EIGHTH AMENDMENT

FURTHER GUARANTEES IN CRIMINAL CASES

CONTENTS

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EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[2] These two contrasting views of the "excessive bail" provision, expressed by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

The history of the bail controversy in England is crucial to understanding why the ambiguity exists.[4] The Statute of Westminster the First of 1275[5] set forth a detailed enumeration of those offenses that were bailable and those that were not, and, though supplemented by later statutes, it served for something like five and a

[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that, in Bell v. Wolfish, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id. at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 ANNALS OF CONGRESS 754 (1789).

[4] Still the best and most comprehensive treatment is Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–89 (1965), *reprinted in* C. FOOTE, STUDIES ON BAIL 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.[8] The Petition cited the Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for *habeas corpus* could not be presented,[9] and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high that it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by Madison in the House of Representatives.[14]

Thus, in England, the right to bail generally was conferred by the basic 1275 statute, as supplemented; the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679; and protection against abridgement through the fixing of excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, § 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought

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[6] 1 J. Stephen, A History of the Criminal Law of England 233–43 (1833). The statute is summarized at pp. 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on *habeas corpus* to effectuation of the right to bail. Id. at 69.

[9] *Jenkes' Case*, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 Documents on Fundamental Human Rights 327–340 (Z. Chafee ed., 1951).

[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. R. Doc. No. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 658 (2d ed. 1836).

[14] 1 Annals of Congress 438 (1789).

to curtail excessive bail without guaranteeing a right to bail, or whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States that had its origin in a provision of the Massachusetts Body of Liberties of 1641:[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"—the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community—is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings.[19]

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[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* I DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Z. Chafee, ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania Constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787), *reprinted in* 1 Stat. 52 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein . . . ." 1 Stat. 91 § 33 (1789).

[19] Congress first provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, §§ 23–1321 *et seq.*, held constitutional in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1978), while in other federal courts, the Bail Reform Act of 1966, as amended, applies. 80 Stat. 214, 18 U.S.C. §§ 3141–56. Amendments contained in the Bail Reform Act of 1984

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.[20] Then, in *United States v. Salerno*,[21] the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[22] Instead, "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[23] "[D]etention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.[24]

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[25] If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[26] To challenge bail as excessive, one must move for a reduction, and, if that motion is denied, appeal to the Court of Appeals, and, if unsuccessful, appeal to the Supreme Court Justice sitting for that circuit.[27] The

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added general preventive detention authority. *See* 18 U.S.C. § 3142(d) and (e). Those amendments authorized pretrial detention for persons charged with certain serious crimes (*e.g.*, crimes of violence, capital crimes, and crimes punishable by 10 or more years' imprisonment) if the court or magistrate finds that no conditions will reasonably assure both the appearance of the person and the safety of others. Detention can also be ordered in other cases where there is a serious risk that the person will flee or that the person will attempt to obstruct justice. Preventive detention laws have also been adopted in some states. Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, *cert. denied*, 444 U.S. 920 (1979).

[20] Schall v. Martin, 467 U.S. 253 (1984).

[21] 481 U.S. 739 (1988).

[22] 481 U.S. at 753.

[23] 481 U.S. at 754.

[24] 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

[25] Stack v. Boyle, 342 U.S. 1, 4–6 (1951).

[26] United States v. Salerno, 481 U.S. at 754.

[27] Stack v. Boyle, 342 U.S. at 6–7.

Amendment is apparently inapplicable to postconviction release pending appeal, but the practice has apparently been to grant such releases.[28]

EXCESSIVE FINES

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[29] Justice Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an "unusual" and "unprecedented" punishment proscribed by the Eighth Amendment.[30] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause,[31] thus obviating any necessity to develop the meaning of "excessive fines" in relation to ability to pay. The Court has held the clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[32] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[33] The Eighth Amendment itself, as were antecedents of the clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[34] Therefore, while leaving open the issues of whether the clause has any applicability to civil penalties or to *qui tam* actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[35] The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.[36]

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[28] Hudson v. Parker, 156 U.S. 277 (1895).
[29] *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).
[30] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).
[31] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
[32] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
[33] 492 U.S. at 265.
[34] 492 U.S. at 266.
[35] 492 U.S. at 268.
[36] In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be

In 1998, however, the Court injected vitality into the strictures of the clause. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." [37] In *United States v. Bajakajian*,[38] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture [39] in this particular case violated the Excessive Fines Cause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense." [40] In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[41]

CRUEL AND UNUSUAL PUNISHMENTS

During congressional consideration of the Cruel and Unusual Punishments Clause one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be

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seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[37] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[38] 524 U.S. 321 (1998).

[39] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. 524 U.S. at 328. The Court distinguished this from civil forfeiture, which, as an *in rem* proceeding against property, would generally not function as a punishment of the criminal defendant. 524 U.S. at 330–32.

[40] 524 U.S. at 334.

[41] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. 524 U.S. at 325–26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed; *i.e.*, a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. 524 U.S. at 338.

done, we ought not to be restrained from making necessary laws by any declaration of this kind."[42] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[43] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[44] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

Style of Interpretation

At first, the Court was inclined to an historical style of interpretation, determining whether a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant had been considered "cruel and unusual" in 1789.[45] In *Weems v. United States*,[46] however, the Court concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character"[47] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the progress

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[42] 1 ANNALS OF CONGRESS 754 (1789).

[43] *E.g.*, 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (2d ed. 1836); 3 id. at 447–52.

[44] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was used by the Court in Weems v. United States, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (*but see* Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[45] Wilkerson v. Utah, 99 U.S. 130 (1878); *In re* Kemmler, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). Chief Justice Rehnquist subscribed to this view (*see*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (dissenting)), and the views of Justices Scalia and Thomas appear to be similar. *See*, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Justice Thomas dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[46] 217 U.S. 349 (1910).

[47] 217 U.S. at 376–77.

of a maturing society."[48] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[49]

Application and Scope

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as [drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[50]

In upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice, and contemporaneous writings on the death penalty.[51] Relying on the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment, the Court next approved electrocution as a permissible method of administering punishment.[52] Many years later, a divided Court, assuming the Eighth Amendment's applicability to the states, held that a second electrocution following a mechanical failure at the first that had injured but not killed the condemned man did not violate the proscription.[53]

In *Baze v. Rees*,[54] a Court plurality upheld capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and that severe pain will re-

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[48] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was later repeated, with the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[49] *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[50] Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

[51] Hanging was the other method of execution commonly used at the time, and implicitly approved by the Court.

[52] *In re* Kemmler, 136 U.S. 436 (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. It implies something inhuman and barbarous, something more than the mere extinguishment of life," id. at 447).

[53] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id. at 470 (concurring). Years earlier the Court, although recognizing that the Eighth Amendment was then inapplicable to the states, opined in dictum that a fine and a brief imprisonment for illegal sale of alcohol was not cruel and unusual punishment. Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867).

[54] 128 S. Ct. 1520 (2008).

sult. The plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[55] The presence of an "unnecessary" or "untoward" risk of harm that can be eliminated by adopting alternative procedures, the plurality found, is insufficient to render the three-drug protocol unconstitutional. Instead, for the protocol to be unconstitutional, an "alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[56]

Divestiture of the citizenship of a natural born citizen was held to be cruel and unusual punishment in *Trop v. Dulles*.[57] The Court viewed divestiture as a penalty more cruel and "more primitive than torture," because it entailed statelessness or "the total destruction of the individual's status in organized society." "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." A punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to

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[55] 128 S. Ct. at 1530–31. The plurality opinion was written by Chief Justice Roberts and joined by Justices Kennedy and Alito. There were five concurring opinions (one of them by Justice Alito) and a dissenting opinion by Justice Ginsburg, joined by Justice Souter.

[56] 128 S. Ct. at 1532. Justice Thomas, joined by Justice Scalia, would have found that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Id. at 1556. Justice Ginsburg, joined by Justice Souter in dissent, would have found that a method of execution violates the Eighth Amendment if it "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." Id. at 1567. Justice Breyer agreed with the Eighth Amendment standard that Justice Ginsburg would have applied, but he concurred with the plurality because he could not find sufficient evidence that the three-drug protocol violated that standard. Id. at 1563. Thus, while Justices Scalia and Thomas' standard would result in Eighth Amendment violations in fewer situations than the plurality's would, Justices Ginsburg, Souter, and Breyer's standard would result in violations in more. Justice Stevens remained neutral as to the appropriate standard. Although concluding that capital punishment itself violates the Eighth Amendment, he found that, under existing precedents, "whether as interpreted by the Chief Justice or Justice Ginsburg," the petitioners failed to prove that the protocol violated the Eighth Amendment. Id. at 1552.

[57] 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id. at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. Id. at 121, 124–27.

preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards." [58]

Capital Punishment

The Court's 1972 decision in *Furman v. Georgia*,[59] finding constitutional deficiencies in the manner in which the death penalty was arrived at but not holding the death penalty unconstitutional *per se*, was a watershed in capital punishment jurisprudence. In the long run the ruling may have had only minor effect in determining who is sentenced to death and who is actually executed, but it had the indisputable effect of constitutionalizing capital sentencing law and of involving federal courts in extensive review of capital sentences.[60] Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review. *Furman* and the five 1976 follow-up cases that reviewed state laws revised in light of *Furman* reaffirmed the constitutionality of capital punishment *per se*, but also opened up several avenues for constitutional review. Since 1976, the Court has issued a welter of decisions attempting to apply and reconcile the sometimes conflicting principles it had announced: that sentencing discretion must be confined through application of specific guidelines that narrow and define the category of death-eligible defendants and thereby prevent arbitrary imposition of the death penalty, but that jury discretion must also be preserved in order to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

While the Court continues to tinker with application of these principles, it also has taken steps to attempt to reduce the many procedural and substantive opportunities for delay and defeat of the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-*Furman* stage involving creation of procedural protections for capital defendants that were premised on a "death is different" rationale.[61] Later, the

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[58] 356 U.S. at 99–100. The action of prison guards in handcuffing a prisoner to a hitching post for long periods of time violated basic human dignity and constituted "gratuitous infliction of 'wanton and unnecessary pain'" prohibited by the clause. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

[59] 408 U.S. 238 (1972).

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

[61] *See*, *e.g.*, Gardner v. Florida, 430 U.S. 349, 357–58 (1977): "From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its

Court grew increasingly impatient with the delays that were made possible through procedural protections, especially those associated with federal *habeas corpus* review.[62] Having consistently held that capital punishment is not inherently unconstitutional, the Court seemed bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. In the *habeas* context, the interest in finality at first trumped a death-is-different approach.[63] Then, in *In re Troy Anthony Davis*,[64] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition. Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

The writ has also been restricted statutorily.[65]

Changed membership on the Court has had an effect. Gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment resulted in two automatic votes against any challenged death sen-

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citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[62] *See*, *e.g.*, Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." *See also* Gomez v. United States District Court, 503 U.S. 653 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"—that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).

[63] In Herrera v. Collins, 506 U.S. 390, 405 (1993), the Court rejected the position that "the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus," and also declared that, because of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." Id. at 417. In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. 506 U.S. at 417–419.

[64] 557 U.S. ___, No. 08–1443 (2009).

[65] *See*, *e.g.*, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214.

tence.[66] Strong differences remain over such issues as the appropriate framework for consideration of aggravating and mitigating circumstances and the appropriate scope of federal review, but a Court majority still seems committed to reducing obstacles created by federal review of death sentences imposed under state laws that have been upheld as constitutional.

General Validity and Guiding Principles.—In *Trop v. Dulles*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[67] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

A series of cases testing the means by which the death penalty was imposed[68] culminated in what appeared to be a decisive rejection of the attack in *McGautha v. California*.[69] Nonetheless, the Court then agreed to hear a series of cases directly raising the question

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[66] Gone too is Justice Blackmun, whose early support for capital punishment gave way near the end of his career to a belief that the Court's effort to reconcile the twin goals of fairness to the individual defendant and consistency and rationality of sentencing had failed, and that the death penalty "as currently administered, is unconstitutional." Callins v. Collins, 510 U.S. 1141, 1159 (1994) (dissenting from a denial of certiorari and announcing that, "[f]rom this day forward, I no longer shall tinker with the machinery of death," id. at 1145). Justice Stevens has also concluded that the death penalty violates the Eighth Amendment, but, because of his wish "to respect precedents that remain a part of our law," he does not constitute an automatic vote against challenged death sentences. Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (finding the death penalty to violate the Eighth Amendment but concurring with the Court plurality that Kentucky's lethal injection protocol does not violate the Eighth Amendment). In Thompson v. McNeil, 129 S. Ct. 1299 (2009), Justice Stevens dissented from a denial of certiorari where the defendant had spent 32 years on death row; Justice Stevens found "such delays . . . unacceptably cruel." Id. at 1300. Justice Breyer dissented separately, and Justice Thomas concurred in the denial of certiorari.

[67] 356 U.S. 86, 99 (1958).

[68] In Rudolph v. Alabama, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment. The Court addressed exclusion of death-scrupled jurors in Witherspoon v. Illinois, 391 U.S. 510 (1968). *Witherspoon* and subsequent cases explicating it are discussed under Sixth Amendment—Impartial Jury.

[69] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with Crampton v. Ohio. McGautha raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the Due Process Clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether

of the validity of capital punishment under the Cruel and Unusual Punishments Clause, and, to considerable surprise, the Court held in *Furman v. Georgia* [70] that the death penalty, at least as administered, violated the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty was "cruel and unusual" *per se* because the imposition of capital punishment "does not comport with human dignity" [71] or because it is "morally unacceptable" and "excessive." [72] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[73] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner [74] and so infrequently that it served no justifying end.[75]

Because only two of the Justices in *Furman* thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.[76] Enactment of death penalty statutes by 35 states following *Furman* led to renewed litigation, but not to the elucidation one might

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to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; although bifurcated proceedings might be desirable, they were not required by due process.

[70] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*.

[71] 408 U.S. at 257 (Justice Brennan).

[72] 408 U.S. at 314 (Justice Marshall).

[73] 408 U.S. at 240 (Justice Douglas).

[74] 408 U.S. at 306 (Justice Stewart).

[75] 408 U.S. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

[76] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

expect from a series of opinions.[77] Instead, although the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[78] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Fur-*

[77] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See*, *e.g.*, Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[78] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder where defendant aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place). *Compare Enmund* with Tison v. Arizona, 481 U.S. 137 (1987) (death sentence upheld where defendants did not kill but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking statute, 49 U.S.C. § 46502, imposes the death penalty only when a death occurs during commission of the hijacking. By contrast, the treason statute, 18 U.S.C. § 2381, permits the death penalty in the absence of a death, and represents a situation in which great and fatal danger might be present. But the treason statute also constitutes a crime against the state, which may be significant. In Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

man.[79] Divisions among the Justices, however, made it difficult to ascertain the form that permissible statutory schemes may take.[80]

Because the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[81] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing, but approved other statutes specifying factors for jury consideration.[82]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. Although there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur that reenactment of capital punishment statutes by 35 states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute

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[79] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[80] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[81] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it "wantonly and . . . freakishly imposed," id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[82] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other states were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other states were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity that can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Nor is the punishment of death disproportionate to the crime being punished, murder.[83]

Second, however, a different majority concluded that statutes *mandating* the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character and record of the . . . offender and the circumstances of the particular offense" that "the fundamental respect for humanity underlying the Eighth Amendment" requires in capital cases.[84]

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be structured so as to reduce arbitrariness and capriciousness as much as possible.[85] What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or

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[83] Gregg v. Georgia, 428 U.S. 153, 168–87 (1976) (Justices Stewart, Powell, and Stevens); Roberts v. Louisiana, 428 U.S. 325, 350–56 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice White's *Furman* dissent and those of Chief Justice Burger and Justice Blackmun show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, 428 U.S. at 227, 231.

[84] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality, and Justices Brennan and Marshall concurred on the basis of their own views of the death penalty. Id. at 305, 306, 336.

[85] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

judge,[86] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[87] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, be presented;[88] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was fairly imposed both in light of the facts of the individual case and by com-

[86] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[Tlhe purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462–63. Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to prevent arbitrary results Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to "consider" a capital jury's sentencing recommendation). The Sixth Amendment right to jury trial is violated, however, if the judge makes factual findings (*e.g.*, as to the existence of aggravating circumstances) on which a death sentence is based. Ring v. Arizona, 536 U.S. 584 (2002).

[87] Gregg v. Georgia, 428 U.S. 153, 188–95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319–21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the Due Process Clause. On the vitiation of *McGautha*, *see Gregg*, 428 U.S. at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding Self-incrimination and Counsel Clauses applicable to psychiatric examination, at least when a doctor testifies about his conclusions with respect to future dangerousness).

[88] Gregg v. Georgia, 428 U.S. 153, 163, 190–92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1224–25 (1984).

parison with the penalties imposed in similar cases.[89] The Court later ruled, however, that proportionality review is not constitutionally required.[90] *Gregg*, *Proffitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[91]

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based.[92] This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

Implementation of Procedural Requirements.—Most states responded to the 1976 requirement that the sentencing authority's discretion be narrowed by enacting statutes spelling out "aggravating" circumstances, and requiring that at least one such aggravating circumstance be found before the death penalty is imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty should be imposed from cases in which it should not be. Thus, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[93] Similarly, an "especially heinous, atrocious, or cruel" aggravating circumstance was held to be unconstitutionally vague.[94] The "especially heinous, cruel, or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[95]

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[89] Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976) (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality).

[90] Pulley v. Harris, 465 U.S. 37 (1984).

[91] 465 U.S. at 50.

[92] Ring v. Arizona, 536 U.S. 584 (2002).

[93] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[94] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988). *But see* Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[95] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*,Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it in-

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,[96] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[97] If, however, actual sentencing authority is conferred on the trial judge, then it is not unconstitutional for a statute to require a jury to return a non-dispositive death "sentence" upon convicting for specified crimes.[98] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when doing so would be justified by the evidence.[99] Because the jury had to choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concen-

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volved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness); Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[96] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant from the first Roberts v. Louisiana case, 428 U.S. 325 (1976).

[97] Sumner v. Shuman, 483 U.S. 66 (1987).

[98] Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence). The constitutionality of this approach has been brought into question, however, by the Court's decision in Ring v. Arizona, 536 U.S. 584 (2002) that a judge's finding of facts constituting aggravating circumstances violates the defendant's right to trial by jury.

[99] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

trate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[100]

The overarching principle of *Furman* and of the *Gregg* series of cases was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime."[101] Discretion was channeled and rationalized. But, in *Lockett v. Ohio*,[102] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude 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."[103] Similarly, the reason that a three-justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid was

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[100] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

[101] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[102] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id. at 613, 619, 621. Justice Rehnquist dissented. Id. at 628.

[103] 438 U.S. at 604 (emphasis in original). Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant." [104] *Lockett* and *Woodson* have since been endorsed by a Court majority.[105] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[106]

The Court has explained this apparent contradiction as constituting recognition that "individual culpability is not always measured by the category of crime committed," [107] and as the product of an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused." [108] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps

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[104] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Justice Stewart, joined by Justices Powell and Stevens). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first-degree murder).

[105] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting *Lockett*); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Powell, Brennan, Marshall, Stevens, and O'Connor; Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. The *Shuman* majority was composed of Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor; dissenting were Justices White and Scalia and Chief Justice Rehnquist. *Woodson* and the first Roberts v. Louisiana had earlier been followed in the second Roberts v. Louisiana, 431 U.S. 633 (1977), a *per curiam* opinion from which Chief Justice Burger, and Justices Blackmun, White, and Rehnquist dissented.

[106] Justice White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Scalia voiced similar misgivings. "Shortly 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. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661, 662 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, *see* Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

[107] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Chief Justice Burger dissenting)).

[108] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

promote fairness to the accused through an "individualized" consideration of his circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty," [109] while consideration of all mitigating evidence requires focus on "the character and record of the individual offender and the circumstances of the particular offense" consistent with "the fundamental respect for humanity underlying the Eighth Amendment." [110] As long as the defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [111]

So far, the Justices who favor abandonment of the *Lockett* and *Woodson* approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered.[112] States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court.[113] Also, the Court has constrained the use of federal *habeas corpus* to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.

While holding fast to the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[114] the Court has upheld state statutes that control the relative weight that the sentencer

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[109] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[110] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[111] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[112] *See*, *e.g.*, Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[113] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[114] *See*, *e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to consider the defendant's evidence of mental retardation and abused background outside of context of deliberateness or assessment of future dangerousness); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (jury must be permitted to consider the defendant's evidence of childhood neglect and mental illness damage outside of the con-

may accord to aggravating and mitigating evidence.[115] "The requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence"; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[116] So, too, the legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance,[117] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[118] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," because in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial."[119] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[120] Due process considerations can also come into play; if the state argues for the death penalty based on

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text of assessment of future dangerousness); Brewer v. Quarterman, 550 U.S. 286 (2007) (same). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[115] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judgment).

[116] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[117] 494 U.S. at 307.

[118] Boyde v. California, 494 U.S. 370 (1990). A court is not required give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 528 U.S. 225 (2000). Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." This was because the jurors had heard "extensive forward-looking evidence," and it was improbable that they would believe themselves barred from considering it. Ayers v. Belmontes, 549 U.S. 7, 10, 15, 16 (2006).

[119] California v. Brown, 479 U.S. 538, 543 (1987).

[120] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990). *Compare* Smith v. Spisak, 558 U.S. ___, No. 08–724, slip op. at 2–9 (2010) (distinguishing jury instructions in *Mills* from instructions directing each juror to

the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.[121]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." [122]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[123] or on a trial judge's consideration of improper aggravating circumstances.[124] In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in *Zant* evidence relating to the invalid factor was nonetheless admissible on another basis.[125] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the ab-

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independently assess any mitigating factors before jury as a whole balanced the weight of mitigating evidence against each aggravating factor, with unanimity required before balance in favor of an aggravating factor may be found).

[121] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of Simmons); Kelly v. South Carolina, 534 U.S. 246 (2002) (prosecutor need not express intent to rely on future dangerousness; logical inference may be drawn). *But see* Ramdass v. Angelone, 530 U.S. 156 (2000) (refusing to apply *Simmons* because the defendant was not technically parole ineligible at time of sentencing).

[122] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to Brown v. Sanders, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

[123] Zant v. Stephens, 462 U.S. 862 (1983).

[124] Barclay v. Florida, 463 U.S. 954 (1983).

[125] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal

sence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evidence.[126] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand notwithstanding the presence of other aggravating factors.[127]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[128] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . 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," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[129] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."[130]

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[131] Changed membership on the Court resulted in overruling of these decisions, however, and a hold-

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testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).

[126] Clemons v. Mississippi, 494 U.S. 738 (1990). *Cf.* Parker v. Dugger, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

[127] Johnson v. Mississippi, 486 U.S. 578 (1988).

[128] 546 U.S. 517, 523 (2006).

[129] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

[130] 546 U.S. at 526.

[131] Booth v. Maryland, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." Id. at 504 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. *See*

ing that "victim impact statements" are not barred from evidence by the Eighth Amendment.[132] "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[133] In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide."[134]

Limitations on Capital Punishment: Proportionality.— The Court has also considered whether, based on the nature of the underlying offense (or, as explored in the next topic, the capacity of the defendant), the imposition of capital punishment may be inappropriate in particular cases. "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[135] However, the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a

also South Carolina v. Gathers, 490 U.S. 805 (1989), holding that a prosecutor's extensive comments extolling the personal characteristics of a murder victim can invalidate a death sentence when the victim's character is unrelated to the circumstances of the crime.

[132] Payne v. Tennessee, 501 U.S. 808 (1991). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," Chief Justice Rehnquist explained for the Court. Id. at 825. Justices White, O'Connor, Scalia, Kennedy, and Souter joined in that opinion. Justices Marshall, Blackmun, and Stevens dissented.

[133] 501 U.S. at 827. Overruling of *Booth* may have been unnecessary in *Payne*, because the principal "victim impact" evidence introduced involved trauma to a surviving victim of attempted murder who had been stabbed at the same time his mother and sister had been murdered and who had apparently witnessed those murders; this evidence could have qualified as "admissible because . . . relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10. *Gathers* was directly at issue in *Payne* because of the prosecutor's references to effects on family members not present at the crime.

[134] 501 U.S. at 822 (citation omitted).

[135] Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (citations omitted).

temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'" [136]

In *Coker v. Georgia*,[137] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy v. Louisiana*,[138] the Court held that this was true even when the rape victim was a child.[139] In *Coker* the Court announced that the standard under the Eighth Amendment was that punishments are barred when they "are 'excessive' in relation to the crime committed. Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted." [140] Although the Court thought that the death penalty for rape passed the first test ("it may measurably serve the legitimate ends of punishment"),[141] it found that it failed the second test (proportionality). Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of the

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[136] 128 S. Ct. at 2675 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

[137] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is *per se* invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

[138] 128 S. Ct. 2641 (2008). Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined.

[139] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons [where a victim's life is not taken]. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 128 S. Ct. at 2659.

[140] 433 U.S. at 592.

[141] 433 U.S. at 593 n.4.

injury to the person and to the public." [142] In *Kennedy v. Louisiana*, the Court found that both "evolving standards of decency" and "a national consensus" preclude the death penalty for a person who rapes a child.[143]

Applying the *Coker* analysis, the Court ruled in *Enmund v. Florida* [144] that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. Although a few more states imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus also opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is likely to deter only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his own intention serves neither of the purposes underlying the penalty.[145] In *Tison v. Arizona*, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the

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[142] 433 U.S. at 598.

[143] 128 S. Ct. 2641, 2649, 2653 (2008). The Court noted that, since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." Id. at 2661.

[144] 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. *Accord*, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a *habeas* case is to remand for state court determination as to whether *Enmund* findings have been made).

[145] Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. 458 U.S. at 816–23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823–26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." [146]

Limitations on Capital Punishment: Diminished Capacity.— The Court has grappled with several cases involving application of the death penalty to persons of diminished mental capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright* [147] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of sanity at the time of execution must be determined in a proceeding satisfying the minimum requirements of due process.[148] The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continued to be so viewed. And, although no states purported to permit the execution of the insane, Florida and some others left the determination to the governor. Florida's procedures, the Court held, violated due process because the decision was vested in the governor without the defendant's having the opportunity to be heard, the governor's decision being based on reports of three state-appointed psychiatrists.[149]

In *Panetti v. Quarterman*,[150] the Court considered two of the issues raised, but not clearly answered, in *Ford*: what definition of

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[146] 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," id. at 157, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Id.

[147] 477 U.S. 399 (1986).

[148] There was an opinion of the Court only on the first issue: that the Eighth Amendment creates a right not to be executed while insane. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422.

[149] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, set forth the Court's holding.

[150] 549 U.S. 1106 (2007).

insanity should be used in capital punishment cases, and what process must be afforded to the defendant to prove his incapacity. Although the court below had found that it was sufficient to establish competency that a defendant know that he is to be executed and the reason why, the Court in *Panetti* rejected these criteria, and sent the case back to the lower court for it to consider whether the defendant had a rational understanding of the reasons the state gave for an execution, and how that reflected on his competency.[151] The Court also found that the failure of the state to provide the defendant an adequate opportunity to respond to the findings of two court-appointed mental health experts violated due process.[152]

In 1989, when first confronted with the issue of whether execution of the mentally retarded is constitutional, the Court found "insufficient evidence of a national consensus against executing mentally retarded people."[153] In 2002, however, the Court in *Atkins v. Virginia*[154] noted that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against it.[155] In 1989, only two states and the Federal Government prohibited execution of the mentally retarded while allowing executions generally. By 2002, an additional 16 states had prohibited execution of the mentally retarded, and no states had reinstated the power. But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[156]

The Court's "own evaluation of the issue" reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—applies with full force to mentally retarded offenders. Retribution necessarily depends on the culpability of the offender, yet mental retardation reduces cul-

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[151] 127 S. Ct. at 2862. In *Panetti*, the defendant, despite apparent mental problems, was found to understand both his imminent execution and the fact that the State of Texas intended to execute him for having murdered his mother-in-law and father-in-law. It was argued, however, that defendant, suffering from delusions, believed that the stated reason for his execution was a "sham" and that the state wanted to execute him to "stop him from preaching."

[152] 127 S. Ct. at 2858.

[153] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). Although unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment," id. at 335, the Court noted that, because of the requirement of individualized consideration of culpability, a retarded defendant is entitled to an instruction that the jury may consider and give mitigating effect to evidence of retardation or a background of abuse. Id. at 328. *See also* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[154] 536 U.S. 304 (2002). *Atkins* was 6–3 decision by Justice Stevens.

[155] 536 U.S. at 314, 316.

[156] 536 U.S. at 315.

pability. Deterrence is premised on the ability of offenders to control their behavior, yet "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." [157]

As to the the procedural requirements for such cases, the Court in *Atkins* wrote that, "[a]s was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" [158] Thus, in *Schriro v. Smith*, the Court held that the Ninth Circuit "erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." [159] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." [160]

In *Hall v. Florida*,[161] however, the Court limited the states' ability to define mental retardation (or, to use the more modern term, "intellectual disability") by invalidating Florida's "bright line" cutoff based on IQ test scores. The Florida state courts had ruled that anyone with an IQ above 70 was prohibited from offering additional evidence of mental disability, and was thus subject to capital punishment. The Court invalidated this rigid standard, observing that "[i]ntellectual disability is a condition, not a number." [162] The majority noted that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature and may only be used as a factor of analysis in death penalty cases.[163] This reason-

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[157] 536 U.S. at 320. The Court also noted that reduced capacity both increases the risk of false confessions and reduces a defendant's ability to assist counsel in making a persuasive showing of mitigation.

[158] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986).

[159] 546 U.S. 6, 7 (2005) (per curiam).

[160] 546 U.S. at 7.

[161] 572 U.S. ___, No. 12–10882, slip op. (2014).

[162] 572 U.S. ___, slip op at 21.

[163] Id. Of those states that allow for the death penalty, a number of them do not have a strict cut-offs for IQ scores. *See, e.g.* Cal. Penal Code Ann. §1376; La. Code Crim. Proc. Ann., Art. 905.5.1; Nev. Rev. Stat. §174.098.7 (2013); Utah Code Ann §77–15a–102. Similarly, the U.S. Code does not set a strict IQ cutoff. See 18 U.S.C. §3596(c).

ing was buttressed by a consensus of mental health professionals that an IQ test score should be read not as a single fixed number, but as a range.[164]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16- and 17-year-olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[165] Although four Justices favored a flat ruling that the Eighth Amendment barred the execution of anyone younger than 16 at the time of his offense, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky* held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri [166] directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16- or 17-year-old murderers, whereas there was such a consensus against execution of 15-year-olds.[167]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[168] less than three years later the Court held that such a consensus had developed. The Court's

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[164] This range, referred to as a "standard error or measurement" or "SEM" is used by many states in evaluating the existence of intellectual disability. 572 U.S. ___, slip op at 12. The dissent, however, denies that there is a consensus of the states on the matter, and criticizes the majority for finding such consensus, not in prevailing societal norms, but in the evolving standards of professional societies. Id. at 5–6, 2 (Alito, J., dissenting).

[165] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[166] Wilkins v. Missouri was decided along with *Stanford*.

[167] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (15 of 37 states permitting capital punishment decline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old offenders).

[168] 536 U.S. at 314, n.18.

decision in *Roper v. Simmons* [169] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Roper*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[170]

As in *Atkins*, the Court in *Roper* relied on its "own independent judgment" in addition to its finding of consensus among the states.[171] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed." [172] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater

[169] 543 U.S. 551 (2005). The case was decided by 5–4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6–3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

[170] Dissenting in *Roper*, Justice O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing 16- and 17-year-old offenders. 543 U.S. at 596.

[171] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394–96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing the mentally retarded.

[172] 543 U.S. at 569, 570.

claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed." [173] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." [174]

The *Roper* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty." [175] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[176]

Limitations on Capital Punishment: Equality of Application.—One of the principal objections to imposition of the death penalty, voiced by Justice Douglas in his concurring opinion in *Furman*, was that it was not being administered fairly—that the capital sentencing laws vesting "practically untrammeled discretion" in juries were being used as vehicles for racial discrimination, and that "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." [177] This argument has not carried the day. Although the Court has acknowledged the possibility that the death penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court's holding that "a capital defendant accused of an interracial

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[173] 543 U.S. at 570.

[174] 543 U.S. at 572–573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[175] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[176] 543 U.S. at 577, 578. Citing as precedent Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317 n.21; Enmund v. Florida, 458 U.S. 782, 796–97, n.22 (1982), Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

[177] 408 U.S. at 248, 257.

crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." [178]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp* [179] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." [180] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (*e.g.*, by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. Although the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[181] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a *prima facie* case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[182]

Limitations on Habeas Corpus Review of Capital Sentences.—The Court's rulings limiting federal *habeas corpus* review of state convictions, reinforced by the Antiterrorism and Effective Death Penalty Act of 1996,[183] may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. In the *habeas* context, the Court rejected the "death is different" approach by applying to capital cases the same

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[178] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[179] 481 U.S. 279 (1987) (5-to-4 decision).

[180] 481 U.S. at 308.

[181] 481 U.S. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).

[182] 481 U.S. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* discussion of "Capital Punishment" under the Fourteenth Amendment, *infra*. *See also* United States v. Bass, 536 U.S. 862 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the government provide information on its decisions to seek the death penalty.

[183] Pub. L. 104–132, 110 Stat. 1214.

rules that limit federal petitions in non-capital cases.[184] Then, in *In re Troy Anthony Davis*,[185] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition.[186]

The Court held in *Penry v. Lynaugh* [187] that its *Teague v. Lane* [188] rule of nonretroactivity applies to capital sentencing challenges. Under *Teague*, new rules of constitutional interpretation announced after a defendant's conviction has become final will not be applied in *habeas* cases unless one of two exceptions applies.[189] The two exceptions—the situations in which "[a] new rule applies retroactively in a collateral proceeding"—are when "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [190] The first exception has also been stated to be "that a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" [191] The second exception has also been stated to be "that a new rule should be applied retroactively if it requires the observance of those procedures that . . . are

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[184] Herrera v. Collins, 506 U.S. 390, 405 (1993) ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus'") (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989)).

[185] 557 U.S. ___, No. 08–1443 (2009).

[186] Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, noted that the fact that seven of the state's key witnesses had recanted their trial testimony, and that several people had implicated the state's principal witness as the shooter, made the case "exceptional." Justices Scalia, joined by Justice Thomas, dissented.

[187] 492 U.S. 302 (1989).

[188] 489 U.S. 288 (1989).

[189] The "new rule" limitation was suggested in a plurality opinion in *Teague*, and a Court majority in *Penry* and later cases adopted it. In Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008), the Court held that *Teague* does not "constrain[ ] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion."

[190] Whorton v. Bockting, 549 U.S. 406, 416 (2007). In Saffle v. Parks, 494 U.S. 484, 494, 495 (1990), the Court stated the two exceptions as follows: "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' . . . The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

[191] Teague v. Lane, 489 U.S. at 311, quoting Mackey v. United States, 401 U.S. 667, 692 (1971). "*Teague* by its terms applies only to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New *substantive* rules generally apply retroactively . . . because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 542 U.S. 348, 351, 352 (2004) (internal quotation marks omitted) (the holding of Ring v. Arizona, that "a sentenc-

implicit in the concept of ordered liberty,'" and "without which the likelihood of an accurate conviction is seriously diminished." [192] Further restricting the availability of federal *habeas* review is the Court's definition of "new rule." Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless "new rules" unless the result was "dictated" by that precedent.[193] Although in *Penry* itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant's mental retardation and abused childhood) was *not* a "new rule" because it was dictated by *Eddings* and *Lockett*, in subsequent *habeas* capital sentencing cases the Court has found substantive review barred by the "new rule" limitation.[194]

A second restriction on federal *habeas* review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a "rational factfinder" inquiry: "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact have found the

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ing judge, sitting without a jury [may not] find an aggravating circumstance necessary for imposition of the death penalty," 542 U.S. at 353, quoting *Ring*, 536 U.S. at 609, was a procedural, not a substantive rule).

[192] Teague v. Lane, 489 U.S. at 311, 313, quoting Mackey v. United States, 401 U.S. at 693. The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990), in which the Court held the exception inapplicable to the Caldwell v. Mississippi rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the Court in *Sawyer* explained, "that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[193] *Penry*, 492 U.S. at 314; *accord*, Whorton v. Bockting, 549 U.S. 406, 416 (2007). Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" or if it would not have been "an illogical or even a grudging application" of the prior decision to hold it inapplicable. Butler v. McKellar, 494 U.S. 407, 415 (1990).

[194] *See*, *e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in Arizona v. Roberson, that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a *separate* investigation, announced a "new rule" not dictated by the 1981 decision in Edwards v. Arizona that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (*habeas* petitioner's request that capital sentencing be reversed because of an instruction that the jury "avoid any influence of sympathy" is a request for a new rule not "compel[led]" by *Eddings* and *Lockett*, which governed *what* mitigating evidence a jury must be allowed to consider, not *how* it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in Caldwell v. Mississippi, although a "predictable development in Eighth Amendment law," established a "new rule" that false prosecutorial comment on jurors' responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to *Caldwell* had invalidated a prosecutorial comment on Eighth Amendment grounds). *But see* Stringer v. Black, 503 U.S. 222 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a "new rule").

essential elements of the crime beyond a reasonable doubt." [195] This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal *habeas* court to weigh a claim that a generally valid aggravating factor is unconstitutional *as applied* to the defendant.[196] In addition, the Court has held that, absent an independent constitutional violation, *habeas corpus* relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.[197] In *In re Troy Anthony Davis*,[198] however, the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition.[199]

Third, a different harmless error rule is applied when constitutional errors are alleged in *habeas* proceedings. The *Chapman v. California* [200] rule applicable on direct appeal, requiring the state to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for *habeas* review, the Court concluded, given the "secondary and limited" role of federal *habeas* proceedings.[201] The appropriate test is that previously used only for nonconstitutional errors: "whether the error has substantial and injurious effect or influence in determining the jury's verdict." [202] Further, the "substantial and injurious effect standard" is to be applied in

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[195] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[196] Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[197] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal *habeas* relief). *Accord*, House v. Bell, 547 U.S. 518, 554–55 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of Schlup v. Delo, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076–2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, *Habeas Corpus*: Scope of the Writ.

[198] 557 U.S. ___, No. 08–1443 (2009).

[199] Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

[200] 386 U.S. 18 (1967).

[201] Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

[202] Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *Brecht* was a non-capital case, but the rule was subsequently applied in a capital case. Calderon v. Coleman, 525 U.S. 141 (1998) (per

federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California* . . . ." [203]

A fourth rule was devised to prevent successive "abusive" or defaulted *habeas* petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him *eligible* for the death penalty under applicable state law.[204]

The Antiterrorism and Effective Death Penalty Act of 1996 prohibits federal *habeas* relief based on claims that were adjudicated on the merits in state court unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [205] The Court's decision in *Bell v. Cone*,[206] rejecting a claim that an attorney's failure to present mitigating evidence during the capital sentencing phase of a trial and his waiver of a closing argument at sentencing should entitle a condemned prisoner to relief, illustrates how these restrictions can operate to defeat challenges to state-imposed death sentences.[207]

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curiam). In Hedgpeth v. Pulido, 129 S. Ct. 530 (2008) (per curiam), the Court held that a reviewing court should apply *Brecht's* "substantial and injurious effect" standard where conviction was based on a general verdict after jury had been instructed on alternative theories of guilt and may have relied on an invalid one.

[203] Fry v. Pliler, 551 U.S. 112, 114 (2007).

[204] Sawyer v. Whitley, 505 U.S. 333 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant's mental health records as a mitigating factor at sentencing.

[205] 28 U.S.C. § 2254(d)(1).

[206] 535 U.S. 685 (2002).

[207] The state court's decision, which applied the rule from Strickland v. Washington, 466 U.S. 668 (1984), rather than the rule from United States v. Cronic, 466 U.S. 648 (1984), to hold that the attorney's performance was not constitutionally inadequate, was not "contrary to" clearly established law. *Cronic* had held that there are some situations, *e.g.*, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," so presumptively unfair as to obviate the need to show actual prejudice to the defendant's case. *See* "Effective Assistance of Counsel" under Sixth Amendment. The Bell v. Cone Court emphasized the word "entirely," noting that the petitioner challenged the defense attorney's performance only "at specific points" in the process. Nor was the second statutory test met. *Strickland*, a "highly deferential" test asking whether an attorney's performance fell below an "objective standard of reasonableness," was not "unreasonably applied." The attorney could reasonably have concluded that evidence presented during the guilt phase of the trial was still "fresh" to the jury, and that repetition through the presentation of mitigating evidence or through a closing statement was unnecessary to counter the state's presentation of aggravating circumstances justifying a death sentence.

In *Carey v. Musladin*,[208] the Court noted that it had previously held that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes,"[209] but that it had never ruled on the effect on a defendant's fair trial rights of *spectator* conduct. In *Carey*, the spectator conduct that allegedly affected the defendant's right to a fair trial consisted of members of the victim's family wearing buttons with the victim's photograph. Given the lack of holdings from the Court on the question of spectator conduct, the Court in *Carey* found that "it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" in denying the defendant relief.[210] Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 precluded *habeas* relief. Similarly, because the Supreme Court has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that the *Cronic* standard for ineffective assistance of counsel should apply, the Court again could not say "that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[211]

The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review.[212]

Proportionality

In *O'Neil v. Vermont*,[213] Justice Field argued in dissent that, in addition to prohibiting punishments deemed barbarous and inhumane, the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In *Weems v. United States*,[214] the Court adopted this view in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance, for the

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[208] 549 U.S. 70 (2006).

[209] Estelle v. Williams, 425 U.S. 501, 512 (1976).

[210] 549 U.S. at 77 (quoting from 28 U.S.C. § 2254(d)(1)).

[211] Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), quoting Carey v. Musladin, 549 U.S. 70, 77 (2006) (under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), defendant not entitled to *habeas* relief).

[212] Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).

[213] 144 U.S. 323, 339–40 (1892). *See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[214] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines, which it interpreted as having the same meaning. Id. at 367.

offense of falsifying public documents. The Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[215] Punishments as well as fines, therefore, can be condemned as excessive.[216]

In *Robinson v. California*[217] the Court carried the principle to new heights, setting aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the state or had committed any act at all within the state's power to proscribe, and because addiction is an illness that—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act,[218] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct that he is unable to control, which would make it a

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[215] 217 U.S. at 381.

[216] "The Eighth Amendment succinctly prohibits 'excessive' sanctions." Atkins v. Virginia, 536 U.S. 304, 311 (2002) (applying proportionality review to determine whether execution of the mentally retarded is cruel and unusual). Proportionality in the context of capital punishment is considered under "Limitations on Capital Punishment: Proportionality," *supra*.

[217] 370 U.S. 660 (1962).

[218] A different approach to essentially the same problem was taken in Thompson v. Louisville, 362 U.S. 199, 206 (1960), which set aside a conviction for loitering and disorderly conduct as being supported by "no evidence whatever." *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

holding of far-reaching importance.[219] In *Powell v. Texas*,[220] a majority of the Justices took the latter view of *Robinson*, but the result, because of one Justice's view of the facts, was a refusal to invalidate a conviction of an alcoholic for public drunkenness. Whether either the Eighth Amendment or the Due Process Clauses will govern the requirement of the recognition of capacity defenses to criminal charges remains to be decided.

The Court has gone back and forth in its acceptance of proportionality analysis in non-capital cases. It appeared that such analysis had been closely cabined in *Rummel v. Estelle*,[221] upholding a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. The Court reasoned that the unique quality of the death penalty rendered capital cases of limited value, and distinguished *Weems* on the ground that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the post-release denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference with state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the chal-

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[219] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, *see* Lambert v. California, 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976); Patterson v. New York, 432 U.S. 197, 202–05 (1977). In Solem v. Helm, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[220] 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, *mens rea*, insanity, mistake, justification, and duress. Id. at 532–37. Justice White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. Id. at 548. Dissenting Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. Id. at 554, 567.

[221] 445 U.S. 263 (1980).

lenge to punishment goes to the length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appeared to be that states may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative grace.[222] The Court dismissed as unavailing the factors relied on by the defendant. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime, and the determination of what is a "small" amount of money, being so subjective, was a legislative task. In any event, the state could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same state ignored the recidivism aspect.[223]

Rummel was distinguished in *Solem v. Helm*,[224] the Court stating unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[225] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[226] The difference was that Helm's sentence of life imprisonment without possibility of parole was viewed as "far more severe than the life sentence we considered in *Rummel v. Estelle*."[227] Rummel, the Court pointed out, "was likely to have been eligible for parole within 12 years of his initial confinement," whereas Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.'"[228] The *Solem* Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(I) the gravity of the offense

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[222] In Hutto v. Davis, 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

[223] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id. at 285, 295–303.

[224] 463 U.S. 277 (1983). The case, like *Rummel*, was decided by a 5–4 vote.

[225] 463 U.S. at 284, 288.

[226] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

[227] 463 U.S. at 297.

[228] 463 U.S. at 297, 303.

and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[229] Measured by these criteria, Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnaping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[230]

The Court remained closely divided in holding in *Harmelin v. Michigan*[231] that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. There was an opinion of the Court only on the issue of the mandatory nature of the penalty, the Court rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[232] As to the length of sentence, three majority Justices—Kennedy, O'Connor, and Souter—would recognize a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[233]

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[229] 463 U.S. at 292.

[230] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, *see* Justice Powell's concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[231] 501 U.S. 957 (1991).

[232] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." 501 U.S. at 994. The Court's opinion, written by Justice Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue, and without reference to the crime for which it is imposed. *See* id. at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (*see* id. at 996 (Justices Kennedy, O'Connor, and Souter concurring); id. at 1009 (Justices White, Blackmun, and Stevens dissenting); id. at 1027 (Justice Marshall dissenting)), the fact that three of those Justices (Kennedy, O'Connor, and Souter) joined Justice Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Scalia's general approach to proportionality.

[233] Because of the "serious nature" of the crime, the three-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. 501 U.S. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Marshall also expressed agreement on this and most other points, id. at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. Id. at 1018.

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[234] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]." [235] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[236] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle." [237] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law.[238] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow." [239]

Declaring that "[t]he concept of proportionality is central to the Eighth Amendment," Justice Kennedy, writing for a five-Justice majority in *Graham v. Florida*,[240] held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." [241] Justice Kennedy characterized proportionality cases as falling within two general types. The first type comprises challenges to the length of actual sentences imposed as being grossly disproportionate, and such challenges are resolved under approaches taken in *Solem*, *Harmelin*, and similar cases.

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[234] Ewing v. California, 538 U.S. 11 (2003).

[235] 538 U.S. at 29–30.

[236] 538 U.S. at 31.

[237] 538 U.S. at 32. The four dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the Solem v. Helm test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[238] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25-year-to-life sentences on a 37-year-old convicted of two petty thefts with a prior conviction.

[239] 538 U.S. at 72.

[240] 560 U.S. ___, No. 08–7412, slip op. (2010).

[241] Id. at 31. The opinion distinguishes life without parole from a life sentence. An offender need not be guaranteed eventual release under the *Graham* holding, just a realistic opportunity for release based on conduct during confinement.

The second type comprises challenges to particular sentencing practices as being categorically impermissible, but categorical restrictions had theretofore been limited to imposing the death penalty on those with diminished capacity. In *Graham*, Justice Kennedy broke new ground and recognized a categorical restriction on life without parole for nonhomicide offenses by juveniles, citing considerations and applying analysis similar to those used in his juvenile capital punishment opinion in *Roper*.[242] In considering objective indicia of a national consensus on the sentence, the *Graham* opinion looked beyond statutory authorization—thirty-seven states and the District of Columbia permitted life without parole for some juvenile nonhomicide offenders—to actual imposition, which was rare outside Florida. Justice Kennedy also found support "in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over."[243] After finding that a consensus had developed against the sentencing practice at issue, Justice Kennedy expressed an independent judgment that imposing life without parole on juveniles for nonhomicide offenses failed to serve legitimate penological goals adequately.[244] Factors in reaching this conclusion included the severity of the sentence, the relative culpability of juveniles, and the prospect for their rehabilitation.[245]

The concept of proportionality also drove Justice Kagan's analysis in *Miller v. Alabama*, a case questioning the imposition of mandatory life imprisonment without parole on juveniles convicted of homicide.[246] Her analysis began by recounting the factors, stated in *Roper* and *Graham*, that mark children as constitutionally different from adults for purposes of sentencing: Children have diminished capacities and greater prospects for reform. Nevertheless, these factors, even when coupled with the severity of a life without parole sentence, did not lead Justice Kagan to bar life without parole for juveniles in homicide cases categorically. Her more immediate

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[242] *See* 543 U.S. 551 (2005). Concurring in the judgement in *Graham*, Chief Justice Roberts resolved the case under a proportionality test, finding the majority's categorical restriction to be unwise and unnecessary in Graham's circumstances. 560 U.S. ___, No. 08–7412, slip op. (Roberts, C.J., concurring).

[243] 560 U.S. ___, No. 08–7412, slip op. at 29.

[244] For a parallel discussion in *Roper*, see 543 U.S. 551, 568–75 (2005).

[245] In dissent, Justice Thomas, joined by Justice Scalia and, in part, by Justice Alito, questioned both the basis and the reach of the majority opinion. In addition to strongly objecting to adopting any categorical rule in a nonhomicide context, Justice Thomas pointedly criticized the conclusion that the legislative and judicial records established a consensus against imposing life without parole on juvenile offenders in nonhomicide cases. He also disparaged the majority's independent judgment on the morality and justice of the sentence as wrongfully pre-empting the political process. 560 U.S. ___, No. 08–7412, slip op. (Thomas, J., dissenting).

[246] 567 U.S. ___, No. 10–9646, slip op. (2012).

concern was that the mandatory life sentences in *Miller* left no room for a sentencer to consider a juvenile offender's special immaturity, vulnerability, suggestibility, and the like. In Justice Kagan's view, a process that mandates life imprisonment without parole for juvenile offenders is constitutionally flawed because it forecloses any consideration of the hallmark distinctions of youth in meting out society's severest penalties. In leading four Justices in dissent, Chief Justice Roberts observed that most states and the Federal Government have statutes mandating life sentences without parole for certain juvenile offenders in homicide cases, and that those mandated sentences are commonly imposed. These sentences simply are not "unusual," nor does state law and practice indicate societal opprobrium toward them. Justice Kagan remained unconvinced, finding the dissent's methodology less persuasive when the issue is the process that must be used in imposing a particular sentence as opposed to categorically barring a type of sentence altogether.

Prisons and Punishment

"It is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'"[247] "Conditions [in prison] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[248] These general principles apply both to the treatment of individuals[249] and to the creation or maintenance of prison conditions that are inhu-

[247] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

[248] 452 U.S. at 347. *See also* Overton v. Bazzetta, 539 U.S. 126, 137 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[249] *E.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (beating prisoner with leather strap violates Eighth Amendment); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment). In Erickson v. Pardus, 551 U.S. 89 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences. Justice Thomas, however, dissented on the ground "that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. . . .

mane to inmates generally.[250] Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as "punishment," there must be a culpable, "wanton" state of mind on the part of prison officials.[251] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[252] in the context of emergency actions, *e.g.*, actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable.[253] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[254]

Beginning with *Holt v. Sarver*,[255] federal courts found prisons or entire prison systems to violate the Cruel and Unusual Punish-

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But even applying the Court's flawed Eighth Amendment jurisprudence, I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." Id. at 95 (internal quotation marks omitted).

[250] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

[251] Wilson v. Seiter, 501 U.S. 294 (1991).

[252] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994). In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 128 S. Ct. 1520, 1530–31 (emphasis added by the Court). This case is also discussed, *supra*, under Eighth Amendment, "Application and Scope."

[253] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[254] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate). *Accord* Wilkins v. Gaddy, 559 U.S. ___, No. 08–10914, slip op. (2010) (per curiam).

[255] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974). The Supreme Court ultimately sustained the decisions of the lower courts in Hutto v. Finney, 437 U.S. 678 (1978)).

ments Clause, and broad remedial orders directed to improving prison conditions and ameliorating prison life were imposed in more than two dozen states.[256] But, although the Supreme Court expressed general agreement with the thrust of the lower court actions, it set aside two rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state legislatures and prison administrators.[257] In both cases, the prisons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that had been left undisturbed.[258] Thus, concerns of federalism and of judicial restraint apparently actuated the Court to begin to curb the lower federal courts from ordering remedial action for systems in which the prevailing circumstances, given the resources states choose to devote to them, "cannot be said to be cruel and unusual under contemporary standards."[259]

Congress initially encouraged litigation over prison conditions by enactment in 1980 of the Civil Rights of Institutionalized Persons Act,[260] but then in 1996 added restrictions through enactment of the Prison Litigation Reform Act.[261] The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that separation of powers principles were not violated.[262]

Limitation of the Clause to Criminal Punishments

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amend-

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[256] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Justice Brennan concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

[257] Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

[258] *See*, *e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (describing conditions of "horrendous overcrowding," inadequate sanitation, infested food, and "rampant violence"); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (describing conditions "unfit for human habitation"). The primary issue in both *Wolfish* and *Chapman* was that of "double-celling," the confinement of two or more prisoners in a cell designed for one. In both cases, the Court found the record did not support orders ending the practice.

[259] Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[260] Pub. L. 96–247, 94 Stat. 349, 42 U.S.C. §§ 1997 *et seq.*

[261] Pub. L. 104–134, title VIII, 110 Stat. 1321–66—1321–77.

[262] Miller v. French, 530 U.S. 327 (2000). *See also* Porter v. Nussle, 534 U.S. 516 (2002) (applying the Act's requirement that prisoners exhaust administrative remedies).

ment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court explained that the Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." [263] These limitations, the Court thought, should not be extended outside the criminal process.

[263] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the Due Process Clause, if at all.