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Texas Law's Life or Death Rule in Capital Sentencing: Scrutinizing Eight Amendment Violations and the Case of Juan Guerrero, Jr.

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ARTICLES

TEXAS LAW'S "LIFE OR DEATH" RULE IN CAPITAL SENTENCING: SCRUTINIZING EIGHTH AMENDMENT VIOLATIONS AND THE CASE OF JUAN GUERRERO, JR.

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I. INTRODUCTION

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments [shall not be] inflicted."[1] It was adopted almost verbatim from the English Bill of Rights of 1689, which stated: "[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."[2] "Cruel and unusual punishments" are sweeping words with vague contours, but at bottom they prohibit both disproportionately harsh punishments as well as punishments that are meted out in arbitrary and capricious ways. The Fourteenth Amendment applies the Cruel and Unusual Punishments Clause to the States.

This condemnation of cruel and unusual punishments, the United States Supreme Court has noted, is formulated by "the evolving standards of decency that mark the progress of a maturing society."[3] In other words, the Eighth Amendment is not static and is not limited to, but is certainly inclusive of,[4] the

1. U.S. CONST. amend. VIII.

2. Solem v. Helm, 463 U.S. 277, 285 (1983) (quoting 1689, 1 W. & M., Sess. 2, c. 2 (Eng.)), *overruled on other grounds by* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion).

3. Trop v. Dulles, 356 U.S. 86, 101 (1958). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

4. *See Solem*, 463 U.S. at 286 ("[O]ne of the consistent themes of the era was that Americans had all the rights of English subjects." (citing Address to the People of Great-Britain, *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 83 (Worthington Chauncey Ford ed. 1904) ("[W]e claim all the benefits secured to the subject by the English constitution ...."), and Georgia Resolutions, Aug. 10, 1774, *reprinted in* 1 AMERICAN ARCHIVES 700 (4th series 1837) ("[H]is Majesty's subjects in *America* ... are entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great*

punishments that were thought to be forbidden in 1791, the year that the Eighth Amendment was ratified.[5] Curiously, the Supreme Court has never accepted that the Eighth Amendment could "retrench" to exclude from its protective orbit punishments once considered cruel and unusual but now no longer so.

The Supreme Court has further articulated that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights [of 1689]. The identical words appear in our Eighth Amendment."[6] In a long, though not unbroken, line of cases from *Furman v. Georgia*[7] in 1972, to its holdings rejecting death sentences for juveniles and the mentally retarded, the Court has appreciated this point. Severity of the crime committed, solely, did not control the outcome here; the "crime" had to be understood broadly with due respect to the mental capacity of the offender, the circumstances then transpiring, and the larger consideration of reasonable consistency among the defendants who receive death sentences and those who

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Britain."))).

5. *Cf., e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2644 (2008) ("[E]volving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty . . . ."); Roper v. Simmons, 543 U.S. 551, 562–63 (2005) (outlining Supreme Court precedent representing the "progress of a maturing society" in abolishing, for example, the availability of the death penalty for defendants with mental retardation); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.").

6. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).

7. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). The Court struck down the death penalty laws of Georgia and Texas as applied as cruel and unusual punishment. *Id.* at 239–40. Justice Stewart stated:

> These death sentences [at issue in *Furman* were] cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [here were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309–10 (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

do not.[8] A death sentence "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[9] But almost all of these pronouncements are limited to proportionality and arbitrariness analyses *in the death penalty context.*

What happens when life imprisonment is the punishment at issue? Which Eighth Amendment principles apply then? These questions bear peculiar significance to Texas criminal procedure and require clarification from the judiciary and eventually the United States Supreme Court. There appears to be a real gap between the protections afforded to a criminal defendant against whom a life sentence is sought and those afforded to a criminal defendant against whom the state seeks the death penalty. As the United States Supreme Court has prescribed little, it is unclear if the Eighth Amendment has much to say regarding the arbitrary fashion in which defendants have been sentenced to life. Even if a democratically enacted positive law mandates that arbitrariness, the Eighth Amendment acts as a trump card against such arbitrariness, and it is incumbent on the courts to pronounce that judgment. We should not be complacent in the realization that these defendants have received *only* life imprisonment rather than capital punishment, for "resort to the [latter] must be reserved for the worst of crimes and limited in its instances of application."[10]

In capital cases, Texas law (specifically article 37.071, section 1 of the Texas Code of Criminal Procedure) commands the trial judge to sentence the defendant to life imprisonment or to death. These are the only options. Texas's statutory scheme creates no room whatsoever to graduate or proportion the sentence to the specific crime, as *Weems v. United States*[11] requires. Ordinarily, consideration of the "crime" should be informed by aggravating and mitigating factors, including a defendant's relative youth, mental retardation, and brain damage vel non. Texas law prescribes no such consideration once death has been ruled out as a penalty option and permits the trial judge or jury no opportunity

8. *See Roper*, 543 U.S. at 568 ("There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission.").

9. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

10. *Kennedy*, 128 S. Ct. at 2665.

11. Weems v. United States, 217 U.S. 349, 367 (1910).

to consider the evidence supporting mitigation to scale down the punishment; such an omission would run afoul of countless Supreme Court precedents in *death penalty* cases.[12] The narrow Eighth Amendment issue is about *who* will make this determination, rather than *what* the ideal determination is. In total, our focus should be on *who* made the determination to impose a life sentence, whether that authority was empowered to *consider* any mitigating factors, and what this means for noncapital sentences anywhere in the United States. Exactly how much arbitrariness in sentencing can governments get away with?

Our recent case, *Guerrero v. Texas*,[13] presented to the United States Supreme Court the question: Is the Texas law

> unconstitutionally arbitrary in violation of the Eighth and Fourteenth Amendments to the United States Constitution for precluding, *ex ante*, all individualized judicial consideration at sentencing and compelling the trial judge to sentence [Guerrero] to life imprisonment, irrespective of pertinent mitigating factors, such as his history of mental retardation *and* brain injury?[14]

There is an imminent need for the Supreme Court to articulate the proper degree of scrutiny when evaluating the Eighth Amendment constitutionality of *life* sentences. To establish this proposition, we proceed in several doctrinal and pragmatic steps.

In Part I, we trace the facts of our case. We also examine the process of Supreme Court deliberation as well as the Court's Eighth Amendment precedents, both procedural and substantive. We then look at these precedents and explain why our issue is more procedural than substantive, and strategically so. Federal courts are reluctant to second-guess state criminal law determinations about the substantive issue of what constitutes the ideal punishment. Courts are more comfortable with making procedural perfections in the law tethered to clear constitutional guidance. Thus, the defendant is better off making a procedural

12. *Compare* TEX. PENAL CODE ANN. § 12.31(a) (Vernon Supp. 2009) (outlining the two punishments for a capital felony: life in prison or death), *with* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1 (Vernon 2006 & Supp. 2009) (mandating that an accused receive a life sentence without parole when convicted of a capital felony for which the state opts not to seek the death penalty).

13. Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

14. Petition for Writ of Certiorari at ii, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

argument focusing on the judge's or jury's entitlement to determine the proper sentence. The question is one of the judge's or jury's entitlement to sentence rather than divining some form of substantive determination of what that sentence should be.

In Part II, we ask if a death sentence is different enough from a life sentence to justify the omission of certain constitutionally required safeguards from life imprisonment cases. By and large, the Constitution makes no distinction between the standards that apply to death penalty cases and those that apply to other criminal cases. Justice Kennedy's opinion concurring in part and concurring in the judgment in *Harmelin v. Michigan*[15] stated that a "narrow proportionality" principle applied to life imprisonment cases.[16] Justice Kennedy contended that, had the case involved the death penalty, stricter and more searching judicial scrutiny would have been appropriate.[17] So did Justice Scalia, and the Court was unanimous in this outlook.[18]

Justice Kennedy's *Harmelin* views, joined by Justice O'Connor and Justice Souter, constitute the "holding of the Court" because these views are the narrowest prevailing ones;[19] Justice Scalia's opinion, the part that was for the Court, did indeed reject the argument that the Eighth Amendment contains a mitigating-factors requirement for non-death penalty cases.[20] But this was in the abstract and concerned the comparatively weaker mitigator

15. Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion).

16. *Id.* at 996 (Kennedy, J., concurring in part and concurring in the judgment).

17. *Id.* at 1000 ("[B]ecause the penalty of death differs from all other forms of criminal punishment, the objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence." (citations and internal quotation marks omitted)).

18. *See id.* at 995 (opinion of Scalia, J.) ("Petitioner's 'required mitigation' claim, like his proportionality claim, does find support in our death penalty jurisprudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is 'appropriate'—whether or not the sentence is 'grossly disproportionate.'"); *id.* at 1013 (White, J., dissenting) ("Not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible."); *id.* at 1027 (Marshall, J., dissenting) ("'[B]ecause of the uniqueness of the death penalty,' the Eighth Amendment requires comparative proportionality review of capital sentences." (citing Gregg v. Georgia, 428 U.S. 153, 188 (1976))).

19. Marks v. United States, 430 U.S. 188, 193 (1977) ("[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (quoting *Gregg*, 428 U.S. at 169 n.15)).

20. *Harmelin*, 501 U.S. at 994–96.

that the *Harmelin* petitioner "had no prior felony convictions."[21] Certainly, there is a tangible difference in culpability effectuated by the lack of prior felony convictions (weak mitigator) vis-à-vis mental retardation and brain damage (strong mitigator).[22] Moreover, the Supreme Court's decisions in *Atkins v. Virginia*[23] and *Ford v. Wainwright*[24] forbid the execution of mentally retarded[25] and insane defendants,[26] respectively. They do not prohibit life sentences in those situations, but they do suggest that these conditions diminish a defendant's culpability.[27]

Part III ventures into the reasons that the issue must be resolved now. Some pragmatic factors must be addressed. While it is true that 127,677 persons were serving life sentences in the nation's state and federal prisons in 2003,[28] strict habeas corpus and retroactivity rules ensure that only the most meritorious cases will be reviewed.[29] Moreover, mental retardation and brain damage go to the heart of culpability, and mandating jury consideration of *these* factors does not mean less relevant factors must also be heeded. Therefore, a Supreme Court determination finding such an Eighth Amendment procedural right will not open up the floodgates.

This is important for courts to know since "revolutionary decision[s] [could] ... impose[] enormous costs on the criminal justice system, and society as a whole, by requiring release or

21. *See id.* at 994 (evaluating the petitioner's claim that "it is 'cruel and unusual' to impose a mandatory sentence of such severity, without any consideration of so-called mitigating factors such as, in his case, the fact that he had no prior felony convictions").

22. *See* Jeffery L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 637–83 (2004) (evaluating various "disease theory factors" including, among others, age, agoraphobia, insanity, and brain damage/head injury); *see also* discussion *infra* Part III.A.

23. Atkins v. Virginia, 536 U.S. 304 (2002).

24. Ford v. Wainwright, 477 U.S. 399 (1986).

25. *Atkins*, 536 U.S. at 321.

26. *Ford*, 477 U.S. at 417.

27. *See Atkins*, 536 U.S. at 321 (stating that execution of mentally retarded criminals does not advance the goals of the death penalty); *Ford*, 477 U.S. at 417 (characterizing as "abhorrent" the taking of the life of a person with mental illness where that person cannot comprehend the reason for the penalty).

28. MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 11 (2004), *available at* http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/lifers_20040511/lifers.pdf (last visited Dec. 28, 2009).

29. *See id.* at 1 (observing that "policy changes beginning in the 1970s" have resulted in more stringent rules for sentencing).

retrials of thousands of already convicted individuals."[30] This is possible "even when there was no realistic doubt about the defendant's guilt or the passage of time would have made a retrial all but impossible."[31] Ironically, then, were the Supreme Court to see such an avalanche as an inevitable result of its decision, it "would probably never have issued a [revolutionary] ruling . . . in the first place—or, at least, would be unlikely to do so ever again."[32]

In any case, because the number of individuals serving life sentences has only increased over the years (the number of lifers in prison rose by 83% between 1992 and 2003),[33] avoiding the issue now for fear of a criminal justice "avalanche" could keep the constitutional question unresolved forever. Therefore, whatever the tension between practical administrability and the pursuit of justice, this issue is not plagued by such problems.[34] The 2007–2009 economic recession's consequential budget cuts have left public defenders' offices strapped for resources and have not aided the cause of fair trials.[35] Rather than biding its time for a more

30. Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 925 (2006); *see* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 100 (1965) (balancing practical administrability and the cause of justice); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CAL. L. REV. 1677, 1697 (2007) ("[F]lexibility in the law of remedies may allow the Court to grant that a particular operative proposition did exist at the time of trial, and hence should govern on collateral review, but still decline to overturn a state judgment in appropriate cases. This remedial calculus would be the place to consider whether the operative proposition relates to the reliability of the verdict, as well as other factors such as the state's reliance interest and the impact on the criminal justice system.").

31. Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 925 (2006).

32. *Id.*

33. MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 11 (2004), *available at* http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/lifers_20040511/lifers.pdf (last visited Dec. 28, 2009).

34. *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (The Legal Classics Library 1982) (1921) (warning against the use of case law as authority for that which "may seem to follow logically from it" and acknowledging that "the law is not always logical at all").

35. *Cf. Public Defenders Face Layoffs Across USA*, USA TODAY, June 15, 2009, *available at* http://www.usatoday.com/news/nation/2009-06-15-lawyers-poor-layoffs_N.htm ("Lawyers for the poor, who say they already are stretched to the breaking point by huge caseloads and dwindling staff, face layoffs across the United States as local governments

favorable climate, the Supreme Court has every reason to resolve the issue now. Part IV concludes.

II. THE CASE OF JUAN CARLOS GUERRERO, JR., AND ITS IMPLICATIONS FOR TEXAS DEFENDANTS: *GUERRERO V. TEXAS*

A. *Seeking Review of Our Case in the United States Supreme Court*

Juan Carlos Guerrero, Jr., was convicted under Texas law of the capital murder of a three-year-old child.[36] Guerrero is mentally retarded and suffers from moderate traumatic brain injury. His mental intelligence quotient (IQ) age is assessed between ten and twelve years of age. The facts of his case—including "[the child's mother] Angela pleaded with [Guerrero] to stop, but he continued, and eventually began slamming [the child D.E.'s] head against a wall. [D.E.,] according to Angela, then 'passed out,' and his 'eyes rolled back to his head'"[37]—are gruesome. Guerrero was represented at trial before the 400th District Court of Fort Bend County and on appeal by Mr. Stephen Doggett. As counsel, Mr. Doggett preserved possible legal grounds for appeal.[38] Counsel also distinguished between legal incompetency to stand trial and the right to be heard concerning the mitigating role of mental retardation and brain injury on culpability.[39]

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slash spending in hard economic times.").

36. *See* TEX. PENAL CODE ANN. § 19.03(a)(8) (Vernon Supp. 2009) (stating that a person commits capital murder if he "murders an individual under six years of age").

37. Petition for Writ of Certiorari at 2–3, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

38. Along with supplying psychiatrist data pointing to the fact that Juan Guerrero, Jr. suffered from moderate brain injury, Guerrero's trial counsel argued that people with mental retardation are less morally culpable because of their limitations. They are more likely to commit crimes because of their limitations, they are more likely to get caught, and they are more likely to have problems putting on a defense because of their limitations. Brief of Appellant at 15, Guerrero v. State, No. 13-15-00709-CR (Tex. App.—Corpus Christi Mar. 13, 2008) (mem. op., not designated for publication), *cert. denied*, 129 S. Ct. 2740 (June 1, 2009) (mem.).

39. Stephen Doggett argued during sentencing proceedings:

> [I]f Mr. Guerrero is found guilty of capital murder, . . . we're objecting to the imposition of an automatic life sentence without a sentencing hearing.
>
> And the bases for our objection are set out in *Atkins vs. Virginia*. Mr. Guerrero is mentally retarded. We think it's a violation of the Constitutional provisions that I've set out in the motion to automatically impose a life sentence on a mentally retarded individual, and we're arguing that, based on the extension of the *Atkins* decision,

The Texas Defender Service (TDS) joined the case and elected to support Guerrero's appeals to the Thirteenth Court of Appeals of Texas, an intermediate state appellate court; the Texas Court of Criminal Appeals, the state's highest court with criminal appellate jurisdiction; and the Supreme Court of the United States. Guerrero challenged the application of article 37.071, section 1 of the Texas Code of Criminal Procedure to his case as unconstitutionally rigid and random.[40] Counsel deliberately chose to facially attack this democratically enacted criminal law provision. Because this particular genre of cases is unprecedented, the efforts must be measured and gradual to give society and the legislature a proper chance to absorb and respond to the developments. Since the heyday of Chief Justice Earl Warren's progressive Supreme Court, courts have not relished society's backlash and have developed a built-in mechanism to go slowly.[41]

Under article 37.071, section 1, in cases where "the state does not seek the death penalty" for capital murder, the defendant

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which says it's cruel and unusual punishment to execute—to allow mentally retarded people to be subject to the death penalty and all of the reasons cited in *Atkins*, the disabilities that mentally retarded people have in their life skills and in their abilities to assist their counsel, even if it doesn't rise to the level of incompetency, it puts them at a disadvantage and makes it more likely for them to be found guilty. For those reasons, we object to that process.

We propose that if Mr. Guerrero is found guilty of capital murder, that rather than impose an automatic life sentence, that the jury not be discharged, and that evidence be presented to the jury to allow them to assess punishment anywhere in the first-degree felony punishment range.

Petition for Writ of Certiorari at 4, *Guerrero* 129 S. Ct. 2740 (No. 08-9534).

40. *See generally* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1 (Vernon 2006 & Supp. 2009) (providing for a sentence of life in prison without parole for "a capital felony case in which the state does not seek the death penalty").

41. *See, e.g.*, Dist. Att'ys Office for the Third Jud. Dist. v. Osborne, 129 S. Ct. 2308, 2341 (2009) (Souter, J., dissenting). Justice Souter pointed out that

[c]hanges in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional.

Id.

automatically receives life imprisonment.[42] The argument runs that just as a standardless jury determination is unconstitutional under the Eighth Amendment, so too is one that allows the judge or jury no room to consider the defendant's mental retardation and moderate traumatic brain injury.[43] Guerrero's case brings to the forefront some difficult questions of constitutional law: What, if *any*, standards guide the Eighth Amendment analysis of the constitutionality of provisions similar to article 37.071, section 1? Which tier of scrutiny applies here—strict, intermediate, or rational basis?

Premising his case on the Eighth and Fourteenth Amendments to the United States Constitution, Guerrero challenged his *automatic* life sentence under Texas law for first-degree murder. Such a sentence, imposed regardless of mitigating factors, is mandatory under the governing Texas statute whenever "the state does not seek the death penalty."[44] When the Texas courts denied his state and federal law arguments, Guerrero went before the United States Supreme Court. In his case, he argued that the jury should have been allowed to impose a penalty within the prescribed range for first-degree felony punishment: between five and ninety-nine years.[45] The questions presented in the petition are interesting because they gave the Supreme Court an occasion to state if complete uniformity, giving no weight *at all* to mitigating factors such as mental retardation and brain injury, is constitutionally permissible for life sentences. Such a rule would contravene Supreme Court decisional law in death penalty cases.[46]

Our petition for writ of certiorari to the United States Supreme Court challenged, on Eighth Amendment grounds, the application of article 37.071, section 1 to Guerrero's case.[47] This statute

42. TEX. CODE CRIM. PROC. ANN. art 37.071, § 1 (Vernon 2006 & Supp. 2009).

43. *See* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (plurality opinion) (noting the death penalty is considered "cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is 'appropriate'").

44. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1 (Vernon 2006 & Supp. 2009).

45. TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 2009).

46. *See* Brief of Appellant at 8, Guerrero v. State, No. 13-15-00709-CR (Tex. App.—Corpus Christi Mar. 13, 2008) (mem. op., not designated for publication), *cert. denied*, 129 S. Ct. 2740 (2009) (mem.) (arguing *Atkins* and *Roper* should be extended to allow mitigating evidence of mental retardation to be introduced and to allow the jury to consider a sentence of less than life in prison).

47. Much of this Article is inspired, verbatim at times, by our certiorari petition in *Guerrero*.

required the trial judge to sentence Guerrero to life imprisonment for capital murder if "the state [did] not seek the death penalty."[48] Since the state had taken the death penalty off the table, Guerrero was automatically sentenced to life imprisonment. No individualized consideration or judicial discretion is available under this binary application of article 37.071, section 1. Thus, Guerrero's combined history of mental retardation and moderate traumatic brain injury could serve no mitigating role in "graduat[ing] and proportion[ing]"[49] his punishment to the crime committed, as the judge's hands were tied. Guerrero, theoretically, is eligible for parole consideration forty calendar years from the date that he began serving his sentence.[50] Candidly speaking, there is, of course, a diminished chance that Guerrero, given his health status, will survive forty years.

The scale of assessing a reasonable punishment in Guerrero's case was tipped totally toward uniformity, giving no weight at all to individualized consideration. The Supreme Court has maintained that "[death] is different in both its severity and its finality" from all other sentences.[51] Our petition argued that *Harmelin*'s rule pertains to substantive assessment of proportionality (and assumes that the mitigating factors would be considered) and does not cure an error so structural. The petition also gave the Supreme Court an opportunity to spell out what structural constitutional safeguards must attach to a process whereby a judge or jury sentences the defendant to life imprisonment. We presented two core questions for review:

> 1. Is . . . Art. 37.071, Sec.1, as applied to this case, unconstitutionally arbitrary in violation of the Eighth and Fourteenth Amendments to the United States Constitution for precluding, *ex ante*, all individualized judicial consideration at sentencing and compelling the trial judge to sentence [Guerrero] to life imprisonment,

48. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1 (Vernon 2006 & Supp. 2009) (mandating that "the judge shall sentence the defendant to life imprisonment without parole" in such a case).

49. *Cf.* Weems v. United States, 217 U.S. 349, 367 (1910) (stating also "that it is a precept of justice" that punishment is proportional to the offense).

50. *See* Act of Apr. 17, 1997, 75th Leg., R.S., ch. 165, § 12.01, 1997 Tex. Gen. Laws 425, 425 (amended 1999, 2005, 2009) (current version at TEX. GOV'T CODE ANN. § 508.145 (Vernon Supp. 2009)) (providing that an inmate serving a life sentence for a capital felony is eligible for parole forty years after his prison term has begun).

51. Gardner v. Florida, 430 U.S. 349, 357–58 (1977).

> irrespective of pertinent mitigating factors, such as his history of mental retardation *and* brain injury?
>
> 2. Is [Guerrero]'s punishment, an automatic life sentence, irrespective of pertinent mitigating factors, such as his history of mental retardation *and* brain injury, sufficiently different from capital punishment under the Eighth and Fourteenth Amendments . . . to permit the sentencing procedure applied to [Guerrero]'s case and noted in Question 1?[52]

Mental retardation and moderate traumatic brain injury, indeed, are most serious mitigating factors that diminish the offender's culpability and, thus, must be considered ingredients of the calculus that decides a defendant's punishment. Article 37.071, section 1, however, *mandates* life imprisonment or imposition of the death penalty upon all persons convicted of capital murder; section 1 does not allow the jury to consider punishment within the first-degree felony range.[53] Texas law already contains the mechanism for a relatively sophisticated evaluation of the proper first-degree felony sentence by a judge or jury: "imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years."[54] The statute takes no mitigating factors into account for a punishment that is "graduated and proportioned to [the] offense"[55] and consequently raises the question of whether the individual humanity and dignity of the person is sufficiently considered in sentencing someone to life imprisonment. The United States Supreme Court has understood the Eighth Amendment to "reaffirm[] the duty of the government to respect the dignity of all persons" "[b]y protecting even those convicted of heinous crimes."[56]

The Thirteenth Court of Appeals of Texas acknowledged that Texas law dictates in Guerrero's case the mandatory imposition of life imprisonment. It also acknowledged that the United States Supreme Court's instruction that the death penalty is different

52. Petition for Writ of Certiorari at ii, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

53. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 1 (Vernon 2006 & Supp. 2009) (vesting the judge with the duty to "sentence the defendant to life imprisonment without parole" when the "defendant is found guilty in a capital felony case in which the state does not seek the death penalty").

54. TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 2009).

55. Weems v. United States, 217 U.S. 349, 367 (1910).

56. Roper v. Simmons, 543 U.S. 551, 560 (2005).

from all other punishments meted out by legislatures and courts implies that not even a mentally retarded and brain-damaged person like Guerrero is constitutionally entitled to have those factors considered.[57] The Texas Court of Criminal Appeals denied our petition for review. Urging the Supreme Court to decide the issue, we petitioned for certiorari.[58] On June 1, 2009, the Supreme Court denied certiorari.[59] Although the Court usually does not supply reasons for denials of certiorari, one might speculate that the Court wishes for the issue to percolate in the courts and legislative-judicial conversations below. This Article is intended to further that discourse. By discussing the reasoning behind particular choices we made in seeking certiorari, perhaps we will improve the next litigant's chances of winning review.

We emphasize the process of drawing the Supreme Court's attention to resolve questions integral to the nation's criminal constitutional law. We explain the rules of the Supreme Court pertaining to the process of drafting certiorari petitions, the process of persuading the Supreme Court to see beyond intercircuit conflict and into contradictory state court judgments, and even into petitions that are singular and *sui generis* in importance.[60] Even though judicial modesty has occasioned comments such as "[w]e are not final because we are infallible, but we are infallible only because we are final,"[61] the truth is that "[i]t is emphatically the province and duty of the judicial department, to say what the law is."[62] As the "one Supreme Court" in which

57. *See* Guerrero v. State, No. 13-05-00709-CR, 2008 WL 5179740, at *2 n.1, *3 (Tex. App.—Corpus Christi Mar. 13, 2008) (mem. op., not designated for publication) (recognizing the Supreme Court's decision to require individualized sentencing only for death penalty cases and finding Guerrero's argument to extend *Roper* unpersuasive), *cert. denied*, 129 S. Ct. 2740 (2009) (mem.).

58. Among all records, including texts of transcripts, decisions, and orders issued below, Guerrero's certiorari petition submitted the results of an electroencephalography (EEG), which was included in the bill of exceptions to the Thirteenth Court of Appeals. Petition for Writ of Certiorari at 6, 12, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

59. *Guerrero*, 129 S. Ct. 2740.

60. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (intervening to take a case from Florida that would decide the national presidential election); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (addressing the constitutionality of the President's nationalization of steel mills).

61. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring), *abrogated on other grounds by* Townsend v. Sain, 372 U.S. 293, 309–10, 312–13 (1963).

62. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the "judicial power of the United States shall be vested,"[63] the work of the Court is a grand and precedent-setting enterprise. In the words of one commentator:

> Whatever the institution of judicial review was originally thought to be, there is little doubt about what it has become: a powerful tool in the hands of a Court that has assigned to itself the job of policing our democracy's deepest structures: the allocation of power among the branches of the national government and between the federal government and the states. Of course, the Constitution itself gave us the basic outlines, the civics textbook's view of these fundamental arrangements. Congress then filled in some of the blanks. But it's not until we step back and look through the lens of judicial review that we become aware of how much of American government as it currently functions has been informed and shaped by judge-made law . . . .[64]

What does "certiorari" mean? Certiorari is the discretionary writ through which the United States Supreme Court reviews cases raising questions of federal constitutional or statutory law.[65] Federal law, as codified at 28 U.S.C. § 1254, empowers the Supreme Court to review any case in the United States Courts of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case."[66] Similarly, the Court is empowered, by 28 U.S.C. § 1257(a), only to review "[f]inal judgments . . . rendered by the highest court of a State in which a

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63. U.S. CONST. art. III, § 1. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." *Id.*

64. Linda Greenhouse, *"Because We Are Final": Judicial Review Two Hundred Years After* Marbury, 148 PROC. OF THE AM. PHIL. SOC'Y 38, 39 (2004); *see also* PAUL H. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 169 (1997) ("The Constitution does not found judicial review; rather, judicial review invents the Constitution.").

65. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 392–93 (2004). This notion of certiorari morphed from pre-1789 Great Britain, where it was used by the King's Bench to assert control over lower courts. *See* Jerome J. Hanus, *Certiorari and Policy-Making in English History*, 12 AM. J. LEGAL HIST. 63, 68, 76 (1968) (outlining the origins of the "royal writ" in England and the role of the King's Bench in the issuance of writs of certiorari, mandamus, and prohibition); *see also* Whitney v. Dick, 202 U.S. 132, 139 (1906) (stating that common law in the United States recognized certiorari "as an auxiliary process only, to supply imperfections in the record of a case already before it").

66. 28 U.S.C. § 1254(1) (2006).

decision could be had" if those judgments implicate questions of federal law[67] Since our case involved the Eighth and Fourteenth Amendments to the United States Constitution, § 1257(a) gave us the prerogative to petition the Court for certiorari within the prescribed ninety-day limit from the day that the Texas Court of Criminal Appeals denied Mr. Guerrero's petition for discretionary review.[68]

We had to know our audience well. Our audience was the Supreme Court, four members of which are needed for certiorari to be granted, as Congress largely allowed through the Judiciary Act of 1925.[69] To win on the merits, it is necessary to convince five of the nine members, a majority. Former President and then-Chief Justice William H. Taft, who successfully lobbied for various judicial reforms including a discretionary application of certiorari for the Supreme Court, believed that the Supreme Court, as distinct from a federal or state appellate court, must retain "the last word on every important issue under the Constitution and the statutes of the United States."[70] Furthermore, a Supreme Court should not be obligated to weigh justice among contending parties. "They have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy."[71]

Taft did not want to make the Supreme Court into a tribunal for error corrections; it was for recognizing what is governing law so that the lower courts (those "two courts" below) could correct their own errors.[72] Of course, because the Constitution created

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67. *Id.* § 1257(a).

68. Petition for Writ of Certiorari at app. I, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

69. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.); *see* Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 1 (2008) ("[I]n 2004, the Supreme Court granted a mere 85 certiorari petitions out of the 8,593 before it. This is a far cry from the early days of the Republic when Chief Justice John Marshall unabashedly declared that the Supreme Court had 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.'" (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.))).

70. William Howard Taft, *Three Needed Steps of Progress*, A.B.A. J., Jan. 1922, at 34, 35.

71. *Id.*

72. *Id.* at 35–36.

this "one Supreme Court" empowered with the final say as to what the Constitution means, lower courts and everyone in the officialdom was bound by the Supreme Court's pronouncements. That is *Marbury* 101.[73]

Taft believed that there must be

> some method . . . by which the cases brought before [the] Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and the statutes of the United States and on all important questions of general law with respect to which there is a lack of uniformity in the intermediate Federal courts of appeal.[74]

In an address given to the Bar Association of Chicago in 1921, Taft commented on the proposal: "[The Supreme Court] thus will remain the supreme revisory tribunal, but will be given sufficient control of the number and character of the cases which come before it, to enable it to remain the one Supreme Court and to keep up with its work."[75] The question still lingers: Is the Supreme Court truly a reactive institution? There is some tension between the perception of a common law Supreme Court that is agenda-setting and largely retains the final word and a Court that awaits cases fitting certain parameters before strategically deciding which cases should receive the benefit of the Court's limited resources.[76] We should not ignore that individual members of the Court might postpone deciding an issue until the environment is ripe for a favorable resolution. The tension, while undeniable, is not irreconcilable. The Supreme Court can be characterized both

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73. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (exercising judicial review of government action). Although *Marbury* was not the first time the Supreme Court exercised judicial review, it was the first time the Court invalidated a law or government action as contrary to the Constitution. *See generally* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 718 (1977) (Rehnquist, J., dissenting) ("Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants . . . reproduced in the Reports of this Court where anyone can see it—devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State [James] Madison, who evidently made no appearance.").

74. William Howard Taft, *Three Needed Steps of Progress*, A.B.A. J., Jan. 1922, at 34, 35.

75. *Id.* at 34, 36.

76. *See generally* Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853, 853–54 (1996) ("[T]he expansion of issues at the merits as an inevitable (and perhaps even necessary) part of formulating an agenda in the high court.").

ways.

First, its discretionary docket enables the Court to resolve the most urgent and imperative legal issues facing contemporary society. This "larger process" of "establishing an agenda" is a natural component of the Supreme Court's "sequential mode of operation in which cases are gradually siphoned off, as the [J]ustices make increasingly more exact judgments at each successive phase."[77] However, on occasion the Supreme Court has, indeed, gone beyond what Justice John Paul Stevens has referred to as respect for the "adversary process"[78] and ordered argument over or considered issues not presented by the parties themselves. From the seminal case establishing judicial review, *Marbury v. Madison*,[79] through *Patterson v. McLean Credit Union*,[80] the Court has taken this approach.[81] As late as 1978, more than half a century after the 1925 Act, Justice Thurgood Marshall explained that "[d]eciding not to decide is, of course, among the most important things done by the Supreme Court."[82]

Second, the United States Supreme Court is more restrained than many other common law courts of last resort. The Court observes strict limits regarding jurisdiction, standing, mootness, and its own roles both in the federal system and with respect to its coordinate branches.[83] As a result, the Court can decide only the cases brought to it via restrictive procedural routes, unlike, for example, the Supreme Court of India under the basic structure

77. *Id.*

78. *See* Patterson v. McLean Credit Union, 485 U.S. 617, 623 (1988) (per curiam) (Stevens, J., dissenting from an order directing re-argument) ("'[T]he adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.'" (quoting New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from an order directing re-argument))).

79. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

80. *Patterson*, 485 U.S. 617.

81. *See id.* at 617 (requiring parties to brief and argue whether a prior decision by the Court concerning its interpretation of a statute should be reconsidered); *Marbury*, 5 U.S. (1 Cranch) at 154, 177–80 (holding Section 13 of the Judiciary Act of 1789 unconstitutional despite the fact that the constitutionality of the statute was not an issue briefed or argued by either party to the case).

82. THURGOOD MARSHALL, *Remarks at the Second Circuit Judicial Conference* (Sept. 8, 1978), *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 174, 177 (Mark V. Tushnet ed., 2001).

83. *See* Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853, 854 (1996) (explaining that issue broadening may be the Justices' method for "realiz[ing] their policy preferences" due to the limitations placed on the types of cases the Court may hear).

doctrine or Canada under the pre-1982 Implied Bill of Rights and the British North America Act of 1867 (BNA).[84] Indeed, since the inception of its discretionary docket the proportion of cases (from the pool of petitions filed) in which the United States Supreme Court has granted certiorari has decreased.[85] The United States Supreme Court generally behaves abstemiously with specific issues before the lower courts have sifted through them, reaching conflicting results through divergent paths below.

"[B]ecause the justices are unable to create cases and are bound to resolve only those conflicts brought before them,"[86] certain studies suggest that this "issue expansion" (broadening the scope of their decisions) is the only way that justices may give voice to the issues requiring deliberation and disposition.[87] Indeed, it has been argued that

> in salient cases—cases in which we presume the justices care a good deal about the outcome—legal advocacy carries no empirical weight. In nonsalient cases, by contrast, the justices still follow their policy preferences, but because they are less resolute about case outcomes, they are more amenable to legal persuasion.[88]

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84. *See* Vivek Krishnamurthy, Note, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE J. INT'L L. 207, 207–08 (2009) (recognizing the similarities between the Canadian and Indian Supreme Courts and noting that the unwritten principles of their written constitutions have allowed both countries to amend their written constitutions and strike down legislation). Krishnamurthy further explained:

> Prior to 1982, Canadian constitutional law was more antique British than American, as Canada lacked a single, integrated document to which one could point as the big-C Constitution. Instead, Canadian constitutional law was a higgledy-piggledy of British and Canadian statutes, judicial decisions, and constitutional conventions dating back to the Magna Carta in which one statute was first among equals: the British North America Act, 1867 (BNA). By establishing and delimiting the powers of the federal and provincial governments, this British enactment set the terms for the union of the various British North American colonies into Canada as we know it between 1867 and 1949.

Id. at 212.

85. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 72–75 (4th ed. 2007) (providing data in Table 2-5 concerning petitions for certiorari filed with the Supreme Court from 1926 to 2004).

86. Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853, 854 (1996).

87. *Id.*

88. Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 260 (2007).

Agenda-building challenges the limits of the proper judicial role, but then the balance between building agendas and building doctrines is a tricky one. Some might argue that the Court, at the certiorari stage, thinks ahead to actual full-dress opinion writing and decision making. Prevailing wisdom is that "the justices . . . require knowledge regarding the implications that a decision will have on public policy. Not only do the justices value this information, but it has historically played a significant role in guiding case outcomes."[89]

Satisfying the interest factor is necessary but not definitively sufficient for certiorari to be granted.[90] Since the statistical odds are clearly against any petitioner seeking certiorari (approximately one percent of petitions are granted), more than just an interesting issue is required. But petitioning counsel's first course of action in any given petition for certiorari *is* to make the issues as interesting as the circumstances permit. Making an interesting argument, "a sophisticated lawyer will have greater opportunity to provide the justices with the kind of information that invites a favorable disposition toward his or her arguments."[91]

When confronted with a gamut of available legal positions to take, "some lawyers may employ heresthetic, adjusting their arguments strategically in order to appeal to one or more justices, while other lawyers may rely upon rhetoric and simply seek to persuade a justice as to the wisdom of their positions."[92] Either way, however, "interested litigators can use the law"—decisional law, comparative and international law, federal and state statutes, rules, or the United States Constitution—"'to condition, channel, and, in some instances, frustrate the process of legal change.'"[93]

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89. *Id.* at 262.

90. *See generally id.* (suggesting that a justice's interest in the argument or issue presented could play a factor in the justice's decision to hear and decide a case). With such a small number of cases selected by the Supreme Court for review, it seems likely that many factors play a role in the selection process. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 72–75 (4th ed. 2007) (listing in Table 2-5 the number of cases accepted for certiorari from 1926 to 2004).

91. Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 262 (2007).

92. *Id.*

93. *Id.* at 262 (quoting Joseph F. Kobylka, *The Mysterious Case of Establishment Clause Litigation: How Organized Litigants Foiled Legal Change*, *in* CONTEMPLATING COURTS 93, 94 (Lee Epstein ed., 1995)). McAtee and McGuire also noted, "This need for

In sum, it should come as no surprise that "good advocates will be prepared to offer arguments about the practical consequences of the Court's decisions as well as more abstract legal reasoning."[94]

Some members of the Supreme Court have encouraged that petitions and briefs include relevant material not traditionally covered by black letter law simply because the Court might otherwise "lack full information regarding available policy alternatives, and what information they do have cannot necessarily be regarded as reliable."[95] Our scientific studies about mental retardation and brain injury fell outside the black letter tradition. But they were relevant, perhaps more so than many cases we cited and the blackletter legal authority we invoked. The cases provided the linchpin to make a "legal" argument, but the "substance" supporting the logic of our assertions came from the studies.

The scientific research, recounted in Part II of this Article, showed that the culpability of Guerrero and similarly situated defendants is, in actuality, compromised by either condition and certainly when the two conditions coexist. It also showed that there is a limiting principle at work, and that the consideration of judicial economy should remain assured that the effects of the two medical conditions were so damaging to *these* defendants that the Court need not fear that all defendants could kick open the floodgates by challenging their own criminal punishments. Justice Stephen Breyer noted in a 2003 lecture the "chicken and egg" problem of referring to extralegal sources in legal petitions and briefs:

> The lawyers must do the basic work, finding, analyzing, and referring us to, th[e] material [concerning comparative law as well as respected scientific studies] .... The lawyers will do so only if they believe the courts are receptive .... The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers—barriers that exist between disciplines, so that the criminal law professor as well as the international law professor understands the international dimension

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reliable information is endemic to appellate courts, and it is scarcely a wonder that appellate lawyers serve a similar function in non-American courts as well." *Id.*

94. *Id.*

95. Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 261 (2007).

> of the subject; barriers that exist between the academy and the bar; barriers that exist between the international specialist and the trial or appellate lawyer.[96]

One cautionary note is that too interesting a question posed too early might be so novel as to not have properly developed in the lower courts, and thus will be unprepared for comprehensive deliberation in the Supreme Court.[97] There is also the scholarly and academic community to consider. Without some academic attention paid to the issues by such "doctrinal entrepreneurs"[98] the Supreme Court will not touch them. "Groups that pursue legal strategies must ... attempt to influence" the academic community.[99] Here, "[e]xperts, legal scholars, and other policy activists may be able to affect legal decision makers through law review articles in which they examine issues and propose solutions, and they develop legal arguments to support them."[100] Moreover, the issue's fascinating character might render it explosive and laden with disastrous potential either way it is decided, thus causing hesitation on the part of the Justices to grant certiorari only to generate a major decision for which the Court has not yet built up the country or its own jurisprudence. Thus, it seemed judicious to touch upon the merits to explain to the Court exactly what was at stake and what the likely real-world consequences were.

B. *Precedents Guiding the Eighth Amendment Inquiry*

In the wake of the Supreme Court's *Atkins* ruling in 2002, the weight accorded to mental retardation in criminal constitutional law cases underwent a watershed change. *Atkins* concerned the

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96. Stephen Breyer, Associate Justice, Supreme Court of the United States, Address at the American Society of International Law 97th Annual Meeting: The Supreme Court and the New International Law (Apr. 4, 2003), *available at* www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

97. *See* Lawrence Baum, *Courts and Policy Innovation*, *in* AMERICAN COURTS: A CRITICAL ASSESSMENT 413, 421 (John B. Gates & Charles A. Johnson eds., 1991) (discussing the process by which innovations become accepted court doctrine, including a discussion of the diffusion of an innovation—the process by which judges become familiar with a particular innovation).

98. *See id.* at 420 (describing "law professors and other legal scholars" as "doctrinal entrepreneurs" due to the high visibility of their publications in law journals).

99. C. Scott Peters, Note, *Getting Attention: The Effect of Legal Mobilization on the U.S. Supreme Court's Attention to Issues*, 60 POL. RES. Q. 561, 564 (2007).

100. *Id.*

Eighth Amendment proportionality challenge of a mildly mentally retarded death row inmate (with an IQ of fifty-nine) guilty of abduction and murder.[101] *Atkins* established the categorical rule that, at least for inmates with mental retardation, death is too excessive a punishment and unconstitutionally cruel and unusual under the Eighth Amendment.[102] As for the diminished culpability of mentally retarded offenders, *Atkins* specifically said:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.[103]

There is some conflict between *Atkins* and Justice Kennedy's 1991 opinion, concurring in part and concurring in the judgment, in *Harmelin v. Michigan*, which suggests a "narrow proportionality" analysis in noncapital cases.[104] It seems that neither Justice Kennedy nor the Court in *Harmelin* gave particular thought to mitigating factors as central to a culpability determination as are mental retardation and brain damage. The Court has never explained the Eighth Amendment's impact in noncapital cases involving a mentally retarded or brain-injured defendant with respect to the constitutionally acceptable balancing of aggravating and mitigating factors and the role that mitigating factors must play in the sentencing decision.

Defending our case from *Harmelin*'s tentacles became an overarching theme. We argued that *Harmelin* did not deal with procedural issues, such as serious punishment imposed *ex ante* the consideration of any mitigating factors, but only with substantive

101. Atkins v. Virginia, 536 U.S. 304, 307–09 (2002).

102. *See id.* at 321 ("[W]e therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

103. *Id.* at 306–07.

104. *See* Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (plurality opinion) (Kennedy, J., concurring in part and concurring in the judgment) (stating that the Eighth Amendment prohibition against grossly disproportionate sentences in comparison to crimes applies in both capital and noncapital cases).

proportionality.[105] The procedural concerns have instead been, we argued, painstakingly developed by the Supreme Court's death penalty jurisprudence since the days of *Furman* in 1972.[106] To the extent that *Harmelin* ignored or did not consider the crucial mitigating factors, it should be reconsidered. The "graduat[ing] and proportion[ing]" of defendants' punishments to their crimes, as required by *Weems*,[107] is a calculus that must take into consideration the relative culpability of the defendant. Again, beyond the death penalty context, the Court has announced only a "narrow proportionality" prescription, meaning that only the most grossly disproportionate sentences would be invalidated.[108] Clearer guidance is needed.

Sooner or later, courts must consider whether a defendant's history as a victim of mental retardation and moderate traumatic brain injury, as mitigating factors extant but unable to be considered for sentencing, render her non-individualized sentencing process unconstitutionally arbitrary under the Eighth and Fourteenth Amendments. The Supreme Court may clarify and guide the lower courts and state and federal legislatures regarding the role of strong mitigating factors in cases where the defendant is accorded life imprisonment as punishment. Over the past seven years since *Atkins* was decided, lower courts have

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105. *See* Petition for Writ of Certiorari at 15, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534) ("The assumptions underlying Justice Kennedy's separate controlling opinion in *Harmelin* ... concerned substantive proportionality analysis to dispense with punishment *after* a presumably satisfactory sentencing process"). *See generally Harmelin*, 501 U.S. 957 (considering whether mitigating factors must be considered in noncapital cases).

106. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (Douglas, Stewart & White, JJ., concurring) (focusing on the procedural flaws inherent in state death penalty schemes throughout the United States and concluding that the death penalty is imposed in an arbitrary, capricious, and often discriminatory manner). In *Furman*, the Court issued a per curiam opinion narrowly holding that "the imposition and carrying out of the death penalty in these cases [involving two petitioners] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239–40. However, the Court was deeply divided about the death penalty in the broader constitutional context, and the ultimate effect of the case was to suspend all executions in the United States for several years. *See generally* Am. Bar Ass'n, *Precedents*, A.B.A. J., Jan. 2008, at 72 (discussing the moratorium on the death penalty beginning in 1967 and its reinstitution following revision of state statutes).

107. *See* Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

108. *Harmelin*, 501 U.S. at 996–97 (Kennedy, J., concurring in part and concurring in the judgment).

lacked a uniform doctrinal prescription to decide not only death penalty cases but also cases involving life imprisonment. Those authorities, legislatures and courts alike, cannot with certitude fulfill *Atkins*'s promise, for *Atkins* left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'"[109] Lower courts and legislatures simply do not know, without further elaboration from the Supreme Court, what *Atkins*'s implications are in specific scenarios—including and most imminently, right after the death penalty, in the next severest case: life imprisonment.

Atkins alone does not necessarily compel a lower court to find that a mentally retarded defendant's sentence of life imprisonment violates the Eighth and Fourteenth Amendments. This argument is more nuanced. Given the Supreme Court's *Atkins*-based understanding that mental retardation significantly diminishes an offender's culpability[110] and its assertion in *Ford* (rendering it unconstitutional to execute the mentally insane),[111] sentencing procedures that make no room whatsoever for consideration of these mitigating factors during the sentencing phase but instead impose an automatic life sentence are, at the very least, constitutionally dubious.

Defendants in Juan Guerrero, Jr.'s position should benefit from the well-entrenched statement in *Atkins* that the status of mental retardation "do[es] not warrant an exemption from criminal sanctions, but ... [simply] diminish[es] their personal culpability."[112] The Court has a unique opportunity to clarify the extent to which the teaching of *Atkins* may be applied to the context of life imprisonment for defendants who are mentally retarded or brain damaged.[113] The sentencing body should

109. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).

110. *See id.* at 318 (discussing how the diminished capabilities of mentally retarded individuals diminish their culpability but do not exempt them from criminal penalties).

111. *See Ford*, 477 U.S. at 401 ("[T]his Court has never decided whether the Constitution forbids the practice [of executing the insane]. Today we keep faith with our common-law heritage in holding that it does."). *Ford* involved an Eighth Amendment challenge by a Florida death row inmate whose mental health declined to the point of paranoid schizophrenia. *Id.* at 402–03, 413–16.

112. *Atkins*, 536 U.S. at 318.

113. Only if either of these conditions taken alone is insufficient should the Court then assess whether the two, taken together, induce the conclusion that the total absence of the consideration of these mitigating factors (reducing the offender's appreciation of

possess the authority to consider such critical factors; in the absence of a statute providing that authority, the Eighth Amendment still does so.[114]

The United States Supreme Court's sentencing precedents started in *Weems*, and were later refined in *Robinson v. California*,[115] *Furman v. Georgia*, *Gregg v. Georgia*,[116] *Woodson v. North Carolina*,[117] *Lockett v. Ohio*,[118] *Rummel v. Estelle*,[119] *Solem v. Helm*,[120] *Atkins v. Virginia*, and *Roper v. Simmons*.[121] The *Atkins-Roper* line of precedent has already acknowledged that mental retardation, like youth, is a special case that diminishes the capacity of the offender to the extent that the offender cannot sufficiently appreciate the gravity or the consequences of the offense he committed.[122] The Court has stated or implied in *Atkins*, and again in *Roper*, that the failure of the defendant to realize these elements constitutes diminished capacity.[123] In both cases, that want of capacity led the Supreme Court to carve out an Eighth Amendment-based categorical exemption for mentally retarded (*Atkins*) and juvenile defendants (*Roper*).[124] The

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the gravity and consequences of his actions) effectuates an unconstitutionally arbitrary sentencing process.

114. *See* Johnson v. Texas, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting) ("[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances."). *See generally Atkins*, 536 U.S. at 318, 321 (recognizing that the Eighth Amendment prohibits the execution of a mentally retarded individual, in part, because of his diminished capacity and culpability); Weems v. United States, 217 U.S. 349, 357–58, 367 (1910) (suggesting, in a noncapital case, that the prohibition of cruel and unusual punishment requires punishments to be proportional to crimes).

115. Robinson v. California, 370 U.S. 660 (1962).

116. Gregg v. Georgia, 428 U.S. 153 (1976).

117. Woodson v. North Carolina, 428 U.S. 280 (1977).

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

119. Rummel v. Estelle, 445 U.S. 263 (1980).

120. Solem v. Helm, 463 U.S. 277 (1983).

121. Roper v. Simmons, 543 U.S. 551 (2005).

122. *Id.* at 569–70 (explaining that juveniles are different from adults because they possess traits such as vulnerability, immaturity, recklessness, and undeveloped character); Atkins v. Virginia, 536 U.S. 304, 318 (2002) ("[Mentally retarded individuals] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").

123. *See Roper*, 543 U.S. at 569–71 (recognizing that the traits of vulnerability, immaturity, recklessness, and undeveloped character diminish the culpability of juveniles); *Atkins*, 536 U.S. at 318 (stating that the deficiencies of individuals with mental retardation "diminish their personal culpability").

124. *Atkins*, 536 U.S. at 318; *Roper*, 543 U.S. at 570–71. The Supreme Court did not

Supreme Court's criminal constitutional law precedents obviously do weigh these mitigating factors.[125]

The precursor to these decisions was *Ford v. Wainwright*, where the Supreme Court interpreted the Eighth Amendment to encompass the common law rule that the insane may not be executed because such an execution serves little retributive value, cannot logically be seen as an example by others, does not work as a deterrent, and is repugnant to humanity.[126] A core inquiry left unanswered asks whether these legal and moral considerations making the death penalty unconstitutional for juveniles, mentally retarded, and insane persons supports the position that an *automatic* life sentence for a mentally retarded person is unconstitutional. Whereas the Court has said that this type of inquiry must be guided by "objective factors to the maximum possible extent,"[127] the Court has also preserved its constitutional duty to "bring [its] own judgment to bear on the question."[128]

Expressing no obvious distinction between life and death sentences, the Supreme Court in *Cooper v. Oklahoma*[129] unanimously declared unconstitutional under due process a state

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think it good enough to let trial authorities determine and regulate the tipping point at which some prejudice to the defendant became too much prejudice. *See, e.g.*, *Roper*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

125. *See, e.g.*, *Roper*, 543 U.S. at 569–70 (analyzing youth as a mitigating factor); *Atkins*, 536 U.S. at 318 (acknowledging mental retardation as a mitigating factor). Although *Roper* and *Atkins* dealt solely with the prohibition of the death penalty, the mitigating factors considered by the Court may have broader implications in the context of the Eighth Amendment, especially in reference to the next severest sentence available, life imprisonment. *But see* Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (plurality opinion) (holding that the Eighth Amendment does not require the consideration of mitigating factors, such as the fact that the defendant in that case had no prior convictions, in the context of a mandatory life sentence).

126. Ford v. Wainwright, 477 U.S. 399, 406–08 (1986) (interpreting the Eighth Amendment to preclude the execution of persons who are mentally insane).

127. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in the judgment) (insisting that proportionality review of sentences must be as objective as possible in light of traditional norms and pointing out the difficulty in objectively distinguishing sentence terms in the context of non-death penalty cases) (quoting Rummel v. Estelle, 445 U.S. 263, 274–75 (1980)).

128. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the death penalty under the Eighth Amendment.").

129. Cooper v. Oklahoma, 517 U.S. 348 (1996).

criminal law rule allowing the trial of a defendant who is more likely than not incompetent.[130] *Cooper* confronted a case where the State presumed the competence of the defendant to stand trial unless and until the defendant could prove to the contrary "by clear and convincing evidence."[131] In *Patterson v. New York*[132] the Court ruled that due process "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged" but that the "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required[.]"[133]

Recently, the Court in *Clark v. Arizona*[134] upheld a state *mens rea* rule allowing an insanity defense only if the defendant cannot tell right from wrong.[135] Prevailing scholarship on the subject maintains that

> [a]n offender who is unable to appreciate the criminality of his conduct or to conform it to the requirements of law—a common legal test for insanity and, if successfully proved, a complete defense to [conviction]—is hardly culpable [for his actions] in any ordinary sense of the concept. So too with diminished responsibility.[136]

Even if a defendant can distinguish right from wrong, mental retardation and brain injury might still reduce personal culpability.[137] The fact that a defendant is legally "competent" to be tried does not mean that the crucial facts reducing her culpability should not be weighed when sentencing is assessed.

C. *Scientific Studies Concerning Mental Retardation and Brain Injury*

The Supreme Court has not, to date, clarified the Eighth Amendment constitutional impact when the defendant has *both*

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130. *Id.* at 369.

131. *See id.* at 350 (citing OKLA. STAT. tit. 22 § 1175.4(B) (1991)) (addressing whether the heightened standard of proof required by the State violated the petitioner's due process rights).

132. Patterson v. New York, 432 U.S. 197 (1977).

133. *Id.* at 210.

134. Clark v. Arizona, 548 U.S. 735 (2006).

135. *Id.* at 742.

136. Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1249–50 (2007).

137. *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002) (stating that the deficiencies of individuals with mental retardation "diminish their personal culpability").

mental retardation *and* brain damage, nor has the Court clarified the extent to which aggravating factors must be negated by the overwhelming force of two such mitigating factors. "[R]espected professional organizations," among other institutions that "have addressed th[is] issue,"[138] present a broadly uniform picture of mental retardation's impact on culpability. The American Association on Mental Retardation (AAMR) states:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[139]

Since *Atkins*, the AAMR has revised its "mental retardation" definition to encompass "practical adaptive skills" and asserts that a "correct understanding of the condition of mental retardation requires a multidimensional and ecological approach that reflects the interaction of the individual and his or her environment, and the ... outcomes of that interaction related to independence, relationships, contributions, school and community participation, and personal well-being."[140]

The AAMR understands mental retardation to be present if the individual's IQ score is less than seventy.[141] In Guerrero's case, for instance, the attending psychologist, Dr. Rosin, diagnosed Guerrero's IQ score to be sixty-nine[142] and his mental IQ range to

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138. *Cf. id.* at 317 n.21 (appreciating the perspectives of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community" (quoting Thompson v. Oklahoma, 487 U.S. 815, 830 (1988))).

139. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (9th ed. 1992).

140. *Id.* at 48 (10th ed. 2002).

141. *See Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (noting that Texas applies the AAMR's definition of mental retardation, including its requirement of "significantly subaverage" general intellectual functioning); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION 41 (4th ed. 2000) (defining "[s]ignificantly subaverage intellectual functioning ... as an IQ of about [seventy] or below").

142. Brief of Appellant at 8, Guerrero v. State, No. 13-05-00709-CR (Tex. App.—Corpus Christi Mar. 13, 2008) (mem. op., not designated for publication), *cert. denied*, 129 S. Ct. 2740 (2009) (mem.).

be between ten and twelve years of age.[143] Helpfully, the *Atkins* Court noted that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70."[144] Dr. Rosin determined, based on Guerrero's history of severe academic difficulties and his inability to live independently or be self-supporting, that Guerrero suffered from mild mental retardation.[145] Guerrero's additional problems included "post traumatic stress disorder, a major mood disorder, and/or underlying organic brain damage," as the psychologist's administration of the WISC-IV test showed.[146] An electroencephalography (EEG) also showed an 85% probability that Guerrero had suffered traumatic head injury, and his severity index placed him in the middle of the scale.[147]

First, with respect to *mental retardation*, the American Psychiatric Association (APA) defines the condition in a manner similar to the AAMR:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at

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143. *Id.* at 9.

144. Atkins v. Virginia, 536 U.S. 304, 308 (2002).

145. Brief of Appellant at 8–9, *Guerrero*, No. 13-05-00709-CR.

146. *Id.* at 8–9. The Wechsler Intelligence Scale for Children—Fourth Edition is the most recent version of the "Wechsler scales for children." Marley W. Watkins, *Orthogonal Higher Order Structure of the Wechsler Intelligence Scale for Children—Fourth Edition*, 18 PSYCHOL. ASSESSMENT 123–25 (2006). The assessment is comprised of ten "core" and five "supplemental subtests" resulting in four index scores and "a single overall score, the full scale IQ (FSIQ), [which] represents general intellectual ability." *Id.*

147. A neurologist, Meyer Proler, M.D., assessed Juan Guerrero, Jr. He reported that

> [t]he EEG showed that [Petitioner] had a focal abnormality consisting of low frequency (or slow) waves in the left frontal-temporal region. Overt findings of this type usually indicate a lesion of destructive character, which suggests impaired function of the underlying region of the brain in this location. The left frontal-temporal regions [are] an important brain center involved in reasoning, reflection, language and impulse control. Individuals having a deficit in this area of the brain have difficulty learning. They have difficulty planning in detail for the future. They also are susceptible to making decisions based on immediate gratification regardless of long-term consequences. The analysis of [Petitioner's] EEG shows features that significantly deviate from the normal population and are strongly suggestive of a previous head injury. The probability of [Petitioner] having traumatic brain injury is 85%. His severity index is 4.84 (on a scale of 10). These results are consistent with moderate traumatic brain injury.

Id.

> least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.[148]

Accepting these conclusions, the *Atkins* Court explained:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.[149]

If "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial," and yet "[b]ecause of their impairments . . . have diminished capacities to understand and process information,"[150] and are of greater clinical susceptibility to yield to external or peer pressure, it is not inconsistent with *Clark*'s approval of the Arizona criminal rule that the only way in which incompetency to stand trial (on insanity grounds) may be proven is if the defendant is incapable of telling right from wrong.[151] Some potential for contradiction emerges here: respected organizations and *Atkins* itself acknowledge that mental retardation and insanity are not strictly coextensive

148. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION 41 (4th ed. 2000).

149. *Atkins*, 536 U.S. at 318.

150. *Id.*

151. *See* Clark v. Arizona, 548 U.S. 735, 747–53 (2006) (discussing the Arizona Legislature's dropping of one of the possible bases for pleading insanity and approval of the current Arizona law, which requires the one claiming insanity only to "demonstrate that 'at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of severity that [he] did not know the criminal act was wrong'" (quoting ARIZ. REV. STAT. ANN. § 13-502(A) (LexisNexis 2001) (modifications by the Court)).

conditions.[152] If, however, defense counsel in the lower courts do not sufficiently appreciate that in some cases their clients might be able to plead diminished capacity (with reference to culpability) while simultaneously being legally competent to stand trial, then the Supreme Court's nuanced and sophisticated line-drawing in reconciling *Clark*'s due process analysis with the Court's Eighth Amendment precedents will be in vain. Courts must make a point of clarifying this fine distinction in relation to the Eighth Amendment's scope of sentencing.

Second, the Court has yet to elaborate upon the constitutional impact on life imprisonment cases of *other* types of mental impairment, such as Guerrero's moderate traumatic brain injury, "which may make a person even more at risk of incompetency to stand trial or to waive [constitutional] rights [such as the privilege against self-incrimination], of being less responsible for [his] actions, or of being more likely to produce false confessions."[153] Neurological research recognizes the effect of moderate traumatic brain injury as causing "letharg[y] or stupo[r]" in the individual.[154] Moreover, studies concerning major depression and perceptions of anxiety following traumatic brain injury published in well-respected journals of psychiatry state:

> Major depression is a frequent complication of TBI that hinders a patient's recovery. It is associated with executive dysfunction, negative affect, and prominent anxiety symptoms. The neuropathological changes produced by TBI may lead to deactivation of lateral and dorsal prefrontal cortices and increased activation of ventral limbic and paralimbic structures including the amygdala.[155]

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152. *Cf. Atkins*, 536 U.S. at 318 (discussing the "consensus . . . about the relative culpability of mentally retarded offenders . . . ."). Justice Stevens, for the majority, explained that

> [m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id.

153. I. Bruce Frumkin, *Mental Retardation: A Primer to Cope with Expert Testimony*, 25 NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Fall 2003, at 6.

154. Jamshid Ghajar, *Traumatic Brain Injury*, 356 LANCET 923, 923 (2000). *See generally* D.M. Sosin et al., *Incidence of Mild and Moderate Brain Injury in the United States*, 10 BRAIN INJURY 47 (1996) (articulating the effects of moderate brain injury).

155. Ricardo E. Jorge et al., *Major Depression Following Traumatic Brain Injury*, 61

> [C]ognitive, emotional, and functional problems following [moderate traumatic brain] injuries are extensive and long lasting.[156]
>
> [B]oth mild and moderate patients exhibited significantly greater depression and anxiety/somatic concern than controls.[157]

The National Institute of Neurological Disorders and Stroke (constituent unit of the National Institutes of Health (NIH)) notes these impacts of modern traumatic brain injury:

> Traumatic brain injury (TBI), a form of acquired brain injury, occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue. Symptoms of a TBI can be mild, moderate, or severe, depending on the extent of the damage to the brain. ... A person with a moderate or severe TBI may show these same symptoms, but may also have a headache that gets worse or does not go away, repeated vomiting or nausea, convulsions or seizures, an inability to awaken from sleep, dilation of one or both pupils of the eyes, slurred speech, weakness or numbness in the extremities, loss of coordination, and increased confusion, restlessness, or agitation.[158]

There is an urgent need for the Supreme Court to evaluate whether the forced nonconsideration of either mental retardation or brain injury, or both, withstands the Eighth Amendment's requirement of individualized consideration in cases where the inevitability is that the defendant may automatically be sentenced to life.

ARCHIVES GEN. PSYCHIATRY 42 (2004).

156. Todd W. Vitaz et al., *Outcome Following Moderate Traumatic Brain Injury*, 60 SURGICAL NEUROLOGY 285 (2003).

157. F.C. Goldstein et al., *Cognitive and Neurobehavioral Functioning After Mild Versus Moderate Traumatic Brain Injury in Older Adults*, 7 J. INT'L NEUROPSYCHOLOGICAL SOC'Y 373 (2001).

158. National Institute of Neurological Disorders and Stroke, National Institutes of Health, NINDS Traumatic Brain Injury Information Page, *available at* http://www.ninds.nih.gov/disorders/tbi/tbi.htm (last visited Dec. 18, 2009).

III. EIGHTH AMENDMENT DECISIONAL LAW ESTABLISHED BY THE SUPREME COURT

A. *Situating* Harmelin*'s "Narrow Proportionality" Test in Proper Context*

There are competing constitutional commands, under the Eighth and Fourteenth Amendments, that certain punishments cannot be imposed in a manner that treats all defendants in that class uniformly, without regard to their individual circumstances, backgrounds, and crimes; at the same time, the process must be accountable to certain standards of uniformity.[159] A procedure of such grave importance to the defendant, whose liberty remains in doubt, must balance aggravating and mitigating factors with consistency.[160] In 1994, Justice Harry A. Blackmun famously renounced efforts to refine the balancing equation and declared that "[i]n the context of the death penalty . . . such jurisprudential maneuvers are wholly inappropriate."[161]

Atkins constitutionalized, indeed it revolutionized, the relationship between mental retardation and culpability.[162] Guerrero's case is about the procedural assessment of mitigating factors in determining the due sentence rather than, as in *Harmelin*, the substantive assessment of proportionality.[163] The Supreme Court may decide what *Harmelin*'s "narrow proportionality" test really means in specific cases.[164] Moreover, the

159. *See generally* Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion) (discussing the individualized capital-sentencing doctrine).

160. *See id.* at 994–95 (asserting that mitigating factors do not need to be considered in a mandatory prison sentence but do need to be considered in a sentence of death).

161. Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

162. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding "that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender" (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

163. *See Harmelin*, 501 U.S. at 962–65 (determining that individualized sentencing is not constitutionally required beyond capital cases).

164. *Cf. id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle."). Justice Kennedy pointed out that

> [the Court] first interpreted the Eighth Amendment to prohibit "'greatly disproportioned'" sentences in *Weems v. United States.* Since *Weems*, we have applied the principle in different contexts. Its most extensive application has been in death penalty cases. In *Coker v. Georgia*, we held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

Harmelin Court's rejection of a mitigating-factors requirement in non-death penalty cases does not address the constitutional outcome when the mitigating factor goes to the heart of culpability (such as mental retardation and brain damage) rather than, as in *Harmelin*, the petitioner's lack of a felonious prior-bad-acts record.[165] Until the issue is squarely resolved in light of *Atkins* and *Ford*, there is limited guidance in this area. This is not to deny that *Atkins*-type restrictions have hitherto never been applied beyond the capital punishment context (to invalidate a noncapital sentence), but that novelty and the lingering question mark is also what makes the issue ripe for constitutional review by the United States Supreme Court in the near future.

Courts eventually must grapple with the difficult task of distinguishing the sentencing procedures that satisfy Eighth and Fourteenth Amendment standards in *life imprisonment cases* but not in *death penalty cases*. Since the constitutional text twice only obliquely distinguishes "capital, or otherwise infamous crime[s],"[166] it is only judge-made common law that can explain treating life imprisonment sentences differently (in effect, more deferentially) from death sentences. That step, if taken by the Supreme Court, ought to be clear to the country.

Even if *Harmelin* were to receive dispositive emphasis, though, the issue is complex. In the way of evidence, *Harmelin* predates both *Atkins* (by eleven years) and *Roper* (by fourteen years) and postdates *Ford* by only five years. *Harmelin* is a result of the Court's myopia and inability in 1991 to predict where constitutional jurisprudence on diminished culpability for mentally retarded and/or brain-damaged defendants would stand in 2009. The Supreme Court itself has recognized that "no constitutional

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Id. (citations omitted). Justice Kennedy continued to delineate the Court's application of the proportionality doctrine, noting that it had most recently "held that a sentence of life imprisonment without the possibility of parole violated the Eighth Amendment because it was 'grossly disproportionate' to the crime" committed by the defendant in *Solem v. Helm*, 463 U.S. 277 (1983). *Id.* at 997 (citations omitted).

165. *See id.* at 994 (opinion of Scalia, J.) (evaluating the petitioner's claim that his mandatory life sentence violated the Eighth Amendment because it did not leave room for consideration of mitigating factors, such as his lack of prior felony convictions).

166. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

rule is immutable" and indeed "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision."[167] The background in which the controlling opinion in *Harmelin* operated consisted of *Stanford v. Kentucky*,[168] a case where the Court rejected the Eighth Amendment claims that imposition of the death penalty upon juveniles is unconstitutional.[169]

Roper v. Simmons, of course, reversed this conclusion.[170] The case involved an Eighth Amendment constitutional attack on Christopher Simmons's death sentence imposed upon him for premeditated murder, which he committed at the age of seventeen; for scientific and societal reasons, eighteen had to be the age of maturity, where criminal law drew the line for death sentences.[171] *Roper*, and earlier *Atkins*, fundamentally altered the way that constitutional law treated offenders with the relevant attributes, and changed into categorical rules what once had only been flexible guideposts.[172] The important realization here is that the *Ford-Atkins-Roper* line of decisions has adjusted the constitutional methodology of ascertaining when diminished culpability requires a categorical ban on certain punishments or, at the very least, requires fact-specific jury determination inclusive of the mitigating factors. As a juridical product of its times and containing the assumptions then prevailing, the *Harmelin* majority's espousal of only a "narrow proportionality principle" cannot be read to exclude the clearest and most objective mitigating factors—mental retardation and brain injury—attending an offender's degree and

167. Dickerson v. United States, 530 U.S. 428, 441 (2000).

168. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

169. *Id.* at 368.

170. *See generally Roper*, 543 U.S. at 578 (noting that "the Eighth and Fourteenth Amendments to the Constitution" forbid the execution of "a juvenile offender who was older than [fifteen] but younger than [eighteen] when he committed a capital crime").

171. *Id.* at 575.

172. *See Stanford*, 492 U.S. at 368 (noting that the imposition of the death penalty on an individual who was sixteen or seventeen years old at the time of the crime does not fall under the Eighth Amendment's ban against cruel and unusual punishment). *But see* Thompson v. Oklahoma, 487 U.S. 815, 821–23 (1988) (construing the Eighth Amendment to prohibit the death penalty for an individual who commits the crime when under the age of sixteen).

type of culpability.

Why does *Harmelin*'s holding not spell or forebode defeat for challenges like Guerrero's? *Harmelin* limits the kinds of non-death penalty punishments that will be considered ultra vires, but it does not bless inadequate and arbitrary sentencing procedures for any crime, from first-degree capital murder to petty theft.[173] Justice Kennedy's *Harmelin* concurrence traces five characteristics common to noncapital proportionality challenges, only some of which are vaguely germane here.[174] The reason for this inapplicability is that *Harmelin*'s treatment and analysis of substantial proportionality bear only a strained relationship to the procedural requirements of punishment assessment in *Guerrero*-like cases. In *Harmelin*, unlike here, the petitioner's Eighth Amendment claim did not concern whether the sentencing authority arrived at a punishment after considering mitigating factors as egregious as mental retardation and brain damage.[175] Justice Kennedy stated in relevant parts:

> The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order.[176]
>
> The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. "The principles which have guided criminal sentencing . . . have varied with the times." The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.[177]

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173. *See* Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (plurality opinion) (noting that "the [Cruel and Unusual] Clause [of the Eighth Amendment] disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed").

174. *Harmelin*, 501 U.S. at 998–1001 (Kennedy, J., concurring in part and concurring in the judgment).

175. *See id.* at 996–97 ("Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled, and they require us to uphold petitioner's sentence.").

176. *Id.* at 998 (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)) (citation omitted).

177. *Id.* at 999 (quoting Payne v. Tennessee, 501 U.S. 808, 819 (1991)) (citation

> Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise. [178]

> The fourth principle at work in our cases is that proportionality review by federal courts should be informed by "objective factors to the maximum possible extent." The most prominent objective factor is the type of punishment imposed.[179]

> The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.[180]

As the second of these criteria demonstrates, the Supreme Court has constitutionally upheld, as falling within the range of rationality, statutory schemes that place disparate weights on factors such as the defendant's likelihood of rehabilitation and the societal needs of retribution and deterrence for *prospective* criminals as well as the long-term need to incapacitate this *immediate* offender from pursuing further criminal activities just as or even more heinous.[181] These elements surely are compelling governmental interests applicable here. But neither retribution nor deterrence nor public safety gains anything at all from denying defendants like Juan Guerrero the remedy of a non-arbitrary sentencing. Premeditation is at the core of the first two goals, but as *Atkins* identified, "[e]xempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision' of other potential murderers."[182]

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omitted).

178. *Id.* at 999–1000 (citations omitted) (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983) and McClesky v. Zant, 499 U.S. 467, 491 (1991)).

179. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Rummel v. Estelle, 445 U.S. 263, 274–75 (1980) (citation and quotation marks omitted)).

180. *Id.* at 1001 (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983)).

181. *See id.* at 999–1000 (observing the criminal system's use of the goals of retribution, deterrence, rehabilitation, and incapacitation and the rationality of sentences that come of the use of these goals).

182. Atkins v. Virginia, 536 U.S. 304, 319 (2002) (quoting Gregg v. Georgia, 428 U.S.

Taking into account *Ewing v. California*[183] also leads to no resolution. In *Ewing*, the Court upheld California's three-strikes law[184] whereby a "sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments."[185] In *Ewing*, unlike in Guerrero's case, the question of mitigating factors as obvious or egregious as mental retardation or brain damage was conspicuously absent. Once again, like *Harmelin*, *Ewing* is a substantive proportionality case, not a structural or procedural arbitrariness case.

Finally, *Roper*'s concession that "[w]hen a[n] ... offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties,"[186] does not approve the State's choice of according the defendant a severely limited sentencing process. Although, in effect, constitutionally permissible sentencing proceedings are invariable prerequisites to constitutional sentences, neither *Harmelin* nor *Ewing* decided anything more than Eighth Amendment *proportionality*. As it turns out, most prior Eighth Amendment decisions of the Supreme Court are not effective analogs of *Guerrero*-like cases.

The trillion-dollar question (worth, moreover, many lives and the integrity of the criminal justice system) is this: where is the tipping point at which sentencing procedures that would *not* satisfy the Eighth and Fourteenth Amendments in death penalty cases would nonetheless be permissible in life imprisonment cases? As Justice Kennedy concludes in his fifth proportionality principle in *Harmelin*, "strict proportionality" is not required in *non*-death penalty cases.[187] *Harmelin* flows from (and expands upon) the Court's earlier decisions in *Rummel v. Estelle* and *Hutto v. Davis*,[188] which concluded that "federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' and that 'successful challenges to the proportionality of

153, 186 (1976)).

183. Ewing v. California, 538 U.S. 11 (2003).

184. CAL. PENAL CODE § 667(b) (West 2008).

185. *Ewing*, 538 U.S. at 30–31.

186. Roper v. Simmons, 534 U.S. 551, 573–74 (2005).

187. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (plurality opinion) (Kennedy, J., concurring in part and concurring in the judgment).

188. Hutto v. Davis, 454 U.S. 370 (1982) (per curiam).

particular sentences' should be 'exceedingly rare.'"[189] However, the legal community does not know with certainty what the acceptable degree of proportionality might be in life imprisonment cases. More relevant to Guerrero's argument, there is significant doubt as to the constitutionality of the sentencing procedure and lack of any individualized consideration currently mandated by Texas law.

If the Supreme Court elects to address this latter point, its earlier precedents will guide the analysis, but there is room for much novelty with respect to *how* the Court wishes to construe those precedents and apply them to the life imprisonment context. The Court has the option of calibrating *Harmelin* or forthrightly abandoning *Harmelin*'s abject rejection of all required mitigation in light of *Atkins*. History and common law too will play an important role. In the seventeenth and eighteenth centuries, for instance, the delineations among the various forms of mental impairment were far less sophisticated.[190] Still, it must be of some moment that—due to the insufficiency of the retribution rationale, risk of inaccuracy, or humanity—common law as construed by William Blackstone and Sir Edward Coke counsels leniency for the mentally challenged:

> [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced . . . .[191]
>
> . . . [B]y intendment of Law[,] the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame

189. *Id.* at 374 (citations omitted) (quoting Rummel v. Estelle, 445 U.S. 263, 272, 274 (1980)).

190. *See* Atkins v. Virginia, 536 U.S. 304, 340–41 (2002) (discussing the law's view of punishing mentally impaired criminals in 1791); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *24–26 (using terms like "mad," "total idiocy," "absolute insanity," "madmen," and "voluntarily contracted madness" when describing the law's view of punishing the mentally impaired).

191. 4 WILLIAM BLACKSTONE, COMMENTARIES *24.

inhumanity and cruelty, and can be no example to others.[192]

Other jurists consolidating English common law agreed with Blackstone and Coke.[193]

B. *How Different Is Life Imprisonment from the Death Penalty?*

The Supreme Court has stated that the death penalty is in its own class as a punishment,[194] and in this Article we seek to explain, for each distinctive factor rendering the death penalty "different," whether the same reasons apply to life imprisonment. Gradually, the Court has honored a line of demarcation—the "sanctuary"[195]—for certain categories of crimes and criminals by exempting those classes from the death penalty.[196] For four essential reasons, the prospect of ultimate societal condemnation attached to capital cases is categorically different from noncapital criminal cases. The first two reasons are largely substantive and innate to the death penalty as a unique institution. The second two reasons involve the punishment's administration and logistics on a large scale.

First, the *humanity* argument: the infliction of death sends the unmistakable message that the defendant's crime was so heinous that she not only is categorically unredeemable but also ought to lose the "right to have rights."[197] Death, whether humanely and

192. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES (1644), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, 962 (Steve Sheppard ed., 2003).

193. Ford v. Wainwright, 477 U.S. 399, 407 (1986) (citing 1 M. HALE, PLEAS OF THE CROWN 35 (1736); 1 W. HAWKINS, PLEAS OF THE CROWN 2 (7th ed. 1795); HAWLES, REMARKS ON THE TRIAL OF MR. CHARLES BATEMAN, 11 STATE TRIALS 474, 477 (1685)).

194. Furman v. Georgia, 408 U.S. 238, 287 (1972) (per curiam).

195. To borrow an elegant metaphor from Victor Hugo, in *The Hunchback of Notre-Dame*, Quasimodo (upon rescuing the wrongfully accused La Esmeralda) ascends the cathedral, shouting "Sanctuary!" Hugo explains that "[w]ithin the walls of Notre-Dame the prisoner was secure from molestation. The cathedral was a place of refuge. Human justice dared not cross its threshold." VICTOR HUGO, THE HUNCHBACK OF NOTRE-DAME 285 (Dodd, Mead & Co., Inc. 1947) (1831).

196. For the Hugo allusion and its connection to the modern judicial administration of capital punishment by the United States Supreme Court, see Lyndsey Sloan, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 351, 367 (2003) (analogizing the language in Hugo's novel to sanctuary for mentally impaired criminals).

197. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).

dignifiedly meted out, or taken back to Tudor and Stuart England's standards of punishing male traitors by hanging, drawing, and quartering (and their female counterparts by burning at the stake), is unique in its harshness and severity.[198] A reference to the entire Anglo-American history, in seeking to resolve the constitutional question within a framework of constitutional historicism, implicates the evolution of law and public conduct propelled by that history.[199] Second, and on a related point, the *finality* argument: the possibility of reversible error, which may be corrected by a presidential or gubernatorial exercise of the authority to pardon or commute, by a reviewing court or by the trial court of original jurisdiction through *coram nobis* or other vehicles, is no longer reversible when the death penalty has already been carried out.

Part of the reason that death is so severe and harsh as a punishment is that it is final; even upon the realization of actual, substantive, or procedural error on the part of the decision maker, the punishment, once imposed, may not be retracted. Concededly, these considerations do not apply quite as absolutely and irreversibly to life imprisonment. However, as *Robinson* noted, even marginally unconstitutional enhancements through impermissible sentencing procedure are problematic.[200] That consideration

198. *See id.* at 289–90 (discussing "the unusual severity of death" as a criminal sanction); *see also* Roper v. Simmons, 534 U.S. 551, 587 (2005) (Stevens, J., concurring) ("If the meaning of th[e] [Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today." (citing Stanford v. Kentucky, 492 U.S. 361, 368 (1989))); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 854 (1969) ("The penalty for treason at the time consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, and then beheaded and quartered."). *See generally* MALCOLM GASKILL, CRIME AND MENTALITIES IN EARLY MODERN ENGLAND (2003) (exploring the changing mentalities of the English in the seventeenth and eighteenth century through the lens of crime and criminal justice); GEORGE IVES, HISTORY OF PENAL METHODS: CRIMINALS, WITCHES, LUNATICS (Patterson Smith 1970) (1914) 77–96 (tracing the history of penal methods as used against "the insane," who were at one time thought to be possessed by "devils" and were therefore tortured in the name of exorcism).

199. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained, . . . 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'").

200. *Cf.* Robinson v. California, 370 U.S. 660, 667 (1962) ("To be sure, imprisonment

finds special support in history. The English Declaration of Rights, for one, was concerned with the selective, random, or irregular application of harsh penalties, and its uncontroverted aim was "to forbid arbitrary and discriminatory penalties of a severe nature."[201]

The Declaration of Rights' prohibition on cruel and unusual punishments was drawn originally from the Magna Carta, which "required that the amercement [or financial penalty] imposed on a criminal not to exceed the severity of his crime."[202] It was not until the time "[w]hen prison sentences began replacing amercements during the 1400s as the common mode of criminal punishment in England" that "English courts extended the protection from excessive punishments to prison sentences."[203] Professor Anthony F. Granucci comprehensively explained:

> Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account, and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.
>
> The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that, "very likely, there was no clause in the Magna Carta more grateful to the mass of the people." Chapter

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for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). In the cases of those situated in Guerrero's position as mentally retarded and brain-damaged inmates or defendants, it might be unrealistic to expect that they will survive forty calendar years before parole consideration.

201. *See Furman*, 408 U.S. at 242–43 (Douglas, J., concurring) (discussing the influence that the English Bill of Rights of 1689 had on the writing and passage of the Eighth Amendment to the United States Constitution).

202. James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 552 (2004).

203. *Id.* at 552–53.

> 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments: A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence, he shall be amerced according to its gravity. [204]

The debates of the First Congress show the following exchange:

> Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
>
> Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.[205]

At the Massachusetts convention, Mr. Holmes articulated his approval of the Amendment:

> What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.[206]

Holmes explained some of the restraints on Congress's power to

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204. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845–46 (1969) (internal footnotes and citations omitted).

205. 1 ANNALS OF CONG. 782–83 (Joseph Gales ed., 1834).

206. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836).

impose punishments, and even though Livermore "favored rejection of the [A]mendment because of his fear of what later generations might make of it,"[207] that view did not prevail. Punishments such as torture were categorically precluded by the Eighth Amendment. Like Holmes and probably unlike Livermore, Patrick Henry at the Virginia convention saw more to fear from federal power in inflicting punishments than in federal inflexibility acting as a healthy deterrent on that power:

> Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights—"that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. . . . In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights.[208]

Henry subsequently added:

> . . . What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing to extort a confession of the crime.[209]

Echoing the earlier point of the privilege against self-

207. *See* William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1390 (2005) (discussing the use by Supreme Court Justices of the original Eighth Amendment debates as support for originalist constitutional arguments).

208. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836).

209. *Id.* at 447–48.

incrimination working in tandem with the Cruel and Unusual Punishments Clause,

> Mr. GEORGE MASON [of Virginia] replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself. . . . Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.[210]

The English Declaration of Rights of 1689 contained the words "cruel and unusual punishments."[211] Section 9 of the Virginia Declaration of Rights absorbed the words verbatim.[212] "Following its inclusion in the Virginia constitution, eight other states [including Delaware, Maryland,[213] New Hampshire,[214]

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210. *Id.* at 452.

211. *See* Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (plurality opinion) (citing the English Declaration of Rights, 1689, 1 W. & M. Sess. 2, c. 2 (Eng.)) ("[A] right to be free from disproportionate punishments was embodied within the 'cruell and unusuall Punishments' provision of the English Declaration of Rights of 1689 . . . . There is no doubt that the Declaration of Rights is the antecedent of our constitutional text.").

212. CONSTITUTION OF VIRGINIA of 1776, Bill of Rights, § 9, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS 3812, 3813 (Francis Thorpe ed., 1909) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (noting that George Mason's proposal for the Virginia Declaration of Rights in Section 9 "was a verbatim copy of a prohibition in the English Bill of Rights of 1689").

213. CONSTITUTION OF MARYLAND of 1776, Declaration of Rights, Arts. XIV, XXII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS 1686, 1688 (Francis Thorpe ed., 1909) ("XIV. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter . . . . XXII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.").

214. CONSTITUTION OF NEW HAMPSHIRE of 1784, Bill of Rights, Arts. XVIII, XXXIII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS 2453, 2456–57 (Francis Thorpe ed., 1909) ("XVIII. All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind. . . . XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.").

North Carolina,[215] Massachusetts,[216] Pennsylvania, and South Carolina] adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787,[217] and it became the [E]ighth [A]mendment to the United States Constitution in 1791."[218]

Even though some scholars and jurists have suggested that the Eighth Amendment did no more than outlaw certain *types* of punishments,[219] the Supreme Court has not thus limited the Amendment's scope. Another argument made is that, at the time, the word "unusual" was synonymous with "illegal" and that because Lord Chief Justice Jeffreys of the King's Bench imposed penalties outside the scope of common law, the Eighth Amendment was intended to forbid only that.[220] But if the Framers truly were economical with words, and there is certainly evidence to that effect (the original Constitution contained, after all, fewer than 5,000 words), then why would they say in the Eighth Amendment what even the most parsimonious interpretation of the Fifth Amendment's Due Process Clause already contained?

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215. CONSTITUTION OF NORTH CAROLINA of 1776, Declaration of Rights, Art. X, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS 2787, 2788 (Francis Thorpe ed., 1909) ("X. That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.").

216. CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS OF 1780, Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, Art. XXVI, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS 1888, 1892 (Francis Thorpe ed., 1909) ("XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.").

217. Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) ("All fines shall be moderate; and no cruel or unusual punishments shall be inflicted.").

218. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (internal footnotes added).

219. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 979–86 (1991) (plurality opinion) (discussing scholarly works on the issue and analyzing the constitutional debates); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840, 860–65 (1969) (arguing that the language of the Eighth Amendment has been misinterpreted and that "the cruel and unusual punishments clause was directed at prohibiting [only] certain *methods* of punishment").

220. *See* Margaret Gibbs, *Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955, 963 n.80 (1992) ("Justice Scalia contended that the English cruel and unusual punishments clause focused on the illegality rather than disproportionality of Jeffreys' King's Bench activities."); *see also Harmelin*, 501 U.S. at 979–86 (discussing most of the bases for narrowly interpreting the scope of the Eighth Amendment).

"Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States."[221]

The Eighth Amendment, of course, would be applied to the states through the Fourteenth Amendment.[222] The Fourteenth Amendment, our own Magna Carta with respect to its society-altering mandate for reform and equality, changed the civic, political, social, and human rights of persons.[223] The Supreme Court has referred to this Amendment as "the most significant structural provision adopted since the original Framing."[224] Not only did the Fourteenth Amendment rework the relationship between the federal government and the states, but it also "'interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'"[225] Congressman Henry H. Bingham, while proposing the Fourteenth Amendment, stated that "the privileges or immunities of citizens of the United States," protected by the Fourteenth Amendment,[226] also protected against "cruel and unusual punishments":

> [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your

221. Hewitt v. Helms, 459 U.S. 460, 466 (1983); *see* Meachum v. Fano, 427 U.S. 215, 223–27 (1976) (asserting that the Fourteenth Amendment did not necessarily add any rights to the Due Process Clause of the Fifth Amendment and that the language of the Due Process Clause attaches different meaning than that of similar language in other constitutional provisions).

222. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding a state court criminal conviction for addiction to narcotics, or any other illness, a violation of both the Eighth and Fourteenth Amendments).

223. *See* Brown v. Bd. of Educ., 347 U.S. 483, 490 (1954) (describing the revolutionary quality of the Fourteenth Amendment, specifically that the early Supreme Court cases interpreting the Amendment stated that it particularly "proscribe[d] all state imposed discriminations against the Negro race").

224. McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 872 (2005).

225. Coleman v. Thompson, 501 U.S. 722, 760 (1991) (Blackmun, J., dissenting) (quoting Reed v. Ross, 468 U.S. 1, 10 (1984)).

226. *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

> Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.[227]

Now come the pragmatic concerns about fairness in death penalty administration, the third and fourth reasons that death is categorically different from, in that it is more severe than, all other punishments. The *practicability* argument indicates that a capital-sentencing process, involving a human being's life, inevitably involves the balancing of individualized consideration of a defendant's background and the nature of crime with the competing need for maintaining uniformity in sentencing.

Finally, the *aggregation* argument, in which the problem is compounded by the consistency and individualized consideration owed all capital defendants within—and perhaps even beyond—a corresponding jurisdiction by a multitude of decision makers not sufficiently aware of the entire pool of "death-eligible" criminals (and their varying degrees of culpability, respecting their aggravating and mitigating factors) to dispense with evenhanded justice. The concerns inherent in these interrelated deductions have been stated eloquently by the Court or by individual Justices in opinions (both controlling and *seriatim*).[228] Both of these

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227. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1865).

228. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005) ("[T]he death penalty is the most severe punishment . . . [.] Capital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution." (internal quotation marks and citations omitted)); Ring v. Arizona, 536 U.S. 584, 605–06 (2002) (stating that "there is no doubt that '[d]eath is different'" (citation omitted)); *Ring*, 536 U.S. at 614 (Breyer, J., concurring) ("States [must] apply special procedural safeguards when they seek the death penalty."); Apprendi v. New Jersey, 530 U.S. 466, 522–23 (2000) (Thomas, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes."); Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that the death penalty is "qualitatively different" from any other sentence); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell, & Stevens, JJ.) (asserting that the "penalty of death is qualitatively different from a sentence of imprisonment, however long"); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (indicating that "the penalty of death is different in kind from any other punishment" and underscoring its "uniqueness"); Furman v. Georgia, 408 U.S. 238, 306 (1972) (per

considerations, *practicability* and *aggregation*, do apply to life sentences, which in Texas also deprives prisoners, until the completion of sentence, of political rights such as suffrage.[229] This causes a form of political death.

Decisions of the United States Supreme Court indicate that death incontrovertibly is different from all other punishments.[230] But they do not indicate, with any degree of reliability, that the structural and procedural flaw attending *Guerrero*-like sentencing suffices for life imprisonment cases. That leap of logic, if it must be made at all, should be performed by the Supreme Court itself, clearly and forthrightly. The Court's self-perception as an impartial arbiter and as "the Supreme Court of a Nation dedicated to the rule of law"[231] hinges on its institutional candor. This candor encompasses the Court's willingness to answer a difficult but imperative constitutional question, as only it can, involving a key aspect of the nation's criminal justice apparatus.[232]

This case really boils down to the procedural safeguards that, while granted to death penalty cases, the government need not necessarily provide a defendant whose liberty, perhaps for good, is at stake. Since the death penalty is by all measures uniquely harsh, irrevocable, and severe, the Court has mandated that procedural strictures must accompany death penalty administration, lest it become arbitrary or capricious.[233] Even though this death penalty

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curiam) (Stewart, J., concurring) (noting that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind").

229. *See* TEX. ELEC. CODE ANN. § 13.001(a)(4)(A) (Vernon 2007) (providing the reinstatement of suffrage after the completion of prison, parole, and probation for felony convictions).

230. *See Furman*, 408 U.S. at 287–88 (explaining how the death penalty is fundamentally different from all other forms of punishment, as it is the most severe, and that it is the only form of punishment that consciously inflicts physical and mental suffering).

231. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion) (explaining that the Court derives much of its power by following stare decisis and the regularity in the law that it brings). "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Id.*

232. *See id.* at 868 ("Th[e] belief [of Americans] in themselves as [a nation of people who aspire to live according to the rule of law] is not readily separable from their understanding of the [Supreme] Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.").

233. *See Gregg*, 428 U.S. at 194–95 (Stewart, J., concurring) (commenting that procedural safeguards such as special jury instructions in capital cases help to prevent

arrangement's jurisdictional root (applying the Eighth Amendment to the states) comes from *Robinson v. California*, the doctrinal root is *Weems v. United States*, where the Court invalidated a fifteen-year sentence of *cadena temporal* (hard labor) and 4,000 pesos for falsifying an official document.[234] *Weems* was born of Justice Stephen J. Field's dissent in *O'Neil v. Vermont*,[235] where Justice Field argued that the Eighth Amendment protects "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[236] *Weems* gave birth to the proportionality doctrine, whereby punishments would need to be reasonably commensurate to the corresponding offense.[237] This is the substantive component of the Eighth Amendment, while its procedural counterpart forbids arbitrary sentencing procedures.[238]

Efforts to bring consistency, individualized consideration, and the repudiation of arbitrariness in trial and sentencing to the enforcement of capital punishment can directly be traced back to the Court's *Furman v. Georgia* and *Gregg v. Georgia* decisional law. The Court's contemporary Eighth Amendment jurisprudence, as pertaining to arbitrariness in capital sentencing, sets forth two requirements. First, the *Furman* line of precedent holds that the death penalty must be effectuated "fairly, and with reasonable consistency, or not at all."[239] Second, the *Woodson v. North Carolina* and *Lockett v. Ohio* line of cases understood fairness in death penalty administration to include an individualized

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sentences that could be fairly seen as arbitrary and capricious).

234. *See* Weems v. United States, 217 U.S. 349, 382 (1910) (holding that even the minimum penalty of hard labor for such a property crime would "have been repugnant to the Bill of Rights").

235. O'Neil v. Vermont, 144 U.S. 323 (1892).

236. *See id.* at 339–40 (declaring that the Cruel and Unusual Punishments Clause is not limited "to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering").

237. *See Weems*, 217 U.S. at 367 (deciding that a sentence of fifteen years imprisonment imposed on a public official for falsifying a public document was not proportionate to the offense).

238. *See* Furman v. Georgia, 408 U.S. 238, 256 (1972) (per curiam) (Douglas, J., concurring) (indicating that the prohibition against cruel and unusual punishment in the Eighth Amendment forbids the application of laws in an arbitrary manner to unpopular groups).

239. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

scrutiny of the defendant's conduct and background.[240]

The Court has prescribed that these two seemingly contradictory formulae for a constitutional death penalty regime can be reconciled, indeed balanced,

> when the class of defendants eligible for the death penalty is narrowed according to 'clear and objective standards that provide specific and detailed guidance,' and when the sentencer, as to the narrowed class of defendants, retains the discretion to consider any mitigating factor relevant to the defendant's character or crime.[241]

C. *Importance of the Jury in Sentencing*

The evolution of the role of the American jury is vital to this analysis. The vast power exercised by American juries in the eighteenth and nineteenth centuries has, of course, been curtailed not just by further legislation (both pre-*Furman* and later propelled by *Furman*'s standards) but also by judicial review directly.[242] In the republic's nascent years, juries "usually possessed the power to determine both law and fact."[243]

In *Georgia v. Brailsford*,[244] the nation's first Chief Justice, John Jay, while trying a case in which the State was a party, notified the jury of its power "to determine the law as well as the fact in controversy."[245] This presumptive authority of federal juries to decide the law at stake was not rejected until 1895, when the Supreme Court decided *Sparf v. United States*.[246] Starting probably with the rights revolution brought about by the Warren Court, the judgment of juries—both state and federal—began to lose its perceptive force as the ultimate safety valve against

240. Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976).

241. Mary K. Newcomer, *Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L.J. 611, 612 (1995) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion)).

242. *See generally* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 909 (1978) (discussing the early role of the jury and the judicial safeguards utilized before the appearance of "modern procedural devices such as judicial instructions on law and evidence, and the practice of setting aside verdicts contrary to law or evidence").

243. *Id.* at 905.

244. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).

245. *Id.* at 4.

246. Sparf v. United States, 156 U.S. 51, 102 (1895).

oppressive laws and targeted prosecutions.[247]

Part of the reason is that much of this constitutional recalibration in criminal law was strictly procedural in nature (questions of *law*) and thus beyond the expertise of juries (concerned primarily with questions of *fact*).[248] The Warren Court and Burger Court's decisions extending the right to physical and spatial privacy and the right to remain silent to protect the innocent citizen as well as the guilty criminal,[249] protecting the First Amendment right of citizens to wear anti-Vietnam War shirts (saying, for instance, "F— the Draft"),[250] giving married and unmarried couples the right to use contraception as an exercise in personal intimacy,[251] and ending government-sanctioned mandatory prayer in American public schools[252] have little to do, at least

247. *Cf.* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 865 (2007) (discussing the Court's progression of "separate but equal" cases and noting that within that period, the Court held unconstitutional the selection of a jury from which African Americans were deliberately excluded).

248. *See generally id.* (discussing the Warren Court's substantial reforms in criminal procedure); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1999) (same); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2002) (same). *But see* William H. Simon, *The Warren Court, Legalism and Democracy: Sketch for a Critique in a Style Learned from Morton Horwitz*, *in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ, (Alfred Brophy & Daniel Hamilton eds., 2009) (explaining the "vices of formalism, individualism, and proceduralism" through the Warren Court's race discrimination, criminal justice, and welfare rights cases).

249. *See generally* Katz v. United States, 389 U.S. 347 (1967) (concluding that the government's surveillance of Katz's conversation in a phone both without following established Fourth Amendment procedural guidelines was an unreasonable search under the Constitution); Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (delineating procedural safeguards that must be followed "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way"); Mapp v. Ohio, 367 U.S. 643, 658 (1961) (establishing that evidence obtained in violation of the Fourth Amendment is "the fruit[] of an unconstitutional search" and inadmissible in both state and federal criminal prosecutions).

250. *See generally* Cohen v. California, 403 U.S. 15 (1971) (reversing the defendant's criminal conviction on the grounds that the California statute at issue violated the First and Fourteenth Amendments).

251. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (maintaining that "providing dissimilar treatment for married and unmarried persons" in regard to their ability to legally obtain contraception from providers "violates the Equal Protection Clause"); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing that laws prohibiting the use of birth control unconstitutionally invade "the notions of privacy surrounding the marriage relationship").

252. *See generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (determining that a law requiring students in public schools to read the Bible aloud and recite the Lord's Prayer in unison violated the Establishment Clause); Engel v. Vitale, 370

directly, with the jury. Such jurisprudential lines involve the constitutional claims of litigants and judicial evaluation of those claims, irrespective of the jury. The Supreme Court's decision in *Witherspoon v. Illinois*,[253] though, involved the constitutional role of the jury.

Witherspoon balanced the American jury's constitutional and traditional role of ensuring the preservation of fairness toward the defendant and toward the state.[254] *Witherspoon* found the Sixth Amendment right to be tried by an impartial jury infringed where the composition of a criminal jury was challenged when most or all anti-death penalty prospective jurors were peremptorily weeded out during the voir dire stage.[255] "On many occasions, fully known to the Founders of this country, jurors . . . have . . . stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices."[256] Justice Joseph Story stated long ago that, at a minimum, the jury right must conform to a basic threshold:

> To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes.[257]

More than a century later, in *Thiel v. Southern Pacific Co.*,[258] the Court would expound:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . .

U.S. 421 (1962) (concluding that the State-encouraged recitation of a school prayer in public schools violated the Establishment Clause).

253. Witherspoon v. Illinois, 391 U.S. 510 (1968).

254. *See generally id.* (standing for the proposition that a defendant cannot be sentenced to death by a jury consisting almost entirely of jurors in favor of the death penalty).

255. *Id.* at 522.

256. United States v. Quarles, 350 U.S. 11, 18–19 (1955).

257. United States v. Cornell, 25 F. Cas. 650, 655–56 (C.C.D.R.I. 1820) (No. 14,868) (Story, J.).

258. Thiel v. S. Pac. Co., 328 U.S. 217 (1946).

> This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[259]

Another commentator stated that:

> Juries undoubtedly may make mistakes: they may commit errours: they may commit gross ones. But changed as they constantly are, their errours and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The esprit du corps will not be introduced among them; nor will society experience from them those mischiefs of which the esprit d[e] corps, unchecked, is sometimes productive.[260]

The Supreme Court was also aware of jury biases: "Unfortunately, instances could also be cited where jurors have themselves betrayed the cause of justice by verdicts based on prejudice or pressures. In such circumstances, independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions."[261] The jury bias problem presented itself glaringly in *Furman* as it had done earlier in *McGautha v. California*.[262] Justice Stewart's and Justice White's concurring opinions were the "narrowest" in substance and thus constituted the "holdings of the Court."[263] Justice Stewart focused on the freakish and unreasonable manner, without meaningful guidelines

259. *Id.* at 220.

260. 2 THE WORKS OF JAMES WILSON 541 (Robert Green McCloskey ed., 1967).

261. *Quarles*, 350 U.S. at 19.

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

263. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

or restrictions, in which death penalty deliberations were conducted; he expressed constitutional reservations concerning how death was imposed upon "a capriciously selected random handful" of convicts.[264]

Similarly, Justice White believed that the death penalty could no longer be "justified by the social ends it was deemed to serve,"[265] when, as in the Georgia and Texas cases at issue in *Furman*, "the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."[266] In other words, the deterrence justification had ceased to work. At that juncture in criminal constitutional law, the death penalty's "imposition would . . . be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[267]

Consequently, the states had three choices: to abolish the death penalty, to formulate jury instructions to diminish juror discretion, or to impose mandatory death sentences for carefully defined crimes so as to avoid the arbitrariness and nondeterrence problems identified by the prevailing opinions of Justice Stewart and Justice White in *Furman*.[268] But never once did the Court come even close to the idea that the role of the jury and some of the discretion it retains must be dishonored. Quite the contrary, in *Apprendi v. New Jersey*,[269] the Supreme Court, acting under the Sixth Amendment, required that in a jury trial all elements of a sentence-enhancing factor must be "proved beyond a reasonable doubt" and "submitted to . . . [the] jury" for its decision.[270] That consequence flows from the Court's 1955 recognition that "[j]uries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field . . . ."[271]

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264. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (per curiam) (Stewart, J., concurring).

265. *Id.* at 312 (White, J., concurring).

266. *Id.*

267. *Id.*

268. *See id.* at 311–12 (examining the constitutionality of three possible death penalty regulatory schemes).

269. Apprendi v. New Jersey, 530 U.S. 466 (2000).

270. *Id.* at 490.

271. United States v. Quarles, 350 U.S. 11, 18 (1955).

In 1868, Chief Justice Thomas M. Cooley of the Supreme Court of Michigan eloquently and succinctly explained the jury's role and function in common law jurisdictions:

> The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.[272]

The Supreme Court's *Apprendi* holding was reaffirmed by the Court itself in *Ring v. Arizona*[273] and *United States v. Booker*.[274] "[R]ecognizing, for instance, that extensive pretrial publicity can taint the pool of prospective jurors to a substantial degree, warranting reversal of any conviction stemming from such hostility,"[275] federal courts have preserved the jury's integrity.[276] *Apprendi* clearly states that a prime aspect of this integrity lies in its sentencing prerogative.[277] William Penn's London trial in 1670 is a hallmark of this prerogative, establishing the jury's right to return a verdict based on complete and relevant facts and without undue outside pressure.[278]

Since that time, "the jury's independence from official reprisal has been maintained and courts have been precluded from

272. People v. Garbutt, 17 Mich. 9, 27 (1868).

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

274. United States v. Booker, 543 U.S. 220 (2005).

275. Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006).

276. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (finding it unconstitutional to prevent the jury from making an independent assessment of facts relevant to sentencing).

277. *See id.* at 482–83 (affirming the historic view that every fact that bears a relation to the punishment of the defendant must be submitted to the jury).

278. *See, e.g.*, Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 YALE L.J. 1815, 1823 (2002) (citing *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1010 (K.B.)) (emphasizing that the legitimacy of the jury system depends on the jury's ability to reach its own verdict without external interference or duress).

inquiring into the jury's deliberative process."[279] The jury similarly has a responsibility to avoid prejudice at all costs and not be swayed by extralegal considerations.[280] This tradition runs back several decades. In *Irvin v. Dowd*,[281] the Court noted a "pattern of deep and bitter prejudice" throughout the community against the defendant that made it impossible to seat an impartial jury.[282]

Similarly, *Guerrero*-like defendants' right to have a jury of their peers consider the mitigating circumstances of their history is given no weight at all by Texas's codified sentencing procedure.[283] This is the rule in *all* capital murder cases where Texas does not seek the death penalty.[284] Even though the "character of the risk at stake"[285] is fundamentally different in death penalty cases from that in life imprisonment cases, arbitrary and unreasonable application in both situations—absence of proportionality between crime and punishment as well as the arbitrary balancing of mitigating and aggravating factors—is unconstitutional. In this area, the Court might apply the criminal law variant of a mode of interpretation: the law "require[s] not blindfolded equality, but responsiveness to difference; not indifference, but accommoda-

279. Claudio v. State, 585 A.2d 1278, 1303 n.65 (Del. 1991).

280. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (commenting that all litigants are forbidden by equal protection principles from committing purposeful discrimination on the basis of gender); Georgia v. McCollum, 505 U.S. 42, 50–55 (1992) (opining that criminal defendants are forbidden by equal protection principles from using peremptory challenges to exclude jurors because of race); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (expressing that private litigants in civil cases are forbidden by equal protection principles from using peremptory challenges to exclude jurors because of race); Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) ("Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted.").

281. Irvin v. Dowd, 366 U.S. 717 (1961).

282. *Id.* at 727–28.

283. *Cf.* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (Vernon 2009) (affording the jury in a capital felony case the opportunity to consider mitigating circumstances of a defendant's history only to warrant a sentence of life without parole rather than the death penalty).

284. *See id.* § 1 ("If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, *the judge shall* sentence the defendant to life imprisonment without parole." (emphasis added)).

285. *See* Baze v. Rees, 128 S. Ct. 1520, 1567 (2008) (Ginsburg, J., dissenting) (expressing concern over whether Kentucky's system of lethal injection possessed sufficient safeguards to prevent subjecting inmates to "severe and unnecessary pain" during execution).

tion."[286] In the same way, similarly situated offenders must be treated similarly and dissimilarly situated offenders must not be treated similarly so that the sentencing process does not gloss over the differences in their degrees of culpability, backgrounds, and crimes. Failing to honor this key ground rule, especially through sentencing procedures that are "automatic," renders such procedures immediately suspect under the Eighth and Fourteenth Amendments.

Four years after *Furman*, in *Gregg v. Georgia*, the Supreme Court confronted newly enacted death penalty statutes adopted in *Furman*'s wake.[287] The joint opinion of Justice Stewart, Justice Powell, and Justice Stevens held, initially, that the death penalty was not inherently a cruel and unusual punishment in violation of the Eighth Amendment.[288] Subsequently, the *Gregg* joint opinion also recognized that capital punishment "[can]not be imposed under sentencing procedures that create[] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner."[289] At the time of the *Furman* Court, Georgia's new death penalty statutes[290] possessed capital-sentencing guidelines and judicial-review provisions triggering an automatic appeal to the State Supreme Court—innovations that deterred arbitrary inflictions of the death penalty, and rendered the law consistent with the Eighth Amendment.[291]

From the *Gregg* Court's perspective, the statute rescinded the erstwhile regime of unitary trials at issue earlier in *McGautha*, and instead replaced it with a two-phase system: in the first phase the jury would determine the defendant's innocence or guilt for the crime charged; in the second phase the jury would consider further evidence of mitigating or aggravating factors and would premise its decision—whether the defendant was to serve a sentence of some

286. Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

287. *Id.* at 169, 179–80.

288. *See* Gregg v. Georgia, 428 U.S. 153, 169, 179–80 (1976) (declaring that the death penalty "does not invariably violate the Constitution," after stating that previous opinions by the Court had not resolved the issue of whether the death penalty was always "cruel and unusual punishment in violation of the Constitution").

289. *See id.* at 188 (articulating the rule to be followed by the Court based on the precedent set for death penalty cases in *Furman*).

290. GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-2201, 26-3301 (1972).

291. *Gregg*, 428 U.S. at 206–07.

number of years or be executed—on all the considerations presented.[292]

The Georgia statute further prescribed that the jury could not impose a death sentence unless it found, beyond a reasonable doubt, that at least one of ten aggravating factors stipulated in the statute was satisfied.[293] Moreover, should the defendant receive a death sentence, an automatic appeal would be taken to the Supreme Court of Georgia to preclude the adverse impact of any "passion, prejudice, or any other arbitrary factor,"[294] to ensure that the evidence actually supports the judicial finding of an aggravating factor contained in the statute, and to inquire "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[295] By narrowing the class of death-eligible crimes and channeling jury discretion to diminish arbitrariness, as well as by providing for overarching judicial review in the State's highest tribunal tasked with the disposition of criminal appeals, *Gregg* found that the Georgia statute had cured itself of the arbitrariness deficiencies identified as fatally determinative in *Furman*.[296]

Not only is a *Guerrero*-type sentencing wanting in a proper balancing of the aggravating and mitigating factors, no balancing nor any other factors were a part of Guerrero's sentencing. Justice Thurgood Marshall stated, regarding the Court's refusal to examine potentially incendiary factors in one death penalty case, "Not only is this less process than due; it is no process at all."[297] In the post-*Gregg* regime, it has been established law that sentencing procedures must be implemented to enable courts to assure themselves that their administration of capital punishment

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292. *Id.* at 162–63.

293. *See* GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-2201, 26-3301 (1972).

294. *Gregg*, 428 U.S. at 166–67 (quoting GA. CODE ANN. § 27-2537 (Supp. 1975)).

295. *Id.* at 167 (quoting GA. CODE ANN. § 27-2537 (Supp. 1975)).

296. *Id.* at 206–07.

297. Andrews v. Shulsen, 485 U.S. 919, 922 (1988) (Marshall, J., dissenting). In *Andrews*, Justice Marshall objected to the Court's rejection of a petition appealing a death sentence given to a black man whose all-white jury had temporarily been in possession of a napkin with a racially incendiary statement encouraging imposition of the death sentence; the trial judge had refused to investigate the potential racial prejudice in the case. *Id.* at 919–20.

is "even-handed, rational, and consistent."[298] This principle, originating in *Jurek v. Texas*,[299] was applied in *Pulley v. Harris*[300] to establish the minimum degree of appellate consideration necessary to render death sentences constitutional.[301] This consideration need not concern specific proportionality review so long as there is "some sort of prompt and automatic appellate review."[302] Accordingly, the total lack of discretion found in *Guerrero*-type sentencing is not the answer.

The quest to establish the appropriate amount of discretion in capital sentencing has spawned several Supreme Court cases. *Lewis v. Jeffers*[303] reiterates the Eighth Amendment requirement that capital-sentencing schemes must circumscribe the discretion of the sentencing jury or judge.[304] *California v. Brown*[305] states that death penalty statutes must "be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."[306] *Zant v. Stephens*[307] stipulates that aggravating factors are "constitutionally necessary" to narrow the pool of death-eligible defendants.[308] Lastly, *Godfrey v. Georgia*[309] affirms that death penalty systems must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'"[310] It was in *Godfrey* that Justice Marshall made his famously apocalyptic prediction that such a

298. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (ruling that Texas's system for imposing the death sentence is constitutional due to its provision of prompt judicial review, which, in conjunction with procedures narrowing the definition of capital murder and authorizing the introduction of a defendant's mitigating circumstances, prevents death sentences from being "'wantonly' or 'freakishly' imposed"). The Supreme Court decided *Jurek* and *Gregg* on the same day. *Id.* at 268.

299. Jurek v. Texas, 428 U.S. 262 (1976).

300. Pulley v. Harris, 465 U.S. 37 (1984).

301. *See id.* at 48–49 (applying the propositions found in *Jurek*, *Gregg*, and *Proffitt v. Florida*, 428 U.S. 242 (1976), to show that proportionality review of a death sentence was "constitutionally superfluous" as long as some "prompt and automatic" review was provided (quoting *Jurek*, 428 U.S. at 276)).

302. *Id.* at 49.

303. Lewis v. Jeffers, 497 U.S. 764 (1990).

304. *Id.* at 774 (quoting Gregg v. Georgia, 428 U.S. 153, 188–89 (1976)).

305. California v. Brown, 479 U.S. 538 (1987).

306. *Id.* at 541 (citing *Gregg*, 428 U.S. 153, and Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)).

307. Zant v. Stephens, 462 U.S. 862 (1983).

308. *Id.* at 878.

309. Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality opinion).

310. *Id.* at 428 (quoting *Gregg*, 428 U.S. at 198, and *Proffitt*, 438 U.S. at 253).

quest in achieving the ideal death penalty regime is "doomed to failure."[311]

This imminent need to be reasonably consistent (and thus non-arbitrary) in the imposition of death sentences was as much a constitutional demand of *Gregg* and its progeny as the somewhat competing need to provide individualized consideration to the defendant and her crime.[312] In *Eddings v. Oklahoma*[313] the Supreme Court interpreted the Eighth Amendment to require that fair and due "consideration [be provided to] the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[314]

To add substance to the Eighth Amendment's non-arbitrariness requirement, four terms later the Court in *Lockett v. Ohio* mandated that "in all but the rarest cases," sentencing authorities "[can]not be precluded from considering . . . *any* aspect of [the] defendant's character or record and any of the [mitigating] circumstances of the offense that the defendant proffers . . . ."[315] The Supreme Court has acknowledged that this constitutionally mandated search for non-arbitrary sentences has engendered a "tension between general rules and case-specific circumstances."[316]

The precise constitutional impact of these precedents in life imprisonment cases is debatable, and the Supreme Court should do away with the dissonance on this subject. The repetitive point in this constitutional discourse is the condemnation of arbitrariness not just in trial but also on appeal, for *Gregg* was no less insistent

311. *Id.* at 442.

312. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (drawing from the requirements of the Eighth and Fourteenth Amendments to state that "any aspect of defendant's character or record and any of the circumstances of the offense" should be taken into consideration in deciding whether to forgo imposing the death penalty and subsequently observing that the law has struggled to "develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual" (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion))).

313. Eddings v. Oklahoma, 455 U.S. 104 (1982).

314. *Id.* at 112 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

315. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality) (emphasis added).

316. *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time.").

on non-arbitrary and nondiscriminatory death sentences, if death sentences they were to be, across the board.[317] Indeed, the *Furman-Gregg* juridical strain was responsive to the benchmark in *Robinson v. California* that the criminalization of being addicted, even to narcotics, was tantamount to the criminalization not of an *act* but of a *status* or *condition*.[318] That the government may not do. On this basis, the *Robinson* Court struck down a California statute criminalizing the very status of having an addiction, however insidious, to narcotics for being an arbitrarily processed penalty and for working a cruel and unusual punishment.[319]

We reiterate *Gregg*'s assertion that the death penalty "[can]not be imposed under sentencing procedures that create[] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner."[320] It is necessary for courts to ask themselves if it is consonant with the Eighth and Fourteenth Amendments for the automatic life sentence imposed upon a criminal defendant, irrespective of his diminished culpability arising from mental retardation and brain damage, to possess a similar "substantial risk that it [will] be inflicted in an arbitrary and capricious manner."[321] We predict that once the Supreme Court's *Apprendi* jurisprudence develops further, a *Guerrero*-type case could serve as the springboard to intersect that Sixth Amendment law with the Eighth Amendment protection against arbitrariness in criminal sentencing.

IV. IMPERATIVE TO RESOLVE THE CONSTITUTIONAL QUESTION

A. *Statistics and Dissonance Among State Courts*

In this section, we look to the dissonance among legislatures and federal and state courts created by the confusion and lack of uniformity in this area of the law. Plenary consideration is the vehicle to clear the proverbial air. This dissonance is not so much

317. *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (concluding that Georgia's death penalty statute was constitutional because it required a jury to "find and identify at least one statutory aggravating factor" while at the same time allowing for the jury's consideration of *any* other aggravating and mitigating factors).

318. Robinson v. California, 370 U.S. 660, 666–67 (1962).

319. *Id.* at 667.

320. *Gregg*, 428 U.S. at 188.

321. *Id.*

in the lower courts' answers to the Eighth Amendment constitutionality of *Guerrero*-like life imprisonment sentencing—the answer, we note soon, almost always is a reluctant yes. Instead, this dissonance derives from the lower courts' and legislatures' understanding that *Harmelin*'s and *Ewing*'s "narrow proportionality" test constitutionally sustains such procedurally faulty imprisonment sentencing. However, as we discussed in Part II, neither *Harmelin* nor *Ewing* so indicates, and we should avoid reaching such preconceptions exclusively via inference and implication.

Moreover, without knowing the United States Supreme Court's reasoning on this subject of procedural constitutional law, the legal community will have a harder time divining answers to related constitutional questions. Consider the following questions that beseech resolution:

1. Is there an Eighth Amendment problem when the mentally retarded and the brain damaged receive life sentences while the non-retarded and non-brain damaged receive ten years for the same crime in the same jurisdiction?
2. May the criminal code instruct the jury or judge to sentence the defendant to life even if there are valid defenses to each of the aggravators as well as the existence of many mitigators?
3. What is the bare minimum that is constitutionally required to satisfy *Lockett*'s life imprisonment mirror image?
4. Does this degree of deference to government policies in conducting criminal trials extend to punishments less than life imprisonment?
5. What other forms of arbitrariness either practiced by the prosecutors or the trial court or mandated by positive law could withstand an Eighth Amendment challenge?

Several limiting principles restrict the force or consequence of any avalanche that could befall settled criminal judgments, thus assuring the Court that dispositions favorable to defendants such as Juan Guerrero, Jr. need not cast aside stare decisis or, for that matter, upset finalized convictions and sentences in the criminal justice systems nationwide. Those limiting principles include a declaration of harmless error, restrictions on retroactive

application of a vindicating Supreme Court decision (both on direct review and on federal habeas corpus), and the fact that judicial recognition of mental retardation and brain damage as possible mitigators entitled for weighing by the sentencing authority do not require other, less salient mitigators to receive that same consideration. In fact, due to *Atkins* and *Ford*, this decision is a logical sequel. Those less salient supposed mitigators could be the defendant's creativity, capacity to love and be loved, extent of education, or bona fide citizenship in community.[322] Since mental retardation and brain damage are the traditional and most obvious mitigating factors, the promulgation of a new rule will not needlessly cast into constitutional doubt all cases where *some* remote mitigating factors were not considered. Professor Kirchmeier groups possible mitigating factors into four essential categories:

> [First,] mitigating circumstances unrelated to the crime that show that the defendant has some good qualities ("Good Character Factors"); [second,] mitigating circumstances that show the defendant had a lesser involvement with the murder ("Crime Involvement Factors"); [third,] mitigating circumstances related to the legal proceedings ("Legal Proceeding Factors"); and [fourth,] mitigating circumstances that show less culpability and/or that help explain why a defendant committed the crime ("Disease Theory Factors").[323]

Professor Kirchmeier's first category encompasses elements such as assisting in the prosecution of another, creativity in the arts, capacity to love, criminal history or lack thereof, military service, remorse, and education obtained in prison.[324] The second category includes duress or coercion, unforeseen risk of causing injury, the defendant's belief that her criminal act was morally justified, and other circumstances that reduce the defendant's culpability.[325] The third category includes "sentencing disparity with codefendant," leniency recommendation by prosecutor or

322. *See* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 658–65 (2004) (outlining "good character factors" and their constitutional significance when utilized as mitigating considerations in sentencing).

323. *Id.* at 658.

324. *Id.* at 658–65.

325. *Id.* at 665–72.

victim's family, and ineligibility for parole.[326] Finally, the fourth category includes age, agoraphobia, childhood abuse, mental retardation, brain damage, drug addiction, insanity, post-traumatic stress, and family background.[327] In resolving a *Guerrero*-like dispute on constitutional merits, the Supreme Court can limit relief to the fourth category of mitigators. Since the constitutional case is procedural and simply mandates the sentencing authority's consideration of the issue, this requirement will not stir the pot and upset the criminal justice system in an irrecoverable manner.

Vindication in *Guerrero*-like cases will mean only that in cases where the mitigating factors are so obvious and necessary for consideration, failure to do so offends fundamental procedural fairness at the heart of the Eighth and Fourteenth Amendments. It leaves open the possibility that the government need honor no mitigating factor less central to the attenuation of the offender's culpability during the sentencing process. Discouraging facial challenges when the constitutional issue has not sufficiently percolated below, the Supreme Court has said that "it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'"[328] Starting slow, if the litigators elect to pursue the "as-applied" posture of this constitutional problem, it would be a judicious move. It narrows the scope of litigation and precludes the high burden of proof that the appellant in a facial attack is required to satisfy.[329]

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326. *Id.* at 672–73.

327. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 673–87 (2004).

328. *See* United States v. Raines, 362 U.S. 17, 21 (1960) (quoting Jackson v. Burrows, 346 U.S. 249, 256 (1953)).

329. *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 878 (2005) (summarizing the Supreme Court's disapproval of facial constitutional challenges). Metzger maintains that

> ... [t]he dominant theme to emerge from this review is that of inconsistency. What equally becomes apparent is the confusion spawned by the Court's narrow definition of facial challenges [*United States v.*] *Salerno*-style as only available where the statute has no valid applications and thus resulting in total invalidation of a statute. This definition obscures both the range of forms a facial challenge can take and the important role severability plays in the Court's treatment of facial challenges.

Id.; *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236–42 (1994) (noting the dichotomy between a facial challenge, which requires

Never before has the Supreme Court addressed the constitutional implications of adequate sentencing procedures under the Eighth and Fourteenth Amendments for offenders suffering from both mental retardation and brain damage. The Sentencing Project states that "[t]he number of inmates in state and federal prisons has increased nearly seven-fold, from less than 200,000 in 1970 to 1,540,805 by midyear 2008."[330] In addition, a May 2004 report by The Sentencing Project stated that "[o]f [those serving life sentences] in prison, one in four (26.3%) is serving a sentence of life without parole, having increased from one in six (17.8%) in 1992" and that "[o]ne of every 11 (9.4%) offenders in state/federal prison—127,677 persons—is now serving a life sentence."[331]

That same report stated that "[i]n six states—Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota—all life sentences are imposed without the possibility of parole."[332] Alabama, California, Florida, Illinois, Louisiana, Michigan, and Pennsylvania have more than 1,000 prisoners serving life sentences without parole.[333] Finally, "[t]he number of lifers in prison rose by 83% from 69,845 in 1992 to 127,677 in 2003."[334] These population shifts in state and federal prisons were driven by policy rather than sudden increases in criminal activity.[335] The issue of life sentences, especially mandatory life sentences, is extraordinarily relevant.

Dissonance in this case law is not abated by decisions such as

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a statute to be unconstitutional under all circumstances, and an "as-applied" challenge, which requires only that the statute be unconstitutional under certain circumstances); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 361 (1998) ("[T]he Supreme Court has made clear on numerous occasions [that] facial challenges are appropriate, if at all, only in exceptional circumstances . . . [and] the challenger labors under a 'heavy burden.'"); Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1034–40 (2003) (stating that, aside from challenges against statutes that allegedly violate the First Amendment, facial challenges are rare).

330. *See* THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2009), http://www.sentencingproject.org/doc/publications/publications/inc_factsaboutprisons.pdf.

331. MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 3 (2004), www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

Harris v. Alabama[336] and *Kansas v. Marsh*,[337] where the Supreme Court held the Eighth Amendment not to require sentencing judges to be advised of the weight they must accord to juries' advisory verdicts or to disallow the jury from imposing a death sentence when the aggravating and mitigating factors are in equipoise.[338] Indeed, these cases aid defendants in Juan Guerrero's shoes because both *Harris* and *Marsh* presumed the existence of some jury deliberation, however limited, over sentencing (instead of summary punishment without regard for mitigating factors).[339] In *Marsh*, the Court specifically stated that the Kansas death penalty statute[340] was constitutional because it "permits a jury to consider any mitigating evidence relevant to its sentencing determination."[341] There was no possibility for any such weighing equation in *Guerrero* or similar cases.

Among state cases, recently in *Paey v. State*[342] the Florida Court of Appeals for the Second District upheld against an Eighth Amendment federal constitutional challenge the impositions of twenty-five year sentences for *each* of the fifteen counts of drug trafficking, possession, and misrepresentation to obtain a controlled substance.[343] The Second District opined that *Harmelin* requires that noncapital sentences must be grossly disproportionate to the crime in order to be a cruel and unusual punishment.[344]

Texas courts, similarly, have never held that automatic life sentences violate the Eighth Amendment—without explaining if

336. Harris v. Alabama, 513 U.S. 504 (1995).

337. Kansas v. Marsh, 548 U.S. 163 (2006).

338. *See Marsh*, 548 U.S. at 173 ("Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise."); *Harris*, 513 U.S. at 512 ("We therefore hold that the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict.").

339. *See Marsh*, 548 U.S. at 175 (stating that a jury may consider any mitigating evidence prior to sentencing); *Harris*, 513 U.S. at 509 (noting that a trial judge must assign great weight to the jury's sentencing recommendation).

340. KAN. STAT. ANN. § 21–4624(e) (1995). The statute provides that the death penalty will be imposed if a unanimous jury finds that mitigating circumstances do not outweigh aggravating circumstances. *Id.*

341. *Marsh*, 548 U.S. at 175.

342. Paey v. State, 943 So. 2d 919 (Fla. Dist. Ct. App. 2006).

343. *Id.* at 925–26.

344. *Id.* at 922–23.

the same conclusion is valid for offenders whose mental retardation or brain injury supply mitigating factors to reduce their culpability and if that determination, on a case-by-case basis, should be made by the sentencing judge or jury.[345] In *Lockyer v. Andrade*[346] the United States Supreme Court stated that the "gross disproportionality principle is applicable to sentences for terms of years," but it is unclear the extent to which this prescription governs the structural error, in light of the mitigating factors.[347]

In *State v. Boatwright*,[348] the Supreme Court of Florida upheld, on *state* law grounds, the "trial judge['s] discretion to stack minimum mandatory sentences in all cases concerning capital felonies."[349] *Boatwright* was reaffirmed, again on state law grounds, in *State v. Christian*.[350] Recitation of these state cases

345. *See* Copeland v. State, No. 14-07-00475-CR, 2008 WL 4735199, at *3 (Tex. App.—Houston [14th Dist.] Oct. 30, 2008, pet. ref'd) (mem. op., not designated for publication) ("Texas courts have consistently held that a life sentence required under section 12.31 of the Penal Code is not unconstitutional under either the Eighth Amendment of the U.S. Constitution or Article I, section 13 of the Texas Constitution."); Thomas v. State, No. 14-06-00066-CR, 2007 WL 2238890, at *5 (Tex. App.—Houston [14th Dist.] Aug. 7, 2007, pet. ref'd) (mem. op., not designated for publication) (affirming that a mandatory life sentence provision was not unconstitutional when applied to a seventeen-year-old defendant), *cert. denied*, 129 S. Ct. 51 (2008); Hughes v. State, No. 2-04-118-CR, 2005 WL 2100455, at *1 (Tex. App.—Fort Worth Aug. 29, 2005, no pet.) (mem. op., not designated for publication) (adhering to stare decisis in upholding a conviction for a mandatory life sentence); Cienfuegos v. State, 113 S.W.3d 481, 495 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("Texas courts have consistently held that the life sentence required under section 12.31(a) of the Penal Code and article 37.071, section 1 of the Code of Criminal Procedure is not unconstitutional as cruel and unusual punishment under the Eighth Amendment and Article I, section 13 of the Texas Constitution."); Barnes v. State, 56 S.W.3d 221, 239 (Tex. App.—Fort Worth 2001, pet. ref'd) (concluding that a mandatory life sentence for the offense of capital murder is not unconstitutional); Buhl v. State, 960 S.W.2d 927, 935 (Tex. App.—Waco 1998, no pet.) (agreeing with other appellate courts' decisions that a defendant's due process rights are not violated by Texas's sentencing procedures concerning mandatory life sentences); Laird v. State, 933 S.W.2d 707, 714–15 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (reasoning that the Texas statutes mandating life imprisonment are not arbitrary, capricious, or unconstitutional); Prater v. State, 903 S.W.2d 57, 60 (Tex. App.—Fort Worth 1995, no pet.) (explaining that jury assessment of punishment is not necessary to comport mandatory life sentences with due process requirements).

346. Lockyer v. Andrade, 538 U.S. 63 (2003).

347. *Id.* at 72.

348. State v. Boatwright, 559 So. 2d 210 (Fla. 1990).

349. *Id.* at 210.

350. *See* State v. Christian, 692 So. 2d 889, 890–91 (Fla. 1997) (legitimizing stacking where it applies to crimes involving "multiple victims, or multiple injuries to one victim" (citing *Boatwright*, 559 So. 2d 210)).

shows that there is a long-held belief based on *Harmelin*, and even before (as *Boatwright* predates *Harmelin* by one year), that like mandatory sentences are constitutionally permissible. However, that belief might be mistaken, for mitigating factors such as mental retardation or brain injury appear not to be part of the judicial ratio or reasoning in any of the aforementioned cases; correct Eighth Amendment interpretation premised on non-arbitrariness may well alter that conclusion.

B. *Dissonance Among Federal Courts*

The Court's denial of certiorari, it is oft-repeated, does not signal any view on the merits of a petition or a case.[351] Nonetheless, it is noteworthy to mention specifically that neither the Supreme Court's denial of certiorari in *Roberts v. Dretke*[352] nor the Sixth Circuit's denial of relief in panel, and later the denial of en banc review in *Hamblin v. Mitchell*[353] should weigh against the grant of certiorari or give the impression that the lower courts are resolving clearly such issues present in *Guerrero*-type cases.

Not only are both cases limited to the capital punishment context, but unlike Juan Guerrero's case, they are federal habeas corpus actions governed by 28 U.S.C. § 2254(d)(1), amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states that habeas relief may not be granted unless the state court proceeding resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[354] A state court decision that is simply incorrect does not constitute an unreasonable application of federal law; instead, that decision must be objectively unreasonable to trigger the application of prior

351. *See* Barber v. Tennessee, 513 U.S. 1184, 1184 (1995) (mem.) ("On occasion it is appropriate to restate the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits.").

352. Roberts v. Dretke, 544 U.S. 963 (2005), *denying cert. to* 356 F.3d 632 (5th Cir. 2004).

353. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004).

354. *See* 28 U.S.C. § 2254(d)(1) (2006) (setting forth the grounds on which federal courts may grant an application for a writ of habeas corpus); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.) (amending then-prevailing statutes controlling federal habeas corpus law).

decisional law of the Court.[355]

The Supreme Court's interpretation of § 2254(d)(1) in *Williams v. Taylor*[356] maintained that a lower court decision is "contrary to our clearly established precedent if [it] applies a rule that contradicts the governing law set forth in our cases" or "if [it] confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[357] *Williams* and its progeny are construed to "apply the 'clear error' rule also to cases with facts that compel, *a fortiori*, the same judgment as the Supreme Court's latest word."[358]

Guerrero-type cases, on direct appeal, are procedurally different from federal habeas cases working through the federal district courts and courts of appeals. Guerrero had exhausted his state remedies and his suit was brought directly to the Supreme Court praying for a writ of certiorari, as permitted by 28 U.S.C. § 1257(a).[359] In federal habeas cases, on the other hand, the circuit courts as well as the Supreme Court generally *assume* "that the state court applied the proper 'clearly established Federal law,'" and then determine "whether its decision was 'contrary to' or 'an objectively unreasonable application of' that law."[360] With

355. *See, e.g.*, Morrow v. Dretke, 367 F.3d 309, 313 (5th Cir. 2004) (delineating the prerequisites federal courts apply when considering the grant of a writ of habeas corpus); Young v. Dretke, 356 F.3d 616, 623 (5th Cir. 2004) ("A state court's decision is an unreasonable application of clearly established federal law whenever the state court identifies the correct governing legal principle from the Supreme Court's decisions but applies that principle to the facts of the prisoner's case in an 'objectively unreasonable' manner.").

356. Williams v. Taylor, 529 U.S. 362 (2000).

357. *Id.* at 405–06.

358. Riddhi Dasgupta, *Retroactive Consequences: A Critique of What the Supreme Court Did Not Say in the Guantánamo Bay Cases*, 4 CAMBRIDGE STUDENT L. REV. 267, 278, n.68 (2009). *See generally* Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423 (1994) (exploring the Supreme Court's treatment of habeas corpus petitions and the dangers such doctrines pose on traditional adjudication); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991) (analyzing the Supreme Court's mistreatment of habeas corpus petitions submitted by petitioners convicted of capital crimes).

359. 28 U.S.C. § 1257(a) (2006). *See generally* Petition for Writ of Certiorari, Guerrero v. Texas, 129 S. Ct. 2740 (2009) (mem.) (No. 08-9534).

360. Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003) (citing Catalan v. Cockrell, 271 F.3d 491, 493 (5th Cir. 2002)); *see* Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining

regard to law and fact, for instance, the ineffective assistance of counsel claim presented in *Virgil v. Dretke*[361] implicated questions of both law and fact; the Fifth Circuit reviewed the federal district court's factual findings for the presence of "clear error."[362]

The Supreme Court has reviewed relatively few noncapital murder cases, which like Guerrero's case, present unique complications. The following examples are cases from federal courts nationwide that exemplify the doubt regarding procedural flaws possibly attending mandatory life sentences. These examples contain the opportunity for evidentiary hearings in federal district courts on federal habeas actions to decide if relief is warranted. What is more, the existence of such drastic procedural flaws renders it appreciable that the Supreme Court should proceed very carefully, since the denial of certiorari will effectively ensure that several other constitutional defects, which would have been open to further scrutiny, might now remain unexplored and unquestioned. In *Bryan v. Mullin*,[363] a capital murder case from Oklahoma, the Tenth Circuit sitting en banc affirmed the district court's decision to hold an evidentiary hearing on the petitioner's claim that during the penalty phase of his trial, the assistance of counsel he was accorded was constitutionally ineffective.[364] The Tenth Circuit found that the State's defense—that the prehearing record contained sufficient evidence to facilitate adjudication of petitioner's claim—was unpersuasive.[365] The Tenth Circuit then noted that even though the trial record contained some evidence in connection with the mental health concerns supporting the ineffective assistance claim, it did not contain any evidence about the trial counsel's knowledge, or the reasons underlying his

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that decision.").

361. Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006).

362. *See id.* at 604–05 ("Virgil's ineffective assistance of counsel claim involves mixed questions of law and fact; we review the federal district court's factual findings for clear error and its conclusions of law de novo."); Busby v. Dretke, 359 F.3d 708, 713 (5th Cir. 2004) ("In a habeas corpus appeal, we review the district court's findings of fact for clear error."); Martinez v. Johnson, 255 F.3d 229, 237 (5th Cir. 2001) (echoing that a district court's fact findings should be reviewed for clear error under a habeas corpus appeal).

363. Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003) (en banc).

364. *See id.* at 1214–15 (concluding the district court was proper in affording Bryan an evidentiary hearing to pursue his ineffective assistance of counsel claims).

365. *See id.* at 1215 (finding the state's argument—that the trial record contained information sufficient to allow a decision on the merits—unconvincing and not supported by the record).

strategy not to offer mental health testimony at trial.[366] The State could not overcome the gap of logic between the record containing the information and the uncertainty regarding defense counsel's awareness of said information.[367] The Tenth Circuit then explained that the petitioner had alleged facts that, if true, would entitle him to relief; the court further maintained that "the district court correctly afforded Bryan an evidentiary hearing[.]"[368]

In another case, *Clark v. Crosby*,[369] a panel of the Eleventh Circuit vacated the district court's denial of relief on the petitioner's ineffective assistance of counsel claim and remanded the case for an evidentiary hearing.[370] In *Graves v. Cockrell*,[371] a Texas capital case, the Fifth Circuit granted a Certificate of Appealability (COA) and remanded for an evidentiary hearing on the petitioner's *Brady v. Maryland*[372] claim relating to the prosecution's withholding of exculpatory evidence favorable to the petitioner's case.[373] Reaffirming *Brady* in 2004, the Supreme Court said that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."[374] The dissonance here arrives from the tangible fact that *Bryan*, in the Tenth Circuit, was a capital case while this Article presents questions concerning sentencing procedures resulting in life imprisonment.

Bryan is consistent with the Supreme Court's disposition of

366. *See id.* (explaining that the trial court record was "missing key testimony from [Bryan's counsel] regarding . . . , most importantly, why he decided not to utilize that evidence").

367. *See id.* at 1214–15 (rejecting the State's argument that an evidentiary hearing was unnecessary and maintaining that the trial record's lack of key testimony justified the district court's grant of an evidentiary hearing on Bryan's claim of ineffective assistance of counsel).

368. *Bryan*, 335 F.3d at 1215.

369. Clark v. Crosby, 335 F.3d 1303 (11th Cir. 2003).

370. *See id.* at 1312 ("Without an evidentiary hearing, the record in this case does not support a finding regarding that constitutional adequacy of Clark's appellate counsel's performance.").

371. Graves v. Cockrell, 351 F.3d 156 (5th Cir. 2003).

372. Brady v. Maryland, 373 U.S. 83 (1963).

373. *Graves*, 351 F.3d at 159.

374. Banks v. Dretke, 540 U.S. 668, 675–76 (2004). *See generally* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES (Carol S. Steiker ed., 2006) (examining why *Brady* has had less impact on the adversarial criminal system than other landmark Supreme Court cases).

Miller-El v. Cockrell,[375] a capital murder case from Texas, where the Court reversed the Fifth Circuit's denial of a COA regarding petitioner's claim, stating that "when a habeas applicant seeks permission to initiate appellate review ... the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims."[376] The central queries require review: whether the capital punishment rule translates into some threshold relief for others nationwide under mandatory life sentences, and whether it was "harmless error" beyond a reasonable doubt for the defendants to receive these sentences.[377]

The Supreme Court temporarily sidelined the questions this Article raises through its discretionary denial of certiorari. This will make it far more difficult for future similarly situated litigants to have a fair chance at collateral attacks. A recent hope is that the Supreme Court might shed new light on diminished culpability in criminal constitutional law through *Sullivan v. Florida*[378] and *Graham v. Florida*,[379] now sub judice. *Sullivan* and *Graham* ask

375. Miller-El v. Cockrell, 537 U.S. 322 (2003).

376. *Id.* at 327.

377. The concept of "harmless error" is often used to deny relief for a writ of habeas corpus. The error must have caused a "substantial and injurious effect or influence in determining the jury's verdict" in order to not be harmless. Kotteakos v. United States, 328 U.S. 750, 776 (1946). Furthermore, if the judge is left in "grave doubt" over whether the error had a substantial influence, the judge must conclude that the error was not harmless. *Id.* at 764–65; *accord* O'Neal v. McAninch, 513 U.S. 432, 436 (1995) (reaffirming that a federal judge who is in "grave doubt" in determining whether a trial error had a "substantial and injurious effect or influence in determining the jury's verdict" must find that the error is not harmless). At common law, courts employed a burden of proof when applying the harmless-error rule. *See* Chapman v. California, 386 U.S. 18, 24 (1967) ("[T]he original common-law harmless-error rule put the burden on the beneficiary of the error—usually the government— ... to prove that there was no injury ...." (citing 1 J. WIGMORE, EVIDENCE § 21 (3d ed. 1940))). Now, courts apply the harmless-error rule without applying a burden of proof. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 26 (1970) ("Whether or not counsel are helpful, it is still the responsibility of the ... court, once it concludes there was error, to determine whether the error affected the judgment. It must do so without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial."); *see also O'Neal*, 513 U.S. at 436–37 ("[W]e think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens ....").

378. Sullivan v. State, 987 So. 2d 83, No. ID07-6433, slip op. (Fla. Dist. Ct. App. 1st Dist. June 17, 2008) (per curiam), *cert. granted*, 77 U.S.L.W. 3605 (U.S. May 4, 2009) (No. 08-7621).

379. Graham v. State, 982 So. 2d 43 (Fla Dist. Ct. App. 1st Dist. 2008), *cert. granted*, 77 U.S.L.W. 3605 (U.S. May 4, 2009) (No. 08-7412).

"whether imposition of a life without parole sentence on a thirteen-year-old for a non-homicide violate[s] the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children."[380] The cases seek clarification, and possibly, an extension of *Roper*. If the Court decides to premise its decision on statistical evidence and "our own judgment"[381] suggesting the diminished culpability that the sentencing authority must take into consideration, that will provide methodological support for *Guerrero*-type cases. Still, for judgments already "final," the Supreme Court and lower federal and state courts should remain assured that under the *Teague v. Lane*[382] retroactivity test, a reversal on the merits in one such case will not apply to all other "final" judgments on collateral attack.[383]

The *Teague* test determines whether decisions in cases on collateral appeal apply to other collateral appeal cases.[384] *Teague* states that a defendant, on collateral appeal, can reap the benefits of retroactivity only if the new procedure, replacing the flawed one, falls under one of two exceptions. First, a new rule will be applied retroactively if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . .'"[385] Second, a rule can also be applied retroactively if is a "watershed" rule "'implicit in the concept of ordered liberty,'" implicating "fundamental fairness," and "without which the likelihood of an accurate conviction is seriously diminished," such that its lack of observance "'creates an impermissibly large risk'" of convicting the innocent.[386] In recent

380. Petition for Writ of Certiorari at i, Sullivan v. Florida, 129 S. Ct. 2157 (mem) (2009) (No. 08-7621).

381. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

382. Teague v. Lane, 489 U.S. 288 (1989).

383. *See id.* at 305, 307, 310 (holding that final judgments on collateral review may not receive retroactive application of a new rule unless they fall under one of two exceptions). *See generally* Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986) (per curiam) (explaining that a "final" judgment occurs where "the judgment of the conviction [has been] rendered, the availability of appeal [has been] exhausted, and the time for petition for certiorari ha[s] elapsed").

384. *Teague*, 489 U.S. at 300.

385. *Id.* at 311 (citing Mackey v. United States, 401 U.S. 667, 692 (1971)).

386. *See id.* at 311–13 (describing an exception to the general rule that new criminal

jurisprudence, the Supreme Court has held several decisions nonretroactive,[387] thus decreasing the possibility that a vindication resulting here, in a case like Guerrero's, will apply to other collateral claimants whose cases are already "final" and presently working up the judicial ladder.[388] If all else fails, the Court can always make a vindication nonretroactive.[389] No avalanche will upset settled criminal judgments.

Finally, we cannot ignore the times facing us. The current recession means that economically vulnerable defendants find it difficult to afford able lawyers for their criminal defense,[390] and public defenders are overloaded with cases in a way that disadvantages clients.[391] Poor defendants already endure this handicap, but it will become even more of a hurdle—greater numbers of victims, fewer hours worked by paid counsel, and more cases on the plate of court-appointed counsel[392]—in the recession's aftermath. Even though the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have established maximum caseload requirements for

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procedural rules may not apply retroactively to final judgments on collateral appeal).

387. *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 418 (2006) (noting that the Supreme Court has "rejected every claim that a new rule satisfied the requirement for watershed status" since *Teague*).

388. *See, e.g.*, *id.* at 420–21 (maintaining the rule of *Crawford v. Washington*, 541 U.S. 36 (2004), which interprets the Confrontation Clause of the Sixth Amendment, governing the admissibility of hearsay statements in a trial, "does not fall within the *Teague* exception for watershed rules" and is thus non-retroactive toward final judgments on collateral appeal).

389. *Cf. Teague*, 489 U.S. at 316 ("We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.").

390. *See* John Schwartz, *Cash Squeeze Said to Deny Legal Aid to Poor*, N.Y. TIMES, Sept. 30, 2009, at A22, *available at* http://www.nytimes.com/2009/09/30/us/30legal.html (indicating that the weakened economy has made access to legal services increasingly difficult for the poor).

391. *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1, *available at* http://www.nytimes.com/2008/11/09/us/09defender.html (reporting that some public defenders believe that their heavy case load is undermining the right to counsel for the poor).

392. *See id.* ("Public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor. Public defenders are notoriously overworked, and their turnover is high and their pay low. But now, in the most open revolt by public defenders in memory, many of the government-appointed lawyers say that state budget cuts and rising caseloads have pushed them to the breaking point.").

public defenders,[393] those standards are vague and require local enforcement.[394] An already difficult situation with public defenders has been exacerbated to its breaking point;[395] there remains little maneuvering space in federal and state budgets.[396] In short, no reason exists to postpone adjudication of the Eighth Amendment arbitrariness problem as pertaining to life imprisonment sentences.

V. CONCLUSION

In *United States v. Reynolds*,[397] the Supreme Court declared that juries "perform . . . an historic restraint on both executive and judicial power."[398] Texas law takes away from the jury, and in effect from the defendant, the jury's prerogative to consider the factors that make one particular defendant's case and crime unique and deserving of case-by-case attention. What Texas or any state cannot do in practice, its prosecutors and trial courts should not be allowed to do openly by following provisions of the criminal code.

In the grand scheme, our contention is a modest one. We do not

393. *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 40 CLEARINGHOUSE REV. 271, 277 (2006), *available at* http://www.povertylaw.org/clearinghouse-review/issues/2006/2006-july-aug/abel2.pdf (describing the ABA and NLADA's requirements for lawyers representing indigent clients). The United States Supreme Court does not set standards for public defenders, and, in fact, excuses their mistakes. *See generally* Editorial, Gideon*'s Promise, Still Unkept*, N.Y. TIMES, Mar. 18, 1993, at A22, *available at* www.nytimes.com/1993/03/18/opinion/ gideon-s-promise-still-unkept.html ("[T]he Court itself . . . accepted in principle the right to counsel but failed to hold lawyers to high standards of performance—especially in capital cases where the right to a lawyer had been honored the longest. With perverse symmetry, . . . [later Supreme] Court[s] overruled decisions that had been handed down on the very same day as [*Gideon*]. It excused the ineptitude of defense lawyers and penalized death row inmates for minor missteps by competent counsel. The net effect was to subject the right proclaimed in [*Gideon*] to a game of chance for the accused.").

394. *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 40 CLEARINGHOUSE REV. 271, 277 (2006), *available at* http://www.povertylaw.org/clearinghouse-review/issues/2006/2006-july-aug/abel2.pdf (detailing the difficulty in applying national standards for public defenders).

395. *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1, *available at* http://www.nytimes.com/2008/11/09/us/09defender.html (describing the increasing workloads burdening already overworked public defenders).

396. *See id.* (describing the impact of state budget cuts on every area of government services).

397. United States v. Reynolds, 397 U.S. 14 (1970).

398. *Id.* at 24.

ask for a categorical exemption from any punishment for any defendant because he is a person with mental retardation and suffers from a brain injury, conditions that impair one's judgment. A decision considering the mental health of Guerrero-like defendants will not compromise federalism by denying states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[399] Our contention merely is that the existence of these mitigating factors warrants the sentencing authority the ability to consider them before locking such defendants away for the rest of their natural lives. By cutting off this path, the Texas sentencing procedure effectuates arbitrariness and caprice—not unlike "being struck by lightning."[400] The provision slots all capital offenders, regardless of their specific circumstances, into a single box and gives no quarter to their individuality. The upholding of such a life sentence by the Supreme Court would denote a radical departure from precedent and tradition, perhaps leaving us forlorn days for the Bill of Rights.

The Supreme Court should speak clearly and inform Americans of the precise reach of their Eighth Amendment rights in criminal proceedings. The question addressed here holds special significance for Texas criminal law and increasingly for the nation itself, especially because of the political disenfranchisement that befalls those sentenced to life in prison. The United States Supreme Court's prior decisions do not resolve this quandary, and those usually are the cases fit for discretionary review by a later Court. Greater attention will be paid to this significant Eighth Amendment problem *only if* robust academic and political discourse about these issues continues. This Article is submitted with the hopes of taking a constructive step in that direction.

399. Ford v. Wainwright, 477 U.S. 399, 405, 416–17 (1986).

400. *See* Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (per curiam) (Stewart, J., concurring) (comparing the higher rate of death sentences for racial minorities to "being struck by lightning").