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Repudiating the Narrowing Rule in Capital Sentencing

*Scott W. Howe**

*This Article proposes a modest reform of Eighth Amendment law governing capital sentencing to spur major reform in the understanding of the function of the doctrine. The Article urges the Supreme Court to renounce a largely empty mandate known as the “narrowing” rule and the rhetoric of equality that has accompanied it. By doing so, the Court could speak more truthfully about the important but more limited function that its capital-sentencing doctrine actually pursues, which is to ensure that no person receives the death penalty who does not deserve it. The Court could also speak more candidly than it has since *Furman v. Georgia* about the problem of inequality that has continued to pervade capital selection. If the Court remains unwilling to strike down unequal death-penalty systems, it should acknowledge the inequality and explain that the problem addressed by the Eighth Amendment is not inconsistency but retributive excess.*

I. INTRODUCTION

The Supreme Court has declared that the Eighth Amendment imposes two mandates on capital sentencing. First, a death-penalty scheme must “rationally narrow the class of death-eligible defendants”¹ Second, it must “at the sentencing phase allow[] for the consideration of mitigating circumstances and the exercise of discretion.”² The body of doctrine that reflects these mandates stems from the 1972 decision in *Furman v. Georgia*,³ in which the Court struck

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1. *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006).

2. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *see also Marsh*, 548 U.S. at 174 (stating that a capital punishment scheme must “permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime”).

3. 408 U.S. 238 (1972) (per curiam).

down capital sentencing as it then existed, and the quintet of 1976 cases, in which the Court upheld three new death-penalty schemes and struck down two others.⁴

Among students of capital-sentencing law, both opponents and proponents of the death penalty generally view the doctrine as grievously flawed.⁵ Opponents frequently argue that the doctrine is “unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place,”⁶ which was the “arbitrary and discriminatory imposition of death”⁷ Proponents emphasize that the doctrine unduly interferes, for no apparent purpose, with states’ decisions about how to structure death-penalty trials.⁸ Commentators from both camps generally agree that the law embodies a confusing and debilitating tension between “consistency,” which is the purported goal of the first mandate, and “individualized consideration,” which is the asserted goal of the second one.⁹

4. The decision in all five cases was issued on July 2, 1976. *See* *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down a statute that mandated the death penalty for first-degree murderers); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down a statute that mandate the death penalty for first-degree murderers); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding against a facial challenge a statute that restricted the definition of capital murder and, at a sentencing hearing, required the jury to answer three special questions affirmatively before a death sentence could be imposed); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding against a facial challenge a statute requiring a judge, after a jury recommendation, to find at least one statutory aggravating factor and to weigh aggravating factors against mitigating factors before deciding to impose a death sentence on a convicted murderer); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding against a facial challenge a statute that required a jury or judge to find at least one statutory aggravating factor and to consider aggravating and mitigating evidence before imposing a death sentence).

5. *See* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 288 (2002); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357–59 (1995).

6. Steiker & Steiker, *supra* note 5, at 359.

7. *Id.* at 358.

8. *See* BANNER, *supra* note 5, at 288 (“Critics on the right complained that the Court’s Eighth Amendment jurisprudence forced state governments to spend time and money for no good purpose.”); *see also* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995) (“The established application of the Eighth Amendment to the administration of the death penalty will continue to give opponents a legitimate platform from which to impede even the most determined efforts to carry out the death penalty on a routine basis.”). There also can be no doubt that developing and enforcing the doctrine has required an enormous investment of time and resources by the federal courts. *See, e.g.*, Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court’s “Culture of Death,”* 34 OHIO N. U. L. REV. 861 (2008).

9. *See, e.g.*, BANNER, *supra* note 5, at 287 (noting “the Court’s constant effort to reconcile two irreconcilable goals”); NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 137 (2011) (asserting that

This Article urges a reform to resolve claims that capital-sentencing doctrine is simultaneously meaningless, overly complex, and at war with itself. The proposal will satisfy neither committed opponents nor ardent proponents of capital punishment, because it would preserve the most important part of existing doctrine and thus, neither assure equality in the distribution of death sentences nor avoid interference with state decisions on how to structure death-sentencing deliberations. While the proposal offers only a modest reform to existing doctrine, it also aims to alter substantially the existing rhetoric regarding capital sentencing's central goal, allowing a more truthful account to blossom. I contend that the Court should abandon the first mandate, regarding narrowing, and end the rhetoric about consistency that has accompanied it. At the same time, the Court should preserve the second mandate, regarding mitigating evidence and sentencer discretion, and articulate the deeper rationale that justifies it, which is not simply "individualized consideration," but a "deserts limitation"—the notion that no person should receive a death sentence who does not deserve it.¹⁰

I previously have argued that the Court should have avoided altogether the regulation of capital-sentencing trials under the Eighth Amendment.¹¹ In *Furman* or in the 1976 cases, the Court could have begun to foreclose the use of the death penalty in certain categorical situations, such as for rape, but otherwise left states to decide how to structure capital-sentencing decisions.¹² Alternatively, the Court could have held the death penalty impermissible as cruel and unusual punishment, except perhaps for rare and egregious crimes against the

capital-sentencing law embodies an "obvious tension"); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 520–21 (1991) (describing an "inherent tension" in the Court's capital sentencing jurisprudence); Steiker & Steiker, *supra* note 5, at 370 (noting "some tension" between the individualization mandate and the consistency aspiration).

Even among the Justices, there is substantial agreement that the two mandates pose a "tension." See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008) ("The tension . . . has produced results not altogether satisfactory."). Justice Blackmun concluded at the end of his career that the inability to achieve both goals justified judicial abolition. See *Callins v. Collins*, 510 U.S. 1141, 1147–49 (1994) (Blackmun, J., dissenting from denial of writ of certiorari). Other Justices have contended that the tension justifies evisceration of the second mandate, particularly because that requirement purportedly lacks grounding in the Eighth Amendment. See *infra* notes 178–79 and accompanying text.

10. See Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 797 (1998).

11. See *id.* at 797–98.

12. See Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 438–43 (2001).

state or against humanity.¹³ My contention that the Court should have avoided regulating capital-sentencing trials stems not from the absence of an Eighth Amendment rationale for it. Indeed, I believe that the Eighth Amendment should prohibit the imposition of the death penalty on those who do not deserve it and that the capital sentencer should follow this principle in reaching its sentencing verdict.¹⁴ The problem for the Court stems from the inability of the Justices to translate this deserts limitation into sufficiently specific rules to make Eighth Amendment regulation of the sentencing trial effective.¹⁵ For this very reason, the Court's capital-sentencing doctrine, even if understood through the prism of the deserts limitation, has produced benefits of uncertain value.¹⁶

Putting aside arguments for deregulation or abolition, however, the narrowing rule warrants repudiation. First, while the individualization mandate can be understood as an imperfect effort to protect against undeserved death sentences, the narrowing rule is too inconsequential to merit continuance. The narrowing rule as constructed does not coherently pursue any goal required by the Constitution.¹⁷ Second, since the articulation of the narrowing rule in 1976, the Court has overlapped it with decisions directly restricting death eligibility. The Court's decisions proscribing the death penalty for certain categories of crimes and offenders has rendered the narrowing rule obsolete.

The third reason to renounce the narrowing requirement is the most important. Repudiation would help the Court speak more forthrightly about the purpose of the Eighth Amendment as it applies to capital

13. See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2004) (explaining the Eighth Amendment argument for abolition based on disproportionality).

14. See Howe, *supra* note 10, at 797.

15. See *id.* at 828–29.

16. See *id.* at 862; see also LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 150–51 (1996) (noting the absence of “a good theory about desert and free will” that can lead to consensus about how to judge the deserved punishment of a murderer).

17. The Court could try to re-explain the narrowing rule as serving the goal of ensuring that only the deserving receive the death penalty. See Howe, *supra* note 10, at 833; see also David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?* 24 FLA. ST. U. L. REV. 545, 577 (1997) (noting that while the “winnowing effect” of Georgia's narrowing effort was “not huge, neither [was] it de minimis” and that this effect helped to define some undeserving defendants “out of the death-eligible pool”). While voluntary state narrowing, if significant and well considered, could help further the deserts limitation, I contend, in Parts II through IV, that the narrowing mandate as articulated by the Court is so incoherent and, in Part V, that its negative consequences are so substantial that the Court should renounce it.

sentencing. The narrowing mandate did not stem from a sensible view about how the Eighth Amendment could regulate robust death-penalty systems. It arose from an implausible theory the Court used in 1976 both to uphold new death-penalty statutes and to assert allegiance to *Furman*, a decision in which only three of the Justices were even beginning to consider Eighth Amendment principles for a regulatory regime.¹⁸ In 1976, the Court asserted that *Furman* had called for “reasonable consistency” in the use of the death penalty and that some of the new systems, by providing for protections that included narrowing, achieved that end.¹⁹ In reality, consistency according to offender deserts is impossible to achieve except through abolition and, in any event, the narrowing effect that the new statutes provided was too minimal and haphazard to promote consistency.²⁰ Yet, for decades, the Court has continued to offer the consistency rationale for the narrowing mandate with the suggestion that reasonable consistency has been assured.²¹ This account has bred confusion over what the Eighth Amendment demands and deep disillusionment with the Court among many who correctly recognize that the distribution of death sentences among capital offenders, while not as egregious as in the pre-*Furman* era,²² has remained highly arbitrary and often racially discriminatory.²³ This account also has obscured the truth about inequality for those who are not predisposed to recognize it.

The Court should stop perpetuating the story that the Eighth Amendment demands reasonable consistency in the use of the sanction and that the narrowing rule helps to assure it. The Court has not taken the consistency goal seriously, and the narrowing rule has served mostly to

18. See *infra* Part II.

19. *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.) (contending that the new Georgia statute, by requiring the finding of an aggravating circumstance as a prerequisite to a death sentence, would help promote “reasonable consistency”); *id.* at 196–98 (opinion of Stewart, Powell & Stevens, JJ.) (noting that the new Georgia statute “narrow[s] the class of murderers subject to capital punishment” and asserting that this protection, among others, meant that there should be “non-discriminatory application”).

20. See *infra* Part III.

21. See *infra* text accompanying notes 54–91.

22. See, e.g., McCord, *supra* note 17, at 548 (“In fact, the best available evidence strongly suggests that post-*Furman* systems are operating less arbitrarily . . .”).

23. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (asserting that in upholding the Georgia system in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in the face of statistics revealing racial bias in the distribution of death sentences, the majority’s opinion was “grievously flawed,” was comparable “to *Plessy* and *Korematsu*,” “repressed the truth,” and was “detestable”).

breed confusion and disappointment. As long as the Court continues to regulate capital trials under the Eighth Amendment, it should declare forthrightly that the central aim is to prevent undeserved death sentences and should maintain not the first requirement but the second, regarding mitigating evidence, which more strongly connects with the deserts limitation.

My project proceeds in four stages. Part II briefly recounts how the narrowing requirement began to emerge in the 1976 cases and was perpetuated in the Court's subsequent decisions. Part III demonstrates that the narrowing requirement has been constitutionally inconsequential as an effort to assure reasonable consistency in the distribution of death sentences and that the Court cannot effectively reform the requirement to serve that end. Part IV demonstrates that, since 1976, the grounds for requiring death-penalty systems to narrow the death-eligible group also have been overtaken by various Court decisions directly restricting death eligibility. Finally, Part V explains how repudiation of the narrowing requirement would assist the Court in accepting and acknowledging the deserts-limitation theory that actually underlies its decisions restricting death eligibility and regulating capital-sentencing trials.

II. THE ORIGINS AND PERPETUATION OF THE NARROWING MANDATE

The narrowing requirement grew out of efforts within the Supreme Court in 1976 to portray several new death-penalty statutes as congruous with *Furman*, and the Court has continued to adhere to that original version of congruence. A puzzling five-to-four decision in which all nine Justices wrote separate opinions,²⁴ *Furman* was generally understood to strike down, under the Eighth Amendment, the standardless capital-sentencing schemes that then prevailed. However, the decision created confusion and left the country "in an uncertain limbo" about the future of the death penalty.²⁵ In 1976, the Court declared *Furman* a strike against inequality, although not a blow mandating abolition.²⁶ The narrowing rule arose because the Court could say that the three new systems that it upheld in 1976, unlike those that it had invalidated in *Furman*, narrowed the class of offenders who were subject to the death penalty, which was

24. See *Furman v. Georgia*, 408 U.S. 238 (1972).

25. See *id.* at 403 (Burger, C.J., dissenting).

26. See *infra* note 55 and accompanying text.

an attribute that the Court declared in turn to promote consistency.²⁷ The Justices have perpetuated this consistency account for the narrowing rule in many subsequent decisions up through the recent past.

A. Furman's Ambiguity

The *Furman* decision appeared to be an abrupt about-face from decisions that the Court had rendered only a year earlier. The ruling embodied three capital cases, two from Georgia and one from Texas.²⁸ The inmate from Texas, Elmer Branch, and one of the inmates from Georgia, Lucious Jackson, had received the death penalty for rape.²⁹ William Furman had received that sanction in Georgia for murder.³⁰ All of the defendants were black, and all of the victims were white.³¹ The statutes under which the defendants were sentenced contained no standards for deciding when to impose death, and no standards were provided to the sentencers.³² The Georgia defendants were also subjected to a unitary trial in which the jury heard evidence and deliberated on the questions of guilt and punishment simultaneously.³³ One year earlier, in *McGautha v. California*,³⁴ and a companion case, *Crompton v. Ohio*,³⁵ the Court had rejected arguments that standardless capital sentencing and unitary trials violated the Constitution.³⁶ However, the Court seemed to disavow at least some aspect of those decisions in *Furman*.

The meaning of the *Furman* decision was unclear.³⁷ In striking down the death sentences in a one paragraph, per curiam opinion, the majority

27. See *infra* notes 56–67 and accompanying text.

28. See *Furman v. Georgia*, 408 U.S. 238, 238 (1972).

29. See *id.* at 239.

30. See *id.*

31. See Carol S. Steiker, *Furman v. Georgia, Not an End, But a Beginning*, in *DEATH PENALTY STORIES* 95, 96 (John H. Blume & Jordan M Steiker eds., 2009).

32. See *Furman*, 408 U.S. at 240 (Douglas, J., concurring) (noting that, in each case, “the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury”).

33. See Steiker, *supra* note 31, at 95.

34. 402 U.S. 183 (1971).

35. *Id.*

36. See *id.* at 196–208 (rejecting the argument against standardless capital sentencing); *id.* at 208–20 (rejecting the argument against unitary capital trials).

37. At one level, the explanation is clear. Two Justices changed their minds. In *McGautha*, Stewart and White had been among six Justices, including Harlan, Burger, Blackmun, and Black, who had rejected the due process challenge. See *id.* at 184. Justices Douglas, Brennan, and Marshall had dissented. See *id.* In *Furman*, Stewart and White changed positions and, along with Douglas, Brennan, and Marshall, supported the per curiam opinion for the Court. See 408 U.S. at 240. The

said little more than that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”³⁸ The five concurring opinions, none of which received the endorsement of another Justice, failed to illuminate an underlying, controlling principle. Justices Brennan and Marshall each concluded that the death penalty was per se cruel and unusual.³⁹ The other three concurring Justices asserted that the Georgia and Texas death-penalty systems violated the Eighth Amendment in operation. Justice Douglas said the systems allowed for improper discrimination.⁴⁰ Justice Stewart said they allowed the death penalty to be imposed on “a capriciously selected random handful” of persons who committed capital crimes⁴¹ and thus produced punishment that was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁴² Justice White said the systems allowed the death penalty to be “exacted with great infrequency” and provided “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”⁴³ Without specifying what kind of reforms, if any, could suffice, these three opinions left open the possibility that new death-penalty statutes might pass constitutional muster. Considering the five concurring opinions together, *Furman* seemed to prohibit discriminatory, arbitrary, or discretionary systems. Anxiety over racial bias seemed to play a large role in the decision.⁴⁴

Although some observers, and perhaps a majority of the Justices, thought *Furman* would cause most death-penalty states to abandon

dissenters were Burger, Blackmun, Powell (who had replaced Black), and Rehnquist (who had replaced Harlan). *See id.*

38. *Furman*, 408 U.S. at 239–40.

39. *See id.* at 305 (Brennan, J., concurring); *id.* at 360 (Marshall, J., concurring).

40. *See id.* at 256–57 (Douglas, J., concurring) (asserting that “these discretionary statutes . . . are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments”).

41. *Id.* at 309–10 (Stewart, J., concurring).

42. *Id.* at 309.

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

44. *See, e.g.,* *Graham v. Collins*, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (“*Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty . . .”); BANNER, *supra* note 5, at 290 (describing race discrimination as “the silent specter” that had prompted the Court’s condemnation of standardless sentencing); *see also* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1795 (1987) (“From its very beginning, the charge of racism in the administration of the death penalty was often the text and always the subtext of the abolitionist litigative campaign.”).

capital punishment, the decision sparked a fierce public backlash and a frenzy of new legislation.⁴⁵ Within four years, thirty-five states enacted revised death-penalty systems.⁴⁶ Based on the perceived need to avoid inequality and infrequency in the use of the death sanction, a large majority of the new statutes simply required the death penalty for conviction of a capital offense.⁴⁷ A much smaller group provided for bifurcated capital trials and sentencing standards.⁴⁸ The states varied on whether they applied the death penalty to crimes other than murder and, with respect to murder, in how narrowly they defined the capital crime.⁴⁹ In states that required bifurcated trials, the standards provided for the sentencing hearing differed but were generally patterned on an American Law Institute proposal⁵⁰ from the early 1960s,⁵¹ although the Court had criticized that approach in *McGautha*.⁵² These varied responses underscored the uncertainty over the meaning of *Furman*. At the same time, the totality of new legislation demonstrated that, if popular support for the death penalty had waned by 1972, *Furman* itself had sparked a resurgence.⁵³

B. The 1976 Cases: Narrowing for Consistency

In the 1976 cases, the narrowing requirement began to emerge as part of a determination within the Court to uphold new death-penalty statutes while asserting allegiance to *Furman*. The manifestation of overwhelming public support for the death penalty after *Furman* undermined any claim that American society had come to view the sanction as altogether inhumane. Influenced by this demonstration,⁵⁴ a

45. See Steiker, *supra* note 31, at 102–07.

46. See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 226, 238 tbl.1 (1986).

47. See *id.* at 227, 252 tbl.3 (indicating that 22 states enacted mandatory-death statutes).

48. See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699–1709 (1974).

49. See Poulos, *supra* note 46, at 227, 248 tbl.2.

50. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). The members of the American Law Institute recently voted to disavow the provision because of insurmountable obstacles to ensuring the fair administration of the penalty. See Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

51. See, e.g., N.Y. PENAL LAW § 65.00 (McKinney 1967) (adopting Model Penal Code's approach to sentencing hearings).

52. See *McGautha v. California*, 402 U.S. 183, 206–08 (1971).

53. See Steiker, *supra* note 31, at 103–04.

54. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE

majority of the Justices in 1976 concluded that the Court should uphold the death penalty in some circumstances.⁵⁵ The Court did strike down two mandatory death systems on grounds, among others, that they improperly denied a defendant the opportunity to present mitigating evidence.⁵⁶ However, the Court upheld three new death systems requiring bifurcated trials on the theory that they promoted consistency, which the Court asserted was the mandate of *Furman*.⁵⁷

Each of the three systems that the Court approved—from Georgia, Florida, and Texas—appeared to reduce the group of capital offenders who were death eligible. Before a court could impose a death sentence in Georgia and Florida, the capital sentencer had to find at least one aggravating circumstance from a statutory list; only then could the sentencer consider all aggravating and mitigating circumstances that might support a potential death sentence.⁵⁸ Texas limited the definition of the capital offense to certain aggravated murders, thus narrowing the death-eligible group at the guilt-or-innocence proceeding before the sentencing phase commenced.⁵⁹

In the 1976 cases, the Court highlighted the narrowing aspect of the three systems as a feature that promoted consistency. The Court contended that reducing the death-eligible group to certain highly culpable offenders would likely cause prosecutors and sentencers to

AMERICAN AGENDA 66–67 (1986) (“Two phenomena appear to have strongly influenced Justices Stewart and White: the impact of *Furman* on public opinion and the legislative response to *Furman*.”).

55. By 1976, seven Justices were prepared to uphold the death penalty in some circumstances, which meant that three Justices from the *Furman* majority were not voting to strike down all of the new statutes. Justice White, part of the majority in *Furman*, voted to uphold all of the statutes before the Court in 1976. Justice Stewart, part of the majority in *Furman*, voted to uphold the death penalty in three of those systems. Likewise, Justice Douglas, part of the majority in *Furman*, was replaced by Justice Stevens, who voted to uphold the same three statutes as Justice Stewart in 1976. See Poulos, *supra* note 46, at 227–35.

56. See *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion).

57. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 222 (White, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 251–53 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 260–61 (White, J., concurring); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 278–79 (White, J., concurring).

58. See *Gregg*, 428 U.S. at 165–66 (opinion of Stewart, Powell & Stevens, JJ.) (discussing the operation of the new Georgia statute); *id.* at 222 (White, J., concurring); *Proffitt*, 428 U.S. at 251–53 (opinion of Stewart, Powell & Stevens, JJ.) (discussing the operation of the new Florida statute); *id.* at 260–61 (White, J., concurring).

59. See *Jurek v. Texas*, 428 U.S. 262, 271, 276 (1976) (discussing the operation of the new Texas statute); *id.* at 278 (White, J., concurring).

regularly favor the death penalty for those who were deemed to fall within the death-eligible category.⁶⁰ If a statute could define a death-eligible class that would cover the most death-deserving offenders, the narrowing strategy, at least in theory, could also produce substantial consistency in the use of the death penalty.

This point was most explicit in the opinions in *Gregg v. Georgia*.⁶¹ A plurality of three Justices—Stewart, Powell, and Stevens—wrote that the narrowing function of the Georgia statute helped to ensure that sentencing discretion “is controlled by clear and objective standards so as to produce non-discriminatory application.”⁶² They asserted that a finding of a statutory aggravator “channeled” and “circumscribed” the decision of the sentencing jury⁶³ and thereby helped ensure a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”⁶⁴ Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred on the importance of the narrowing function. He asserted that, if application of the death penalty is limited to the worst murders, as it was “in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined.”⁶⁵ White also asserted that prosecutors would almost always pursue the death penalty when they could prove murder plus an aggravating circumstance.⁶⁶ Thus, he concluded that there was “reason to expect” that Georgia’s new system would avoid “the infirmities which invalidated its previous system under *Furman*.”⁶⁷

C. Narrowing for Consistency After 1976

Since 1976, the Court has continued to tout the narrowing rule as the central antidote to the infirmities that justified the *Furman* decision. In

60. *See, e.g., Proffitt*, 428 U.S. at 260 (White, J., concurring) (asserting, regarding the new Florida statute, that there was “good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity”).

61. *Gregg*, 428 U.S. at 153.

62. *Id.* at 197–98 (opinion of Stewart, Powell & Stevens, JJ.) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

63. *See, e.g., id.* at 206–07.

64. *Id.* at 198 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

65. *Id.* at 222 (White, J., concurring).

66. *Id.* at 225.

67. *Id.* at 222.

two subsequent decisions, the Court rejected state-court applications of particular statutory aggravators as unduly vague and, thus, inadequate to narrow the death-eligible group. While the Court has not further applied the narrowing rule to reject a state-court judgment supporting a death sentence, it has frequently reiterated that the rule ensures the consistency required by *Furman*.

The Court rejected statutory aggravators for inadequate narrowing in *Godfrey v. Georgia*⁶⁸ and *Maynard v. Cartwright*.⁶⁹ In *Godfrey*, the Court focused on a Georgia statutory aggravator that asked whether the offense “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”⁷⁰ In *Cartwright*, an Oklahoma aggravator at issue asked whether the murder was “especially heinous, atrocious, or cruel.”⁷¹ In neither case had the state courts applied a narrowing construction of the aggravator.⁷²

The Supreme Court rejected the application of the Georgia provision on grounds that a “person of ordinary sensibility could fairly characterize almost every murder” to satisfy it.⁷³ The Court rejected the application of the Oklahoma provision on the same basis, noting that it left the jury “with the kind of open-ended discretion which was held invalid” in *Furman*.⁷⁴ In both cases, the Court emphasized that narrowing was essential to help ensure a principled basis for distinguishing the few cases “in which the death penalty was imposed, from the many cases in which it was not.”⁷⁵

In several later cases, the Court upheld state-court constructions of aggravating circumstances that were similar to those in *Godfrey* and *Cartwright*, but it continued to stress the importance of the narrowing rule.⁷⁶ For example, in *Walton v. Arizona*⁷⁷ and *Lewis v. Jeffers*,⁷⁸ the

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

69. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

70. *Godfrey*, 446 U.S. at 422 (plurality opinion) (quoting GA. CODE § 27-2534.1(b)(7) (1978) (recodified as GA. CODE ANN. § 17-10-30(b)(7) (2012)).

71. *Cartwright*, 486 U.S. at 359 (quoting OKLA. STAT., tit. 21, § 701.12(4) (1981)).

72. *See id.* at 360–61; *Godfrey*, 446 U.S. at 430–32 (plurality opinion).

73. *Godfrey*, 446 U.S. at 428–29.

74. *Cartwright*, 486 U.S. at 361–62.

75. *Godfrey*, 446 U.S. at 433 (plurality opinion); *Cartwright*, 486 U.S. at 363 (quoting *Godfrey*, 446 U.S. at 433 (plurality opinion)).

76. In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Court rejected claims that aggravating factors specified in the California statute for consideration at a final selection stage of the sentencing process, rather than at the earlier stage for determining death-eligibility, were too vague.

Court upheld applications of an Arizona statutory aggravator that asked whether the murder was “committed ‘in an especially heinous, cruel or depraved manner.’”⁷⁹ Likewise, in *Arave v. Creech*,⁸⁰ the Court upheld the application of an Idaho statute that asked whether “[by] the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.”⁸¹ In all three cases, the Court found that the state courts had provided a narrowing construction sufficient to pass constitutional muster.⁸² The Court also emphasized that the narrowing requirement plays “a significant role in channeling the sentencer’s discretion”⁸³ and in providing “a principled basis” for distinguishing “those who deserve capital punishment from those who do not.”⁸⁴ The function of the narrowing requirement, according to the Court, was “to ensure that the death penalty will be imposed in a consistent, rational manner.”⁸⁵

Throughout the modern era, the Court has perpetuated the view that the Eighth Amendment demands reasonable consistency in the use of capital punishment and that the narrowing rule helps to assure that consistency.⁸⁶ At times, the Court has said something less—that the Eighth Amendment demands merely that use of the penalty not be

77. 497 U.S. 639 (1990).

78. 497 U.S. 764 (1990).

79. *Walton*, 497 U.S. at 645 (quoting ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989)); *Jeffers*, 497 U.S. at 766 (quoting the same statute).

80. 507 U.S. 463 (1993).

81. *Id.* at 465 (alteration in original) (quoting IDAHO CODE ANN. § 19-2515(g)(6) (1987)) (internal quotation marks omitted).

82. *See Creech*, 507 U.S. at 471–75, *Walton*, 497 U.S. at 654–55; *Jeffers*, 497 U.S. at 778–80.

83. *Jeffers*, 497 U.S. at 774.

84. *Creech*, 507 U.S. at 474; *see also Walton*, 497 U.S. at 655 (rejecting Walton’s claim that aggravator was “applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed”).

85. *Jeffers*, 497 U.S. at 776 (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring in judgment)).

86. The Court has asserted an Eighth Amendment goal of consistency or non-arbitrariness in capital sentencing on various occasions in addition to those already mentioned in this Part. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 341 (1992) (asserting that “narrowing factors” protect against “arbitrary and capricious impositions of the death sentence”); *California v. Brown*, 479 U.S. 538, 541 (1987) (“[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (“Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would [promote] . . . measured, consistent application.”).

“wholly arbitrary”⁸⁷ or not “wanton” or “freakish.”⁸⁸ However, the Court frequently has asserted that the goal is something approaching equality and that the narrowing rule is the central means for achieving it.⁸⁹ Only recently, in *Kennedy v. Louisiana*,⁹⁰ the Court reiterated that the function of the narrowing rule is to “ensure consistency in determining who receives a death sentence.”⁹¹

III. THE INADEQUACY OF THE NARROWING MANDATE TO ACHIEVE REASONABLE CONSISTENCY

Despite the narrowing requirement’s central role in the Court’s effort to articulate an underlying principle for modern capital-sentencing law, this rationale for congruence between *Furman* and the 1976 cases was always implausible. This Part contends that the Court should not have claimed that the post-*Furman* statutes, by narrowing death eligibility, achieved reasonable consistency in the use of the sanction and that inconsistency in its use was the problem that underlay *Furman*. The idea that the narrowing effect in the new statutes could promote consistency according to offender deserts was wildly unrealistic. This Part also demonstrates that the Court has not in the decades after 1976 enforced the narrowing mandate to require states to limit death eligibility in meaningful ways. Ultimately, the problem for the Court stems from its inability to define which category of offenders deserves the death penalty.

Narrowing of the death-eligible class can never achieve anything approaching consistency according to offender deserts, except through abolition.⁹² Even extreme narrowing cannot produce equality.⁹³ Assume,

87. *See, e.g.*, *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 438 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

88. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 308 (1989) (asserting that the death sentence was not “wantonly and freakishly” imposed (citation omitted)).

89. *See supra* text accompanying notes 54–91.

90. 554 U.S. 407 (2008).

91. *Id.* at 436.

92. The Court on one occasion seemed to concede this point. *See McCleskey*, 481 U.S. at 318 n.45 (contending that “narrowing the class of death-eligible defendants” could not eliminate racial inconsistency in the use of the death penalty).

93. *See, e.g.*, Ronald J. Allen, *Forward: Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. CRIM. L. & CRIMINOLOGY 727, 736–37 (1991) (explaining that, assuming one could understand what constitutes an “arbitrary” decision, although the total number of “arbitrary” death sentences could be reduced by reducing the number of cases processed as capital ones, the number of “arbitrary” life sentences could increase).

for example, that the penalty was reserved only for the assassination of certain high government officials and for terrorist attacks causing the death of ten or more persons. Criminals falling within the death-eligible class would likely receive the death penalty at a high rate, even if the death penalty remained discretionary with the sentencer, as required by the prohibition on mandatory death penalties.⁹⁴ These crimes are sufficiently egregious that prosecutors and sentencers probably would favor the death penalty much of the time, regardless of the presence of other factors that might often influence decisionmakers to favor life imprisonment. However, extreme narrowing of this sort amounts to near abolition. These crimes rarely occur. Moreover, even such extreme narrowing would not produce consistency according to an offender's deserts, because many equally death-deserving offenders would commit horrible crimes not captured by the definition of the death-eligible class, and some offenders who fell within the definition would still escape the sanction although they deserved it.⁹⁵ The capital-selection process is filled with opportunities and pressures for prosecutors to spare offenders who deserve the death penalty, and at the guilt-or-innocence and sentencing stages, judges and juries also retain discretion to grant merciful reprieves.⁹⁶ Despite the Court's repeated rhetoric, narrowing cannot assure "that the death penalty will be imposed in a consistent, rational manner"⁹⁷ nor provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed, from the many in which it is not."⁹⁸ The only way to assure consistency in the use of the death penalty is to abolish it.

Although the Court has at times described the goal as simply "reasonable" consistency,⁹⁹ the Court also has not demanded that states narrow in the major way required to achieve even that more modest end. The Court long ago seemed to give up on any requirement that states avoid vague aggravators. In *Walton v. Arizona*¹⁰⁰ and *Lewis v. Jeffers*,¹⁰¹

94. See *supra* text accompanying note 54.

95. See, e.g., Allen, *supra* note 93, at 736–37.

96. See, e.g., BANNER, *supra* note 5, at 288 (discussing the many non-desert-based reasons that most offenders who appear death eligible escape the death sanction).

97. *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring in judgment)).

98. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

99. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (plurality opinion).

100. 497 U.S. 639 (1990).

101. 497 U.S. 764 (1990).

the Court relied on state court adoptions of purportedly limiting constructions to approve an Arizona aggravator that asked whether the murder was “committed ‘in an especially heinous, cruel or depraved manner.’”¹⁰² In *Arave v. Creech*,¹⁰³ the Court relied on the same rationale to uphold an Idaho statute that asked whether “[by] the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.”¹⁰⁴ However, the limiting constructions seemed as vague as the statutory language. The Arizona Supreme Court had essentially required only that the killing appear “senseless,”¹⁰⁵ and the Idaho Supreme Court had merely required that the killing be “cold-blooded” and “pitiless.”¹⁰⁶ Constructions of this kind, just like the vague statutory language, “invite an affirmative answer in every case.”¹⁰⁷

The Court also has not otherwise required states to limit the overall coverage of their death-penalty statutes to the degree necessary to pursue near-equality according to deserts. For example, after *Furman*, Georgia retained the death penalty “for six categories of crime: murder, kidnapping for ransom or where the victims is harmed, armed robbery, rape, treason, and aircraft hijacking.”¹⁰⁸ Likewise, the aggravators in the new statute, taken together, covered the vast majority of those capital crimes.¹⁰⁹ The most thorough and sophisticated study of the death

102. *Walton*, 497 U.S. at 645 (quoting ARIZ. REV. STAT. ANN § 13-703(F)(6) (1989)); Jeffers, 497 U.S. at 766 (quoting the same statute).

103. 507 U.S. 463 (1993).

104. *Id.* at 465 (alteration in original) (quoting IDAHO CODE ANN. § 19-2515(g)(6) (1987)) (internal quotation marks omitted).

105. *State v. Gretzler*, 659 P.2d 1, 11–12 (Ariz. 1983).

106. *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981).

107. *Steiker & Steiker*, *supra* note 5, at 374.

108. *Gregg v. Georgia*, 428 U.S. 153, 162–63 (opinion of Stewart, Powell & Stevens, JJ.) (footnotes omitted). In *Gregg*, the plurality emphasized that the Georgia Supreme Court had, in *Gregg*’s case and on several occasions since *Furman*, rejected the death penalty for armed robbery. *See id.* at 205–06.

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

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

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

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

penalty conducted in any state—by the famous Baldus team—found that “more than 90 percent of the pre-*Furman* death sentences [in Georgia] were imposed in cases whose facts would have made them death-eligible under Georgia’s post-*Furman* statute.”¹¹⁰ Thus, any appearance of major narrowing was illusory.

The Court also has not required that narrowing efforts focus on identifying the most death-deserving offenders. From a deserts perspective, aggravating factors that were included on Georgia’s statutory list made little sense in light of factors that were excluded. Shooting to death an important civil-rights leader out of racial hatred or to thwart her work was not a death-eligible offense, while committing a murder for pecuniary gain would render the offender death-eligible.¹¹¹ Why should such a horrible crime be excluded if such ordinary murders were covered? Shooting a small child, a severely handicapped man, or an elderly woman out of spite was not necessarily included, while killing during a robbery automatically rendered the offender death eligible.¹¹² Why was the perpetrator who assassinated a helpless person less culpable than the offender who committed one of the most common of murders?

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

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

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

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

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

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

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

GA. CODE ANN. § 27-2534.1 (Supp. 1975) (recodified as GA. CODE ANN. § 17-10-30(b)(7) (2012)), *quoted in* Gregg v. Georgia, 428 U.S. 153, 165 n.9 (1976). The statute also allowed that in cases of treason or aircraft hijacking, none of the statutory aggravating circumstances need be found as a prerequisite to the imposition of the death penalty. *See id.*

110. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 102 (1990) [hereinafter BALDUS STUDY].

111. *See* GA. CODE ANN. § 27-2534.1 (Supp. 1975) (recodified as GA. CODE ANN. § 17-10-30(b)(7) (2012)).

112. *See id.*

The lack of good answers to these questions underscores that the statute's minor narrowing effect was not tied to any reasonable measure of culpability.¹¹³

Various other modern death-penalty systems based on the 1976 cases also fail to reduce significantly the death-eligible group so as to identify the most culpable offenders. The Supreme Court "has placed no outer limit on the number of aggravating factors that a state may adopt."¹¹⁴ As a consequence, several states, like Georgia, specify ten or more aggravating circumstances that individually can support a death sentence and that together cover the vast majority of all capital offenses.¹¹⁵ California, for example, currently specifies twenty-two categories of aggravating circumstances, some with multiple parts.¹¹⁶ Professor Gerald Uelmen has concluded that these special circumstances "can be applied to 87% of the murders committed in California."¹¹⁷ Likewise, the federal death penalty applies to a broad array of offenses, including several nonhomicide crimes, and the list of aggravating circumstances that can render an offender death eligible is expansive.¹¹⁸

In Georgia and states with similar systems, as in the pre-*Furman* era, many offenders are death eligible, but only a few receive death sentences and even fewer are executed.¹¹⁹ Most persons who are death eligible are rerieved by prosecutors and jurors for reasons that have nothing to do with whether they deserve the death penalty.¹²⁰ A system so filled with

113. Some of the statutory aggravators were surely grounded in part on utilitarian considerations, such as the effort to deter future crimes. Yet, jurors may be less likely to sentence an offender to death on deterrence grounds than on grounds that he is highly culpable, which means that such aggravators will not tend to produce consistently high death-sentencing rates among the death eligible. For other reasons as well, I have argued that statutory aggravators defining death eligibility should describe egregious offender culpability rather than circumstances conforming to the state's heightened desire to deter. *See, e.g., Howe, supra* note 13, at 2141–43.

114. Steiker & Steiker, *supra* note 5, at 374.

115. *See id.*

116. *See* CAL. PENAL CODE §190.2 (West 2011).

117. Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 497 (2010) (citing CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (2008), available at http://www.ccfaj.org/documents/CCFAJ_FinalReport.pdf); *see also* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997) (asserting that California's death penalty scheme is "arguably the broadest such scheme in the country").

118. *See generally* LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 352–54 (2d ed. 2008).

119. *See* Steiker & Steiker, *supra* note 5, at 375.

120. The Baldus researchers found, for example, that "in 59 percent of the death-eligible cases, a life sentence was imposed by default when the prosecutor unilaterally waived the penalty

opportunities for discretionary reprieves—through charging decisions, plea-bargaining decisions, decisions not to pursue death after a guilty finding, nullifications by juries and sentencing decisions that remain essentially standardless¹²¹—could not be expected to produce consistent outcomes.¹²² Indeed, from 1977 to 1999, Georgia sentenced only 243 persons to death out of 10,912 persons arrested for murder, for a death-sentence-to-murder rate of 2.2 per hundred.¹²³ Given that almost all murders in Georgia were death-eligible offenses,¹²⁴ one could not plausibly claim that narrowing had produced anything approaching equality according to deserts in the use of the death penalty.¹²⁵

The Court also cannot remedy the inconsistency problem, except through abolition or near abolition. We have already seen that even extreme narrowing will not produce true consistency in the use of the death sanction.¹²⁶ However, without effectively shutting down death-penalty systems, the Court also cannot demand even “reasonable” consistency. A central problem is that even the worst homicides appear to fall into an expansive array of various kinds of murder that cannot find definition in narrow terms.¹²⁷ Many states have resisted narrow definitions of death eligibility precisely because restrictive definitions

trial” after a conviction. BALDUS STUDY, *supra* note 110, at 106. *See also* JOHN J. DONOHUE III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 2 (2011), available at http://works.bepress.com/john_donohue/87 (“At best, the Connecticut system haphazardly singles out a handful for execution from a substantial array of horrible murders.”).

121. *See, e.g.*, *Zant v. Stephens*, 462 U.S. 862, 874 (1982) (conceding that “the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its [purported] function of narrowing the class of persons convicted of murder who are eligible for the death penalty”).

122. *See, e.g.*, *BANNER*, *supra* note 5, at 288 (noting many arbitrary factors that influence the capital-selection process).

123. *See* John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 (2004).

124. *See* BALDUS STUDY, *supra* note 110, at 268 n.31 (noting that approximately eighty-six percent of people convicted of murder in a five-year period after the passage of the post-*Furman* statute were death eligible).

125. If eighty-six percent of the 10,912 murders were death-eligible crimes, the death-sentence to death-eligibility rate in Georgia for the period would have been one death sentence for every 38.6 death-eligible murders.

126. *See supra* text accompanying notes 90–95.

127. *See* *McGautha v. California*, 402 U.S. 183, 204 (1971) (“To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”).

fail to include many of the most culpable offenders.¹²⁸ For this same reason, the Court cannot identify a robust but specific category of death-worthy cases in which the offenders are so culpable that arbitrary factors, such as the race of the victim or of the defendant, the quality of defense counsel, or the influence of political or financial pressures on the prosecutor, would not matter.¹²⁹

The Court also cannot plausibly pursue consistency by simply directing states to achieve a certain proportion between death-eligible offenders and death sentences. We can theorize that the Court could, for example, order states to narrow to a degree that one of every five or ten death-eligible offenders receives a death sanction, rather than one of approximately every forty, which represents the post-*Furman* situation in Georgia.¹³⁰ However, the Court would not know what proportion to mandate in a particular state to achieve “reasonable” consistency, as measured, for example, by near-zero-racial-disparity levels. The correct proportion seemingly would vary over time and across jurisdictions.¹³¹ Also, the Court would have no good basis to know whether the proportion chosen in a particular state was working until many persons already had received death sentences. The litigation that would arise in any effort to confront these problems would largely shut down the use of the death penalty.¹³² Thus, attempting to force states to narrow is not an effective regulatory strategy for the Court to try to promote equality in the use of the death penalty.

IV. HOW PROPORTIONALITY DOCTRINE HAS SUPERSEDED THE NARROWING MANDATE

The narrowing requirement is also obsolete in light of modern rulings by the Court that prohibit the use of the death penalty for certain categories of offenders. Beginning in 1977 and continuing with a series

128. See, e.g., Steiker & Steiker, *supra* note 5, at 416 (noting a serious concern that forced narrowing would require states to exclude from their definitions of death eligibility many of the worst offenders).

129. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1431 (1988) (“The one thing upon which death penalty deregulators and death penalty abolitionists agree is that ‘the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system.’”) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring)).

130. See *supra* text accompanying notes 121–123.

131. See Howe, *supra* note 13, at 2131.

132. See *id.* at 2130–31.

of important decisions since 2002, the Justices have foreclosed the use of the death penalty for, among others: rapists of adult victims, kidnappers, certain felony murderers, retarded offenders, juvenile offenders, and child rapists.¹³³ These “proportionality” decisions have helped to reduce racial discrimination in the use of the sanction and in that sense, to promote consistency.¹³⁴ However, the decisions do not purport to prevent inconsistent use of the death penalty but rather, only undeserved, or disproportionate, death sentences.¹³⁵ By demonstrating a plausible Eighth Amendment purpose for the Court to narrow the death-eligible class, proportionality doctrine underscores the lack of a feasible function for the narrowing rule.

The groundbreaking proportionality decision after *Furman* was *Coker v. Georgia*,¹³⁶ in which the Court banned the death penalty for the rape of an adult victim. Writing for a four-Justice plurality,¹³⁷ Justice White sought to demonstrate that society generally had come to oppose the death penalty for all rapes.¹³⁸ He contended, in any event, that the question whether capital punishment was excessive was ultimately for the Court’s “own judgment.”¹³⁹ The retributive basis for the plurality’s judgment was clear. Justice White did not deny that the execution of rapists as much as the execution of murderers could serve general deterrence goals. He also did not deny that there were incapacitation benefits from executing an unusually dangerous offender like Coker, who had raped the victim while on escape from prison, where he was serving multiple life sentences for earlier crimes of brutality.¹⁴⁰ Instead, Justice White argued that rape, while awful, was not among the category

133. See *infra* text accompanying notes 134–154.

134. See *infra* notes 155–159 and accompanying text.

135. See Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 453–56 (2009); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 721–25 (2005).

136. 433 U.S. 584 (1977).

137. Justices Brennan and Marshall agreed with the judgment on broader grounds, concluding that the death penalty was altogether unconstitutional. See *id.* at 600 (Brennan, J., concurring); *id.* (Marshall, J., concurring).

138. For the view that the argument was unpersuasive, see Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 346 n.89 (1992).

139. *Coker*, 433 U.S. at 597 (plurality opinion).

140. Previously, Coker had raped and murdered one woman and, in a separate incident, had raped and tried to kill another. See *id.* at 605 (Burger, C.J., dissenting).

of horrible crimes for which the death penalty was deserved.¹⁴¹ Thus, the opinion embraced a deserts limitation on the death penalty that insists that utilitarian arguments for executions, such as deterrence and incapacitation, yield to retributive limits.

For twenty-five years after *Coker*, the Court made only modest use of the proportionality mandate to announce additional categorical restrictions on the death penalty. *Coker* strongly implied that most ordinary nonhomicide crimes, such as robbery or burglary, were not punishable with death, and the Court also promptly excluded kidnapping, where no life was taken.¹⁴² In *Enmund v. Florida*,¹⁴³ the Court also exempted certain minor participants in murders from death eligibility.¹⁴⁴ Although for a unique sort of excessiveness, the Court also held, in *Ford v. Wainwright*,¹⁴⁵ that the Eighth Amendment forbids the execution of a prisoner who is insane. Likewise, in *Thompson v. Oklahoma*,¹⁴⁶ the Court rejected the death penalty for a fifteen-year-old murderer and raised serious doubts that it would allow any future executions of persons who committed a capital crime before age sixteen.¹⁴⁷ At the same time, the Court initially rejected claims that offenders who were retarded or under age eighteen at the time of their offenses were immune from the

141. *See id.* at 598 (plurality opinion) (“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.”).

142. *See Eberheart v. Georgia*, 433 U.S. 917 (1977), *rev’g* *Eberheart v. State*, 206 S.E.2d 12 (Ga. 1974) (holding that a statute imposing the death penalty for kidnapping did not violate the Eighth Amendment).

143. 458 U.S. 782 (1982).

144. The Court later limited the exemption that *Enmund* had drawn. In *Enmund*, the Court had exempted the accomplice in a felony murder who did not himself kill or intend to kill. *See id.* at 798. In *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court ruled that “major participation in the felony committed, combined with reckless indifference to human life” was enough for the death penalty to apply.

145. 477 U.S. 399 (1986).

146. 487 U.S. 815 (1988).

147. *Id.* at 838. Justice O’Connor provided the fifth vote, and her separate opinion was not definitive regarding the underlying principle. The objective evidence of a societal consensus was less impressive than the objective evidence of a societal consensus in *Coker* and *Enmund*, because many states did not set a minimum age on the use of the death penalty although they also had not for many years imposed a death sentence for an offense committed by a person below age sixteen. *See id.* at 852–53 (O’Connor, J., concurring). Consequently, Justice O’Connor concurred in the judgment only on grounds that persons who were below the age of sixteen at the time of their offenses could not be executed “under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.” *Id.* at 857–58.

capital sanction,¹⁴⁸ and the Court did not further extend the proportionality doctrine for the rest of the century.

Beginning in 2002, however, the Court dramatically expanded the proportionality exemptions. First, in *Atkins v. Virginia*, mentally retarded offenders gained protection.¹⁴⁹ Three years later, in *Roper v. Simmons*, the Court excluded juvenile offenders.¹⁵⁰ Likewise, in 2008, in *Kennedy v. Louisiana*, the Court exempted offenders convicted of child rape.¹⁵¹ In these decisions, as in *Coker*, a deserts limitation explained the outcomes. The Court found that retarded offenders, juvenile offenders, and child rapists are insufficiently culpable to warrant the death penalty.¹⁵² The Court also claimed—although not always convincingly—to find objective evidence that a societal consensus had arisen against the death penalty for these offenders.¹⁵³ Likewise, regarding retarded and juvenile offenders, the Court muddled its analysis by asserting that capital punishment was less effective in serving deterrence goals.¹⁵⁴ But, in *Kennedy*, the Court conceded that the death penalty for child rapists might help deter them, and it still found the death penalty excessive.¹⁵⁵ Likewise, in *Atkins* and *Simmons*, as Professor Pamela Wilkins has

148. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding the death penalty for seventeen- and sixteen-year-old murderers); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (upholding the death penalty for retarded offenders).

149. 536 U.S. 304, 321 (2002).

150. 543 U.S. 551, 578–79 (2005).

151. 554 U.S. 407, 413 (2008).

152. *See Kennedy*, 554 U.S. at 435; *Simmons*, 543 U.S. at 571; *Atkins*, 536 U.S. at 321.

153. *See Kennedy*, 554 U.S. at 438–40. For an argument that changes after 1989 in societal views about the death penalty generally, not changes embodied in the Court’s “evolving standards” analysis, largely account for the Court’s willingness to expand proportionality protections beginning in 2002, see Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 35–57 (2007).

154. *See Simmons*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 319–20. The Court’s discussions in *Atkins* and *Simmons* regarding the reduced deterrent effect of the death penalty were unfortunate. Whether or not the imposition of the death penalty on retarded and juvenile murderers would help deter other retarded and juvenile persons from crime, a legislature could still conclude that such punishment could help deter those who are not retarded or juveniles. Professor H.L.A. Hart pointed out long ago that, as a theoretical matter, the fact that an offender suffers from a condition that makes him undeterrable does not mean that there is no deterrent effect in punishing him. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 19–20, 43 (1968). Indeed, the central explanation for proportionality doctrine begins with the acknowledgment that imposing the death penalty on persons who do not deserve it can serve utilitarian ends. Thus, rather than deny the likelihood of deterrence, the Court would have done better in *Atkins* and *Simmons* to clarify that the Eighth Amendment aims to prevent the use of the death penalty when the offender does not deserve it, although there may be utilitarian advantages in executing him.

155. *Kennedy*, 554 U.S. at 441 (“[I]t cannot be said with any certainty that the death penalty for child rape serves no deterrent . . . function.”).

noted, “it seems clear that the Court’s independent conclusion . . . rested principally upon the deserts determination.”¹⁵⁶ The overall effect of these recent decisions, combined with *Coker* and its earlier progeny, is to narrow the possible application of the death penalty away from the most marginal categories of cases in terms of offender deserts.

While the explanation for the proportionality decisions is avoidance of retributive excess, the targeted exclusions also have promoted consistency by reducing racial disparities in the use of the death sanction. *Coker* surely had the most dramatic effect. Among the 455 men whom states executed for rape from 1930 to 1972, 405, or 89%, were African-American, and almost every victim was white.¹⁵⁷ “Rape had always been the crime for which the race of the defendant made the biggest difference, so *Coker* instantly wiped away more discrimination than any reform of murder sentencing could have.”¹⁵⁸ The prohibition on juvenile executions may also have helped. In the post-*Furman* era, twelve of the twenty juvenile murderers who faced execution were African-American or Latino, and, in seventeen of those cases, the victim or victims were white.¹⁵⁹ Likewise, in *Kennedy*, the Court conceded “no confidence” that use of the death penalty to punish child rape could avoid the problem of arbitrariness—a concern primarily about race discrimination¹⁶⁰—that confronted the Justices in *Furman*.¹⁶¹

The proportionality decisions have overtaken the narrowing rule so as to highlight its superfluity. Imagine, for example, that after *Furman* Georgia had enacted a new death-penalty statute that narrowed death eligibility in the way that the Court’s proportionality decisions have now narrowed the permissible scope of the death penalty. The statute would have defined a capital offense to include only murder, excluding several nonhomicide offenses, such as rape, that the Georgia statute covered at the time of *Furman*.¹⁶² Likewise, the statute would have required after

156. Wilkins, *supra* note 135, at 456.

157. See Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in *DEATH PENALTY STORIES* 171, 193 (John H. Blume & Jordan M. Steiker eds., 2009).

158. BANNER, *supra* note 5, at 289.

159. See VICTOR STREIB, NO. 77, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–FEBRUARY 28, 2005*, at 4 (2005), available at <http://www.deathpenaltyinfo.org/juvdeathstreib.pdf>.

160. *Kennedy*, 554 U.S. at 439.

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

162. See e.g., Act of April 11, 1968, No. 1157, Sec. 1, §§ 26-401(e), 26-2001, 26-3102, 1968 Ga. Laws 1249, 1264, 1299, 1335 (repealed and renumbered 1981). The system would also have provided a process to protect from execution those inmates who are insane on a proposed date of

conviction that the jury find not a single aggravating factor but all three of the following: (1) that the offender was not retarded; (2) that the offender was not under age eighteen at the time of the offense; and (3) that, if the offender did not actually kill or intend to kill, and was, thus, only guilty as an accomplice to a felony murder, she exhibited “major participation in the felony committed, combined with reckless indifference to human life.”¹⁶³ In addition, the statute would have allowed the jury, assuming it found all three factors present, to weigh all of the additional evidence of aggravating and mitigating circumstances in reaching a sentencing decision.¹⁶⁴ Such a system would have met the two Eighth Amendment requirements for a constitutional death-sentencing scheme.¹⁶⁵ The system would have narrowed the death-eligible group, and it would have allowed for the consideration of relevant mitigating evidence. Would it have become unconstitutional because it would today accomplish no more narrowing than the Court has directly accomplished through its various proportionality cases? The Court has never pursued the proposition that the narrowing rule requires a particular kind or amount of narrowing.¹⁶⁶ Yet, if no additional narrowing is required, the narrowing rule today commands nothing more than proportionality doctrine requires.

The robust development of proportionality doctrine underscores why the Court should concede that the narrowing rule is superfluous. Proportionality doctrine demonstrates that the Court can provide specific direction about the narrowing that states must accomplish to serve a plausible Eighth Amendment end. By contrast, the narrowing rule has gone largely undeveloped, because it lacks a plausible Eighth Amendment function. Proportionality doctrine both reveals the actual rationale for limited narrowing by the Court and highlights the vacuous nature of the separate call for states, without specific direction, to narrow.

execution. *See supra* text accompanying note 145.

163. *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *see also supra* note 142 and accompanying text (discussing the exclusion for certain accomplices on the fringes of the felony-murder rule).

164. I assume that the system would also have included a requirement that the Georgia Supreme Court conduct an appellate review to ensure that a death sentence did not appear excessive in relation to sentences imposed in similar cases. The plurality in *Gregg v. Georgia*, 428 U.S. 153, 154 (1976) (plurality opinion), noted that the new Georgia statute included such a mandate. *See id.* at 198. At the same time, the Supreme Court has clarified that this kind of appellate review is not necessarily required by the Eighth Amendment. *See Pulley v. Harris*, 465 U.S. 37, 50–51 (1984).

165. *See supra* text accompanying notes 1–2.

166. *See supra* text accompanying notes 97–123.

V. THE BENEFITS OF REPUDIATING THE NARROWING MANDATE

While the narrowing mandate has not amounted to much in practice and lacks a plausible Eighth Amendment explanation, one might still question why the Court should openly repudiate it at this late date. After all, the Court has not done much since 1976 to develop and enforce the requirement and has also effectively retreated from the small steps forward that it took in *Godfrey* and *Cartwright*.¹⁶⁷ If the Court already has essentially abandoned the narrowing mandate, except in rhetoric, why now repudiate it? The answer is that candor from the Court could help reduce continuing confusion over the goal of the second mandate in capital-sentencing doctrine and promote intelligent discourse about how best to pursue that goal. Likewise, candor could clarify that the Court does not believe that capital-sentencing doctrine has assured reasonable consistency in the use of the death penalty. Repudiation of the narrowing rule would help the Court acknowledge that the Eighth Amendment goal that it has pursued in regulating capital-sentencing trials is not equality but the avoidance of undeserved death sentences.

A. Developing a Rationale for Regulating Capital-Sentencing Trials

The idea that the narrowing rule aims to achieve consistency has long given rise to confusion over how the Court could endorse the second mandate: individualized sentencing based on expansive consideration of mitigating evidence and the exercise of discretion.¹⁶⁸ If the first mandate aims to pursue equality, the second seems to honor something opposite—that every capital offender is unique or nearly so when it comes to assessing his proper punishment.¹⁶⁹ Some Justices have cited this purported conflict as a reason to abandon the death penalty, and others have cited it as a reason to confine or even abandon the second mandate.¹⁷⁰ Of course, these arguments ignore not only that narrowing and individualized sentencing are actually compatible as doctrines,¹⁷¹

167. See *supra* text accompanying notes 66–73.

168. See, e.g., Stephen P. Garvey, “As the Gentle Rain from Heaven”: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1001 (1996) (“Commentators have often remarked that *Furman*’s mandate of consistency and *Woodson*’s mandate of individualization compete with one another at some level.”).

169. See CARTER, KREITZBERG & HOWE, *supra* note 118, at 169.

170. See *infra* text accompanying notes 178–179.

171. See *infra* notes 182–183 and accompanying text.

but also that the Court has never developed the narrowing rule, nor has the rule itself ever produced consistency. Nonetheless, the Court's continued use of consistency rhetoric in explaining the narrowing rule has fueled the ongoing confusion and impeded the development by the Court of a plausible Eighth Amendment theory to explain the second mandate.¹⁷² Explicit repudiation of the narrowing rule would help the Court to acknowledge that the Eighth Amendment regulation of capital-sentencing trials should center on the principle behind the second mandate.

1. The rhetorical conflict of the two mandates

Within the Court, the idea that the Eighth Amendment doctrine embodies a problematic tension between the two mandates has come largely from the conservatives, whose goal is not to promote consistency but to cabin or eviscerate the second mandate.¹⁷³ The second mandate first arose from the two 1976 decisions in which the Court struck down mandatory death systems in North Carolina and Louisiana.¹⁷⁴ A decisive plurality—Justices Stewart, Powell, and Stevens—concluded that the mandatory schemes precluded the sentencer from considering “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”¹⁷⁵ Dissenters claimed that these decisions were at odds with *Furman* and the pursuit of consistency that the same plurality had endorsed in upholding three other statutes in 1976.¹⁷⁶ Nonetheless, the Court reiterated and even expanded the individualized-sentencing requirement two years later in *Lockett v. Ohio*,

172. See Howe, *supra* note 12, at 438–40.

173. If conservatives, in pointing to the conflict, actually sought to achieve consistency in the distribution of death sentences, they would have to view all existing death penalty statutes as unconstitutional. All existing statutes provide the individualized consideration required by the second mandate and thus, could not provide consistency, according to the argument. Conservative Justices have not endorsed the view that all existing death penalty statutes are unconstitutional. See Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 459–60 (2007).

174. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

175. *Woodson*, 428 U.S. at 304 (plurality opinion). See also *Roberts*, 428 U.S. at 333–34 (“Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.”).

176. See, e.g., *Roberts*, 428 U.S. at 346 (White, J., dissenting) (“[W]e are now in no position to rule that [Louisiana's] present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman*.”).

when it rejected an Ohio “special-question” system as too mandatory.¹⁷⁷ The *Lockett* Court ruled that the capital sentencer must remain free to reject the death penalty based on “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁷⁸ Conservative Justices have continued to allege a problematic tension with the goal of consistency as a reason to confine or even abolish this expansive individualization rule.¹⁷⁹ Justices Scalia and Thomas also have asserted that the individualization rule lacks an Eighth Amendment explanation,¹⁸⁰ and, indeed, the *Lockett* opinion did not provide a well-developed rationale for it. The Court has continued generally to enforce the *Lockett* holding,¹⁸¹ but that mandate also continues to face criticism

177. See 438 U.S. 586, 607 (1978) (plurality opinion). The Ohio statute required a death sentence unless the offender could establish by a preponderance of the evidence one of three mitigating circumstances:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender’s psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

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

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

179. See, e.g., *Smith v. Texas*, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting) (citing his argument in *Walton*); *Tennard v. Dretke*, 542 U.S. 274, 293–94 (2004) (Scalia, J., dissenting) (repeating essence of his argument in *Walton*); *id.* at 294–95 (Thomas, J., dissenting) (rejecting petitioner’s claim on grounds that contradiction in the doctrine justified restricting the individualized-consideration mandate); *Johnson v. Texas*, 509 U.S. 350, 373 (1993) (“Our capital sentencing jurisprudence seeks to reconcile two competing, and valid, principles in *Furman*, which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer.”); *id.* (Scalia, J., concurring) (repeating essence of his argument in *Walton*); *Walton v. Arizona*, 497 U.S. 639, 666–67 (1990) (Scalia, J., concurring in part and concurring in judgment) (contending that the individualization mandate undermines “consistency and rationality among sentencing determinations” because it “permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers but to two murderers whose crimes have been found to be of similar gravity”); *California v. Brown*, 479 U.S. 538, 544 (1987) (O’Connor, J., concurring) (asserting need to balance competing goals of realizing nondiscriminatory results and allowing for individualized consideration); *Lockett*, 438 U.S. at 622 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court) (asserting that “[t]he Court has now completed its about-face since *Furman*”); *id.* at 631 (Rehnquist, J., concurring in part and dissenting in part) (contending that the *Lockett* rule “will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it”).

180. See, e.g., *Graham v. Collins*, 506 U.S. 461, 486–88 (1993) (Thomas, J., concurring); *Walton*, 497 U.S. at 673 (Scalia, J., concurring in part and concurring in the judgment).

181. See, e.g., *McKoy v. North Carolina*, 494 U.S. 433, 439–44 (1990) (rejecting requirement that jury find mitigating circumstances unanimously); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)

from conservatives based on the purported conflict with the goal of consistency.¹⁸²

The conflict exists only in the Court's rhetoric about the purposes of the doctrine rather than in the doctrine itself. However, the rhetoric hinders understanding and assessment of capital-sentencing doctrine. At the doctrinal level, narrowing of the death-eligible group does not conflict with individualized sentencing.¹⁸³ States can narrow the death-eligible group, while also providing the individualized sentencing required by *Lockett*.¹⁸⁴ Yet, the rhetorical claims about the first mandate impede the explanation of the second one. The Court has continued to claim to enforce the narrowing rule and that the rationale is the pursuit of equality. Until the Court stops making those claims, it cannot sensibly articulate a rationale for the second mandate that rejects equality as an Eighth Amendment end.

(concluding that Texas statute did not allow jury an adequate opportunity to reject death penalty based on mitigating evidence of retardation and childhood abuse); *Hitchcock v. Dugger*, 481 U.S. 393, 397–99 (1987) (rejecting requirement that mitigating factors appear on statutory list in order to be considered in sentencing); *Sumner v. Shuman*, 483 U.S. 66, 67, 85 (1987) (rejecting mandatory death penalty for intentional murder by an inmate already serving life sentence without possibility of parole); *Skipper v. South Carolina*, 476 U.S. 1, 5–6, 8 (1986) (reversing death sentence where sentencing judge had refused to consider evidence of defendant's good behavior while in jail awaiting trial); *Eddings v. Oklahoma*, 455 U.S. 104, 112–13 (1982) (overturning death sentence imposed based on statute interpreted by state courts to preclude consideration of defendant's emotional disturbance and violent and tumultuous childhood); (*Harry*) *Roberts v. Louisiana*, 431 U.S. 633, 637–38 (1977) (per curiam) (striking down mandatory death penalty for murder of police officer). *But see Graham*, 506 U.S. at 463, 478 (rejecting, on nonretroactivity grounds, claim that youth, family background and positive character traits could not be adequately considered under Texas statute).

182. Justices seeking to limit or undermine the second mandate are not the only ones to cite the conflict as a reason for reform. Justice Blackmun originally rejected the second mandate, *see, e.g., Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (Blackmun, J., dissenting), then came to accept it, *see California v. Brown*, 479 U.S. 538, 562–63 (1987) (Blackmun, J., dissenting), and then later concluded that it fundamentally conflicted with the first mandate, *see Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of writ of certiorari). However, he concluded that the solution was to strike down all existing death penalty statutes, *see id.* at 1158–59, and he asserted doubt that any statute could appropriately reconcile the purported conflict. *See id.* at 1145.

183. *See, e.g., Walton*, 497 U.S. at 716–18 (1990) (Stevens, J., dissenting) (noting that there is no tension at the doctrinal level, because the narrowing function for identifying statutory aggravators functions at an eligibility phase while the individualized-consideration mandate functions at a subsequent selection phase where the sentencer actually decides whether the offender should receive the death penalty).

184. *See CARTER, KREITZBERG & HOWE, supra* note 118, at 170–71.

2. Eliminating the first mandate to focus on the second

Repudiating the narrowing rule would clarify that the individualization mandate is the core of capital-sentencing doctrine and would eliminate a major obstacle to rationalizing and assessing that mandate.¹⁸⁵ If the narrowing rule disappears, the perceived need to justify it on consistency grounds also disappears, which allows an explanation for individualization that permits inconsistency. Thus, by repudiating the narrowing rule, the Court would decisively end the confusion over whether capital-sentencing regulation is at war with itself and could proceed to address important questions about the purpose and legitimacy of the second mandate.

The second mandate finds Eighth Amendment explanation in the same theory that explains proportionality doctrine.¹⁸⁶ The goal is to help ensure that no one receives a death sentence who does not deserve it. Even after the exclusion of those offenders who are protected from death eligibility by proportionality doctrine, the deserts of those who have committed capital crimes vary greatly. Laws concerning felony murder and vicarious liability bring within the death-eligible group many capital offenders whose involvement in the capital crime is low. The mental states, mental capacities, and prior conduct of those who are highly involved in a capital crime also can differ enormously. Whether or not all capital offenders are unique, they vary widely in their deserts, and legislatures arguably cannot adequately capture the important variances with categorical sentencing rules. Both permitting the convicted capital offender, at a separate sentencing hearing, to present any mitigating evidence that he desires concerning his character, record, or crime, and ensuring that the sentencer can use that evidence to reject the death penalty could help to avoid undeserved death sentences.¹⁸⁷

185. Some Justices have at times asserted that both mandates serve the pursuit of equality. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (asserting that the failure to individualize capital sentencing would treat all capital offenders alike when differences exist among them). However, the claim that individualized sentencing promotes consistency in the use of the death penalty is implausible if only because individualized sentencing provides no safeguard against arbitrary reprieves outside of the sentencing trial.

186. *See* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold & Loeb*, 79 IOWA L. REV. 989, 1051–56 (1994).

187. The deserts limitation, much more than a consistency goal, also can explain why the Court has focused its Eighth Amendment regulatory efforts on the capital-sentencing trial. A consistency theory cannot plausibly explain why the Court would regulate the capital-sentencing trial while leaving prosecutors with almost unfettered discretion to not pursue death sentences in death-eligible cases. Mandating equality at the sentencing trial is senseless unless it is part of an

Accepting the deserts limitation as the central Eighth Amendment principle governing capital selection¹⁸⁸ would not eliminate disagreements over how the Court should regulate the capital-sentencing trial. Indeed, Justices who concur on the centrality of the deserts limitation could still differ over how to pursue it.¹⁸⁹ Because the Court lacks the ability to translate the command into specific rules about who actually deserves death, some Justices could favor deregulation of the capital-sentencing trial and reliance simply on the proportionality rules to define a death-eligible group.¹⁹⁰ Justices who are skeptical of the Court's ability to protect against improper influences (such as racial bias) on capital sentencers could favor abolition or near abolition.¹⁹¹ Justices who reject both deregulation and abolition could conclude that proportionality doctrine and the individualized-sentencing rule most effectively fulfill the deserts limitation, which means that they would not vote to expand regulation of the sentencing trial but could support further expansion of proportionality protections.¹⁹² Finally, some Justices could favor

effort to achieve equality in the greater selection process, which could only be pursued, even in theory, by trying to regulate prosecutorial decisions on charging and plea-bargaining in capital cases. In contrast, the deserts limitation does not assert that everyone who deserves a death penalty must receive it, but only that those who do not deserve the sanction should not receive it. Regulating the sentencing trial might help to protect against undeserved death sentences even if prosecutors are allowed to act arbitrarily in deciding which death-eligible offenders to pursue.

188. The deserts limitation rests on the notion that the Eighth Amendment proscribes disproportional punishments in addition to punishments deemed inherently inhumane. Some Justices have concluded, on originalist grounds, that the prohibition is only against certain inhumane forms of punishment. *See, e.g., Graham v. Collins*, 506 U.S. 461, 488 (1993) (Thomas, J., concurring) (“[T]he better view is that the Cruel and Unusual Punishments Clause was intended to place only substantive limitations on punishments . . .”); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Scalia, J., joined by Rehnquist, C.J.) (“[T]he Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment . . .”). However, the “modes only” position is vigorously disputed on historical grounds, and since *Weems v. United States*, 217 U.S. 349, 378 (1910), a majority of the Court has consistently rejected it. *See Howe, supra* note 173, at 461–62. *See also* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY. BILL RTS. J. 475, 507–19 (2005) (contending that an originalist inquiry demonstrates “that the ban was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense and the offender at hand”).

189. *See Howe, supra* note 173, at 464–80.

190. *See Howe, supra* note 10, at 835–43 (explaining the argument for deregulation of the capital-sentencing trial and reliance on proportionality rules regarding death-eligibility); *see also* Howe, *supra* note 186, at 1056–68 (describing the grounds for unease over the Court's imposition of the individualization mandate).

191. *See Howe, supra* note 13, at 2085–89 (explaining the Eighth Amendment argument for abolition based on disproportionality stemming from unconscious racial discrimination).

192. *See Howe, supra* note 173, at 474–76 (explaining current doctrine as a compromise between arguments for deregulation and abolition).

additional regulation of sentencing trials to try to ensure that capital sentencers impose the death penalty only on those who deserve it.¹⁹³ Repudiation of the narrowing rule would not end debate about capital-sentencing regulation. However, repudiation would help focus the debate on how to implement the core restriction that the Constitution imposes on the distribution of capital sentences.

B. Honesty About Inequality

Repudiation of the narrowing rule would also help the Court acknowledge that capital selection is arbitrary and undesirably discriminatory. The many claims by Justices that the narrowing rule has assured reasonable consistency in the use of the death penalty have conveyed that a majority of the Court does not perceive substantial inequality in capital selection.¹⁹⁴ If the Court were to concede that the Eighth Amendment does not require equality, the Justices would not need to obscure the truth.

1. The racial discrimination problem and the inability of the Court to plausibly discount it under a consistency view of the Eighth Amendment

The problem of racial discrimination, whether intentional or unconscious, has continued to plague capital selection in the modern

193. See, e.g., Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2599 (1996) (asserting that states should “instruct sentencers that the death penalty . . . is reserved only for those defendants who deserve the penalty and that the moral judgment of whether death is deserved remains entirely with them; that the determination whether death is deserved involves consideration of any factor that suggests whether the defendant is or is not among the small group of ‘worst’ offenders; and that, in deciding whether the defendant deserves the death penalty, the sentencer is required to consider not only the circumstances surrounding the crime but also aspects of the defendant’s character, background, and capabilities that bear on his culpability for the crime”); Howe, *supra* note 173, at 478 (contending that prosecutors should not be allowed to “present capital sentencers with utilitarian evidence or arguments to justify death sentences”).

194. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 338–39 (1997) (asserting that the *McCleskey* majority “did not want to concede facts” indicating the powerful influence of race in Georgia’s post-*Furman*-death-penalty system and that “[d]oing so would have performed the tremendous benefit of educating the public about the real world of capital sentencing and the real world of Supreme Court decisionmaking”); Robert A. Burt, *Wrong Tomorrow, Wrong Yesterday, but Not Today: On Sliding into Evil with Zeal but Without Understanding*, 5 ROGER WILLIAMS U. L. REV. 19, 34–35 (1999) (citing *McCleskey* as the first example for the proposition that “Dred Scott, of course, is by general agreement today ranked as the low point, the most deeply immoral ruling, in our constitutional jurisprudence (though I must say that the decision has earned this rank only after a close race in a crowded field)”; Kennedy, *supra* note 23, at 1389 (asserting that the decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) “repressed the truth”).

era.¹⁹⁵ The problem surely is not as severe as in the pre-*Furman* past.¹⁹⁶ American society generally has progressed since the 1960s in reducing racial prejudice for many reasons that go beyond the Court's doctrine.¹⁹⁷ Likewise, the Court has developed laws, other than the narrowing rule, that marginally limit racial bias in the capital selection process, even if obliquely. One example, as we have seen, is the proportionality doctrine, particularly the elimination of rape as a death-eligible crime.¹⁹⁸ The Court also has taken steps to ensure greater participation on juries by members of racial minority groups¹⁹⁹ and to allow the ferreting out of racial bias during jury selection in capital cases.²⁰⁰ Nonetheless, there can be no doubt, as Justice O'Connor asserted not long ago, that, in the United States, "race unfortunately still matters."²⁰¹ In the post-*Furman* era, empirical evidence concerning capital selection bears out this conclusion. There are many studies from a variety of jurisdictions demonstrating that the race of the victim and, to a lesser extent, the race of the defendant, often continue to influence decisions determining which capital offenders receive the death penalty.²⁰²

The most sophisticated investigation of race and capital selection, the famous Baldus study,²⁰³ gave rise to what is surely the Court's most controversial decision on capital selection after *Furman*. Based on a painstaking study of Georgia murder cases from the mid- to late 1970s, the Baldus researchers concluded that a defendant faced odds 4.3 times

195. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 132–34 (1999); Anthony G. Amsterdam, *Courtroom Contortions: How America's Application of the Death Penalty Erodes the Principle of Equal Justice Under Law*, THE AM. PROSPECT, July 2004, at A19–21 ("The Court's reason for [the result in *McCleskey v. Kemp*] came close to a frank admission that the administration of capital punishment would grind to a halt if courts took seriously the challenge of ensuring that death sentences are not the products of racial bias.").

196. See, e.g., BANNER, *supra* note 5, at 289 (noting the importance of the civil rights movement of the 1960s in increasing greater representation of blacks on juries).

197. See, e.g., BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 236 (2006) ("I maintain, however, that in today's America [racial] prejudices are far more loosely held than they once were—and hence are subject to refutation.").

198. See *supra* text accompanying notes 155–156.

199. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (restricting the ability of prosecutors to use peremptory strikes to eliminate potential jurors).

200. See *Turner v. Murray*, 476 U.S. 28, 28–33 (1986) (ruling that a capital defendant charged with an interracial crime can advise prospective jurors of the race of the victim and inquire about their possible racial bias).

201. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

202. See Howe, *supra* note 13, at 2106–23.

203. See BALDUS STUDY, *supra* note 110.

higher of receiving the death penalty solely because his victim was white rather than black.²⁰⁴ Regarding race-of-defendant discrimination, the researchers found that black defendants enjoyed an advantage over white defendants in the overall run of cases.²⁰⁵ Black murderers, as a group, were beneficiaries because their crimes were usually intra-racial.²⁰⁶ Nonetheless, among the white-victim cases, the researchers concluded that a defendant faced odds 2.4 times higher of receiving the death penalty simply because he was black rather than white.²⁰⁷ Thus, solely because of racial factors, a black offender who killed a white person faced odds many times higher of receiving the death penalty than a white offender who killed a black person. This evidence formed the basis for challenges under the Equal Protection Clause and the Eighth Amendment brought by Warren McCleskey, a black man who had been sentenced to death in Georgia during the relevant period for killing a white police officer. Ultimately, the Supreme Court rejected those challenges by a five-to-four vote in *McCleskey v. Kemp*.²⁰⁸

While critics reviled the *McCleskey* decision on multiple grounds,²⁰⁹ the most objectionable part of the majority opinion concerned the rejection of the Eighth Amendment challenge. The Court purported to assume that the Baldus study was valid because the Court of Appeals had assumed its validity.²¹⁰ Despite that assumption, the Supreme Court at least offered an intelligible basis to reject McCleskey's Equal Protection claim. The majority asserted that the Fourteenth Amendment required proof "that the decision-makers in *his* case acted with discriminatory purpose," and that the statistical study failed to establish that any of the

204. *See id.* at 316.

205. *See id.* at 327.

206. *See id.*

207. *See id.* at 328.

208. 481 U.S. 279, 319 (1987). The majority Justices were Powell, Rehnquist, White, O'Connor, and Scalia. *See id.* at 282. The dissenters were Blackmun, Brennan, Marshall, and Stevens. *See id.* at 345 (Blackmun, J., dissenting).

209. *See, e.g., The Supreme Court—Leading Cases*, 101 HARV. L. REV. 119, 158 (1987) (describing the decision as "logically unsound, morally reprehensible, and legally unsupportable").

210. While the Federal District court had found the Baldus study flawed, the Court of Appeals had assumed that the study was valid and had, nonetheless, rejected the constitutional claims. *See McCleskey v. Kemp*, 481 U.S. 279, 291 n.7 (1987). There was support in the amicus filings in the Supreme Court for the methodological soundness of the study. A group of eminent social scientists endorsed its validity. *See* Brief for Dr. Franlin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel & Professor Franklin E. Zimring as Amici Curiae Supporting Petitioner Warren McCleskey at 3, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811).

relevant decision-makers in *McCleskey*'s case acted with such a purpose.²¹¹ While one might disagree with that interpretation of the Fourteenth Amendment, the Court's precedents supported it,²¹² and it provided a clear explanation of why *McCleskey*'s evidence, even if accepted, was insufficient. As for the Eighth Amendment claim, however, the Court obfuscated. If the Baldus study was valid, it showed dramatic inconsistency in the distribution of death sentences based on race—particularly the race of the victim—and the Court had never suggested that “invidious intent” mattered under the Eighth Amendment.²¹³ Confronted with this claim, the Court equivocated both about the meaning of the study and about whether the Eighth Amendment required reasonable consistency.²¹⁴ At some points, the Court implied that the Eighth Amendment required consistency,²¹⁵ but the Baldus study did not show that the Georgia system failed to achieve it.²¹⁶ At other times, the Court implied that, while there might be inconsistency in Georgia's selection process, such inequality was not constitutionally relevant, although the Court did not illuminate a principled Eighth Amendment reason.²¹⁷ The Court recounted its

211. *McCleskey*, 481 U.S. at 292.

212. See Kennedy, *supra* note 23, at 1403 (“Had the court ruled differently in *McCleskey* it would not have been in step with judicial tradition; to the contrary, it would have been making an unprecedented step forward.”).

213. COLE, *supra* note 195, at 136.

214. See, e.g., *id.* at 140 (describing why the “reader of *McCleskey* comes away with conflicting messages”).

215. See, e.g., *McCleskey*, 481 U.S. at 303 (reiterating the plurality's claim in *Gregg* that the post-*Furman* Georgia system safeguarded “against arbitrariness and caprice”); *id.* at 306–07 (“[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, *McCleskey* cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.”); *id.* at 313 n.37 (“The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment [to promote rationality].”).

216. See, e.g., *id.* at 291 n.7 (“Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia.”); *id.* at 312 (“At most, the Baldus study indicates a discrepancy that appears to correlate with race.”); *id.* at 313 (“[W]e decline to assume that what is unexplained is invidious.”); *id.* at 308 (“Statistics at most may show only a likelihood that a particular factor entered into some decisions.”).

217. See, e.g., *id.* at 307 n.28 (asserting that “[t]he Constitution is not offended by inconsistency” that results from various discretionary decisions that occur throughout the selection process); *id.* at 311 (“But the inherent lack of predictability of jury decisions does not justify their condemnation.”); *id.* at 317 (“If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be used upon any arbitrary variable”); *id.* at 319 (“The Constitution does not require that a State eliminate any

doctrine on capital selection and concluded that, since Georgia had complied with it, “we lawfully may presume” that *McCleskey*’s death sentence did not violate the Eighth Amendment.²¹⁸ However, the opinion both discounted the reality of racial inequality revealed by the Baldus study and failed to clarify the purpose of the Eighth Amendment in regulating capital selection.

Despite abundant empirical evidence that race—usually the race of the victim—continues to influence outcomes in capital selection, Court majorities since *McCleskey* have also often spoken as if these studies are invalid.²¹⁹ In 1990, after an evaluative synthesis of all fifty-three then-existing post-*Furman* studies, the General Accounting Office concluded that the race of the victim frequently influenced the selection process.²²⁰ Subsequent studies, while not unanimous, confirm this general conclusion.²²¹ The empirical evidence is readily available, and the Justices seem likely to have noted it. Nonetheless, as we have seen, Court majorities after *McCleskey* have not simply remained silent about the inequality but have often effectively denied it,²²² declaring that the narrowing rule serves to “ensure consistency in determining who receives a death sentence.”²²³

As long as the Court clings to the rhetoric of consistency to explain the narrowing rule, it cannot speak candidly about unconscious discrimination and caprice in capital selection. Surely, the disconnection

demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”).

218. *Id.* at 308.

219. After *McCleskey*, these studies generally are useless to establish a constitutional violation. The exception concerns studies that tend to confirm racialized decisionmaking by a particular prosecutor’s office across many cases. Such studies could sometimes help show the kind of discrimination required to establish an equal protection violation. See John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1805–06 (1998).

220. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990) [hereinafter GAO STUDY].

221. See Howe, *supra* note 13, at 2117–19 (discussing several subsequent studies); see also Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807 (2009) (recent study of race and capital selection in Harris County, Texas, which encompasses Houston); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 23–28, tbls.6, 7 & 8 (2006) (recent study of race and geographical disparities in capital selection in California). Cf. DONOHUE, *supra* note 120, at 2–3 (finding arbitrariness in the use of the death penalty in Connecticut from 1973 to 2007).

222. See *supra* Part V.

223. *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

between rhetoric and reality stems from the Court's effort to uphold capital punishment without contradicting its past efforts to find congruence with *Furman*; the Justices likely understand the reality of unconscious discrimination and caprice. Years after *McCleskey*, in the papers of the late Justice Marshall, an internal Court memo from Justice Scalia surfaced,²²⁴ revealing that he had advised the other Justices, as the Court considered *McCleskey*, that he had no doubt that capital selection continued to be influenced by "irrational sympathies and antipathies, including racial" ones, and that these influences were ineradicable.²²⁵ Although Justice Scalia did not write the opinion in *McCleskey*, he joined it, and his memo underscores that even those in the majority probably understood that the Court's narrowing rule had done little to promote equality. Of course, given the public outcry and the frenzy of new death-penalty legislation after *Furman*, many Justices may strongly resist any concession that would again seem to call for widespread invalidation of death-penalty systems. Yet, the Court obscures a serious social problem when it claims that the distinction between pre- and post-*Furman* death-penalty systems is "reasonable consistency." Even if the Court will not strike down death-penalty systems that produce unequal outcomes, it does not serve us well by masking reality.

224. See, e.g., Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER. L. REV. 1035, 1037–38 (1994) (discussing the public revelation of the memo when the Library of Congress made public the papers of Justice Marshall).

225. Henry J. Reske, *Behind the Scenes*, 79 A.B.A. J., August 1993, at 28 (quoting Memorandum to the Conference from Justice Antonin Scalia, in No. 84-6811 – *McCleskey v. Kemp* of Jan. 6, 1987, *McCleskey v. Kemp* File, THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C.) The context of the statement in the memo was as follows:

Scalia expressed his general support for Justice Lewis Powell's initial attempts to draft a majority opinion. But more significantly, it was also a medium for Scalia's "two reservations . . ." "I disagree," he began, "with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in [Powell's draft opinion], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view," Scalia continued, "that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones] is real, acknowledged by the [cases] of this court and ineradicable, I cannot honestly say that all I need is more proof."

See Dorin, *supra* note 224, at 1037–38 (alterations in original).

2. *Addressing the racial discrimination problem more forthrightly under a deserts-limitation view of the Eighth Amendment.*

The Court need not obscure the existence of discrimination and caprice if it acknowledges that the deserts limitation fully explains its Eighth Amendment regulation of capital selection.²²⁶ This limitation is not offended if many capital offenders who deserve the death penalty escape that sanction. The deserts limitation commands only that no one receive the death sanction who does not deserve it. Thus, by renouncing the narrowing requirement and focusing on the second mandate, the Court could not only provide a unified theory of Eighth Amendment regulation but could also speak candidly about the problem of “irrational sympathies and antipathies, including racial” ones,²²⁷ left unsolved.

Because the deserts limitation does not aim to prevent inconsistency, statistical studies finding the influence of irrational factors on capital selection in a city, county, or state generally do not establish a constitutional violation. First, the studies often do not separately examine the capital-sentencing trial or, if so, they do not identify racialized decisionmaking at that stage.²²⁸ Often, studies look only at the overall death-selection process or only at the decisions of prosecutors.²²⁹ Likewise, among the few statistical studies that have attempted to isolate racialized decisionmaking at the sentencing phase, some have found no evidence that capital sentencers favored white defendants or killers of black victims.²³⁰ Studies that fail to identify racial effects at the sentencing stage do little to prove that death sentences that have been issued in a jurisdiction are undeserved. If a sentencing jury has correctly determined that a guilty and convicted capital murderer deserves the death sanction, his deserts do not change because unconscious racial bias motivated the prosecutor to seek that sanction. The motivations of the

226. Although too ill-developed and distracting to warrant perpetuation, even the narrowing requirement is better explained by the deserts limitation than by a consistency mandate. *See* Howe, *supra* note 10, at 833.

227. *See* Reske, *supra* note 225 (quoting Memorandum to the Conference from Justice Antonin Scalia, in No. 84-6811 – *McCleskey v. Kemp* of Jan. 6, 1987, *McCleskey v. Kemp* File, THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C.).

228. *See* Scott W. Howe, 2010 *Death Penalty Issue: Race, Death and Disproportionality*, 37 N. KY. L. REV. 213, 226 & n.86 (2010).

229. *Id.*

230. *See, e.g.*, Phillips, *supra* note 221, at 830–39 (finding no evidence that capital-sentencing juries in Harris County (Houston), Texas, between 1992 and 1999, acted out of bias against black defendants or against killers of white victims, despite finding strong evidence that, due to racialized decisionmaking by prosecutors, those defendants were disfavored in the overall selection process).

prosecutor alone would not undermine the reliability of the jury's deserts determination.²³¹

Under a deserts limitation, even statistical studies that separately examine the capital-sentencing trial and find racial effects at that stage carry muted probative value. The problem is that the studies cannot distinguish between two kinds of unconscious discrimination—one prohibited by the deserts limitation and one permitted. Because the deserts limitation is unidirectional, it is forgiving of unconscious racial bias in favor of mercy, although it is not indifferent to racial bias that influences a desert finding in support of a death sentence. Statistical studies indicating racialized decisionmaking at the capital-sentencing stage cannot reveal the degree to which the racial effects reflect one kind of discrimination versus the other. The ultimate question for the interpreter of these studies remains whether sentencers seem to be condemning some capital offenders who do not deserve it or merely reprieving some others who do deserve it.

In *McCleskey*, the evidence from the Baldus study, if accepted as valid, unquestionably demonstrated an Eighth Amendment violation under a “reasonable consistency” command, but it was much less compelling under a deserts limitation. “Much of the disparity seemed attributable to Georgia prosecutors, who sought the death penalty in 70 percent of cases involving black defendants and white victims, but only 19 percent of cases involving white defendants and black victims.”²³² Yet, evidence of prosecutorial bias was not evidence that Georgia juries sentenced defendants to death who did not deserve it. The Baldus study also revealed statistical evidence of racialized decisionmaking at Georgia sentencing trials.²³³ Yet, there was no clarity that the statistical evidence of bias by juries reflected undeserved death sentences rather than undeserved reprieves. Some commentators would be predisposed to

231. A plausible argument can be made that even a statistical study that indicates racialized decisionmaking by prosecutors, but not by sentencing juries, could justify a disproportionality conclusion under the Eighth Amendment. The argument would assert that, at some point, the expressive function of capital punishment should carry paramount importance and that the expressive function is distorted when large racial disparities arise. See Lee, *supra* note 135, at 712–13. Under this view, the proportionality notion would carry a limited comparative element, although the point at which a finding of disproportionality should arise would remain elusive. I note, however, that this argument lacks a solid foundation in the existing capital-sentencing rulings of the Supreme Court.

232. COLE, *supra* note 195, at 133, (citing *McCleskey v. Kemp*, 481 U.S. 279, 327 (1987) (Brennan, J., dissenting)).

233. See BALDUS STUDY, *supra* note 110, at 187 tbl.44.

conclude that the bias was not about mercy.²³⁴ Yet, “[m]any observers have contended” that the central problem was not undue harshness toward any group but a “devaluation of black victims” and, thus, a “relative leniency extended to killers of blacks.”²³⁵ The facts surrounding Warren McCleskey’s offense certainly did not suggest that his was a marginal case for the death penalty. Evidence indicated that he had participated in an armed robbery of a furniture store during which he personally and intentionally had killed a police officer who had responded to a silent alarm.²³⁶ Evidence also revealed that McCleskey had participated in two additional armed robberies in the weeks preceding the capital offense.²³⁷ At McCleskey’s trial, Georgia also had allowed him to present any mitigating evidence as defined by *Lockett* and allowed the jury freedom to reject the death penalty. If the function of the Eighth Amendment was to ensure that McCleskey would not receive the death penalty unless he deserved it, the Court plausibly could disbelieve that the Baldus study demonstrated that his jury had acted unfairly.

Had the *McCleskey* Court chosen to highlight the evidence of inconsistency but relied on the deserts limitation to explain why that evidence did not establish an Eighth Amendment violation, the Court still would have displeased many, but at least it would have spoken forthrightly. That approach would have been better than the course the majority followed. The actual *McCleskey* opinion sought to discount the Baldus study as if it had uncovered only a minor anomaly.²³⁸ The majority asserted at one point, for example, that “[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race.”²³⁹ In the same vein, the Court sought to maintain the fiction that the Eighth Amendment required consistency in the distribution of death sentences and that the doctrine assured it. The Court claimed, for example, that the

234. One can sensibly conclude that a likelihood that desert determinations that underlie even a fraction of death verdicts are distorted by racial prejudice and other improper factors justifies striking down a death-penalty system for violating the deserts limitation. *See supra* text accompanying note 190. Nonetheless, much room for disagreement remains over the level of imperfection that should be allowed of any system and further, over whether statistical studies can ever sufficiently establish that a system is producing any or too many undeserved death sentences. *See supra* text accompanying notes 230–31.

235. Kennedy, *supra* note 23, at 1391, 1393.

236. *McCleskey*, 481 U.S. at 283.

237. *See McCleskey v. State*, 263 S.E.2d. 146, 150 (Ga. 1980).

238. KENNEDY, *supra* note 194, at 338.

239. *McCleskey*, 481 U.S. at 312.

Georgia system safeguarded “against arbitrariness and caprice.”²⁴⁰ Nonetheless, in the end, the Court also noted the option of a legislative response to the problem. The majority asserted that “McCleskey’s arguments are best presented to the legislative bodies.”²⁴¹ Yet, the Court could not effectively emphasize a need for democratic reform while simultaneously denying the need for it.²⁴² Reliance on the deserts limitation alone would have allowed the Court to highlight rather than discount what the Baldus study established and to explain intelligibly why the study did not establish an Eighth Amendment violation.²⁴³

The *McCleskey* Court also could have revised the explanation of congruence between *Furman* and modern doctrine, and that explanation is easy.²⁴⁴ The two defendants in the companion cases to *Furman*, Elmer Branch and Lucious Jackson, had received the death penalty for rape.²⁴⁵ According to the *Coker* decision, which came only five years after *Furman* and invalidated the death penalty for rape, those death sentences

240. *Id.* at 303.

241. *Id.* at 319.

242. *Cf.* KENNEDY, *supra* note 194, at 338–39 (“It would have been better if the Court openly declared that, for reasons of policy, it declined to grant relief to McCleskey notwithstanding the disturbing facts revealed by the Baldus study.”).

243. After *McCleskey*, Congress considered allowing statistical proof to establish a presumption of racial discrimination in capital sentencing, but the bill failed. *See* Racial Justice Act of 1989, S. 1696, 101st Cong. § 2922(b)(1) (1989). The state legislative response has been only marginally more fruitful. Only Kentucky and North Carolina have signed legislation to permit capital defendants to bring challenges of racial discrimination based on statistical evidence. *See* KY. REV. STAT. ANN. § 532.300 (West 2011); N.C. GEN. STAT. §§ 15A–2011 to –2012 (2011). The difficulty for defendants under the Kentucky statute, moreover, is that it requires them to raise the claim before trial and state specifically how the evidence shows that “racial considerations played a significant part in the decision to seek a death sentence in his or her case.” KY. REV. STAT. ANN. § 532.300(4) (West 2011). Defendants apparently may only challenge charging decisions and only based on evidence of discrimination in the specific prosecutorial district. *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2116 & n.380 (2010). Likewise, the statute requires defendants to prove their claims “by clear and convincing evidence.” *See* KY. REV. STAT. ANN. § 532.300(5) (West 2011). The North Carolina Act, adopted in 2009, is more favorable toward capital defendants. It allows statistical evidence that does not focus on the particular prosecutorial district, covers not only charging decisions, but also prosecutorial peremptory challenges and decisions by juries, and imposes on the defense only the preponderance standard of proof. *See* N.C. GEN. STAT. §§ 15A–2011 to –2012 (2011); Kotch & Mosteller, *supra*, at 2116–18 & nn.380–81.

244. Although in terms too brief to be enlightening and in context of a paragraph that muddled together the concepts of excessiveness and inconsistency, the *McCleskey* Court at one point alluded to “presumed excessive[ness]” as the explanation for congruence between *Furman* and modern doctrine. *See McCleskey*, 481 U.S. at 301.

245. *See Furman v. Georgia*, 408 U.S. 238, 239 (1972).

were disproportional.²⁴⁶ As for William Furman, while his death sentence was for murder, he received no chance to present all mitigating evidence concerning his character, record, and crime at a separate sentencing hearing.²⁴⁷ His trial violated the individualization rule, which was announced in the 1976 cases only four years after *Furman* and reiterated in *Lockett* two years later. Thus, *Furman* is best understood not as a mandate for consistency but as a mandate against retributive excess.

V. CONCLUSION

The notion that the Eighth Amendment demands consistency in the use of the death penalty dies hard. Rhetoric in some of the crucial *Furman* opinions seemed to call for consistency, and the Court has long assured us that the narrowing rule in post-*Furman* capital-sentencing law provides a principled basis for distinguishing the few cases “in which the death penalty [is] imposed, from the many cases in which it [is] not.”²⁴⁸ The Court also appeared to come close to effective abolition of the death penalty in *McCleskey*, in which four Justices were prepared to strike down Georgia’s post-*Furman* death-penalty system because of statistical evidence of racially inconsistent outcomes.²⁴⁹ After *McCleskey*, the Court also has maintained the rhetoric that the narrowing requirement in capital sentencing exists to “ensure that the death penalty will be imposed in a consistent, rational manner.”²⁵⁰ Given all that the Court has said and what it almost did in *McCleskey*, the idea that *Furman* mandates equality is not easily dispelled.

The hard truth, however, is that the Eighth Amendment, as revealed in modern capital-sentencing law, is about one overriding command: the government can only impose a death sentence on a person who deserves that sanction.²⁵¹ The idea that consistency is required represents what the

246. See *supra* text accompanying notes 136–141.

247. See Steiker, *supra* note 31, at 95.

248. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion); *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (quoting *Godfrey*, 446 U.S. at 433).

249. See *McCleskey*, 481 U.S. at 345 (Blackmun, J., dissenting, joined by Marshall, Stevens, and in all but Part IV–B, Brennan, JJ.).

250. *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990). See also *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008) (asserting that the narrowing rule serves to “ensure consistency in determining who receives a death sentence.”).

251. See, e.g., Howe, *supra* note 10, at 828–35; see also Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1203 (2000) (“The Court’s real concern is not equality in punishment, but proportionality in punishment.”); McCord, *supra* note 17, at 548 (“[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing *overinclusion*, with

Court has said, and what many believe the Court should enforce through abolition, but not what the Court has done. All of the Court's Eighth Amendment doctrine regulating capital sentencing is best explained as an effort to prevent undeserved death sentences, and this idea of proportionality does not merge with a requirement of consistency.

The goal of maintaining both robust death-penalty systems and consistency in the use of the sanction was always implausible. Modern systems retain enormous opportunities for discretionary reprieves.²⁵² Moreover, in an endeavor as subjective, emotion-laden, and dependent on humans²⁵³ as determining the deserved punishment for murderers, elimination of arbitrary influences, including "irrational sympathies and antipathies," is impossible.²⁵⁴ The idea that a narrowing rule—other than one so demanding as to produce effective abolition—could assure equality was fantasy. Yet, when the Court approved the resumption of capital sentencing in the 1976 cases and asserted that the minimal and haphazard narrowing effects in the new statutes could produce consistency, observers, and even many of the Justices, seemed persuaded.

The Court should repudiate the narrowing mandate. The requirement carries little, if any, meaning, but the continued claim that it produces consistency has impeded recognition that individualized consideration is the central Eighth Amendment mandate that bears on capital sentencing. The individualization rule finds explanation in the same rationale that justified the Court in directly limiting death eligibility through its proportionality decisions: the deserts limitation. Four decades after *Furman*, if the Court remains unwilling to strike down death-penalty

particular interest in minimizing invidious overinclusion due to racial bias."); Wilkins, *supra* note 135, at 457 ("[W]hen surveying the terrain of *all* of the Court's capital Eighth Amendment jurisprudence, one can best impose some kind of order upon the material by viewing it through the lens of a deserts-limitation principle."). Cf. Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 787 (2005) (asserting that the concurring Justices in *Furman* were more concerned about "arbitrariness in an individual case" than with "arbitrariness between cases" and thus, "consistency was not, and has not been, the Court's end goal.").

252. See *supra* text accompanying note 120.

253. Among many other factors, widely varying competence levels among capital defense lawyers contribute greatly to arbitrariness in capital selection. See David R. Dow, Bell v. Cone: *The Fatal Consequences of Incomplete Failure*, in DEATH PENALTY STORIES 389, 414 (John H. Blume & Jordan M. Steiker eds., 2009); Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1301–02 (1997).

254. See BANNER, *supra* note 5, at 288, 290 (explaining why "the major determinants" of who lives and who dies are "not the statutory aggravating . . . circumstances.").

systems that produce unequal outcomes, honesty calls for acknowledging the inequality and clarifying that the Eighth Amendment prohibits not inconsistency but retributive excess.