LESS IS BETTER: JUSTICE STEVENS AND THE NARROWED DEATH PENALTY

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INTRODUCTION: JUSTICE STEVENS ON THE DEATH PENALTY

In a recent speech to the American Bar Association, Justice John Paul Stevens "issued an unusually stinging criticism of capital punishment."1 Although he "stopped short of calling for an end to the death penalty," Justice Stevens catalogued a number of its "serious flaws,"2 including several procedures that the full Court has reviewed and upheld over his dissent—selecting capital jurors in a manner that excludes those with qualms about the death penalty, permitting elected state judges to second-guess jurors when they decline to impose the death penalty, permitting states to premise death verdicts on "victim impact statements," tolerating sub-par legal representation of capital defendants, and eschewing steps that might moderate the risk of executing the innocent.3 News reports on the

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3. Holland, supra note 2. According to Justice Stevens, evidence that a significant number of defendants in capital cases have not been provided with fully competent legal representation at trial... is by no means the only defect in the system... Gruesome facts pose a danger that emotion will play a larger role in the decisional process than dispassionate analysis...

[The mechanisms for] selecting juries in capital cases are troublesome... Preoccupation with [whether prospective jurors are apprehensive about imposing a death sentence] creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant... The fact that most of the judges who preside and often make the final life-or-death decision must stand for re-election creates a subtle bias in favor of death. Moreover, the admissibility of victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of the defendant, serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.
speech identified Justice Stevens as “the Supreme Court’s most liberal member” who often is on the losing end of close votes in capital cases and is likely to be in that position more often now that Justice Sandra Day O’Connor has left the Court.  

Justice Stevens certainly is not at the center of the current Court on the issue of the death penalty. But focusing on that point misses a more interesting one. Notwithstanding the resistance of a majority of his colleagues and the nation’s law-and-order consensus, Justice Stevens’s nuanced position on the death penalty is fitfully but unmistakably prevailing on the ground. In this Article, we discuss the conflicting views about how to administer the death penalty that have tormented the Court over the past thirty years, Justice Stevens’s leading role in those debates, the surprising triumph of his approach on the ground even as his views have lost ground on the Court, and the need for the current Court to embrace Justice Stevens’s “less is more” approach and the policy consensus that has formed around the approach.

I. SUMMARY OF THE ARGUMENT: FROM FURMAN TO THE FUTURE

Modern death penalty jurisprudence is founded on a contradiction. In Furman v. Georgia, the Court invalidated the death penalty as then imposed in the United States while allowing jurisdictions that wanted to continue executing offenders to reform their method of deciding who dies. In the standard formulation, Furman “held” that states had to replace existing capital-sentencing procedures with ones that were reasoned, not “arbitrary.”

Although the Court’s capital jurisprudence has continued ever since to treat Furman’s “holding” as its lodestar, Furman has no holding. It is a collection of separate opinions that contradict each other. Of course, the four Justices in dissent (Justices Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist) who saw no constitutional problem with the way U.S. jurisdictions were then administering the death penalty contradicted the two concurring Justices (William Brennan and Thurgood Marshall) who believed the death penalty was unconstitutional under all circumstances and the three concurring Justices (William Douglas, Potter

Stevens, supra note 1; see also infra notes 114, 132, 139, 149, 251, 272, 280 and accompanying text (discussing Justice Stevens’s dissents from the Court’s decisions on these issues).

4. See, e.g., Holland, supra note 2.
5. 408 U.S. 238 (1972).
6. See authorities cited infra note 45.
7. See infra note 45.
8. See Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 315, 317 (“[Furman] is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias.”; “[T]here really is no doctrinal holding in Furman.”).
9. See Furman, 408 U.S. at 375 (Burger, C.J., dissenting); id. at 405 (Blackmun, J., dissenting); id. at 414 (Powell, J., dissenting); id. at 465 (Rehnquist, J., dissenting).
10. See id. at 257 (Brennan, J., concurring); id. at 314 (Marshall, J., concurring).
Stewart, and Byron White) who believed the penalty was unconstitutional as then applied.\textsuperscript{11} More vexing were the contradictory views of the concurring Justices whose opinions controlled the outcome—Justices Douglas, Stewart, and White.

In Justice Douglas’s view, the constitutionality of the death penalty depended on states’ capacity to develop death-sentencing procedures that kept race and other irrelevant factors from driving outcomes.\textsuperscript{12} Although other Justices acknowledged this problem,\textsuperscript{13} Justice Douglas differed from them in believing the problem could be solved. Assuming instead that racial and other illegitimate influences were inevitable, the dissenters believed the penalty’s valid objectives took precedence,\textsuperscript{14} while Justices Brennan and Marshall thought that avoiding race-tainted decisions was the greater imperative.\textsuperscript{15} Justices Brennan and Marshall noted other disturbing risks as well, including executing the innocent.\textsuperscript{16}

Justices Stewart and White departed from Justice Douglas only in insisting upon a particular solution to the problem. Justices Stewart and White both attributed the failure of existing death-sentencing procedures to lawlessness, and both identified a source of the problem. But it was there that the difficulty arose. Justices Stewart’s and White’s diagnoses and

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11. \textit{See id.} at 240 (Douglas, \textit{J.,} concurring); \textit{id.} at 306 (Stewart, \textit{J.,} concurring); \textit{id.} at 310 (White, \textit{J.,} concurring).

12. \textit{Id.} at 256 (Douglas, \textit{J.,} concurring) (“The high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.”).

13. \textit{See id.} at 447 (Powell, \textit{J.,} dissenting) (“Certainly the claim is justified that [the death penalty] falls more heavily on the relatively impoverished and underprivileged elements of society.”); \textit{id.} at 366 (Marshall, \textit{J.,} concurring) (“It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.”); \textit{see also id.} at 389 (Burger, C.J., dissenting) (“There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State.”).

14. \textit{See, e.g., id.} at 447 (Powell, \textit{J.,} dissenting) (“The root causes of the higher incidence of criminal penalties on ‘minorities and the poor’ will not be cured by abolishing the system of penalties.”); \textit{id.} at 398-99 (Burger, C.J., dissenting) (“The decisive grievance . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice . . . This claim of arbitrariness . . . manifestly fails to establish that the death penalty is a ‘cruel and unusual’ punishment.”).


16. \textit{See id.} at 290 (Brennan, \textit{J.,} concurring) (“Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. . . . Yet the finality of death precludes relief. An executed person has indeed ‘lost the right to have rights.’”); \textit{id.} at 367-68 (Marshall, \textit{J.,} concurring) (“No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. . . . Surely there will be more as long as capital punishment remains part of our penal law.” (footnote omitted)).
solutions were contradictory. Justice Stewart believed the penalty was imposed too indiscriminately and that the solution was "narrowing": less death sentencing as a result of more carefully limiting the categories of offenders who were eligible for the death penalty. Justice White believed the penalty was imposed too sparingly and that the solution was "numerousness": more death sentencing.

Justice Stevens joined the Court soon after it decided *Furman*, replacing Justice Douglas. In co-writing the lead opinions in the Court's next five important death penalty decisions—announced on Friday, July 2, 1976, as the Court and the nation adjourned for the Bicentennial celebration—Justice Stevens placed himself squarely in Justice Stewart's, less-is-better camp. With the support of Justice Powell, and with the separately concurring votes of Justices Brennan and Marshall opposing the death penalty in all situations, the Stewart-Stevens view held sway for the next five years. When Justice Stewart left the Court in 1981, however, the Court rapidly rejected what then became the Stevens, less-is-better view, and as new issues arose, the Court endorsed Justice White's more-is-better approach. Then in *McCleskey v. Kemp* in 1987, the Court decided that it would no longer treat Justice Douglas's opinion in *Furman* as

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17. *Id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *see infra* notes 25, 42, 71, 80-88.

18. As Justice White wrote, [W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when, for so many in like circumstances, life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. . . . [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

*Furman*, 408 U.S. at 311-12 (White, J., concurring); *see also id.* at 314 ("Legislative 'policy' is thus necessarily defined not by what is legislatively authorized, but by what juries and judges do in exercising the discretion so regularly conferred upon them."); *infra* notes 43, 73-74, 99-102 and accompanying text.


20. *See infra* Part III.B.

21. *See infra* Part III.C.

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authority. Death-sentencing patterns explicable only on the basis of race are tolerable, the Court ruled, because they are both intractable and endemic to capital and criminal justice systems the states legitimately believe they cannot do without.\footnote{23}{See \textit{id.} at 312 ("Apparent disparities in sentencing are an inevitable part of our criminal justice system."); \textit{id.} at 315-319 ("[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. . . . The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.").} The five-person majority reached this conclusion over dissents by Justices Brennan, Marshall, Blackmun, and Stevens arguing that any choice between race-driven death sentencing and no death penalty at all had to be made in favor of the latter.\footnote{24}{\textit{id.} at 320 (Brennan, J. dissenting); \textit{id.} at 365 (Blackmun, J. dissenting).} The majority also ignored a different sort of argument, advanced in the separate dissent by Justice Stevens (joined by Justice Blackmun). In Justice Stevens's view, race-influenced death sentencing is inevitable only if states are allowed to take a more-is-better approach to the penalty. Had the Court instead stuck with the Stewart-Stevens, less-is-better view, the states could have retained the death penalty without letting race drive its application.\footnote{25}{\textit{id.} at 367 (Stevens, J., dissenting) ("If Georgia were to narrow the class of death-eligible defendants to [certain categories of extremely serious crimes], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.").}

Surprisingly, however, at the very time the Supreme Court was abandoning its commitment to narrowing as a way of dealing with flaws in the administration of capital punishment, the use of the death penalty in the United States began to shrink. Notwithstanding the Court's endorsement of broad death-sentencing schemes and the triumph of tough-on-crime politics and policies,\footnote{26}{See Atkins v. Virginia, 536 U.S. 304, 315 (2002) (noting "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime").} events on the ground have vindicated Justice Stevens's less-is-better view. Although the Court lets states impose death with abandon, the harmful effects of doing so are convincing many jurisdictions to adopt Stevens's less-is-better approach to capital sentencing.\footnote{27}{\textit{See infra} Part IV.B-C.} Ever so, the unevenness of that transformation and the harmful capital-sentencing conditions that still exist in some places should induce the Court to acknowledge its more-is-better mistakes of the 1980s and 1990s and to begin nudging laggard jurisdictions into line with the nation's less-is-better trend. With actual practice leading the way, the Court can now take this step without having to answer the boundary question that may have scared it away from the Stevens view in the first place: How much less capital sentencing is better? On that question, time and events on the ground will tell. Recent activity in a number of jurisdictions provides a basis for predicting that a lot less is better. The trend thus gives the Court the capacity to follow the pragmatic incrementalism of Justice Stevens's
McCleskey dissent and, for now at least, to narrow without abolishing the death penalty.

In this Article, we expose the unacknowledged contradiction at the core of Furman’s “holding” and trace the Court’s resolution of that conflict. That resolution first tended towards the Stewart-Stevens “narrowing” view, then embraced Justice White’s “numerousness” view, and culminated in an incoherent jurisprudence that, in Furman’s name, has essentially made constitutionally mandatory what Furman found constitutionally abhorrent. We then describe the “political economy of death” in this country over the last thirty-five years—the winding path public opinion and action have taken towards today’s incredibly shrinking death penalty. As we then discuss, this public trend reveals that narrowing is the best available cure for what ails the death penalty, namely, error and the risk of executing the innocent, racial disparity, arbitrariness, and resource deprivation. We close by charting a path forward for the Court towards Justice Stevens’s pragmatic incrementalism, and beyond.

II. FURMAN AS RORSCHACH

A. Furman’s “Holding”

In a five-person per curiam opinion in Furman v. Georgia, the Supreme Court ruled unconstitutional the death-sentencing systems of Georgia and Texas. Doing so effectively “remove[d] the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country” and “nullified” the “capital punishment laws of no less than 39 States and the District of Columbia.” Yet, Furman’s “holding” was constrained. “The Court h[e]ld[] that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” On the death penalty’s constitutionality in all cases, however, the four dissenting Justices voted to uphold the penalty, and only two concurring Justices voted to invalidate it. The three remaining Justices, whose opinions thus controlled Furman’s effect, expressed no opinion at all on the constitutionality of capital punishment per se.

28. See infra Part III.
29. See infra Part IV.
30. See infra Part V.
31. See infra Part VI.
32. 408 U.S. 238 (1972).
33. Id. at 417-18 (Powell, J., dissenting) (footnote omitted).
34. Id. at 239-40 (per curiam) (emphasis added).
35. Id. at 375-96 (Burger, C.J., dissenting); id. at 407-10 (Blackmun, J., dissenting); id. at 418-56 (Powell, J., dissenting); id. at 468 (Rehnquist, J., dissenting).
36. Id. at 257-306 (Brennan, J., concurring); id. at 342-71 (Marshall, J., concurring).
37. Id. at 257 (Douglas, J., concurring); id. at 306 (Stewart, J., concurring); id. at 310-11.
Despite the "as applied" nature of the decision, the Justices spent little time discussing the aspects of the penalty's application in the cases before the Court that made it unconstitutional. The Justices emphasized that Georgia and Texas had "discretionary [death-sentencing] statutes" giving jurors nearly complete freedom to choose between death and prison sentences for defendants they convicted of murder or rape. But no Justice parsed the relevant texts of the Georgia and Texas statutes, analyzed the underlying crimes (apart from expressing revulsion at what took place), discussed the investigative or judicial procedures that generated death sentences in the three cases, or (except for Justice Douglas, who ultimately attributed no legal effect to what he found) said much about the three defendants. Instead, the three concurring Justices whose opinions dictated the "as applied" nature of the holding found the death sentences unconstitutional, not because of any specific characteristic or action of the particular laws and individuals before the Court, but because of the overall pattern of effects produced by the existing, wholly discretionary capital-sentencing laws in the run of potentially capital cases.

In Justice Douglas's view, existing death-sentencing procedures were unconstitutional because "in the overall view [they] reach[ed] [a] result in practice" that was "pregnant with [race and wealth] discrimination." For Justice Stewart, the death sentences violated the Eighth Amendment because, "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." And Justice White concluded "that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."

In the years following Furman, the Justices have occasionally acknowledged the difficulty states have faced in devising death-sentencing procedures along lines specified in the three separate Furman opinions, each with only a single adherent and with the other six Justices describing
the task as hopeless or unnecessary. Despite that, the Court has repeatedly discerned a common thread connecting Furman's three critical opinions and even a "holding" (beyond the technical one that preexisting death verdicts and discretionary statutes were invalid). Even today, the Justices unanimously swear fealty to Furman.

44. See, e.g., Lockett v. Ohio, 438 U.S. 586, 599, 602 (1978) (plurality opinion of Burger, C.J.) (noting that "the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment," and "[t]he signals from this Court have not ... always been easy to decipher"); see also Furman, 408 U.S. at 397, 403 (Burger, C.J., dissenting) ("The actual scope of the Court's ruling, which I take to be embodied in these [three] concurring opinions, is not entirely clear" and leaves "the future of capital punishment in this country ... in an uncertain limbo"); id. at 414, 416 (Powell, J., dissenting) (stating that the Court's holding must be gleaned from several "separate opinions, expressing as many separate rationales," leaving "uncertainties" about "what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today").

45. See, e.g., Walton v. Arizona, 497 U.S. 639, 657-59 (1990) (Scalia, J., concurring in part and concurring in the judgment); Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious ruling; there was no principled means provided to distinguish those that received the penalty from those that did not."); McCleskey v. Kemp, 481 U.S. 279, 322 (1987) (Brennan, J., dissenting) ("Furman held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner," (internal quotation omitted)); Godfrey v. Georgia, 446 U.S. 420, 427 (1980) ("In Furman, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." (citation omitted)); Gregg v. Georgia, 428 U.S. 153, 188 n.36, 189 (1976) (plurality opinion of Stewart, Powell, and Stevens, J.J.) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); id. at 220-21 (White, J., concurring) ("In Furman, this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual." (footnotes omitted)). Examples of articles making the same assumption about Furman's holding or principle are: Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 Case W. Res. L. Rev. 1067, 1071 (1991); Stephen Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 9-11 (1980); Ingrid A. Holewinski, "Inherently Arbitrary and Capricious": An Empirical Analysis of Variations Among State Death Penalty Statutes, 12 Cornell J.L. & Pub. Pol'y 231 (2002); Margaret J. Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989, 998 (1978); Elizabeth Vicens, Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard, 80 N.Y.U. L. Rev. 350, 371 (2005); see also Brief for Petitioner at 20, Kansas v. Marsh, No. 04-1170, 2005 WL 1953798 (U.S. Aug. 15, 2005) (claiming, in a brief for the State of Kansas signed by, inter alia, former Solicitor General Theodore B. Olson, that "[f]or over 30 years, the holding in Furman has represented the constitutional standard against which state capital sentencing systems are measured," and that "[i]n Furman, the Court held ... that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion" (internal quotation omitted)); infra note 120.

46. See, e.g., Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) (discussing "the holding of Furman, that the sentencer's discretion must be constrained to
Notwithstanding the coherence the Court continues to ascribe to Furman and the practical effect it undoubtedly had, Furman has no common thread. Instead, it advances contradictory understandings of the defects of preexisting death-sentencing procedures. Perversely, efforts to reconcile this contradiction have helped generate a body of doctrine that very nearly mandates the capital-sentencing patterns the Court invalidated in Furman.

B. Furman’s Narrowing-Versus-Numerousness Contradiction

Thinking geometrically, imagine a plane of human activity made up entirely of adjudicated criminal behavior. On that plane, inscribe a circle—like the one in Figure 1 below—that encompasses all adjudicated criminal behavior for which the law makes the death penalty a possible punishment. Each imaginary point on the plane represents a crime committed during a particular period for which a defendant has been convicted; each imaginary point inside the circle represents a capital crime committed during the same period. Near the circumference of the circle, but just outside it, lie crimes that barely miss rising to the level of capital offenses; near the

avoid arbitrary or freakish imposition of the death penalty” (citation omitted)); Loving v. United States, 517 U.S. 748, 771 (1996) (claiming that the holding in Furman established the need for limiting absolute discretion in capital sentencing). Even the Court’s most conservative member on matters relating to the death penalty has affirmed his support for Furman—in the course of rejecting much of the rest of the Court’s modern death penalty jurisprudence. Walton, 497 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment) (stating that Furman “stand[s] for the principle that a sentencer’s discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion”).

47. Furman undoubtedly has made capital sentencing different today from what it was in 1972. Compare Cal. Penal Code §§ 189.5, 190.1, 190.2 (West 1999) and Ga. Code Ann. § 17-10-30 (2004) (multi-page statutes) with Cal. Penal Code §§ 189.5, 190.1, 190.2 (West 1970) and Ga. Code Ann., § 26-1302 (1971) (pre-Furman one-line statutes). Other changes include the bifurcation of guilt-innocence and capital-sentencing trials and application at the latter of due process protections that previously applied only at the former, see, e.g., Estelle v. Smith, 451 U.S. 454 (1981) (applying the privilege against self-incrimination and Miranda rights to the capital-sentencing phase); Bullington v. Missouri, 451 U.S. 430 (1981) (applying the double jeopardy bar to the capital-sentencing phase), mandatory direct appeals, see Whitmore v. Arkansas, 495 U.S. 149 (1990) (noting that although the Constitution has never been interpreted to guarantee a constitutional right to direct appeal, all state and federal jurisdictions guarantee appellate review by at least one level of appellate courts in capital cases); Thomas P. Bonczar & Tracy L. Snell, Capital Punishment 2002, Bureau of Justice Statistics 3 (2003) (noting that although federal death penalty procedures do not provide for automatic review after a death sentence has been imposed, thirty-seven of thirty-eight states with capital statutes provide for automatic appellate review “regardless of the defendant’s wishes”), lengthy and extensive state and federal post-conviction review in virtually all cases, see, e.g., James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2148-49 (2000), and relatively few actual executions even in states that have imposed large numbers of death-sentences (for example, between 1973 and the summer of 2005, respectively, 648, 108, and 223 inmates have piled up on the death rows of California, Tennessee, and Pennsylvania, but those states carried out only eleven, one, and three executions during that thirty-two-year period, see Criminal Justice Project of the NAACP Legal Def. & Educ. Fund, Inc., Death Row U.S.A. (2005), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2005.pdf).
circumference of the circle but just inside it lie crimes that barely do rise to the level of capital offenses. As one travels along any radius of the circle from the circumference to the center, one encounters progressively more aggravated capital offenses. Imagine also that particular slices of the capital “pie” represent crimes committed by particular classes of criminals, say, white offenders in one wedge, wealthy offenders in an overlapping wedge, African-American offenders in another wedge, and so forth.

![Figure 1](image)

Next, imagine that each time the perpetrator of a capital offense is given a death sentence, the point within the circle representing the criminal act for which that sentence was imposed turns from invisible to black. If no “capital” offenses were in fact punished by death, the circle would be empty (all white); if every capital offense were punished in that way, the circle would be solidly colored in; if every other capital offense were punished with death, the circle would be uniformly polka-dotted; if only the single most aggravated offense of all resulted in a death verdict, the circle would be empty save for a dot at its center.

Now, along with the *Furman* Justices, visualize a geometric depiction of the pattern of death sentences generated by the forty American jurisdictions with the death penalty in 1972. Judging from what Justices Douglas, Stewart, and White said in *Furman*, Figure 1 is that pattern. All three agreed, moreover, that something was wrong with the picture. They did not, however, agree on what was wrong. In true gestalt fashion, each Justice presented with the same image saw a different picture based on a distinct interpretation of the foreground and background.

Justice Douglas saw a wedge of African-American, poor, and mentally deficient condemned offenders whom capital-sentencing procedures had invidiously cut from the pie and sentenced to die far more frequently than,
for example, white and wealthier criminals.\textsuperscript{48} Justice Stewart also focused on the distribution of death sentences within the capital circle. But where Justice Douglas saw a disturbing concentration of death sentences in particular social classes, Justice Stewart saw a distressingly even sprinkling of condemned offenders in a broth of virtually identical, but spared, offenders.\textsuperscript{49} Instead of the expected high concentration of death sentences at the aggravated core and a thinning towards the mitigated edges, he saw a disturbing consistency across all aggravation levels. Finally, what Justice White saw was white, or too much of it—a plate virtually empty of condemned offenders, though something approaching a full plate was needed to fulfill his views of the core functions of capital punishment—to convey the retributive message that people who commit the crime in question deserve to die, and to deter by credibly promising that death would be imposed on individuals who commit the crime. In other words, Justice White saw too few death sentences, regardless of their distribution.\textsuperscript{50}

Although the problems the three Justices identified are often grouped under the single rubric of "arbitrariness,"\textsuperscript{51} the word obscures the different vices they condemned. Justice Douglas’s definition of "arbitrariness" refers to selection on the basis of an identifiable but illegitimate trait, a definition that draws upon equal protection notions more usually associated with the

\textsuperscript{48} A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional in their operation. They 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.

\textit{Furman}, 408 U.S. at 256-57 (Douglas, J., concurring) (footnote omitted).

\textsuperscript{49} These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders[,] . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

\textit{Id.} at 309-10 (Stewart, J., concurring) (footnote omitted).

\textsuperscript{50} At the moment [the death penalty] ceases realistically to further these [deterrent and retributive] purposes, . . . its imposition . . . would violate the Eighth Amendment . . . for its imposition would then be the pointless and needless extinction of life . . . .

\textit{Id.} at 312-13 (White, J., concurring).

\textsuperscript{51} See authority cited \textit{supra} note 45.
word “discrimination.” Justice Stewart’s notion of arbitrariness (or, better perhaps, “caprice”) involves selection on the basis of no identifiable trait. It conjures up visions of a procedural due process violation, a selection procedure gone haywire, as manifested by its incoherent results. Justice White’s definition of arbitrariness speaks instead in substantive due process tones. For him, arbitrariness means the failure of a rights-withdrawing mechanism to achieve enough of a social benefit to justify the illiberal step.

Nor did the three Justices agree on a single solution to the contradictory problems they identified. Although Justice Stewart wanted some principle of selection to operate where none was operating before, and Justice Douglas wanted a selection principle different from the illegitimate one he saw operating, it was not clear that either agreed with Justice White that many more selections—more defendants sentenced to die—were the answer. This is especially clear in Justice Stewart’s case, given his view that, even among first-degree murderers, only a small subset comprised of the very worst cases warranted society’s ultimate punishment.

52. Furman, 408 U.S. at 257 (Douglas, J., concurring).
53. Complicating matters was McGautha v. California, 402 U.S. 183 (1971), in which the Court, only fourteen months prior to Furman, had refused to read the Due Process Clause to require reforms that might satisfy Justices William O. Douglas, Potter Stewart, and Byron White. As Justice Stewart later would conclude in Furman, the McGautha petitioners claimed that “state and federal legislatures which provide for [unguided] jury discretion in capital sentencing . . . not only failed to provide a rational basis for distinguishing the one group from the other, . . . but they have failed even to suggest any basis at all.” Id. at 203-04 (citation omitted). As Justice White later would do in Furman, the McGautha petitioners decried the penalty’s “rar[ity]”—its imposition “on far fewer than half the defendants found guilty of capital crimes.” Id. at 203. But in a five-person majority opinion that both Stewart and White joined, the Court rejected the procedural solutions the petitioners proposed: standards to govern decisions between life and death and bifurcated guilt-innocence and capital-sentencing hearings to permit evidence inadmissible or prejudicial on the former issue to be admitted on the latter issue. Rather, expressing faith in “jurors confronted with the truly awesome responsibility of decreeing death for a fellow human,” and expressing no faith in legislators and judges acting in advance of that fateful moment, the Court concluded that guidance was not constitutionally required: “The infinite variety of cases and facets to each case would make general standards either meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.” Id. at 208. With regard to bifurcation, the Court said simply that, “[f]rom a constitutional standpoint we cannot conclude that . . . the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury’s attention solely on punishment after the issue of guilt has been determined.” Id. at 221. One explanation for the seemingly contradictory positions Justices Stewart and White joined in McGautha and expressed in their opinions in Furman is that the former was a Fourteenth Amendment due process view and the latter were Eighth Amendment cruel and unusual punishment views. But as is noted above, the views that both Justices Stewart and White expressed in Furman draw on different types of due process analyses of just the sort they had rejected in McGautha. See supra text following note 52; see also Gardner v. Florida, 430 U.S. 349, 363-64 (1977) (White, J., concurring in the judgment) (acknowledging that, as the plurality held, “the Due Process Clause . . . [is] the vehicle by which the strictures of the Eighth Amendment [were] triggered” in Furman and other cases “invol[v]ing the procedure employed by the State to select persons for the unique and irreversible penalty of death.” (internal quotation omitted)).
III. NARROWING VERSUS NUMEROUSNESS IN THE YEARS SINCE FURMAN

A. Delimiting the Capital Circle by Categories of Crime

By the time the Court decided its next five death penalty cases in 1976, a landslide of three-fourths of the states had opted to reinstate the death penalty. With Justice Stevens having replaced Justice Douglas, the Court in Gregg v. Georgia answered the big question Furman left unresolved. Over dissents by Justices Brennan and Marshall, the Court held that "when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." Before considering the Court's treatment in Gregg and its companion cases of how and when deliberate murder could be punished with death—an issue on which the Furman plurality Justices diverged—we begin with the Court's answer to a boundary question Gregg left open. May a state capitally punish crimes other than deliberate killing? On this question—i.e., in drawing the constitutionally permissible circumference of the capital circle—the views of Justices Stewart, Stevens, and White converged to limit significantly the application of the death penalty.

Soon after Gregg, the Court held the death penalty unconstitutional for the crime of rape and indicated that the same rule applied to other non-homicidal crimes of violence such as armed robbery and kidnapping. Later, the Court held that only those felony murders in which the offender took life or, at least, intended or contemplated the taking of life could fall within the circle of constitutionally death-eligible offenses. Justice White

55. Id. at 187 (footnote omitted).
56. See id. at 187 n.35 (expressly reserving this question).
57. Coker v. Georgia, 433 U.S. 584, 592 (1977). The Court limited its ruling to the imposition of the death penalty for the "rape of an adult woman." Id.; see also id. at 595. Nothing in the Court's subsequent case law has turned on the qualification. One state, however, Louisiana, continues to treat the aggravated rape of a victim under age twelve as a capital crime, see La. Rev. Stat. Ann. §§ 14:30, 14:42 (2004), and has sentenced a defendant to die for that crime. See Adam Liptak, Louisiana Sentence Renews Debate on the Death Penalty, N.Y. Times, Aug. 31, 2003, at A20 (discussing Patrick O. Kennedy's death sentence for raping an eight-year-old girl, and legal challenges to the sentence that are currently pending).
58. An order vacating death sentences for kidnapping and armed robbery and remanding for reconsideration in light of Coker, Eberheart v. Georgia, 433 U.S. 917 (1977), prompted the Georgia Supreme Court to rule the death penalty unconstitutional for those offenses as well. See Garmon v. Johnson, 257 S.E.2d 276, 277 (Ga. 1979) (noting that the death penalty may not be imposed for armed robbery); Potts v. Georgia, 243 S.E.2d 510 (Ga. 1978) (invalidating a death sentence for armed robbery); Collins v. Georgia, 236 S.E.2d 759 (Ga. 1977) (holding that the death penalty may not be imposed for the crimes of rape, kidnapping, and armed robbery).
59. Enmund v. Florida, 458 U.S. 782, 801 (1982) ("Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."). In Tison v. Arizona, 481 U.S. 137 (1987), the Court refined the Enmund standard, allowing the death eligible circle to include non-intentional first-degree felony murders in which the offender, although not himself the killer, was a "major participa[nt] in the felony
wrote for the Court and emphasized the infrequency concerns that drove his opinion in Furman—the abandonment by most jurisdictions in the nation and the world of the death penalty for non-homicidal felonies and felonies in which someone accidentally died at the hands of a co-felon, and most juries’ rejection of death for those offenses even in the few states that made them potentially capital.

Justices Stewart (in the rape case, before leaving the bench) and Stevens joined Justice White, no doubt because only whim could explain how prosecutors and jurors picked out the miniscule number of felonies in which death was imposed even though a killing did not occur or occurred but was not contemplated by the co-felon. In Figure 1 terms, by placing outside the death-eligible circle all the “white” area representing the vast majority of non-homicidal felons who were spared from execution, while eliminating the sprinkling of death sentences for non-homicidal felons in the highly mitigated area near the circumference, the decisions eliminated aspects of the pre-Furman sentencing patterns to which both Justices White and Stewart objected. The rape decision also responded to Justice Douglas’s concerns, given that historically only black men convicted of raping white women were at genuine risk of being condemned.

B. The Stewart-Stevens Interlude: Narrowing over Numerousness

Although the three controlling analyses in Furman supported limits on the death penalty for crimes short of deliberate murder, they gave state legislators mixed signals about which deliberate killers they could render eligible for the death penalty. One possibility was to adopt bifurcated and rule-bound procedures of the sort the Court, only a few years before in

committed” and exhibited “reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death.” Id. at 157-58. Either actual participation in the fatal actus reus or a highly culpable mens rea as to the homicide—deliberation, premeditation, intent, or gross recklessness—constitutionally suffices.

60. Enmund, 458 U.S. at 789-94; Coker, 433 U.S. at 592 n.4, 593-96, 596 n.10 (“Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.”).

61. Enmund, 458 U.S. at 794-97; Coker, 433 U.S. at 596-97 (“[I]n the vast majority of rape cases, at least 9 out of 10, juries have not imposed the death sentence.”).

62. See Jack Greenberg, Capital Punishment as a System, 91 Yale L.J. 908, 912 (1982) (“Between 1930 and the present, of the 455 persons executed for rape, 405 were black and two were members of other minorities. Almost ninety percent of those executed were black men convicted for the rape of white women.”); see also Furman v. Georgia, 408 U.S. 238, 449 (1972) (Powell, J., dissenting) (discussing “substantial statistical evidence . . . tending to show a pronounced disproportion in the number of Negroes receiving death sentences for rape . . . in the South”). Because the felony murder doctrine often is used in interracial and inter-class crimes, see Walter L. Gordon, III, Crime and Criminal Law: The California Experience, 1960-1975, at 13-14, 52-53 (1981); Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C. L. Rev. 1103, 1117-20 (1990) (noting that “[e]xchanging the rules for murder liability simply because of the presence of a concurrent felony also has clear racial implication in modern American society” (citing studies)), Enmund also responded to Douglas’s concerns in Furman.
McGautha v. California, had refused to mandate as a matter of due process. Most of the reenacting states took this approach, and in Gregg and two companion cases decided on July 2, 1976, the Court facially approved that approach. In each case, seven Justices concurred in the judgment—Justices Stewart, Powell, and Stevens in a jointly authored plurality opinion; Justice White, joined by Chief Justice Burger and Justice Rehnquist in a separate concurrence; and Justice Blackmun in an uninformative one-line concurrence. These “guided discretion” statutes typically required a finding of one statutorily authorized aggravating circumstance in addition to murder before a death sentence could be imposed; directed the sentencer (usually a jury) to act based on all the aggravating and mitigating factors and to forgo a verdict of death if mitigation preponderated; and subjected death sentences to automatic appellate review for nonarbitrariness and conformity with sentences in similar cases.

In their joint opinion, Justices Stewart, Powell, and Stevens avidly endorsed guided discretion as a way to assure that death sentences congregated towards the aggravated center of the circle of death-eligible cases and thinned out towards the mitigated circumference. Justice White was less enthusiastic, fearing that jurors granted any kind of discretion to vote for life might impose the death penalty “in as discriminatory, standardless, and rare a manner as it was imposed under the scheme

64. 428 U.S. 153 (1976).
66. See, e.g., Gregg, 428 U.S. at 158 (plurality opinion of Stewart, Powell, and Stevens, JJ.).
67. Id. at 207 (White, J., concurring in the judgment).
68. Id. at 227 (Blackmun, J., concurring in the judgment).
69. The Court eventually held that judges could constitutionally sentence defendants to die, Spaziano v. Florida, 468 U.S. 447 (1984), but that a jury must find the aggravating circumstance necessary to increase the maximum permissible sentence from a prison term to death. See Ring v. Arizona, 536 U.S. 553, 584, 609 (2002) (overruling Walton v. Arizona, 497 U.S. 639 (1990)). Although Ring leaves intact Spaziano’s holding that judges may constitutionally make the ultimate decision whether to impose death, Ring’s requirement of a jury determination of all factors that make a defendant eligible for the maximum penalty of death has had the practical effect of encouraging nearly all jurisdictions to give jurors the entire responsibility for capital sentencing. For additional discussion, see infra note 254.
70. See, e.g., Gregg, 428 U.S. at 195 (plurality opinion).
71. Left unguided, [pre-Furman] juries imposed the death sentence in a way that could only be called freakish. The new ... sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. ... [T]he review function of the [state] Supreme Court ... affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree ....

Id. at 206-07.
declared invalid in Furman." He nonetheless rejected the "naked assertion" that efforts to avoid those problems by guiding discretion were "bound to fail," resting most of his hopes on the practical force of the statutes' requirement of proof of a statutory aggravating circumstance in addition to murder:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in [the new statutes] . . . 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. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.73

More to Justice White's liking were guided discretion statutes that "required [the sentencer] to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors."74 Those statutes gave him "good reason to anticipate" that the Furman problem would be avoided, because the penalty would "be imposed with regularity."75

A sizeable minority of legislatures looked for alternatives to guided-discretion statutes, perhaps influenced by Justice Harlan's warning in McGautha that death-sentencing standards were likely to be "meaningless 'boiler-plate' or a statement of the obvious,"76 or by a worry that sentencing standards combined with jury discretion would limit the number of death sentences too much to satisfy Justice White. History supplied an alternative. Mandatory death sentences for all individuals convicted of specified felonies had been the norm in England for centuries and in the United States until the mid-nineteenth century.77 Departing from the preceding century's "enlightened introduction of flexibility into the sentencing process" via discretionary death sentencing, a number of states after Furman mandated death for all first-degree murderers.78 Theoretically, the death-eligible circle in those states would be entirely

72. Id. at 221 (White, J., concurring in the judgment).
73. Id. at 222.
76. McGautha v. California, 402 U.S. 183, 208 (1971); see id. ("For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.").
shaded in, as in Figure 2 below. That, in turn, would put aright all three disturbing patterns the Furman plurality Justices perceived—discrimination, caprice, and infrequency—because all similarly situated offenders would receive the same clear and, in Justice White’s view, penologically defensible penalty.

As perfect a solution to the Furman problems as mandatory death sentencing seemed to provide, a majority of the Court—composed of a plurality opinion by Justices Stewart, Powell, and Stevens and a concurring opinion by Justices Brennan and Marshall—rejected mandatory capital sentencing in Woodson v. North Carolina.79 Prominent among their reasons for doing so was a version of Justice Stewart’s complaint about the effect of pre-Furman discretionary death statutes. The plurality opinion noted that juries in mandatory death-sentencing regimes “have persistently refused to convict a significant portion of persons” guilty of first-degree murder because of the known death-sentencing consequences of doing so.80 By rejecting mandatory death-sentencing statutes because they “provide[] no standards to guide the jury in its inevitable exercise of the power” of selective nullification, the plurality relegated Justice White’s numerousness concern to secondary status and made Justice Stewart’s narrowing and patterning concerns preeminent:

While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill Furman’s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.81

Justices Stewart, Powell, and Stevens were convinced that, via the process in Figure 3, jurors’ unfettered ability to acquit first-degree murderers eventually would transform the solid Figure 3 into a new version of the capriciously mottled (if somewhat more densely colored in) Figure 1.82

79. 428 U.S. 280.
80. Id. at 302.
81. Id. at 303; accord Stanislaus Roberts v. Louisiana, 428 U.S. 325, 334-36 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion) (“The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily.”).
82. The plurality did not answer Justice White’s question why jurors who could not be trusted to follow instructions to convict offenders guilty of the carefully instructed upon elements of first-degree murder could be trusted to follow the more intricate instructions demanded by guided discretion statutes. Cf. Stanislaus Roberts, 428 U.S. at 345-47 (White, J., dissenting).
The Court followed the logic of Woodson in a series of cases overturning the capital statutes that are rendered in Figure 2 above, and Figures 4, 5, and 6 below. Woodson overturned a North Carolina statute (Figure 2) making death mandatory for all traditional first-degree murders, including Woodson’s attenuated accessorial felony murder. Then, rejecting the argument that states could sufficiently discourage jurors from arbitrarily granting mercy via acquittals by narrowing and making only more aggravated the murders mandatorily punished by death, the Court in Stanislaus Roberts v. Louisiana and Harry Roberts v. Louisiana overturned a statute (Figure 4) that limited capital murder to five confined categories of intentional homicide, such as killing a police officer in the line of duty. And in Sumner v. Shuman, the Court invalidated a still narrower statute (Figure 5) mandating death for prisoners who deliberately killed while then serving a sentence of life imprisonment. In each case, the Court emphasized the possibility that jury nullification, as depicted in Figures 3 and 6, might end up replicating the pattern that most offended Justice Stewart in Furman.

83. Woodson, 428 U.S. at 305. While intoxicated, Woodson served as lookout for a robbery resulting in a killing by a confederate. Id. at 283-84.
84. 428 U.S. 325.
87. See id. at 84; Stanislaus Roberts, 428 U.S. at 348 (plurality opinion); Woodson, 428 U.S. at 293 (plurality opinion).
The *Woodson* plurality (Justices Stewart, Powell, and Stevens) also objected to mandatory capital sentences on the ground that “the penalty of death is qualitatively different from a sentence of imprisonment, however long,” creating “a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

Mandatory death sentencing cannot reliably make that case-specific determination, the plurality argued, because it “accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense . . . [and thus to] the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.” But why, as Justice White asked, doesn’t the jury’s verdict of guilt of a capital crime reliably place defendants sentenced to death

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88. *Woodson*, 428 U.S. at 305 (plurality opinion). In a third objection, the plurality criticized mandatory death sentences as a throwback to a less-enlightened era and, thus, as inconsistent with the “evolving standards of decency” that govern cruel and unusual punishment analysis. *Id.* at 288-301.

89. *Id.* at 304.
inside the capital circle (even if nullification spares some others who belong inside the circle)?\(^90\) Answering this question requires a closer look at Justice Stewart’s and the \textit{Woodson} plurality’s view of the problem in \textit{Furman}.

For Justices Stewart, Powell, and Stevens, the \textit{Furman} problem was not just the absence of any pattern of death-sentencing dots within the capital circle but the absence of a particular pattern—a concentration of death verdicts towards the circle’s aggravated center and a thinning out towards the mitigated circumference. Although the statute overturned in the \textit{Roberts} cases and the one overturned in \textit{Shuman} (see Figures 3-5 above) might be thought to achieve that pattern, even with a significant amount of nullification-induced mottling, that assumption ignores the role of mitigating factors as neutralizers of aggravating factors. For the \textit{Woodson} plurality, the same reasoning that treats the aggravated nature of the offense as drawing the offender towards the aggravated center of the circle also must treat the extenuating aspects of the offense as propelling the offender away from the core and towards the mitigated circumstance.\(^91\) Just as nullification arbitrarily relieves some offenders of a death sentence though their crimes and characters place them at the aggravated core, the absence of any role for mitigation leads to death sentences for offenders whose crimes put them at the aggravated core but whose character and “diverse frailties” pull them back towards the circumference. Once consideration is given to the explosive effect of nullification and of mitigation’s impact on culpability, the end result of mandatory death sentencing may be more like that portrayed in Figure 7 than in Figures 2, 4, or 5 and thus hardly different from the pre-\textit{Furman} picture in Figure 1.

\(^90\) See Stanislaus Roberts, 428 U.S. at 358 (White, J., dissenting) ("Implicit in the plurality’s holding that a separate proceeding must be held at which the sentencer may consider the character and record of the accused is the proposition that States are constitutionally prohibited from considering any crime, no matter how defined, so serious that every person who commits it should be put to death regardless of extraneous factors related to his character.").

\(^91\) A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. \textit{Woodson}, 428 U.S. at 304 (plurality opinion).
The *Woodson* plurality's insistence on individualization to assure reliability has generated the Court's longest line of cases overturning capital statutes and verdicts. In addition to decisions invalidating mandatory death-sentencing statutes, this line of cases includes the Court's watershed holding in *Lockett v. Ohio*\(^92\) that States may not limit jurors to a finite set of mitigating factors.\(^93\) It also includes decisions forbidding States to cramp consideration of mitigating evidence by making capital sentencing turn on questions that give no extenuating impact to particular kinds of mitigating evidence or define mitigating factors as aggravating;\(^94\) disapproving legal interpretations of mitigating factors that screen out some of their mitigating potential;\(^95\) overturning evidentiary rulings that kept mitigating evidence from the sentencer;\(^96\) rejecting temporal limitations on the periods of the offender's life that may be considered in mitigation;\(^97\) and requiring states to let individual jurors give weight to factors they believe are mitigating, even though other jurors do not believe the factor is mitigating or even present.\(^98\)

Justice White's different perception of the problem in *Furman* prompted a bitter dissent in *Woodson*. The problem with pre-*Furman* discretionary sentencing, he reiterated, was that death "came to be imposed less and less frequently" until it was inflicted "so seldom and so freakishly and

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96. See, e.g., Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam).
97. See, e.g., Skipper v. South Carolina, 476 U.S. 1, 8 (1986).
arbitrarily that it was no longer serving the legitimate ends of criminal justice." Nullification notwithstanding, Justice White argued, mandatory death sentencing would improve matters because jurors would not “refuse to follow their instructions” to convict murderers of murder as “often and systematically” as they had refused to impose death when left entirely to their own devices “under [pre-\textit{Furman}] statutes.”

If Justice White found the \textit{Woodson} plurality’s worries about arbitrary nullification overly persnickety, he found its requirement that jurors consider all mitigating factors positively pernicious—an “about-face since \textit{Furman}.” The reason is not hard to see. When Justice White looked at the procedures demanded by the \textit{Woodson-Roberts-Lockett} line of cases, he saw jurors not only allowed but required to cast large numbers of potentially condemnable capital murderers out of the death chamber based on any mitigating factor any juror intuited in the case. He saw Figure 3 magnified, verging quickly back to Figure 1, his pre-\textit{Furman} bete blanc:

I greatly fear that the effect of the Court’s decision today will be to compel constitutionally a restoration of the state of affairs at the time \textit{Furman} was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that “its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social and public purpose.”

As these decisions reveal, Justice Stewart’s view in \textit{Furman} triumphed, and Justice White’s receded into dissent throughout the late 1970s and early 1980s. The apogee of Justice Stewart’s influence and the perige of Justice White’s patience came in the 1980 decision in \textit{Godfrey v. Georgia}. A jury had premised Robert Godfrey’s death sentence for killing his wife and mother-in-law on a single aggravating factor—that the killings were “outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind.” In overturning the application of this factor, Justice Stewart’s plurality opinion (joined by Justices Blackmun, Powell, and Stevens, with Justices Brennan and Marshall concurring in the judgment) suggested that the Court was now prepared to invalidate a death sentence on the ground that the mix of aggravating and mitigating factors placed the case unconstitutionally close to the periphery of the death-eligible circle:

\[\text{T]he validity of the petitioner’s death sentences turns on whether, in light of the facts and circumstances of the murders that [Godfrey] was}\]

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100. \textit{id.} at 347-48.
103. 446 U.S. 420 (1980).
104. \textit{id.} at 422 (citation omitted).
convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the ["outrageously vile" circumstance] . . . . We conclude that the answer must be no. The petitioner’s crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility . . . .

There [thus] is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.\textsuperscript{105}

Justice White dissented in the most emotive of his numerous opinions in post-\textit{Furman} death penalty cases. To begin with, he was offended by the peripheral location within the death-eligible circle that the Court assigned to the case.\textsuperscript{106} As Justice White’s opinion graphically illustrates, sparing none of the grisly details, he placed Godfrey’s double killings at the aggravated core.\textsuperscript{107} More basically, Justice White objected to the “role” the plurality assumed in the case—“peer[ing] majestically over the lower court’s shoulder so that we might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language” of aggravation; and acting as “a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors.”\textsuperscript{108} In Justice White’s view, “[t]he Georgia Supreme Court, faced with a seemingly endless train of macabre scenes, ha[d] endeavored in a responsible, rational, and consistent fashion to effectuate its statutory mandate as illuminated by our judgment in \textit{Gregg},” in the process reversing more than a quarter of the post-\textit{Furman} death verdicts it reviewed.\textsuperscript{109} To have the Supreme Court nonetheless inform Georgia officials that their death-sentencing “efforts have been outside the Constitution”—throwing more death-sentencing dots out of the capital circle and leaving more white space within (as in Figure 3, verging on Figure 1)—was more than Justice White could bear.\textsuperscript{110}

\textsuperscript{105} \textit{Id.} at 432-33.
\textsuperscript{106} \textit{Id.} at 449-50 (White, J., dissenting).
\textsuperscript{107} \textit{Id.} at 444-45, 449, 450 & n.2, 451.
\textsuperscript{108} \textit{Id.} at 450, 456 n.6.
\textsuperscript{109} \textit{Id.} at 456; see also \textit{id.} at 452-53.
\textsuperscript{110} \textit{Id.} at 456. Although \textit{Godfrey} was the high watermark in the Court’s adoption of Stewart’s less-is-better approach, two other decisions came close, again provoking strong dissents by Justice White. Parker v. Dugger, 498 U.S. 308 (1991) (intimating, in an opinion by Justice O’Connor, with Justice Stevens joining and Justice White in vehement dissent, that the mitigating evidence in the case required a verdict less than death); Eddings v. Oklahoma, 455 U.S. 104 (1982) (suggesting that the mitigating evidence required a verdict less than death, with Justice Powell writing for the Court, Justices Stevens and O’Connor concurring separately, and Justice White joining Chief Justice Burger’s harsh dissent).
C. Justice White Triumphant: Numerousness over Narrowing

Justice White’s time came soon enough, however. When Justice Stewart left the Court soon after Godfrey, Justice Stevens quickly assumed the less-is-better mantle. With Justices Brennan, Marshall, Powell, O’Connor, and, especially later in the period, Justice Blackmun as his frequent allies in this respect, Justice Stevens succeeded in preserving the less-is-better victories of the late 1970s and early 1980s, particularly the Woodson-Lockett endorsement of muscular mitigation. Justice Stevens also led the way in disapproving devices states developed to pry death sentences out of reluctant jurors in close cases by telling them that, notwithstanding their sentencing verdict, other authorities would have the final say over whether the defendant lived or died. But as most other new issues arose, the advantage swung decisively in Justice White’s favor.


112. In concurring with “misgivings” in the Court’s decision to deny a stay of execution in Maggio v. Williams, Justice Stevens sharply criticized a prosecutor whose closing argument “sought to minimize the jury’s responsibility for imposing a death sentence by implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the proper sentence,” thereby “encourag[ing] the jury to err on the side of imposing the death sentence.” 464 U.S. 46, 52-54 (1983) (Stevens, J., concurring in the judgment). In Caldwell v. Mississippi, citing Justice Stevens’s opinion in Maggio, a majority of the Court held that jury instructions and prosecutors’ arguments along these lines are unconstitutional. 472 U.S. 320, 331-32 (1985). Justice Rehnquist dissented, joined by Justice White. Id. at 343 (Rehnquist, J., dissenting). The Court has not always strictly adhered to this principle. For example, in California v. Ramos, the Court approved instructions telling jurors that, though the alternative to a death sentence was life in prison without possibility of parole, the governor could commute life sentences to life with parole. 463 U.S. 992, 1013 (1983). The Court reached this conclusion despite its acknowledgement that the instruction might skew jury deliberations in favor of death, see id. at 1016, and over Justice Stevens’s dissenting view that “it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury, indirectly to be sure, that doubt concerning the proper penalty should be resolved in favor of [a death sentence],” id. at 1030 (Steven, J., dissenting); see also Romano v. Oklahoma, 512 U.S. 1, 13-14 (1994) (holding, over a dissent joined by Justice Stevens, that a capital-sentencing jury could permissibly be told that the defendant had already been sentenced to die in another case). Also of note is Justice Stevens’s decision for the Court in Beck v. Alabama, holding that states may not encourage jurors to locate cases that probably lie outside the capital circle inside the circle by forbidding judges to instruct jurors on lesser included offenses of capital murder. 447 U.S. 625 (1980). When life is at stake, Justice Stevens held for the Court, the Constitution will not tolerate the potentially unreliable effect of giving jurors a Hobson’s choice: either acquit and turn loose defendants who may well be guilty of a very serious but not a capital offense such as second-degree murder or, to avoid that unpalatable outcome, convict them of death-eligible first-degree murder. See id. at 644-46. In reaching this conclusion, Justice Stevens rejected Alabama’s more-is-better argument that its procedure avoided jury nullification of the death penalty and the infrequency concerns that motivated Justice White in Furman. See id. at 643-45. Justice White joined Justice Rehnquist’s dissenting opinion. Id. at 646 (Rehnquist, J., dissenting on jurisdictional grounds).
Justice Stevens wasted little time in identifying the next step he believed was necessary to extend and consolidate the less-is-better approach. Using a medium he was developing into a fine art—an opinion respecting the denial of certiorari—Justice Stevens argued that a death sentence might violate the Constitution even though the sentencing jury had made the two findings that the Court's existing jurisprudence seemed to suggest were constitutionally sufficient: that at least one statutory aggravating factor was present, and that the aggravation outweighed mitigation.\(^{113}\) Only an additional finding, Justice Stevens argued—"that a comparison of the totality of aggravating factors with the totality of mitigating factors leaves" the jury with no reasonable "doubt as to the proper penalty"—would satisfy \textit{Woodson}'s demand for "reliability in the determination that 'death is the appropriate punishment in a specific case.'"\(^{114}\) In other words, death could not be imposed unless there was enough aggravation net of mitigation to "'persuad[e the sentencer], beyond a reasonable doubt, that the imposition of the death penalty is justified.'"\(^{115}\) In the terms introduced by our diagrams, Justice Stevens was arguing that death could not be imposed unless, considering both aggravation and mitigation, the offense was located (as in Figures 8 and 9 below, but not Figure 7 above) inside the death-eligible circle at a point substantially distant from the mitigated periphery and near or at the aggravated core.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{diagram.png}
\caption{Figure 8}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{diagram2.png}
\caption{Figure 9}
\end{figure}


\(^{115}\) Smith, 459 U.S. at 1057 (quoting State v. Wood, 648 P.2d 71, 83 (Utah 1982)).
Instead of leading the Court’s next advance towards a full-fledged less-is-better conception of constitutional capital sentencing, however, Justice Stevens spent most of the next decade and a half dissenting from the Court’s retreat from that conception. In thirteen decisions between 1983 and 1993 (the year Justice White retired), and in three decisions thereafter (the latest in 2000), the Court dramatically reversed field. With Justice White writing five and concurring in all the majority opinions while he was on the bench, the Court veered sharply in the more-is-better direction he had surveyed in *Furman*.116

1. Aggravation

Recall that Justice White pinned his numerousness hopes for guided discretion statutes on the power of aggravating circumstances to motivate jurors to impose death.117 The aggravating circumstance requirement pursued this goal by narrowing the range of death-eligible offenses to ones likely to strike jurors as warranting death and by directing jurors’ attention to aspects of the case calling for death. Justice White thus hoped to crowd the death-sentence dots in Figure 7 inside the smaller death-eligible space representing aggravated capital murder, as in Figure 8 above. He hoped that doing this would achieve a high enough concentration of death verdicts to make a penologically convincing case that such murders deserved, and their perpetrators would receive, the death penalty. Unlike Justice Stevens’s route to Figure 8, however, which proceeded by telling jurors disposed to impose death to think again based on the mix of aggravating and mitigating factors, Justice White’s route to the same outcome told jurors disposed not to impose death to think again based primarily on the aggravating factors. In short, Justice White hoped the aggravating


117. See supra notes 72-75 and accompanying text.
circumstances feature of modern guided discretion statutes would "jawbone" jurors into sentencing capital murderers to death by keeping prominently before their eyes the especially egregious aspects of the crime and criminal.\(^{118}\)

In its 1980s and 1990s cases, the Court made this aspect of Justice White's analysis the law of the land. In doing so, the Court reinterpreted *Godfrey* as holding not that reviewing courts could white-out death sentences jurors had inscribed too close to the periphery of the death-eligible circle but rather that legislators could satisfy *Furman*’s narrowing requirement by etching a death-warranted inner circle somewhere inside the death-eligible circle and by encouraging jurors to black-in as many death sentences as possible within the inner circle.

In *Zant v. Stephens*, the Court held that, if at least one statutory aggravating factor was present—if the legislature had drawn the inner circle and the jury tentatively had placed the case within it—the jury was free to consider other non-statutory aggravating factors in deciding whether to impose death.\(^{119}\) Because *Zant* let state legislators cede control over aggravating factors to individual sentencers as long as at least one legislatively identified factor was available to accomplish the constitutionally required narrowing, many observers see *Zant* as marking the collapse of the Stewart anti-caprice line of thinking and the ascendance of a more forgiving interpretation of the Eighth Amendment.\(^{120}\) In fact, the case fits neatly within the Stewart-Stevens line of thinking—explaining why Justice Stevens wrote the decision. *Zant* gave jurors the same leeway to locate cases towards the center of the circle based upon their individual assessments of aggravation as *Woodson*, *Lockett*, and other Stewart-influenced decisions had given jurors to locate cases away from the center, and even outside the circle, based on mitigation.\(^{121}\) Unlike *Woodson* and


\(^{119}\) *Zant*, 462 U.S. at 890-91.

\(^{120}\) See, e.g., Berger, supra note 45, at 1076-77; Weisberg, supra note 8, at 305, 315, 317; see also Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 Wash. U. L.Q. 573 (1985); Brent E. Newton, *A Case Study in Sentencing Unfairness: The Texas Death Penalty, 1973-1994*, 1 Tex. F. on C.L. & C.R. 1 (1993); *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 Hous. L. Rev. 1105 (1994). By allowing consideration of aggravating circumstances about which the statute was silent, *Zant* certainly did reveal, in contradistinction to what many observers initially thought, that the "guidance" provided by so-called "guided discretion statutes" would come more from the logic of the concept of aggravation (in Justice White’s view) of aggravation net of mitigation (in the view championed by Justices Stewart and Stevens) than from instructions actually set forth in the statute and conveyed to the jury.

\(^{121}\) As the Court stated in *Zant*,

Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors.
Lockett, however, Zant prompted no dissent from Justice White and his disciples. In contrast to the power to grant mercy based on non-statutorily specified mitigating factors as depicted in Figure 6, the discretion to impose death based on legally unstated aggravating factors only allayed White’s infrequency fears.

Zant is important for another reason as well. Typically, difficulties with the Court’s death penalty doctrine are ascribed to an allegedly untenable mixture of doctrines heeding Furman’s call for guidance and rules and Woodson/Lockett’s call for individualization and discretion. This classic criticism associates “discretion” with the Court’s holdings in Woodson and Lockett—decisions we place in the Stewart-Stevens camp—and associates “rules” with holdings supported by Justice White and his allies. In fact, both of the contending sides in the Court’s post-Furman debates advocated combinations of rules and discretion. As Zant revealed, the Stewart-

in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Zant, 462 U.S. at 878-79 (citing Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586, 601-05 (1978) (plurality opinion); Harry Roberts v. Louisiana, 431 U.S. 633, 636-37 (1977); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion)); see also Barclay v. Florida, 463 U.S. 939, 958 (1983) (Stevens, J., concurring) (applying a similar analysis in concurring with the majority opinion upholding a death sentence premised on a somewhat more idiosyncratic set of nonstatutory aggravating factors). Justice Stevens further explained the logic of Zant in a concurring opinion in Tuitlaepa v. California, 512 U.S. 967, 981 (1994) (Stevens, J., concurring in the judgment), and in a dissenting opinion in Graham v. Collins, 506 U.S. 461, 500 (1993) (Stevens, J., dissenting). Justice Stevens approved of the state’s use of capital-sentencing factors, such as the “age of the victim,” even though they need not apply in every case and even though the jury is not instructed as to how the factors are relevant and whether they are aggravating or mitigating. Tuitlaepa, 512 U.S. at 981-83, 987. He reasoned that, because the factors are relevant to individualized sentencing, a jury informed of them would be more likely to base its decision on a reliable judgment about the relative amounts of aggravation and mitigation and less likely to rely on race or other arbitrary considerations. Id.

122. See, e.g., Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) (alleging an "incompatibility between the Lockett-Eddings requirement [of unfettered consideration of mitigating circumstances] and the holding of Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), that the sentencer’s discretion must be constrained to avoid arbitrary or freakish imposition of the death penalty"); Graham, 506 U.S. at 499 (Thomas, J., concurring) (arguing that the Furman requirement of guidance cannot be maintained if Lockett and Eddings are read to mean "that the State has no role in structuring or giving shape to the jury’s consideration of these mitigating factors" (internal quotation omitted)); Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("To acknowledge that ‘there may be an inherent tension’ between [the Woodson-Lockett principle and Furman] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II... They cannot be reconciled."); Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. Rev. 1147, 1165-67 (1991) (discussing the implications of Justice Scalia’s abandonment of Woodson and Lockett).

123. Of course, virtually all workable legal regimes are combinations of rules and discretion.
Stevens narrowing approach tolerated considerable discretion as to both non-statutorily specified aggravation and mitigation (assuming aggravating factors performed a narrowing function), while Justice White’s numerous approach likewise tolerated discretion as to aggravation, but not as to mitigation. Later decisions reveal, moreover, that Justice Stevens would have placed substantially more limits on the discretion to define and consider aggravating circumstances than the prevailing White approach.

In Lowenfield v. Phelps, the Court permitted states to satisfy the statutory aggravating-circumstance requirement at the guilt rather than the sentencing phase, by adopting more-aggravated-than-usual definitions of murders subject to capital punishment. States that did so, Lowenfield additionally held, were then free to let juries base death verdicts not only on non-statutory aggravating factors, as in Zant, but also on statutory factors that served no narrowing function because they merely replicated elements of capital murder that the jury already had found at the guilt phase. The capacity of these aggravating factors’ supernumerary reappearance at the sentencing phase to “jawbone” jurors into relying on it as a basis for death no doubt appealed to Justice White’s more-is-better instincts. But the possibility that the factors’ double duty would lead jurors to believe more aggravation was present that in fact was true—to believe that the case was farther inside the capital circle than it was—prompted Justice Stevens to dissent.

Subsequent decisions on the constitutionality and application of particular aggravating circumstances—with Justice White leading the way and Justice Stevens in dissent—further expanded the death-sentencing discretion that aggravating factors may permissibly grant sentencers. First, however, came a transitional decision, Maynard v. Cartwright, in which a unanimous Court speaking through Justice White struck down Oklahoma’s “especially heinous, atrocious, and cruel” factor. In the process, Justice White brilliantly recast the Court’s less-is-better classic, Godfrey v. Georgia, into a more-is-better prop.

Noting that “an ordinary person could honestly believe that every unjustified, intentional taking of human life is ‘especially heinous,’” Maynard invalidated the heinousness factor because it had no constitutionally sufficient “narrowing principle.” From Justice White’s perspective, a murder’s designation as “heinous” had little power to convince jurors to impose death. From Justice Stevens’s perspective, a murder’s heinousness failed to locate it at or near the aggravated core of first-degree murders, and he joined Justice White’s decision.

125. See id.
126. Id. at 247 (Marshall, J., dissenting, joined by Stevens, J.).
128. Id.
More crucially, the *Maynard* Court also “rejected the submission that a particular set of facts surrounding the murder, however shocking they might be, [is] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.” In theory, this passage is consistent with the Stewart-Stevens view that jurors may choose between life and death only in accordance with instructions explaining the aggravation-net-of-mitigation logic of decision, and Justice Stevens raised no objection. But as the Court’s next “heinousness” case, *Lewis v. Jeffers*, revealed, Justice White understood the passage to mean something different. In *Lewis*, over Justice Stevens’s dissent, Justice White read the language to revoke *Godfrey’s* invitation to reviewing courts to determine where a particular offense belongs within the death-eligible circle and whether death constitutionally could be imposed for an offense located there. *Lewis* thus enshrined the rule that Justice White had unsuccessfully advanced in *Godfrey*: A particular set of facts surrounding a murder, however moderate and ordinary those facts may be, cannot invalidate a death verdict that was premised on an aggravating factor that the statute or court had nominally cabined within a narrowing principle.

Having required state legislatures to use the aggravating circumstance requirement to narrow death eligibility within the inner circle in Figure 8, the Court next had to decide how far inside the outer circle the new circle belonged. The answer given in four cases decided in the early 1990s—two authored by Justice White, with Justice Stevens dissenting in all four—was that a paper-thin margin, much smaller than that in Figure 8, would suffice. Indeed, the decisions made clear that, *pace Godfrey*, the misnamed “narrowing” requirement has little to do with achieving a significant quantity of aggravation, i.e., with establishing the crime’s or criminal’s relative distance from the non-aggravated circumstance and proximity to the super-aggravated core. Rather, the “narrowing” requirement has everything to do with convincing the sentencer of the crime’s or criminal’s quality of “being aggravated,” i.e., with “jawboning” as many death verdicts out of juries as possible. True to Justice White’s

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129. *Id.* at 363.
131. *Id.* at 776, 779. *But see id.* at 784 (Blackmun, J., dissenting, joined by Stevens, J.).
133. *See supra* notes 72-75, 117-18 and accompanying text. In addition to serving a narrowing function, aggravating factors must be “determinate.” *Arafe*, 507 U.S. at 474. By requiring that a trait be easily recognized as aggravating when it is present, and that its presence or absence be easily detectable, the determinacy requirement helps assure that aggravating circumstances will draw jurors’ attention to aspects of the offense or offender beyond the elements of capital murder that call for a death sentence. *See Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (per curiam) (holding that standards must provide “guidance for determining the presence or absence of the factor[s]”); *Stringer v. Black*, 503 U.S. 222, 224 (1992) (rejecting “factors which as a practical matter fail to guide”).
approach, aggravation had everything to do with broadening sentencers' discretion to impose death, and nothing to do with the rules Justices Stewart and Stevens sought to steer death-sentencing discretion towards the core of the capital-eligible circle.

The aggravating factors the Court upheld were indeed broad. For example, even in cases where premeditation and deliberation defined first-degree murder, and thus the size and location of the circumference of the outer, capital circle, the Court held that states could sufficiently "narrow" death-eligible murders to a point inside the outer circle by treating as "aggravating" any first-degree murder that, additionally, was "caldblooded, pitiless" or was committed "without feeling or sympathy" or "indifferen[ly] to the suffering of the victim." In other words, an aggravating factor that encompasses the vast majority of capital murders suffices, as long as "not all" such murders are included.

Going further in two decisions written by Justice White, the Court permitted Arizona to define its heinousness factor as any fact about the crime or criminal that places the case "above the norm of first-degree murders." Enough narrowing occurs, the Court held, if the sentencer, in its discretion, can find any fact in the case that to any degree advances the case past the circumference and into the center of the capital circle. In this way, the Court permitted states to use lists of aggravating circumstances that, taken as a whole, encompass all capital crimes—even those on the circumference—as long as no single circumstance was itself entirely encompassing. In the Arizona cases, for example, the Court approved the subdivision of that state's "above the norm" gloss on heinousness into (by the United States Court of Appeals for the Ninth Circuit's count) thirty subcategories of aggravation, including several paired possibilities that, between them, capture all possible cases—e.g., that the victim had time to contemplate her impending death or, instead, was caught unawares and lacked time to prepare to die.

134. Arave, 507 U.S. at 468.
135. Id. at 481, 488; Walton, 497 U.S. at 655; see also Lewis, 497 U.S. at 775; cf. State v. Charboneau, 774 P.2d 299, 342 (Idaho 1989) (Bistline, J., dissenting) ("What first degree murderer fails to show 'callous disregard for human life'? I suppose this would be the 'pitiful' slayer who, prior to delivering the fatal blow, tells the victim: 'Excuse me, pardon me, I know it's inconvenient, but I must now take your life.'").
136. See Arave, 507 U.S. at 475-76. The Court concluded that although a "sentencing judge might conclude that every first-degree murderer is 'pitiless,'" and although factors such as "cold-blooded" describe a wide variety of murders, the circumstance is constitutional because "not all . . . capital defendants are 'cold-blooded,'" i.e., "without feeling or sympathy," given that "some within the broad class of first-degree murderers do exhibit feeling." Id.
137. See Lewis, 497 U.S. at 784 (approving the standard in State v. Gretzler, 659 P.2d 1, 9-11 (Ariz. 1983)).
138. See Adamson v. Ricketts, 865 F.2d 1011, 1044-45 (9th Cir. 1988), cert. denied, 497 U.S. 1031 (1990); see also Tuilaepa v. California, 512 U.S. 967, 977, 979 (1994) (approving sentencing factors, e.g., "age of the victim," that admittedly are difficult for jurors to use because they apply, albeit with more or less force, in every case); Arave, 507 U.S. at 476
Similarly, the Court allowed jurors to weigh “victim impact” aggravating factors in the sentencing balance, even when those factors encompass effects of a crime on the victim’s family and friends that the defendant had no way of anticipating.\textsuperscript{139} Overall, therefore, aggravating factors are judged by their capacity to convey some potentially death-inviting quality of evil—their potential to jawbone a sentencer into imposing death—regardless of whether they are quantitatively limited to less than all capital murders and murderers. The breadth that was the aggressors’ chief vice from the less-is-better perspective of Justices Stewart and Stevens was their main virtue from Justice White’s and, in time, the Court’s more-is-better point of view.

These cases completed the Court’s retreat from Godfrey’s quantitative or “core-ward” definition of aggravating circumstances and from its fact-sensitive method of reviewing such circumstances. Maynard began the retreat by focusing single-mindedly on the propriety of the state’s verbal formulation of the factor and by refusing to consider the facts of the case.\textsuperscript{140} Lewis greatly limited the situations in which reviewing courts could overturn a sentencer’s conclusion that the facts satisfied the circumstance’s “narrowing” formulation.\textsuperscript{141} And Arave v. Creech refused to consider the facts of other cases in which the circumstance had (or had not) been found, even where doing so might shed light on whether in fact the factor has any narrowing effect.\textsuperscript{142} Aggravating factors suffice if they create a realistic possibility of wrangling death sentences out of otherwise reluctant sentencers, no matter how consistently they actually do so and no matter whether they place the case at any distance from the capital circle’s non-aggravated periphery.

\footnotesize
(approving aggravating circumstances inviting death sentences because the killing was committed vengefully with feeling (deriving “pleasure”) and callously “without feeling”).

\textsuperscript{139} See Payne v. Tennessee, 501 U.S. 808, 814-15 (1991). Unlike the other aggravating circumstances discussed in this section, the victim impact in Payne was not a statutory aggravating circumstance designed to “narrow” the class of death-eligible murders, but a non-statutory aggravating factor that Tennessee allowed jurors to weigh in the ultimate sentencing balance. Still, Justice Stevens found the factor objectionable because it invited jurors to treat aspects of the case as aggravating though they have little or no capacity to render the case more aggravated than other murder cases. See id. at 859-64 (Stevens, J., dissenting). From Justice White’s perspective, however, by drawing particularized attention to what is horrible about every murder, the factor served a usefully persuasive function.

\textsuperscript{140} See supra notes 129-31 and accompanying text.

\textsuperscript{141} See Lewis, 497 U.S. at 783 (holding that the Constitution is satisfied by the finding of a properly defined aggravating factor unless “no reasonable sentencer” could conclude that the facts satisfy the definition).

\textsuperscript{142} See Arave, 507 U.S. at 477; see also Sochor v. Florida, 504 U.S. 527, 534 (1992) (declining, over Justice Stevens’s dissent, to rule that use of a “heinousness” aggravating circumstance without any limiting instruction is so obviously and egregiously error under the Eight Amendment that the trial judge should have provided a narrowing instruction even absent the defendant’s request for one).
2. Cases Close to the Line

In three cases decided in 1990, the Court explicitly rejected the view Justice Stevens had advanced in a 1982 opinion respecting the denial of certiorari—\textsuperscript{143} that aggravation must substantially exceed mitigation before death may be imposed.\textsuperscript{144} In the majority's view, it was a matter of no interest whether the aggravating and mitigating facts left a case only slightly inside the circle defined by the elements of capital murder—or, indeed, whether, once the aggravating and mitigating circumstances were considered, the case remained inside the circle at all. Reflecting Justice White's preference in the July 2, 1976 cases,\textsuperscript{145} and with Justice Stevens in dissent, the Court held that states could require sentencers to impose death in any case brought inside the capital circle by the guilt and aggravating-factor findings unless the offender could prove that mitigation outweighed aggravation.\textsuperscript{146} Even if mitigation entirely neutralized the more-than-murder aggravation, propelling the case all the way back to the capital circle's outer circumference, the state still could require the sentencer to impose death.

Four years before \textit{Furman}, the Supreme Court, through Justice Stewart, with Justice White in dissent, held "that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death."\textsuperscript{147} A quarter century later, however, Justice White's search for numerosness enshrined the opposite principle, favoring a presumption of death. \textit{Lowenfield} suggested this presumption by inviting juries to give double weight to aggravating factors, as did the Court's decisions allowing states to define aspects of all capital murders as sufficient to justify a death sentence.\textsuperscript{148} The presumption was explicit in the sentencing instructions upheld by the 1990 cases, which told jurors that, "when aggravation and mitigation are equal, you must impose death." The Court later approved Alabama's distention of the same principle into a two-

\textsuperscript{143} Smith v. North Carolina, 459 U.S. 1056 (1982) (opinion by Stevens, J., respecting the denial of certiorari); see supra notes 113-14 and accompanying text.


\textsuperscript{146} Walton, 497 U.S. at 655-56; Boyde, 494 U.S. at 386; Blystone, 494 U.S. at 308-09. Recently, the Supreme Court of Kansas invalidated a statutory provision requiring a death sentence when aggravation and mitigation are in "equipoise." State v. Kleypas, 40 P.3d 139, 223, 234 (Kan. 2001), \textit{cert. denied}, 537 U.S. 834 (2002). The Supreme Court recently granted certiorari to review that conclusion. Kansas v. Marsh, 125 S. Ct. 2517 (2005) (mem.).

\textsuperscript{147} Witherspoon v. Illinois, 391 U.S. 510, 521 & n.20 (1968) (holding "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death").

\textsuperscript{148} See supra notes 134-39 and accompanying text.
chances-at-death procedure, which gave trial judges unfettered discretion to reject life verdicts imposed by jurors and substitute death absent any indication that the jurors failed to follow the law.\footnote{149} Only Justice Stevens dissented.\footnote{150}

Finally, a line of cases in the 1990s (in all of which Justice Stevens dissented) allowed states to juxta pose lengthy instructions on aggravation with terse and uninformative references to mitigation,\footnote{151} and to give instructions designed to keep jurors from considering some, as long as the jurors were not kept from considering all, of the extenuating value of particular mitigating factors.\footnote{152} Together with the Court’s other holdings, these decisions validated procedures requiring death sentences in cases in

\footnote{150} Id. at 515-16, 526 (Stevens, J., dissenting). Justice Stevens concluded that “the complete absence of standards to guide the judge’s consideration of the jury’s verdict renders the statute invalid under the Eighth Amendment,” and that “[t]o permit the State to execute a woman in spite of the community’s considered judgment that she should not die is to sever the death penalty from its only legitimate mooring.” Id. Justice Stevens’s powerful dissent in \textit{Harris} reveals him characteristically at his best when speaking for only himself. In (modest) defense of the rest of the Court, it should be pointed out that Alabama trial judges also have the power, for no reason at all, to substitute life verdicts for death sentences imposed by jurors. It is just—as Justice Stevens pointed out—that elected Alabama judges never do so, in contrast to their frequent substitution of death for life verdicts. \textit{See id.} at 520-21; \textit{see also} Schiro v. Indiana, 493 U.S. 910, 912 (1989) (Stevens, J., respecting the denial of certiorari) (questioning Indiana’s practice, since abandoned, of permitting judges to override jury verdicts in capital cases).

\footnote{151} Weeks v. Angelone, 528 U.S. 225 (2000); Buchanan v. Angelone, 522 U.S. 269, 272 n.1 (1998); Boyde v. California, 494 U.S. 370, 373-74 & n.1 (1990). In \textit{Weeks}, the Court refused, over Justice Stevens’s dissent, to overturn a jury verdict in favor of death notwithstanding that (1) the jury wrote the trial judge a note expressing confusion about the terse, ambiguous, and potentially misleading and under-inclusive instructions on mitigation; (2) in contrast to how little the instructions said about mitigation, they placed considerable emphasis on aggravation; and (3) the trial judge responded to the jurors’ request for more guidance by merely reprising the instruction that had initially confused them. 528 U.S. at 225. In \textit{Buchanan}, the Court upheld instructions that made no mention of mitigation or extenuation at all, and instead said only that “[i]f you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph [discussing aggravating circumstances], then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.”’ 522 U.S. at 272 n.1. In \textit{Boyde}, the Court upheld an instruction that limited the constitutionally mandated directive to consider the full range of mitigating aspects of the defendant’s background and character as well as of the offense to a single reference to “‘[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.’” 494 U.S. at 373-74 & n.1; \textit{see also} Brown v. Payton, 125 S. Ct. 1432, 1440-41 (2005) (extending \textit{Boyde}, over Justice Stevens’s dissent, to a case in which the prosecutor was permitted to argue repeatedly that the jury could treat only aspects of the offense as mitigating and could not (or, at least, should not) consider the defendant’s demonstrable reformation in prison after the offense); Delo v. Lashley, 507 U.S. 272, 279-80 (1993) (per curiam) (holding, over Justice Stevens’s dissent based on the presumption of innocence, that defendant was not entitled to an instruction on the mitigating circumstance that he had no prior criminal history, where neither the state nor the defendant presented any evidence about the defendant’s prior criminal record or lack thereof).

which full attention to mitigation might have revealed that the offenses were actually outside the capital circle.

3. Categorical Mitigation

As is noted above, Justices White, Stewart, and Stevens joined forces in the late 1970s and early 1980s to limit the crimes subject to capital punishment to deliberate or at least grossly and advertently reckless murder.\textsuperscript{153} Justice White favored this baseline because it included only crimes aggravated enough to jawbone death sentences out of most jurors, thereby ensuring the numerosness he demanded for a category of murders to be death eligible. Justices Stewart and Stevens also favored the baseline, but for a different reason: It excluded crimes that almost never fell at the aggravated core. But as three decisions issued in 1988 and 1989 revealed, agreement on a baseline of highly aggravated crimes did not translate into agreement on a baseline of highly aggravated criminals.

The rift first appeared in \textit{Thompson v. Oklahoma}\textsuperscript{154} in 1988. Justice Stevens's four-person plurality opinion concluded that executions of individuals who were under sixteen years old at the time they committed the crime were so rare (none having occurred in the United States since 1948), and that such offenders were so much less culpable than adults, that Thompson could not constitutionally be executed for a crime he committed as a fifteen-year-old.\textsuperscript{155} Justice O'Connor concurred separately, concluding only that it was unconstitutional to execute Thompson under a statute that was silent as to any age limit on eligibility for the death penalty and thus did not explicitly contemplate the death penalty for fifteen-year-olds.\textsuperscript{156} In dissent, Justice Antonin Scalia, joined by Chief Justice Rehnquist and Justice White, saw no reason to doubt the jury's conclusion that Thompson himself was sufficiently culpable to be sentenced to die, given the nature of his offense.\textsuperscript{157} In essence, Justice Stevens and his allies believed the

\textsuperscript{153} See \textit{supra} notes 54-62 and accompanying text.
\textsuperscript{154} 487 U.S. 815 (1988).
\textsuperscript{155} \textit{Id.} at 838 (plurality opinion).
\textsuperscript{156}

The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.

\textit{Id.} at 857 (O'Connor, J., concurring in the judgment).
\textsuperscript{157}

[A] jury then considered whether, despite his young age, his maturity and moral responsibility were sufficiently developed to justify the sentence of death. In
mitigating force of a fifteen-year-old’s youth would inevitably distance any offense committed from the aggravated core, while Justice White and his allies saw no reason to immunize fifteen-year-old offenders from death sentences that the aggravated nature of their crimes persuaded jurors to impose.

In the two cases decided the next year, however, with Justice Anthony Kennedy now having joined the Court and with Justice O’Connor having switched sides, Justice Stevens lost his fragile majority. In Stanford v. Kentucky,158 Justice Scalia concluded in a four-person plurality opinion (joined by Chief Justice Rehnquist and Justices White and Kennedy, with Justice O’Connor concurring separately on slightly narrower grounds159) that, despite the infrequent imposition of the death penalty on defendants who committed murder as sixteen or seventeen-year-olds, there was no constitutional reason to treat them as automatically ineligible for the death penalty. Although the plurality was comprised of Justices White and other Justices who opposed unlimited mitigation, they reasoned in this case that the constitutional assurance of “individualized consideration” of Stanford’s youth and other aspects of the case made it lawful to sentence him to die.160

Similar logic supported the Court’s ruling in Stanford’s companion case, Penry v. Lynaugh,161 that the Constitution does not automatically bar the death penalty for mentally retarded offenders. In an opinion by Justice O’Connor, the five-person majority concluded that constitutionally mandated individualization would enable jurors to distinguish properly between mentally retarded criminals who should live and those who should die, making a categorical ban unnecessary.162 Justice O’Connor’s reliance on the mitigating force of mental retardation was not surprising. Since replacing Stewart on the Court, Justice O’Connor had generally supported

upsetting this particularized judgment on the basis of a constitutional absolute, the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution.

Id. at 863-64 (Scalia, J., dissenting). Justice Kennedy took no part in the Court’s decision in Thompson.

159. Id. at 381-82 (O’Connor, J., concurring in part and concurring in the judgment). Although Justice O’Connor agreed that no national consensus had developed against executing defendants for crimes committed when they were sixteen or seventeen, she disagreed with the plurality’s determination that the constitutionality of the death penalty for a class of offenders is based entirely on the number of state legislatures that permit or forbid the execution of those offenders. Id. In Justice O’Connor’s view, the Court must additionally exercise its own proportionality judgment. Id.
160. Id. at 375 (Scalia, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)).
162. “So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case.” Id. at 340.
the Court’s mitigation decisions.\footnote{See, e.g., Tennard v. Dretke, 542 U.S. 274, 288 (2004) (O’Connor, J.) (“Reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence. Evidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death.”) (internal quotation omitted); Penry v. Johnson, 532 U.S. 782, 797 (2001) (O’Connor, J.) (“[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.”) (internal quotations omitted); Penry v. Lynaugh, 492 U.S. at 340 (O’Connor, J.) (“Mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense . . . . So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case.”); Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O’Connor, J., concurring) (“Because sentences of death are ‘qualitatively different’ from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor.”) (footnote and citation omitted).} But what about the rest of her majority, comprised entirely of Justices, White included, who opposed unbounded mitigation? What suddenly made them such avid fans of individualization?

The lineup of Justices on a second issue in Penry provides an answer. Joined on this issue by Justice Stevens and the other Stanford dissenters, Justice O’Connor concluded that the jury instructions given in Penry’s case did not in truth allow his mental retardation to be considered in mitigation. In dissenting from that ruling, Justice White and the rest of the Stanford plurality found attractive exactly what Justice O’Connor (and Justice Stevens) found constitutionally offensive about the instructions: They jawboned jurors into treating Penry’s retardation as mainly aggravating (because he was more likely to offend in the future), thus increasing the likelihood that the jury would impose death. For Justice White and his allies, individualization meant the discretion to find attributes of criminals sufficiently awful to justify death—including that they committed heinous crimes as children or as a result of a mental disability. For Justice Stevens and his allies, individualization meant the legal duty to premise outcomes on all of the mitigating as well as aggravating aspects of youth and mental disability. Where aggravation threatens to overwhelm the jurors’ capacity to consider mitigation (as Justice Stevens, but not Justice O’Connor believed was true in the case of juvenile and mentally retarded offenders), categorical constraints were needed, lest jurors treat cases that were not at the aggravated core as if they were.\footnote{We are indebted to Professor Elizabeth Emens for this insight. See Elizabeth Emens, Aggravating Youth: Roper v. Simmons and Age Discrimination, 2005 Sup. Ct. Rev. (forthcoming 2006).}

4. Death-Sentencing Patterns

Interspersed among the Court’s decisions refusing to require capital sentencing to conform to Justices Stewart’s and Stevens’s aggravation-net-
of-mitigation logic are decisions refusing to require courts or officials to attend to sentencing patterns at all. We already mentioned Arave v. Creech, which refused to examine the pattern of all of a state’s decisions applying a particular aggravating factor.\textsuperscript{165} Even more to the point are Pulley v. Harris\textsuperscript{166} and McCleskey v. Kemp.\textsuperscript{167} Respectively, those decisions held that federal courts have no business scrutinizing, or requiring state courts to scrutinize, sentencing patterns to assure via “comparative proportionality review” that other offenders in the immediate vicinity within the capital circle of the case under review also received the death penalty,\textsuperscript{168} or via “arbitrariness review” that true aggravation and mitigation, not illegitimate considerations such as the victim’s race, account for the run of sentences imposed.\textsuperscript{169} In all of these cases, the Court concluded that adherence to other Eighth Amendment doctrines, particularly the requirement of a statutory aggravating circumstance, suffices constitutionally no matter where any particular case falls within the capital circle and no matter what sentence is typically imposed in similar cases.

In the face of Justice Stevens’s powerful dissent, the Court’s decision in McCleskey reveals how deeply committed the Court had become to the more-is-better approach to capital sentencing. The Court upheld McCleskey’s death sentence for shooting a white police officer despite proof that the murder of a white victim in Georgia was 4.3 times more likely to provoke a death sentence than the otherwise identical murder of a black victim.\textsuperscript{170} Justice Powell’s decision for the Court proceeded in six steps: (1) As interpreted in Furman, the Eighth Amendment cannot tolerate the irrational death verdicts generated by wholly discretionary death sentencing; (2) the July 2, 1976 cases constrained death sentencing so that, while some jury discretion remains, it is controlled by “objective standards” designed to achieve “nondiscriminatory application”; (3) in rejecting mandatory death sentences, the July 2, 1976 cases held that some amount of

\textsuperscript{165} See supra note 142 and accompanying text.


\textsuperscript{167} 481 U.S. 279 (1987).

\textsuperscript{168} Pulley, 465 U.S. at 53-54. Justice Stevens concurred separately in Pulley, rejecting the Court’s conclusion that no appellate review for arbitrariness or disproportionality of death sentences was required but also rejecting the petitioner’s view that a “comparative” form of such review was required in all cases. Id. at 54-55 (Stevens, J., concurring in the judgment). In other opinions, Justice Stevens has commended statutory provisions that require the state’s highest court to assure that death sentences imposed in each case are comparatively proportional to sentences imposed in all similar cases across the state. See, e.g., Maggio v. Williams, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring); Zant v. Stephens, 462 U.S. 862, 890 (1983) (Stevens, J.); Gregg v. Georgia, 428 U.S. 153, 203 (1976) (Stewart, Powell, Stevens, JJ., concurring).

\textsuperscript{169} McCleskey, 481 U.S. at 315-19 (“If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.” (footnotes omitted)).

\textsuperscript{170} See id. at 321 (Brennan, J., dissenting).
capital-sentencing discretion is not only constitutionally permissible but plays a “fundamental role in . . . [the] system”; (4) in tandem, the good reasons to let the jury be the agency that exercises the discretion, together with the ever-present “risk of racial prejudice influencing” a jury’s decision requires “unceasing efforts to eradicate racial prejudice from our criminal justice system”; (5) “the Baldus study indicates a discrepancy that appears to correlate [death sentencing] with race” and cannot be explained by any other factor the state or Court could identify; and therefore, (6) “[i]n light of” the above, “we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”

Justice Powell’s argument impresses us as building inexorably to the opposite of the conclusion that his last sentence asserts: By revealing a death-sentencing “discrepancy that appears to correlate with race” and cannot otherwise be explained, the evidence exposes the “discriminatory application” the Constitution forbids. The Baldus study thus revealed that post-Furman decisions designed to wash discrimination out of capital sentencing had failed precisely because a condition that plays a “fundamental role” in the reformed sentencing systems—partially discretionary juror decision making—also disposed the new systems to “racial discrepancies.”

A footnote that follows Justice Powell’s concluding sentence begins to provide the missing justification for the outcome he reaches. Justice Brennan’s “eloquent” statement of the constitutional problem, Justice Powell says, is unconvincing because Justice Brennan has no solution to discriminatory death sentencing short of his “often repeated” call for abolition. In other words, the Court’s “‘unceasing efforts’ to eradicate racial prejudice in our criminal justice system” must cease when necessary to let states continue using the death penalty. Discomfort with that answer may have led Justice Powell to up the ante in a final section, which suggests that eradicating racial influences cannot be an unwavering constitutional imperative else our entire “criminal justice system” would have to give way.

171. Id. at 301, 303-04, 309, 311-13 (citation omitted).
172. Id. at 313 n.37.
173. Id. at 309. On the assumption that racial influences are intractable, hence that the Court has no hope of eradicating them if the death penalty is allowed to continue, see Justice Scalia’s internal memorandum announcing that he would probably join Justice Powell’s majority opinion (as he ultimately did): “Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this Court, and ineradicable, I cannot honestly say that all I need is more proof [of discrimination].” Henry J. Reske, Behind the Scenes, A.B.A. J., Aug. 1993, at 28 (discussing Memorandum to the Conference re: McCleskey v. Kemp, January 6, 1987, located in The Papers of Thurgood Marshall, Box 425, Folder 7).
Justice Stevens's McCleskey dissent made plain, however, that it was not the survival of capital punishment—much less of organized society—that depended on accepting racial disparity, but only the survival of Justice White's more-is-better approach to the penalty. The Baldus study showed that Georgia knew how to mete out sentences in murder cases without racial discrepancies and had done so by imposing death sentences in many highly aggravated cases and by imposing a lesser sentence in many highly mitigated cases. Only in the mid-range cases, in which aggravation and mitigation were relatively even, did race drive outcomes. As Justice Stevens explained, by adopting a less-is-better approach to constitutional capital sentencing—by requiring a high degree of aggravation net of mitigation—the Court could remain steadfast in its efforts to eradicate racial influences and fulfill Furman's promise without sacrificing the death penalty or the social order.175

[T]here exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.176

In the July 2, 1976 cases, states adopting so-called guided discretion statutes had assured the Court that their newly narrowed statutes would cure the ills Furman had condemned. When the evidence presented in McCleskey proved these predictions false as to a crucial pre-Furman ill—the role of race in determining who lives and who dies—Justice Stevens had no trouble explaining why. Although the July 2, 1976 cases had approved guided discretion in principle, affirming the Florida, Georgia, and Texas statutes "on their face,"177 the decisions left open the statutes' constitutionality as applied. When more than a decade of applications showed that the new procedures did not sufficiently limit the death penalty to cases defined by net aggravation, as opposed to race, it was clear that further narrowing was required. In rejecting this view, the five-person McCleskey majority in effect overruled Justice Douglas's portion of the Furman "holding" and made clear that the problem Justice Stewart had discerned in Furman was not a prevailing concern. Justice White's quest for numerosity had largely triumphed.


176. McCleskey, 481 U.S. at 367 (Stevens, J., dissenting).

D. Full Circle Back to Furman: The Cost of Mixing Narrowing and Numerousness

The sentencing patterns that the Court's post-Furman decisions invite have an even greater and more perverse effect on Furman than we have suggested. Figure 10 depicts the death-sentencing pattern elicited by the Court's post-Furman case law as of 2000 or so. Dots represent death sentences jawboned out of jurors by the more-is-better approach to aggravation that the Court has encouraged recently. Blank spaces represent the cases jurors cast outside the capital-circle by the less-is-better approach due to mitigation that the Court's earlier decisions require. The wedge is the death-sentencing disparity (based on the race of the victim) that the Baldus study revealed in McCleskey. The difference between Figures 1 and 10 is the return the nation has derived from thirty-five years of intensive Supreme Court regulation of the death penalty.

![Figure 1](image1)

![Figure 10](image2)

The difference is minimal.

Given the removal of a smattering of death sentences for non-homicidal offenses, Figure 10 is slightly smaller than Figure 1. And thanks to Justice White, the proportion of death-eligible crimes that actually receive the death penalty is somewhat greater. But otherwise things are much as they were in 1972. For every defendant who received the death penalty, there are many essentially identical offenders who did not (white space surrounds almost every dot).\(^{178}\) And racially skewed death-sentencing patterns (the wedge) continue to exist, albeit now based on the race of the victim not (or not only) the race of the defendant.\(^{179}\)

The Court thus has brought capital punishment full circle, almost precisely back to where it stood nearly thirty-five years ago when the Court embarked on an intensive effort to change capital punishment without annihilating it. The only difference is that the pattern the states had

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179. See id. at 248-66.
generated on their own—the pattern found unconstitutional in *Furman*—is now constitutionally required.

E. *The Question Begged: Narrowing or Numerousness?*

The incoherence of death penalty doctrine is not Justice White’s fault, or Justices Stewart’s and Stevens’s. Nor is the problem that the Court’s doctrine provides a role for discretion as well as for rules.\(^{180}\) Rather, the problem—the source of the pattern in Figure 10—is the intermingling of a set of late 1970s/early 1980s decisions requiring anything-goes mitigation in service of the Stewart-Stevens less-is-better approach to capital sentencing with a set of late 1980s and 1990s doctrines allowing anything-goes aggravation in keeping with Justice White’s contradictory, more-is-better approach.

The remainder of this Article addresses a question posed by our conclusion that it was not sensible for the Court to construct its death penalty doctrine out of two contradictory solutions to the problems identified in *Furman*: Which of the two solutions—numerousness or narrowing—should the Court have single-mindedly pursued?\(^{181}\) Drawing on a brief history of death penalty politics and practices in this country over the last thirty-five years, we conclude that Justices Stewart and Stevens were right, and Justice White was wrong. Numerousness breeds racial disparity, invites error, risks execution of the innocent, and overtaxes the system. Narrowing mitigates these problems.

IV. THE POLITICAL ECONOMY OF DEATH, 1972-2006

Thus far, we have suggested that the Court led other public actors in setting the nation’s course on the death penalty. The reality is more complicated. In a number of respects, the Court has self-consciously followed the public. We consider here whether it should do so again.

A. 1972-1994: *Rising Support for the Death Penalty*

*Furman* itself was both a reaction to public opinion on the death penalty and the Court’s attempt to clarify it. The decision came at a time when public support for the death penalty seemed relatively weak in this country.

\(^{180}\) *Cf. supra* notes 122-23.

\(^{181}\) Other questions are raised by our analysis to this point: What accounts for the particular aspects of each of the competing doctrines the Court patched together into an incoherent whole? Why in regard to the death penalty did the Court break with its practice of leaving substantive criminal law (as opposed to criminal procedure) to the states? And once the Court intervened, what kept it from abolishing the death penalty? These questions are addressed in a forthcoming two-part article by Professor Liebman. James S. Liebman, _Slow-Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006 Part 1: The Court’s Obsessive Search for and Flight from Responsibility_ (Feb. 21, 2006) (unpublished manuscript, on file with Professor Liebman); James S. Liebman, Part 2: Why the Court Is Trapped in Its Dance with Death; How It Can Extricate Itself (Feb. 21, 2006) (unpublished manuscript, on file with Professor Liebman).
According to a Gallup Organization poll three months before *Furman* was decided, only fifty percent of those questioned favored the death penalty for a person convicted of murder.\(^{182}\) In this light, the true, technical "holding" of *Furman*—that the death penalty as then administered was unconstitutional, without any decisive view being expressed about how to fix it or whether it could be fixed—acted as a call for a national referendum on the issue via the States' decisions whether to reinstate the death penalty and, if so, in what form. That referendum, in turn, was resoundingly supportive of capital punishment. Although a few formerly capital jurisdictions (e.g., District of Columbia, Massachusetts) declined to bring back the death penalty, and others (e.g., Kansas and New York) delayed doing so for years, the vast majority of formerly capital states quickly reinstated capital punishment via lopsided votes of their legislatures or (e.g., in California and Oregon) lopsided votes of the public in voter referenda.\(^{183}\)

Goaded perhaps by rising crime rates, support for the death penalty climbed steadily after 1972. By the late 1980s when, for example, *McCleskey*, *Stanford*, and *Penry* were decided, support for capital punishment was in the seventy to seventy-nine percent range. Public support for capital punishment reached a modern peak in the mid-1990s, with eighty percent of those polled in 1994 supporting the death penalty. It is not surprising, therefore, that it was during the late 1980s and early 1990s period when Justice White's more-is-better approach to the death penalty particularly flourished.\(^{184}\)

The Court's move from "narrowing" to "numerousness" in turn affected public activity on the death penalty. Emboldened by the Court's more-is-better decisions, some states by legislation and judicial interpretation vastly increased the number of statutory aggravating factors that were sufficient to permit a death sentence,\(^{185}\) the breadth of interpretation of those factors,\(^{186}\)


\(^{186}\) See, e.g., Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. Rev. 941, 943-44 (1986) ("Twenty-four states permit imposition of the death penalty based on a finding that the murder was, in some ill-defined way, worse than other murders. The states use a variety of terms to denote this aggravating circumstance, with most statutes containing, either alone or
and their tolerance for outlier death verdicts—ones imposed for crimes and on criminals who at most times or in most places were not thought to warrant the ultimate penalty.\textsuperscript{187} As a result, variability among jurisdictions in terms of the frequency with which they imposed the death penalty increased.\textsuperscript{188}

B. 1995 to the Present: Qualms Based on Innocence and Error

Starting in the mid-1990s, however, public support for the death penalty began to slip. Between 1994 and 2001, there was a slow but steady decline in support for capital punishment, with a 2001 poll showing that support had dropped to sixty-five percent. A major catalyst for the change in public opinion was the increasing recognition that the capital punishment system, which had been touted as the most fair and accurate system imaginable, had in fact led to a series of death sentences for demonstrably innocent individuals. In the mid-1990s, activists decided to focus on this issue as a major reason for reform or abolition of the death penalty.\textsuperscript{189} As will be seen, this movement not only spawned concern about the actual guilt of individuals who had been convicted for death-eligible offenses, it also generated concern about the general fairness of a system that was capable of such chronic and profound error.

Since time immemorial, opponents of the death penalty have pointed to the risk of wrongful convictions as reason enough to abolish capital


\textsuperscript{189} For many abolitionists, the decision to promote factual innocence as a major vice of the death penalty was a profoundly difficult one given the fear that a focus on innocence would imply that execution of guilty defendants was acceptable. See generally Carole S. Steiker & Jordan M. Steiker, \textit{The Seduction of Innocence: The Attraction and Limitation of the Focus on Innocence in Capital Punishment Law and Advocacy}, 95 J. Crim. L. & Criminology 587 (2005). Notwithstanding these legitimate concerns, virtually all major abolitionist organizations have come to recognize the power of the innocence issue to expose the public to a broad spectrum of problems associated with the death penalty that go well beyond the risk of wrongful executions. Thus far, at least, support for the death penalty has not rebounded in the manner these concerns might have suggested.
punishment.\footnote{190} Many examples of questionable convictions in capital cases bolstered this point.\footnote{191} Yet with some exceptions,\footnote{192} it was difficult to develop evidence conclusive enough to persuade the general public that those who were exonerated were indeed innocent. In the 1990's, this began to change with the increased use of post-conviction DNA testing. Through a series of exonerations based on forensic DNA testing, the public began to acknowledge that innocent people were being convicted of crimes and even being sentenced to death.\footnote{193}

It was not the number of DNA exonerations that mattered. By 1995, DNA testing had led to only three death row exonerations, and just twenty-five exonerations of inmates serving sentences other than death. What mattered was the message that the DNA cases drove home about the system's general fallibility—including in cases where DNA testing was unavailable. The overwhelming majority of capital cases are not

\footnote{190}{To recognize the fallibility of human judgment and still to act, but act wisely in the light to such fallibility, is one of the great challenges of mankind. For this reason the fact of irrevocability has always been among the arguments for the abolition of the death penalty . . . . It was brought up on all conceivable occasions in the time span . . . of legislative consideration of the abolition of capital punishment. In all probability it will continue to be brought up until capital punishment has disappeared from the practice of civilized society. Otto Pollak, *The Errors of Justice*, in *Capital Punishment* 207 (Thorsten Sellin ed., 1967); see also United States v. Quinones, 313 F.3d 49, 63 (2d Cir. 2002) ("[T]he argument that innocent people may be executed . . . has been central to the centuries old debate over both the wisdom and the constitutionality of capital punishment.").}


\footnote{192}{The classic exceptions to this point were cases in which a defendant had been convicted of murdering a victim, who later was discovered to be alive and well. For an example of such a case which spawned widespread adoption of the corpus delicti rule in the United States, see Robert Warden, Wilkie Collins's *The Dead Alive* (2005) (detailing the 1815 convictions of Jesse and Stephen Boorn for the murder of Russell Colvin, who turned out to be alive).}

\footnote{193}{By 2003, seventy-three percent of those polled believed that an innocent person had been executed within the previous five years. Interestingly, despite a growing number of exonerations, that number dropped to fifty-nine percent in 2005. Even so, the idea that fifty-nine percent of those polled believe that an innocent person had been executed is staggering. Recently, considerable evidence has emerged that individuals executed in the last fifteen years were indeed innocent. *See* Terry Ganey, *Was the Wrong Man Executed?*, St. Louis Post Dispatch, July 11, 2005, at A1 (discussing newly uncovered evidence that the killing for which Missouri executed Larry Griffin in 1995 was committed by others); Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, Chi. Trib., Dec. 9, 2004, at A1 (discussing forensic evidence that a fatal fire Cameron Todd Willingham was executed in 2004 for having deliberately set was accidental); Lise Olsen, *Did Texas Execute an Innocent Man? Eyewitness Says He Felt Influenced by Police to ID Teen as the Killer*, Hous. Chron., Nov. 20, 2005, at A1 (discussing newly developed evidence that the shooting for which Texas executed Ruben Cantu in 1993 was committed by another man).}
susceptible to verification through any sort of DNA testing because there is no biological evidence left by the perpetrator that can be tested with currently available technologies. 194 Once courts, governors, legislators, and juries came to understand the flaws that DNA revealed, however, they became far more receptive to claims of innocence that were not supported by DNA. 195

A related phenomenon played a supporting role in rising doubts about the death penalty: high rates of reversible error found by courts reviewing capital verdicts. A study published in 2000 revealed that sixty-eight percent of the thousands of death verdicts imposed and fully reviewed in the United States between 1973 and 1995 were reversed because of legal error. 196 The vast majority of these reversals were based on errors found to have undermined the reliability of the guilt or sentencing determination—mainly, ineffective assistance of counsel, prosecutorial misconduct, and misinstruction of jurors. 197 Ninety-five percent of the errors were found by state judges elected by constituencies that strongly supported the death penalty or by panels of federal judges on which a majority of those voting to reverse were appointed by Republican, “law-and-order” Presidents. 198

On retrial following reversal, where data were available, eighty-two percent of the death verdicts that were reversed were replaced by sentences less than death, including nine percent in which the previously death-sentenced defendants were acquitted. 199

The reasons for these reversals, the judges responsible for them, and results on retrial following reversal suggested that the errors were by and large serious—the kind that could cause the execution of people whose crimes did not warrant the death penalty or who committed no crime at all.

194. Indeed, of the 121 death-row exonerations since Furman, only fourteen have involved DNA testing. See Death Penalty Information Center, Innocence: List of Those Freed from Death Row, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited Jan. 12, 2006). For accounts of death row inmates exonerated as a result of DNA, see Tim Junkin, Bloodworth: The True Story of the First Death Row Inmate Exonerated by DNA (2004); Barry Scheck et al., Actual Innocence: Five Days To Execution and Other Dispatches from the Wrongly Convicted 126-57 (2000).

195. See, e.g., James S. Liebman, The New Death Penalty Debate: What’s DNA Got to Do with It?, 33 Colum. Hum. Rts. L. Rev. 527 (2002). In this way, the DNA cases have helped pave the way for many non-DNA exonerations. Recently, though, concern has grown that judges and prosecutors will demand DNA evidence before they will be willing to recognize that a defendant has been wrongly convicted. This phenomenon, sometimes called the CSI effect (after the popular television show involving forensic evidence) has the potential to wreak great harm, particularly once the numbers of post-conviction DNA exonerations decrease as a result of widespread pretrial use of DNA technology.


198. Id. at 221-23.

199. Id. at 221.
The findings generated questions about the accuracy of capital verdicts across a wide spectrum of observers.200

C. The Public Drive for Reform

These developments fueled a movement to reform the post-

Furman capital justice system. Fears about the death penalty’s reliability and shrinking public support for capital punishment led policy makers to recognize that the system needed serious improvement.201 Notwithstanding the Supreme Court’s increasingly expansive approach to the death penalty, some legislatures and officials began to consider whether it was necessary to limit application of the death penalty beyond what the courts required.

There are myriad examples of how these newfound concerns about the fairness and accuracy of the death penalty affected public policy. In some states, legislatures enacted measures; in others they proposed moratoria or created study commission to assess methods of addressing the problems; and in two states, governors imposed moratoria.

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200. See, e.g., David S. Broder, Broken Justice, Wash. Post, June 18, 2000, at B7 (“That [the study’s findings demonstrate the system is working] might be plausible if one out of a hundred or even one out of ten capital cases were handled in such a slipshod fashion as to merit reversal. But when two-thirds of them involve ‘serious error’ in the eyes of reviewing state and federal judges, Liebman is justified in saying, ‘By anyone’s standards, this is not a system that is working.’”); David Gergen, Death by Incompetence, U.S. News & World Rep., June 26, 2000, at 76 (“[L]ast week . . . brought forward a stunning report from a team of researchers at the Columbia Law School . . . [revealing] that appeals courts determined that an astonishing sixty-eight percent of the cases had prejudicial errors and should be reversed.”); Gara LaMarche, Ending Executions, Am. Prospect, June 4, 2001, http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=5730 (“Sam Millsap, the former district attorney for San Antonio . . . recently called for a moratorium on executions. Why? Because he was influenced by the work of Columbia Law School [researchers], who spent years on a study of the error rate in capital convictions.”); Murder One, Economist, June 17, 2000, at 33 (“The huge proportion of first trials that are later set aside also represents a gigantic waste of money. It may sound callous to count the cost when lives are at stake but the criminal-justice system, like everything else, is subject to financial pressures. Money thrown down the drain on recklessly inefficient early proceedings is money not available for combating murder elsewhere.”); James Q. Wilson, What Death-Penalty Errors?, N.Y. Times, July 10, 2000, at A19 (“For those who support capital punishment, as I do, the possibility that innocent people could be executed is profoundly disturbing. . . . [E]ven if perfection is not possible, . . . the number of errors ought to [be] kept as low as possible. For that reason, it is worth studying ‘Broken System: Error Rates in Capital Cases,’ the recent . . . Columbia University Law School [report] . . . ”).

201. This recognition of the need for reform also implicates non-death cases. As Justice Stevens recently explained, “with the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously. That evidence is profoundly significant—not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice.” Stevens, supra note 1.
In 1998, Kentucky enacted the Racial Justice Act, requiring pretrial procedures in capital cases so trial courts could determine whether race was playing a part in prosecutors' decisions to seek the death penalty. The Act allowed admission of statistical evidence and other evidence showing that death sentences were sought more frequently against persons of one race than of another, or were sought more frequently as punishment for offenses against persons of one race than as punishment for crimes against persons of another race. If a court "finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought." In enacting this legislation, Kentucky did precisely what the Court in \textit{McCleskey} had refused to do.

Between 1989 and 2001, fifteen states that had earlier allowed the execution of mentally retarded defendants amended their statutes to bar such executions.

Between 1989 and 2004, five states that had earlier allowed executions for crimes committed by juveniles amended their statutes to bar such executions.

In 1999, the Nebraska Legislature voted to impose a moratorium on all executions so that a study commission could examine all aspects of the death penalty's application in the state. Governor Mike Johanns vetoed the bill, but the Legislature proceeded with a major study of the state's death penalty.

In 1999, legislators in twelve states introduced bills to abolish the death penalty.

\begin{footnotes}

203. At the time of the Act's passage, seven of thirty-three people on Kentucky's death row were African-American (21% of death row population in a state with a 7.7% non-white population), and all victims of the seven inmates were white. \textit{See id.}


205. It also bears noting that in 2003, Kentucky Governor Paul Patton commuted to life imprisonment the death sentence of Kevin Stanford, the petitioner in \textit{Stanford v. Kentucky}, on the ground of his age at the time of the crime. \textit{See Tom Loftus, Patton Has Short, Quiet Last Day as Governor}, Courier-J. (Louisville, Ky.), Dec. 9, 2003, at 1B.


209. Jeffrey L. Kirchmeier, \textit{Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States}, 73 U. Col. L. Rev. 1, 3 (2002) (noting that twelve states in 1999 introduced bills to abolish the death penalty, which was a significant increase from four states in 1998); \textit{see also A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions}, 2000 A.B.A. Sec. Individual Rts. & Resp. 1, 76-96 (noting that between August 1998 and November 1999, thirteen states introduced legislation to abolish the death penalty: Connecticut, Indiana, Kansas, Kentucky,
In 2000, Illinois became the first state actually to impose a moratorium on executions, when Governor George Ryan declared that, pending the results of a study he was commissioning, he would grant a reprieve to any inmate on death row who was scheduled for execution. This decision came in the shadow of several high-profile exonerations of death row inmates in Illinois. By the time Governor Ryan imposed the moratorium, thirteen condemned prisoners had been exonerated since Furman, in a state in which twelve had been executed. Governor Ryan appointed a bipartisan, Blue Ribbon Commission, charging it to examine every aspect of the capital punishment system in Illinois.\footnote{210}

In 2000, the New Hampshire Legislature passed a bill to abolish the death penalty in the State. As in Nebraska, the Governor vetoed the measure, but with its vote, the New Hampshire Legislature became the first legislature to pass a repeal measure since Furman.\footnote{211}

Between 2001 and 2003, important studies of the operation of the death penalty with an eye towards reform were also conducted by Arizona, Indiana, Maryland, Nevada, North Carolina, Pennsylvania, Virginia, and the United States Department of Justice.\footnote{212}

\footnote{210} See, e.g., Alan Berlow, \textit{Death in Texas: The Capital of Capital Punishment Should Heed Illinois's Example}, Wash. Post, Feb. 13, 2000, at B5 (describing Governor Ryan's actions and noting that in announcing that he would not approve any more death sentences until a review of Illinois's capital punishment system was conducted, Ryan said, "I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life").


\footnote{212} See Hon. David S. Baime, Report to the Supreme Court, Systemic Proportionality Review Project: 2000-2001 Term 5 (2001) ("[T]here is unsettling statistical evidence indicating that cases involving killers of White victims are more likely to progress to a penalty trial than cases involving killers of African-American victims."); David C. Baldus et al., \textit{The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis 96-100} (2001) (finding that defendants who killed victims of a high socioeconomic status were almost six times more likely to be sentenced to death than victims of low socioeconomic status); Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003), available at \url{http://www.courts.state.pa.us/Index/supreme/BiasCmte/FinalReport.pdf} (recommending an overhaul of Pennsylvania's capital punishment system, including imposing a moratorium on executions until policies and procedures are implemented to ensure the death penalty is administered in a fair and impartial manner); Rachel King et al., \textit{Broken Justice: The Death Penalty in Virginia} (2003) (urging the Virginia legislature, courts, and governor to consider a number of recommendations geared towards improving Virginia's capital punishment system); Janet Napolitano, Office of the Attorney Gen., State of Ariz., Capital Case Commission Final Report 14 (2002) ("The Commission unanimously agrees that additional resources must be made available for capital cases . . . and urges the Legislature to consider and pass legislation appropriating monies for capital litigation resources at the earliest possible opportunity."); Raymond Paternoster et al., \textit{An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction} (2003), available at \url{http://www.newsdesk.umd.edu/pdf/finalrep.pdf} (documenting the impact of race and geography on the imposition of the death penalty in Maryland); Isaac Unah & John Charles Boger, \textit{Race and the Death Penalty in North Carolina: An Empirical
In 2002, the Illinois Governors’ Commission on Capital Punishment issued its report, calling for eighty-five reforms of the State’s capital-justice system. Even then, the Commission concluded, it could not guarantee that these reforms would eliminate many of the vices—including the condemnation of innocent defendants—that had plagued the death penalty.213

In 2003, Illinois Governor George Ryan commuted the sentences of all 167 death row inmates on death row.214 In his address announcing the commutations, Governor Ryan highlighted the relationship between wrongful convictions and the general question of the death penalty’s fairness: “The facts that I’ve seen in reviewing each and every one of these cases questions not only . . . the innocence of people on death row, but [also] the fairness of the death penalty system as a whole.”215

In 2001, even Texas, the avowed capital punishment capital of the United States, joined a number of other death-sentencing jurisdictions in making better qualified, trained, and funded lawyers available in capital cases.216 And in 2005, after years of resistance by Governors George W. Bush and Rick Perry, the latter signed into Texas law a provision allowing capital jurors to opt for life without parole instead of death as the punishment for capital murder.217 This action brought Texas into line with a nearly unanimous movement across the country to give capital jurors an explicit life-without-parole option. As then-Governor Bush noted in opposing previous versions of this legislation, its effect is to limit the extent to which future-dangerousness concerns jawbone death sentences out of jurors in

Analysis, 1993-1997 (2001) (“[T]he race of the homicide victim—played a statistically significant role in determining who received death sentences in North Carolina during the 1973-1997 period. The odds of receiving a death sentence rose by 3.5 times or more among those defendants (of whatever race) who murdered white persons.”); see also Liebman, supra note 195, 527-28 (discussing studies).


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marginal cases where the defendant’s assured confinement in prison is sufficient to allay juror fears.\textsuperscript{218}

In 2005, in the aftermath of a New York Court of Appeals decision holding New York’s death penalty procedures unconstitutional, the Code Committee of the New York General Assembly refused to pass a measure that would have cured the defect and reinstated the death penalty. Members of the Committee made clear that revelations of the previous several years—particularly involving innocent defendants on death row—had persuaded them that the State was better off without capital punishment.\textsuperscript{219}

In 2006, the New Jersey Legislature became the first in the nation to declare a moratorium on executions, again influenced in part by a fear of executing the innocent.\textsuperscript{220}

It is difficult to exaggerate the significance of these developments or the extent to which they reflect a reversal of positions between the Court and popularly accountable state officials. In the late 1970s and early 1980s, it had been the states pushing for increased use of the death penalty, and the Court putting up some resistance. Even thereafter, as the Court came around to Justice White’s more-is-better approach, it was the states that were urging the Court along. States that entered the post-\textit{Furman} era with statutes listing only a handful of aggravating factors consistently expanded the array of crimes and conditions that made a defendant death-penalty-

\textsuperscript{218} See Clay Robison, \textit{Bush Defends Texas’ Criminal Justice System}, Hous. Chron., Feb. 6, 1998, at A33 (describing then-Governor George W. Bush’s response to polls demonstrating that approximately half of Texans favored giving jurors a life without parole sentencing option in capital cases, namely, that life without parole “weakens the death penalty”). The Supreme Court has required jurors to be informed when the alternative to a death sentence is life without the possibility of parole, but the Court has not required them to be informed if the alternative to a death sentence is a life sentence in which parole is possible—even if (as in Texas, prior to the recent change) parole is not possible for thirty-five years and thereafter is highly unlikely. See \textit{Brown v. Texas}, 522 U.S. 940, 941 (1997) (Stevens, J., respecting the denial of the petition for the writ certiorari); \textit{Simmons v. South Carolina}, 512 U.S. 154, 170-71, 177-78 (1994) (providing that, at least in states in which future dangerousness is a relevant factor in capital sentencing, jurors must be informed that capital murderers will receive a penalty of life without parole if they are not sentenced to die); \textit{cf. Ramdass v. Angelone}, 530 U.S. 156, 178, 182, 196-97 (2000) (holding, over Justice Stevens’s dissent, that the trial court properly denied an instruction informing the jury of the life without parole option, where the state scheduled the defendant’s trial ahead of the hearing on another offense at which judgment was entered making the defendant parole ineligible for his capital murder); \textit{Brown}, 522 U.S. at 941 (Stevens, J., respecting the denial of the petition for the writ certiorari) (questioning the distinction the Court has drawn between parole ineligibility for the remainder of the prisoner’s life, about which penalty-phase jurors must be informed in capital cases, and parole ineligibility for a term of years—here, thirty-five years—about which the Court has not required capital jurors to be informed).


eligible. That by the turn of the century many states were examining the need for reform, while the Court remained steadfast in its more-is-better stance, is powerful testament to the change in climate around the issue. At no time since Furman has the climate been as ripe as today for significant reforms.

V. NARRATING AS A CURE FOR WHAT AILS THE DEATH PENALTY

As the Court itself did in Furman, when it took the nation's pulse on the death penalty, we consider here what the recent reforms say about the Court's approach to the death penalty, and especially about the numerousness-versus-narrowing debate. We conclude that the recent actions by legislators, prosecutors, and jurors reveal a trend towards narrowing and away from numerousness. More broadly, we conclude that numerousness is a likely cause of the problems that motivate the trend, and additional narrowing is a promising if only partial cure.

A. Lessons on the Ground

1. Legislative Activity

Some of the recent legislative reforms of the death penalty fall into the category of narrowing measures. For example, a number of states recently limited the reach of the death penalty by excluding two categories of offenders—juveniles and mentally retarded individuals—from death eligibility. Likewise, the trend towards providing better trial lawyers in capital cases and offering jurors an explicit life-without-parole alternative to death suggests a preference for sentences less than death in marginal cases in which the quality of one's lawyer and available sentencing options are most likely to influence jurors.

Nonetheless, a striking aspect of recent reform activity is how little of it has involved the straightforward narrowing of death-eligibility factors. Even as many legislatures have examined flaws in their death-penalty systems, and even as study commissions have called for narrowed capital-eligibility criteria, the states have taken virtually no steps to restrict their statutory lists of factors that render a defendant eligible for capital punishment, and some states have continued to expand their lists.

221. See supra Part IV.C.3.

222. See generally Norman Lefstein, Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation, 29 Ind. L. Rev. 495, 529 (1996) (discussing the drop in capital prosecutions in marginal cases caused by Indiana legislation improving counsel and defense support services in capital cases); supra note 218 and accompanying text (discussing the effect in marginal cases of a life-without-parole alternative to the death penalty).

223. See supra notes 202-20 and accompanying text.

2. Actions by Prosecutors and Jurors

To achieve a complete picture of what is happening in the States, it is essential to look beyond legislative activity and to examine how prosecutors and sentencing jurors have "voted with their feet" on the death penalty in recent years. The results of this inquiry are quite stark. Most importantly, the number of death sentences being imposed in the United States has fallen dramatically since the post-Furman peak years of 1994 (314 death sentences), 1995 (318 death sentences), and 1996 (320 death sentences).

Death Sentences By Year

![Graph showing death sentences by year from 1982 to 2004]

Those three years saw only a slightly higher number of sentences imposed than during the period from 1982, by which year most post-Furman capital-sentencing statutes were up and running, and 1999, when an average of 283 death sentences were imposed annually. By contrast, in 2001 and 2002, the number of defendants sentenced to death dropped to 163 and 168, respectively. In 2003, the number fell to 152, by 2004, the number was 125, and in 2005 the number of death sentences was at an all time post-Furman low of ninety-six. The average number of sentences during the 2001-2005 period (141) were less than fifty of the average death sentences per year compared to the 1982-1999 period, and just forty-six percent of the average number of death sentences imposed per year during the peak period of 1994-1998 (when 305 death sentences were imposed each year on average).

Although many factors may fuel this decrease in capital verdicts, a major one is a newfound resolve among prosecutors to reserve capital prosecutions to the “worst of the worst” murders. As Joshua Marquis, an Oregon prosecutor who has served as a National District Attorneys Association spokesman on the death penalty and chair of its Capital Litigation Committee, explained recently, “The point we’re coming to in America is that we are going to keep refining and refining and refining those who are eligible for the death penalty. . . . It should really be reserved for people like (Oklahoma City bomber) Timothy McVeigh.”

Virginia Governor James Gilmore expressed the same sentiment, observing that the death penalty should be “reserved only for the worst possible cases.” Along these same lines, Professor Robert Blecker, an outspoken supporter of the death penalty, has written that “the vast majority of the 3,700 murderers on death row today should, instead, spend the rest of their lives in prison. Our responsibility is to figure out who should be included in that small minority—the very worst of the worst—who deserve to die.”

B. Numerousness as the Cause; Narrowing as the Cure

The trend toward narrowing the death penalty to the worst of the worst offenses is a promising response to all of the major concerns that recently have generated skepticism about the death penalty. Narrowing the bases for a death sentence and linking decisions to a reliable assessment of aggravation net of mitigation—all in classic Stewart-Stevens, less-is-better fashion—can help ameliorate (1) the risk that innocent or other legally

226. See A Governor’s Role in Death Penalty Cases, Burden of Proof with Greta Van Susteren (CNN television broadcast Aug. 21, 2001).
undeserving defendants will be sentenced to die and executed, (2) racial disparity, (3) other forms of arbitrariness, and (4) the overtaxing of resources that exacerbates all of these problems.

1. Error and Execution of the Innocent

There are two ways in which narrowed aggravating factors, a substantial degree of aggravation net of (full) mitigation, and other less-is-better techniques can address concerns about executing the innocent. First, assuming there is a static error rate, a reduction in the absolute number of death sentences imposed will yield a proportional reduction in the incidence of errors. Second, evidence reveals that reducing the numerosness of capital prosecutions and verdicts tends to decrease the rate of error as well.

Even if one assumes a static error rate, a reduction in the number of overall death sentences will generate a reduction in the number of innocent defendants sentenced to die. Hypothetically assuming an error rate of five percent, reducing the gross number of death sentences imposed in the country from 300 per year to sixty per year will reduce the number of innocent defendants sentenced to death from fifteen to three.

If one is to believe the polls, most Americans continue to support capital punishment, though a strong majority believes that innocent people have been executed. People thus may believe some risk of error is tolerable if the only alternative is abandoning the death penalty altogether. But this hardly reveals a national consensus in favor of executing innocent defendants in cases far removed from the small core of "worst of the worst" cases that mainly drive support for continued use of the penalty. On the contrary, narrowing death eligibility to the core of the circle would permit the public to maintain a death penalty while reducing significantly its concerns about error and wrongful execution.

The effects of narrowing are more significant than that, however, because the rate of error is not actually static. As the frequency of capital proceedings goes up in a given jurisdiction so does the rate of error. A comprehensive effort to explain differences in rates of reversible error in capital cases across states and years found that "higher death-sentencing rates—death sentences per 1000 homicides—are associated with a higher probability of reversal of any death verdict that is imposed." Numerousness in death sentencing breeds error, which in turn undermines the reliability of guilt and sentencing outcomes and increases the risk of executing the undeserving and the factually innocent. As is depicted by

228. See supra note 193.


Figure 11 below, "[w]hen other factors are held constant at their average values, the predicted probability of reversal [based on serious error] increases about seven-fold when moving from states and years with the fewest to those with the most death sentences imposed per 1,000 homicides." The same pattern appears at the county level. Whether comparing counties with similar numbers of death sentences or similar numbers of homicides, it is consistently the case that jurisdictions with higher death-sentencing rates have substantially higher rates of reversible error in the capital verdicts they impose and are much more likely to convict and condemn defendants who are later found to be not guilty. Tables 1-3 in the Appendix provide examples.

![Graph showing the relationship between death sentencing rate and reversal probability.]

Figure 11

In short, narrowing the categories of death-eligible offenses, which in turn reduces the frequency with which death is sought in a jurisdiction, serves not only to reduce the gross number of errors, but the rate of errors as well. Although errors inevitably will continue to occur—including some that may occur precisely because of the aggravated quality of the worst cases—the number and risk will recede.

231. Id.


2. Racial Disparity

With regard to the impact of race, Justice Stevens’s dissent in *McCleskey* and the Baldus study presented in that case make a compelling showing that narrowing death-eligibility can significantly lessen the impact of race in capital sentencing. As Justice Stevens pointed out, when aggravation is extraordinarily severe, juries impose death sentences regardless of the race of the victim or perpetrator.234 David Baldus and his coauthors would later write with reference to Justice Stevens’s position that “[a] ruling in *McCleskey* that limited death sentencing to only those cases in which death sentences are routinely sought and imposed would have imported a greater degree of rationality and consistency into state death-sentencing systems than any of the other procedural safeguards that the Supreme Court has heretofore endorsed.”235

Unfortunately, even with strict narrowing of death eligibility, racial biases may still affect the guilt-innocence determination. As Justice White pointed out, a jury’s discretion to find mitigating circumstances surrounding even the most aggravated murder may enable it to treat race or other illegitimate factors, for example, the low social status of the victim, as a basis for sparing even the worst offenders from the death penalty.236 Narrowing, again, is not a cure-all. It is, however, a potent tool for reducing significantly the impact of race in capital cases.

3. Arbitrariness

Despite the promise of the post-*Furman* “guided discretion” statutes, the problem of arbitrariness continues to plague capital sentencing. Studies, many conducted by the states themselves, show persistent disparities between rural and urban areas and outcomes that generally defy reason.237

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236. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 623 (1978) (White, J., concurring in part, dissenting in part) (“By requiring . . . that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.”).
237. Governor Ryan discussed this problem in his commutation address:

Should geography be a factor in determining who gets the death sentence? I don’t think it should. But in Illinois it makes a difference. You are five times more likely to get a death sentence for . . . first-degree murder in the rural areas of the state than you are . . . in Cook County. Five times more. Where’s the fairness in that? Where is the fairness in the justice system?

On the other hand, when death eligibility is truly limited to the "worst of the worst" crimes and defendants—to cases in which jurors almost always impose death absent extraordinary mitigation evidence—much of the arbitrariness seems to evaporate.238

This of course was Justice Stewart's principal insight in *Furman*. But it has turned out that the narrowing statutes the Court approved "on their face" in the July 2, 1976 cases were not narrow enough to curb arbitrary prosecutorial decisions on when to seek death or arbitrary jury decision on when to impose it. Since 1976, moreover, and with the encouragement of the Court's more-is-better decisions of the late 1980s and 1990s, the States have greatly exacerbated the problem through ever-growing statutory lists and ever-broader interpretations of aggravating factors. If the goal of reducing arbitrariness is to be taken seriously, therefore, either the states or the Court will have to narrow death-eligibility factors further.

4. Availability of Resources

It is widely recognized that a major flaw in the administration of the death penalty in most states is the quality of counsel and investigative resources provided to indigent defendants.239 Enhancing the quality of legal representation and defense services is a powerful response to the problem of wrongful convictions and other flaws in the administration of capital punishment.240 But (with a few exceptions such as Illinois, Indiana,

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238. See supra notes 175-76 and accompanying text.

239. See generally M. Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L.J., June 11, 1990, at 30 (studying death penalty representation in the South and concluding that capital trials are "more like a random flip of the coin than a delicate balancing of scales," because the defense attorney is "too often . . . ill-trained, unprepared [and] grossly underpaid").

240. See generally Lefstein, supra note 222.
and Texas\textsuperscript{241}) it has been difficult to persuade legislators to increase spending on capital defense.\textsuperscript{242}

Narrowing can help address this problem. When a jurisdiction prosecutes scores of capital prosecutions in any given year, the resources available for funding of counsel or investigators are limited by the need to allocate limited funds among the universe of capital cases. Were the same jurisdiction to prosecute only a handful of capital cases each year, it would be far more feasible to provide adequate funding for high-quality defense counsel and investigation.\textsuperscript{243} Improved representation also enables the adversarial process to weed out the marginal cases that are magnets for error, conviction of the innocent, and arbitrariness.\textsuperscript{244}

VI. NARROWING BY THE COURT REDUX: VINDICATING STEWART AND STEVENS

There is, then, much force to Justice Stevens’s view that narrowing death eligibility can moderate the problems that plague capital punishment in the United States today. The question remains whether the Court as a whole is prepared to follow the public, and reinvigorate and extend its less-is-better jurisprudence of the 1970s and early the 1980s. Although the less-is-better trend on the ground is promising, it probably is not sufficient by itself, absent endorsement and enforcement by the Court, to tackle the most significant remaining flaw in the administration of the capital justice system: the states’ ever-expanding lists of ever-more-broadly interpreted capital eligibility factors.

In the last few years, public opinion has led the Court in a less-is-better direction. Relying explicitly on recent trends in death penalty legislation, prosecution, and jury verdicts, the Court recently overturned two of its own decisions issued at the height of its more-is-better period. In Justice

\textsuperscript{241} See id. (detailing the effects of Indiana’s recent increase in funding for defense counsel in capital cases); supra notes 208, 212 and accompanying text (discussing the increase in funding and other improvements in the provision of defense counsel in capital cases in Illinois and Texas).

\textsuperscript{242} See Lefstein, supra note 222, at 532 (“Of all the problems involved in achieving reform, probably none is more difficult than convincing legislators and other government officials that adequate funding should be provided for the defense of capital cases.”); Lawrence C. Marshall, Gideon’s Paradox, 73 Fordham L. Rev. 955, 961 (2004) (discussing economic and political constraints on funding of counsel).

\textsuperscript{243} For examples of instances in which jurisdictions have declined to seek the death penalty against a defendant because of the higher costs of bringing a capital case, see Russell Gold, Counties Struggle with High Cost of Prosecuting Death Penalty Cases, Wall St. J., Jan. 9, 2002, at B1; Dave Maas, Some Counties Simply Can’t Afford to Pursue Capital Offense Cases, Ariz. Capital Times, May 25, 2001, at A1. See generally Ashley Rupp, Note, Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?, 71 Fordham L. Rev. 2735, (2003).

\textsuperscript{244} See Lefstein, supra note 222, at 526 (“Improved defense representation will reduce the risk of conviction of persons genuinely innocent and of persons who, though guilty of the offense, deserve to be spared the death penalty because of mitigating circumstances.”).
Stevens's opinion for the Court in *Atkins v. Virginia*,\(^{245}\) a six-person majority concluded that the Eighth Amendment bars execution of the mentally retarded, thereby overruling the Court's 1989 decision in *Penry v. Lynaugh*.\(^{246}\) Three years later, in *Roper v. Simmons*,\(^{247}\) the Court overruled its decision in *Stanford v. Kentucky*,\(^{248}\) and held that the Constitution prohibits execution of defendants who committed their crimes as juveniles.\(^{249}\) Most notable was the vote of Justice Kennedy, a long-time adherent of Justice White's more-is-better approach,\(^{250}\) who nonetheless joined Justice Stevens's decisions in *Atkins*, and was assigned by Justice Stevens (the senior Justice in the majority) to write the decision in *Roper*.

Several other lines of recent cases also reveal a willingness on the Court's part to scrutinize death sentences more vigorously, particularly in cases falling near the mitigated circumstance. Recently, for example, the Court overturned three death verdicts due to ineffective assistance of counsel, concluding that there was a "reasonable probability" that the mitigating evidence trial counsel incompetently failed to discover would have generated a sentence less than death.\(^{251}\) To like effect are recent decisions overturning instructions that discouraged jurors from giving full weight to mitigating circumstances\(^ {252}\) and other decisions requiring jurors

\(^{245}\) 536 U.S. 304 (2002).
\(^{247}\) 125 S. Ct. 1183 (2005).
\(^{249}\) See also *In re Stanford*, 537 U.S. 968, 969-70 (2002) (Stevens, J., dissenting from denial of original habeas corpus petition) (presaging much of the analysis in *Roper* in arguing that the Court should grant an extraordinary writ in order to rule that the Constitution bars the execution of individuals for crimes they committed as juveniles).
\(^{251}\) See *Rompilla v. Beard*, 125 S. Ct. 2456, 2468-69 (2005) (finding constitutionally inadequate representation because, "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up" which in turn would have revealed "a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury"); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) ("Given both the nature and the extent of the abuse [Wiggins] suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form."); *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (Stevens, J.) (concluding "that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence" (internal quotation omitted)). *But cf.* *Bell v. Cone*, 535 U.S. 685, 702 (2002) (concluding, over Justice Stevens's dissent, that counsel's failure to plead for the defendant's life at the capital-sentencing trial after having also failed to investigate or introduce mitigating evidence was not constitutionally inadequate); *Mickens v. Taylor*, 535 U.S. 162, 164, 179 (2002) (holding, over Justice Stevens's dissent, that trial counsel's conflict of interest—counsel had previously represented the woman the defendant was charged with murdering—was not sufficiently prejudicial to the defendant to justify overturning his capital sentence).
\(^{252}\) See supra notes 94-95, 163 and accompanying text (discussing the three decisions: *Smith v. Texas*, 543 U.S. 37, 48-49 (2004); *Tennard v. Dretke*, 542 U.S. 274, 284-86 (2004);
to be told that, in assessing whether the defendant will be a danger in the future, they may consider state law assuring that defendants will be sentenced to life without parole if they are not sentenced to death—factors likely to prove decisive in close cases. The Court’s recent decision requiring a jury, not a judge, to find the statutory aggravating circumstance that makes the defendant eligible for a death sentence may have a similar effect, given the greater willingness of jurors than judges to spare the lives of capital defendants.

In the current term, moreover, the Court will decide three cases in which death row inmates seek retrials at which they can introduce newly discovered evidence undermining the evidence of guilt or positively suggesting they were innocent. The Court has also granted certiorari to reconsider the propriety of state statutes mandating death when aggravation net of mitigation is zero, i.e., when aggravation and mitigation are in “equipoise.”

Subject to recent changes in the make up of the Court with replacement of Chief Justice Rehnquist and Justice O’Connor with Chief Justice John


253. See decisions cited supra note 218.

254. See Ring v. Arizona, 536 U.S. 584, 609 (2002). On this point, Ring overruled Walton v. Arizona, 497 U.S. 639, 647-49 (1990)—a classic more-is-better decision by Justice White on this and a number of other issues, see supra notes 132, 144-46 and accompanying text—and adopted the position Justice Stevens had advocated in dissent. Walton, 497 U.S. at 713 n.4 (Stevens, J., dissenting). On the greater proclivity of judges than jurors to impose death sentences, see Harris v. Alabama, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting). Justice Stevens, joined by Justices Brennan and Marshall, wrote a strong dissent to the Court’s 1984 decision approving the small minority of capital statutes that assign judges, not juries, to decide whether to impose capital punishment. Spaziano v. Florida, 468 U.S. 447, 490 (1984); see also Baldwin v. Alabama, 472 U.S. 372, 398 (1985) (Steven, J., dissenting) (dissenting from a ruling upholding a judge’s determination to impose death under “guided discretion” procedures after receiving a recommendation of that sentence from a jury instructed that death was the mandatory punishment for the offense).

255. See Holmes v. South Carolina, 126 S. Ct. 34 (2005) (granting certiorari to review State v. Holmes, 605 S.E.2d 19 (S.C. 2005), on the question whether the trial court constitutionally barred a capital defendant on retrial from presenting evidence that another man had repeatedly confessed to acquaintances that he committed the rape-murder with which the defendant was charged); House v. Bell, 125 S. Ct. 2991 (2005) (granting certiorari to review House v. Bell, 386 F.3d 668 (6th Cir. 2004), including on the question, left open in Herrera v. Collins, 506 U.S. 390 (1993), whether the Constitution bars the execution of a prisoner who can make a convincing showing of his factual innocence based on newly discovered evidence); Oregon v. Guzek, 125 S. Ct. 1929 (2005) (granting certiorari to review State v. Guzek, 86 P.3d 1106 (Or. 2004) on the question of whether a capital defendant on retrial of the penalty phase may present evidence, some of it newly discovered, that the chief witnesses against him at the guilt phase lied in testifying about the defendant’s guilt and level of culpability).

256. Kansas v. Marsh, 125 S. Ct. 2517 (2005). The Court granted certiorari to review the decision in State v. Marsh, 102 P.3d 445 (Kan. 2004) on the question of whether Kansas may constitutionally require jurors to impose death when aggravating and mitigating circumstances are in “equipoise,” and on the effect of Walton v. Arizona, 497 U.S. 639 (1990), which upheld an Arizona statute that state courts had interpreted to have an effect similar to Kansas’s equipoise provision. Id.
Roberts and Justice Samuel Alito, there is some reason to think that the Court, tracking events on the ground, is resurrecting the Stewart-Stevens brand of narrowing and abandoning Justice White’s perilous quest for numerosness. But to give the less-is-better approach the best chance of addressing existing problems with the existing death penalty, the Court will have to go further. In the manner of jujitsu, it will have to use the impetus from the states’ own less-is-better reforms to impel them to undertake reforms they have thus far refused to adopt on their own,257 namely, limits on the number and breadth of statutory aggravating factors and other death-eligibility criteria. As is demonstrated above, with Justice Stevens’s McCleskey dissent as the starting point, narrowed death-eligibility criteria are a potent tool for curbing racial disparity, error, arbitrariness, and resource drains.258 Indeed, this was “the considered and unanimous judgment” of the Illinois Governor’s Commission on Capital Punishment—the most thoughtful and thorough public study ever undertaken of the death penalty in the United States:

[T]he number of eligibility factors in the Illinois death penalty scheme need[s] to be reduced. The continued expansion of the list of eligibility factors has placed significant burdens upon the criminal justice system, as prosecutors and courts struggle to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system, and, more important, reflect a degree of arbitrariness, when decisions across the state are compared.259

Some eligibility factors are narrow enough already or may be politically untouchable. (Murder of a police officer may be an example of both.) But the elimination or diminution of other factors is feasible and a promising response to problems with the existing capital system. As a majority of the Illinois Governor’s Commission and others have noted, an eligibility factor that is particularly ripe for elimination or narrowing is the accompanying-felony circumstance.260 Virtually all of the thirty-seven states with current death penalty statutes make defendants eligible for death if a robbery, burglary, rape, or other “assaultive” or “dangerous” felony in some manner accompanied the killing. Yet, as a majority of the Illinois Commission noted (in regard, it should be pointed out, to one of the narrowest versions of this factor among the many used by the states), the inherent breadth of this factor invites trouble:

The “course of a felony” eligibility factor, when originally enacted in the 1977 Act, enumerated nine felonies which resulted in the potential for death eligibility. The list of felonies contained in the . . . factor has now increased to fifteen. Despite the fact that [Illinois’ version of] the . . .

257. See supra Part IV.C.
258. See supra notes 175-76 and accompanying text.
259. See III. Comm’n on Capital Punishment, supra note 213, at 68.
260. See Blecker, supra note 227, at B1; Blecker & Liebman, supra note 2277.
factor is narrowly drawn in terms of its requirement for actual participation in the killing by the defendant and intent on the part of the defendant, the long list of felonies included within its scope could make almost any first degree murder eligible for the death penalty. . . .

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. 261

The disparity- and error-inviting breadth of this factor is even greater in the typical death-sentencing jurisdiction which, unlike Illinois, does not "require . . . actual participation in the killing by the defendant" or "intent" on the defendant's part. In some states, the felony-murder rule makes capital eligible any participant in a fatal felony, potentially including getaway drivers, unarmed defendants who unsuccessfully urged co-felons not to use their weapons, 262 and accomplices in felonies that ended tragically when a gun fired accidentally or when a bystander or police officer fired an errant shot. 263 The rule even sometimes applies to killings committed in the heat of passion when no felony was contemplated—as when a defendant, as an afterthought, escapes in the victim's car or takes a ring he previously gave the victim. 264

Matters are still worse in states that treat the accompanying felony both as sufficient by itself to elevate unintentional homicide to first-degree murder (the only degree of murder for which death is a possible punishment) and as the single statutory aggravating factor needed to


262. See, e.g., White v. Dugger, 483 U.S. 1045, 1049 (1987) (Brennan, J., dissenting from denial of certiorari) (arguing that the Constitution should not permit a death sentence for a defendant convicted of felony-murder who did not participate in the killing of the victims, was not aware that accomplices intended to kill victims, and had previously voiced opposition to killing anyone); State v. Hacker, 510 So.2d 304, 306 (Fla. Dist. Ct. App. 1986) (upholding a felony murder conviction when defendants fleeing scene of a robbery in a vehicle collided with another vehicle causing the death of the driver of the other vehicle).

263. See People v. Hernandez, 624 N.E.2d 661, 662, 666 (N.Y. 1993) (finding defendants liable for felony-murder based on fellow police officers' killing of an undercover officer during a shootout following the defendants' robbery); People v. Caldwell, 681 P.2d 274, 281 (Cal. 1984) (upholding a felony-murder conviction where the "defendants' malicious conduct of fleeing in a dangerous high-speed chase, confronting the officers with a dangerous weapon when the chase ended and further preparing to shoot it out with the deputies was a proximate cause of [the accomplice's] death"); State v. Baker, 607 S.W.2d 153, 156-57 (Mo. 1980) (finding the defendant responsible for the accomplice's death at the hands of the intended victim); People v. Hickman, 319 N.E.2d 511, 512, 514 (Ill. 1974) (upholding a felony-murder conviction of unarmed burglar because pursuing police officers accidently shot and killed a plain clothes detective from another jurisdiction who was also pursuing the suspect).

264. See Franklin E. Zimring & James Zuehl, Victim Injury and Death in Urban Robbery: A Chicago Study, 15 J. Legal Stud. 1, 31-36 (1986) (discussing the use of the felony-murder rule to increase killings to murder and to establish accompanying-felony aggravating circumstance for purposes of capital sentencing where evidence suggested that defendant's taking of property was an afterthought to killings committed for other reasons); see also State v. East, 481 S.E.2d 652, 664-65 (N.C. 1997) (concluding in dicta that the accompanying-felony aggravating circumstance is satisfied by proof that the defendant stole the keys to the victims' car for purposes of escape).
“narrow” first-degree murder enough to make it death eligible. In these states the accompanying felony moves a crime that otherwise lies outside the capital circle onto the circle’s circumference (by making it first degree), and then bootstraps the crime inside the circle (by making it “aggravated”). Some statutes even invite triple- and quadruple-dipping based on the accompanying felony—as where a robbery (1) turns a manslaughter or negligent homicide into first-degree murder, then (2) supplies the accompanying-felony aggravating factor, then (3) provides the only factual basis for other statutory aggravating factors, for example, that the defendant killed the victim for “pecuniary gain,” or to “eliminate a witness” or “avoid arrest” for the robbery. Individually and as a whole, these

265. See, e.g., Jefferson v. State, 353 S.E.2d 468, 475 (Ga. 1987) (rejecting a challenge to the constitutionality of the death sentence premised on an accompanying-felony aggravating circumstance after the defendant was found guilty of capital murder on a felony-murder theory); State v. Pritchett, 621 S.W.2d 127, 140-41 (Tenn. 1981) (approving use of a “during the course of a felony” aggravating circumstance in a case in which the first-degree murder conviction was based on a felony-murder theory); Rosen, supra note 62, at 1125-26 (“Some states, several of which have large death row populations, are pure felony murder states; that is, they allow the defendant to be sentenced to death solely because the killing took place during an accompanying felony. A defendant first can be convicted of first-degree murder because of the rule. The rule then is used again as an aggravating circumstance, unqualified at either stage by any mens rea requirement.”); id. at 1135 (“[D]efendants continue to be sentenced to death solely because they committed a murder during the course of a felony . . . .”) (citing cases); Zimring & Zuehl, supra note 264, at 31 (describing the use of the felony-murder rule as a means of “automatic[ally] upgrading . . . any murder involving a robbery to the status of first degree as well as . . . automatic[ally] includ[ing] . . . the robbery as a circumstance that generates eligibility for the death penalty”); see also Marc R. Shapiro, Re-Evaluating the Role of the Jury in Capital Cases After Ring v. Arizona, 59 N.Y.U. Ann. Surv. Am. L. 633, 660 (2004) (noting that “many [States]” statutory aggravating circumstances [parallel] conduct included in the list of capital offenses,” so that “the capital defendant may have certain facts counted against her twice: once as an element in the charged offense and again as an aggravating circumstance” (citing cases)). Among the decisions ruling that there is no constitutional impediment to basing a death sentence on an aggravating circumstance that duplicates an element of first-degree murder, including the element of felony murder, are Perry v. Lockhart, 871 F.2d 1384, 1392-93 (8th Cir.), cert. denied, 493 U.S. 959 (1989); McKenzie v. Risley, 842 F.2d 1525, 1539 n.30 (9th Cir.), cert. denied sub nom McKenzie v. McCormick, 488 U.S. 901 (1988); Ritter v. Thigpen, 828 F.2d 662, 665 (11th Cir. 1987); Wilson v. Butler, 813 F.2d 664, 673 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Coral v. State, 628 So. 2d 954, 958 ( Ala. Crim. App. 1992) (upholding a death sentence although the only aggravating circumstance overlapped an element of the capital offense).

266. See Rosen, supra note 62, at 1131-32 (“Other[] [states] broadly construe [the pecuniary gain aggravating factor] to include all felony murder cases where an underlying motive for monetary gain exists, including all robbery murders and most burglary murders. In these latter states, most felony murderers are automatically death eligible without any further narrowing required because most felony murders occur during robberies or other crimes committed for monetary gain.”).

267. See, e.g., James Higgins, Avoiding Furman: The Unconstitutionality of Mississippi’s Killing to Avoid Arrest Aggravator, 39 U.S.F. L. Rev. 175, 190-94 (2004). Recently courts in some states have taken steps to limit the double counting of aggravating circumstances, such as the “accompanying felony” and “pecuniary gain” circumstances. Id. Elsewhere, however, courts have been less vigilant in restricting the “duplicative” use of the “accompanying felony” and “arrest avoidance” aggravating circumstances in the same case, including when both are premised entirely on a felony murder that was previously used as
permutations (and perversions) of the "accompanying felony" factor make capital-eligible crimes out of thousands of homicides that, even apart from mitigation, will never come close to the aggravated core. Even worse, these statutory schemes then jawbone jurors into treating that single factor as multiple reasons to sentence the offender to die. The opportunities for
discrimination, error, arbitrariness, and waste of resources are rife.

To date, state legislatures have not been willing to subtract or narrow
death-eligibility criteria as a way of repairing the death penalty. For
example, although the Illinois legislature enacted a bill incorporating many
of the recommendations of the Governor's Commission—many of them
likely to reduce the number of death sentences particularly in weak and
marginal cases—\textsuperscript{268} the Commission's call to truncate the state's list of
aggravating factors from twenty to five or at least to eliminate the
accompanying-felony factor was never seriously considered.\textsuperscript{269} Nor have
state courts been willing to examine how broadly eligibility factors in the
state's statute are applied across the run of cases or whether factors such as

\begin{quote}
the basis for convicting the defendant of capital murder. \textit{Id.} In Mississippi, for example, a
large proportion of capital murder convictions are based on felony murder, and "an
overwhelming number of capital murderers face the prospect of beginning their sentencing
phase with two aggravators," felony murder and (entirely as a result of the killing in the
course of a felony) arrest avoidance. \textit{Id.}
\end{quote}

\textsuperscript{268} In response to the recommendations of the Illinois Governor's Commission on
Capital Punishment, the Illinois legislature has enacted a number of criminal-justice reforms.
These include: (1) videotaping of all interrogations in homicide cases (725 Ill. Comp. Stat.
Ann. 5/103-2.1(b) (West Supp. 2005)); (2) a pilot project utilizing improved protocols for
2005)); (3) a requirement for a pretrial reliability hearing before a jailhouse informant may
testify (725 Ill. Comp. Stat. Ann. 5/115-21(d) (West Supp. 2005)); (4) increased disclosure
testimony of a jailhouse informant or a single eyewitness (720 Ill. Comp. Stat. Ann. 5/9-1(1h-5) (West Supp. 2005)); (6) decertification of police found to have perjured themselves in
murder cases (50 Ill. Comp. Stat. Ann. 705/6.1(h) (West 2005)); (7) defense access to a
DNA database to seek out alternative suspects (725 Ill. Comp. Stat. Ann. 5/116-5 (West
Supp. 2005)); (8) increased funding for defense investigations in capital cases (725 Ill.
Comp. Stat. Ann. 105/10 (West Supp. 2005)); (9) removal of several factors that had
5/9-1(b) (West Supp. 2005)); (10) additions to the list of mitigating factors that must be
considered by a jury in capital sentencing hearings (720 Ill. Comp. Stat. Ann. 5/9-1(c) (West
Supp. 2005)); (11) changes in the statute that clarify the jury's right not to impose a sentence
of death (720 Ill. Comp. Stat. Ann. 5/9-1(g) (West Supp. 2005)); and (12) a requirement that
the state supreme court reverse any death sentence that it deems fundamentally unjust (720
(2005); Associated Press, \textit{Illinois Reforms System for Death Penalty}, Wash. Post, Nov. 20,
Penalty Reform Legislation: Calls On General Assembly To Hold Hearings With Key

\textsuperscript{269} \textit{See} Thomas P. Sullivan, \textit{Preventing Wrongful Convictions—A Current Report from
Illinois}, 52 Drake L. Rev. 605, 611 (2004) ("The Illinois legislature tinkered with language,
but made no substantive changes to the all-encompassing list of factors . . . .").
the "accompanying felony" circumstance have been stretched beyond recognition across the board or in particular outlier cases.\textsuperscript{270}

The states are not entirely to blame. In each of these respects—flabby or elastically interpreted aggravating factors, a refusal to examine the pattern of all applications of particular factors, and the denial of comparative proportionality review—state legislatures and courts have drawn support from the Supreme Court's more-is-better decisions of the 1980s and 1990s.\textsuperscript{271} The other side of the coin, however, is that in each respect, state legislatures and courts can find blueprints for needed less-is-better reforms in concurring and dissenting opinions authored or joined by Justice Stevens. If the states fail to adopt these reforms, the Court itself should elevate to law those dissenting (or in some cases separately concurring) views, by (1) tightening constitutional limits on factors that can qualify as aggravating and how broadly they may be defined,\textsuperscript{272} (2) disallowing double counting of aggravating factors,\textsuperscript{273} (3) requiring sentencers before imposing death to find a substantial balance of aggravation net of mitigation,\textsuperscript{274} and (4) expanding the extent of constitutionally mandated capital appellate review to include comparative proportionality analysis\textsuperscript{275} and examination of the pattern of each factor's application across the run of all cases.\textsuperscript{276}

\begin{footnotes}
\item[270] See, e.g., sources cited supra note 187.
\item[271] See supra Part III.C.
\item[272] See, e.g., Arave v. Creech, 507 U.S. 463, 480 (1993) (Blackmun, J., dissenting, joined by Stevens, J.); Payne v. Tennessee, 501 U.S. 808, 861 (1991) (Stevens, J., dissenting) ("The sentencer's unguided consideration of victim impact evidence thus conflicts with the principle central to our capital punishment jurisprudence that, 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976))); Lewis v. Jeffers, 497 U.S. 764, 803-04 (1990) (Blackmun, J., dissenting, joined by Stevens, J.) (concluding "that the Arizona Supreme Court has [not] placed constitutionally sufficient limitations on its 'especially heinous . . . or depraved' aggravating circumstance"); Walton v. Arizona, 497 U.S. 639, 692 (1990) (Blackmun, J., dissenting, joined by Stevens, J.) (arguing that Arizona's "body of case law" does not "articulate[] a construction of the [heinousness and related] aggravating circumstance that is coherent and consistent, and that meaningfully limits the range of homicides to which the aggravating factor will apply").
\item[273] See, e.g., Lowenfield v. Phelps, 484 U.S. 231, 258 (1988) (Marshall, J, dissenting, joined by Stevens, J.) ("[T]he application of the Louisiana sentencing scheme . . . where there is a complete overlap between aggravating circumstances found at the sentencing phase and elements of the offense previously found at the guilt phase, violates constitutional principles in ways that will inevitably tilt the sentencing scales toward the imposition of the death penalty.").
\item[275] See, e.g., Pulley v. Harris, 465 U.S. 37, 54 (1984) (Stevens, J., concurring in the judgment) ("While the cases relied upon by respondent do not establish that comparative proportionality review is a constitutionally required element of a capital sentencing system, I believe the case law does establish that appellate review plays an essential role in
\end{footnotes}
Justice Stevens suggested these needed reforms in his recent speech to the American Bar Association—277—in each case criticizing practices the Court has endorsed (over his dissent) that encourage death sentences in marginal cases.278 The Court should (1) no longer allow jurors to premise death sentences on omnipresent “victim impact” evidence, (2) forbid states to exclude from service on capital juries people who have doubts about the death penalty but are not unalterably opposed to imposing it,279 (3) overturn rules in Alabama and elsewhere allowing elected judges to “override” lawful jury verdicts that declined to impose death,280 and (4) take greater precautions against executing the innocent.281

CONCLUSION: NARROWING VERSUS NOTHING

The narrowing Justice Stevens has promoted has an additional virtue from the Court’s perspective. The approach enables the Justices to take meaningful action to address problems with the death penalty—problems several of them have gone out of their way to address in their rare public speeches282—without requiring them to take the more controversial step of declaring the penalty unconstitutional.

eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by [Furman], and hence that some form of meaningful appellate review is constitutionally required.”

276. See, e.g., Arave, 507 U.S. at 488 (Blackmun, J., dissenting, joined by Stevens, J.).
277. See supra note 139 and accompanying text.
278. See supra note 3 and accompanying text.
280. Compare Harris v. Alabama, 513 U.S. 504, 515 (1995) (majority opinion) (“The Constitution . . . is . . . not offended when a State . . . requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight [without any standards to guide that decision].”), with id. at 525 (Stevens, J., dissenting) (“[A]n unfettered judicial override of a jury verdict for life imprisonment cannot be taken to represent the judgment of the community. A penalty that fails to reflect the community’s judgment that death is the appropriate sentence constitutes cruel and unusual punishment under our reasoning in Gregg.”).
281. Compare Herrera v. Collins, 506 U.S. 390, 417 (1993) (expressing doubt whether a capital prisoner’s factual innocence is a basis for habeas corpus relief from his death sentence), with id. at 435 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) (“I believe it contrary to any standard of decency to execute someone who is actually innocent . . . [and thus] that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent.” (citations omitted)).
282. See Joan Biskupic & Fred Barbash, Retired Justice Lewis Powell Dies At 90, Wash. Post, Aug. 26, 1998, at A1 ("[Justice Powell] was the author of a 1987 five-justice ruling rejecting arguments that a state’s capital punishment system be struck down because statistics suggested blacks were more likely to get the death penalty than whites. He said he regretted that decision and declared that he had come to think that capital punishment should be abolished."); Charles Lane, O’Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed, Wash. Post, Jul. 4, 2001, at A1 ("Speaking to a meeting of Minnesota Women Lawyers in Minneapolis, O’Connor said that ‘serious questions are being raised’ about the death penalty. Noting that 90 death row inmates have been exonerated . . . since 1973, she said that ‘the system may well be allowing some innocent defendants to be executed.’"); Associated Press, Justice Backs Death Penalty Freeze, CBS News, Apr. 10,
The idea of providing the Court with a pragmatic avenue to limit the death penalty without invalidating it outright was central to Justice Stevens's dissent in McCleskey. When McCleskey was before the Court, there was a widespread sense that the future of capital punishment was in the balance. It was widely assumed that any ruling by the Court endorsing the use of statistics to show that a state's capital sentencing scheme was race based would inevitably lead to outright abolition of the penalty. The Court was unwilling to go that far. Justice Stevens sought to make the choice less binary, by assuring his colleagues that they could tackle racial disparities without immunizing the "worst of the worst" cases from the ultimate sanction.

Narrowing death-eligibility factors also makes the available responses to the problem of innocence less binary. Capital punishment need not present a choice of either accepting the execution of the innocent and those undeserving of death or eliminating the death penalty altogether. Narrowing provides a means to satisfy those who remain adamant about preserving a death penalty while still taking significant steps to reduce the likelihood of the most serious miscarriages of justice.

A critical message of Justice Stevens's death penalty jurisprudence is that narrowing death eligibility is an important incremental step that remains open to the states and the Court. Those committed to enhancing the fairness and accuracy of the capital justice system should take this lesson to heart. Justice Stevens has not hidden his personal view that "this country would be much better off if we did not have capital punishment... I really think it's a very unfortunate part of our judicial system and I would feel much, much better if more states would really consider whether they think

2001, http://www.CBSnews.com/stories/2001/04/10/deathpenalty/main284850.shtml ("Justice Ruth Bader Ginsburg supports a proposed state moratorium on the death penalty, saying that accused murderers with good lawyers "do not get the death penalty." Ginsburg criticized the often "meager" amount of money spent to defend poor people, [stating that she] would be "glad to see" Maryland become the second state after Illinois to pass a moratorium on imposition of the death penalty. "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial...""); supra note 108, infra note 284 and accompanying text (quoting and discussing Justice Stevens's public comments on two separate occasions expressing doubts about the reliability of the administration of the death penalty in the United States); see also Callins v. Collins, 510 U.S. 1141, 1145-56 (1994) (Blackmun, J., dissenting from the denial of certiorari) (cataloguing defects in the current administration of the death penalty as reason for his decision thereafter to dissent from all of the Court's decisions imposing the death penalty).

283. See Callins, 510 U.S. at 1155-57 (Blackmun, J., dissenting from the denial of certiorari) ("[S]ince McCleskey, I have come to wonder whether there was truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing."); McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) ("The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia.").
the benefits outweigh the very serious potential injustice."\textsuperscript{284} But even those who believe that “none is best” can recognize that “less is better.”

\begin{flushright}
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Table 1. The Fifteen U.S. Counties with Fifty or More Death Verdicts from 1973 to 1995: Comparison of Rates of Reversible Error and of Capitally Sentenced Defendants Later Found Not Guilty in Counties with High and Low Death-Sentencing Rates

### High Death-Sentencing Counties

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts</th>
<th>Homicides</th>
<th>Death Verdicts / 1000 Homicides</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pima (Tucson), AZ</td>
<td>63</td>
<td>986</td>
<td>64</td>
<td>71%</td>
<td>1</td>
<td>1.6</td>
</tr>
<tr>
<td>Clark (Las Vegas), NV</td>
<td>71</td>
<td>1,288</td>
<td>55</td>
<td>64%</td>
<td>2</td>
<td>2.8</td>
</tr>
<tr>
<td>Pinellas (St. Petersburg), FL</td>
<td>51</td>
<td>1,018</td>
<td>50</td>
<td>89%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Okla. (City), OK</td>
<td>68</td>
<td>1,361</td>
<td>50</td>
<td>75%</td>
<td>3</td>
<td>4.4</td>
</tr>
<tr>
<td>Maricopa (Phoenix), AZ</td>
<td>114</td>
<td>2,782</td>
<td>41</td>
<td>84%</td>
<td>5</td>
<td>4.4</td>
</tr>
<tr>
<td>Hillsborough (Tampa), FL</td>
<td>67</td>
<td>1,839</td>
<td>36</td>
<td>72%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>All 6 Counties</td>
<td>434</td>
<td>9,274</td>
<td>47</td>
<td>76% avg.</td>
<td>11</td>
<td>2.5</td>
</tr>
</tbody>
</table>

—VS.—

285. This table and the two that follow are from Liebman et al., supra note 188, at 291 tbl.10B, 294 tbl.13A, 295 tbl.13B, 297 tbl.14A, 298 tbl.14B. In each of these tables, death verdicts, homicides, and death-sentencing rates ((death verdicts/homicides) × 1000) are those occurring during the portion of the 1973-1995 period when the state in which the county is located had a valid post-Furman capital statute. Error rates are the overall capital reversal rates at the state direct appeal and federal habeas corpus stages.
### Low Death-Sentencing Counties

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts</th>
<th>Homicides</th>
<th>Death Verdicts / 1000 Homicides</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duval (Jacksonville), FL</td>
<td>66</td>
<td>2,232</td>
<td>30</td>
<td>51%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Philadelphia, PA</td>
<td>127</td>
<td>4,698</td>
<td>27</td>
<td>25%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jefferson (Birmingham), AL</td>
<td>55</td>
<td>2,161</td>
<td>25</td>
<td>55%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Broward (Ft. Lauderdale), FL</td>
<td>55</td>
<td>2,599</td>
<td>21</td>
<td>84%</td>
<td>2</td>
<td>3.6</td>
</tr>
<tr>
<td>Harris (Houston), TX</td>
<td>190</td>
<td>9,829</td>
<td>19</td>
<td>32%</td>
<td>2</td>
<td>1.1</td>
</tr>
<tr>
<td>Dade (Miami), FL</td>
<td>103</td>
<td>6,936</td>
<td>15</td>
<td>67%</td>
<td>1</td>
<td>.9</td>
</tr>
<tr>
<td>Cook (Chicago), IL</td>
<td>138</td>
<td>12,586</td>
<td>11</td>
<td>57%</td>
<td>8</td>
<td>5.8</td>
</tr>
<tr>
<td>Dallas, TX</td>
<td>61</td>
<td>5,682</td>
<td>11</td>
<td>67%</td>
<td>1</td>
<td>1.6</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>150</td>
<td>17,998</td>
<td>8</td>
<td>37%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>All 9 Counties</strong></td>
<td><strong>945</strong></td>
<td><strong>64,721</strong></td>
<td><strong>15</strong></td>
<td><strong>53% avg.</strong></td>
<td><strong>14</strong></td>
<td><strong>1.5</strong></td>
</tr>
</tbody>
</table>
Table 2. Death-Sentencing Counties with 950-1400 Homicides, 1973-1995: Comparison of Rates of Reversible Error and of Capitaly Sentenced Defendants Later Found Not Guilty in Counties with High and Low Death-Sentencing Rates

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts / 1000 Homicides</th>
<th>Homicides</th>
<th>Death Verdicts</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pima (Tucson), AZ</td>
<td>64</td>
<td>986</td>
<td>63</td>
<td>71%</td>
<td>1</td>
<td>1.6</td>
</tr>
<tr>
<td>Clark (Las Vegas), NV</td>
<td>55</td>
<td>1,288</td>
<td>71</td>
<td>64%</td>
<td>2</td>
<td>2.8</td>
</tr>
<tr>
<td>Pinellas (St. Petersburg), FL</td>
<td>50</td>
<td>1,018</td>
<td>51</td>
<td>89%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Oklahoma (City), OK</td>
<td>50</td>
<td>1,361</td>
<td>68</td>
<td>75%</td>
<td>3</td>
<td>4.4</td>
</tr>
<tr>
<td><strong>All 4 Counties</strong></td>
<td><strong>54</strong></td>
<td><strong>4,653</strong> (avg. 1,163)</td>
<td><strong>253</strong> (avg. 63)</td>
<td><strong>75% avg.</strong></td>
<td><strong>6</strong></td>
<td><strong>2.4</strong></td>
</tr>
</tbody>
</table>

—VS.—

286. In Tables 2 and 3, high death-sentencing counties are the eighty-one counties (the top one-third), among the 244 U.S. counties with five or more death verdicts during the 1973-1995 study period, that had the highest rates of death verdicts to homicides. The lowest death-sentencing counties are the eighty-one counties (bottom one-third) among the same 244 counties that had the lowest rates of death verdicts to homicides. To assure statistical comparability, this and the next table compare only those counties within the two cohorts that had like numbers of homicides during the study period. In this table, the comparison is among counties with between 950 and 1400 homicides during the study period. In Table 3, the comparison is among counties with 200 to 700 homicides during that period.
### Counties with Death-Sentencing Rates in the Bottom Third of All U.S. Death-Sentencing Counties

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts / 1000 Homicides</th>
<th>Homicides</th>
<th>Death Verdicts</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>DeKalb (suburban Atlanta), GA</td>
<td>17</td>
<td>1,065</td>
<td>18</td>
<td>100%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Fresno, CA</td>
<td>14</td>
<td>1,256</td>
<td>18</td>
<td>40%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Mecklenburg (Charlotte), NC</td>
<td>14</td>
<td>1,013</td>
<td>14</td>
<td>64%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Santa Clara (San Jose), CA</td>
<td>13</td>
<td>1,161</td>
<td>15</td>
<td>22%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jefferson (Louisville), KY</td>
<td>12</td>
<td>1,201</td>
<td>15</td>
<td>53%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Allegheny (Pittsburgh), PA</td>
<td>12</td>
<td>1,145</td>
<td>14</td>
<td>64%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Travis (Austin), TX</td>
<td>10</td>
<td>975</td>
<td>10</td>
<td>44%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Contra Costa, CA</td>
<td>9</td>
<td>1,015</td>
<td>9</td>
<td>0%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pulaski (Little Rock), AR</td>
<td>7</td>
<td>1,157</td>
<td>8</td>
<td>60%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Davidson (Nashville), TN</td>
<td>6</td>
<td>1,323</td>
<td>8</td>
<td>29%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Prince George’s (sub. Washington), MD</td>
<td>6</td>
<td>1,074</td>
<td>6</td>
<td>50%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Richmond, VA</td>
<td>5</td>
<td>1,071</td>
<td>5</td>
<td>17%</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**All 12 Counties** | 10 | 13,456 (avg. 1,121) | 140 (avg. 12) | 45% avg. | 0 | 0 |

**Counties with Death-Sentencing Rates in the Top Third of All U.S. Death-Sentencing Counties**

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts / 1000 Homicides</th>
<th>Homicides</th>
<th>Death Verdicts</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pasco (suburban Tampa-St. Petersburg), FL</td>
<td>72</td>
<td>279</td>
<td>20</td>
<td>100%</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Robeson (Lumberton), NC</td>
<td>62</td>
<td>340</td>
<td>21</td>
<td>76%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Baltimore County (suburbs), MD</td>
<td>56</td>
<td>612</td>
<td>34</td>
<td>100%</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>Bay (Panama City), FL</td>
<td>55</td>
<td>238</td>
<td>13</td>
<td>83%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Escambia (Pensacola), FL</td>
<td>55</td>
<td>513</td>
<td>28</td>
<td>87%</td>
<td>1</td>
<td>3.6</td>
</tr>
<tr>
<td>Horry (Myrtle Beach), SC</td>
<td>54</td>
<td>261</td>
<td>14</td>
<td>82%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Brevard (Melbourne), FL</td>
<td>50</td>
<td>482</td>
<td>24</td>
<td>54%</td>
<td>1</td>
<td>4.2</td>
</tr>
<tr>
<td>Volusia (Daytona Beach), FL</td>
<td>49</td>
<td>546</td>
<td>27</td>
<td>44%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>All 8 Counties</strong></td>
<td><strong>55</strong></td>
<td><strong>3,271 (avg. 409)</strong></td>
<td><strong>181 (avg. 23)</strong></td>
<td><strong>78% avg.</strong></td>
<td><strong>5</strong></td>
<td><strong>2.8</strong></td>
</tr>
</tbody>
</table>

—VS.—
## Counties with Death-Sentencing Rates in the Bottom Third of All U.S. Death-Sentencing Counties

<table>
<thead>
<tr>
<th>County (City), State</th>
<th>Death Verdicts/1000 Homicides</th>
<th>Homicides</th>
<th>Death Verdicts</th>
<th>Error Rate</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lauderdale, MS</td>
<td>20</td>
<td>246</td>
<td>5</td>
<td>80%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lucas (Toledo), OH</td>
<td>20</td>
<td>498</td>
<td>10</td>
<td>17%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lubbock, TX</td>
<td>20</td>
<td>609</td>
<td>12</td>
<td>60%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Buncombe (Asheville), NC</td>
<td>19</td>
<td>259</td>
<td>5</td>
<td>50%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lafayette, LA</td>
<td>19</td>
<td>265</td>
<td>5</td>
<td>25%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jefferson (Pine Bluff), AR</td>
<td>18</td>
<td>327</td>
<td>6</td>
<td>100%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Ventura, CA</td>
<td>18</td>
<td>545</td>
<td>10</td>
<td>14%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Brazoria, TX</td>
<td>18</td>
<td>273</td>
<td>5</td>
<td>33%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cumberland (Fayetteville), NC</td>
<td>18</td>
<td>602</td>
<td>11</td>
<td>63%</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Calcasieu (Lake Charles), LA</td>
<td>18</td>
<td>330</td>
<td>6</td>
<td>100%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Knox (Knoxville), TN</td>
<td>18</td>
<td>499</td>
<td>9</td>
<td>100%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Clayton (suburban Atlanta), GA</td>
<td>18</td>
<td>279</td>
<td>5</td>
<td>80%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Seminole (Orlando), FL</td>
<td>18</td>
<td>335</td>
<td>6</td>
<td>33%</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>Virginia Beach, VA</td>
<td>18</td>
<td>335</td>
<td>6</td>
<td>0%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>St. Lucie, FL</td>
<td>18</td>
<td>395</td>
<td>7</td>
<td>71%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Wichita (Falls), TX</td>
<td>17</td>
<td>287</td>
<td>5</td>
<td>80%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Santa Barbara, CA</td>
<td>17</td>
<td>287</td>
<td>5</td>
<td>0%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Douglas (Omaha), NE</td>
<td>17</td>
<td>658</td>
<td>11</td>
<td>68%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Franklin (Columbus), OH</td>
<td>16</td>
<td>497</td>
<td>8</td>
<td>17%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Fayette (Lexington), KY</td>
<td>16</td>
<td>315</td>
<td>5</td>
<td>40%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Tulare, CA</td>
<td>16</td>
<td>515</td>
<td>8</td>
<td>25%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bell (Killeen), TX</td>
<td>15</td>
<td>388</td>
<td>6</td>
<td>67%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Alachua (Gainesville), FL</td>
<td>15</td>
<td>388</td>
<td>6</td>
<td>20%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>County (City), State</td>
<td>Death Verdicts/1000 Homicides</td>
<td>Homicides</td>
<td>Death Verdicts</td>
<td>Error Rate</td>
<td># Not Guilty</td>
<td>% Not Guilty</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------------------------------</td>
<td>-----------</td>
<td>----------------</td>
<td>------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Spartenburg, SC</td>
<td>15</td>
<td>453</td>
<td>7</td>
<td>50%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Gaston (Gastonia), NC</td>
<td>14</td>
<td>347</td>
<td>5</td>
<td>33%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Gregg (Longview), TX</td>
<td>14</td>
<td>348</td>
<td>5</td>
<td>75%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bibb (Macon), GA</td>
<td>13</td>
<td>595</td>
<td>8</td>
<td>56%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Fairfax (suburban Washington), VA</td>
<td>13</td>
<td>376</td>
<td>5</td>
<td>14%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hidalgo (McAllen), TX</td>
<td>12</td>
<td>409</td>
<td>5</td>
<td>50%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Delaware (suburban Philadelphia), PA</td>
<td>12</td>
<td>491</td>
<td>6</td>
<td>0%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Greenville, SC</td>
<td>11</td>
<td>555</td>
<td>6</td>
<td>40%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Camden, NJ</td>
<td>11</td>
<td>559</td>
<td>6</td>
<td>100%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Guilford, NC</td>
<td>11</td>
<td>564</td>
<td>6</td>
<td>60%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Galveston, TX</td>
<td>11</td>
<td>664</td>
<td>7</td>
<td>44%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Richland (Columbia), SC</td>
<td>9</td>
<td>634</td>
<td>6</td>
<td>40%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Salt Lake, UT</td>
<td>8</td>
<td>655</td>
<td>5</td>
<td>20%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>All 36 Counties</strong></td>
<td><strong>15</strong></td>
<td><strong>15,782</strong></td>
<td><strong>239</strong></td>
<td><strong>48%</strong></td>
<td><strong>2</strong></td>
<td><strong>0.8</strong></td>
</tr>
</tbody>
</table>