital prosecutions in the minds of prosecutors who have carefully determined the facts and fairness of their individual cases."). *See also* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 198 (2d ed. 2001) (noting that death penalty supporters argue that society's interest in retribution trumps equal protection concerns); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1178–79 (1981) (noting that retributivists argue "that inequitable application is not inherent in the penalty, and that it is better that some receive their just deserts, however biased the sample executed, than that none do"). Nonetheless, the important question is whether evidence of racial disparities casts doubt on our ability to appropriately determine the deserts of murderers. For more on why this kind of claim should raise Eighth Amendment concerns about the use of the death penalty, see *infra* Part III.B.2.

8. *See* Howe, *supra* note 6, at 824 ("If the Eighth Amendment required consistency, a system involving unrelenting harshness in the imposition of death sentences should succeed, while a system giving officials discretion to extend merciful reprieves should fail."); Daniel P. Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1, 27 (asserting that an Eighth Amendment mandate of consistency in capital sentencing involves a "profound contradiction," because it means that "a punishment imposed under a system of unmitigated harshness would be less cruel" than one allowing merciful reprieves).

Consistency or nonarbitrariness appears impossible to achieve unless, illogically, the group within which the measure is to be taken consists only of those convicted of a capital crime. It is not apparent how to achieve consistency among those merely charged with or factually chargeable with a capital offense. *See infra* text accompanying notes 28–29. Yet, it is also not apparent why consistency within the convicted group should matter except as part of an effort to achieve consistency within the larger selection process.

9. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (rejecting a statute mandating the death penalty based on negative answers to three narrow sentencing questions); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (rejecting a statute mandating the death penalty upon conviction).

10. *See, e.g.*, Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675 (1986) ("We have a system of capital punishment that results in infrequent, random, and erratic executions, one that is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357, 438 (1995) ("We are left with the worst of all possible worlds: the Supreme Court's detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts—much less 'sober' ones—our profoundly failed system of capital punishment.").

11. *See, e.g.*, Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2106–23 (2004) (discussing various studies); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted To Substantially Diminish*

Despite these problems, not only the Justices but commentators as well have often asserted that consistency is a principal goal of the Court's capital sentencing regulation.[12] The prevailing approach to analyzing the doctrine accepts consistency as a principal aim and focuses on whether the Court has achieved that goal and, in some cases, on whether better strategies exist to achieve it.[13] Scholars generally conclude that the Court started out after *Furman* by genuinely pursuing consistency, but that it later retreated.[14] They acknowledge that the Court rendered numerous decisions in the 1980s that cast doubt on the level of its commitment to consistency.[15] Nonetheless, commentators have generally

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*Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 778 (1990–91).

12. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 26 (1990) [hereinafter BALDUS STUDY] (asserting that the post-*Furman* decisions sought to "vindicate the core concerns" of *Furman* by requiring that systems be capable of "producing rational, evenhanded sentences while ensuring that each defendant receives a factually reliable, individualized sentencing determination"); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 458 (1998) ("The modern era of the Court's evaluation of the constitutionality of the death penalty began with a simple principle: While treating all defendants equally, sentencers should fully and fairly consider each defendant and the crime committed before deciding whether to execute or to imprison."); Steiker & Steiker, *supra* note 10, at 378. *See also* Stephen P. Garvey, *Death–Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 228 (1992); Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 786 (2005); Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 83 (2002).

13. *See, e.g.*, BALDUS STUDY, *supra* note 12, at 26–27 ("If, in fact, [our] study concluded that the Georgia statute has failed to produce rational, consistent sentencing results, such a finding would threaten the central premise of the Court's conclusion . . . that the [post–*Furman*] Georgia statute was constitutional."); LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 181 (noting that, according to the prevailing view, "the critical question is whether the results of the death penalty system . . . are arbitrary and capricious"); Steiker & Steiker, *supra* note 10, at 414–26 (discussing "means other than controlling sentencer discretion at the moment of decision" to promote "'equality' in the administration of the death penalty").

14. *See, e.g.*, BALDUS STUDY, *supra* note 12, at 394; WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 8, 11 (1991) (asserting that, in 1983, the Court took a new interest in "promoting expeditious executions"); Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643, 1658 (1993) (noting that the Court's decisions in the early 1980s reflected the "deregulation" of capital punishment); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1782 (1987); William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 759–60 (1985); Raymond J. Pascucci et al., *Special Project: Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1138 (1984); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305; Richard E. Wirick, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay *&* Harris, 17 U.C. DAVIS L. REV. 689, 729 (1984).

15. The most transparent example is *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the Court upheld Georgia's capital sentencing system despite statistical evidence from a sophisticated study indicating that race influenced outcomes. *See infra* notes 86–88 and accompanying text.

not questioned whether consistency is a legitimate Eighth Amendment aspiration.

This Article rejects consistency as a rationale for capital sentencing doctrine. The Article demonstrates that the Supreme Court was never seriously committed to consistency after *Furman*. Instead, the Court has always focused on the goal of individualized consideration. In light of the Court's work, the Article urges an Eighth Amendment theory for individualization and an evaluation of the doctrine under that theory.

Recognition that the earliest post-*Furman* decisions actually rejected the consistency mandate and that the Court has never seriously pursued that goal would eliminate a major distraction from the important questions to be asked about the purpose and legitimacy of the doctrine. Scholars and the Justices themselves have often touted the notion that the doctrine reflects a problematic tension between the goal of consistency and the requirement of individualized consideration. Some have suggested that the Court faces an ongoing struggle to accommodate those competing aims.[16] Others have contended that the goals are irreconcilable, thereby justifying abolition of the death penalty[17] or, in the view of two Justices, the evisceration of the individualization requirement.[18]

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Commentators have disagreed about when the Court began backing away from the goal of consistency. Most have concluded that the crucial turn came in the 1980s, but some have noted the emergence of a tension as early as 1976, *see, e.g.*, Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1079–80 (1991) (asserting that "*Gregg* purported to solve the problem of arbitrariness and inequality exposed in *Furman*" while "simultaneously, *Woodson* enshrined the primacy of individualization"), or with the decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), *see, e.g.*, Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1206 (1991).

16. *See, e.g.*, California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) (noting "the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence"); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 520 (1995) (noting an "inherent tension" in the Court's capital sentencing jurisprudence and discussing the Court's continuing efforts to confront it).

17. *See* Callins v. Collins, 510 U.S. 1141, 1149, 1157 (1994) (Blackmun, J., dissenting from denial of certiorari) (asserting that the inability to satisfy both commands warrants abolition); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 103 (1992) ("The Court's two objectives are not, as Justice Scalia argues, irreconcilable with each other. Rather, they are irreconcilable with the death penalty."). *See also* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 868 (1992) (book review).

18. *See, e.g.*, Tennard v. Dretke, 542 U.S. 274, 293–94 (2004) (Scalia, J., dissenting) (contending that the conflict requires evisceration of the individualization mandate); *Callins*, 510 U.S. at 1141–42 (Scalia, J., concurring in denial of certiorari) (arguing that the inability to fulfill both commands warrants rejection of the individualization mandate); Graham v. Collins, 506 U.S. 461, 487–88 (1993) (Thomas, J., concurring) (expressing "disagreement with the Court's prohibition" of "mandatory sentencing provision[s]"). *See also*

Yet, none of these arguments are sensible because the Court's decisions embody no such conflict. Except in its rhetoric, the Court repudiated consistency as a regulatory goal—and justifiably so—when it first reconsidered capital punishment after *Furman* in the *1976 Cases*.[19]

The Article also explains how regulation centered on promoting individualized consideration serves Eighth Amendment ends. The explanation builds on a deserts-limitation—only those who deserve the death penalty should receive that sanction.[20] This principle comports with the language of the Eighth Amendment and, if understood as a basis for mediating between deregulation and abolition, can both justify and improve capital sentencing doctrine.

This Article proceeds in three stages. Part I demonstrates that the Court's early post-*Furman* decisions, which explicated the principles that still govern capital sentencing today, resulted from goals other than consistency. Principally, the decisions ensured individualized capital sentencing. Nonetheless, as Part II demonstrates, the Justices and commentators have often continued to assert that *Furman* commands consistency, which has spurred a false notion that the doctrine embodies a problematic tension between consistency and individualized consideration. Rejecting the consistency rationale resolves the various claims that this purported conflict has spawned, but leaves unanswered the question whether existing doctrine has constitutional legitimacy. Part III concludes that the Court's central focus on individualized consideration finds explanation in the Eighth Amendment prohibition against retributive excess. Although existing doctrine largely coincides with this Eighth Amendment limitation, this Part also notes reforms that could further assure that only the deserving receive the death penalty.

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Steiker & Steiker, *supra* note 10, at 382 ("[T]wo Justices have sought to resolve the dilemma by abandoning the individualization requirement.").

19. The Court decided five cases on July 2, 1976. Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the Georgia capital sentencing system); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding the Florida scheme); Jurek v. Texas, 428 U.S. 262 (1976) (upholding the Texas statute); Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting the North Carolina statute); Roberts v. Louisiana, 428 U.S. 325 (1976) (rejecting the Louisiana system).

20. *See generally* Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 418–19 (1992) ("The Eighth Amendment limits the use of the death penalty to those who deserve it, and the need to assess deserts individually explains the need for a capital sentencing inquiry.").

## I. MODERN CAPITAL SENTENCING DOCTRINE

The effective interpretation of the Court's modern jurisprudence rests on properly understanding the relationship between *Furman* and the early decisions on capital sentencing. The prevailing view suggests that *Furman* articulated an Eighth Amendment vision of equal treatment of capital offenders and that the early decisions after *Furman* vigorously pursued that vision.[21] The Court itself has looked back at the *1976 Cases* as being congruous with *Furman*,[22] and consistency remains a touted aspiration of the Court's regulatory efforts.[23] Nonetheless, this Part presents a different perspective. It contends that the post-*Furman* Court was always focused on the goal of individualized consideration and was never seriously committed to consistency.

### *A.* Furman *and Consistency*

Despite the consensus that subsequently developed about the meaning of *Furman*, its immediate message for the future of capital punishment was indecipherable. The five Justices who supported the *per curiam* order striking down death sentences under the Eighth Amendment[24] all wrote separate opinions in which no other Justice joined. Brennan and Marshall advocated abolition.[25] Douglas, Stewart, and White purported only to oppose the death penalty as then administered.[26] These latter three Justices denounced as unacceptably biased or, at least, haphazard the results produced by then-existing systems, and focused their opposition especially on

21. *See supra* notes 12–13 and accompanying text.

22. *See* Steiker & Steiker, *supra* note 10, at 364.

23. Consistency remains a cited goal although most commentators agree that the Court tempered its pursuit of consistency in the 1980s. Regarding the continuing tendency among the Justices to cite consistency as an important goal, see *infra* Part II. Regarding the tendency among commentators to accept this aspiration as legitimate, despite the perception of a waning commitment by the Justices in the 1980s, see *supra* notes 12–15 and accompanying text.

24. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

25. *Id.* at 305 (Brennan, J., concurring) ("The punishment of death is . . . 'cruel and unusual'"); *id.* at 371 (Marshall, J., concurring) (concluding that the death penalty was not consistent with contemporary community values and, therefore, violated the Eighth Amendment).

26. Douglas asserted that discretionary capital sentencing was "pregnant with discrimination" against minorities and the poor. *Id.* at 257 (Douglas, J., concurring). Stewart concluded that standardless sentencing produced "capricious[]" and "random" results. *Id.* at 309–10 (Stewart, J., concurring). White found that the death penalty was imposed inconsistently and with "great infrequency." *Id.* at 313 (White, J., concurring).

the prevailing practice of standardless capital sentencing.[27] Yet, none of them clarified what approach might satisfy the Eighth Amendment, which left legislators in the dark about whether or how they could successfully restructure their capital selection systems.

Some commentators thought that *Furman* signaled the end of the death penalty.[28] If the majority of the Court was to require consistency in the overall capital selection process, the standard appeared impossible to achieve. Neither sentencing hearings with standards nor even mandatory death penalties would prevent arbitrary reprieves by prosecutors and juries at the pre-sentencing stages. Indeed, it was unclear how a state could control discretion at those phases. Nor was it clear why the Court would care about consistency at the sentencing stage except as a way of promoting consistency in the overall selection process.[29]

The view also persisted, however, that five Justices might accept something less than consistency in the larger process. Although *McGautha v. California* had suggested only a year before *Furman* that generalized capital sentencing criteria would be useless,[30] some believed that the Court might interpret *Furman* narrowly to require only very basic sentencing standards.[31] The view was widespread that five Justices might also accept mandatory death statutes, which at least would ensure consistent treatment at sentencing.[32] The Court's failure to strike down the death penalty

27. Concerns about racial discrimination in the administration of the death penalty animated the litigation leading up to *Furman* and surely influenced these Justices. *See, e.g.*, Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) ("*Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty . . . .").

28. *See* HUGO ADAM BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT xiii (1977); MICHAEL MELTSNER, CRUEL AND UNUSUAL 291 (1973) (noting that, shortly after the *Furman* decision, Jack Greenberg, then head of the NAACP Legal Defense Fund, issued a public statement asserting: "there will no longer be any more capital punishment in the United States"); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 51 (1986).

29. *See, e.g.*, Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1691 (1974) (noting that consistency might be required not only at the sentencing stage but in the larger capital selection process).

30. McGautha v. California, 402 U.S. 183, 208 (1971) ("The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.").

31. *See, e.g.*, Note, *The Death Penalty—The Alternatives Left After* Furman v. Georgia, 37 ALB. L. REV. 344, 362–63 (1973) (asserting that capital sentencing systems based on a Model Penal Code proposal, which was the basic approach ultimately adopted in such states as Georgia and Florida, might pass constitutional muster).

32. *See, e.g.*, 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, 235 (1986) (noting that twenty-two state legislatures enacted mandatory death penalty statutes

altogether in *Furman* left open the possibility that some kind of capital sentencing scheme could satisfy the Justices.

The outpouring of public and legislative support for the death penalty shortly after *Furman* also allayed any notion that the sanction had lost its general acceptance. Many public officials denounced the Court in the days after *Furman*.[33] Some called for requiring federal judges to sit for election[34] and others for a constitutional amendment permitting the death penalty.[35] Within four years, thirty-five states enacted new death penalty legislation.[36] The majority of these states opted for a mandatory death penalty, although they defined the predicate capital offense in varying terms.[37] The remainder chose to provide sentencing hearings with standards.[38] These cumulative results, while demonstrating legislative uncertainty as to what *Furman* mandated, made clear that the death penalty remained enormously popular.

### *B. The* 1976 Cases*: Rejecting Consistency*

When the Court returned to the question of capital punishment in the *1976 Cases*, its decisions rejected consistency as a goal while its rhetoric claimed the contrary. A crucial plurality struck down statutes that seemed at least to promote consistency in the sentencing phase while upholding others that did little even to advance that goal. The plurality retreated from *Furman's* apparent command of consistency by refraining to abolish capital punishment, but used that same command to justify ongoing regulation and, in particular, to reject the mandatory statutes that *Furman* had encouraged.[39]

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shortly after *Furman* on the conclusion that "mandatory capital punishment would pass constitutional muster").

33. *See* MELTSNER, *supra* note 28, at 290–91 (detailing comments of public officials, some praising, but many deriding the decision).

34. *See id.* at 291 ("Georgia State Representative Sam Nunn, Jr., a candidate for the United States Senate, announced that the decision justified forcing federal judges to face the voters every six years.").

35. *See id.* ("By the time the evening papers were out, a few congressmen had proposed an amendment to the Constitution in order to permit the death penalty.").

36. *See, e.g.*, Poulos, *supra* note 32, at 226, 238 tbl. 1.

37. *See id.* at 227, 238 tbl. 1 (indicating that twenty-two of the thirty-five states enacted statutes providing for a mandatory death penalty).

38. For a review of the different standards employed, see Note, *supra* note 29, at 1699–1709 (summarizing the new statutes and explaining the standards they imposed).

39. The composition of the Court changed slightly between 1972 and 1976. Justice Stevens, who voted with the crucial plurality in the *1976 Cases*, replaced Justice Douglas, who had voted to strike down the death statutes in *Furman*. *See* Poulos, *supra* note 32, at 228.

In the *1976 Cases*, the Court considered together the propriety of the new statutes passed in North Carolina, Louisiana, Texas, Florida, and Georgia. North Carolina's statute was the most severe, subjecting anyone convicted of a broadly defined category of murder to a mandatory death penalty.[40] The statute from Louisiana narrowed the capital offense to more aggravated categories, but also made the death penalty mandatory upon conviction.[41] Texas's statute was in the middle, narrowing the definition of a capital crime to certain aggravated murders and providing a limited sentencing inquiry.[42] The capital sentencer was presented with three "special questions," and, unless the answer to one of the questions was negative, the offender received the death penalty.[43] Florida and Georgia enacted discretionary sentencing statutes that provided for a separate sentencing hearing at which the sentencer retained great discretion.[44] To impose a death sentence, the sentencer was required to find the presence of at least one aggravating factor from a statutory list and thereafter to consider additional aggravating evidence offered by the prosecution and any mitigating evidence offered by the defense.[45]

In assessing the five statutes under the Eighth Amendment, the Justices faced four basic options:

1. Strike down all five statutes;
2. Uphold all five statutes;

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40. *See* N.C. GEN. STAT. § 14–17 (Cum. Supp. 1975).

41. *See* LA. REV. STAT. ANN. § 14:30 (1974).

42. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711 (Vernon 1975).

43. The statute required the sentencing jury or judge to answer the first two questions and also the third in any case where there was evidence of victim provocation:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

*Id.* § 3(b)(1)–(3).

44. *See* FLA. STAT. § 921.141 (Supp. 1976–77); GA. CODE ANN. § 27-25-03 (1972).

45. The two systems differed in some ways, such as whether the sentencer could consider nonstatutory aggravators, with Georgia allowing such consideration but Florida, at least originally, seeming not to allow it. *See, e.g.*, Weisberg, *supra* note 14, at 354. *But see infra* text accompanying note 85 (discussing decision of the Florida Supreme Court finding harmless error in the consideration of nonstatutory aggravating evidence). Also, in Florida, the jury recommended a sentence but the judge could override a jury recommendation, while, in Georgia, the jury's decision was controlling. *See* Weisberg, *supra* note 14, at 354.

3. Uphold the mandatory statutes while striking down the discretionary statutes; or
4. Uphold the discretionary statutes while striking down the mandatory statutes.

In the end, the Court was badly divided among these choices. A splintered group of four Justices—Burger, White, Rehnquist, and Blackmun—voted to uphold all five statutes.[46] Two Justices—Brennan and Marshall—adhered to their views in *Furman* that the death penalty was altogether unconstitutional.[47] A plurality of three Justices—Stewart, Powell, and Stevens—chose option four. The plurality upheld the discretionary sentencing statutes of Georgia and Florida and also upheld the special-question statute from Texas.[48] However, the plurality struck down the mandatory death penalty laws in North Carolina and Louisiana.[49]

The significance of the *1976 Cases* was revealed in the outcomes more than by what any of the Justices said about them. The plurality claimed to pursue *Furman's* command of consistency.[50] However, the outcomes demonstrated that the plurality had no serious interest in that goal. If the plurality had wanted to pursue consistency, it would have chosen option three or option one. The approach that would produce consistency, at least among convicted capital offenders, was option three—upholding only the mandatory strategy adopted in North Carolina and Louisiana. Of course, if the group within which consistency was required included all who were

46. Chief Justice Burger and Justices White and Rehnquist concurred in the Georgia, Florida, and Texas cases in which the death penalties were upheld. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.); Proffitt v. Florida, 428 U.S. 242, 260 (1976) (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.); Jurek v. Texas, 428 U.S. 262, 277 (1976) (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.). They dissented in the North Carolina and Louisiana cases in which the death penalties were overturned. *See* Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (White, J., dissenting, joined by Burger, C.J., and Rehnquist, J.); Roberts v. Louisiana, 428 U.S.325, 337 (1976) (White, J., dissenting, joined by Burger, C.J., and Rehnquist, J.). Justice Blackmun separately concurred in the Georgia, Florida, and Texas cases. *See Gregg*, 428 U.S. at 227 (Blackmun, J., concurring); *Proffitt*, 428 U.S. at 261 (Blackmun, J., concurring); *Jurek*, 428 U.S. at 279 (Blackmun, J., dissenting). He separately dissented in the North Carolina and Louisiana cases. *See Woodson*, 428 U.S. at 307 (Blackmun, J., dissenting); *Roberts*, 428 U.S. at 363 (Blackmun, J., dissenting).

47. *See, e.g.*, *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 232 (Marshall, J., dissenting).

48. *See id.*, 428 U.S. at 158 (plurality opinion); *Proffitt*, 428 U.S. at 244 (plurality opinion); *Jurek*, 428 U.S. at 264 (plurality opinion).

49. *See Woodson*, 428 U.S. at 305 (plurality opinion); *Roberts*, 428 U.S. at 336 (plurality opinion).

50. *See, e.g.*, *Gregg*, 428 U.S. at 198 (plurality opinion) ("On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))).

merely chargeable or charged with a capital offense, the mandatory statutes might not be any better (but certainly no worse) than the discretionary statutes because both approaches would allow arbitrary reprieves at stages other than capital sentencing. However, on that view, the best choice for upholding a commitment to consistency was option one—striking down all of the statutes. Regardless of how the Court defined the group within which to measure consistency, the Justices could not easily have viewed the discretionary statutes as promoting consistency and thus could not plausibly have chosen option two. Even more clearly, the least sensible choice for pursuing consistency was option four—upholding the discretionary statutes while striking down the mandatory statutes. Nonetheless, the plurality chose that least plausible option.

A cursory review of the Georgia sentencing statute, which the plurality upheld in *Gregg v. Georgia*,[51] revealed that it did almost nothing to ensure consistency. The statute provided an extensive list of aggravating factors, at least one of which the sentencing jury had to find as a prerequisite to a death sentence.[52] The list seemed

51. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

52. The statutory aggravating circumstances in the post-*Furman* Georgia statute were as follows:

(1) The offense . . . was committed by a person with a prior record of conviction for a capital felony, or the offense . . . was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense . . . was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor [was committed] during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense . . . was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

to cover almost all murders rather than reducing death eligibility to a tiny class of the worst homicides.[53] After identifying one of the aggravating circumstances, the jury would decide whether to impose the death penalty based on all of the aggravating and mitigating evidence presented by both parties.[54] The statute provided no governing standard for the decision, allowing the jury to act as it wished, just as in the pre–*Furman* era.[55] While the plurality at times described the function of the aggravating circumstances as channeling or guiding the sentencer's discretion,[56] these characterizations were wishful thinking at best.[57] The finding of an aggravating circumstance had no clear effect other than to slightly narrow the group of people subject to the jury's untrammeled discretion.[58] The plurality's decision to uphold this scheme rendered

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(9) The offense ... was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE ANN. § 27-2534.1 (1975) (current version at GA. CODE ANN. § 17-10-30 (2004)) (quoted in *Gregg*, 428 U.S. at 165–66 n.9).

53. *See, e.g.*, BALDUS STUDY, *supra* note 12, at 102 ("[M]ore than 90 percent of the pre-*Furman* death sentences were imposed in cases whose facts would have made them death-eligible under Georgia's post-*Furman* statute.").

54. The plurality noted that the jury was not confined to considering aggravating factors that were on the statutory list. *Gregg*, 428 U.S. at 197 ("In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances.").

55. When *Furman* was decided, almost every death penalty jurisdiction in the country "afforded sentencers absolute discretion to impose either death or life imprisonment (or sometimes merely a term of years) for certain crimes." Steiker & Steiker, *supra* note 10, at 364. Some jurisdictions, such as Ohio, conducted a combined guilt-or-innocence and sentencing trial, while others, such as California, separated the two decisions. *See* McGautha v. California, 402 U.S. 183, 185–95 (1971) (discussing the conduct of two capital trials, one from California and one from Ohio). Nonetheless, "unfettered discretion remained the American way of imposing the death penalty." Poulos, *supra* note 32, at 159. For a short summary of the pre–*Furman* history of capital sentencing procedure in the United States, see *id.* at 146–72.

56. *See, e.g.*, *Gregg*, 428 U.S. at 197 ("No longer can a Georgia jury do as *Furman*'s jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.").

57. *See, e.g.*, Berger, *supra* note 15, at 1073 ("But the Georgia system upheld in *Gregg* channeled the jury's discretion minimally—mandating only that jurors ... find, beyond a reasonable doubt, a single statutory aggravating circumstance.").

58. At one point, the plurality acknowledged the more limited "narrowing" function. After noting that Georgia had not, in the wake of *Furman*, refined its definition of murder to provide for a more limited crime of capital murder, the plurality asserted: "Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed." *Gregg*, 428 U.S. at 196–97.

dead on arrival its simultaneous claim that *Furman* had commanded consistency.[59]

The plurality's opinions striking down the mandatory statutes only underscored its lack of concern for consistency. In *Woodson v. North Carolina*, Justice Stewart offered three reasons for requiring individualized consideration and, thus, forbidding mandatory death penalties.[60] First, the mandatory approach conflicted with the trend toward discretionary capital sentencing that had begun in the 1830s.[61] This point had nothing to do with whether the mandatory statutes promoted consistency; it merely implied that consistency could not be achieved through unacceptable methods. Second, Justice Stewart asserted that the mandatory statutes only shifted the potential for arbitrary action to the guilt-or-innocence trial.[62] This point ignored that, assuming the concern was arbitrariness in the overall selection process,[63] the discretionary statutes also did nothing to prevent arbitrary action at non-sentencing stages and, worse, continued to allow for arbitrary action at the sentencing phase.[64] Finally, he contended that a mandatory statute

59. The plurality noted that the statute also called for the Georgia Supreme Court to conduct an appellate review to ensure that a death sentence did not appear disproportionate to the sentences imposed in similar cases. *Gregg*, 428 U.S. at 199. However, the plurality could not reasonably have placed significant weight on this feature of the system. It was clear that the Georgia Supreme Court could not ensure consistency among those charged with capital crimes, or even those convicted of capital crimes, because that court would never know all of the facts of the vast majority of relevant cases—those in which the defendant pled guilty to a lesser charge, those in which the prosecutor declined to pursue the death penalty after conviction, or even those that proceeded to a sentencing trial but in which the sentencer rejected the death penalty. One observer noted an aspect of this problem even before the Georgia statute came before the United States Supreme Court. *See* Note, *supra* note 29, at 1703. Later studies revealed that the Georgia Supreme Court's proportionality review was unhelpful in ensuring consistency. *See, e.g.*, George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 110–23 (1979). In reviewing a California death sentence, the United States Supreme Court later confirmed that this kind of appellate review was not required by the Eighth Amendment. *See* Pulley v. Harris, 465 U.S. 37, 49 (1984).

60. *Woodson v. North Carolina*, 428 U.S. 280, 292–305 (1976) (plurality opinion).

61. *Id.* at 292–301.

62. *Id.* at 302–03.

63. In reviewing Georgia's discretionary statutes, the plurality took the opposite position regarding the relevant group within which consistency was required, asserting that *Furman* had only been concerned with arbitrariness among those convicted of capital crimes. *See Gregg*, 428 U.S. at 199 ("*Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense.").

64. The theory by which the discretionary statutes would promote consistency outside of the sentencing hearing had to be that prosecutors would usually pursue the death penalty where one of the aggravating factors appeared to be present. However, there was no good reason to assume such a position. Indeed, studies later established that, even after a capital murder conviction, prosecutors subsequently declined to pursue the death penalty in a large majority of cases. *See* BALDUS STUDY, *supra* note 12, at 327 (noting that in more than two-thirds of the death-eligible cases, a life sentence was imposed by default because the prosecutor declined to pursue the death penalty after obtaining the murder conviction).

precluded the sentencer from considering "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[65] This point implied that the Eighth Amendment required an expansive sentencing inquiry that recognized each offender's uniqueness, which collided with the notion that all offenders, or some definable subset thereof, were equal. If the sentencer had to be free, as the plurality required, to reject the death penalty based on all "relevant facets of the character and record of the individual offender or the circumstances of the particular offense,"[66] consistency would seem thwarted, not served.[67]

The inability of the plurality in the *1976 Cases* to explain the decisions on consistency grounds—and the implausibility of consistency as an Eighth Amendment value[68]—reveals that the *1976 Cases* were grounded on pragmatics more than on theory. First, the plurality apparently wanted to uphold some of the sentencing schemes to make it clear that the Court would allow the death penalty to continue. On this view, the plurality was largely deferring to the forceful manifestations of public and legislative support for the death penalty in the wake of *Furman*.[69] Second, the plurality wanted to eliminate the mandatory statutes because they appeared regressive and draconian.[70] These goals, rather than a theory of consistency, seem to explain the plurality's holdings.

Pursuing these pragmatic goals produced a disconnection between the decisions and the consistency rationale. To dispel the specter created by *Furman* that the Court would abolish the death penalty, the plurality had to repudiate the notion that consistency was highly valued. Rejecting abolition required rejecting the

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

66. *Id.*

67. A year after the *1976 Cases*, in *(Harry) Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam), the Court struck down a provision in the Louisiana mandatory death statute concerning the murder of a police officer. Some dispute apparently remained within the Court as to whether *Roberts v. Louisiana*, 428 U.S. 325 (1976), had left open the question of whether a mandatory death penalty under the police officer provision was permissible. However, in a *per curiam* opinion joined by the five Justices who had voted to reverse in the 1976 case, the Court rejected a mandatory death penalty for such a crime. *See (Harry) Roberts*, 431 U.S. at 637. While the *(Harry) Roberts* Court left open the question of whether a mandatory death penalty could apply to an intentional murder by an inmate already serving a life sentence without possibility of parole, the Court later rejected a mandatory death penalty even for that tiny class of murderers in *Sumner v. Shuman*, 483 U.S. 66 (1987).

68. *See supra* notes 5–8 and accompanying text.

69. *See, e.g.*, ZIMRING & HAWKINS, *supra* note 28, at 66–67 ("Two phenomena appear to have strongly influenced Justices Stewart and White: the impact of *Furman* on public opinion and the legislative response to *Furman*.").

70. *See Woodson*, 428 U.S. at 296 (plurality opinion) (noting the "incompatibility of mandatory death penalties with contemporary values").

notion that consistency was required because consistency could not be achieved through regulation. However, the plurality did not want to overrule *Furman* both because that course would concede an enormous error and because the plurality opposed the mandatory statutes and needed a rationale to reject them. Arbitrariness was the common concern expressed among the Justices supporting the *per curiam* order in *Furman*, and the plurality understandably chose to claim allegiance to that decision in supervising capital sentencing.

### *C. The Early Refinements (1977–1980): Clarifying the Narrowing and Individualization Requirements*

In the four years after the *1976 Cases*, the Court clarified the mandates from those early decisions and confirmed that consistency was not an important concern. The *1976 Cases* had not articulated precisely what rules defined an acceptable capital sentencing system. However, two basic requirements were implied.[71] First, the approval of the Georgia system, in light of the rejection of the standardless Georgia scheme in *Furman*, suggested that aggravating circumstances were needed to at least slightly narrow the group subject to the death penalty. Second, the rejection of the mandatory death penalties indicated that states must allow for a sentencing hearing[72] at which the sentencer could reject the death penalty based on mitigating evidence proffered concerning the offender's character, record, or crime. Shortly after the *1976 Cases*, the Court endorsed these two mandates, although the Court still seemed not to have settled on a coherent Eighth Amendment theory to justify its regulatory regime.

The Court's effort in *Godfrey v. Georgia*[73] to clarify the role of aggravating circumstances paid lip-service to the consistency goal, but demonstrated no serious commitment to that end. In *Godfrey*, the Court struck down one of the ten aggravating circumstances in Georgia's statutory list because, as applied by the Georgia Supreme Court, the circumstance plausibly described every murder.[74] In re-

71. *See, e.g.*, Semeraro, *supra* note 12, at 87–88.

72. The *1976 Cases* did not expressly resolve whether a state could satisfy the Eighth Amendment through a unitary proceeding at which a fact-finder would resolve both the guilt-or-innocence and the sentencing questions. However, since 1976, no state has passed such legislation and, thus, the Court has had no occasion to address the question.

73. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

74. *Id.* at 429. The circumstance applied to an offense that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an

jecting it, the Court described the purpose of aggravating circumstances as "channeling" sentencer discretion and, thereby, implied a desire for consistency.[75] However, the Court knew that the aggravating circumstances in the Georgia statute did not actually guide the sentencer to a decision.[76] At most, they narrowed the group of offenders subject to standardless decision-making. Even on that score, the combined list of remaining aggravating circumstances in the statute obviously covered the vast majority of all murders. Such minimal system-wide narrowing failed to identify the very worst homicides, which meant that the system did little if anything to promote consistency. If consistency mattered, the Court should have rejected the Georgia system altogether.

The Court's decision in *Lockett v. Ohio*[77] reaffirmed and refined the requirement of individualized consideration, and, in the process, further demonstrated that consistency was not a principal concern. In rejecting Ohio's special-question scheme[78] as too mandatory, the Court, through Chief Justice Burger, clarified that the capital sentencer must remain free to reject the death penalty based on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[79] Burger neither described the substantive question or questions to which this evidence

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aggravated battery to the victim." *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

75. *See, e.g., Godfrey*, 446 U.S. at 429 ("The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court."). *See also id.* at 428 ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

76. *See supra* notes 51–59 and accompanying text.

77. Lockett v. Ohio, 438 U.S. 586 (1978).

78. The statute required a death sentence unless,

> considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following [was] established by a prepondence [sic] of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

*Id.* at 612–13 (appendix to opinion of the Court) (citing OHIO REV. CODE ANN. § 2929.04(B) (1975)).

79. *Id.* at 604 (plurality opinion).

supposedly related nor explained why the Eighth Amendment should mandate such a rule. He simply asserted that the rule would help to protect against a death sentence that ignored "factors which may call for a less severe penalty,"[80] and that it was justified by the "degree of respect due the uniqueness of the individual."[81] The *Lockett* mandate seemed to foreclose the use of any objective guiding rules aimed at promoting consistency, given that any such rule inevitably would prevent the use of certain kinds of mitigating evidence to reject the death penalty.[82] The Court's explanation for the mandate also eschewed any commitment to consistency. The idea that capital offenders were each unique collided with the notion that they or some subgroup of them were equal.

These decisions, coming shortly after the *1976 Cases*, only underscored that the Court was never serious about consistency as a goal for its capital sentencing regulation. The Court's early post-*Furman* decisions revealed that a capital sentencing scheme need only provide minimal narrowing[83] and broad individualized consideration to pass Eighth Amendment muster. Despite the Court's rhetoric, neither of these two mandates tended to ensure "a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not."[84]

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80. *Id.* at 605.

81. *Id.*

82. *See, e.g.*, Sundby, *supra*, note 15, at 1161 ("[A]fter *Lockett*, one of the surest routes to reversible error would be to guide the sentencer by listing mitigating factors that could be considered without also making clear that the sentencer could consider any unlisted mitigating evidence bearing on the offender's culpability.").

*Lockett* raised concerns about the Texas statute, which the Court previously upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). Although the Texas statute allowed for consideration of a broader array of mitigating evidence than the Ohio statute, it seemingly did not allow mitigation evidence showing a permanent disability, like mental retardation. Such evidence might help explain why the offender had committed the crime although it would not establish that the offender had acted unintentionally. The Supreme Court later struck down the statute as applied to a retarded offender in *Penry v. Lynaugh*, 492 U.S. 302 (1989), before it held the death penalty categorically inapplicable to retarded offenders in *Atkins v. Virginia*, 536 U.S. 304 (2002).

83. The Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977), helped clarify the starting point from which narrowing was to occur. In *Coker*, the Court held that the death penalty was categorically inapplicable to the rape of an adult woman in which no life was taken. *Id.* at 597–98. The implication was that, except perhaps for certain extraordinary crimes, the death penalty would only apply to murders.

84. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). *See also* McCleskey v. Kemp, 481 U.S. 279, 301 (1987) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

### *D. Enforcing the Early Principles (Beyond 1980): Policing the Narrowing and Individualization Commands*

Since 1980, the Court's regulation of capital sentencing under the Eighth Amendment has centered on enforcing the minimal narrowing and expansive individualization requirements that grew out of the *1976 Cases*. During the mid-1980s, the Court strongly underscored its continuing disinterest in pursuing consistency.[85] The clearest indication was its decision in *McCleskey v. Kemp*,[86] which involved the Court's rejection of a claim based on statistical evidence that the Georgia system produced results influenced by racial bias.[87] While generally seen by commentators as apostasy,[88] cases like *McCleskey*—and the Court's post-1980 cases in general[89]—coincided with the early post-*Furman* decisions.

The narrowing mandate from *Godfrey v. Georgia*[90] did not serve any clear function, but, while it was never completely abandoned, it was also never extended. Later decisions have followed *Godfrey*'s holding that a statutory aggravator effectively describing all murders is invalid.[91] However, the Court has frequently upheld vague

85. The Court decided three cases in the 1983 term that initially were thought to reveal a retreat from the consistency goal but that now appear only as fairly predictable follow-ups to the Court's repudiation of consistency beginning in 1976. The decisions came in *Zant v. Stephens*, 462 U.S. 862 (1983), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Pulley v. Harris*, 465 U.S. 37 (1984). The *Zant* case reaffirmed that Georgia's statute was constitutional although the finding of an aggravating circumstance under the statute served no purpose other than to narrow the group of defendants subjected to an entirely discretionary sentencing decision. *Zant*, 462 U.S. at 874. The *Barclay* decision confirmed *Gregg's* transparent conclusion that consideration of nonstatutory aggravating circumstances was not constitutionally prohibited. *Barclay*, 463 U.S. at 957–58. *See also supra* note 54 and accompanying text (discussing *Gregg*). In *Pulley*, the Court repudiated some earlier rhetoric suggesting that a system like that used in Georgia or Florida would require efforts by the state appellate courts to measure and enforce consistency. *Pulley*, 465 U.S. at 54.

86. McCleskey v. Kemp, 481 U.S. 279 (1987).

87. The Supreme Court rejected McCleskey's Equal Protection and Eighth Amendment claims in a five to four decision. McCleskey, a black man, had been sentenced to death for killing a white Atlanta police officer in the mid-1970s. *Id.* at 283. In arguing that race-of-victim and race-of-defendant bias infected his case, he relied on a sophisticated study of murder cases arising in Georgia between 1973 and 1979. *Id.* at 286.

88. *See, e.g.*, sources cited *supra* note 14.

89. The decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), further underscored that consistency was not the Court's goal. The Court rejected a Louisiana petitioner's challenge to the use of an aggravating factor that mirrored an element of capital murder. *Id.* at 241. A seven-Justice majority held that there need be no narrowing at the sentencing phase if narrowing occurs at the guilt–or–innocence stage through a narrowed definition of capital murder. *Id.* at 246. The decisions in the *1976 Cases* did not clearly foretell this conclusion, but they strongly suggested it.

90. Godfrey v. Georgia, 446 U.S. 420 (1980). *See also supra* notes 74–75 and accompanying text.

91. *See, e.g.*, Richmond v. Lewis, 506 U.S. 40, 46–52 (1992) (concluding that "especially heinous, cruel or depraved" factor in Arizona statute was overly vague); Espinosa v. Florida,

aggravating circumstances on grounds that the narrowing constructions given them by state courts have cured the ambiguity.[92] These decisions reveal that the Court will not require much specificity in the application of statutory aggravators.[93] The Court has also never required that states limit the application of their full list of statutory aggravators, and some states have long lists that cover almost all murders.[94] The result is that capital sentencing systems on the whole need only provide minimal, if any, narrowing,[95] which means that the *Godfrey* mandate does virtually nothing to promote consistency.

At the same time, throughout the 1980s and beyond, the Court repeatedly enforced the broad individualization rule. Despite the Court's ruling in *Lockett v. Ohio*,[96] states continued to prevent capital sentencers from relying on mitigating evidence to reject the death penalty. However, in a lengthy series of decisions arising in a variety of states, the Supreme Court continued to overturn death sentences under *Lockett*. The decisions concerned evidence relevant to various substantive questions, including the defendant's culpability for the capital offense,[97] good deeds unrelated to the

505 U.S. 1079, 1081–83 (1992) (per curiam) (finding that "especially wicked, evil, atrocious and cruel" factor in Florida statute did not adequately narrow); Shell v. Mississippi, 498 U.S. 1, 4 (1990) (per curiam) (rejecting as inadequate judicial efforts by the Mississippi courts to provide a narrowing construction for "especially heinous, atrocious *or* cruel" aggravator); Maynard v. Cartwright, 486 U.S. 356, 364–65 (1988) (holding that Oklahoma's aggravating factor of murder "especially, heinous, atrocious, or cruel" was too ill-defined).

92. *See, e.g.*, Arave v. Creech, 507 U.S. 463, 479 (1993) (upholding narrowing construction of "utter disregard" for human life); Walton v. Arizona, 497 U.S. 639, 652–56 (1990) (upholding narrowing construction of "especially heinous, cruel, or depraved").

93. Commentators have contended that the Supreme Court has at times been willing to accept "narrowed" constructions that themselves lack sufficient specificity. *See, e.g.*, Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 501 (1996). *Cf.* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases–The Standardless Standard*, 64 N.C. L. REV. 941 (1986) (arguing that the "especially heinous" aggravators cannot satisfactorily be narrowed through judicial construction).

94. *See* Steiker & Steiker, *supra* note 10, at 384 (asserting that the many special circumstances listed in the California statute do not, as a group, significantly reduce the number of murderers subject to a possible death sentence).

95. *See, e.g.*, Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2619 (1996) ("Aggravating circumstances that purport to identify a narrowed category of especially deserving offenders in fact identify virtually the entire class of offenders."); White, *supra* note 14, at 87 (asserting that "statutes that require the prosecution to prove at least one aggravating circumstance" produce only "a marginal reduction" in the group subject to the death penalty).

96. Lockett v. Ohio, 438 U.S. 586 (1978).

97. *See, e.g.*, McCoy v. North Carolina, 494 U.S. 433, 439–44 (1990) (rejecting requirement that jury find mitigating circumstances unanimously where defendant presented mitigating evidence of emotional disturbance and youth); Hitchcock v. Dugger, 481 U.S. 393, 397–99 (1987) (rejecting Florida practice of limiting mitigating factors to those on statutory list because it precluded consideration of defendant's mental problems arising

crime,[98] and future dangerousness.[99] The Court also concluded that, where evidence could serve several mitigating functions, the sentencer should be free to consider it for any of those purposes.[100] The decisions culminated with *Penry v. Lynaugh*,[101] in which the Court struck down the Texas statute that it originally had upheld in 1976 as applied to a mentally retarded offender.[102] Recently, the Court again rejected several death sentences imposed under the original post-*Furman* Texas system,[103] concluding that the special questions precluded the jury's use in mitigation of an offender's proffered evidence.[104] These decisions reveal the Court's continuing

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from sniffing gasoline as a youth and his upbringing in deprived circumstances); Eddings v. Oklahoma, 455 U.S. 104, 112–13 (1982) (rejecting death sentence imposed by judge based on a statute that precluded consideration of defendant's emotional disturbance and tumultuous and violent upbringing).

98. *See, e.g.*, *Hitchcock*, 481 U.S. at 397–99 (implying that evidence that defendant was a "fond and affectionate uncle" could not be precluded from consideration).

99. *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1, 5–6 (1986) (overturning death sentence where sentencing judge had declined to consider evidence of defendant's well-adjusted behavior in jail awaiting trial); *Eddings*, 455 U.S. at 113 (holding that preclusion of consideration of evidence of offender's rehabilitative potential violated *Lockett* rule).

100. *See, e.g.*, *Skipper*, 476 U.S. at 7 (concluding that defendant's good behavior in jail pending trial was relevant both to his good character and to his lack of future dangerousness if sentenced to prison rather than to death).

101. Penry v. Lynaugh, 492 U.S. 302 (1989).

102. *Id.* at 328 (concluding that the jury was not allowed an adequate opportunity under the special questions in the statute to reject the death penalty based on Penry's mitigating evidence of retardation and childhood abuse).

103. The Texas legislature amended the statute in 1991 to allow for the consideration of all mitigating evidence. The current statute poses two questions that are similar to the first two questions in the old statute and also requires the sentencer, before imposing a death sentence, to answer negatively the following broad question:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (Vernon 2006). For the text of the original post-*Furman* statute, see *supra* note 43.

104. *See, e.g.*, Smith v. Texas, 543 U.S. 37 (2004) (reversing death sentence because the statute prevented the jury from considering the defendant's evidence of relatively low intelligence, among other factors, as a reason to reject the death penalty); Tennard v. Dretke, 542 U.S. 274 (2004) (reversing death sentence on grounds that evidence that the defendant had an intelligence quotient of sixty-seven could not reasonably be considered by sentencing jury as a basis for rejecting the death penalty).

Between *Penry* and *Tennard*, the Court also upheld some death sentences under the old Texas statute against claims that the sentencing jury could not consider the evidence as required by the *Lockett* rule. In some cases, the Court simply decided that the jury could appropriately consider the disputed evidence. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 368 (1993) (concluding that evidence of defendant's youthful status at time of crime could be adequately considered in mitigation under the special question concerning future

support for expansive individualized consideration, which also further underscores its disinterest in promoting consistency.

## II. THE PURPORTED CONFLICT BETWEEN CONSISTENCY AND INDIVIDUALIZED CONSIDERATION

Although the Court's Eighth Amendment doctrine on capital sentencing has never required more than minimal single-aggravator narrowing and individualized consideration of potentially mitigating evidence, the Justices have often stated that it also requires consistency, which has fostered confusion. Some of the Justices have continued to urge that a tension exists in the decisions between the goals of consistency and individualized consideration.[105] They have cited this purported conflict as a reason to allow restrictions on individualized consideration or, in some cases, to pursue much more drastic reforms. Of course, these arguments ignore that the Court was never serious after *Furman* about pursuing consistency and that a consistency command has no plausible grounding in the Eighth Amendment.

The idea that the doctrine embodies a conflict between consistency and individualized consideration has come largely from conservative Justices, whose goal has not been to achieve consistency so much as to limit the doctrine of individualization. Dissenting opinions by Justices White and Rehnquist in *Lockett* first claimed that a conflict existed between *Furman* and *Lockett*.[106]

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dangerousness). In other cases, the Court concluded that the claim was not cognizable in federal habeas corpus because the state court's ruling that the jury could have adequately considered the evidence was not an unreasonable interpretation of then-existing federal law. *See, e.g.*, Graham v. Collins, 506 U.S. 461, 475 (1993) (concerning claims regarding the defendant's youth and history of childhood abuse).

105. *See infra* notes 106–120 and accompanying text. Justice Stevens has claimed that there is no such tension because the narrowing function for identifying statutory aggravating circumstances operates at an eligibility stage to promote consistency while the individualized consideration requirement operates at a subsequent stage where the sentencer actually decides whether the offender should receive the death penalty. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 716–18 (1990) (Stevens, J., dissenting). Although less explicitly, a majority of the Court has also hinted at this two-stage theory. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 304 (1987) ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence."). *See also* CARTER & KREITZBERG, *supra* note 13, at 179–80 (discussing Justice Stevens's view); Sundby, *supra* note 15, at 1161–64 (discussing the Court's use of this two-stage theory). However, the narrowing requirement in stage one is minimal and, thus, virtually useless as a way to promote consistency.

106. *See* Lockett v. Ohio, 438 U.S. 621, 622 (1978) (White, J., dissenting) (contending that, with its opinion in *Lockett*, "[t]he Court has now completed its about-face since *Furman*"); *id.* at 631 (Rehnquist, J., dissenting) (asserting that the *Lockett* rule "will not elimi-

Nearly a decade later, Justice O'Connor also pointed to the purported conflict as a reason to limit the individualization requirement.[107] A conservative majority of the Court has also sometimes referenced the purported need to pursue consistency as a secondary reason to reject an individualization claim.[108]

Some Justices have also cited the purported conflict as a reason to abandon the individualization requirement altogether. In 1990, in *Walton v. Arizona*,[109] Justice Scalia first advocated this position. He claimed that consistency was required by *Furman*,[110] that broad individualized consideration was required by *Woodson* and *Lockett*,[111] and that the two goals were fundamentally incompatible.[112] He also urged that the only acceptable way to resolve the conflict was to rescind the requirement of individualized consideration, which he

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nate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it").

107. In *California v. Brown*, 479 U.S. 538 (1987), the Court addressed whether an instruction against relying on "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" improperly prevented the jurors from acting on the sympathy they might have felt for Brown based on his mitigating evidence. *Id.* at 542. Justice O'Connor joined the majority's opinion upholding the instruction's validity. At the same time, she wrote a decisive concurrence. She noted that, on remand, the California court could conclude that the trial judge had not adequately informed the jury of its obligation to provide a "reasoned *moral* response" to the mitigating evidence. *Id.* at 544. However, she also concluded that a capital sentencer should not be able to act on mere sympathy untethered to mitigating evidence. *Id.* at 545. She justified this latter conclusion in part on the need to balance the competing goals of achieving "non-discriminatory" results and allowing for individualized consideration. *Id.* at 544 (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976)).

108. *Johnson v. Texas*, 509 U.S. 350 (1993), is an example. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White, Scalia, and Thomas, rejected Johnson's contention that the original post-*Furman* statute in Texas did not allow his youth to be given mitigating effect for what it said about his culpability. *Id.* at 370. However, Kennedy also asserted that the Court was required to limit the individualization mandate to pursue the competing requirement of guided discretion, which *Gregg* had justified as promoting consistency. *Id.* at 373 ("The reconciliation of competing principles is the function of law. Our capital sentencing jurisprudence seeks to reconcile two competing, and valid, principles in *Furman*, which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer.").

109. Walton v. Arizona, 497 U.S. 639 (1990).

110. *See id.* at 666 (Scalia, J., concurring in part and concurring in judgment) (asserting that the issue involved in *Furman* was whether society "may insist upon a rational scheme in which all sentencers making the individualized determination apply the same standard").

111. *See id.* at 662 (asserting that, under the *Woodson–Lockett* line of cases, "a defendant could not be sentenced to death unless the sentencer was convinced, by an unconstrained and unguided evaluation of offender and offense, that death was the appropriate punishment").

112. *See id.* at 666–67 (asserting that the individualization mandate undermines "consistency and rationality among sentencing determinations" because it "permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity"); *id.* at 672–73 ("My . . . fundamental problem . . . is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*.").

suggested had no good Eighth Amendment explanation.[113] Justice Scalia has repeated these arguments on several occasions.[114] Justice Thomas has announced his agreement with Justice Scalia.[115]

The reputed conflict has not been cited exclusively by Justices advocating limits on individualization. One Justice who originally supported the Court's decisions resanctioning capital punishment after *Furman* subsequently noted the conflict as a reason to reject all existing death penalty statutes. In an opinion dissenting from the denial of certiorari in *Callins v. Collins*,[116] one of his last opinions before retiring from the Court, Justice Blackmun argued that both consistency and individualized consideration were required by the Court's prior decisions. Like Justice Scalia, he contended that consistency was required by *Furman*[117] and that individualized consideration was required by *Woodson* and *Lockett*.[118] He also agreed with Justice Scalia that the two goals were incompatible.[119] However, unlike Justice Scalia, Justice Blackmun concluded that the solution was to strike down all existing death statutes.[120]

Much scholarly commentary also has accepted the existence of the dual goals. The prevailing view remains that the Court was serious about pursuing consistency after *Furman*.[121] There is also a widespread view that the Court's larger struggle after *Furman* was over how to accommodate efforts to pursue consistency with efforts to ensure individualized consideration.[122] Of course, the Court has

113. *See id.* at 673 ("Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.").

114. *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); Johnson v. Texas, 509 U.S. 350, 373 (1993) (Scalia, J., concurring).

115. *See, e.g.*, Graham v. Collins, 506 U.S. 461, 487–88 (1993) (Thomas, J., concurring) (asserting "disagreement with the Court's prohibition" of "mandatory sentencing schemes"). *Cf. Tennard*, 542 U.S. at 294–95 (Thomas, J., dissenting) (rejecting petitioner's claim that the Texas statute allowed inadequate consideration of his low intelligence in part because the contradiction in the doctrine justified restricting the requirement of individualized consideration). *See also* Steiker & Steiker, *supra* note 10, at 382.

116. Callins v. Collins, 510 U.S. 1141 (1994).

117. *See, e.g., id.* at 1147–49 (Blackmun, J., dissenting from denial of writ of certiorari).

118. *Id.* at 1150–51.

119. *Id.* at 1155 ("All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.").

120. Justice Blackmun explicitly concluded that the death penalty was unconstitutional as currently administered. *Id.* at 1158–59 ("Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, . . . I believe that the death penalty, as currently administered, is unconstitutional."). However, he also stated that he did not believe that any statute could reconcile the purportedly competing goals, which meant that he favored abolition. *Id.* at 1145.

121. *See, e.g.*, sources cited *supra* note 12.

122. *See, e.g.*, Hoeffel, *supra* note 12, at 786 ("[A] standard claim of critics of the Court's administration of the death penalty is that *Furman*'s Eighth Amendment command, which is

failed to achieve consistency.[123] However, there has been little scholarly dissent from the view so often expressed by the Justices that consistency is an Eighth Amendment objective.[124]

The difficulty with all of these arguments is that the purported conflict between consistency and individualized consideration is fictional.[125] Questions have arisen about how far the Court will go in requiring individualized consideration.[126] However, those questions have not implicated a genuine concern with balancing individualization against consistency. Consistency is not a valid Eighth Amendment aspiration.[127] Moreover, the Court abandoned any serious effort to pursue consistency in the *1976 Cases*.[128]

Justice Scalia has also revealed that he knows that the doctrine does not value consistency. If he were correct that the *Woodson* and *Lockett* decisions violated a principle of consistency compelled by the Eighth Amendment, every existing death penalty statute should be unconstitutional.[129] All existing statues allow for expansive individualized consideration of mitigating circumstances and, thus, could not provide consistency, according to Justice Scalia's argument. However, he has made clear that he would not, on this account, support a requirement that states channel the capital sentencer's mitigating discretion.[130] He would view any argument

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described as a command for standardization and consistency, is in irreconcilable conflict with the *Woodson/Lockett v. Ohio* Eighth Amendment command to individualize the sentencing decision to the characteristics of the individual offenders." (footnote omitted)); Semeraro, *supra* note 12, at 83 (noting that not only the Court but commentators as well have generally viewed the doctrine "as a tool to reduce arbitrariness and provide an individualized inquiry" and, when so viewed, the doctrine "appears to be riddled with inconsistency and mystery").

123. *See infra* text accompanying notes 170–172 and 192–196.

124. *But see* Hoeffel, *supra* note 12, at 787 (asserting that the concurring Justices in *Furman* ultimately were more concerned with "arbitrariness *in an individual case*" than with "arbitrariness *between* cases" and, thus, "consistency was not, and has not been, the Court's end goal").

125. I have elsewhere argued that the capital sentencing cases embody a conflict, but not one between consistency and individualized consideration. The inconsistency is between the mandate of individualized consideration and the Court's failure to limit the capital sentencing inquiry in accordance with the best Eighth Amendment explanation for that mandate. *See* Howe, *supra* note 20, at 417 (contending that the requirement of individualized consideration means that "[t]he capital sentencing inquiry should be directed in a way that aims to ensure that the sentencer renders judgments about offender deserts"). *See also infra* Part III.C.

126. *See supra* notes 96–104 and accompanying text.

127. *See supra* notes 5–8 and accompanying text.

128. *See supra* Part I.B.

129. *See* Sundby, *supra* note 15, at 1189 ("If *Lockett*'s mitigation scheme violates *Furman*, the immediate effect, of course, would be to invalidate all existing death penalty schemes, since they have been legislatively or judicially modified to meet *Lockett*'s requirements.").

130. In *Johnson v. Texas*, Justice Scalia stated:

that current statutes should be struck down for failing to channel mitigating discretion as an unacceptable extension of current doctrine.[131] This position undermines his very claim that the doctrine values consistency.

Recognizing that the Court in 1976 uncoupled capital sentencing regulation from an equality command resolves arguments based on the alleged conflict. Minimal narrowing and expansive individualized consideration are the only Eighth Amendment requirements that the Court has imposed on capital sentencing trials. Because consistency is not required, the purported conflict is imaginary.

## III. ASSESSING THE DOCTRINE UNDER THE EIGHTH AMENDMENT

Questions remain about the legitimacy of the Court's capital sentencing doctrine. Rejecting the consistency explanation leaves unanswered the question of whether the doctrine has a constitutional rationale.[132] However, this Part demonstrates that the doctrine can find explanation in the Eighth Amendment. The prohibition against cruel and unusual punishment limits the use of the death penalty to those persons who deserve death.[133] If understood as a middle ground between deregulation and abolition, a theory of regulation based on this principle can explain and improve the doctrine.

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> In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider "all relevant mitigating evidence" is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled. That will continue to be true unless and until the sort of "channeling" of mitigating discretion that Texas has engaged in here is not merely *permitted* . . . but positively *required*—a further elaboration of our intricate Eighth Amendment jurisprudence that I neither look forward to nor would support.

*Johnson v. Texas*, 509 U.S. 350, 373–74 (1993) (Scalia, J., concurring) (citation omitted).

131. *See id.*

132. The prevailing scholarly view is that the doctrine lacks legitimacy because it fails to achieve consistency. *See supra* notes 12–14 and accompanying text.

133. I have presented this theory previously. *See, e.g.*, Howe, *supra* note 6, at 829–31; Howe, *supra* note 11, at 2139–41.

### *A. A Deserts-Limitation as an Eighth Amendment Restriction on the Use of the Death Penalty*

The deserts-limitation builds on the idea that the Eighth Amendment proscribes disproportional punishments as well as punishments deemed altogether inhumane. Those who conclude on originalist grounds that the prohibition is only against certain inhumane modes of punishment do not endorse the disproportionality doctrine, and several recent or current Justices have sometimes advocated this restrictive construction.[134] However, the "modes only" view is vigorously disputed on historical[135] and other grounds.[136] For nearly a century, a majority of the Court has consistently rejected it.[137] The Court has repeatedly endorsed the

134. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (Scalia, J., joined by Rehnquist, C.J.) ("[T]he Clause disables the Legislature from authorizing particular forms or 'modes' of punishment."); Graham v. Collins, 506 U.S. 461, 488 (1983) (Thomas, J., concurring) ("[T]he better view is that the Cruel and Unusual Punishments Clause was intended to place only substantive limitations on punishments . . . ."). *See also* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 44–49 (1982) (asserting that the Framers only intended to proscribe certain barbarous punishments and that the death penalty was not among them).

135. *See, e.g.*, Laurence Clausen, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 136 (2004) (asserting that the clause was meant to prohibit certain instances of invidious discrimination, in particular, efforts "to single out an offender on a morally insufficient basis for more punishment than was customarily imposed"); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839–42 (1969) (asserting that the drafters and early jurists probably understood the clause as prohibiting only certain modes of punishment, but contending that, as used in the English Bill of Rights, from which it derived, the clause was understood only to prohibit excessive punishments); Tom Stacy, *Cleaning Up The Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 510, 507–519 (2005) (contending that an originalist inquiry, rather than supporting Justice Scalia's view, reveals "that the ban was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense and the offender at hand"). *See also* Phillip E. Johnson, *Cruel and Unusual Punishment*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 575, 575 (Sanford H. Kadish ed., 1983) (suggesting that attempts to assess the clause's original meaning have been inconclusive).

136. The propriety of the orginalist enterprise itself is, of course, disputed, but that issue is beyond the scope of this Article. The question has produced a vast literature. For some prominent recent commentary on the subject, see ANTONIN SCALIA, A QUESTION OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (arguing for an originalist approach focusing on "objectified" intent or, in other words, on original understanding). *Cf.* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY 30 (2002) (contending that Justice Scalia's approach has been "a failure on its own terms," because "[i]t has been no more successful than other methods in purging judicial decisionmaking of value judgments" and has presented "deeply contradictory strains").

137. In *Weems v. United States*, 217 U.S. 349 (1910), the Court first struck down a punishment as excessive in relation to the crime. For embezzling a small sum of money, Weems was sentenced to twelve years of hard labor, a loss of civil rights, and perpetual supervision. The Court struck down the penalty as cruel and unusual on the grounds that the punishment was too severe for the offense. *Id.* at 366–67.

proportionality concept in the non-capital context.[138] More importantly, the Court has used the proportionality notion to impose categorical restrictions on the use of the death penalty.[139] These categorical decisions have rested on a conclusion that the death penalty in the relevant context is undeserved,[140] a measure that comports with our basic sense of justice.[141]

This deserts-limitation theory can help explain not only the Court's categorical restrictions on the death penalty, but also the need for an individualized assessment of potentially mitigating evidence concerning the offender's character, record, and crime. Even after excluding those defendants protected by the Court's categorical rulings, the level of deserts of those who have committed murder ranges widely.[142] Doctrines regarding felony-murder and vicarious liability bring within the murder category many persons whose involvement in the crime is minor. The mental and emotional states of even those who are highly involved in a murder also vary greatly. Allowing a convicted murderer at a separate sentencing hearing to present all of the evidence bearing on his deserts that a jury might rationally use to reject the death penalty

138. *See, e.g.*, *Harmelin*, 501 U.S. at 997 (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in part and concurring in the judgment) (endorsing a "narrow proportionality principle" for non-capital cases); *id.* at 1009 (White, J., dissenting, joined by Blackman, J. and Stevens, J.) (asserting that "any punishment that is grossly disproportionate" to the defendant's offense violates the clause); Solem v. Helm, 463 U.S. 277 (1983) (overturning as cruel and unusual punishment a sentence of life imprisonment without possibility of parole under state habitual offender law after conviction for fraudulently passing a bad check for $100.00).

139. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (rejecting the death penalty for retarded offenders); Ford v. Wainwright, 477 U.S. 399 (1986) (rejecting the death penalty for inmates who are insane); Coker v. Georgia, 433 U.S. 584, 599 (1977) (plurality opinion) (prohibiting the death penalty for "rape not involving the taking of life"); Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam) (holding the death penalty per se inapplicable for kidnapping and rape where no life is taken).

140. *See Atkins*, 536 U.S. at 318–19 (concluding that retarded offenders generally lack the "personal culpability" to justify a death sentence); *Coker*, 433 U.S. at 598 (plurality opinion) (contending that, while rape greatly harms serious personal interests, those interests were not equal to life itself). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 57 (3rd ed. 2001) (asserting that, in the plurality opinion in *Coker*, "Justice White applied a strictly retributive conception of proportionality").

141. *See, e.g.*, ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45 (1976) ("Ask the person on the street why a wrongdoer should be punished, and he is likely to say that he 'deserves' it."); John Hospers, *Retribution: The Ethics of Punishment*, *in* ASSESSING THE CRIMINAL 181, 183 (Randy E. Barnett & John Hagel III eds., 1977) ("'[T]reatment in accord with desert' is probably the most frequently encountered definition of the term 'justice' itself.").

142. *See, e.g.*, Steiker & Steiker, *supra* note 10, at 373 ("[D]eath-eligibility remains remarkably broad—indeed, nearly as broad as under the expansive statutes characteristic of the pre-*Furman* era.").

could help ensure that only those who deserve the death penalty receive that sanction.[143]

The deserts-limitation theory also prevails by default over a utilitarian-based explanation for the doctrine. A theory that focuses on utilitarian concerns cannot rationalize the need for an expansive sentencing inquiry as a prerequisite to every death sentence. Some utilitarian questions, such as the need for incapacitation of a capital murderer, might benefit from individualized sentencing inquiries.[144] However, several utilitarian justifications, such as the potential for deterrence of other potential murderers or resource efficiency, call for categorical rather than case-by-case adjudication.[145] The Court seemingly could not ignore these latter utilitarian rationales for eliminating the sentencing inquiry unless utilitarian rationales in general were not part of the Eighth Amendment explanation for mandating the inquiry. The Eighth Amendment's language does not seem to forbid some of the utilitarian justifications for punishment but permit the others.[146]

As an explanation for regulating capital sentencing trials, the deserts-limitation theory more satisfactorily coincides with the language of the Eighth Amendment than does the consistency theory.[147] The theory provides the substantive measure for

143. *See, e.g.*, Sundby, *supra* note 15, at 1178 (asserting that the Court's broad definition of potentially mitigating evidence in *Lockett* is "tied to the ultimate issue of whether the defendant deserves the death penalty").

144. To determine whether a capital offender would likely commit future acts of violence if not executed, a sentencer would appropriately consider the particularities of the capital crime along with details about the offender's background and character. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 269 (1976) (noting that the post-*Furman* Texas statute included a capital-sentencing inquiry focused in part on whether the defendant would commit future acts of criminal violence).

145. A legislature could determine, for example, that the execution of all who are convicted of certain aggravated crimes, objectively defined, would provide the greatest societal benefit in crime reduction taking account of the costs involved. If this utilitarian question were all that mattered, there would be no apparent reason for a sentencing inquiry. It would make little sense to require repeated determinations by individual capital sentencers about whether the legislature was correct, particularly given that resolution of the question would not turn on the facts of the particular cases before them. *Cf.* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1079 (1964) (noting that, if general deterrence of crime were the only consideration, "it becomes difficult if not impossible to impeach the rationality of legislation [favoring] the death penalty in a particular category of offenses").

146. *See, e.g.*, Howe, *supra* note 20, at 341–42 (rejecting utilitarian theories as an explanation for individualized consideration).

147. An undeserved death penalty is plausibly understood to violate the language of the Amendment. "Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence." James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052 (2000). The small absolute and proportional numbers of death sentences even for homicide indicate that the punishment is unusual. Further, imposing an undeserved death sentence is especially

determining when a death sentence is cruel and unusual that the consistency theory ignores.[148] Unlike the consistency theory, the deserts-limitation also defines who may not receive the death penalty without also demanding that all who deserve death receive that sanction. The theory does not claim equality in the distribution of death sentences as an Eighth Amendment mandate and, therefore, is not undermined by evidence that many who deserve the death penalty are spared.[149]

The deserts-limitation theory, much more than the consistency theory, also rationalizes the Court's actual doctrine regulating capital sentencing trials. The consistency theory cannot explain why the Court would regulate the capital sentencing phase while allowing decision makers at other stages nearly unfettered discretion to reprieve murderers from the death sanction. Pursuing consistency at the sentencing phase makes little sense except as part of a larger effort to secure consistency in the overall selection process. In contrast, the deserts-limitation theory claims only that no offender should receive the death penalty if it is not deserved. Rules regulating the capital sentencing hearing could help ensure this result even if decision makers at other stages of the selection process retain largely unregulated discretion to confer reprieves.

### *B. Using the Deserts-Limitation as a Principle for Regulating Capital Sentencing: The Difficulty of Defining and Measuring Deserts*

While the deserts-limitation theory is more plausible than any other Eighth Amendment theory for regulating capital sentencing trials, it also poses problems. The Supreme Court lacks the ability to manage the capital sentencing inquiry to ensure good desert assessments because the Court cannot define in detail when an offender deserves the death penalty.[150] From a deregulatory

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unusual, and, certainly, can be thought cruel. *See, e.g.*, Stacy, *supra* note 135, at 531, 550 (reading "the Eighth Amendment as prohibiting punishments that are not reasonably regarded as justly deserved" and asserting that "death is a proportionate punishment only if it is imposed on the . . . subcategory of murderers who deserve the harshest punishment as a matter of justice").

148. *See* sources cited *supra* note 6.

149. The theory, thus, corresponds with what one commentator has observed about the Court's regulatory efforts: "[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing overinclusion . . . ." David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545, 548 (1997).

150. The ultimately moral nature of the question makes precision about how it should be assessed unrealistic and, some commentators suggest, unamenable to the rule of law. *See,*

perspective, this problem implies that the Court should have avoided doctrines governing capital sentencing trials and relied instead on a few categorical rules defining death eligibility. The Court should not have tried to specify the rules of capital sentencing if the societal consensus about deserts did not allow the Justices to be specific.[151] At the other end of the spectrum, from a defendant–oriented perspective, the inability of the Court to define deserts with precision means that regulation was doomed to fall short of the goal of protecting against undeserved death sentences.[152] This claim, which differs from a claim alleging mere inconsistency, implies that the Court should have abolished the death penalty.[153] On either of these views, the deserts-limitation fails as a basis for regulating capital sentencing trials. However, when understood as a compromise between these polar positions, the theory succeeds as a regulatory rationale.

### 1. The Argument for Deregulation

The argument against the use of the Eighth Amendment to regulate the capital sentencing trial rests on the proposition that the Court should interpret the Amendment in accordance with societal values. The Court has long asserted that the protection against cruel and unusual punishments embodies the "'evolving standards of decency that mark the progress of a maturing society.'"[154] While anathema to those who believe that the clause should apply as it would have originally,[155] this view also connotes that the Court should not get ahead of the societal consensus. The Court has purported to follow this view in addressing claims for categorical restrictions on the death penalty. The Justices have

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*e.g.*, Semeraro, *supra* note 12, at 107 ("[T]here are certain decisions that are so intertwined with moral questions that decision-making according to the rule of law is unacceptable.").

151. *See* Howe, *supra* note 6, at 835–43 (explaining the argument that the Court's inability to define deserts with any precision favors, on prudential grounds, not attempting to regulate capital sentencing trials under the Eighth Amendment).

152. *See, e.g.*, Howe, *supra* note 11, at 2106–23 (summarizing numerous studies from various states indicating that race heavily influences the distribution of death sentences).

153. *See generally id.* at 2138–64 (setting out the Eighth Amendment argument for abolition based on the inability to appropriately determine which offenders deserve death).

154. Ford v. Wainwright, 477 U.S. 399, 406 (1986) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

155. *See, e.g.*, James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 10 (1991) (asserting that this view would "make an originalist's skin crawl").

disagreed on the methods for identifying societal consensus.[156] Nonetheless, a successful showing has generally included objective evidence, such as, for the relevant category, that a majority of state legislatures do not authorize the death penalty and that, in most other states, capital sentencers usually do not impose the sanction.[157]

The principal problem for the Court in using the deserts–limitation to regulate capital sentencing trials is the absence of any apparent agreement about how to measure deserts.[158] While a societal consensus surely exists that only the deserving should receive the death penalty, the agreement does not proceed "all the way down"[159] to specific rules about how to determine deserts. The Court has avoided the difficulty of clarifying the rules by merely holding that the capital sentencer must be free to reject the death penalty based on any evidence proffered concerning the offender's character, record, or crime.[160] This approach effectively allows each sentencing jury to decide for itself what substantive rules should control.[161]

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156. *See, e.g.*, CARTER & KREITZBERG, *supra* note 13, at 62–63 (noting that there is disagreement among the Justices about how to determine "the views of contemporary society" regarding the appropriate application of the death penalty).

157. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 594–98 (1977) (plurality opinion) (categorically rejecting the death penalty for the rape of an adult woman, noting that only Georgia continued to allow the death penalty for such a crime and that Georgia juries only imposed the death penalty in about ten percent of rape cases). *See also* Atkins v. Virginia, 536 U.S. 304 (2002) (outlawing the imposition of the death penalty on mentally retarded offenders, after noting, among other evidence, that more than half of the states did not permit the death penalty in such cases and that this majority position reflected a strong recent trend); Enmund v. Florida, 458 U.S. 782 (1982) (striking down the death penalty for accomplices who neither intended to, attempted to, nor actually killed and noting that the vast majority of states did not provide for the death penalty in such cases).

158. Some commentators have questioned whether a sentencer can ever accurately assess the level of deserved punishment of a criminal offender. *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 318 (1998) ("Any effort to do so will confront very serious problems of knowledge, interest, and power."); WALTER KAUFMANN, WITHOUT GUILT AND JUSTICE 64 (1973) ("Not only is it impossible to measure desert with the sort of precision on which many believers in retributive justice staked their case, but the whole concept of a man's desert is confused and untenable.").

159. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 225 (1974).

As one commentator has noted, "[t]he moral judgment that the sentencer must make is . . . a profoundly personal one." Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713, 1725 (1999). This assertion implies that there is no societal consensus to which the sentencer is seeking to conform. *See id.* "[T]he members of the jury are not to determine, on some agentic basis, what the moral judgment of the community would be. Rather, the community's conscience in these cases is expressed through the exercise of conscience by each individual juror." *Id.*

160. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion).

161. Under the Court's approach, some jurors may give secondary consideration to the deserts question and focus instead on a utilitarian issue to impose a death sentence. *See id.* For example, a juror could decide that a defendant should be executed because he would

The problem is that, even if all jurors intuitively focused on offender deserts, they probably would not agree on how to assess deserts. It is unclear, for example, whether jurors should focus only on the offender's culpability for the capital crime or, instead, on a broader assessment of the offender's "general deserts" based on all of his life works. If the inquiry is only about culpability, details of the crime and the offender's role in it, along with any explanations based on his background or character that suggest his reduced moral blameworthiness, would be relevant.[162] However, if the inquiry focuses on his general deserts, the jury could also consider, for example, the offender's crimes or acts of valor independent of the capital offense.[163]

Assuming the Court was to require a focus on culpability, which is the more specific of these desert measures, major definitional problems would remain. Philosophers and criminal law theorists do not agree on how to define when a person becomes morally responsible for a crime.[164] They certainly would not agree on when a partial excuse should mitigate the punishment. When should notions of determinism prevail over notions of free will to excuse an offender altogether? In cases where notions of free will prevail, when can causes external to the offender's responsible self, such as childhood abuse or an accidental brain injury, still render a subsequent crime somewhat forgivable? Philosophers and criminal

present a great danger to others if given a prison term rather than a death sentence. Likewise, a juror could decide that the defendant should be executed to deter other potential murderers. Such a decision could often coincide with a determination by the juror that the offender does not deserve the death penalty, perhaps because some mental or emotional disability beyond the offender's control helped to explain his violence. The Court's decisions do not prevent a prosecutor from arguing for the death penalty on these utilitarian grounds. *See infra* notes 221–223 and accompanying text. Nor do they require that jurors be instructed to focus only on the question of offender deserts. *See infra* notes 208–213 and accompanying text.

162. *See, e.g.*, California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (noting that a focus on culpability would involve an evaluation of the facts of the crime and the defendant's involvement along with an assessment of the defendant's history and character to the degree that they imply that the crime was "attributable to a disadvantaged background, or to emotional and mental problems").

163. *See, e.g.*, Howe, *supra* note 6, at 836–38 (noting that there is no apparent agreement about which measure of deserts ought to determine the sentence in capital cases).

164. Philosophers have debated for centuries whether notions of free will and determinism are sufficiently compatible to support a theory for determining the moral blameworthiness for human actions. *See, e.g.*, DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 99–105 (L.A. Selby-Bigge ed., 1894); PLATO, THE REPUBLIC 250 (Francis McDonald Cornford trans., New York: Legal Classics Library special ed. 1945); SAINT AUGUSTINE, THE CITY OF GOD, 152–58 (Marcus Dods trans., New York, Modern Library 1950). Voluminous discussion has continued about this problem in modern times. *See generally* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE (Sydney Hook ed., 1958); FREE WILL (Gary Watson ed., 1982); MORAL RESPONSIBILITY (John Martin Fischer ed., 1986).

law theorists provide widely varying answers to these kinds of questions.[165] Given these disagreements, there are no grounds to claim a societal consensus.

An effort to determine deserts must also confront the uncertainty and disagreements about the relative degree to which the death penalty punishes the offender. Some murderers may suffer much more greatly than others from a sentence of life imprisonment, and some offenders may suffer much more greatly than others from the anticipation of execution. Yet, there is no consensus about how to make these determinations in individual cases.[166] It is also unknown what suffering, if any, comes after death. Indeed, some have argued that a death sentence is sometimes less punishment than life imprisonment.[167] These uncertainties and disagreements further complicate the argument that widespread agreement exists about how to judge the deserts of capital murderers.

Given the doubts about the existence of a societal consensus, or at least the Supreme Court's ability to identify it, the Justices arguably should defer to each state legislature. Unless the Court can explain in fairly specific terms why a legislative judgment on how to judge capital murderers is improper, the Court arguably should not interfere. The Court certainly lacks a compelling basis to turn the question over to various juries, using whatever standards their particular members prefer.[168]

### 2. The Argument for Abolition

The countervailing argument for abolition emphasizes that the inability to clarify appropriate rules for judging deserts inevitably will result in improper impositions of the death penalty. Because

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165. *See generally* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1012–36 (1994) (explaining the disagreements among philosophers and criminal-law theorists about the answers to such questions).

166. *See, e.g.*, John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 89 (1987) (stating that there is "dissensus" among judges and jurors about how to value the retribution involved with prison and death).

167. *See, e.g.*, Jacques Barzun, *In Favor of Capital Punishment*, *in* THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 154, 161–63 (Hugo A. Bedau ed., 1964) (asserting that a life prison sentence generally causes more suffering than a death sentence); Douglas Mossman, *The Psychiatrist and Execution Competency: Fording Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1, 58 n.231 (1992) (questioning whether execution is necessarily more punitive than life imprisonment).

168. I have developed the argument for deregulation more extensively elsewhere. *See generally* Howe, *supra* note 6.

capital sentencers often will not determine deserts appropriately, they will not ensure that only persons who deserve death receive that sanction. Consequently, the criminal justice system is not able to fulfill the promise of the Eighth Amendment. On this view, the sanction should be abolished.[169]

Evidence that the justice system cannot adequately protect against undeserved death sentences comes from numerous studies indicating that race strongly influences the outcomes in capital cases.[170] Studies conducted in a variety of states reveal that a defendant is much more likely to receive the death penalty for the murder of a white victim than for an identical murder of a black victim.[171] Many studies have also found that, among those who kill whites in seemingly identical circumstances, black defendants are more likely to receive the death penalty than white defendants.[172] The race of the victim or of the defendant does not itself bear on the deserts of the offender.[173] Therefore, these studies strongly suggest that some offenders who receive the death penalty do not deserve that sanction, even though those individual cases cannot be identified with much certainty.

The Supreme Court is also unable to remedy racial bias in capital selection through regulation. Commentators have suggested various strategies that the Court might follow to promote equality in capital selection. These proposals include imposing more demanding procedural requirements in capital cases, mandating the reintroduction of mandatory death sentencing, requiring a narrowing in the use of the death penalty to certain highly aggravated murders, and reversing all death sentences in certain categories in which statistical evidence demonstrates a reasonable probability that race has influenced outcomes.[174] However, all of these strategies pose serious problems that make them implausible as ways to eliminate racial discrimination. Some of the proposals, particularly

169. *See, e.g.*, Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1184 (1980) ("The issue is really whether we can accord due respect to any defendant sentenced to death in the context of a system that we know must wrongly kill some of them although we do not know which." (citation omitted)).

170. *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 app. B at 1742–45 (1998) (providing a summary of information concerning various states in which empirical studies have found race-of-victim or race-of-defendant discrimination in capital cases).

171. *See, e.g.*, Howe, *supra* note 11, at 2106–23 (summarizing many of the studies).

172. *See id.*

173. *See* Sundby, *supra* note 15, at 1178 ("Certainly, no reasonable person would argue that invidious factors like race or poverty . . . properly bear on whether the defendant deserves death.").

174. *See* Howe, *supra* note 11, at 2123 (compiling these theories).

those focused on procedural reform or mandatory death penalties, would likely be ineffective.[175] Other proposals, particularly those focused on forced narrowing, would remedy the disparities only by miring the federal courts in an administrative morass while also nearly thwarting the use of the death penalty.[176] Still other proposals, especially some of those requiring states to produce racial neutrality according to statistical measures, assume a level of centralized state control over capital sentencing that is unrealistic or unconstitutional.[177] These problems imply that there is no workable solution to the problem.[178]

Abolishing the death penalty based on evidence of racial discrimination would require the Court to ignore the majoritarian

175. Some scholars have asserted that procedural reforms could promote equal outcomes for equally situated defendants. *See, e.g.*, Steiker & Steiker, *supra* note 10, at 421–25. However, most of the prominent proposals have centered on such problems as the conviction-prone nature of capital sentencing juries, the poor quality of defense counsel, and the haphazard opportunities for merits review in habeas appeals. *See* Howe, *supra* note 11, at 2124. These reforms would safeguard against certain forms of inequality. However, they appear unlikely to reduce racial discrimination in capital selection except to the extent that they thwart the use of the death penalty generally. *See id.* at 2124–27. Proposed safeguards to confront racial bias directly, such as by requiring jurors to certify that racial prejudice has not influenced their verdict, also appears hopelessly ineffectual. *Id.* at 2126–27.

176. The idea of forced narrowing assumes that the federal courts would require jurisdictions to so substantially narrow the group of death-eligible offenders that prosecutors and jurors would almost always favor the death penalty in the resulting narrowed category of offenders, rendering race irrelevant. This notion builds on suggestions by Justice Stevens about the way that states might attack inequality in capital selection. McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting). The overriding problem with this theory is the inability of the federal courts, without effectively abolishing or nearly abolishing the use of the death penalty, to identify with objective standards the category of aggravated capital cases in which racial bias would not operate. *See* Howe, *supra* note 11, at 2129–32.

177. Proposals for the United States Supreme Court to simply mandate near-zero disparity levels, as revealed by statistical evidence, contemplate that states would discover their own ways to eliminate racial disparities and, if not, that the federal courts would invalidate their death selection systems. *See id.* at 2132. However, states have insufficient control over local prosecutors and individual sentencers to increase the level of death sentences in black-victim cases, where the death-sentencing rates are low. *See id.* at 2132–33. Moreover, assuming states could overcome those practical problems to achieve "leveling up," any such efforts at racial engineering in this context would likely violate the Equal Protection Clause. *See id.* at 2134–36. Of course, the federal courts could simply require that states pursue strategies for eliminating racial disparities through reducing the use of the death penalty in general. However, because of the high level of litigation that would recur over the statistical methodologies and proof, this approach would still greatly burden the federal judiciary and likely result in the de facto elimination or near elimination of the death penalty. *See generally id.* at 2136–38.

178. *See, e.g.*, WHITE, *supra* note 14, at 158 (asserting that "some of the forces that create racism in capital sentencing are simply too powerful to be swept away by procedural tinkering" and that "abandoning the death penalty entirely" is the only solution to the racial discrimination problem). *See also* Kurt S. Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. ST. U. L. REV. 95, 124 (1987) (asserting that racial prejudice as an influence on the criminal justice system is not likely to disappear "within the foreseeable future").

view favoring perpetuation of the sanction.[179] Widespread legislative support for capital punishment and its occasional imposition imply that there is no societal consensus against its use in aggravated murder cases.[180] However, relying on the societal consensus test to uphold the use of the sanction ignores the discrimination problem. Evidence that a majority supports the use of the sanction arguably should not determine its constitutionality if racial prejudice inevitably taints its use. The Court could instead focus directly on the problem and ask if there is a workable remedy. On grounds that there is no solution—meaning that undeserved death sentences inevitably will issue—the Court could abolish the sanction under the Eighth Amendment.

Understanding the racial disparities as a violation of the deserts-limitation undermines a central argument of retentionists about why the Eighth Amendment cannot require abolition.[181] Retentionists have emphasized that the Fifth and Fourteenth Amendments contain language that contemplates the use of the death penalty, indicating that the Eighth Amendment was not originally understood to prohibit the sanction.[182] However, this point arguably focuses too heavily on the specific application rather than the gen-

179. Public support for the death penalty remains strong, with approximately two in three Americans favoring the death penalty. *See* Charles Lane, *Changing Attitudes About the Death Penalty*, WASH. POST, Jan. 2, 2006, at A11 ("[D]espite recent slippage, public sentiment in favor of capital punishment remains strong: 69 percent in the 2005 Gallup poll supported the death penalty for murder.").

180. The death penalty is available as a penalty for certain aggravated crimes in more than two-thirds of American jurisdictions. For a listing of state death-penalty statutes in 2004, see Death Penalty Info. Ctr., Crimes Punishable by the Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=144&scid=10 (on file with The University of Michigan Journal of Law Reform). For information regarding the number of death sentences issued in recent years, see Death Penalty Information Center, *Death Sentences by Year, 1977–2004*, http://www.deathpenaltyinfo.org/article.php?scid=9&did=873 (last visited Jan. 31, 2007) (on file with the University of Michigan Journal of Law Reform).

181. Retentionists have also emphasized that racial inconsistency does not undermine the propriety of deserved death sentences. *See, e.g.*, COYNE & ENTZEROTH, *supra* note 7, at 198 (noting that death penalty supporters contend that society's interest in retribution trumps concerns about racial inequality). However, this argument incorrectly assumes that the problem revealed by the racial disparities is mere inconsistency among those who deserve the death penalty. Once the capital sentencing hearing is understood as an effort mandated by the Eighth Amendment to determine who deserves death, evidence that race influences the outcomes suggests that some who are sentenced to death do not deserve that sanction. *See* Howe, *supra* note 11, at 2146–47.

182. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA, 213–14 (1990) (asserting that the Fifth and Fourteenth Amendments provided protections against the use of the death penalty and "thus clearly showed that the death penalty itself was constitutionally acceptable" (citation omitted)); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 34 (1987) (contending that the death penalty does not violate the Eighth Amendment in part because the penalty is contemplated by language in the Fifth and Fourteenth Amendments).

eral understanding of the prohibition. If the clause is understood to prohibit the death penalty when it is not deserved, the modern death penalty can be stricken down as violating the deserts-limitation despite the sanction's use at the time of the founding because it was then thought deserved for various crimes.[183] The Supreme Court repeatedly has concluded that the Eighth Amendment now requires that the capital offender be free to try to persuade the jury that he does not deserve the death penalty, although mandatory death sentences were allowed at the time of the founding.[184] This change has come about because contemporary society no longer believes that a murderer automatically deserves death, although the contrary view prevailed when the Eighth Amendment was promulgated.[185] Statistical evidence of the racial discrimination problem provides additional new information that, despite efforts to assess deserts, the judicial system is frequently unable to determine deserts accurately. Consequently, the modern system for imposing the death penalty can be seen as inevitably violative of the Eighth Amendment.[186]

Striking down the death penalty on these grounds would not pose any serious problems for sentencing in non-capital cases. Retentionists have noted that racial discrimination seems to influence the imposition of prison sentences in non-capital cases and, therefore, to abolish the death penalty on grounds of racial bias would logically require abolishing prison sentences as well.[187] However, the Court could easily distinguish the death penalty from other punishments and sensibly limit a conclusion based on statistical

183. The same kind of reasoning has been used by originalists to endorse the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), although the Fourteenth Amendment was not originally understood to require integration of public institutions. *See, e.g.*, BORK, *supra* note 182, at 81–82 (asserting that *Brown* can be grounded on an originalist interpretation if the Fourteenth Amendment is understood as requiring only a general principle of equality rather than the specific understanding of equality that was held when the amendment was promulgated).

184. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 289 (1976) ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." (citation omitted)).

185. *See, e.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 13–16 (2002) (noting the prevailing view in the seventeenth and eighteenth centuries that capital punishment was just retribution for serious crimes).

186. *See, e.g.*, SEIDMAN & TUSHNET, *supra* note 7, at 154 (asserting that the death penalty could infringe the "general prohibition" in the Eighth Amendment although that view did not prevail at the time the Eighth Amendment became law).

187. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987) (asserting that McCleskey's claim based on evidence of racial discrimination in the Georgia capital selection system "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system").

evidence of racial discrimination to the capital sentencing context. The Court has frequently emphasized that death as a sanction is unique due to its severity and finality and because of the troublesome moral questions that it raises.[188] The Court has used this distinction to explain several differences in the procedural protections afforded to capital as opposed to non-capital defendants.[189] Most importantly, the difference explains why a more demanding proportionality rule applies in capital cases than in non-capital cases.[190] This special effort to ensure that only deserving offenders receive the death penalty also can explain why racial discrimination that may be tolerated in the non-capital context is intolerable in the capital context.[191]

Evidence of racial discrimination is likely only the most visible part of a much larger problem with undeserved death sentences. Many improper considerations besides race probably also influence decisions to impose death. For example, prosecutors and capital sentencers may sympathize more with victims and defendants who they find physically appealing than with those they find ugly[192] and favor those who are from their own community more than those who are outsiders.[193] "We value the life most of those we are most like."[194] In addition, fact–finders all too frequently convict innocent persons of capital murder and compound the error by sentencing them to death.[195] The frequency of exonerations from death row in recent years raises a sobering question about the

188. *See, e.g.*, Beck v. Alabama, 447 U.S. 625, 637–38 (1980) (noting the uniqueness of the death penalty both from the point of view of the defendant and society); Gardner v. Florida, 430 U.S. 349, 357–58 (1977) (same).

189. This distinction also explains, for example, why individualized consideration is essential in capital cases but not in other criminal contexts. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that "[d]eath, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two" and, consequently, that there is need for heightened reliability in a death penalty case).

190. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991).

191. I have elsewhere addressed additional claims that retentionists offer about why the Eighth Amendment should not be understood to prohibit the death penalty even assuming that unconscious racial discrimination influences some decisions to impose death. *See* Howe, *supra* note 11, at 2150–64.

192. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 317 (1987).

193. *See, e.g.*, Interview with Alan M. Dershowitz, Professor at Harvard Law School, in Cambridge, Ma. (Mar. 2, 1988), *in* A PUNISHMENT IN SEARCH OF A CRIME 330, 331 (Ian Gray & Moira Stanley eds., 1989).

194. *See id.*

195. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005) (noting that, between 1989 and 2003, seventy-four persons sentenced to death in the United States were exonerated).

number of executions of innocents.[196] These concerns further undermine confidence that decision makers will always determine deserts appropriately. The general inability of our capital selection systems to ensure deserved death sentences, beyond racial discrimination alone, warrants abolition under the Eighth Amendment.

### 3. Pursuing the Deserts-Limitation Theory as a Compromise Between Deregulation and Abolition

The case for regulating capital sentencing trials under the Eighth Amendment is best understood as a compromise between arguments for deregulation and abolition. The mandated capital-sentencing hearing allows the defense to present all of the potentially mitigating evidence that bears on the offender's deserts with the hope that jurors will impose a death sentence only where the offender deserves that sanction. The inability of the Court to define for jurors how to determine deserts raises troubling questions about the legitimacy of the effort. Nonetheless, arguments for deregulation or abolition also pose problems.

The argument for deregulation does not account for the possibility that some states will impose mandatory or near mandatory capital sentencing schemes. In response to *Furman*, for example, many death penalty states enacted mandatory death statutes,[197] reflecting an approach to capital sentencing that had been abandoned throughout the country during the previous century.[198] This legislation was surely an effort to respond to *Furman*, and, while perhaps no jurisdiction would impose such an approach if the Court deregulated capital sentencing today, we cannot be sure. To favor deregulation is to say that the Court should eschew any effort to address such an occurrence, a position that is made especially difficult by the repeated decisions of the Court to require expansive individualized consideration throughout the last thirty years.[199]

The argument for abolition under the Eighth Amendment rests on a value judgment with which many may disagree. Statistical

196. *See id.* at 552 ("If we managed to identify and release 75% of innocent death-row inmates before they were put to death, then we also executed twenty-five innocent defendants from 1989 through 2003.").

197. *See supra* note 37 and accompanying text.

198. *See* Woodson v. North Carolina, 428 U.S. 280, 292–301 (1976) (plurality opinion) (discussing the trend away from mandatory death penalties toward discretionary systems that began in the 1830s).

199. *See supra* text accompanying notes 96–104.

studies implying racial bias in capital selection,[200] while suggesting that some of the death sentences that issue are undeserved, do not clarify the proportion[201] and certainly do not resolve whether the number of undeserved death sentences is unbearably high.[202] Consequently, the argument for abolition must build on an assumption that even a low level of undeserved death sentences is intolerable. However, the majority of the public is not persuaded that the death penalty is administered so unfairly as to warrant abolition. Popular support for the death penalty remains strong,[203] apparently grounded heavily on the widespread belief that the vast majority of murderers who receive the death penalty deserve that sanction.[204] Vigorous public endorsement of the penalty may make it difficult for the Justices to endorse a conclusion that it is too often undeserved.[205]

The Court's capital sentencing doctrine represents a way of mediating between deregulation and abolition.[206] As is the nature of

200. Some have resisted the conclusion that the studies reveal racial bias. *See, e.g.*, McCleskey v. Zant, 580 F. Supp. 338, 379 (N.D. Ga. 1984) (rejecting the evidence embodied in the Baldus study as proof of racial discrimination in the Georgia system on grounds that the data was flawed and the statistical methods unreliable); Stanley Rothman & Stephen Powers, *Execution by Quota?*, PUB. INT., Summer 1994, at 3, 8 ("On the basis of the available research, one simply cannot conclude that racial discrepancies are a function of racism.").

201. For example, some would contend that the statistical evidence may only show that unwarranted reprieves are granted disproportionately to certain groups and, on that view, that those who receive the death penalty still deserve it. *See, e.g.*, Scheidegger, *supra* note 178, at 125–26 (asserting that the disproportionately low number of death sentences in black-victim cases may result from reduced pressure on prosecutors from the black community to pursue the death penalty in such cases). Abolitionists would argue that this view implausibly assumes that race influences decisions to grant mercy and other non-desert bases for reprieves but not decisions about deserts. They would urge as more intuitive that race influences deserts decisions themselves and taints not only some decisions to reprieve but also some decisions to condemn. *See also supra* note 181 and accompanying text.

202. *See* CARTER & KREITZBERG, *supra* note 13, at 252 (noting that former congressman Bill McCullom has even concluded that "executing the innocent is an acceptable trade-off for the public's increased sense of security").

203. *See supra* notes 179–180 and accompanying text.

204. *See, e.g.*, Little, *supra* note 7, at 1597 ("The fact is, in the minds of many Americans, black or white, extremely aggravated killings simply cry out for a morally equivalent penalty."); Scott Turow, *To Kill or Not to Kill*, NEW YORKER, Jan. 6, 2003, at 43 (noting that an Illinois Commission appointed to recommend reforms of the state's capital punishment system heard from supporters of capital punishment "one argument again and again: sometimes a crime is so horrible that killing its perpetrator is the only just response").

205. *See, e.g.*, Steiker & Steiker, *supra* note 10, at 428 ("[T]he center [of the Court] has been reluctant to adhere to *Furman's* reforming commitments in a manner that would place 'totally unrealistic conditions' on the use of the death penalty." (quoting McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

206. *See* Burt, *supra* note 14, at 1778 ("By insisting [in 1976] that juries must have discretion to impose or withhold death sentences, Stewart reopened—but also buried—the controversy. Stewart's essential mission thus was to dampen and obscure social conflict by appeasing both proponents and opponents of capital punishment.").

compromises, the effort is not entirely satisfying; it both denies state legislatures significant latitude in guiding capital sentencer discretion and fails, as the racial discrimination studies reveal, to prevent undeserved death sentences. However, the doctrine can still be understood as an imperfect effort to ensure that only those who deserve the death penalty receive that sanction.

### *C. Arguments Based on Deserts-Limitation for Improving the Doctrine*

While existing capital sentencing regulation can find grounding in an Eighth Amendment theory, the Court could also improve the doctrine. The continuing lack of guidance to the jury about the desert-oriented focus of the inquiry is at odds with the goal of protecting against undeserved death sentences.[207] Reforms that aim to focus the jury on finding deserts as a prerequisite to a death sentence could improve the process.

Capital sentencers should be told that the central issue that they are to resolve before imposing a death sentence is whether the offender deserves that punishment. Few capital sentencing systems provide this information.[208] Under the Georgia scheme, for example, sentencing jurors are essentially only instructed that they must find at least one aggravating circumstance from a statutory list before imposing a death sentence.[209] They receive no meaningful guidance about how to reach the verdict.[210] Jurors in Florida are given more instructions concerning possible mitigating circumstances that they may balance against aggravating evidence in deciding the ultimate question.[211] However, they are not told how to weigh any particular factor or what overriding question should

207. *See* Howe, *supra* note 20, at 417 ("The capital sentencing inquiry should be directed in a way that aims to ensure that the sentencer renders judgments about offender deserts.").

208. The current Texas statute includes a broad special question that asks the jury to consider, inter alia, the "personal moral culpability" of the offender in deciding whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (Vernon 2006). This question arguably does not sufficiently clarify that a finding of deserts must precede a death sentence. However, it at least explicitly focuses the jurors on deserts, which is exceptional among existing capital sentencing statutes.

209. *See supra* notes 51–59 and accompanying text.

210. *See* Zant v. Stephens, 462 U.S. 862, 871 (1983) (noting that "[t]here is an absolute discretion in the factfinder" to decide whether to impose death after the finding of a single statutory aggravating circumstance).

211. *See supra* notes 44–45 and accompanying text.

determine their decision.[212] Consequently, some sentencers may choose to impose the death penalty on utilitarian grounds—for example, to deter other potential murderers or to incapacitate a seemingly dangerous offender. Particularly where the offender's dangerousness appears high, but his culpability reduced, as with certain physiologically or psychologically impaired murderers, the decision makers may not focus on what retributive punishment the offender deserves.[213]

A requirement that a jury find, as a prerequisite to a death sentence, that the offender deserves that sanction should replace the current requirement that each aggravating circumstance slightly narrow the group of capital offenders subject to execution. The contours of the current narrowing requirement, which the Court has held can be satisfied at either the guilt–or–innocence or capital sentencing trial,[214] lack a convincing Eighth Amendment explanation.[215] Requiring, instead, that the capital sentencing jury find that the offender deserves a death sentence directly addresses the crucial Eighth Amendment concern.

If a state legislature opts to continue requiring sentencers to determine the existence of aggravating circumstances at the capital sentencing trial as an aid in resolving the deserts inquiry, restrictions should apply. First, a meaningful narrowing requirement[216] should control. The deserts–limitation theory for regulating capital sentencing trials contemplates that not every defendant convicted of a capital murder deserves the death penalty.[217] On this view, either a single aggravating circumstance or a list of such circumstances that is reasonably thought to apply to every murder or even most murders may mislead a sentencing jury. Such a scheme will fail to narrow the group to those more deserving of the death penalty and may imply at the final stage of decision-making that any given offender deserves that sanction. A meaningful narrowing mandate would prevent this potential for skewing the jury towards a death verdict.

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212. *See, e.g.*, Steiker, *supra* note 95, at 2618 ("For the comparison of aggravating and mitigating factors to be meaningful, the decisionmaker must be informed of the moral question or questions that the factors are intended to help answer.").

213. *See id.* ("Indeed, the most aggravated crimes are likely to be the very ones in which the defendant has some identifiable limitations which render him less culpable.").

214. *See supra* note 89 and accompanying text.

215. *See supra* text accompanying notes 51–59, 73–76, and 90–95.

216. *See supra* notes 51–55, 73–74 and 90–91 and accompanying text.

217. *See* Stacy, *supra* note 135, at 550 ("One feature of prevailing practice that may be relied upon as having constitutional significance is the widely shared judgment that not every murderer deserves death.").

Statutory aggravating circumstances that focus only on utilitarian concerns also should be prohibited. For example, in Oklahoma and Virginia, a statutory aggravating circumstance asks whether the offender probably presents a danger of further criminal violence.[218] This kind of factor rests on an incapacitation rationale and has the particularly detrimental effect of turning mitigating evidence into aggravating evidence. Many capital offenders have disabilities that arguably reduce their culpability, but also increase their future dangerousness.[219] Consequently, an aggravating circumstance focused on future danger not only fails to narrow the group to the more deserving, but also may greatly increase the odds at the final stage of decision-making that capital sentencers will impose a death sentence on persons who do not deserve that sanction. Moreover, any aggravating circumstance that finds its explanation in utilitarian theory may also at least modestly increase the danger of an undeserved death sentence.[220]

Regardless of whether a state continues to articulate statutory aggravating circumstances, prosecutors should generally not present capital sentencers with utilitarian evidence or arguments to justify death sentences. Under current practice, prosecutors can present evidence on utilitarian concerns, such as expert testimony from mental health professionals that the offender presents a high

218. *See* OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 2006) (listing as an aggravating circumstance "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); VA. CODE ANN. § 19.2-264.2 (2006) (listing as an aggravating factor "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"). *See also* Russel Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 216–17 (2004) (discussing the widespread use of "future dangerousness" as an aggravating factor and the tendency of prosecutors to urge the offender's dangerousness).

219. *See, e.g.*, WHITE, *supra* note 14, at 86 (quoting death penalty expert Craig Haney's comments that "people who commit extraordinary crimes have extraordinary backgrounds," which, of course, also suggests that they will act violently in the future).

220. Legislation in most death penalty states lists aggravating circumstances that appear to rest primarily on utilitarian rationales. "For example, under nearly every state death penalty statute, the fact that the victim was a police officer is identified as an aggravating circumstance." WHITE, *supra* note 14, at 104. Defining an aggravating circumstance as the status of the victim as a police officer rather than, for example, a nun or a disabled person, could be viewed by many jurors as an effort at deterrence. "Presumably, the legislature's basis for making the victim's status as a police officer an aggravating circumstance is the belief that there is a special need to deter homicidal attacks on police officers." *Id.* Perhaps such a circumstance could be aggravating based on a retributive ground. However, given the danger that the jurors would see the rationale as utilitarian, such a circumstance should not be allowed, unless through instructions, the trial judge clarifies that jurors should consider it only for what it reveals, if anything, about the offender's enhanced culpability.

risk of future danger.[221] Likewise, prosecutors can urge a death sentence to incapacitate a seemingly dangerous offender or to send a message to others who may contemplate murder.[222] Such deterrence arguments are common.[223] In an open-ended system like that used in almost all death penalty states, this could mislead the jury into imposing a death sentence without finding that the offender deserves that punishment. Consequently, this kind of evidence or argument should be proscribed except in a "special-question" system in which the utilitarian question is presented separately from the question of deserts[224] or in an open-ended system where the defense has urged a reprieve on utilitarian grounds.

Requiring these new protections could cause some disruptions in the use of the sanction, but they do not justify inaction. First, the Court has recently shown itself willing to reverse course on capital-sentencing procedures even in the face of some disruptions. In *Ring v. Arizona*, the Court overturned long-standing precedent that it had repeatedly reaffirmed by holding that a jury must determine the existence of the aggravating circumstance that makes a murderer death-eligible.[225] When the Court decided *Ring*, judges had served as sentencers and had determined the presence of aggravating circumstances in nine death penalty jurisdictions.[226] Moreover,

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221. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880 (1983) (rejecting challenge alleging that expert witnesses in capital-sentencing proceedings are incapable of reliably predicting future danger).

222. One commentator has noted:

> [The prosecutor] may argue in favor of the death penalty in general, premising his argument on a penological theory like *deterrence* or retribution. Or he may emphasize that the death penalty is an especially appropriate punishment for the particular defendant before the jury. Frequently, these two themes will be mixed together and presented to the jury with the aid of colorful metaphors and strong emotional appeals.

WHITE, *supra* note 14, at 113 (emphasis added).

223. *See id.* at 115–17 (discussing some common arguments relating to incapacitation and general deterrence used by prosecutors in Georgia, Pennsylvania, and Wyoming, and noting the permissive standards used by appellate courts in reviewing them).

224. Under the unusual special-question system currently employed in Texas, issues regarding future danger and offender culpability appear in separate questions. The ostensible effect of this approach is to prevent a death sentence without findings of both future danger and offender culpability, among others. Under the deserts-limitation theory, the Eighth Amendment should not require states to allow reprieves on non-desert grounds. For defendants who deserve death, the death penalty is not cruel and unusual punishment. *But see* Skipper v. South Carolina, 476 U.S. 1, 5–6 (1986) (holding that a capital offender is entitled to have his sentencer be free to reject the death penalty based on evidence of good behavior in jail while awaiting trial as an indication that he would not pose a future danger if sentenced to life imprisonment).

225. Ring v. Arizona, 536 U.S. 584 (2002).

226. *Id.* at 608 n.6.

while these new protections would affect more states than the mandate in *Ring*, they would still not affect most existing death sentences. Under the law governing federal habeas corpus petitions, federal courts cannot overturn a conviction or sentence from a state court based on new Supreme Court decisions.[227] Consequently, states would not have to reconsider death sentences that had become final on direct appeal.

These further efforts by the Court to ensure a deserts finding as a prerequisite to a death sentence are warranted despite the Court's inability to define the sentencing inquiry precisely.[228] The true inconsistency in the capital sentencing cases arises from the Court's failure on the one hand to impose more desert–oriented controls and its determination on the other hand to require broad individualized consideration.[229] The Court has not done all that it can to ensure that each death sentence is deserved.[230] Yet, the individualized sentencing requirement finds Eighth Amendment explanation only in a deserts-limitation theory on the use of the death penalty.

## V. CONCLUSION

The prevailing story about capital sentencing doctrine builds on the notion that *Furman v. Georgia* revealed a regulatory principle of nonarbitrariness or consistency in the use of the death penalty that the Supreme Court has struggled to fulfill. According to the account, which the Justices themselves have fueled, the post–*Furman* Court sought to ensure that death selection systems provided "a meaningful basis for distinguishing the few cases in which [the

227. A state court decision is not reviewable on the merits in federal habeas unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2006). *See also* Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 761 (2005) (providing information on the meaning of 28 U.S.C. § 2254(d)(1)). *See also* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 46–67 (discussing the 1996 legislation limiting federal habeas review of state court decisions).

228. *See supra* text accompanying notes 158–163.

229. *See* Howe, *supra* note 20, at 401 ("[N]o member of the Court has ever acknowledged the inconsistency of requiring individualized capital sentencing while approving sentencing statutes that fail to require sentencer judgments about offender deserts.").

230. For an argument that the Constitution demands substantially more than this Article has proposed to ensure that a jury's death verdict rests on proper grounds, see Hoeffel, *supra* note 12, at 820–23 (making the case for allowing post-trial interviews of and testimony by capital sentencing jurors to determine if they relied on improper considerations).

penalty] is imposed from the many cases in which it is not."[231] This nonarbitrariness goal has gone unrealized.[232] The prevailing explanation is that the post-*Furman* Court originally pursued consistency, but then backed away after also becoming committed to the competing goal of individualized sentencing consideration. The consensus also remains, however, that consistency in the use of the death penalty is a legitimate Eighth Amendment aspiration.[233]

A very different story about capital sentencing should prevail, one that uncouples *Furman's* mythical mandate from the doctrine. Nonarbitrariness or consistency in the use of capital punishment is not itself a legitimate Eighth Amendment objective. If an offender deserves death, the prohibition against cruel and unusual punishments should not require that he be treated equally with other offenders who deserve that punishment but are spared.[234] Furthermore, the Supreme Court was never actually committed to consistency after *Furman*, except in its rhetoric. From the beginning of the post-*Furman* era, the Court rejected statutory selection systems that sought to promote consistency, at least among those convicted of capital crimes, while it upheld others that did virtually nothing to achieve even that end.

The Court's continuing rhetorical focus on consistency as a goal of regulation, moreover, has diverted attention from the important questions to be asked about the doctrine.[235] The Justices have frequently been caught up with the notion that the doctrine reflects a problematic tension between the goal of consistency and the goal of individualized consideration of potentially mitigating evidence.[236] Scholars as well have often accepted the existence of this conflict as the central problem in the Court's effort to regulate capital sentencing trials. None of this is accurate. The predominant Eighth Amendment rule for capital sentencing from the very beginning of the Court's post-*Furman* regulatory efforts has been the mandate of individualized consideration. Consequently, the important questions to ask about the doctrine stem from the Eighth Amendment explanation for this individualization mandate.

231. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)) (alteration in original). *See also* McCleskey v. Kemp, 481 U.S. 279, 301 (1987) (quoting Furman v. Georgia, 408 U.S. 238, 313 (White, J., concurring)).

232. *See supra* text accompanying notes 170–173 and 192–196.

233. *See supra* notes 12–13 and accompanying text.

234. *See supra* notes 5–8 and accompanying text.

235. *See supra* Part II.

236. *See id.*

The Eighth Amendment principle that can justify individualized capital sentencing and against which the Court's regulatory efforts should be assessed is a deserts-limitation.[237] The protection against cruel and unusual punishments limits the use of the death penalty to those persons who deserve that sanction. Much of the existing regulation can be understood as pursuing this goal. There are plausible arguments against the regulatory effort, some favoring deregulation and others favoring abolition of capital punishment. There are also good arguments that the Court's regulation could be improved. However, all claims about the role of the Eighth Amendment in limiting the use of the death penalty should recognize that the goal is to protect against retributive excess, not to ensure equality.

237. *See supra* Part III.