DEFENDING CATEGORICAL EXEMPTIONS TO THE DEATH PENALTY: REFLECTIONS ON THE ABA'S RESOLUTIONS CONCERNING THE EXECUTION OF JUVENILES AND PERSONS WITH MENTAL RETARDATION

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I
INTRODUCTION

The American Bar Association's ("ABA's") recent call for a moratorium on the imposition of capital punishment[1] constitutes a dramatic escalation of the ABA's efforts to improve the American death penalty system. Over the past twenty years, the ABA has focused on particular aspects of state practices and recommended piecemeal reforms relating to competency of counsel, post-conviction review, race discrimination, and the execution of juveniles and persons with mental retardation.[2] Recognizing that each of these prior resolutions has essentially fallen on deaf ears, and that current death penalty "reforms" have run in the opposite direction of its proposals, the ABA concluded that the overall system surrounding the American death penalty had become "so seriously flawed"[3] that a stronger position was warranted.

We are sympathetic to the ABA's global approach to the administration of the death penalty in this country and have elsewhere taken stock of the courts' quarter-century effort to regulate state capital systems via the Eighth and Fourteenth Amendments.[4] In this article, we address the ABA's resolutions regarding the execution of juveniles and persons with mental retardation.[5] Al-

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1. *See* American Bar Ass'n, Resolution of the House of Delegates (Feb. 3, 1997), *reprinted in Appendix*, 61 LAW & CONTEMP. PROBS. 219 (Autumn 1998).

2. *See* American Bar Ass'n, Report No. 107 (1997), *reprinted in Appendix*, *supra* note 1, at 220.

3. *Id.* at 2.

4. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

5. In 1983, the ABA announced its policy calling for exemption from the death penalty for persons who were under the age of 18 at the time of their offenses; in 1989, the ABA announced its policy

though we agree with the ABA's bottom line in these areas—that such persons should be exempted from execution—we believe that the strongest legal case for that position requires a more nuanced and intricate argument than the ABA has thus far advanced in its resolutions.

The ABA has joined other advocates of exemption (including litigators, commentators, and dissenting judges) in maintaining that juveniles and persons with mental retardation should be spared the death penalty because such application of the punishment is contrary to evolving standards of decency. According to this view, various legislative provisions that allow for the execution of juveniles and mentally retarded persons conflict with an emerging national consensus about the appropriateness of the death penalty for such persons.[6] In legal terms, this claim about the harshness of the death penalty as applied to certain offenders is framed as an Eighth Amendment proportionality claim: Juveniles and mentally retarded persons should be exempted on the ground that they invariably lack the level of culpability necessary to "deserve" the ultimate sanction according to contemporary community standards.

Proportionality analysis, though, provides a weak foundation for categorical exemptions in the death penalty context. From a purely doctrinal perspective, the United States Supreme Court has shown increasing hostility to the whole proportionality enterprise, with at least some members of the Court disclaiming any constitutional authority to adjudge the severity of a punishment in relation to the offense or offender.[7] More broadly, the Court has had difficulty articulating a workable, principled approach in proportionality cases, and the few instances in which the Court has exempted classes of offenders are less than persuasive on their own terms.[8]

We believe that the exemption of juveniles and mentally retarded persons can be better defended by invoking several of the prominent strands of current death penalty jurisprudence traceable to the Court's foundational capital cases. The pillars of modern doctrine—the requirements of (1) narrowing the class of the death eligible, (2) channeling the discretion of capital sentencers, (3) ensuring effective consideration of all relevant mitigating evidence, and (4) securing heightened reliability in the procedures leading to the imposition of the death penalty—together provide an impressive case for exempting juveniles and mentally retarded persons from the death penalty. Moreover, appealing to

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calling for the prevention of executing mentally retarded persons. *See* American Bar Ass'n, Report to the House of Delegates (1983) [hereinafter ABA Report (1983)]; American Bar Ass'n, Report to the House of Delegates (1989) [hereinafter ABA Report (1989)].

6. Of the 40 death penalty jurisdictions, 11 states and the federal government currently prohibit the execution of mentally retarded persons; 14 require offenders to have reached 18 at the time of the crime to be death-eligible.

7. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 976-90 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) (arguing against recognition and application of Eighth Amendment proportionality doctrine).

8. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (invalidating death sentence as applied to defendant who neither killed, attempted to kill, nor intended to kill); Coker v. Georgia, 433 U.S. 584 (1977) (invalidating death sentence for crime of rape).

these aspects of the Court's distinctive death penalty jurisprudence avoids the most significant pitfalls of seeking exemption based on the more general proportionality doctrine.

In the first section of this article, we describe the origins of the Court's current constitutional regulation of the death penalty. We then critically examine the Court's proportionality methodology and illustrate the weaknesses of seeking exemption via that doctrine. Finally, we argue that the Court's distinctive death penalty jurisprudence, though it shares many of the concerns of the proportionality doctrine, offers a firmer and more promising basis for exempting juveniles and mentally retarded persons from the death penalty.

II

BACKGROUND

For the first 175 years of our country's history, the Constitution was not construed to place any limits on the states' ability to impose capital punishment.[9] The few challenges that reached the United States Supreme Court during this period were relatively modest; they did not question the constitutionality of the death penalty itself but instead sought to preclude particularly brutal or novel means of execution.[10] After all, the death penalty had existed as a mode of punishment both in England and the colonies, and the text of the Constitution itself appears to contemplate permissible applications of the death penalty.[11] In rejecting these challenges, the Court acknowledged that the Eighth Amendment's prohibition of "cruel and unusual" punishments forbids barbaric executions—such as burning at the stake or crucifixion—but does not preclude less painful means such as the firing squad and electrocution.[12] Indeed, the Court refused to interfere in the case of an inmate who objected to "death by installments"; the inmate had been placed in the electric chair and the switch had been thrown, but no shock had been administered because of mechanical failure.[13] The Court, recognizing that "[a]ccidents happen," found no constitutional impediment to a second state attempt to extinguish the inmate's life "humanely."[14]

The historical and textual support for the death penalty was buttressed by the Court's longstanding doctrinal conclusion that the Eighth Amendment con-

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9. As a prominent death penalty scholar observed in 1968, "not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be 'cruel and unusual punishment' under any state or federal constitution." Hugo Adam Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 228-29.

10. *See, e.g.*, *In re* Kemmler, 136 U.S. 436 (1890) (upholding electrocution).

11. *See* U.S. CONST. amend. V (referring to "capital" crimes and requiring due process of law before deprivations of "life").

12. *See Kemmler*, 136 U.S. at 446-47 (holding that burning or crucifixion would be forbidden, but electrocution was permissible); Wilkerson v. Utah, 99 U.S. 130 (1879) (upholding firing squad).

13. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 474 (1947) (Burton, J., dissenting).

14. *Id*. at 462, 464.

strained only federal (and not state) practices.[15] Eventually, and perhaps inevitably, the Warren Court's dramatic "incorporation" (and application against the states) of virtually all of the protections for criminal defendants in the Bill of Rights led to a judicial reassessment of the death penalty's place in our constitutional scheme.

The first suggestion that the Court might regulate state death penalty practices appeared not in a Court decision, but in a 1963 Court order announcing the denial of two petitions for *certiorari*.[16] The petitions, like the constitutional challenges of the earlier era, did not contend that the death penalty itself was an impermissible punishment; instead, the petitions maintained that the death penalty was excessive when imposed for the crime of rape.[17] Justice Goldberg, writing for himself and two other Justices, maintained that the questions raised by the petitions were worthy of the Court's attention.[18]

Almost a decade later, in *Furman v. Georgia*,[19] the Court entertained a more encompassing challenge to the death penalty. Buoyed by a decline in popular support for the death penalty (as well as a sharp decrease in the number of executions actually implemented), opponents of the death penalty sought a sweeping declaration that the death penalty was no longer consistent with contemporary American values. The Court's ultimate decision, although often erroneously portrayed as "abolishing" the death penalty on these broad grounds, did not declare (and the Court has never declared) that capital punishment is invariably "cruel and unusual" punishment prohibited by the Eighth Amendment. Only Justices Brennan and Marshall supported so expansive a holding.[20] *Furman* did, however, make clear that prevailing state death penalty practices were unconstitutional.[21]

The scope and meaning of *Furman* is unusually elusive—even as Supreme Court opinions go—because there is no "majority" or even "plurality" opinion which details the reasoning of the Court; the five majority Justices wrote separate, extensive, and at times conflicting accounts explaining their joint conclusion that the sentences obtained under the challenged statutes were unconstitutional.

The common thread of the opinions focused on the *infrequency* of death sentences and executions, which generated two separate concerns. First, the paucity of death sentences and executions was difficult to square with the ex-

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15. The Court first held the Eighth Amendment's prohibition of cruel and unusual punishment applicable against the states in *Robinson v. California*, 370 U.S. 660 (1962) (invalidating punishment for addiction to narcotics).

16. *See* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting); Snider v. Cunningham, 375 U.S. 889 (1963) (Goldberg, J., dissenting).

17. *See Rudolph*, 375 U.S. at 889 (Goldberg, J., dissenting); *Snider*, 375 U.S. at 889 (Goldberg, J., dissenting).

18. *See Rudolph*, 375 U.S. at 889 (Goldberg, J., dissenting); *Snider*, 375 U.S. at 889 (Goldberg, J., dissenting).

19. 408 U.S. 238 (1972).

20. *See id*. at 305-06, 369-71 (Brennan & Marshall, JJ., concurring).

21. *See id*. at 239.

traordinarily broad state statutes that rendered virtually all murderers (and often rapists and armed robbers) "death eligible."[22] Although the state statutes *permitted* enormous numbers of offenders to be sentenced to death, the statutes never *required* that death be imposed.[23] Worse still, the statutes offered no criteria at all for choosing between life and death.[24] This tremendous disparity between the death penalty's availability and its use, together with the absence of meaningful guidance, suggested strongly that death sentences were meted out arbitrarily; there was simply no reliable evidence suggesting that the few persons sentenced to death and executed were truly the "worst" offenders among the broad death eligible class.[25] Indeed, "arbitrary" administration of the death penalty seemed like an optimistic assessment; available statistical and anecdotal evidence suggested that the rare death sentences and executions secured during this period were disproportionately distributed to poor and minority offenders.[26]

Second, the rarity of death sentences and executions undermined the states' arguments regarding the necessity of the death penalty.[27] In the absence of significant numbers of executions, states had difficulty defending a plausible deterrent or retributive function of the death penalty within their schemes. Moreover, the extremely limited use of the death penalty (in view of its wide availability) pointed to the absence of "will" on the part of various actors within state systems—prosecutors, jurors, and judges—to utilize the punishment, which in turn might have reflected an emerging societal consensus that the punishment was excessive or barbaric notwithstanding its legislative authorization.

Ultimately, states reaffirmed their commitment to the death penalty in the wake of *Furman*.[28] When the Court reviewed the new schemes in 1976, it retreated from any suggestion that the death penalty was inconsistent with con-

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

23. *See id.* at 257 (Douglas, J., concurring) (leaving open the possible constitutionality of a mandatory death penalty); *id.* at 308 (Stewart, J., concurring) ("[T]he Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape."); *id.* at 311 (White, J., concurring) ("The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which . . . the legislature does not itself mandate the penalty in any particular class or kind of case.").

24. For example, the Georgia statute reviewed in *Furman* afforded the jury absolute discretion to sentence a defendant convicted of forcible rape to death, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years;" the Texas rape law consolidated for review in the same case allowed the jury to impose punishment "by death or by confinement in the penitentiary for life, or any term of years not less than five." *Id.* at 308 n.8 (Stewart, J., concurring) (quoting GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969), and TEX. PENAL CODE art. 1189 (1961)) (internal quotation marks omitted).

25. *See id.* at 291-95 (Brennan, J., concurring).

26. *See id.* at 250-53 (Douglas, J., concurring).

27. *See, e.g.*, *id.* at 311 (White, J., concurring) (noting that under discretionary capital punishment schemes, "legislative will is not frustrated if the penalty is never imposed").

28. *See* Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2594 (1996) (discussing states' responses to *Furman*).

temporary standards of decency.[29] The Court's regulation of state death penalty practices thereafter has focused on several overlapping and to some extent inconsistent principles. First, states must meaningfully narrow the class of death eligible offenders to ensure that those sentenced to death are truly among the "worst" offenders.[30] This "narrowing requirement" flows primarily from the empirically observed chasm between the numbers of death eligible defendants and the number of defendants actually sentenced to death and executed.[31] Second, states must channel discretion to ensure that sentencers remain focused on relevant, clearly identified criteria as they decide between life and death.[32] Third, states must protect the right of capital defendants to present and have considered any mitigating factors calling for a sentence less than death.[33] Although this requirement of individualization is in substantial tension with the concept of state-provided guidance (because individualization essentially cuts the sentencer loose from state-defined criteria), the Court has insisted that both must be fulfilled to reduce arbitrariness in capital sentencing.[34] Lastly, the Court has articulated a general requirement of heightened reliability in light of the difference in kind between death and all other punishments.[35]

III

PROPORTIONALITY

Soon after the Court approved several of the new schemes adopted in the wake of *Furman*, it revisited the question that it had refused to address in 1963: whether the death penalty is an excessive punishment for the crime of rape.[36] The Court's resulting plurality decision in *Coker v. Georgia* invalidated the death penalty as grossly disproportionate to the crime of rape.[37]

Despite the tremendous significance of the case, and the remarkable breadth of its holding in light of prior decisions, the Court's defense of its ruling in *Coker* is both brief and unsatisfying. As an initial matter, the plurality assumed, with little discussion, that the Constitution contains a proportionality guarantee that authorizes courts to review the appropriateness of a punishment

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29. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (Stewart, J., plurality opinion) (remarking that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction").

30. *See* Steiker & Steiker, *supra* note 4, at 372-78.

31. *Id.*

32. *See id.* at 378-89.

33. *See id.* at 389-96.

34. *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 859-66 (1992) (book review) (discussing tension between dual requirements of channeling discretion and facilitating individualized sentencing).

35. *See* Steiker & Steiker, *supra* note 4, at 397-403.

36. 433 U.S. 584 (1977).

37. *See id.* at 592. Although the victim of the defendant's crime was 16, the Court qualified its holding by insisting that death was an excessive punishment for the crime of raping an "adult" woman. *See id.*

in light of an offender's crime.[38] Although it is perfectly plausible to locate such a proportionality principle within the Eighth Amendment's prohibition of cruel and unusual punishment, the Court had never firmly embraced such a doctrine. Indeed, the *Coker* plurality cited just five cases spanning seventy years as establishing a proportionality doctrine, all of which could have been explained on other grounds.[39]

Having conclusorily established the existence of a proportionality guarantee, the plurality self-consciously sought to limit its intrusiveness by ensuring that the Court's proportionality judgments "should not be, or appear to be, merely the subjective views of individual Justices."[40] Accordingly, the plurality maintained that their judgments should be guided "to the maximum possible extent" by "objective factors" such as public attitudes, history, precedent, legislative attitudes, and jury behavior.[41]

The plurality's application of these factors in *Coker* was remarkably unpersuasive. The plurality relied heavily on the fact that at the time of its decision, Georgia was alone in authorizing the death penalty for the crime of raping an adult woman.[42] But just five years before, sixteen states and the federal government had permitted rape to be punishable by death.[43] Had public opinion and contemporary values shifted so precipitously in a half decade? Clearly the Court's decision in *Furman* had encouraged states to redraft their statutes, and eleven states adopted mandatory death penalty provisions in the (ultimately misguided) hope that maximum guidance would cure the unconstitutional arbitrariness that the Court had identified in *Furman*.[44] That only two of these

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38. *See id.*

39. *See id.* at 592 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); and Weems v. United States, 217 U.S. 349 (1910)). In *Weems*, the Court invalidated a bizarre set of punishments inflicted on a public official who was convicted of falsifying an official document in the United States-controlled Philippine Islands. *See Weems*, 217 U.S. at 357-58. The 15-year sentence included terms requiring him to be chained at the ankle and wrists while he performed hard and painful labor. *See id.* at 364. Although some language in *Weems* suggests the existence of a proportionality guarantee, the decision is better understood to prohibit barbaric punishments regardless of the underlying offense. *See id.* at 365-67. Similarly, in *Trop*, the Court seemed more concerned with the nature of the punishment—stripping the defendant of his natural-born citizenship—than its severity in relation to his offense of desertion during war. *See Trop*, 356 U.S. at 90-93. In *Robinson*, the Court invalidated an extremely modest punishment ("not less than ninety days nor more than one year in the county jail") because it was imposed based on the defendant's status of being an addict rather than for the commission of a particular criminal act; the opinion suggests that no criminal liability could be justified (hence, proportionality does not seem to explain the decision). *Robinson*, 370 U.S. at 661 n.1, 667. In *Furman*, several members of the Court hinted at a proportionality rationale for prohibiting the death penalty for all crimes, but the decision could not fairly be read to have firmly established a general proportionality principle, especially given the myriad of conflicting rationales offered in the five opinions supporting the judgment. *See supra* text accompanying notes 19-22. Lastly, in *Gregg*, the Court suggested that the Constitution limits the imposition of excessive punishments, but upheld the death penalty against a broad proportionality challenge. *See Gregg*, 428 U.S. at 168-69.

40. *Coker*, 433 U.S. at 592.

41. *Id.*

42. *See id.* at 594-95.

43. *See id.* at 593.

44. *See* Steiker, *supra* note 28, at 2594.

statutes continued to permit (and indeed required) the death penalty for rape reflects, at most, a post-*Furman* sentiment that death is not invariably required for the crime of rape. It cannot fairly be read, along the lines of the plurality opinion, to reflect a newly emerged legislative consensus that death is never justified for rape.

The plurality's use of jury data is even more problematic. In support of its national rule precluding use of the death penalty for rape, the plurality prominently cited a study of sixty-three rape cases in Georgia during the four years preceding its decision, in which only six defendants had been sentenced to death.[45] The plurality seemed to regard as significant that within this sample, "in the vast majority of cases, at least nine out of ten, juries have not imposed the death sentence."[46]

Even accepting the dubious assumption that this data fairly demonstrates Georgians' repugnance toward punishing rape with death during the relevant four-year period, it certainly cannot be construed to demonstrate any larger emerging national consensus about the inappropriateness of the death penalty for rape. The Court is, of course, constrained in its ability to develop constitutional facts necessary to reach its decisions; it cannot itself conduct sophisticated jury studies and must instead rely on the factual development by the parties in the lower courts. But the Court should at least be circumspect about its appallingly loose use of statistics in cases like *Coker*; no professional sociologist would dare venture an opinion about national values (or "evolving standards of decency") based on such limited data.

Ultimately, perhaps recognizing the weakness of its "objective" evidence, the plurality retreated to its "own judgment" that the crime of rape is simply not serious enough to permit the death penalty.[47] Although "[l]ife is over for the victim of murder[,] for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."[48] These reflections likewise provide a thin basis for establishing a firm national rule. One can regard rape as less damaging than murder and still believe that some rapes should be punishable by death. Moreover, as Chief Justice Burger argued in dissent, the plurality's "subjective" analysis appeared to constitutionalize a version of *lex talionis* by seemingly insisting on a defendant's taking life before becoming death eligible.[49] Strong moral arguments can be made on behalf of such a limitation on the death penalty's use, but it is difficult to see why the plurality's moral perception should automatically be elevated to a constitutional rule.

Strikingly absent in *Coker* was any reference to what most death penalty critics would regard as the central indictment of the states' use of the death penalty for rape. Both at the time of Justice Goldberg's opinion respecting de-

45. *See Coker*, 433 U.S. at 596-97.
46. *Id.* at 597.
47. *Id.*
48. *Id.* at 598.
49. *Id.* at 621 (Burger, C.J., dissenting).

nial of *certiorari* in 1963 and the Court's decision in *Coker* in 1977, it was all too apparent that the death penalty was not generally available for the crime of rape; it was available for the crime of interracial rape by African-African men of white women in a specific geographical region.[50] In the half-century before *Coker*, over ninety-five percent of the executions for rape in the United States occurred in former Confederate states, and an overwhelming number of the executions involved African-American defendants convicted of raping white victims.[51] In Texas, the largest executioner of rapists during the period, eighty-one of the ninety-nine persons executed were African-Americans convicted of raping whites, even though a substantial majority of the 2,308 rapists convicted during the period were white or Hispanic[52] and a significant number of victims were non-white.[53] Rape offenders generally were sentenced to death in about one in eighteen cases,[54] but African-Americans who were convicted of raping white victims were approximately thirty-five times more likely to be sentenced to death than prison.[55]

Given the historical role of race in punishing rapists with death, it is surprising that race is not mentioned either in Justice Goldberg's opinion regarding *certiorari* or in *Coker* itself. More generally, *Coker* would have been a much stronger opinion if, instead of endeavoring to gauge contemporary morality, the Court had invoked the broader concerns about arbitrariness articulated in the various opinions in *Furman*. Of course, the unwillingness of whites to use the death penalty to punish white rapists or to avenge nonwhite victims arguably supports the Court's ultimate conclusion that society regards death as an excessive punishment for rape. But the evident arbitrary and discriminatory character of this nation's history of punishing rape with death provides a cleaner and more persuasive basis for prohibiting the practice than the weak indicators of public opinion advanced by the Court.

Following *Coker*, the Court applied its proportionality methodology in *Enmund v. Florida*[56] to exempt one additional class of offenders: persons convicted via the felony-murder rule who did not themselves kill, intend to kill, or attempt to kill. As in *Coker*, the Court engaged in its legislative head-counting and concluded that the contemporary legislative judgment was against executing such offenders.[57] As the Court conceded, its survey of legislative schemes was even less persuasive than it was in *Coker*, because the Court's parsing of the various state statutes revealed that the relevant class of offenders would be

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50. *See* JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 39-47 (1994).

51. *See id.*

52. *See id.* at 56.

53. *See id.* at 57.

54. *See id.* at 56.

55. *See id.*

56. 458 U.S. 782 (1982).

57. *See id.* at 789-93.

death eligible in as many as seventeen states.[58] Evidence of jury practices was somewhat stronger, in that few members of the class had been sentenced to death nationwide over a several-decade period.[59] But the Court did not provide data that would have indicated whether juries had been given the opportunity to execute offenders like Enmund who had neither killed, attempted to kill, or intended to kill. Hence, it was not clear whether the paucity of such offenders on death row reflected the considered moral judgment of juries or the exercise of discretion elsewhere in the system (which might—but might not—accurately reflect prevailing community values).

Overall, *Coker* and *Enmund* together reveal the difficulty the Court faces in its efforts to discern evolving standards of decency. In its more recent decisions, the Court has rejected proportionality-based exemptions for juveniles and persons with mental retardation.[60] Rather than rehashing the various "objective" indicia of contemporary moral standards, we explore other routes to exempting such offenders based on particular aspects of the Court's death penalty jurisprudence.

IV

EXEMPTING JUVENILES AND PERSONS WITH MENTAL RETARDATION FROM EXECUTION BY ADHERING TO CAPITAL PUNISHMENT JURISPRUDENCE

We believe there exists a solid foundation in both law and policy for exempting juveniles and persons with mental retardation from the ultimate sanction of death—a foundation that avoids the pitfalls of the proportionality analysis conducted by the Supreme Court. Quite apart from the Court's dubious proportionality doctrine, the rest of the Court's Eighth Amendment jurisprudence strongly supports the exemptions called for by the ABA. Moreover, granting constitutional exemption from the death penalty to juveniles and persons with mental retardation not only would promote the central goals of the Supreme Court's constitutional regulation of capital punishment, but also would interfere little with the goals propounded by supporters of capital punishment.

It is puzzling that neither abolitionist litigators nor any member of the Supreme Court has mounted an argument against executing juveniles and persons with mental retardation rooted in the central pillars of the Court's Eighth Amendment jurisprudence. As we have sketched above and explained at length elsewhere,[61] the Court identified four central concerns about the pre-*Furman* death penalty system when it began its regime of constitutional regulation of the death penalty in 1972: the need for greater assurance of (1) individual desert; (2)

58. *See id.* at 792-93.

59. *See id.* at 794-96.

60. *See* Stanford v. Kentucky, 492 U.S. 361 (1989) (declining to exempt 16-year-olds from execution because of the absence of a discernible national consensus against practice of executing such offenders); Penry v. Lynaugh, 492 U.S. 302 (1989) (declining to exempt persons with mental retardation from execution because of absence of discernible national consensus).

61. *See* Steiker & Steiker, *supra* note 4.

fairness across cases; (3) individualized consideration; and (4) heightened procedural reliability.[62] In time, the Court developed four doctrines to address these four concerns: the doctrinal requirements of (1) narrowing the class of the death eligible; (2) channeling the discretion of the capital sentencer; (3) permitting the consideration of all relevant mitigating evidence; and (4) adapting procedures to reflect the fact that "death is different" from all other punishments not only in degree, but in kind.[63] Yet, instead of starting from these pillars and asking what they might imply about the execution of juveniles or persons with mental retardation, litigants and courts alike have tried to tease out a general "proportionality" principle from the Eighth Amendment, which prohibits only disproportionate punishments. Important as such a principle might be, however, there is no need to rely upon it in questioning the application of the death penalty to the two groups under discussion; rather, exempting these groups from execution would go a long way toward furthering the more specific purposes of the Court's death penalty jurisprudence.

How does the Court's jurisprudence support (indeed, require) the exemption of juveniles and persons with mental retardation from the death penalty? Consider first the doctrinal requirement of "narrowing the class of the death eligible."[64] In the pre-*Furman* death penalty regimes, large numbers of convicted criminal defendants were technically eligible for the death penalty under state death penalty laws. Neither prosecutors nor sentencers were given any meaningful guidance by law regarding how to choose who should be executed. Moreover, very few capital sentences were sought by prosecutors, and even fewer were imposed by sentencers (almost always juries).[65] Hence, the Supreme Court expressed its concern in *Furman* that the death penalty appeared to be imposed in an arbitrary (or worse, discriminatory) manner, striking like "lightning" and therefore destroying confidence that the worst of the death eligible were being selected for the worst punishment.[66] Note that this concern is a mini-proportionality concern—it is a fear that some people were being selected to die who were not sufficiently culpable to "deserve" that penalty. As the Court itself explained, the narrowing requirement helps to ensure that a capital sentencing scheme can "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[67]

This concern led the Supreme Court to develop the doctrinal requirement of "narrowing," by which the Court sought to force state legislatures to designate in advance those offenders most deserving of death. The Court has held that legislatures can meet this requirement either by refining their definitions of capital murder such that only a subset of the worst murderers will be eligible for the

62. *See id.* at 361-71.
63. *See id.* at 371-401.
64. *Id.* at 372-78.
65. *See* Furman v. Georgia, 409 U.S. 238, 291-95 (1972) (Brennan, J., concurring).
66. *Id.* at 309 (Stewart, J., concurring).
67. Zant v. Stephens, 462 U.S. 862, 877 (1983).

death penalty,[68] or by providing for required findings of aggravating circumstances at sentencing hearings before "ordinary" murderers can be made eligible for the death penalty.[69] The Court has also approved, although not required, a form of *ex post* narrowing; it has held that capital sentencing schemes are improved by the statutory requirement of case-by-case examination by appellate courts to ensure that each sentence imposed is deserved in light of a particular jurisdiction's actual sentencing practices.[70] It makes perfect sense to regard categorical exemptions from the death penalty (such as the proposed exemptions for juveniles and persons with mental retardation) through the lens of the Eighth Amendment's "narrowing" requirement rather than as a part of a grander theory of constitutional proportionality, though to our knowledge, no litigant or court has done so.

Of course, the Court's narrowing doctrine, as currently elaborated, seems to require merely that states designate a subset of murderers that they deem the "worst" murderers to be eligible for the death penalty; the Court has declined to impose through the narrowing requirement any substantive view of "better" or "worse" murderers. And, as noted above, the Court seems right to conclude that there no doubt exist *some* juveniles and *some* persons with mental retardation who are sufficiently culpable so as to "deserve" execution as both a moral and a legal matter. So why should the states not be free to include at least some young or retarded defendants among the death eligible? How is it that the Court's narrowing doctrine can be said to support or even require the wholesale exclusion of juveniles and persons with mental retardation?

The narrowing argument, unlike the proportionality argument, does not rely on establishing that no juvenile or mentally retarded person can be found to "deserve" execution, morally or legally. Rather, the narrowing argument suggests that classes of defendants for whom there is a particularly high likelihood of mistake about the question of desert should be exempted in order to assure that those actually selected for the death penalty deserve it. In essence, the narrowing argument is that states must be forced to exclude some who may deserve the death penalty in order to assure that all of those who actually get the death penalty deserve to get it.[71] States might justifiably object to *any* constitutional narrowing requirement on the grounds suggested by Justice Harlan's famous opinion

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68. *See* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) ("The legislature may . . . narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern [about narrowing the class of the death eligible].").

69. *See Zant*, 462 U.S. at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.").

70. *See* Gregg v. Georgia, 428 U.S. 153, 204-06 (1976) (Stewart, J., plurality opinion) (describing Georgia's case-by-case comparative proportionality review as a means of assuring that the death penalty is reserved for the most deserving defendants); *see also* Pulley v. Harris, 465 U.S. 37, 44-54 (1984) (holding that the Eighth Amendment does not invariably require comparative proportionality review by state appellate courts).

71. To use terminology we have developed elsewhere, states should be forced to endure some "underinclusion" in order to ensure that there is minimal "overinclusion" in the group of those subject to capital punishment. *See* Steiker & Steiker, *supra* note 4, at 366.

for the Court in *McGautha v. California*[72]—legislatures are simply unable to "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and . . . express these characteristics in language which can be fairly understood and applied by the sentencing authority."[73] States might thus claim that requiring them to designate subsets of the "worst" murderers necessarily forces them to categorically exclude some who might nonetheless deserve the penalty, all things considered. But the Supreme Court has nonetheless insisted that narrowing is essential to ensure individual desert. In a similar vein, if the risk of error about desert could be shown to be high enough in a particular group, the narrowing doctrine should require the exclusion of that entire group.

We think juveniles and persons with mental retardation are just such groups—groups about whom, when their members are aggregated, there is a substantial risk that an individual sentencer might err in concluding that an individual member of the group is appropriately subject to the death penalty. These are the very points that the relevant ABA reports made eloquently as far back as 1983, when the ABA first announced its opposition to the imposition of capital punishment upon "any person for any offense committed while under the age of eighteen"[74] and again in 1989, when it extended that opposition to include "person[s] with mental retardation."[75] As for children, it is widely recognized that adolescents are generally less developed both cognitively and in their ability to control their behavior than fully mature adults. The 1983 ABA report noted that "[m]ost would agree that adolescents live for today with little thought of the future consequences of their actions. Their defiant attitude and risk-taking behavior is probably related to their developmental stage of defiance about danger and death."[76] And given that "no adult with mental retardation has a mental age higher than 12,"[77] the argument that persons with mental retardation are unlikely to achieve the requisite level of moral culpability for criminal wrongdoing to justify execution is at least as strong as that for juveniles.

Why is it not sufficient, as the Supreme Court has argued, to simply require that each capital sentencer consider a defendant's youth or mental retardation as a mitigating factor? Why is blanket immunity required, or even helpful? The answer is that youth and mental retardation are conditions that not only frequently render defendants incapable of achieving the sort of moral culpability that the "worst" murderers must have to deserve the death penalty; these conditions also are uniquely hard to convey as entirely mitigating in the capital sentencing context. The cognitive and volitional immaturity exhibited by many juveniles and

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72. 402 U.S. 183 (1971) (rejecting a due process challenge to uncontrolled capital sentencing discretion).

73. *Id.* at 204.

74. ABA Report (1983), *supra* note 5, at 1.

75. ABA Report (1989), *supra* note 5, at 1.

76. ABA Report (1983), *supra* note 5, at 8 (internal quotation marks and citations omitted).

77. ABA Report (1989), *supra* note 5, at 5 (emphasis omitted) (citing AMERICAN ASS'N ON MENTAL RETARDATION, CLASSIFICATION IN MENTAL RETARDATION 33 (H. Grossman ed., 1983)).

persons with mental retardation, while mitigating as regards the defendant's personal culpability for criminal wrongdoing, is at the very same time clearly aggravating as regards the question of the defendant's dangerousness in the future. Indeed, the more impaired an individual defendant is, the more powerful the inference of future dangerousness.[78] And a sentencer's concerns about future dangerousness are likely to loom disproportionately large, given that most jurors (capital sentencing is almost invariably done by jury) vastly underestimate the meaning of a "life" sentence.[79] Moreover, defense lawyers are permitted to correct this routine misimpression only to a limited extent.[80] Under these circumstances, there is an unacceptable likelihood that a juvenile or a person with mental retardation who is sentenced to die will have a degree of diminished culpability insufficient to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[81]

Indeed, the Court's doctrine regarding individualized sentencing in the capital context—from which flows its requirement that youth and mental retardation be considered as "mitigating circumstances"—lends affirmative support to the argument that the Court's narrowing doctrine requires the exemption of the young and mentally retarded from the death penalty. As we have argued elsewhere, the requirement of individualized sentencing derives from a commitment to individual moral culpability (as opposed to consequentialist concerns) as the central inquiry in a constitutional scheme of capital punishment.[82] Youth and mental retardation are relevant to capital sentencing precisely because they are unusually likely to reduce the defendant's personal moral culpability for the criminal wrongdoing at issue. Yet these qualities are at the same time not very amenable to being taken fully into account through individualized consideration by sentencing juries. Risking the erroneous execution of those who lack the requisite degree of moral culpability for their actions thus strikes at the very constitutional heart of the Court's impetus to regulate capital punishment under the Constitution.

The third and final pillar[83] of the Court's constitutional regulation of capital punishment—the requirement of heightened procedural reliability—also sup-

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78. *See* Penry v. Lynaugh, 492 U.S. 302, 323-25 (1989) (suggesting that some types of *mitigating* evidence might be treated as *aggravating*, given the state's focus on future dangerousness in its capital sentencing scheme); Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in the judgment).

79. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Cases*, 77 TEX. L. REV. 605 (1999).

80. *See* Simmons v. South Carolina, 512 U.S. 154 (1994) (requiring that the defendant be permitted to inform his capital sentencing jury about his parole ineligibility under state law when the prosecutor argued that the defendant would pose a danger in the future). *But see* Brown v. Texas, 118 S. Ct. 354 (1997) (denying *certiorari* to a capital defendant whose future dangerousness was at issue under state law but who was precluded from informing his sentencing jury that he would be ineligible for parole for 35 years under state law).

81. *See supra* text accompanying notes 67, 69 (quoting Zant v. Stephens, 462 U.S. 862, 878 (1983)).

82. *See* Steiker & Steiker, *supra* note 34, at 844-58.

83. We initially identified four pillars of the Court's constitutional regulation of capital punishment—narrowing, channeling, permitting consideration of mitigating evidence, and requiring heightened procedural reliability. *See supra* text accompanying notes 30-35 (citing Steiker & Steiker, *supra*

ports a categorical exemption from the death penalty for juveniles and persons with mental retardation. The purpose of the Court's "death is different" doctrine is to ensure through adequate procedures that the decision to take a life, which is greater in severity and finality than any other possible state sanction, is as reliable as possible. This requirement has been applied not only to procedures related to determinations of the defendant's factual guilt or innocence of the underlying crime, but also to determinations regarding the appropriateness of death as a sentence.[84] The requirement that death sentences be especially reliable can be promoted not only by procedures that reduce the chance of an erroneous outcome, but by wholesale exclusions when the risk of error in particular categories is particularly high.

Thus, the requirements of narrowing, individualized consideration, and heightened procedural reliability, when read together, support the categorical exemptions recommended by the ABA because such exemptions are likely the only way to eliminate the substantial risk that would otherwise exist of a certain type of moral and constitutional error. This argument proceeds directly from the particular concerns the Supreme Court identified at the commencement of its constitutional regulation of the death penalty as the central concerns of the Eighth Amendment. And nothing in this argument depends on generating a convincingly calibrated "proportionality principle" that can tell us in every case whether a punishment is constitutionally disproportionate. Rather, it depends only on identifying crude, aggregate risks of constitutional error.

Moreover, exempting juveniles and persons with mental retardation also would not impede the goals of capital punishment most frequently cited by proponents of the death penalty. Unlike many other changes to our system of capital punishment urged by reformers, these exemptions would not make more difficult or costly the administration of capital punishment generally, nor would it delay the death sentences imposed upon others outside of the exempted groups. And to the extent that capital punishment deters serious homicides generally (which many proponents seem to believe it does), it seems unlikely that much of any deterrent effect is accomplished with juveniles or persons with mental retardation. The very qualities that make these two groups generally less morally culpable for criminal conduct also make them less likely to be able to process and act upon the likelihood of execution as a penalty for certain proscribed actions. Indeed, the deterrence argument is even weaker for persons with mental retardation than it is for juveniles, given that persons with mental retardation have, at most, the cognitive function of a pre-teen.[85] And although any individual executed will certainly be specifically deterred (that is, incapacitated) from committing any future crimes

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note 4, at 371-403). As we explain in our longer work, the Court eventually abandoned channeling as an independent requirement and instead folded it into the narrowing doctrine. *See* Steiker & Steiker, *supra* note 4, at 378-89.

84. *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320, 328-30 (1985) (invalidating death sentence when prosecutor deliberately misled jury about the consequences of its sentencing decision by misstating the scope of appellate review).

85. *See* ABA Report (1989), *supra* note 5, at 5.

while imprisoned, this argument carries little water in the context of juveniles, because "such irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems."[86]

Arguments from retribution likewise have reduced force in the context of juveniles and persons with mental retardation. Retributive theories of justice are essentially founded on the idea of desert.[87] As we argued above, juveniles and persons with mental retardation often (even though not invariably) fail to attain the requisite degree of moral culpability for their wrongdoing to justify the death penalty, and there is little reason to be confident that our current capital sentencing practices are satisfactory in ensuring that such insufficiently culpable individuals are winnowed out. In such circumstances, the goal of executing only those truly deserving of the ultimate sanction would seem to be promoted rather than defeated by the categorical exclusions suggested by the ABA.

Finally, many supporters of the death penalty point to its symbolic or expressive value—its ability to communicate our collective condemnation of horrible acts of violence. While it is true that public acts of government necessarily "speak" about our collective values, such acts do not always speak in one voice. Exempting the very young and those with mental retardation from the ultimate sanction also sends a message. This message is partly one of care and caution—a signal that we wish to ensure that only the most culpable and degraded are subject to the special penalty that we reserve for "the worst of the worst." But the message is also one of hope for our collective future. As Clarence Darrow urged in a capital sentencing proceeding in 1924, when he argued for the lives of Leopold and Loeb (who were eighteen and seventeen respectively at the time of their notorious murder of fourteen-year-old Bobby Franks):

> Your Honor stands between the past and the future. You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who, in ignorance and darkness, must grope his way through the mazes which only childhood knows. In doing it you will make it harder for unborn children. You may save them and make it easier for every child that sometime may stand where these boys stand. You will make it easier for every human being with an aspiration and a vision and a hope and a fate.
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> I am pleading for the future. . . .[88]

Darrow's future is now, and the ABA has appropriately taken up his plea at this important time in the history of the death penalty.

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86. ABA Report (1983), *supra* note 5, at 9.

87. *See, e.g.*, Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, *in* PERSPECTIVES ON PUNISHMENT: AN INTERDISCIPLINARY EXPLORATION 139, 149 (Richard Mowery Andrews ed., 1997).

88. Darrow's closing argument in the Leopold and Loeb case is printed in full in ATTORNEY FOR THE DAMNED 86 (Arthur Weinberg ed., 1957).