The Problem of Implementing a Constitutional System of Capital Punishment

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I. INTRODUCTION

The Supreme Court of the United States fundamentally altered the role of the federal courts in capital punishment when, in *Furman v. Georgia*,[1] it effectively declared all state capital punishment systems then in use in the United States unconstitutional. This momentous decision represented an abrupt departure from the Court's prior reticence in this area.[2] Although there was no majority opinion for the Court,[3] the five Justices who voted for the *Furman* result generally agreed that the capital punishment systems of 1972 bestowed upon the sentencer a constitutionally unacceptable level of discretion to decide who should die and who should not, resulting in the arbitrary imposition of death sentences.[4] The suspicion that this discretion permitted states to implement capital punishment in a racially discriminatory fashion further bolstered the opinions of at least some of the Justices that the 1972 systems were unconstitutional.[5] In form, the Justices based their conclusion that the capital punishment systems of 1972 were unconstitutional on the Eighth Amendment's prohibition on the infliction of "cruel and unusual punishments,"[6] although their rationales (arbitrariness and

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1. 408 U.S. 238 (1972).

2. Indeed, in *McGautha v. California*, 402 U.S. 183 (1971), *vacated by* Crampton v. Ohio, 408 U.S. 941 (1972), decided only the previous term, the Supreme Court reconfirmed its tradition of non-involvement in capital sentencing when it rejected the arguments that in capital cases the Constitution (1) prohibits granting the sentencer unlimited discretion; *id.* at 207 and (2) requires a separate sentencing proceeding following the guilt phase of the trial, *id.* at 213.

3. The Court issued ten separate opinions: a per curiam opinion for the Court and a separate opinion for each Justice. *See* 408 U.S. at 239-470.

4. *See, e.g., id.* at 309-310 (Stewart, J., concurring), 313 (White, J., concurring).

5. *See, e.g., id.* at 253-57 (Douglas, J., concurring), 310 (Stewart, J., concurring), 363-65 (Marshall, J., concurring).

6. The Eighth Amendment provides in its entirety that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. CONST. amend. VIII (emphasis added). The Justices in *Furman* expressly based their determination of unconstitutionality on the Cruel and Unusual Punishments Clause of this amendment. *See* 408

racial discrimination) sound very much like due process and equal protection concerns.

Importantly for any state seeking to implement and administer a constitutional system of capital punishment today, *Furman* did not end either capital punishment or the Supreme Court's involvement in this area. Instead, in 1976, the Court addressed the constitutionality of five of the approximately three dozen state capital punishment statutes that were enacted in response to *Furman*. The Supreme Court upheld three statutes that limited and guided the sentencer's discretion[7] and struck down two that imposed mandatory capital sentences.[8] In so doing, the Supreme Court identified and applied two primary principles that now form the core of the Court's Eighth Amendment capital jurisprudence. These principles are that (1) the sentencer must be given specific guidance regarding how to determine when death is an appropriate sentence (the "guided discretion" principle) and (2) in making that determination, the sentencer must be permitted to consider each defendant's situation on an individual basis (the "individualized sentencing" principle). The guided discretion and individualized sentencing principles are the ostensible bases for the vast framework of constitutional rules—one Justice has referred derisively to the Court's role as that of "rulemaking body for the States' administration of capital sentencing"[9]—that the Supreme Court has developed since 1976 to govern the trial and review of capital cases.[10]

U.S. at 240, 256 (Douglas, J., concurring), 257 (Brennan, J., concurring), 306 (Stewart, J., concurring), 310-12 (White, J., concurring), 314 (Marshall, J., concurring). The Eighth Amendment, by its terms, is not applicable to the states; and therefore its prohibitions may, as a federal constitutional matter, be imposed on the states only by virtue of incorporation of the Eighth Amendment's prohibitions through the Due Process Clause of the Fourteenth Amendment. Over one hundred years ago, the Supreme Court held that the Eighth Amendment did not apply to the states, *see O'Neil v. Vermont*, 144 U.S. 323, 332 (1982); and in deciding *Furman* the Court did not declare expressly that the Eighth Amendment's Cruel and Unusual Punishments Clause applies to the states by virtue of incorporation through the Fourteenth Amendment's Due Process Clause; but the Court since *Furman* regularly has applied the prohibition to the states in the capital sentencing context. *Cf.* Browning-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (reserving the question of whether Eighth Amendment's prohibition on excessive fines applies to the states); *id.* at 283-84 (O'Connor, J., dissenting) (arguing that it must apply, in large part because of the Court's capital jurisprudence).

7. Gregg v. Georgia, 428 U.S. 153, 207 (1976); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

8. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

9. Walton v. Arizona, 497 U.S. 639, 657 (1990) (Scalia, J., concurring).

10. An unscientific count of capital cases the Supreme Court has decided with full briefing and oral argument since 1976 indicates that there are approximately 75-80 such cases, an average of approximately four per term. In addition, the Court has issued several opinions in ruling on applications for stays of execution in capital cases. Virtually every provision in the new Kansas

The Supreme Court's construction and application of the guided discretion and individualized sentencing principles in particular cases has created an identifiable conflict between the two. The guided discretion principle, which clearly has its genesis in *Furman* itself, in theory requires that the sentencer be given specific guidelines regarding the circumstances in which death is an appropriate sentence. Taken to its extreme, this principle might justify a rigid, formulaic, or even mandatory approach to the sentencing determination. The Supreme Court, however, rejected mandatory capital punishment in 1976, striking down two such statutes.[11]

The individualized sentencing principle—which is not derived from *Furman* but instead was first recognized in the 1976 cases—requires the sentencer to focus on the individual defendant in each case. The reasoning that the Supreme Court has offered in support of this principle is that, because death is the ultimate punishment ("penalty of death is qualitatively different"[12]), there is a heightened need for reliability in determining such a sentence and the Eighth Amendment therefore requires that the sentencer carefully consider all the circumstances surrounding the defendant's crime, including the defendant's background, history and so forth. The individualized sentencing principle, however, when interpreted broadly, could permit the sentencer to grant mercy on the basis of almost *any* evidence a defendant argues that counsels against death, irrespective of the factors a state may have identified to guide the sentencing determination.

The tension between the two principles thus arises when the defendant's mitigation evidence—which typically is intended either to generate sympathy or to provide justification or excuses for the defendant's conduct—does not fit within or relate to the (ostensibly) objective factors the state has identified in its capital punishment system to guide the sentencer's discretion in deciding whether to impose a death sentence. The state cannot guide the sentencer's discretion if the sentencer is permitted to ignore statutorily identified factors and recommend mercy on the basis of *anything* the defendant chooses to present. The individualized sentencing principle, when broadly

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capital punishment statute, see *infra* Part II.D., is based on a constitutional rule created by the Supreme Court since 1976. *See* Stephen R. McAllister, *Implementing Capital Punishment in Kansas*, 64 K.B.A.J. ___ (forthcoming 1995). *See generally*, RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982); WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 4-25 (1991).

11. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

12. *Woodson*, 428 U.S. at 305 (opinion of Stewart, Powell and Stevens, JJ.).

interpreted, explodes any attempt by the state to guide the sentencer's discretion.[13]

In essence, the simultaneous pursuit of the guided discretion and individualized sentencing principles is a zero-sum dilemma. In other words, any attempt to guide discretion necessarily limits consideration of individualized circumstances, and *vice versa*. The greater the vigor with which the Supreme Court pursues one goal, the greater the damage it must necessarily do to the other goal. Fundamentally, the only solutions are either to eliminate one of the goals or to strike an acceptable balance between the two. The zero-sum problem of attempting to restrict discretion while at the same time retaining flexibility is not unique to capital jurisprudence,[14] but it takes on a heightened importance in the capital context given the potential consequences.

Justice Blackmun, shortly before his retirement last year, acknowledged the tension between the two principles as the Court has developed and applied them, and announced that the Supreme Court should give up capital punishment altogether, at least for the time being, because there is no solution to the zero-sum dilemma.[15] In Justice Blackmun's view, the Court cannot adhere to both principles and at the same time craft rules that permit states to implement and administer capital punishment in a constitutional fashion.[16] This public acknowledgement of the constitutional dilemma by perhaps the Court's most liberal member at the time followed prior recognition of the problem by two of Justice Blackmun's more conservative colleagues. In *Walton v. Arizona*,[17] Justice Scalia argued that the line of cases applying (and in his view vastly extending) the original individualized sentencing principle as created in the 1976 cases is inconsistent with *Furman*'s

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13. *See, e.g.*, Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 495 & n.6 (1992).

14. Other examples of the tension between restricting a decisionmaker's discretion to avoid the arbitrary exercise of power and retaining flexibility to ensure fairness in specific situations abound. One example is the United States Sentencing Guidelines, 18 U.S.C.S. App. (Law. Co-op. 1994), which greatly curtail sentencing judges' discretion but do provide for upward or downward adjustments in particular circumstances. Another example would be an administrative agency's adoption of a rule that creates specific standards for obtaining a license or some other benefit, but also provides for waivers and exceptions in some situations.

15. Callins v. Collins, 114 S. Ct. 1127, 1137 (1994) (Blackmun, J., dissenting from denial of stay). *See also*, Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 KAN. L. REV. 367 (1995) (chronicling Justice Blackmun's evolution from dissenter in *Furman v. Georgia* to proponent of abolishing capital punishment in *Callins v. Collins*).

16. *Id.* Justice Blackmun's opinion prompted a sharp response from Justice Scalia. *See id.* at 1127-28 (Scalia, J., concurring in denial of stay).

17. 497 U.S. 639 (1990).

requirement of guided discretion and has no basis in the text or history of the Eighth Amendment; he therefore proposed that the Court abandon it altogether.[18] Subsequently, Justice Thomas considered the relationship between the two principles and proposed a compromise.[19] He recognized the constitutional validity of some form of the individualized sentencing principle but argued that the Supreme Court had carried the principle beyond its appropriate bounds.[20] Thus, he concluded that the Court should attempt to strike an appropriate balance between its pursuit of these two objectives by reemphasizing the guided discretion principle and reconstruing the individualized sentencing principle more narrowly.[21] These recent opinions representing the views of Justices at opposite ends of the political spectrum who employ very different interpretational methodologies suggest that the Supreme Court's current capital jurisprudence may be in need of fundamental reexamination.[22]

This Article examines the zero-sum dilemma inherent in the Supreme Court's current capital jurisprudence. Part II traces the evolution of the Supreme Court's capital jurisprudence from the ratification of the Constitution to 1993. Specifically, Part II.A. traces the Supreme Court's pre-1972 history of non-involvement in capital punishment as a federal constitutional issue and examines the nature of the state capital punishment systems that existed immediately prior to the Court's decision in *Furman*; Part II.B. addresses the Court's recognition of the guided discretion principle in *Furman* and its creation of the individualized sentencing principle in the 1976 cases; Part II.C. examines some representative cases applying the principles over the next seventeen years; and Part II.D. describes and discusses the new Kansas capital punishment statute as an example of a modern, post-*Furman* capital sentencing system, particularly as it relates to implementation of the two principles.

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18. *Id.* at 662-73 (Scalia, J., concurring).

19. Graham v. Collins, 113 S. Ct. 892, 914 (1993) (Thomas, J., concurring).

20. *See id.* at 906-09.

21. *Id.* at 914-15.

22. That the Supreme Court's capital jurisprudence is problematic in any number of ways is neither a novel nor controversial suggestion. *See, e.g.*, MARK TUSHNET, THE DEATH PENALTY (1994); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205 (1992); Diane Wells, *Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of Furman*, 80 J. CRIM. L. & CRIMINOLOGY 427 (1989); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Michael W. Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S. U. L. REV. 1 (1980) (arguing that the Supreme Court may desire uncertainty in its capital jurisprudence because uncertainty generates litigation, giving the Court more opportunities to intervene in this area and shape public policy).

Part III.A. examines the Supreme Court's current debate regarding its capital jurisprudence. Part III.B. considers whether the Court's capital jurisprudence is sensible and whether it serves to address the concerns that gave rise to the Court's initial decision in *Furman* to constitutionalize the law of capital punishment after 180 years of non-involvement. In particular, Part III.B.1. concludes that the Supreme Court should resolve the zero-sum dilemma along the lines Justice Thomas suggested by reemphasizing the guided discretion principle and narrowing the individualized sentencing principle in order to strike an appropriate, sensible balance that retains a limited but significant role for the federal courts. Part III.B.2. considers the problem of racial discrimination in capital punishment, its role in the Court's decision in *Furman* and its importance in formulating a sensible and fair capital jurisprudence. Parts III.B.3. and 4. consider and tentatively reject the alternatives suggested by Justices Scalia and Blackmun. Finally, Part III.B.5. suggests that even the dramatic step of prohibiting the imposition of capital punishment altogether as a matter of federal constitutional law, although not yet warranted, ultimately may be the most satisfying resolution to the constitutional dilemma.

II. THE SUPREME COURT'S CAPITAL PUNISHMENT JURISPRUDENCE

A. Prior to 1972

1. Constitutional Decisions

For most of this nation's history, the Supreme Court of the United States demonstrated a strong reluctance to treat capital punishment as an issue of federal constitutional law. There are virtually no Supreme Court opinions in capital cases decided prior to the Civil War that even address federal constitutional challenges to the imposition or execution of a death sentence. Although constitutional issues were raised in a few capital cases reaching the Supreme Court in the fifty years following the Civil War, no successful challenges to capital punishment were based on the Eighth Amendment.[23] Similarly, during the first half of the

23. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (holding that execution by public shooting does not violate the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment."); Calton v. Utah, 130 U.S. 83, 86-87 (1889) (reversing death sentence—without reference to any particular constitutional provision—when trial court failed to inform jury in murder case that it had the option by statute of

twentieth century, the Supreme Court rarely addressed constitutional issues in capital cases,[24] and when it did it interpreted the Constitution to impose virtually no restraints on the states' administration of their capital punishment systems.[25] Certainly, the Court did not recognize the Eighth Amendment as the source of any significant constitutional prohibitions or limitations.[26] Not until the 1960s, when the Warren Court generally became active in addressing and upholding criminal defendants' individual rights claims, did the Court impose any significant federal constitutional constraints on capital punishment.[27]

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recommending a sentence of life imprisonment); *In re* Kemmler, 136 U.S. 436, 447-49 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.") (rejecting challenges to a New York statute requiring that execution be accomplished by electrocution); Winston v. United States, 172 U.S. 303, 312-13 (1899) (construing an act of Congress permitting juries to recommend life imprisonment rather than a death sentence in murder cases arising in the District of Columbia to require that the jury be given that option no matter the circumstances of the crime because the ultimate sentencing decision "is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."); Finley v. California, 222 U.S. 28, 31 (1911) (rejecting equal protection challenge to California statute making premeditated murders committed by inmates serving life sentences punishable by death).

24. *See, e.g*, Powell v. Alabama, 287 U.S. 45, 71-72 (1932) (due process requires the appointment of counsel for indigent defendants in capital cases).

25. *See, e.g.*, Francis v. Resweber, 329 U.S. 459, 462-65 (1947) (holding that executing petitioner after first attempt to execute by electrocution was unsuccessful due to mechanical difficulties would not violate double jeopardy, the Eighth Amendment, due process or equal protection principles); Solesbee v. Balkcom, 339 U.S. 9, 12-13 (1950) (rejecting a due process challenge to a Georgia statute that granted the governor the power to determine whether a person under a death sentence had become insane after imposition of the sentence and therefore could not be executed under state law, declaring that "[w]e cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved").

26. *See, e.g.*, Williams v. Oklahoma, 358 U.S. 576, 586-87 (1959) (holding that sentence of death for kidnapping did not violate due process "or any other constitutional right"). Because the Eighth Amendment by its terms does not apply to the states, it can apply to them only by virtue of incorporation into the Due Process Clause of the Fourteenth Amendment. As explained above, the Supreme Court held in the late nineteenth century that the Eighth Amendment did not apply to the states, and the Court has never expressly addressed the incorporation question with respect to the Cruel and Unusual Punishments Clause of the Eighth Amendment, although it has applied that prohibition regularly to the states in capital cases since *Furman*. *See supra*, note 6.

27. *See, e.g.*, United States v. Jackson, 390 U.S. 570, 581-85 (1968) (declaring unconstitutional—as a violation of Fifth and Sixth Amendment rights—a federal statute's death penalty clause that created an offense punishable by death if the case was tried to a jury but appeared not to permit the imposition of a death sentence if guilt was determined in a bench trial or by guilty plea); Witherspoon v. Illinois, 391 U.S. 510, 521-23 (1968) (holding that it violates due process to carry out a death sentence "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

In 1971, however, in *McGautha v. California*,[28] the Court held that unlimited discretion in capital sentencing was not unconstitutional[29] and that the Constitution did not require a separate sentencing proceeding in capital cases.[30] *McGautha* involved two consolidated cases, the named case and *Crampton v. Ohio*,[31] a capital case from Ohio.[32] The California case raised the issue of unlimited jury discretion to impose sentence while the Ohio case raised both that question and the question of whether the Constitution required a separate sentencing proceeding in capital cases.[33]

In rejecting the defendants' constitutional challenges—which they based not on the Eighth Amendment but the Fourteenth Amendment's Due Process Clause[34]—Justice Harlan, writing for the Court, first observed that

> Before proceeding to a consideration of the issues before us, it is important to recognize and underscore the nature of our responsibilities in judging them. Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases. In assessing the validity of the conclusions reached in this opinion, that basic factor should be kept constantly in mind.[35]

In addressing the claim that unlimited sentencing discretion violated due process, the Court pointed out that "[n]one of these States have . . . adopted statutory criteria for imposition of the death penalty. In recent years, challenges to standardless jury sentencing have been presented to many state and federal appellate courts. No court has held the

28. 402 U.S. 183 (1971), *vacated by* Crampton v. Ohio, 408 U.S. 941 (1972).
29. *Id.* at 207-08.
30. *Id.* at 220.
31. 248 N.E. 2d 614 (1969), *vacated*, 408 U.S. 941 (1972).
32. *McGuatha*, 402 U.S. at 185.
33. *Id.*
34. *See id.* at 196 ("To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.").
35. *Id.* at 195-96.

challenge good."[36] Similarly, the Court rejected the claim that the Constitution required a separate sentencing proceeding in capital cases.[37]

Thus, for over 180 years, the Supreme Court rarely ventured into the area of capital punishment as a constitutional matter, and when it did so its decisions were quite limited in scope. Prior to 1972, the Eighth Amendment was not the source of a single successful challenge to capital punishment; indeed, frequently the Eighth Amendment is not even mentioned in the Court's pre-1972 opinions. Thus, until *Furman* the states developed and administered their capital punishment systems with virtually no federal oversight.

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36. *Id.* at 203. Thus, with respect to this claim, the Court concluded that

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. 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. 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 207-08 (footnote omitted). The Court pointed out, however, that "[t]he issue whether a defendant is entitled to an instruction that certain factors such as race are not to be taken into consideration is not before us, as the juries were told not to base their decisions on 'prejudice,' and no more specific instructions were requested." *Id.* at 207 n.17.

37. The opinion declared that

> [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider 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.
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> The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair. Having reached these conclusions we have performed our task of measuring the States' process by federal constitutional standards . . . .

Id. at 221-22 (citations omitted).

2. Representative State Capital Punishment Systems

A brief examination of the statutes underlying the California and Ohio systems that the Court upheld in *McGautha*[38] illustrates the relative simplicity of the pre-*Furman* systems of capital punishment. The California statute required that there be a sentencing proceeding separate from the guilt phase in capital cases,[39] but provided essentially no standards by which the sentencer was to determine whether death was the appropriate penalty. Indeed, the statute provided only as follows:

> Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death *shall be in the discretion* of the court or jury trying the issue of fact on the evidence presented . . . .[40]

Similarly, Ohio law did not provide any specific guidelines for determining whether a death sentence was an appropriate punishment. Rather, in the case before the Court, the defendant was tried and sentenced in a single proceeding in accordance with Ohio practice.[41] The trial court instructed the jury simply that "'[i]f you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life.'"[42] Ohio law further provided that, prior to imposition of sentence, a defendant had the right of allocution — that is, the right to make a statement to the court regarding any reasons why judgment should not be pronounced against him.[43] Finally, under Ohio law, neither the trial court nor an appellate court could reduce a jury's verdict in favor of death.[44] The standardless nature of the capital punishment determination under the California and Ohio systems was endemic to the states' capital sentencing processes prior to the Supreme Court's decision in *Furman*.[45]

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38. 402 U.S. 183 (1971), *vacated by* Crampton v. Ohio, 408 U.S. 941 (1972).

39. *See* CAL. PENAL CODE §190.1 (1970) (repealed 1973).

40. *Id.* (emphasis added); *see also McGautha*, 402 U.S. at 186 n.3.

41. *McGautha*, 402 U.S. at 191-92.

42. *Id.* at 194. The trial court also instructed the jury not to be influenced by sympathy or prejudice. *Id.* at 194.

43. *Id.* at 195, 217-18 (citing OHIO REV. CODE ANN. §2947.05 (1954)).

44. *Id.* at 195 n.7.

45. *See id.* at 203 (None of the States have "adopted statutory criteria for imposition of the death penalty. In recent years, challenges to standardless jury sentencing have been presented to many state and federal appellate courts. No court has held the challenge good."). *See also, e.g.*, KAN. STAT. ANN. §21-403 (1964) (repealed 1970) (providing that "every person convicted of murder in the first degree shall be punished by death, or by confinement and hard labor in the

B. The Birth of a Constitutional Jurisprudence

1. Guided Discretion: Furman v. Georgia

The Supreme Court's history of non-involvement in capital punishment changed dramatically in 1972 when the Court decided *Furman v. Georgia*.[46] In *Furman*, the Court considered Georgia and Texas capital punishment systems.[47] The Georgia system, like the California system the Court approved in *McGautha*, provided essentially no standards by which the sentencer was to determine whether death was an appropriate penalty. The Georgia statute provided that the punishment for persons convicted of murder "shall be death" but could be life instead if (1) the jury returned "a recommendation of mercy" or (2) the conviction rested "solely on circumstantial testimony."[48] In the former situation, the trial judge was required to sentence the defendant to life imprisonment rather than death, but in the latter situation the court had the discretion to choose either life imprisonment or death.[49] Similarly, the Texas statute at issue provided that "[t]he punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two,"[50] with the ultimate sentencing determination left primarily in the jury's hands without any specific guidance.

In *Furman* the Court held that the Georgia and Texas statutes were unconstitutional because they lacked adequate standards to guide the sentencer's discretion and thus permitted the arbitrary and capricious

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penitentiary of the state of Kansas for life. If there is a jury trial the jury shall determine which punishment shall be inflicted. If there is a plea of guilty the court shall determine which punishment shall be inflicted and in doing so shall hear evidence . . . ."); FLA. STAT. ANN. §921.141(2)(a) (West 1973) ("The determination of whether the defendant will be recommended to the mercy of the court shall be in the discretion of the court or jury trying the issue of the facts on the evidence presented . . . ."); MISS. CODE ANN. §99-19-13 (1972) (repealed 1974) (providing that in capital cases, the jury "may fix the punishment at imprisonment for the natural life of the party"); OKLA. STAT. ANN. tit. 21 § 707 (West 1971) (repealed 1973) ("Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury."); ARIZ. REV. STAT. ANN. §43-2903 (1939) (current version at ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1994)) ("Every person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, at the discretion of the jury trying the same . . . .").

46. 408 U.S. 238 (1972) (per curiam).

47. *Furman* actually consisted of three consolidated cases, two from Georgia and one from Texas. *See id.* at 239 (deciding *Furman v. Georgia*, No. 69-5003, *Jackson v. Georgia*, No. 69-5030, and *Branch v. Texas*, No. 69-5031). The petitioners in *Jackson* and *Branch* were sentenced to death for rape, while the petitioner in *Furman* had been found guilty of murder. *Id.*

48. GA. CODE ANN. §26-1005 (Supp. 1971).

49. *Id.*

50. TEX. PENAL CODE ANN. art. 1257 (1961) (amended 1973).

imposition of capital punishment.[51] The Court concluded that, under these statutes, it was impossible to differentiate between those persons who received the death penalty and those who did not.[52] Moreover, the Court had before it evidence and arguments that the southern states administered capital punishment in a racially discriminatory fashion,[53] a problem that clearly concerned several of the Justices.

For example, Justice Douglas thought it unconstitutional to apply capital punishment "selectively to minorities"[54] such as "'the poor, the Negro, and the members of unpopular groups.'"[55] Thus, he concluded that unlimited sentencing discretion "enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."[56] Justice Marshall similarly observed that committing the sentencing determination to the sentencer's unguided discretion was "an open invitation to discrimination"[57] on the basis of race or other inappropriate considerations. Justice Stewart emphasized that those sentenced to death were "among a capriciously selected random handful"[58] upon whom the punishment was "wantonly and . . . freakishly" inflicted,[59] and Justice White saw "no meaningful basis for distinguishing" those who were sentenced to death from those who were not.[60] Likewise, Justice Brennan concluded that, under a standardless sentencing scheme, there was no "rational basis" for distinguishing "the few who die from the many who go to

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51. *See* 408 U.S. at 239-470. The Court issued ten separate opinions: a *per curiam* opinion for the Court, *id.* at 239-40, and a separate opinion for each Justice, *id.* at 240-70.

52. *See, e.g., id.* at 294 (Brennan, J., concurring), 309-10 (Stewart, J., concurring) 313 (White, J., concurring).

53. Indeed, the three petitioners before the Court were black men who had been sentenced to death for crimes committed against white victims—two rapes and one unintentional killing—in the states of Georgia and Texas. *Id.* at 252-53 (Douglas, J., concurring), 294-95 n.48 (Brennan, J., concurring). Three justices expressly commented upon the racial aspect of the issue before the Court. *Id.* at 253-57 (Douglas, J., concurring), 363-65 (Marshall, J., concurring), 310 (Stewart, J., concurring). Justice Thomas discussed the nature and sources of the racial discrimination evidence presented to the Court in *Furman*, as well as the NAACP Legal Defense and Educational Fund, Inc.'s, litigation strategy in presenting that information to the Court, in his concurring opinion in *Graham v. Collins*, 113 S. Ct. 892, 902-06 (1993) (Thomas, J., concurring).

54. *Furman*, 408 U.S. at 245 (Douglas, J., concurring).

55. *Id.* at 249-50 [quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

56. *Id.* at 255.

57. *Id.* at 365 (Marshall, J., concurring).

58. *Id.* at 309-10 (Stewart, J., concurring).

59. *Id.* at 310.

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

prison."[61] Ultimately, Justice Stewart suggested that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[62]

In form, the individual Justices' opinions in *Furman* focus on the Eighth Amendment's prohibition on the infliction of "cruel and unusual punishments."[63] The issues the Court considered, however, (arbitrariness and racial discrimination) are also due process and equal protection concerns. Justice Powell, dissenting in *Furman*, recognized that "it seems clear that the tests for applying these two provisions [the Due Process Clause of the Fourteenth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment] are fundamentally identical."[64] Nonetheless, it may be important that cases subsequent to *Furman* have continued to pay lip service to the Eighth Amendment as the touchstone of capital jurisprudence.[65]

Thus, at least in form, the primary focus of the Supreme Court's current capital jurisprudence is the Cruel and Unusual Punishments Clause of the Eighth Amendment rather than either the Due Process Clause or the Equal Protection Clauses of the Fourteenth Amendment. As a consequence, the Court implicitly treats the Fourteenth Amendment as simply incorporating the requirements of the Eighth Amendment and requiring virtually nothing more. The Court has not viewed the Fourteenth Amendment as imposing any significant, independent limitations on the states' implementation and administration of their capital punishment systems.

2. Guided Discretion and Individualized Sentencing: The 1976 Decisions

Rather than resulting in the demise of capital punishment, as some might have expected, the Supreme Court's decision in *Furman* prompted thirty-five states to enact new capital punishment statutes.[66] The states designed this second generation of capital punishment

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61. *Id.* at 294 (Brennan, J., concurring).

62. *Id.* at 310 (Stewart, J., concurring).

63. *See, e.g., id.* at 240, 256 (Douglas, J., concurring), 257 (Brennan, J., concurring), 306 (Stewart, J., concurring), 310-11 (White, J., concurring), 314 (Marshall, J., concurring). The Court had not, at the time it decided *Furman*, held that the Eighth Amendment applied to the States by virtue of incorporation into the Due Process Clause of the Fourteenth Amendment, and it did not expressly do so in *Furman* itself, although subsequently it repeatedly has applied the Eighth Amendment's Cruel and Unusual Punishments Clause to the States in capital cases. *See supra*, note 6.

64. *Id.* at 422 n.4 (Powell, J., dissenting).

65. *See infra* Part III.B.

66. *See* Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

statutes to respond specifically to the concerns the Court expressed in *Furman* about unguided discretion and the resulting potential for arbitrary sentencing. In 1976, in five consolidated cases, the Supreme Court upheld three of these statutes against constitutional challenge while striking down two others.[67] These cases reaffirmed the guided discretion to which *Furman* had given birth and, for the first time, recognized the individualized sentencing principle.

In *Gregg v. Georgia*,[68] *Proffitt v. Florida*,[69] and *Jurek v. Texas*,[70] the

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67. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (upholding capital punishment statute); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976) (upholding capital punishment statute); Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding capital punishment statute); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down capital punishment statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down capital punishment statute). Although the controlling opinions in the five consolidated cases never refer specifically to the racial discrimination concerns that the Court addressed in *Furman*, the three cases in which the Court upheld capital punishment statutes involved white defendants while the two cases in which the Court struck down the statutes involved black defendants. *See* Graham v. Collins, 113 S. Ct. 892, 908 n.7 (1993) (Thomas, J., concurring).

68. 428 U.S. 153 (1976). The Georgia statute approved by the Court required the jury as sentencer—following a defendant's conviction of murder—to consider any mitigating or aggravating circumstances in determining the appropriate sentence. GA. CODE ANN. § 26-3102 (Supp. 1975) (current version at § 17-10-30 (1990)). The statute provided that if the jury recommended a sentence of death, it had to designate in writing the statutory aggravating circumstances which the jury found to exist beyond a reasonable doubt. *Id.* The statute further provided that, if the jury failed to find the existence of any statutory aggravating circumstances, then the death penalty was not permissible. *Id.* The Georgia statute did not provide, however, that the jury was to weigh or balance the aggravating and mitigating circumstances in determining whether death was the appropriate sentence. Thus, the Georgia system is not considered a "weighing" system in the sense that most of the capital punishment statutes in this country are. *See* Clemons v. Mississippi, 494 U.S. 738, 744-45 (1990) (Georgia is not a "weighing" state because the finding of aggravating circumstances under the Georgia statute "serve[s] only to make a defendant eligible for the death penalty and not to determine the punishment").

69. 428 U.S. 242 (1976). The Florida system that the Court approved was considerably more complicated than the Georgia system. Under the Florida statutes, when a defendant was convicted of capital murder, the trial court was required to conduct a separate sentencing proceeding; any evidence relevant to statutory mitigating or aggravating factors had to be admitted. At the conclusion of the hearing, the trial court was to instruct the jury to consider whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist, and to decide, based on those considerations, whether the defendant should be sentenced to death or life imprisonment. The jury had to return a verdict by majority vote, but its determination was only advisory. The trial judge ultimately imposed sentence but could override a jury recommendation in favor of life imprisonment only if the facts that suggested a death sentence were so clear that virtually no reasonable person could differ. Even if the jury recommended death, however, the trial judge was required to weigh the aggravating and mitigating circumstances and to set forth in writing its findings upon which it based any death sentence. The statute also provided for automatic review by the Supreme Court of Florida. See FLA. STAT. ANN. § 921.141(4) (Supp. 1976-1977) .

70. 428 U.S. 262 (1976). The Texas system approved by the Court first defined capital murder as an intentional or knowing killing accompanied by one of five statutory aggravating

Supreme Court upheld death penalty statutes that created "aggravating" and "mitigating"—or in the Texas case "special"—circumstances as a way of limiting and guiding the sentencer's discretion. The controlling opinion in each of these cases was a joint opinion of Justices Stewart, Powell and Stevens. These three Justices distilled from *Furman* the guided discretion principle and emphasized that, in order to satisfy the Constitution, a system of capital punishment must provide specific, objective standards to guide the sentencer.[71] The controlling opinion read *Furman* to stand for the proposition that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[72] In addition, however, the Court pointed out that a constitutional system of capital punishment must require the sentencer to focus on the circumstances of the crime and the character of the defendant.[73]

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factors. See TEX. PENAL CODE ANN. § 19.03(a) (West 1974) (amended 1983, 1985, 1991, 1993 and 1994). Texas law also required that the court conduct a separate sentencing proceeding in capital cases in which "evidence may be presented as to any matter that the court deems relevant to sentence." TEX. CRIM. PROC. CODE § 37.071(a) (West Supp. 1975-1976) (amended 1985, 1991 and 1993). In the sentencing proceeding, the statute required the jury to answer the following three questions (sometimes referred to as "special circumstances"):

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result [the "deliberateness" circumstance];
>
> (2) whether there is a probability that the defendant would commit criminal act of violence that would constitute a continuing threat to society [the "future dangerousness" circumstance]; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased [the "provocation" circumstance].

Id. §(c).

If the jury unanimously found that the state had proven an affirmative answer to each of the three questions beyond a reasonable doubt, then a death sentence was imposed. *Id.* at (d). If, however, the jury answered any one or more of the questions in the negative, the sentence was life imprisonment. *Id.* The statute also provided for expedited review in the Texas Court of Criminal Appeals. *Id* at (f).

71. *See, e.g., Gregg*, 428 U.S. at 189, 198 (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt*, 428 U.S. at 258 (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek*, 428 U.S. at 270-71, 273-74 (opinion of Stewart, Powell, and Stevens, JJ.).

72. *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.).

73. *See, e.g., Gregg*, 428 U.S. at 189-90, 199 (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek*, 428 U.S. at 273-74 (opinion of Stewart, Powell, and Stevens, JJ.). The individualized sentencing principle was at best of secondary importance to the Court in upholding the statutes at issue in *Gregg*, *Proffitt*, and *Jurek*; but it was essential to the Court's reasoning in striking down the mandatory sentencing systems at issue in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), discussed *infra*, notes 74-82 and accompanying text.

After the Supreme Court's decision in *Furman v. Georgia*, some states responded to the Court's concerns about arbitrariness and unlimited discretion by enacting statutes that removed *all* discretion from the sentencer through the use of mandatory death sentences. In *Woodson v. North Carolina*,[74] and *Roberts v. Louisiana*,[75] the Court—again through the controlling opinion of Justices Stewart, Powell and Stevens—struck down two statutes that made death the mandatory penalty for first degree murder. In so doing, the controlling opinion relied on three Eighth Amendment grounds: (1) that a mandatory death sentence was inconsistent with contemporary notions regarding punishment and thus constituted a form of cruel and unusual punishment;[76] (2) that mandatory capital statutes would only mask the problem of unguided discretion because juries still could arbitrarily nullify the statutes by refusing to convict defendants of capital murder;[77] and (3) that the Eighth Amendment's requirement of heightened reliability in capital cases necessitates that the sentencer be permitted to consider the character and record of each individual defendant and the circumstances of each particular crime in order to determine whether death is an appropriate punishment.[78]

It is the third justification for invalidating mandatory capital sentencing systems that has evolved into the individualized sentencing

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74. 428 U.S. 280 (1976).

75. 428 U.S. 325 (1976).

76. *See Woodson*, 428 U.S. at 301 (opinion of Stewart, Powell, and Stevens, JJ.) ("[O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."); *Roberts*, 428 U.S. at 333 (opinion of Stewart, Powell, and Stevens, JJ.) (discussing "our society's rejection" of the belief that every offense in a single category calls for the same punishment).

77. *See Woodson*, 428 U.S. at 302 (opinion of Stewart, Powell, and Stevens, JJ.) (suggesting that "[m]andatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion" because "there is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder under mandatory death penalty statutes"); *Roberts*, 428 U.S. at 334-35 (opinion of Stewart, Powell, and Stevens, JJ.) (discussing same problem in connection with the Louisiana system, which permitted the jury to consider lesser offenses "[e]ven if there was not a scintilla of evidence to support the lesser verdicts" and which therefore "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate").

78. *See Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.) ("[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death."); *see also Roberts*, 428 U.S. at 333 (opinion of Stewart, Powell, and Stevens, JJ.) (A Louisiana statute failed to "focus on the circumstances of the particular offense and the character and propensities of the offender."). *See generally* John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 226-34 (1986).

principle the Court recognizes today. In creating this principle in three short paragraphs in *Woodson*, the controlling opinion recognized that "the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative"[79] but that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment"[80] requires such a constitutional rule. The controlling opinion then stated the now-familiar refrain that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense."[81] Finally, it declared that "[t]his conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long" and that "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[82]

C. Subsequent Evolution of the Fundamental Principles

Thus, the guided discretion principle and at least some form of the individualized sentencing principle were well established following the Supreme Court's decisions in the 1976 capital punishment cases. Indeed, the Court's subsequent capital decisions routinely have read Furman and the 1976 cases as standing for the proposition that "channelling and limiting of the sentencer's discretion . . . is a fundamental constitutional requirement,"[83] repeatedly insisting that states identify "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"[84] Whether the Court subsequently has applied the guided discretion and individualized sentencing principles in a consistent and coherent fashion and whether the Court's decisions have remained faithful to the *Furman* legacy are, however, the questions at the center of the current debate within the Court. Because a thorough review of all or even most of the Court's capital punishment decisions since 1976 would take up considerable space without significantly advancing an understanding of the current debate, this

79. *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.).

80. *Id.*

81. *Id.*

82. *Id.* at 305.

83. Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

84. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976), Proffitt v. Florida, 428 U.S. 242, 253 (1976), and *Woodson*, 428 U.S. at 303). *See also* Walton v. Arizona, 497 U.S. 639, 660 (1990) (Scalia, J., concurring); Arave v. Creech, 113 S. Ct. 1534, 1540 (1993).

Article focuses on only a few representative cases that highlight the evolution of the guided discretion and individualized sentencing principles.

Because of *Furman* and the 1976 cases, almost every state with capital punishment now has a statutory scheme that requires the sentencer to decide whether aggravating and mitigating circumstances exist, either to determine the defendant's eligibility for death or as part of the balancing process in determining the actual sentence. As a result, there has been considerable litigation over the meaning, application and constitutionality of various aggravating factors that the states have adopted for use in their capital sentencing systems.[85] The Supreme Court has emphasized that the role of aggravating factors in capital sentencing is to "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty" of the same crime.[86] Thus, aggravating circumstances today are the primary means by which the states comply with *Furman*'s requirement that they guide and limit the discretion of the sentencer.[87]

Easily the most problematic, and therefore most frequently litigated, aggravating circumstance is one that applies when the sentencer finds that the defendant committed the murder in an "especially heinous, atrocious or cruel" manner (or in a manner described by words of similar import).[88] The Court first addressed constitutional challenges to such aggravating circumstances in 1976 in *Gregg v. Georgia*[89]and *Proffitt v. Florida*.[90] In *Gregg*, the petitioner challenged a Georgia aggravating factor that authorized capital punishment if the murder was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.'"[91] The petitioner argued that the factor was so broad that it could apply to any murder.[92] The Supreme Court rejected this facial challenge, however, observing that "[i]t is, of course, arguable that any murder

85. *See generally* Christian D. Marr, *Criminal Law: An Evolutionary Analysis of the Role of Statutory Aggravating Factors in Contemporary Death Penalty Jurisprudence—From* Furman *to* Blystone, 32 WASHBURN L.J. 77, 95-103 (1992).

86. Zant v. Stephens, 462 U.S. 862, 877 (1983) (addressing the Georgia capital punishment statute).

87. *Id.*

88. *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).

89. 428 U.S. 153 (1976).

90. 428 U.S. 242 (1976).

91. 428 U. S. at 201 (opinion of Stewart, Powell and Stevens, J.J.) (quoting GA. CODE ANN. § 27-2534.1 (Supp. 1975) (current version at § 17-30-10 (1990)).

92. *Id.*

involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."[93] Similarly, in *Proffitt*, the petitioner argued that Florida's "especially heinous, atrocious, or cruel" aggravating circumstance was so vague that virtually any murder defendant would be a candidate for capital punishment.[94] The Supreme Court upheld Florida's reliance on the factor, however, because the Florida Supreme Court had limited its application to "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim'";[95] and the Court could not "say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases."[96] Given the vagueness of the Florida limiting definition and the lack of rigor with which the Supreme Court evaluated that definition, the 1976 cases themselves raise serious questions about the strength of the Court's commitment to the guided discretion principle.

Indeed, for the next decade the individualized sentencing principle was on the ascendancy, generally at the expense of the guided discretion principle. In *Lockett v. Ohio*,[97] for example, the Court addressed an Ohio statute that itself permitted the trial judge to consider only three statutory mitigating circumstances—(1) whether the victim induced or facilitated the offense, (2) whether the defendant acted under duress or coercion, and (3) whether the defendant's conduct was the result of a psychosis or mental deficiency[98]—and did not include the defendant's lack of specific intent to cause death or the defendant's role as an accomplice, considerations that the defendant in *Lockett* argued were present in her case and mitigated in favor of a sentence less than death.[99] In *Bell v. Ohio*,[100] a companion case to *Lockett*, the Court considered another death sentence imposed under Ohio law in a case in which the defendant argued that the trial court was precluded from giving effect to mitigating evidence of his youth, cooperation with the police and insufficient evidence of specific intent to kill.[101] In deciding *Lockett* and *Bell* and reversing the death sentences at issue, a plurality of the Court asserted that the 1976 cases, which had declared mandatory

93. *Id.*
94. 428 U.S. at 255 (opinion of Stewart, Powell, and Stevens, J.J.).
95. *Id.* (quoting State v. Dixon, 283 So. 2d 1, 9 (1973)).
96. *Id.* at 255-56.
97. 438 U.S. 586 (1978) (plurality opinion).
98. *Id.* at 607.
99. *Id.* at 608-09.
100. 438 U.S. 637(1978) (plurality opinion).
101. *Id.* at 641.

capital punishment systems unconstitutional, compelled the Court to recognize "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[102]

The full Court's subsequent adoption and application of the form of the individualized sentencing principle recognized in *Lockett* is illustrated by several cases, all of which vacated death sentences on the basis of the *Lockett* construction of the individualized sentencing principle. In *Eddings v. Oklahoma*,[103] for example, a majority of the Supreme Court adopted the *Lockett* approach and reversed a death sentence because the sentencer refused to treat the defendant's negative family history as a mitigating factor.[104] In *Eddings*, the defendant was a sixteen-year-old male who offered as mitigating evidence the facts that his parents had divorced when he was very young, that they had subjected him to physical and emotional abuse and that he suffered from a personality disorder.[105] In sentencing the defendant to death, the Oklahoma courts declined to give this evidence any weight,[106] and the Supreme Court held that such an action violated the individualized sentencing principle.[107] In so doing, the Court held that *Lockett* required not only that a defendant be permitted to *present* evidence relevant to any mitigating circumstances identified in a state's capital punishment system, but that the sentencer *consider* and *give weight* to *any* relevant mitigating evidence.[108] According to the Court, "[j]ust as the State may not by statute preclude the sentencer from considering *any* mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, *any* relevant mitigating evidence."[109]

In *Skipper v. South Carolina*,[110] the Supreme Court invalidated a death sentence because the trial court excluded evidence that the defendant had adjusted well to incarceration during the seven months he spent in jail between his arrest and trial.[111] The Court declared that

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102. *Lockett*, 438 U.S. at 604 (footnote omitted). *See also id.* at 597-605.

103. 455 U.S. 104 (1982).

104. *Id.* at 112-13.

105. *Id.* at 107-08. Unlike the Ohio statute at issue in *Lockett*, the Oklahoma statute simply provided that "'evidence may be presented as to *any mitigating circumstances*.'" *Id.* at 106 (quoting OKLA. STAT. tit. 21, § 701.10 (1980) (amended 1987, 1989 and 1992)).

106. *Id.*at 109-10.

107. *Id.* at 113.

108. *Id.* at 113-15.

109. *Id.* at 113-14 (emphasis added).

110. 476 U.S. 1 (1986).

111. *Id.* at 4-5.

there was "no disputing that this Court's decision in *Eddings*" prohibits precluding the sentencer from considering any mitigating factor or any relevant mitigating evidence.[112] The Court acknowledged that defendant's evidence regarding adjustment to incarceration did "not relate specifically to petitioner's culpability for the crime he committed," but that it nonetheless was mitigating evidence within the ambit of *Lockett* because it "might" serve as a basis for choosing life imprisonment instead of death.[113]

In *Hitchcock v. Dugger*,[114] the Court reversed a death sentence when Florida law precluded the advisory jury from considering nonstatutory mitigating circumstances[115]—for example, that the defendant had a habit of inhaling gasoline fumes, that he was one of seven children from a poor family, that he had lost his father to cancer and that he was a good uncle to the children of one of his brothers[116]—and the trial judge refused to consider them. In reaching its holding, the Court simply reviewed the Florida statutes and the evidence and concluded that "[w]e think it could not be clearer that . . . the proceedings therefore did not comport with the requirements of" *Lockett*, *Eddings*, and *Skipper*.[117] Although it reversed the death sentence, the Court did opine that the State could seek a new death sentence in subsequent proceedings so long as it permitted the defendant to present "any and all relevant mitigating evidence."[118]

In *Maynard v. Cartwright*,[119] the Supreme Court held that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague on its face and failed to channel adequately the jury's discretion in the absence of any further limiting instructions.[120] Unlike the Florida Supreme Court in *Proffitt*, the Oklahoma courts had not adopted any particular limiting definitions

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112. *Id.* at 4.
113. *Id.* at 4-5.
114. 481 U.S. 393 (1987).
115. The Florida statute at issue in *Hitchcock* provided that the mitigating circumstances shall be the following: that the defenda"nt had no significant history of prior criminal activity"; that the crime "was committed while the defendant was under the influence of extreme emotional or mental disturbance"; that the victim participated in or consented to the crime; that the defendant was merely an accomplice; that the defendant acted under duress or domination; that "the capacity of the defendant to appreciate the criminality of his conduct" was substantially impaired; and the age of the defendant at the time of the crime.

Id. at 396 n. 3 (discussing FLA. STAT. ch. 921.141(6) (1975)).
116. *Id.* at 397.
117. *Id.* at 398-99.
118. *Id.* at 399.
119. 486 U.S. 356 (1988).
120. *Id.* at 364-65 (considering OKLA. STAT. tit. 21, §§ 701.12(2), (4) (1981)).

for this factor but instead applied a totality of the circumstances approach to determine whether it existed in a particular case.[121] The Court reversed the death sentence at issue, declaring that it previously had "rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty."[122] The Court did acknowledge, however, that defining the circumstance to apply to situations involving "some kind of torture or serious physical abuse" would satisfy constitutional requirements.[123]

In *Penry v. Lynaugh*,[124] the Supreme Court held that the Texas system of requiring the jury to answer three special circumstances—whether the defendant acted deliberately, posed a future danger or acted without provocation—violated *Lockett* under the facts of that case.[125] The defendant in *Penry* had offered as mitigating evidence the fact that he was mentally retarded.[126] In upholding his claim that the Texas scheme impermissibly restricted the sentencer's ability to consider and give effect to such mitigating evidence, the Court first opined that the principle underlying *Lockett* and *Eddings* is "that punishment should be directly related to the personal culpability of the criminal defendant."[127] Moreover, the Court declared, it is "clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer also must be able to consider and give effect to that evidence in imposing sentence."[128] The Court then examined the three Texas special circumstances and concluded (1) that the trial court did not instruct the jury how to give effect to the defendant's evidence of mental retardation with respect to any of the three special circumstances and (2) that such evidence was relevant to defendant's moral culpability *beyond the scope* of the special circum-

121. *Id.* at 360-61.

122. *Id.* at 363.

123. *Id.* at 365.

124. 492 U.S. 302 (1989) (opinion of Stewart, Powell and Stevens, J.J.).

125. *Id.* at 322-38. *See also supra* note 70 and accompanying text.

126. 492 U.S. at 307-09.

127. *Id.* at 319. This is true even though the Court expressly conceded in *Skipper* that evidence of a capital defendant's adjustment to prison life had to be considered "mitigating," irrespective of the fact that it had nothing to do with the defendant's culpability for the crime. *See supra* note 113 and accompanying text.

128. *Id.*

stances.[129] *Penry* perhaps represents the highwater mark of the individualized sentencing principle.

Shortly after its decision in *Penry*, the Supreme Court renewed its interest in the guided discretion principle. In *Walton v. Arizona*,[130] for example, the Court upheld the Arizona "especially heinous, cruel or depraved" aggravating circumstance as applied by a trial judge.[131] In so doing, the Court declared that

> [w]hen a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.[132]

The Court acknowledged that the "especially heinous" factor is vague on its face[133] but observed that the Arizona Supreme Court had restricted the factor's application to murders where the perpetrator "'relishes the murder, evincing debasement or perversion,'"[134] or "'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing."[135] The Court then held that "[r]ecognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, [the Court] concludes that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives *meaningful guidance* to the sentencer."[136]

More recently, in *Arave v. Creech*,[137] the Court rejected a vagueness challenge to the Idaho aggravating circumstance that the defendant

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129. *Id.* at 322-28. *See also* J. Dwight Carmichael, Penry v. Lynaugh: *Texas Death Penalty Procedure Unconstitutionally Precludes Jury Consideration of Mitigating Evidence*, 42 BAYLOR L. REV. 347, 365-67 (1990); Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 423-25 (1990).

130. 497 U.S. 639 (1990) (plurality opinion).

131. *Id.* at 652-56 (considering ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989)).

132. *Id.* at 654.

133. *Id.*

134. *Id.* at 655 (quoting State v. Walton, 769 P.2d 1017, 1033 (Ariz. 1989) (en banc), *aff'd*, 497 U.S. 639 (1990)).

135. *Id.*

136. *Id.* at 655 (emphasis added). In Lewis v. Jeffers, 497 U.S. 764, 777-78 (1990), the Court upheld the same Arizona aggravating circumstance as applied in another case, relying upon *Walton*.

137. 113 S. Ct. 1534 (1993).

exhibited "utter disregard for human life."[138] The Court applied the analytical framework set forth in *Walton* and considered whether the limiting definition adopted by the Idaho Supreme Court—that the circumstance referred to the "cold-blooded, pitiless slayer"[139]—satisfied constitutional requirements.[140] Observing that the Idaho Supreme Court appeared to intend its limiting definition to apply only to the "killer who kills without feeling or sympathy,"[141] the Court upheld the application of the factor as simply requiring an inquiry into the perhaps difficult, but nonetheless factual, question of the defendant's state of mind at the time of the killing.[142] Thus, in the Court's view, the Idaho Supreme Court's definition of the "utter disregard for human life"[143] factor was "no less 'clear and objective' than the language sustained in *Walton*."[144]

Finally, in *Johnson v. Texas*,[145] the Court held that the Texas future dangerousness special circumstance allowed adequate consideration of a defendant's *youth* as a mitigating circumstance.[146] The Court first emphasized that the individualized sentencing principle should not be understood to prohibit states altogether from guiding the sentencer's consideration of mitigating evidence.[147] The Court then discussed *Penry* and its implications[148] but concluded that *Penry* was distinguishable because in *Johnson* the future dangerousness circumstance did permit the jury to give effect to mitigating evidence of a defendant's youth.[149] Indeed, the Court declared that "the fact that a juror might view the

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138. *Id.* at 1538, 1545 (quoting IDAHO CODE § 19-2515(g)(6) (1987)); *see* Troy R. Olsen, *"Utter Disregard for Human Life"—A Clear and Objective Standard for the Purpose of Imposing the Death Penalty?*, 28 IDAHO L. REV. 421 (1991-92).

139. 113 S. Ct. at 1541 (quoting State v. Creech, 670 P.2d 463, 471 (Idaho 1983), *cert. denied*, 465 U.S. 1051 (1984)).

140. *Id.* at 1540.

141. *Id.* at 1541.

142. *Id.* 1541-42.

143. *Id.* at 1538 (quoting IDAHO CODE § 19-2515(g)(6) (1987)).

144. *Id.* at 1542. *See* Cheri L. Bugajski, *The United States Supreme Court Held that the Idaho "Utter Disregard" Aggravating Circumstance Provided a Clear and Objective Standard for the Sentencer to Apply When Determining if the Death Penalty Should be Imposed*, 32 DUQ. L. REV. 347 (1994).

145. 113 S. Ct. 2658 (1993). The same claim was made in an earlier decision, *Graham v. Collins*, 113 S. Ct. 892 (1993), but the case was on federal habeas review and thus involved the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). *Johnson*, 113 S. Ct. at 2661. For that reason, this article does not discuss *Graham* in this section. However, Justice Thomas's concurring opinion in *Graham*, which addresses extensively the relationship between the guided discretion and individualized sentencing principles, is discussed at length in Part III.A.2., *infra*.

146. *Id.* at 2669.

147. 113 S. Ct. at 2666.

148. *Id.* at 2667-68.

149. *Id.* at 2669-70.

evidence of youth as aggravating, as opposed to mitigating, does not mean that the rule of *Lockett* is violated,"[150] because the Eighth Amendment requires only that "the jury had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth."[151]

Several questions emerge from an examination of the foregoing cases. For example, any reasonably intelligent and honest observer might question how much bite there is in the constitutional requirement of guided discretion. Are any of the limiting definitions actually approved by the Supreme Court in connection with aggravating factors that are concededly vague and unhelpful on their face much, if any, more informative to the sentencer than the inadequate statutory language itself?[152] If not, then is there really any substance to the guided discretion principle? In other words, has more than twenty years of judicial effort resulted in a more rational and consistent framework for imposing capital punishment than existed prior to the Court's decision in *Furman*? Or is the situation unfortunately similar to the Supreme Court's role in resolving obscenity cases in the 1960s and early 1970s—the infamous "we know it when we see it" approach to jurisprudence?

Second, if the guided discretion principle is central to the Supreme Court's capital jurisprudence, why is there no precise standard for determining whether an aggravating circumstance adequately guides the sentencer's discretion?[153] One possible reason for the lack of specificity

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150. *Id.* at 2669.

151. *Id.*

152. For example, constitutional definitions include "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" Proffitt v. Florida, 428 U.S. 242, 255 (1976) (opinion of Stewart, Powell and Stevens, J.J.) (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)); "some kind of torture or serious physical abuse," Maynard v. Cartwright, 486 U.S. 356, 365 (1988); "the perpetrator inflicts mental anguish or physical abuse before the victim's death," Walton v. Arizona, 497 U.S. 639, 654 (quoting State v. Walton, 769 P.2d 1017, 1032 (Ariz. 1989) (en banc), *aff'd*, 497 U.S. 639 (1990)), or "relishes the murder, evidencing debasement or perversion," *Walton*, 497 U.S. at 655 (quoting *Walton*, 769 P.2d at 1033), or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing, *id.*, or the "'cold-blooded, pitiless slayer.'" Arave v. Creech, 113 S. Ct. 1534, 1541 (1993) (quoting State v. Creech, 670 P.2d 463, 471 (Idaho 1983), *cert. denied*, 465 U.S. 1051 (1984)). Insufficient definitions include the "we know it when we see it," totality of the circumstances approach the Supreme Court rejected in Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (plurality opinion), and Maynard, 486 U.S. at 363-64; and attempts such as "'[t]he word heinous means extremely wicked or shockingly evil'" and "'atrocious means outrageously wicked and vile,'" Shell v. Mississippi, 498 U.S. 1, (1990) (per curiam).

153. *See Walton*, 497 U.S. at 655 ("the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision"); *See also Arave*, 113 S. Ct. at 1542 (quoting *Walton*, 497 U.S. at 655). Two other recent decisions suggest only that a statutory aggravating factor must "furnish principled guidance for the choice between death and a lesser penalty," Richmond v. Lewis, 113 S. Ct. 528, 534 (1992), and that an aggravating circumstance

is the inherent difficulty in making a subjective determination regarding how much guidance is sufficient. Another is that some, if not most, of the Justices of the Supreme Court—past and present—are or have been ambivalent about capital punishment, at least when confronted with actual death row inmates in real cases. Clearly, the members of the Court have not always agreed upon the proper level of federal oversight, with some Justices preferring that the Court return to a limited supervisory role in this area while others seek a more interventionist role. The lack of a precise standard for evaluating challenges to aggravating circumstances tends both to confirm the subjectivity of the guided discretion determination and to permit an ambivalent Court to retain flexibility in resolving particular cases. A guided discretion principle without specificity and real teeth, however, undermines *Furman* itself and one of the primary reasons the Supreme Court decided to concern itself with capital punishment after 180 years of non-intervention.

With respect to the individualized sentencing principle, it appears that the Supreme Court's expansion of the principle's scope in cases such as *Eddings*, *Hitchcock* and *Skipper*, virtually assures that the guided discretion principle will have only limited bite as a substantive constitutional limitation. Even if the Supreme Court were to adopt a stricter approach to evaluating the aggravating factors that would support imposition of a death sentence, the notion of guiding the sentencer's discretion dissolves in the face of a broad interpretation of the individualized sentencing principle. For if a capital defendant may present as "mitigating" evidence considerations that are at best remotely related to—or even unrelated to—the murder in question (*e.g.*, the fact that the defendant's father died of cancer or that the defendant was a good uncle or that he caused no problems in jail while awaiting trial), the sentencer effectively exercises complete discretion. The notion of guided discretion is destroyed and the goal of consistent results is unattainable if the sentencer's discretion is guided with respect to aggravating circumstances but unlimited in granting mercy.

In sum, it appears that generally when the Court emphasizes guided discretion, it upholds particular sentencing procedures and the State prevails. On the other hand, when the Court focuses on individualized sentencing, capital defendants generally prevail. Although *Johnson v. Texas* may signal a willingness on the Supreme Court's part to attempt to declare a truce between the two principles, that result is by no means

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is unconstitutional "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992).

certain. Rather, the virtually limitless expansion of the individualized sentencing principle,[154] coupled with the Court's shifting focus between that principle and the notion of guided discretion, suggests a serious ambivalence by at least the "swing" votes on the Court toward capital punishment.[155] A majority of the Supreme Court never has been willing to declare capital punishment unconstitutional in all circumstances. Nonetheless, it is clear that several Justices—both past and present—have been seriously troubled by the imposition of death sentences in particular cases. The result may be an internally inconsistent and irreconcilable, perhaps even irrational, capital jurisprudence.

D. A 1994 System of Capital Punishment

In April, 1994, shortly after Justices Blackmun and Scalia skirmished in *Callins v. Collins*,[156] the State of Kansas adopted what was at the time the newest system of capital punishment in the United States.[157] The Kansas statute applies to offenses committed on or after July 1, 1994.[158] The contrast between the Kansas system and the pre-*Furman* systems is striking.[159]

As is common in many of the states that have instituted capital punishment, the Kansas statute creates a new offense of capital murder, significantly limiting the class of murderers that are eligible for capital punishment. Under the statute, capital murder is defined as the "intentional and premeditated killing" of a person under any one of the

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154. The Court has created a variation of the *Lockett* principle in cases in which the capital punishment system at issue required, or could have been understood by the jury to require, that the jury consider only mitigating circumstances that the jury unanimously found to exist. Thus, in Mills v. Maryland, 486 U.S. 367, 369 (1988), and McKoy v. North Carolina, 494 U.S. 433, 435 (1990), the Supreme Court invalidated death sentences imposed under such systems.

155. Current "swing" votes in this respect probably include Justice Stevens, Justice O'Connor (the author of *Penry*), Justice Souter, Justice Ginsburg and Justice Breyer. As explained *infra*, text accompanying notes 16-19 Justices Scalia and Thomas have publicly criticized the individualized sentencing principle; Justice Kennedy authored *Johnson v. Texas*, which read *Penry* narrowly; and the Chief Justice has never been considered a "swing" voter on capital punishment issues. Thus, currently, it is possible that a five-Justice majority will rule in a capital defendant's favor in a particular case.

156. 114 S. Ct. 1127, 1127-28 (1994) (Scalia, J., concurring in denial of stay); *id.* at 1128-38 (Blackmun, J., dissenting from denial of stay).

157. John Hanna, *Finney Keeps Word on Death Penalty*, TOPEKA CAPITAL-JOURNAL, Apr. 23, 1994, at 1-A. *See also* Carla J. Stovall & Margaret M. Henson, *In Support of the Death Penalty*, 4 KAN. J.L. & PUB. POL'Y 47 (1994). Subsequently, New York enacted a capital punishment statute in early 1995. N.Y. CORRECT. LAW ch. 43, art. 22-B (McKinney 1995).

158. KAN. STAT. ANN. § 21-4631(c) (Supp. 1994)

159. For a detailed description and analysis of the Kansas capital punishment statute and the particular constitutional rules on which many of its provisions are based, see McAllister, Implementing Capital Punishment in Kansas, 64 K.B.A.J. ____ (forthcoming 1995).

following circumstances: (1) murder during a kidnapping or aggravated kidnapping for ransom; (2) murder through participation in a contract killing; (3) murder by an inmate while incarcerated; (4) murder involving rape or sodomy; (5) murder of a law enforcement officer; (6) murder of more than one person during a single event; and (7) murder during the kidnapping of a child under fourteen years of age when done with the intent to commit a sex offense.[160] As a procedural matter, however, even when a defendant's crime falls within one of the foregoing categories, the state may seek the death penalty only if it files and serves notice of intent to seek such a penalty within five days of the defendant's arraignment.[161] Moreover, capital punishment is not an option for the state if the defendant was younger than eighteen years of age[162] or was mentally retarded[163] at the time the murder was committed.[164]

As is also true in most, if not all, current state capital punishment systems, following a conviction on capital murder charges, the Kansas statute requires what is essentially a second trial on the issue of sentencing.[165] Generally, the jury that determined a defendant's guilt or innocence also will make a recommendation regarding the defendant's sentence. The defendant does have the option, however, of waiving the right to a jury and being sentenced by the trial judge.[166] In the sentencing proceeding, the jury must determine unanimously and beyond a reasonable doubt whether there are any statutory aggravating circumstances[167] and whether such circumstances are outweighed by any

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160. KAN. STAT. ANN. § 21-3439 (a) (Supp. 1994). At least in modern times, the Supreme Court has never condoned the imposition of a death sentence on a defendant convicted of a crime less than murder. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding death is a disproportionate penalty for rape when the victim is not killed). Indeed, the Court has insisted that not even all murderers, even within a particular class of murders, may be sentenced to death. *See, e.g.*, Zandt v. Stevens, 462 U.S. 862 (1983).

161. KAN. STAT. ANN. § 21-4624(a) (Supp. 1994).

162. *Id.* § 21-4622.

163. *Id.* § 21-4623.

164. Similarly, the state may not execute any death row inmate who is insane at the time of the scheduled execution. *Id.* § 22-4006.

165. *Id.* § 21-4624(b). The new Kansas statute, at least with respect to sentencing, is modeled largely on the Virginia capital punishment statute. *See* VA. CODE ANN. § 17-110.1 (Michie 1988).

166. KAN. STAT. ANN. § 21-4624(b) (Supp. 1994).

167. KAN. STAT. ANN. § 21-4624(e) (Supp. 1994). KAN. STAT. ANN. § 21-4625 (Supp. 1994) provides that the Kansas statutory aggravating circumstances are as follows:

> (1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.
>
> (2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.
>
> (3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

mitigating circumstances.[168] If the jury unanimously concludes that death is the appropriate sentence, then the trial judge may, but is not required to, impose a death sentence.[169] If the jury cannot reach a unanimous determination that death is the appropriate sentence, then the judge must sentence the defendant under other appropriate sentencing options, and a death sentence is not permitted.[170]

All death sentences imposed in Kansas trial courts are subject to automatic and expedited review in the Kansas Supreme Court.[171] In reviewing a capital case, the statute specifically directs the Kansas Supreme Court to determine (1) whether the evidence supports the jury's recommendation that death be imposed and (2) whether the jury's recommendation was the result of passion, prejudice or any other arbitrary factor.[172] The method of execution in Kansas is to be lethal injection.[173]

Interestingly, the Kansas legislature apparently responded to the Court's guided discretion requirement in three ways: (1) narrowly defining the crime of capital murder,[174] (2) identifying statutory aggravating circumstances for consideration at sentencing and (3) limiting the sentencer's consideration of aggravating circumstances to the statutory factors.[175] Not surprisingly, however, in attempting to comply simultaneously with the individualized sentencing requirement, the Kansas statute directs the sentencer to consider "any" mitigating circumstances,[176] not just those identified by statute.[177] The two critical statutory provisions in this regard both refer to consideration of "aggravating circumstances *enumerated in K.S.A. 1993 Supp. 21-4625*

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(4) The defendant authorized or employed another person to commit the crime.

(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

168. KAN. STAT. ANN. § 21-4624(e) (Supp. 1994).

169. *Id.* § 21-4624(f) (trial court shall review verdict and modify if not supported by the evidence).

170. *Id.* § 21-4624(e).

171. *Id.* § 21-4627(a).

172. *Id.* § 21-4627(c)(1).

173. KAN. STAT. ANN. § 22-4001(a) (Supp. 1994).

174. KAN. STAT. ANN. § 21-3439(a) (Supp. 1994).

175. *See id.* § 21-4624(e), 21-4625.

176. *Id.* § 21-4624(e).

177. *See id.* § 21-4626.

. . . and *any mitigating circumstances*."[178] By omitting any specific reference to the statutory mitigating circumstances found in K.S.A. 1993 Supp. 21-4626,[179] the drafters of the Kansas statute must have been cognizant of the *Lockett* line of cases and probably hoped to avoid the potential for constitutional violations by permitting the consideration of *any* mitigating circumstances—statutory or nonstatutory. In a similar vein, the Kansas statute expressly declares that evidence relevant to "any mitigating circumstances" that has "probative value may be received regardless of its admissibility under the rules of evidence . . ."[180]

Thus, the new Kansas statute is a perfect illustration of the problem created by tension between the guided discretion and individualized sentencing principles and their resulting zero-sum dilemma. The Kansas statute, on the one hand, attempts to satisfy the guided discretion principle by clearly and expressly defining the crime of capital murder and by delineating with precision the aggravating factors on which the sentencer may rely in determining whether death is an appropriate sentence. On the other hand, in an attempt to satisfy the individualized sentencing principle, the statute imposes no restraints on—and provides no guidance with respect to—the defendant's presentation and the sentencer's consideration of mitigating circumstances. Thus, particularly given that the sentencer must weigh aggravating circumstances against mitigating factors, any consistency achieved by guiding discretion with respect to the definition of capital murder and statutorily identifying the factors that warrant a death

178. *Id.* § 2624(c), (e) (emphasis added).

179. The statute provides that

> [m]itigating circumstances shall include, but are not limited to, the following:
>
> (1) The defendant has no significant history of prior criminal activity.
>
> (2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
>
> (3) The victim was a participant in or consented to the defendant's conduct.
>
> (4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
>
> (5) The defendant acted under extreme distress or under the substantial domination of another person.
>
> (6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.
>
> (7) The age of the defendant at the time of the crime.
>
> (8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.

Id. § 21-4626.

180. *Id.* § 21-4624(c).

sentence is undermined by the sentencer's open-ended and unguided consideration of mitigating factors.

As explained in the next section of this Article, the fundamental question is whether the new Kansas statute—even having as it does the advantage of hindsight with respect to twenty years of Supreme Court capital jurisprudence—can be implemented and administered in a rational and consistent fashion. If the conclusion is that it cannot be, then perhaps either the Supreme Court's capital jurisprudence—or capital punishment itself—is fundamentally wrong.

III. A CONSTITUTIONAL DILEMMA OF THE COURT'S OWN MAKING

A. Recognizing the Problem

Although earlier opinions had acknowledged tension between the guided discretion and individualized sentencing principles,[181] Justice Scalia engaged in the first full-scale reexamination of the Court's capital jurisprudence in 1990.[182] Justices Thomas and Blackmun then followed suit in 1993[183] and 1994[184] respectively.

1. *Walton v. Arizona* (1990): Justice Scalia

In *Walton v. Arizona*,[185] the petitioner asserted that his death sentence was invalid both because (1) the state's "especially heinous, cruel or depraved aggravating circumstance" was unconstitutionally vague,[186] and (2) the Arizona statute at issue declared that the sentencer "shall impose" death if the aggravating circumstances were not outweighed by the mitigating circumstances.[187] Justice White, writing for a plurality, rejected both claims and affirmed the death sentence.[188] Justice Scalia provided the fifth vote for affirmance, concurring in the rejection of the

181. *See, e.g.*, Franklin v. Lynaugh, 487 U.S. 164, 181-82 (1988) (plurality opinion); McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring).

182. *See* Walton v. Arizona, 497 U.S. 639, 657-73 (1990) (Scalia, J., concurring); *see also* discussion *infra* Part III.A.1.

183. *See* Graham v. Collins, 113 S. Ct. 892, 904-15, (1993) (Thomas, J., concurring); *see also* discussion *infra* Part III.A.2.

184. *See* Callins v. Collins, 114 S. Ct. 1127, 1128-37 (1994) (Blackmun, J., dissenting from denial of stay); *see also* discussion *infra* Part III.A.3.

185. 497 U.S. 639 (1990) (plurality opinion).

186. *Id.* at 652 (considering ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989) (amended 1993)).

187. *Id.* at 651 (considering § 13-703(e)).

188. *Id.* at 651-56.

first claim and concurring only in the result with respect to the second claim.[189] In an explosive first paragraph Justice Scalia observed:

> Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one—the choice between death and imprisonment. One cannot have the discretion whether to select the one yet lack discretion whether to select the other. Our imaginary observer would then be surprised to discover that, under this Court's Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on *both* of these antagonistic claims, simultaneously . . . . But that just shows that our jurisprudence and logic have long since parted ways.[190]

Justice Scalia began his discussion of the Supreme Court's capital jurisprudence with an inquiry into the origin of the guided discretion principle, tracing its origin to the opinions of Justices White and Stewart in *Furman v. Georgia* and pointing out that the principle was crucial to the controlling opinion of Justices Stewart, Powell and Stevens in the 1976 cases.[191] He then observed that

> [s]hortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to "impose" the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to "*decline* to impose" it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of "guided discretion" once had.[192]

Justice Scalia identified the mandatory sentencing cases in 1976 (*Woodson* and *Roberts*) and *Lockett v. Ohio* as the genesis of the individualized sentencing principle, arguing that in those cases the Court transformed *Furman*'s prohibition on unbounded discretion to impose a death sentence into a constitutional requirement of unlimited discretion to grant mercy.[193] He then derided the Court's application of the individualized sentencing principle, suggesting that the principle requires the sentencer to consider almost anything the defendant desires, including

> that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that

189. *Id.* at 656-57 (Scalia, J., concurring).

190. *Id.* at 656.

191. *Id.* at 657-61.

192. *Id.* at 661 (quoting McClesky v. Kemp, 481 U.S. 279, 304 (1987) (alteration in original) (citations omitted).

193. *Id.* at 661-62.

> he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother.[194]

Thus, in Justice Scalia's view, to acknowledge the tension between the guided discretion and individualized sentencing principles, or to speak of them as twin objectives "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II" or "rather like referring to the twin objectives of good and evil."[195]

After commenting on the flood of capital litigation that in his view has been a direct result of the Court's development of inconsistent constitutional principles,[196] Justice Scalia declared that "it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based."[197] Justice Scalia began his textual inquiry by quoting the Eighth Amendment and commenting that it (1) prohibits only cruel *and* unusual punishments, (2) "does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment," and (3) therefore applies to capital sentencing only when the procedures utilized "are of such a nature as systematically to render the infliction of a cruel punishment 'unusual.'"[198] He then reasoned that at least some of the opinions in *Furman* were consistent with his understanding of the Eighth Amendment—because they emphasized that unlimited discretion could result in arbitrary sentencing, making the punishment "unusual" in at least one sense—but that the *Woodson-Lockett* line of cases was "another matter."[199] In Justice Scalia's view, mandatory death sentences are consistent with a textual understanding of the Eighth Amendment because such punishment is neither *cruel* (when imposed for murder) nor *unusual* (it is automatic, not arbitrary).[200] Although he considered the effect of *stare decisis*, he concluded that it was not persuasive in this context because "*Woodson* and *Lockett* are rationally irreconcilable with *Furman*."[201]

Ultimately, Justice Scalia announced, "I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of

194. *Id.* at 663.
195. *Id.* at 664.
196. *Id.* at 667-69.
197. *Id.* at 669.
198. *Id.* at 670.
199. *Id.* at 671.
200. *Id.*
201. *Id.* at 673.

respect under *stare decisis*. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim [based on the individualized sentencing principle]."[202]

2. *Graham v. Collins* (1993): Justice Thomas

Justice Thomas also has reexamined the Supreme Court's capital jurisprudence and questioned its legitimacy. In *Graham v. Collins*,[203] relying primarily on the Court's decision in *Penry v. Lynaugh*,[204] the petitioner raised the issue whether, under the Texas capital sentencing system, the jury was able to give effect to mitigating evidence of the petitioner's youth, family background and positive character traits.[205] A majority of the Court never reached that question, however. Instead, because the case was before the Supreme Court on federal habeas review, the Court applied the nonretroactivity doctrine of *Teague v. Lane*,[206] determined that petitioner sought the announcement of a new constitutional rule and denied relief.[207]

Justice Thomas concurred in the Court's opinion, agreeing that the *Teague* rule applied.[208] He wrote separately, however, to explain why he thought that, in any event, *Penry* had been wrongly decided.[209] Justice Thomas noted the constitutional dilemma, observing that several members of the Court had "commented on the 'tension' between [the Court's] cases on the constitutional relevance of mitigating circumstances in capital sentencing and those decisions applying the principle . . . that the Eighth and Fourteenth Amendments prohibit States from giving sentencers unguided discretion in imposing the death penalty."[210] He then asserted that *Penry* is "the most extreme statement" in the individualized sentencing line of cases and that it "creates more than an unavoidable tension; it presents an evident danger."[211]

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202. *Id.*
203. 113 S. Ct. 892 (1993).
204. 492 U.S. 302 (1989). See *supra* notes 124-129 and accompanying text.
205. *Graham*, 113 S. Ct. at 895.
206. 489 U.S. 288 (1989). In *Teague*, the Court held that when a federal habeas petitioner seeks relief on the basis of a "new" constitutional rule (essentially a constitutional rule announced after the trial of the petitioner's case and one that was not dictated by prior precedent), such relief generally is barred unless the petitioner satisfies one of two narrowly construed exceptions. *Id.* at 316.
207. *Graham*, 113 S. Ct. at 903.
208. *Id.* (Thomas, J., concurring).
209. *Id.*
210. *Id.* at 904 (citations omitted).
211. *Id.*

Justice Thomas next discussed the origin of the Court's capital jurisprudence, *Furman v. Georgia*,[212] and emphasized the importance of race in the Court's decision.[213] He pointed out that *Furman* "was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States, and most particularly in rape cases."[214] He then examined the importance that race played in the opinions of Justices Douglas and Marshall and noted the well-documented role of the NAACP Legal Defense and Educational Fund, Inc.,[215] in the *Furman* litigation.[216] Justice Thomas observed that the essence of the Justices' numerous opinions in *Furman* was that standardless sentencing schemes create irrational and arbitrary results.[217] He then commented that "[i]t cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."[218]

Having thus considered the foundation of the Court's capital jurisprudence, Justice Thomas embarked upon an examination of the individualized sentencing principle line of cases.[219] He observed that, at its inception, this "line of cases sprang in part from the same concerns that underlay *Furman*."[220] He examined the Court's decisions in the 1976 cases and observed that, although he disagreed with the conclusion that mandatory death sentences are unconstitutional,[221] the Court's decisions "guaranteed that sentencers would exercise some degree of discretion in every capital case."[222] Thus, he pointed out, the emphasis in the 1976 cases on the sentencer's having access to the character and record of the defendant as well as the nature and circumstances of the offense is the foundation on which *Lockett* is based.[223]

Rather than attacking the *Lockett* line of cases wholesale as Justice Scalia had done, however, Justice Thomas summarized those cases as follows:

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212. 408 U.S. 238 (1972).
213. *Graham*, 113 S. Ct. at 904-06.
214. *Id.* at 904.
215. *See, e.g.*, MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 73-105 (1973); TUSHNET, *supra* note 22, at 28-33.
216. *Graham*, 113 S. Ct. at 904-06.
217. *Id.* at 906.
218. *Id.*
219. *Id.* at 906-11.
220. *Id.* at 906.
221. *Id.* at 908.
222. *Id.* at 909.
223. *Id.*

> [T]here was at root a logical—if by now attenuated—connection between the rationalizing principle of *Furman* and the prophylactic rule of *Eddings*. *Eddings* protects the accused's opportunity to 'appris[e]' the jury of his version of the information relevant to the sentencing decision. Our early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer . . .
>
> Consistent with this (admittedly narrow) reading, I would describe *Eddings as a kind of rule of evidence*: it governs the admissibility of proffered evidence but does not purport to define the substantive standards or criteria that sentencers are to apply in considering the facts. By requiring that sentencers be allowed to "consider" all "relevant" mitigating circumstances, we cannot mean that the decision whether to impose the death penalty must be based upon all of the defendant's evidence, or that such evidence must be considered the way the defendant wishes. Nor can we mean to say that circumstances are necessarily relevant for constitutional purposes if they have any conceivable mitigating value.[224]

Justice Thomas acknowledged that "*Eddings* is susceptible to more expansive interpretations,"[225] but argued that all of the Court's individualized sentencing principle cases except for *Penry* could be squared with his reading.[226]

Justice Thomas next addressed *Penry*.[227] *Penry*, he argued, rendered meaningless the guided discretion principle because the opinion turned the individualized sentencing principle into a constitutional imperative that the sentencer be permitted to recommend mercy for *any* reason and on the basis of *any* evidence offered by a capital defendant as "mitigating," irrespective of a state's efforts to identify the relevant considerations and guide the sentencer's discretion.[228] He rejected the rationale of *Penry* that so long as the class of those eligible for the death penalty is narrowed at the outset, there is no constitutional infirmity in giving the jury essentially unlimited discretion to recommend mercy regarding the ultimate sentence.[229] He declared that "[t]o withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on the basis

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224. *Id.* at 909-10 (emphasis added).

225. *Id.* at 910.

226. *Id.*

227. *Id.* at 911-14.

228. *Id.* at 911-12. Empirical support for that proposition is found in the Texas Legislature's response to *Penry*, which was to delete the intent and lack of provocation special circumstances while expressly permitting the presentation of any "mitigating" evidence and allowing the jury to recommend mercy on the basis of any mitigating considerations the jury deems sufficient to warrant such a decision. *See* Peggy M. Tobolowsky, *What Hath Penry Wrought? Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 380-84 (1992).

229. *Graham*, 113 S. Ct. at 912.

of negative bias,"[230] and that "[s]urely that is exactly what the petitioners and the Legal Defense Fund argued"[231] in the mandatory death cases in 1976. Thus, he concluded that "*Penry* reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing."[232]

Finally, Justice Thomas considered whether the Court could resolve the current constitutional dilemma. He declared that "[i]f the death penalty is constitutional, States must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements."[233] He then asserted that in his view

> we should enforce *a permanent truce* between *Eddings* and *Furman*. We need only conclude that it is consistent with the Eighth Amendment for States to channel the sentencer's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny the defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances.[234]

Justice Thomas emphasized that the determination of what factors are appropriate for the sentencer's consideration should be left to the states in the first instance, with federal courts reviewing those choices under a "reasonableness"[235] standard. Lastly, Justice Thomas noted that every month the Court receives petitions for a writ of certiorari from capital defendants claiming that "some new class of evidence"—such as "evidence of voluntary intoxication or of drug use" or that the defendant "is a sociopath"—has relevance "'beyond the scope'"[236] of a particular state's sentencing criteria. Ultimately, he concluded that "[w]e cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*."[237]

3. *Callins v. Collins* (1994): Justice Blackmun

In *Callins v. Collins*,[238] Justice Blackmun acknowledged the tension between the guided discretion and individualized sentencing principles and discussed his frustration with the Supreme Court's capital jurispru-

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230. *Id.*
231. *Id.*
232. *Id.* at 913.
233. *Id.* at 914.
234. *Id.* (emphasis added).
235. *Id.* at 914-15.
236. *Id.* at 915 (quoting Penry v. Lynaugh, 492 U.S. 302, 322 (1989)).
237. *Id.* at 915.
238. 114 S. Ct. 1127 (1994).

dence.[239] Justice Blackmun began by asserting that, despite the best professional efforts of those involved in capital sentencing, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[240] In his view, "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."[241] Justice Blackmun further observed that "[i]t is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other or to assume that an acceptable balance between them already has been struck."[242] Instead, he announced that

> [f]rom this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[243]

Justice Blackmun next examined the Court's decisions in *Furman* and the 1976 cases,[244] observing that "[t]here is little doubt now that *Furman*'s essential holding was correct,"[245] but ultimately concluding that "[e]xperience has shown that the consistency and rationality promised in *Furman* are *inversely related* to the fairness owed the individual when considering a sentence of death."[246] Thus, he concluded, "*[a] step toward consistency is a step away from fairness.*"[247]

Justice Blackmun considered the Court's individualized sentencing decisions and declared that he believed those cases "to be fundamentally sound and rooted in American standards of decency that have evolved over time."[248] Yet, he conceded the very "real"[249] tension between the guided discretion and individualized sentencing principles and observed that the "dilemma was laid bare in *Penry*."[250] Justice Blackmun, like Justice Thomas in *Graham v. Collins*, rejected the *Penry* theory that the

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239. *Id.* at 1129 (Blackmun, J., dissenting from denial of stay).
240. *Id.*
241. *Id.* (citation omitted).
242. *Id.*
243. *Id.* at 1130 (citations omitted).
244. *Id.* at 1131-34.
245. *Id.* at 1131.
246. *Id.* at 1132 (emphasis added).
247. *Id.* (emphasis added).
248. *Id.* at 1133.
249. *Id.*
250. *Id.* at 1134.

capital sentencing process should be viewed as consisting of two distinct stages—the first involving the narrowing of the class of those eligible for the death penalty by reference to objective standards and the second involving the sentencer's unlimited discretion to make the sentencing choice once it has been determined the defendant falls within the eligible class.[251] He concluded that such an approach "simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing."[252]

Justice Blackmun then recognized that "[t]he arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race."[253] He acknowledged that "*Furman*'s promise . . . will go unfulfilled so long as the sentencer is free to exercise unbridled discretion . . . ."[254] He then focused[255] on the Court's decision in *McCleskey v. Kemp*,[256] in which a majority of the Court rejected the argument that a Georgia capital defendant could establish a constitutional violation by offering a statistical study indicating that black capital defendants in Georgia were significantly more likely to be sentenced to death than white capital defendants, as were those whose victims were white rather than black.[257] After pointing out that he dissented in *McCleskey* on the grounds that the statistical study demonstrated both an Eighth Amendment and equal protection violation, Justice Blackmun stated that "as far as I know, there has been no serious effort to impeach the Baldus study. Nor, for that matter, have proponents of capital punishment provided any reason to believe that the findings of that study are unique to Georgia."[258] With respect to the question of racial discrimination in capital sentencing, he asserted that

> [t]he fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the *Furman* promise. To the contrary, here a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought."[259]

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251. *Id.*
252. *Id.*
253. *Id.* at 1135.
254. *Id.*
255. *Id.* at 1135-36.
256. 481 U.S. 279 (1987).
257. *Id.* at 291, 319.
258. *Callins*, 114 S. Ct. at 1135-36.
259. *Id.* at 1136 (quoting *McClesky*, 481 U.S. at 343 (Brennan, J., dissenting)).

Justice Blackmun opined that capital sentencing "inevitably defies the rationality and consistency required by the Constitution."[260] Thus, he declared that "even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge."[261] He concluded that

> the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.[262]

Finally, Justice Blackmun observed that

> Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that . . ." the death penalty . . . must be abandoned altogether." I may not live to see that day, but I have faith that eventually it will arrive.[263]

B. Identifying and Evaluating the Possibilities

The guided discretion and individualized sentencing principles—considered the cornerstones of the Supreme Court's capital jurisprudence—simply cannot be reconciled as currently interpreted and construed by the Court itself. Justices Blackmun and Thomas, approaching the dilemma from opposite ends of the political spectrum, both offer devastating critiques[264] of the Court's rationale in Penry v. Lynaugh,[265] which asserted that the two principles can be harmonized by viewing the guided discretion principle as applying only to the initial narrowing of the class of those eligible for the death sentence and the individualized sentencing principle then as applying to the final question whether or not to recommend mercy.[266] Indeed, the *Penry* approach

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260. *Id.* at 1135.

261. *Id.* at 1136.

262. *Id.* at 1137.

263. *Id.* at 1138 (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in the judgment)).

264. *See supra* notes 209 to 263 and accompanying text.

265. 492 U.S. 302 (1989).

266. *Id.* at 327; *see* Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 23-28 (1980); Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1161-64 (1991). *Cf.* Mann, *supra* note 13, at 541 (concluding that the two principles can be harmonized by viewing them as a single principle—that "any decision which sends a defendant to death without taking the time to consider the defendant's

simply narrows the class of those subject to arbitrary sentencing in capital cases; it does not eliminate arbitrary sentencing. Thus, the Court's current approach to the guided discretion and individualized sentencing principles has not resulted in a satisfactory solution to the zero-sum dilemma.

One possible solution has been proposed by Justice Scalia: jettison one of the two principles, removing the inherent tension that currently exists.[267] Justice Thomas has proposed a second, more moderate solution: strike an acceptable balance between the constitutional interests served by the two principles.[268] A third possibility, advocated by Justice Blackmun, is to abandon capital punishment on the ground that the Court simply is unable as a practical matter to create constitutional rules that satisfy both principles simultaneously.[269] Finally, a fourth option would be to adopt the longstanding view of former Justices Brennan and Marshall that capital punishment is unconstitutional in all circumstances.[270]

In analyzing these options, the author makes certain, important assumptions. First, the text of the Constitution, although not alone controlling, should be of considerable importance in interpreting the scope of particular provisions. Second, the history of the Supreme Court's understanding of a constitutional provision is an important interpretational tool. At the least, constitutional text and history of interpretation should provide a starting point for analysis of the Supreme Court's capital jurisprudence. Third, pragmatic considerations are of considerable significance. When text and history fail to resolve interpretational questions, pragmatic considerations such as public policy, fairness and judicial efficiency may provide guidance in interpreting constitutional provisions.[271] Fourth, to borrow a maxim from contract law, one constitutional provision should not be given

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individual circumstances" is "cruel" within the meaning of the Eighth Amendment—and thus the statute in *Furman* was unconstitutional because it gave no guidance to the sentencer, with the (somehow corresponding) result that "individualized consideration did not occur," *id.* at 499, while the mandatory sentencing statutes declared unconstitutional in 1976 failed because they "precluded individualized consideration." *Id.*

267. Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J. concurring). *See supra* notes 185 to 202 and accompanying text.

268. Graham v. Collins, 113 S. Ct. 892, 914 (1993) (Thomas, J., concurring); *see supra* notes 203 to 237 and accompanying text.

269. Callins v. Collins, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting); *see supra* notes 238 to 263 and accompanying text.

270. *See* Furman v. Georgia, 408 U.S. 238, 305 (Brennan, J., concurring), 369 (Marshall, J., concurring) (1972).

271. *See, e.g.*, RICHARD A. POSNER, THE PROBLEM OF JURISPRUDENCE 454-69 (1990); RICHARD A. POSNER, OVERCOMING LAW 198-214 (1995).

effect at the complete expense of another constitutional provision if it is at all possible to reconcile or harmonize the two provisions and the interests they serve.

Applying the foregoing assumptions in analyzing the four options discussed above for resolving the zero-sum dilemma, an approach along the lines of the compromise suggested by Justice Thomas appears justified. Moreover, only his approach offers a realistic chance of resolving the constitutional dilemma. Justice Thomas's compromise proposal recognizes the constitutional validity of both guided discretion and individualized sentencing and, as demonstrated below, can be structured to give substance to each. Furthermore, it is the only proposal that genuinely attempts to *balance* the competing constitutional interests that the guided discretion and individualized sentencing principles serve.

1. Striking an Appropriate Balance

In reexamining its capital jurisprudence, the Supreme Court should first focus on the concerns that motivated it to constitutionalize this area of the law in *Furman*. As discussed previously, the Court in *Furman* clearly rested its conclusion of unconstitutionality on two critical factors: (1) the sentencer's unlimited discretion with the resulting potential for arbitrary and capricious results; and (2) as a direct result of (1), the potential for invidious discrimination on the basis of unacceptable factors such as race. None of the opinions in *Furman* attaches constitutional significance to the notion of individualized sentencing. Indeed, given the totally unguided nature of the capital sentencing processes at issue in *Furman*, there was no question that the capital defendants in those cases received an individualized sentencing determination. That was precisely what the capital defendants complained about and what a majority of the Court condemned: the determination was *too* individualized, unfocused and unguided. Individualized sentencing necessarily injects an element of arbitrariness into the sentencing determination. Thus, individualized sentencing heightens rather than minimizes the risk of discrimination on the basis of unacceptable factors such as race. Because the individualized sentencing principle permits, and perhaps even promotes, discrimination in capital sentencing, it should be of secondary importance. The guided discretion principle should be the Court's preeminent concern in creating a rational and consistent capital jurisprudence.

In a sense, Justice Thomas has offered the only *solution* to the guided discretion-individualized sentencing zero-sum dilemma. He proposed neither abandoning a constitutional principle nor abandoning capital punishment itself but, rather, striking an acceptable balance between the

competing principles.[272] Striking such a balance is the very essence of *judging*. Justice Thomas's approach, importantly, has an arguable basis in the text of the Eighth Amendment;[273] is faithful to the history of the Supreme Court's understanding of the Amendment in *Furman* and the 1976 cases;[274] and, if pursued in the fashion suggested in this Article, maintains a meaningful but appropriately limited role for the federal courts in overseeing the administration of state capital punishment systems.

Justice Thomas starts from the (one would think) irrefutable premise that "[i]f the death penalty is constitutional, States must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements."[275] He first suggests that the determination and identification of the appropriate considerations for capital sentencing be primarily the responsibility of the states, in particular the state legislatures.[276] Once a state has identified the considerations that it deems relevant to the determination of whether capital punishment is appropriate in any particular case, the Supreme Court in all cases and the lower federal courts in federal habeas cases could review those factors to ensure that they are *reasonable*.[277] Why Justice Thomas settles on "reasonableness" as an Eighth Amendment standard is not apparent. One possibility, however, is that it is a concept derived from the relationship between the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Because the Eighth Amendment can apply to the states only by virtue of incorporation into the Fourteenth Amendment, there is nothing

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272. *Graham*, 113 S. Ct. at 892; *see supra* notes 203 to 237 and accompanying text.

273. Because the Eighth Amendment prohibits the infliction of "cruel and unusual punishments," U.S. CONST. amend. VIII, assuming for the moment that as a textual matter the Amendment even applies to the procedures for determining sentence as opposed to the *sentence* itself, a strictly textual understanding would require that any punishment be both "cruel" and "unusual" in order for it to violate the constitutional prohibition. The argument for basing the guided discretion principle on the Eighth Amendment as a matter of text is that an arbitrary death sentence is both "cruel" and "unusual." This argument, however, fails to treat the "cruel" requirement as independent of the "unusual" requirement because it in essence bases a conclusion that a death sentence may satisfy both requirements on the sole fact that it is arbitrary. In other words, a death sentence may be "cruel" simply because it is "unusual." Nonetheless, the problem of arbitrariness that the guided discretion principles addresses at least has some connection to the text of the Eighth Amendment. The Supreme Court has never articulated a similar textual argument in support of the individualized sentencing principle.

274. *See supra* Part II.B.

275. *Graham*, 113 S. Ct. at 914.

276. *Id.* at 914-15. As discussed previously, for approximately 180 years, the Supreme Court did not even consider capital punishment a significant federal constitutional problem. *See supra* Part II.A.

277. *See id.* at 915.

remarkable about discussing or utilizing due process concepts in the capital context. The "reasonableness" or "rational basis" concept is a well-recognized standard in both due process and equal protection cases arising under the Fourteenth Amendment.

It is not clear from his opinion in *Graham* exactly what level of scrutiny Justice Thomas's "reasonableness" review entails. In order to serve the interests of the guided discretion principle of *Furman*, however, any "reasonableness" review should have constitutional teeth. If the Supreme Court simply rubber stamps any capital sentencing considerations a state develops, then the Court will not have advanced the inquiry beyond its starting point (*Furman* itself); and capital punishment, although probably vastly more complicated, will be just as arbitrary as it was in 1972. Rather, the Supreme Court could use a meaningful "reasonableness" standard to prohibit state reliance on potentially discriminatory aggravating circumstances. For instance, if a state declared that an aggravating factor weighing in favor of capital punishment is that the victim was white or that the victim made more than $100,000 per year, such choices surely would be unreasonable both because they bear no rational relationship to the moral culpability of the defendant and because they involve unacceptable discrimination.[278]

A meaningful reasonableness approach also would invalidate vague aggravating circumstances that may serve as vehicles for covert, invidious discrimination. In this regard, the "especially heinous, atrocious or cruel" circumstance—as well as most of its equally vague and unhelpful "limiting" definitions—should be declared unconstitutional because it does not provide any reasonable basis for distinguishing the punishment accorded different murderers and, because of its open-endedness, creates the affirmative risk that a sentencer motivated by other, unacceptable discriminatory motives, might rely upon it in imposing a death sentence. Only by placing primary emphasis on the guided discretion principle of *Furman* and enforcing it through a meaningful standard of review can the Supreme Court truly minimize the opportunities for unacceptable discrimination in capital sentencing on the basis of invidious and irrational factors such as race, wealth or social status.

278. They are, however, facts that may be revealed in the course of the trial in explaining the nature and circumstances of the crime and, as such, are not *per se* inappropriate evidence for the sentencer to consider, at least when they bear some relationship to the defendant's moral culpability (*e.g.*, when the crime was racially motivated or involved a kidnapping-for-ransom plan). *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that admission in capital sentencing proceeding of evidence of impact of murder on young child who witnessed murder and who defendant also attempted to murder was not *per se* unconstitutional).

There is no dispute that the Court's current interpretation of the individualized sentencing principle grants capital defendants the right to compel the sentencer to consider and possibly grant mercy on the basis of almost any evidence the defendant labels "mitigating." Thus, the murderer who has witnesses that will testify that he is a good uncle and has inhaled gasoline fumes[279] may—for essentially irrelevant and perhaps irrational reasons, and certainly for reasons that do not bear on the defendant's personal responsibility or moral culpability for the crime—have a better chance at avoiding capital punishment than the murderer who produces no such witnesses. Indeed, the Supreme Court has held that even the mere fact that a murderer has behaved well in jail while awaiting trial—a consideration that the Court conceded has nothing to do with personal responsibility or moral culpability for the crime—is "mitigating" evidence that the sentencer must consider.[280]

Although Justice Thomas harshly criticized the Court's development and broadening of the individualized sentencing principle and questioned the correctness of the Court's decisions declaring mandatory capital punishment systems unconstitutional, he nonetheless suggested that the principle may retain vitality in some form. In particular, he recognized that in some form the individualized sentencing principle serves an important purpose as a due process-type rule of fairness. In other words, the individualized sentencing principle ensures that capital defendants will receive an opportunity equal to that of the state to present evidence that relates to the objective, reasonable factors that the state has identified as relevant to the capital sentencing determination. In this form, the principle operates more as a rule derived from the Due Process Clause of the Fourteenth Amendment[281] than as a command of the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments.

Thus, if a state reasonably determines that an appropriate factor is whether the defendant tortured the victim, the trial court would be required to permit the defendant to present evidence that the victim's death was instantaneous, evidence that the defendant did not inflict any wounds that caused the victim to suffer prior to death or any other

279. *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393, 397 (1987).

280. *See* Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

281. The Supreme Court long has recognized that ordinary Fourteenth Amendment due process principles, of course, apply to state capital sentencing proceedings and may impose requirements or limitations independently of those justified on the basis of the Eighth Amendment. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion) (holding that due process bars the sentencer in a capital case from relying upon a confidential presentence report unavailable to counsel); Lankford v. Idaho, 500 U.S. 110, 127 (1991) (holding that due process bars imposition of a death sentence in a proceeding prior to which neither the defendant nor his attorney received adequate notice that the sentencer was considering imposing such a sentence).

evidence that the defendant did not torture the victim. The defendant generally would not be entitled as a constitutional matter, however, to present evidence that his father died of cancer or that the defendant was a good uncle. Similarly, if a relevant factor was the future dangerousness of the defendant, then he might have the right to present evidence that he suffered from a treatable psychiatric condition, that he had no prior history of violence, or that the murder was provoked. Again, however, he would have no right to present evidence of any matters that did not relate directly to the factor at issue. Justice Thomas's view of the individualized sentencing principle rightly endorses the notion that it makes sense to have both parties to the capital sentencing proceeding address the same issues with their own evidence, rather than to have the state follow statutory guidelines while the defendant presents any evidence he desires and argues to the jury that such evidence should have an unspecified legal relevance that is not defined anywhere in the capital sentencing statute or the state's laws.

Nonetheless, a "reasonableness" standard with teeth as a means of addressing *Furman*'s concerns regarding unguided discretion also would permit the federal courts to serve the initial goal of the individualized sentencing principle of ensuring that the states do not in effect implement mandatory capital sentencing systems.[282] For example, if a state declared that the only factor relevant in determining whether to impose a death sentence was whether the defendant acted intentionally, a federal court could invalidate such a system on the ground that it did not reasonably permit the sentencer to exercise any discretion with reference to factors that meaningfully guided and advanced the sentencing determination. Indeed, if a state identified only one or two relevant considerations, the Court could invoke a presumption that the state effectively had adopted an unconstitutionally mandatory system of capital punishment that would not withstand a reasonableness review.

Under this approach, the post-*Furman* but pre-*Penry* Texas statute with its three special circumstances—intent, future dangerousness, and lack of provocation—arguably would be close to crossing the constitutional line prohibiting mandatory death sentences. The vast majority of states with capital punishment, however, do not place such severe restrictions on the considerations that are determinative of the capital sentencing decision. For example, as noted previously, Kansas has identified by statute eight aggravating factors and eight mitigating

282. The following discussion assumes the continuing constitutional validity of the Supreme Court's decisions holding that mandatory capital punishment systems are unconstitutional. Part III.B.3., *infra*, discusses in more detail the arguments in favor of retaining that principle; to retain the principle would mean, in turn, retaining some form of the individualized sentencing principle.

circumstances.[283] In any event, it makes more sense to inquire rigorously whether the state has identified sentencing considerations that are reasonable and which provide the sentencer with meaningful guidance rather than to ask, as the Court's more extreme individualized sentencing principle cases do, whether a particular state statute permits a capital defendant to present, and the sentencer to grant mercy on the basis of, virtually any evidence that the defendant labels "mitigating."

An approach similar to that suggested by Justice Thomas by no means eliminates all uncertainty. Indeed, serious questions regarding the *reasonableness* of particular sentencing considerations surely would arise. But judging is not simply about announcing black letter rules that the courts never again have to apply. Any solution to the zero-sum dilemma that attempts to *balance* the competing interests served by the guided discretion and individualized sentencing principles necessarily will leave some uncertainty. However, unless judges are willing to ignore the complexities of constitutional dilemmas such as the tension between the guided discretion and individualized sentencing principles, the balancing of competing interests and considerations is a necessary—albeit often difficult and subjective—component of constitutional adjudication.

Moreover, any uncertainty inherent in this approach is probably both less extensive and less objectionable than the uncertainty present in the current jurisprudence. Uncertainty about the reasonableness of particular sentencing considerations generally could be resolved on a system-wide basis. The primary focus of the federal courts' review would be the general considerations that a particular state has identified as governing the sentencing determination, rather than a case-by-case consideration of the "mitigating" evidence a defendant desired to present. Moreover, a renewed emphasis on guided discretion necessarily should decrease the opportunities for unacceptable discrimination.

Under an approach such as Justice Thomas's, the federal courts could continue a significant role in the oversight of the states' administration of their capital punishment systems. More importantly, elevating guided discretion as the preeminent principle while implementing it with a meaningful *reasonableness* standard of review might permit the states' capital punishment systems to attain a higher level of consistency and fairness—at least from the perspective of a neutral, objective observer, one who believes neither that the Constitution imposes no restraints on capital punishment nor that the Constitution altogether prohibits the imposition of capital punishment. No longer would the states be told that they may constitutionally operate a system of capital punishment

283. *See* KAN. STAT. ANN. §§ 21-4625 to 4626 (Supp. 1994).

only to discover the reality that the federal courts' unconfined application of fundamentally inconsistent principles makes such systems virtually impossible to implement and administer in any rational and consistent fashion.

2. The Problem of Racial Discrimination in Capital Sentencing

As Justice Thomas observed in *Graham*, a significant motive for the Supreme Court's initial decision to involve itself in capital punishment was concern about racial discrimination in capital sentencing.[284] In *Furman*, Justices Douglas, Marshall and Stewart all expressly noted their concern about racial motives in capital sentencing; and indeed the capital defendants in *Furman* and its two companion cases were black.[285] Moreover, in the 1976 cases, although the Supreme Court does not refer specifically to race discrimination concerns, the three cases in which the Court upheld capital punishment statutes involved white defendants while the two cases in which the Court struck down mandatory capital punishment statutes involved black defendants.[286] One might well question whether the original creation and application of the guided discretion principle was not actually the operation of Fourteenth Amendment equal protection concerns in the guise of Eighth Amendment doctrine.

For ten years following the 1976 cases, the Supreme Court did not directly address the issue of racial discrimination in capital sentencing. In 1986, however, in *Turner v. Murray*,[287] the Court considered a case in which a black defendant had been accused of an interracial murder.[288] The defendant argued that the Constitution required that he be given an opportunity on *voir dire* to inform the potential jurors of the victim's race and to question them regarding their attitudes on matters of race.[289] The Court upheld the defendant's claim and imposed a constitutional rule that, upon a defendant's request, the trial court must permit such questioning on *voir dire* in capital cases involving interracial crimes.[290] In reaching its conclusion, the Court emphasized that the discretion given capital sentencing juries creates a risk that juries or individual jurors will base their decisions on racial prejudices that the courts have no means to detect.[291] The *Turner* rule, however, applies only to

284. *See* Graham v. Collins, 113 S. Ct. 892, 904 (1993) (Thomas, J. concurring).
285. *See id.* at 252-53 (Douglas, J., concurring), 294-95 n.48 (Brennan, J., concurring).
286. *See id* at 908 n.7, (Thomas, J., concurring) (discussing the racial facts of the 1976 cases).
287. 476 U.S. 28 (1986).
288. *Id.* at 29.
289. *Id.* at 33.
290. *Id.* at 36-37.
291. *Id.* at 35.

interracial crimes and offers no protection to minority defendants who are charged with murdering victims of their own race.

Probably the most important case to raise constitutional questions regarding racial discrimination in capital sentencing was *McCleskey v. Kemp*,[292] which the Supreme Court decided the year following *Turner*. In *McCleskey*, a black capital defendant argued that his death sentence violated the Equal Protection Clause of the Fourteenth Amendment because statistical studies demonstrated that capital punishment in Georgia—the state in which he was tried, convicted and sentenced—was imposed more frequently on those who murdered whites and that blacks who murdered whites received the death penalty more often than whites who murdered whites.[293] The Supreme Court rejected his argument.[294] The Court declared that statistical studies alone do not suffice to state a cognizable equal protection claim.[295] Instead, relying on longstanding equal protection precedent, the Court held that in order to state a constitutional claim a capital defendant would have to prove that racially discriminatory animus actually motivated the sentencer in his case.[296] In so holding, the Supreme Court emphasized that the Constitution does not require that a state eliminate all demonstrable disparities that might correlate with an irrelevant and discriminatory sentencing factor—such as race—in order to operate a valid system of capital punishment.[297]

McCleskey was the first case in which the Supreme Court expressly and directly addressed the implications of the Equal Protection Clause of the Fourteenth Amendment with respect to capital punishment. The primary thrust of the argument in *McCleskey* did not involve the Eighth Amendment at all; rather, it involved a constitutional provision that was ratified almost eighty years after the constitutional prohibition on the infliction of cruel and unusual punishments and that might well be viewed as providing an independent reason for prohibiting imposition of a death sentence when the Eighth Amendment alone would not. Thus, prior to *McCleskey* there was a plausible argument that the Equal Protection Clause, either instead of or in addition to the Eighth Amendment, provided a constitutional basis for the Court's recognition of the guided discretion principle. Following *McCleskey*, it is clear that a majority of the Court is unlikely to adopt that view of *Furman*.

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292. 481 U.S. 279 (1987).
293. *Id.* at 286-87.
294. *Id.* at 292.
295. *See id.* at 292.
296. *Id.* at 292, 297.
297. *Id.* at 314-19.

McCleskey notwithstanding, both Justice Thomas, in his concurring opinion in *Graham*,[298] and Justice Blackmun, in his dissenting opinion in *Callins*,[299] have recently emphasized the Court's continuing uneasiness with the specter of racial discrimination in capital sentencing.[300] Justice Thomas, in his concurring opinion in *Graham*, emphasized the importance of race considerations to the outcomes in *Furman* and the 1976 cases.[301] Moreover, he correctly warned that only a renewed focus on the guided discretion principle and the imposition of strict limitations on the individualized sentencing principle will permit the Supreme Court to impose any effective constraints on the sentencer's ability to rely on racial prejudices in determining the appropriate sentence in capital cases.[302] Justice Blackmun, on the other hand, argued that the Court lacks the ability to eliminate racial discrimination in capital

298. *See* Graham v. Collins, 113 S. Ct. 892, 904-06 (1993) (Thomas, J., concurring).

299. *See* Callins v. Collins, 114 S. Ct. 1127, 1130-36 (Blackmun, J., dissenting).

300. It is the view of this author that the problems of race discrimination and mistaken execution of the innocent are the two most serious legal and moral obstacles to the use of capital punishment. The latter problem, however, is not within the scope of this Article and, therefore, is not discussed, although it was recently before the Supreme Court for the second time in two years. *See* Schlup v. Delo 115 S. Ct. 851 (1995); *see also* Herrera v. Collins, 113 S. Ct. 853, 860 (1993) (holding that a claim of "actual innocence" based on newly discovered evidence does not automatically state a federal constitutional violation that is cognizable in a federal habeas corpus proceeding). In my personal experience as a law clerk to two Supreme Court Justices, I never saw a capital punishment case in which it appeared that the crime was not sufficiently horrible or egregious as to justify a death sentence on moral grounds, so long as the defendant was in fact the guilty party. Rather, one might legitimately question whether the Supreme Court has gotten it backwards in the first instance by focusing almost exclusively on the sentencing determination rather than the guilt decision in capital cases. There might be a much higher level of confidence in the accuracy of capital punishment systems and less uneasiness with the results if steps were taken to improve the quality of the guilt phase of capital trials. Neither the Supreme Court nor legislative bodies, which are strapped for funds, have adopted such an approach to capital punishment. Thus, given the Supreme Court's emphasis on the sentencing process, some death penalty opponents apparently (and probably correctly) believe that the sentencing process—along with the numerous asserted "errors" that may occur in that phase—offers the best opportunity to frustrate the implementation and administration of a capital punishment system. *See, e.g.*, Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required when Reviewing Capital Sentences*, 4 KAN. J. L. & PUB. POL'Y 51 (1994) (using metaphors drawn from *The Wizard of Oz* to argue that the Kansas Supreme Court should *never* apply harmless error analysis in reviewing capital cases under the new Kansas capital punishment statute).

301. *Graham*, 113 S. Ct. at 904-15 (Thomas, J., concurring).

302. *See id.* at 915 (Thomas, J., concurring) ("We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*."); *cf.* David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 417-19 (1994) (arguing that racial discrimination in capital sentencing is neither inevitable nor impossible to prevent but that the Supreme Court must return to the principles of *Furman* in order to eliminate the problem).

sentencing and, in part for that reason, should abandon "the death penalty experiment"[303] altogether.[304]

Justices Blackmun's view ultimately may prove correct, but it also may be premature. An important and relatively recent development in the Supreme Court's equal protection jurisprudence (a development on which neither Justice Blackmun nor Justice Thomas focuses) in conjunction with a renewed emphasis on the concept of guided discretion, may counsel against any immediate abandonment of capital punishment if the abandonment rests on the ground that capital punishment necessarily results in racial discrimination that the Supreme Court is helpless to prevent. Shortly before the Supreme Court's decision in *McCleskey*, the Court held in *Batson v. Kentucky*[305] that a criminal defendant may establish a prima facie equal protection violation simply by showing that the prosecutor in the defendant's trial exercised peremptory challenges to exclude members of the defendant's own race from the petit jury.[306] Once such a showing is made, the prosecutor then must offer racially neutral reasons in support of the strikes, or the strikes will be disallowed.[307] The *Batson* rule, at least in its original form, possibly creates a potent limitation (at least in geographic areas in which the jury venire is racially diverse) on the state's ability to select an entire petit jury that is likely to base a capital sentencing decision on racial prejudices. If a black defendant is charged with a capital crime, the prosecutor cannot, in light of *Batson*, use peremptory challenges to strike all black or other minority jurors absent race-neutral reasons for doing so. Moreover, in conjunction with the *Turner* rule permitting capital defendants to inquire on *voir dire* about the potential jurors' attitudes toward race in cases involving interracial murders, the Court's constitutional jurisprudence regarding jury selection in criminal cases creates, at least in theory, safeguards against racial discrimination in capital sentencing.

These safeguards are not foolproof, however; and much depends on the lower state and federal courts' implementation of *Batson* and the rigor, or lack thereof, with which they scrutinize prosecutorial peremptory strikes of minority jurors.[308] Moreover, the Supreme Court's

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303. *Callins*, 114 S. Ct. at 1130 (Blackmun, J., dissenting from denial of stay).

304. *Id.* at 1138.

305. 476 U.S. 79 (1986).

306. *Id.* at 96.

307. *Id.* at 97-98.

308. Some critics have argued that *Batson* is ineffective in protecting black capital defendants from racial discrimination in criminal trials because the requirement that prosecutors explain peremptory strikes on race-neutral grounds lacks teeth and has not been applied by the courts in a way that significantly affects prosecutorial discretion in striking potential jurors. *See* Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in*

extension of the *Batson* principle in *Georgia v. McCollum*[309] to a criminal defendant's exercise of peremptory strikes has probably undermined minority capital defendants' ability to use their own peremptory strikes in an effort to achieve racial diversity on their petit juries. *McCollum* prohibits a black capital defendant from exercising peremptory strikes against white jurors solely in the hopes of seating a black or other minority juror on the petit jury.[310] Justice Thomas, concurring in *McCollum*, warned that minority "criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes."[311]

Finally, much also depends on the quality of representation accorded indigent capital defendants. To the extent that minority capital defendants are members in disproportionate numbers of lower socio-economic classes, as indigents they must rely on appointed counsel. When states provide unskilled, underfunded and inexperienced appointed counsel to represent indigent capital defendants, the states increase the likelihood of incompetent representation at trial, probably the most important and complicated stage of a capital proceeding and certainly the stage in which racial discrimination is most likely to operate. Although indigent capital defendants often receive substantial and extremely competent *pro bono* representation on appeal, they frequently do not receive such assistance at trial when they may need it the most. No solution to the racial discrimination problem will be complete without a serious commitment to providing skilled, experienced and adequately funded counsel to indigent capital defendants at the trial level. Although this is not necessarily a constitutional problem—apart from the Sixth Amendment right to counsel and general due process considerations—the shortcomings of appointed counsel in capital cases certainly increase the discomfort that judges may experience when considering the problem of racial discrimination in capital sentencing.

In theory at least, (1) a renewed emphasis on guiding the sentencer's discretion in capital cases in a meaningful sense, both by focusing on objective factors that counsel in favor of a sentence of death and by limiting the scope of the evidence that may be presented in mitigation, in conjunction with (2) a meaningful *Batson* restriction on a State's ability to eliminate minority jurors from the sentencing body and (3) a

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Criminal Justice, 51 WASH. & LEE L. REV. 509, 519-27 (1994).

309. 112 S. Ct. 2348, 2359 (1992).

310. *Id.*

311. *Id.* at 2360 (Thomas, J., concurring). Justice Thomas concurred in the result because, although he disagreed with the *Batson* rationale, he felt bound by the Court's *Batson* line of cases and agreed that the rule in *McCollum* was the logical extension of *Batson*. *Id.* at 2359.

more broadly construed right under *Turner* for a minority capital defendant to inquire about the racial attitudes of potential jurors[312] should reduce the opportunities for and the likelihood of racial prejudices motivating the sentencer's exercise of its discretion to impose death or life in capital cases. Certainly, the only hope for significantly reducing the intolerable specter of racial discrimination in capital cases lies in a fundamental reformation of the Supreme Court's current capital jurisprudence. Only pursuit of the guided discretion concept will ever *reduce* the opportunities for racial discrimination; adherence to open-ended considerations that may lead to a determination in favor of mercy in a particular case never will.

It is at least in part because of the Supreme Court's own development of inconsistent constitutional objectives that the problem of racial discrimination in capital sentencing remains a serious one. Rather than abandon the entire system as a result, the Court ought first to attempt to identify and pursue a constitutional objective or objectives that will permit the approximately three dozen states with capital punishment statutes to administer rationally and consistently and in compliance with the Eighth Amendment a punishment that the Constitution clearly contemplates, while at the same time avoiding discriminatory results that are unacceptable under the independent constraints of the Fourteenth Amendment's Equal Protection Clause.

3. Abandon a Principle

Justice Scalia's proposal to eliminate the individualized sentencing principle[313] has the advantages of simplicity and analytical clarity. Indeed, his proposal has considerable merit as a matter of Eighth Amendment jurisprudence because there is little, if anything, in the text or the history of the Supreme Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause to justify the application of such a principle. As Justice Scalia recognizes,[314] his reading of the Eighth Amendment would require rejection of the

312. The *Turner* rule applies only to capital cases involving interracial murders and does not, as announced by the Supreme Court, permit minority capital defendants to make such inquiries in *voir dire* generally. *See* Turner v. Murray, 476 U.S. 28, 36-37 (1986). Because statistical evidence suggests that racial considerations may be important in any case in which the capital defendant is of a minority race, even if the victim was of the same race, *see McCleskey*, 481 U.S. at 286-87, the Supreme Court's limitation on the *Turner* rule may fail to provide minority capital defendants with the full measure of protection that they need against racial discrimination.

313. Walton v. Arizona, 497 U.S. 639, 662-73 (1990) (Scalia, J., concurring). *See supra* text accompanying notes 17-18.

314. *Id.*

rationales offered to justify *Woodson v. North Carolina*[315] and *Roberts v. Louisiana*,[316] the 1976 cases declaring mandatory capital sentencing schemes unconstitutional.

A significant objection to Justice Scalia's proposal, however, is that it ignores the possibility that the individualized sentencing principle retains constitutional validity under the independent authority of a different constitutional provision, such as the Due Process Clause of the Fourteenth Amendment. Although adopting his theoretically simple alternative would simplify the Court's capital jurisprudence, Justice Scalia's proposal is an option only if the individualized sentencing principle cannot be justified under any provision of the Constitution. Thus, the real question is whether the individualized sentencing principle can claim a legitimate constitutional pedigree; if so, then it cannot merely be ignored.

At first glance, elimination of the individualized sentencing principle and the resulting constitutional validation of mandatory capital punishment systems may seem an attractive way to achieve consistency in capital sentencing. Indeed, there is an irresistible logical appeal to the notion that no arbitrariness in sentencing will result if the law simply condemns all convicted first degree murderers, as did the statutes at issue in *Woodson*[317] and *Roberts*.[318] Putting aside for the moment considerations regarding prosecutorial discretion in charging and plea bargaining, as well as the possibility for jury nullification, such a capital punishment system at least in theory would be blind to all potentially discriminatory considerations, including race, wealth and social status.

Upon further consideration, however, it is possible to imagine troubling scenarios that suggest that mandatory punishment is consistent but not necessarily fair. Two such examples would be the battered or abused spouse or child who kills the victimizer,[319] or the person who assists another in committing suicide. Although both situations easily could involve the offense of capital murder, to many, if not most, people it would not seem fair to subject such defendants to the same punishment as the defendant who tortured and killed someone during a robbery or cold-bloodedly gunned down a complete stranger.

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315. 428 U.S. 280 (1976).

316. 428 U.S. 325 (1976).

317. 428 U.S. at 284. *See supra* notes 74 to 82 and accompanying text.

318. 428 U.S. at 328. *See supra* notes 74 to 82 and accompanying text.

319. *See, e.g.*, KAN. STAT. ANN. § 21-4628(8) (Supp. 1994) (recognizing as a mitigating circumstance that "the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim").

These hypotheticals, of course, do not serve to establish that mandatory systems of capital punishment violate the Constitution. The controlling opinions in the 1976 cases invalidating mandatory capital punishment systems suggested that the Eighth Amendment prohibited such schemes both because they were inconsistent with evolving standards of decency in American society and because there ought to be heightened reliability—in the form of individualized consideration—in capital cases.[320] Both propositions are extremely debatable. The first is seriously undermined by the resort of the federal government and many state governments to strict sentencing guidelines for virtually all criminal offenses and mandatory minimum sentences for many offenses. The second assumes that there is a more reliable determination of the appropriate sentence when a criminal defendant's individual circumstances are considered. The current popularity of sentencing guidelines and mandatory minimum sentences again runs counter to that notion. More importantly, perhaps, as Justice Thomas convincingly argued in *Graham*, the power to recommend mercy on the basis of virtually *any* "mitigating" circumstances is really nothing more than the power to *discriminate* for virtually any reason.[321] It is simply clothed in different terms.

Thus, Justice Scalia may well be correct, and perhaps the individualized sentencing principle should be understood to have only a tenuous basis (if that) in the Eighth Amendment. Nonetheless, it is at least arguable that the results, even if not the rationales, in *Woodson* and *Roberts* were correct. The basis for this suggestion is the Due Process Clause of the Fourteenth Amendment. The hypotheticals discussed above suggest that many people would find mandatory capital punishment systems to be fundamentally unfair. Thus, relying upon both the procedural and substantive components of the Due Process Clause, an argument could be made that at least to some degree, individualized sentencing is required by the Fourteenth rather than the Eighth Amendment. Indeed, the Court's opinions in the *Lockett* line of cases repeatedly refer—although completely without explanation—to the "Eighth and Fourteenth Amendments" as dual bases for the individual-

320. *See Woodson*, 428 U.S. at 301, 304-05 (opinion of Stewart, Powell, and Stevens, JJ.); *see also Roberts*, 428 U.S. at 332-33 (opinion of Stewart, Powell and Stevens, JJ.). The controlling opinions also suggested that mandatory systems only masked the problem of unguided discretion because juries still could arbitrarily nullify the statutes simply by refusing to convict in particular cases, *Woodson*, 428 U.S. at 302-03 (opinion of Stewart, Powell and Stevens, JJ.); *Roberts*, 428 U.S. at 334-35 (opinion of Stewart, Powell, and Stevens, JJ.); that objection, however, exists under *any* capital punishment system and seems a weak straw on which to hang a distinction between mandatory and other capital punishment systems.

321. Graham v. Collins, 113 S. Ct. 892, 912-13 (Thomas, J., concurring).

ized sentencing principle.[322] Similarly, Justice Thomas in *Graham* refers to his view of the individualized sentencing principle as a sort of evidentiary rule of fairness that gives the defendant an opportunity equal to that of the state to present his side of the story.[323] That characterization looks and sounds like a due process rather than an Eighth Amendment principle. Of course, the Supreme Court has expressly recognized the applicability of general due process concepts in capital sentencing proceedings.[324]

Moreover, basing the individualized sentencing principle on the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's Cruel and Unusual Punishments Clause is both intellectually and analytically more satisfying than the Supreme Court's current jurisprudence. It is simply illogical to assert that a single, terse and unilluminative clause in an amendment ratified two hundred years ago requires the Supreme Court to adhere simultaneously to two fundamentally inconsistent principles. The Due Process Clause of the Fourteenth Amendment, on the contrary, did not become part of the Constitution until more than seventy years later. Thus, there is nothing either intellectually dishonest or analytically troubling about the proposition that the Fourteenth Amendment might in some circumstances prohibit what the Eighth Amendment alone otherwise might permit.

The Supreme Court should take all of these considerations into account if and when it engages in a fundamental reexamination of its capital jurisprudence. So long as the individualized sentencing principle retains vitality under the Due Process Clause, even if it does not do so under the Eighth Amendment, it exists as an important limitation on the states' adoption and implementation of capital punishment systems. For if, in the name of guided discretion, the states limit the sentencing considerations too narrowly, then they effectively adopt mandatory sentencing systems in all but name. Moreover, any meaningful existence for the individualized sentencing principle requires that capital defendants be permitted a reasonable opportunity to respond to the factors that the states identify as supporting the imposition of a death

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322. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604, 606, 608 (1978) (opinion of Burger, C. J.); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Penry v. Lynaugh, 492 U.S. 302, 318 (1989).

323. Graham v. Collins, 113 S. Ct. 892, 910-11 (1993) (Thomas, J., concurring).

324. The Supreme Court has recognized that ordinary Fourteenth Amendment due process principles may impose in state capital sentencing proceedings requirements or limitations independent of those justified on the basis of the Eighth Amendment. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 362 (1977) (due process bars the sentencer in a capital case from relying upon a confidential presentence report unavailable to counsel); Lankford v. Idaho, 500 U.S. 110, 127 (1991) (due process bars imposition of a death sentence in a proceeding prior to which neither the defendant nor his attorney received adequate notice that the sentencer was considering imposing such a sentence).

sentence. Thus, Justice Scalia's proposal to abandon this principle altogether,[325] although potentially meritorious with respect to the Court's Eighth Amendment rationale for it, requires the Court to blind itself to the Due Process Clause.

Nonetheless, as Justice Scalia has observed, it is difficult to comprehend why a capital defendant should be permitted to label *any* evidence upon which a juror conceivably might vote to grant mercy as "mitigating" and thereby compel the sentencer to consider it, irrespective of the factors the state has identified to guide the sentencer.[326] In a state like Kansas, for example, which identifies by statute eight aggravating factors[327] and eight mitigating factors[328] relevant to the capital sentencing determination, there is no inherent unfairness—so long as those factors are reasonably related to the sentencing determination—in limiting the defendant as well as the state to the presentation of evidence that is relevant to those factors. There is no logical reason, regardless of the constitutional basis, for an unbounded individualized sentencing principle. Few people, if any, are completely without redeeming characteristics or deeds; but it is not unfair to exclude evidence that a capital defendant helped an elderly person across the street when in the third grade or was emotionally traumatized by the loss of a favorite toy at the age of five or was voluntarily intoxicated at the time of the murder if such evidence is not relevant to specific and reasonable criteria that the state has identified to guide the sentencing determination.

It is, however, difficult to argue credibly that, once the state has identified relevant sentencing considerations, only the State may present evidence regarding those considerations. Thus, Justice Scalia's total rejection of the individualized sentencing principle probably is unwarranted. His analysis, however, helps to illustrate the irrational nature of the Court's current Eighth Amendment capital jurisprudence.

4. Abandon the Enterprise

Justice Blackmun's proposal that the Court abandon its attempts to achieve a capital jurisprudence that achieves rational and consistent results[329] would eliminate the constitutional dilemma altogether, along with the unfairness and inefficiency that results from the Supreme Court's current misguided approach. Justice Blackmun's proposal,

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325. Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring).
326. *See id.* at 661-73.
327. *See* KAN. STAT. ANN. § 21-4625 (Supp. 1994).
328. *See id.* at § 21-4626.
329. Callins v. Collins, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting).

however, requires either acceptance of the notion that a single, terse clause in the Constitution that expressly refers neither to guided discretion nor to individualized sentencing nonetheless compels simultaneous adherence to both principles or acceptance of the notion that the Due Process Clause of the Fourteenth Amendment (which arguably provides an alternative basis for the individualized sentencing principle) effectively prohibits the imposition of capital punishment in most, if not all, circumstances in which the Eighth Amendment otherwise would permit it.

Justice Blackmun's assertion that the Supreme Court should abandon the entire capital punishment enterprise because *the Constitution* compels rigid adherence to two fundamentally inconsistent principles[330] is untenable if he bases the derivation of those two principles on the Eighth Amendment, a point that is not clear from his opinion. Justice Blackmun's opinion in *Callins* repeatedly refers to "moral" considerations and to his personal perceptions,[331] but it nowhere refers to the text of the Eighth Amendment or to any other provision of the Constitution. There can be little doubt that the Constitution contemplates the use of capital punishment; and, indeed, the Supreme Court has never suggested otherwise.

The Supreme Court long has engaged in an "evolving standards of decency" inquiry in interpreting the scope of the Eighth Amendment prohibition on the infliction of cruel and unusual punishments.[332] Thus, neither the textual contemplation of capital punishment nor the Supreme Court's prior interpretations are strictly controlling, but the Court did not rely on the "evolving standards" analysis to create the guided discretion principle in *Furman*. In fact, the Court relied upon that analysis for only one of three rationales underlying its invalidation of mandatory capital sentencing systems in *Woodson* and *Roberts*. Nor was the evolving standards of decency inquiry the basis for the Court's further development of the individualized sentencing principle in the *Lockett* line of cases. Rather, the Court relied on the "death is different" rationale to hold that individualized sentencing is required in order to satisfy an asserted need for heightened reliability in capital cases.[333] As explained previously, until *Furman* and the 1976 cases, the Court for more than 180 years and despite clear opportunities, had not held that the Eighth Amendment placed any significant restraints on the

330. *Id.*

331. *See, e.g., id.* at 1130.

332. *See, e.g.*, Weems v. United States, 217 U.S. 349, 368-74 (1910); Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

333. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

states' implementation and administration of their capital sentencing systems.[334]

Thus, it is clear that the Supreme Court does not purport to derive the individualized sentencing principle from either the text, its own interpretations or perhaps even the purposes of the Eighth Amendment. Rather, the principle is based on considerations that appear more suited to the Due Process Clause of the Fourteenth Amendment. Unless he is suggesting that the Due Process Clause provides an independent justification for the individualized sentencing principle, Justice Blackmun's assertion that *the Constitution* compels rigid adherence to two inconsistent principles[335]—at least one of which the Supreme Court itself created without clear, direct or perhaps even indirect support in the text of the Eighth Amendment—is simply unacceptable. Rather than distorting and perverting the Eighth Amendment in the name of fairness, perhaps the Supreme Court should simply resort to the open-ended Due Process Clause of the Fourteenth Amendment.

The convictions of Justices on either side of the capital punishment debate may well be deeply held, but deeply held convictions are no excuse for ignoring what the Constitution expressly contemplates or for refusing to acknowledge that the present constitutional dilemma largely is of the Supreme Court's own making. The evolution of the guided discretion and individualized sentencing principles in directions that increase rather than minimize the conflict between the two with no attempt to balance the competing interests is probably the result of several factors. These factors include the ambivalence of swing voters on the Supreme Court toward capital punishment[336] and the Court's inability or unwillingness to recognize the conflict within its own jurisprudence. Clearly, Justices who oppose capital punishment in all circumstances, such as former Justices Brennan and Marshall,[337] or

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334. *See supra* text accompanying notes 23 to 37.

335. *Callins*, 114 S. Ct. at 1129 (Blackmun, J., dissenting).

336. Some Justices, such as Justices Stewart, Blackmun and Stevens, clearly have been unwilling to declare capital punishment unconstitutional in all circumstances but nonetheless sometimes have been strongly inclined to resolve any doubts about its propriety in particular cases in favor of the capital defendant. *See e.g.*, Woodson v. North Carolina, 428 U.S. 280, 282-305 (1976) (Opinion of Stewart, Powell and Stevens, J.J.); Roberts v. Louisiana, 428 U.S. 325, 327-36 (1976) (Opinion of Stewart, Powell and Stevens, J.J.); Walton v. Arizona, 497 U.S. 639, 677-708 (1990) (Blackmun, J., dissenting). Other Justices, for example, Justices White, O'Connor and Souter, although perhaps more strongly committed to the constitutionality of capital punishment, nonetheless occasionally have voted in favor of capital defendants in particular cases. *See e.g.*, Maynard v. Cartwright, 486 U.S. 356 (1988) (White, J., delivering the opinion of the Court); Penry v. Lynaugh, 492 U.S. 302, 307-40 (1989) (O'Connor, J., delivering the opinion of the Court.); Parker v. Dugger, 111 S. Ct. 731, 733-40 (1991) (O'Connor, J., delivering the opinion of the Court); *Parker*, 111 S. Ct. at 733-40 (Souter, J., joining in the opinion of the Court).

337. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 257 (1972).

those who are greatly troubled by it—such as Justices Stevens and Blackmun, at least in recent years—have supported the creation of many rules that make the implementation and administration of capital punishment more difficult, generally through an expansive interpretation of the individualized sentencing principle. At the same time, those at the other extreme who favor capital punishment and desire to limit the federal courts' intervention in the process, such as Chief Justice Rehnquist and Justices Scalia and Kennedy, typically have focused on the guided discretion principle in order to uphold and justify various aspects of state capital punishment systems. The ultimate result is a capital jurisprudence that is not faithful to its origins, the constitutional text on which it is purportedly based, or perhaps even rational thinking.

That result, however, does not justify the course that Justice Blackmun advocates.[338] The Supreme Court would be abdicating its responsibility as the final arbiter of the Constitution if it simply gave up on its capital jurisprudence and effectively barred the administration of capital punishment in this country without actually declaring that any particular constitutional provision compels such a result. Moreover, it is not at all clear that a fundamental reexamination of the Court's capital jurisprudence would not result in a more rational and acceptable system of federal oversight. Rather, as Justice Thomas suggests, it may be possible to strike a balance between the constitutional considerations such that the federal courts may assume a meaningful and yet limited role.[339] In any event, to declare that the solution for the Court is simply to give up is essentially lawless.

5. The Absolutist Position

The absolute constitutional prohibition on capital punishment long advocated by former Justices Brennan and Marshall[340] also would eliminate the constitutional dilemma altogether. Even under the very precedents on which former Justices Brennan and Marshall relied, however, the absolutist approach must confront serious obstacles. Under current Eighth Amendment jurisprudence, the Court could declare an absolute prohibition only if a majority of the Court concluded as a factual matter that capital punishment is in all circumstances

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338. *Callins*, 114 S. Ct. at 1138 (Blackmun, J., dissenting).

339. Graham v. Collins, 113 S. Ct. 892, 914 (1993) (Thomas, J., concurring). *See supra* text accompanying notes 203 to 237.

340. *See* Furman v. Georgia, 408 U.S. 238, 305-06 (Brennan, J., concurring) 360-71 (Marshall, J., concurring) (1972); *see also*, Gregg v. Georgia, 428 U.S. 153, 229, (Brennan, J., dissenting), 231 (Marshall, J., dissenting) (1976). See also literally every other capital case that came before the Court during their tenures and William J. Brennan, Jr., *Foreword: Neither Victims nor Executioners*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1 (1994).

contrary to evolving standards of decency in American society, an extremely questionable conclusion. It is doubtful that any objective assessment of current American attitudes toward capital punishment would result in the conclusion that death now should be considered cruel and unusual punishment in all circumstances.

Nonetheless, the Brennan-Marshall approach would at least serve the important purpose of avoiding the waste of substantial amounts of limited defense and prosecutorial resources. Moreover, the absolutist approach would bring certainty to the capital sentencing process by eliminating it altogether. Thus, the states no longer would be permitted or encouraged to waste resources on capital prosecutions in pursuit of a punishment that will never be realized. Nor would the states and their citizens be misled to believe that capital punishment is a feasible way in which to express societal outrage. The removal of capital cases from the Supreme Court's docket would also result in the elimination of last-minute requests for stays of execution and a significant reduction in both petitions for a writ of certiorari and cases set for full briefing, argument and decision. Additionally, the Supreme Court would be finished with an aspect of constitutional jurisprudence that threatens to make a mockery of the Court as an institution. Finally, the elimination of capital punishment altogether would necessarily obviate very real concerns about the unacceptable specters of racial discrimination and mistaken executions of the innocent. For all of these reasons, adopting the position that capital punishment is in all circumstances unconstitutional may be preferable to the Supreme Court's present adherence to fundamentally inconsistent principles that it purports to derive from a single, terse and unilluminative clause in the Constitution.

IV. CONCLUSION

The Supreme Court's current capital jurisprudence is a disaster. For over 180 years, the Supreme Court did not view capital punishment as involving any significant federal constitutional issues. In *Furman v. Georgia*, however, the Court quite properly concluded that standardless capital sentencing discretion created an unacceptable risk of arbitrary sentencing and presented the very real threat that such determinations might be based on constitutionally repugnant considerations such as the defendant's race. When confronted with mandatory capital punishment systems in the 1976 cases, the Supreme Court found itself unable to rely solely on the guided discretion principle of *Furman*. Instead, in order to invalidate the mandatory systems, the Court developed the individualized sentencing principle, which it also purportedly based on the Eighth Amendment. Had the Court declined to reach beyond the proposition that the individualized sentencing principle was sufficient

to make unconstitutional any mandatory system of capital punishment, the Court's capital jurisprudence might today be more rational and acceptable. Unfortunately, the Court, in subsequent decisions, repeatedly has expanded the scope of the individualized sentencing principle at the expense of guided discretion.

In essence, the Supreme Court has failed to devise an acceptable solution to the zero-sum dilemma created by its simultaneous pursuit of the objectives of guiding the sentencer's discretion and according defendants individualized sentencing. Neither principle can be extended except at the expense of the other. The Supreme Court largely has ignored the conflict and purported to decide capital cases as if the principles coexist in harmony. Unless and until the full Court acknowledges the dilemma, no solution will be forthcoming.

If the Supreme Court accepts the challenge of resolving this zero-sum dilemma, *Furman* provides the appropriate starting point for any fundamental reconfiguration of the federal constitutional law of capital punishment. Only by returning to an emphasis on the guided discretion principle and striking a balance between it and the individualized sentencing principle may the Supreme Court ever hope to achieve a system of federal oversight and review that results in the rational, consistent and fair application of capital punishment. Only a renewed faithfulness to *Furman*'s principle of guided discretion promises any realistic hope of eliminating the problem of racial or other unacceptable forms of discrimination in capital sentencing. The power to recommend mercy for virtually any reason and on the basis of almost any evidence—the essence of the individualized sentencing principle—necessarily bestows on the sentencer the ability also to discriminate malevolently on the basis of factors such as a capital defendant's race or lack of social status, as well as beneficently on the basis of a defendant's individual circumstances.

The individualized discretion principle, however, also must be accorded constitutional respect. Although that principle is difficult to justify on the basis of the Eighth Amendment and although it has been expanded beyond its appropriate bounds, the Supreme Court should recognize a form of the principle on the basis of the Due Process Clause of the Fourteenth Amendment. Nonetheless, it seems unlikely that the Due Process Clause of the Fourteenth Amendment should be understood to prohibit the imposition of capital punishment in most, if not all, circumstances in which the Eighth Amendment would otherwise permit it. Thus, any balance the Court strikes between the guided discretion and individualized sentencing principles should weigh more strongly in favor of the former principle.

Neither abandonment of the individualized sentencing principle in its entirety nor the prohibition of capital punishment altogether are

probably acceptable constitutional alternatives. Complete abandonment of the individualized sentencing principle would require that the Supreme Court overrule its decisions declaring mandatory capital punishment systems unconstitutional. That result perhaps is justifiable as a matter of Eighth Amendment jurisprudence but ignores the Due Process Clause of the Fourteenth Amendment as an independent source for some form of the individualized sentencing principle. Similarly, the absolute prohibition of capital punishment on federal constitutional grounds is difficult to justify under any current mode of constitutional interpretation. It seems unlikely that a majority of the Court honestly could conclude that capital punishment is in all circumstances inconsistent with evolving standards of decency in American society. Nor is it persuasive to suggest that the Eighth Amendment's terse and unilluminative prohibition on cruel and unusual punishments compels simultaneous adherence to fundamentally inconsistent principles.

Capital defendants and the states deserve better than the current situation, which works inexcusable hardships on capital defendants, the states and their citizens, and wastes tremendous amounts of defense and prosecutorial resources. For the past two decades, the Court repeatedly has shifted in the rigor of its application of the guided discretion and individualized sentencing principles, heightening rather than minimizing the tension between the two. Perhaps this state of affairs is an inevitable result of perfectly understandable judicial ambivalence toward capital punishment. The current constitutional dilemma may be attributable to the difficulties inherent in reconciling and integrating the text, history and functions of the Constitution and the Court with the personal moral and intellectual values of those charged with interpreting the Constitution with respect to an important and controversial issue. The evolution of the Court's capital jurisprudence may have more to do with this fundamental conflict inherent in the human process of judging than with anything the Constitution says or requires. Nonetheless, "[i]f the death penalty is constitutional, States must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements."[341] Let reason prevail.

341. *Graham*, 113 S. Ct. at 914 (Thomas, J., concurring).