
Waking the *Furman* Giant

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In its 1972 Furman v. Georgia decision, the Supreme Court — concerned that the death penalty was being imposed infrequently and without objectively measurable criteria — held that the penalty violated the Eighth Amendment to the Constitution. In the four decades since Furman, there has been considerable Eighth Amendment litigation regarding capital punishment, but almost none of it has focused on the Court’s concern with arbitrariness and infrequency. But this may be about to change. With a growing body of quantitative data regarding the low death sentencing rates in several states, Furman is poised to return to center stage. While previous challenges attacked the form of various state capital statutes, new empirical data is leading condemned inmates to challenge the application of state sentencing statutes. This Article announces the return of Furman — a splintered opinion that nonetheless remains binding precedent forty-three years after it was decided — and provides a reading of that case that can guide courts as they consider the latest round of challenges to the application of capital punishment. A careful revisiting of Furman is necessary and overdue because the critical underpinnings of American death penalty jurisprudence — narrowing, eligibility, and individualization — are currently being conflated or forgotten altogether by both courts and capital litigants. This Article is a timely guidepost for the inevitable next wave of Furman litigation.

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INTRODUCTION

On July 16, 2014, Judge Cormac Carney of the Northern District of California wrote an order in *Jones v. Chappell* finding the California death penalty unconstitutional.¹ Noting that California had sentenced more than 900 people to death but had executed only thirteen in the previous thirty-six years, Judge Carney wrote: “For Mr. Jones to be executed in such a system, where so many are sentenced to death but only a random few are actually executed, would offend the most fundamental of constitutional protections — that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death.”² Judge Carney’s basis for this ruling was the nation’s bedrock death penalty holding of *Furman v. Georgia*.³

Long overlooked by scholars and litigants, *Furman* held that the infrequency of death sentences among the class of persons who could be sentenced to death was symptomatic of an arbitrariness that could not be tolerated by the Eighth Amendment.⁴ The very rarity of death sentences — like the low odds of being struck by lightning — informed crucially the Court’s decision to strike down the death penalty systems under review.⁵ The Justices deciding the case considered it a “near truism” that death penalty systems cannot effectively serve either deterrent or retributive goals when the overwhelming number of persons who are death eligible are not sentenced to death.⁶

Since *Furman*, many different challenges have been brought regarding the procedural fairness required for a capital sentencing system. But

¹ *Jones v. Chappell*, No. CV 09–02158–CJC, 2014 WL 3567365, at *14 (C.D. Cal. July 16, 2014).

² *Id.* at *9.

³ *Id.* at *9 (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.” (quoting *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring))).

⁴ See, e.g., *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (concluding that the Eighth Amendment cannot tolerate the imposition of a death sentence imposed so arbitrarily and infrequently); *id.* at 313 (White, J., concurring) (concluding that the death penalty is imposed so infrequently under existing statutes that the death penalty does not serve any valid penological interest); see also Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1285 (1997) (“[A]ll five Justices focused on the infrequency with which the death penalty was imposed . . .”).

⁵ In his dissent, Chief Justice Burger expressed concern over the fact that only 15–20% of the death eligible defendants convicted of murder were sentenced to death. See *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting).

⁶ See *id.* at 311 (White, J., concurring).

until the recent District Court decision in *Jones*, something surprising has happened in the Court's post-*Furman* death penalty jurisprudence. *Furman* itself has been lost and seemingly forgotten. The defining command of the *Furman* decision — that discretion must be cabined at the stage of objective legislative definition so as to “genuinely narrow the class of persons eligible for the death penalty”⁷ — has been eclipsed by other measures of a capital regime's fairness. Over the last forty years, challenges based on *Furman* have been few and far between. Indeed, the last time the Supreme Court considered directly whether a state's capital sentencing scheme ran afoul of the Eighth Amendment narrowing requirement was in the early 1990s,⁸ and only once, in *McCleskey v. Kemp*,⁹ has the Supreme Court ever considered whether a statute that “on its face meets constitutional requirements”¹⁰ might be unconstitutional under *Furman* in its application. Moreover, the Court has never had the occasion to consider a quantitative challenge that examines the practical application, rather than the just the form, of a state's aggravating factors. *Furman*, in short, has fallen out of the spotlight and into obscurity.

As the forty-fifth anniversary of *Furman* approaches, it appears that the *Furman* challenge is experiencing a kind of renaissance. The result in *Jones* has inspired calls for similar litigation in other states¹¹ and a growing body of empirical studies is developing that shows that the primary defect identified by *Furman* in 1972 — the infrequency with which the death penalty was being applied to persons who are eligible for the ultimate punishment — is the primary defect that haunts it today. The statutory limits on prosecutorial and sentencing discretion are vanishingly few and in many places the actual imposition of the death penalty is now so rare that only a “random handful” of the many

⁷ See *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

⁸ See *Tuilaepa v. California*, 512 U.S. 967, 975-80 (1994) (considering California's capital sentencing scheme). See generally *Lowenfield*, 484 U.S. at 244 (considering Florida and Georgia's sentencing schemes when reviewing Louisiana law).

⁹ See *McCleskey v. Kemp*, 481 U.S. 279, 308-13 (1987).

¹⁰ *Arave v. Creech*, 507 U.S. 463, 478 (1993) (assessing an individual aggravator).

¹¹ See, e.g., Bryan Denson, *Is Oregon's Death Penalty as 'Cruel and Unusual' as California's?*, THE OREGONIAN (July 18, 2014, 6:10 AM), http://www.oregonlive.com/politics/index.ssf/2014/07/is_oregons_death_penalty_as_cr.html (considering the impact of *Jones* on Oregon's death penalty system); Mike Lear, *Ruling Against California Death Penalty Could Be Raised in Missouri Execution Cases*, MISSOURINET (July 18, 2014), <http://www.missourinet.com/2014/07/18/ruling-against-california-death-penalty-could-be-raised-in-missouri-cases/> (discussing the impact *Jones* could have on Missouri's death penalty cases).

defendants eligible for death actually receive the sentence.¹² In fact, the death sentencing rates in many states may be far lower today than they were in 1972 when the *Furman* Court recognized this as constitutionally impermissible.¹³

This Article seeks to reintroduce *Furman* and explain the constitutional significance of empirical studies documenting the failure of state systems to adequately engage in Eighth Amendment narrowing. In Part I, the constitutional requirement of legislative narrowing is defined and its relationship to eligibility and individualization is examined. One of the primary sources of death penalty confusion in this realm is definitional — key terms of art are being conflated and confused by both courts and litigants. Having elaborated on the meaning of *Furman* and defined its core requirements, in Part II, we consider whether a statute that is facially compliant with *Furman* can ever fail to narrow in practice. Specifically, the recent empirical studies of legislative narrowing are summarized and the relevance of the data to the Eighth Amendment is examined.

In Part III, the most likely and salient critiques of the next wave of *Furman* challenges are anticipated and analyzed. The reemergence in the twenty-first century of the biggest death penalty case of the twentieth century will not be without resistance. The most salient critique of new *Furman* challenges grounded in empirical data is that these challenges fail to appreciate all of the various aspects of a state's penalty phase that "narrow" the death penalty. In response, in Part IV we provide an original series of diagrams to help disentangle what we identify in Part III as the most serious impediment to *Furman* litigation — the conflation of narrowing and eligibility. The expanding definition of narrowing by lower courts — made possible by the dormancy of *Furman* and absence of such litigation — results in judges carelessly conflating all eligibility preconditions with Eighth Amendment narrowing. When narrowing is conflated with other eligibility preconditions, *Furman* narrowing is rendered empirically immeasurable and *Furman*'s constitutional commands are obscured.

This Article seeks to restore *Furman* to its rightful place and make way for the next era of *Furman* challenges. Far from an academic or semantic exercise, defining the scope and meaning of *Furman* challenges will be the determinative issue in assessing the very constitutionality of many state death penalty systems.

¹² *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

¹³ See *infra* Part II.

I. THE EIGHTH AMENDMENT REQUIREMENTS IN A CAPITAL CASE

A. *The Forgotten Doctrine of Eighth Amendment Narrowing: The Three Pillars of Narrowing*

In 1971, the Supreme Court threw up its hands and abandoned as impossible the enterprise of meaningfully limiting a death penalty regime through legislatively enacted standards. In *McGautha v. California*,¹⁴ the defendant challenged a California statute that made all defendants convicted of first-degree murder subject to the death penalty depending only on the whims and discretion of the jury. The jury was instructed in McGautha's case, "Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror."¹⁵ The defendant argued that the system left "the jury completely at large to impose or withhold the death penalty as it [saw] fit."¹⁶

McGautha maintained that such open-ended discretion violated the Fourteenth Amendment.¹⁷ The Court rejected this argument, holding that the "absence of standards to guide the jury's discretion on the punishment"¹⁸ did not raise constitutional concerns; "absolute discretion" to decide who lives and who dies was deemed a necessary evil in a sentencing regime designed to determine moral desert.¹⁹ The Court described the process of crafting statutory language that could identify before the fact the worst of the worst offenders as a task "beyond present human ability."²⁰ There was, then, nothing that could be done about petitioner's assertion that the death penalty was "imposed on far fewer than half the defendants guilty of capital crimes."²¹

Furman and the line of cases that followed in its wake were an explicit rejection of this approach. The *Furman* line of cases holds that legislatively defining the class of persons whose crimes are the worst of

¹⁴ *McGautha v. California*, 402 U.S. 183, 190 (1971).

¹⁵ *Id.* at 189-90.

¹⁶ *Id.* at 196.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 190-208 (affirming the correctness of the phrase "absolute discretion" that had been used in the prior trial's jury instruction as a reflection of the jury's historic power to choose between the death penalty, or recommend mercy, in cases where the two choices are appropriate).

²⁰ *Id.* at 204.

²¹ *Id.* at 203.

the worst is not only possible, but constitutionally required.²² *Furman* created for the first time a requirement that the class of persons eligible for the ultimate penalty be legislatively “narrowed.” The requirement of narrowing can be understood as consisting of three distinct but related requirements, which we describe in detail in Sections 1–3 below. In addition, before the viability of future empirically based challenges to state systems can be meaningfully explored, it is necessary to examine in Section 2 the distinct Eighth Amendment requirement of individualization. With a firm understanding of the contours of narrowing and individualization in place, in Section 3 we assess the potential of awakening courts to a new era of *Furman* challenges by carefully differentiating the various Eighth Amendment requirements animating current death penalty jurisprudence.

1. *Furman* Narrowing: Avoiding Infrequency²³ and Arbitrariness

Although it decided the case as a due process challenge, the *McGautha* Court suggested that no provision of the Constitution was offended by a discretionary capital system: “In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”²⁴ Just one year after *McGautha*, however, the impossible became the essential. In *Furman v. Georgia*, a fractured Court held that the discretion state systems afforded — along with the infrequency with which the penalty was imposed — rendered the death penalty unconstitutional.²⁵

Furman is often seen as a convoluted decision, but its practical application and meaning are anything but intractable. Although it gave

²² See, e.g., *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (explaining that *Furman* requires that at the stage of legislative definition, a capital sentencing scheme must “genuinely narrow the class of persons eligible for the death penalty”); *id.* at 876 n.14 (recognizing that post-*Furman*, there were concrete limits on the ability of a state to arbitrarily impose the ultimate penalty insofar as “it is always circumscribed by legislative guidelines”).

²³ Throughout this Section we discuss the constitutional problem with infrequency in capital sentencing. As the ensuing discussion makes clear, we are not faulting prosecutors, per se, for not bringing enough death penalty cases. The problem of infrequency is a relative one, *the problem* is the infrequency of the death penalty relative to the number of cases in which it is statutorily permitted. Understood in this way, infrequency is miner’s canary for the core problem identified in *Furman*: arbitrary or random death sentencing practices largely unchecked by statutory factors.

²⁴ *McGautha*, 402 U.S. at 207.

²⁵ See *Furman v. Georgia*, 408 U.S. 238, 239-40, 311 (1972).

rise to ten opinions (one per curiam paragraph announcing the decisions and one opinion from each of the nine Justices) the views of the various Justices — and the holding of the Court — are easily understood. Decisions of the Court that lack a majority opinion can nonetheless create binding precedent,²⁶ and *Furman* is no exception. Indeed, it would be ironic to discount the value of *Furman* as a plurality precedent insofar as the now famous *Marks* rule for discerning plurality precedent was first announced in a footnote in *Gregg* setting forth the controlling precedent from *Furman*.²⁷ Moreover, the case for recognizing *Furman* as defining a binding Eighth Amendment rule is made easy even without recourse to the *Marks* rule. On several occasions a majority of the Supreme Court has held that *Furman* is binding precedent.²⁸ As Justice Scalia has summarized this issue: “The critical opinions [in *Furman*] . . . focused on the *infrequency and seeming randomness* [of state death penalty systems.]”²⁹

The opinion contained three groups of decisions: One group of dissenting Justices — Powell, Rehnquist, and Burger — concluded that the Georgia statute under consideration complied with the Constitution. Another subset, consisting of Justices Brennan and Marshall, held that the death penalty could never be imposed consistently with the Constitution. The last group, consisting of Justices White, Stewart, and Douglas, believed that the death penalty could be imposed constitutionally, but that the Georgia statute under consideration failed to meet constitutional muster. Because this last group decided the case on the narrowest basis, it is generally seen as providing the decision’s holding.³⁰

²⁶ See *Marks v. United States*, 430 U.S. 188, 193 (1977) (defining the “narrowest grounds” rule); see also Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 935, 936 (2013).

²⁷ See *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.) (“Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .”).

²⁸ See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (“*Furman* held that Georgia’s then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not.”); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (“In [*Furman*], the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.” (citation omitted)); see also *Loving v. United States*, 517 U.S. 748, 771 (1996) (petitioner claiming that the holding in *Furman* established the need for limiting absolute discretion in capital sentencing).

²⁹ *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring).

³⁰ See, e.g., *Gregg*, 428 U.S. at 187-96 (discussing *Furman*’s effect on narrowing the

For the three Justices who controlled the *Furman* holding, the constitutional defect with Georgia's system in 1972 was arbitrariness, and a key symptom of that arbitrariness was the rarity with which death sentences were imposed in Georgia. Far from espousing the view that unfettered discretion was the best practice in the administration of a capital sentencing scheme, Justice Brennan noted that "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."³¹ Justice Stewart described this lottery of death as being "cruel and unusual in the same way that being struck by lightning is cruel and unusual."³² The very infrequency of the penalty was understood by Justice White to reflect an inconsistency with all legitimate penological goals and to be symptomatic of a form of arbitrariness that was constitutionally intolerable.³³ He explained, "[T]he penalty is so infrequently imposed that the threat of execution is too attenuated [to comply with the Eighth Amendment]."³⁴

Although the Court had some difficulty placing an exact number on the percentage of all eligible defendants actually sentenced to death, it seems clear that the number was in the range of 15–20%. As a leading scholarly paper on the topic explains:

In *Furman*, the Justices' conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death. Chief Justice Burger, writing for the four dissenters, adopted that statistic, citing four sources. Justice Stewart, in turn, cited to the Chief Justice's statement as support for his conclusion that the imposition of death was "unusual." In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment."³⁵

capital crimes that would allow the death penalty).

³¹ *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

³² *Id.* at 309 (Stewart, J., concurring).

³³ *Id.* at 311 (White, J., concurring) ("I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.").

³⁴ *Id.* at 313.

³⁵ Shatz & Rivkind, *supra* note 4, at 1288.

At the time *Furman* was decided, the United States had been without an execution for four years.³⁶ The death penalty, having reached a high of nearly 200 executions per year in the 1930s³⁷ had steadily dwindled in its popularity to the point that a de facto moratorium was in place. Against this background, it was reasonable for the three Justices in the plurality to conclude that the punishment was both rare and unusual. Following the resumption of executions in 1977, however, the executing states quickly ramped up their death sentencing and execution rates. The core tenet of *Furman* — that a punishment imposed infrequently and without proper safeguards may violate the Eighth Amendment — has been out of sight and out of mind as execution rates have returned to their pre-*Furman* highs. But it is important to remember that the very rarity of the death penalty was deemed by the *Furman* Court to be a constitutional defect. Indeed, it is commonplace today for lower court judges — often at the urging of prosecutors — to openly question whether *Furman* created any binding precedent at all.³⁸ Such a position is excusable in light of the passage of time, the dearth of true *Furman* challenges, and the fact that each of the five Justices in the majority in *Furman* wrote separately and did not join each other's opinions; however, it is not correct.³⁹

³⁶ 43A GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 49:2 (3d ed. 2013) (“By the time of the *Furman* decision in 1972, there had been no executions in the United States for four years and none were performed for five years after the *Furman* decision until the moratorium period ended . . .”).

³⁷ See DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA 58 n.21 (Oxford Univ. Press ed. 2009); Kelly J. Minor, *Prohibiting the Death Penalty for the Rape of a Child While Overlooking Wrongful Execution: Kennedy v. Louisiana*, 54 S.D. L. REV. 300, 308 n.9 (2009) (“In the 1930s there was an average of 167 executions per year, more than any other decade in the history of America.”); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2012 — STATISTICAL TABLES 3 (2014), available at <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>.

³⁸ See *infra* Part III.

³⁹ Leading commentators have observed that *Furman* is still “the decision [the Court] treats as its death penalty lodestar . . .” James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 5 (2007). For Professor Liebman, though, *Furman* is predicated on contradictory rationales. On the one hand, in “Justice White’s view . . . the death penalty needed to be more frequently imposed,” and on the other hand in “Justice Stewart’s . . . view, the penalty needed to be imposed more discriminately.” *Id.* at 6 (commenting that White’s view is now largely “discredited”).

Our view is different. We think that there is ample support in the opinions of both White and Stewart to support the view that the rarity and infrequency of the death penalty was constitutionally problematic and that the cure was to provide predictable

In short, it is beyond peradventure that *Furman* states a constitutional rule that has not been overturned by the Supreme Court.⁴⁰ The very issue that the Court addressed in *Gregg* was whether the problem of infrequency and related arbitrariness had been cured by the new Georgia sentencing system before the Court.⁴¹ In fact, the sentencing systems approved in 1976⁴² were approved because they complied with *Furman*.⁴³ As leading death penalty scholar Professor Steven Shatz has

standards for sorting the few murderers who are eligible for death from the many who are not. *See, e.g.*, *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring) (explaining the holding of *Furman* as a combination of the Stewart and White opinions which both focused on the “infrequency and seeming randomness” of the death penalty); *see also Furman*, 408 U.S. at 313 (White, J., concurring) (concluding that it was the infrequency combined with the lack of “meaningful basis for distinguishing” between defendants that made the death penalty unconstitutional). Moreover, we think that a desire to apply the death penalty in a more predictable and discriminate manner is best accomplished by lowering the rate of death eligibility, and likewise we think that the problem of infrequency (low death sentencing rates) is also solved by narrowing the class of death eligible defendants. High death-eligibility rates and low death sentencing rates — the catalysts for arbitrariness recognized by the two Justices — are but two sides of the same coin. *But see* James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1608 (2006) (contending that “*Furman* has no holding” (citing Robert Weisberg, *Deregulating Death*, 1983 *SUP. CT. REV.* 305, 315, 317)). Notably, even Professors Liebman and Marshall do not doubt for a moment that “[e]ven today, the Justices unanimously swear fealty to *Furman*.” *Id.* at 1614.

⁴⁰ Perhaps the best argument that the infrequency of the death penalty does not raise a constitutional problem derives from examining the Court’s pre-*Roper v. Simmons* cases regarding the death penalty for juveniles. In *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality), a plurality seems to conclude that the rarity of the penalty for juveniles was indicative of an Eighth Amendment violation. By contrast, in *Stanford v. Kentucky*, 492 U.S. 361, 373-76 (1989) (plurality), despite the rarity of the penalty, a plurality of the Court upheld the use of the death penalty on a juvenile. But this disagreement, which is more than a disagreement about the holding of *Furman* and the problems of low death-sentencing rates generally, reflects the tension on the Court over how best to interpret the evolving standards of decency that are relevant to modern Eighth Amendment analysis. *Cf.* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 *FLA. ST. U. L. REV.* 853, 853-54 (2013) (discussing in detail the conflict and evolution over the evolving standards of decency test).

⁴¹ *See Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (1976) (emphasizing that “prior to *Furman* less than 20% of those convicted of murder were sentenced to death . . .”).

⁴² There were five state systems under review on July 2, 1976. Three were approved — Georgia, Texas, and Florida — and two were rejected — North Carolina and Louisiana. *See, e.g.*, *Gregg*, 428 U.S. 153 (approving); *Jurek v. Texas*, 428 U.S. 262 (1976) (approving); *Proffitt v. Florida*, 428 U.S. 242 (1976) (approving); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (disapproving); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (disapproving).

⁴³ In Part I.A.1, we provide a considerable elaboration on the meaning of *Furman* and the precise difference between narrowing and eligibility as constitutional

summarized of the law, “*Furman* was a mandate to the states to raise their death sentence ratios,” and the state systems that have been directly or implicitly approved by the Supreme Court have been deemed facially compliant with *Furman*.⁴⁴ Since 1972, *Furman* has been and continues to be the threshold measuring stick by which capital sentencing systems are evaluated.⁴⁵

2. Narrowing: An Act of Objective Legislative Definition

As the previous Section makes clear, the very infrequency of death sentences for those convicted of death-eligible crimes raises concerns of a constitutional magnitude under *Furman*. But one can imagine various ways to solve such a problem. One solution might be to mandate a death sentence for certain crimes and eliminate all discretion, at least as to those persons who are in fact charged with those crimes. As we discuss below, this sort of mandatory death penalty regime was ultimately held unconstitutional.⁴⁶ Another potential solution would be to vest prosecutors with the critical function of determining who is *in fact* death eligible by affording them the power to screen out the worst of the worst from those who are eligible on the basis of the *statute alone*. Under this approach, death-sentencing rates would be calculated by using as a denominator those cases in which death was actually sought by the prosecutor and as a numerator those cases in which a sentence of death was actually imposed — if the prosecutor did not seek the death penalty, then it was by definition not a death eligible case.⁴⁷

To be sure, prosecutorial discretion plays an important role in ensuring the integrity of our justice system; in fact, it is often recognized that the decision of a prosecutor not to charge a defendant — or not to

requirements. We also compare the phrases death eligibility and death-sentencing rates.

⁴⁴ Shatz & Rivkind, *supra* note 4, at 1290 (noting that since *Furman*, the Court has never examined the death-sentencing ratios for any state).

⁴⁵ See, e.g., *Pulley v. Harris*, 465 U.S. 37, 44, 62 (1984) (noting the “great infrequency” of death sentences in 1972 as a driving force behind the *Furman* decision).

⁴⁶ See *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Woodson*, 428 U.S. at 305.

⁴⁷ This, of course, is not the way that death-sentencing rates were calculated in *Furman* or *McGautha*. In those cases the numerator was the number of death sentences, but the denominator were all persons who committed a crime that made them, on the face of the statute, eligible for the death penalty. See *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring) (“Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized — as ‘freakishly’ or ‘spectacularly’ rare, or simply as rare — it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?”).

seek a death penalty — is one of the least visible and least reviewable in the entire criminal justice system.⁴⁸ The more difficult question is whether such discretion can properly be regarded as a cure for the rarity and arbitrariness problems identified in *Furman*. Prosecutors today — as they did at the time of *Furman* — often defend the rarity of death sentences as “evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in ‘extreme’ cases.”⁴⁹ In *Furman*, the Court concluded that the use of enlightened discretion and judgment on the part of prosecutors and jurors was not enough to justify low death sentence rates. Instead, the Court came to the opposite conclusion, namely that “[c]rimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.”⁵⁰ Indeed, when the Court subsequently approved the revised Georgia capital sentencing scheme in *Gregg v. Georgia*, it did so because death eligibility was defined in such a way that it was expected to result in death sentences for most persons who were deemed death eligible. As the joint opinion of Justices White, Burger, and Rehnquist explained:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries — even given discretion not to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined.⁵¹

It is not, then, prosecutorial discretion, but legislative drafting that must provide the narrowing of the pool of persons for whom the ultimate penalty is a possibility. Prosecutors may exercise their discretion nobly, but they are not constitutionally required to do so. Indeed, in a subsequent decision, the Court summarized the holding of *Gregg* as

⁴⁸ Indeed, it is often asserted and assumed that prosecutorial discretion is largely beyond review. See *Barnett v. Antonacci*, 122 So. 3d 400, 405 (Fla. 4th Dist. App. 2013) (“[T]here is considerable authority for the proposition that prosecutorial discretion is itself an incident of the constitutional separation of powers, and that as a result the courts are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over criminal prosecutions.” (quoting *State v. Cain*, 381 So. 2d 1361, 1368 (Fla. 1980))).

⁴⁹ *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

⁵⁰ *Id.* at 294.

⁵¹ *Gregg v. Georgia*, 428 U.S. 153, 222 (1976).

recognizing “the need for *legislative criteria* to limit the death penalty.”⁵² Stated differently, the constitutional imperative of avoiding low death sentencing rates must be alleviated through the use of legislatively enacted “narrowing factors” rather than discretion and judgment by prosecutors or juries.⁵³ The required winnowing or narrowing of the pool of potential death sentence recipients is a “constitutionally necessary function at the stage of legislative definition.”⁵⁴ The narrowing determination happens through the finding of a legislatively defined “aggravating circumstance (or its equivalent) at either the guilt or penalty phase.”⁵⁵

It is counterintuitive for courts to assume that anything unconstitutional can flow from prosecutorial discretion exercised under local, statewide, or even national policies. No one wants to assume that prosecutors act with anything less than the best motives. And yet requiring legislative narrowing above and beyond prosecutorial discretion makes a certain amount of sense. If the problem is arbitrariness and unchecked discretion, then simply turning the question of death eligibility over to individual prosecutor’s offices would not provide a solution. If the constitutionally required narrowing could be accomplished through the exercise of prosecutorial discretion, then states would not have needed to redraft their capital murder statutes after *Furman*. Prosecutorial discretion was already a reality in Georgia and other states in 1972 where prosecutors always enjoyed the option of charging a non-capital offense and surely did so in some cases where, for example, a jury verdict of first-degree murder would likely have been upheld on appeal. In other words, if prosecutorial discretion sufficed to cure the requirement of Eighth Amendment narrowing, then a system in which 100% of first-degree murders were eligible for death, but only if the prosecutor and the jury so decided, would be entirely constitutional. This, however, is exactly the system that was identified in *McGautha* and explicitly rejected in *Furman*.⁵⁶ The *solution* of

⁵² *Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983).

⁵³ See *Sawyer v. Whitley*, 505 U.S. 333, 341-42 (1992).

⁵⁴ *Zant*, 462 U.S. at 878.

⁵⁵ *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994). At the guilt phase the requirement can be satisfied by some sort of special finding unrelated to the definition of first-degree murder. *Id.* (describing the California system). Alternatively, the narrowing can occur through the definition of first-degree murder. See *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988) (describing the Louisiana system).

⁵⁶ Certainly in any given case, a prosecutor might urge the jury not to return a sentence of death, or potentially even forego death as a potential penalty for a capital crime.

prosecutorial and juror discretion, then, was the very *problem* identified in *Furman*.⁵⁷

The Supreme Court has been unequivocal on this point. The Court has repeatedly recognized that the constitutionally required narrowing must occur through statutory definitions. *Furman* held that narrowing is required, and a line of cases, not the least of which is *Zant v. Stephens*, recognizes that such narrowing must occur “at the stage of legislative definition.”⁵⁸ Unless *Zant* and *Furman* are to be overturned, therefore, no set of prosecutorial screening functions, no matter how objective and unbiased, will suffice to meet the narrowing obligation. High death eligibility rates (and correspondingly low death sentence rates) are constitutionally problematic and only the legislature can remedy this concern.

3. Narrowing: A Determination of Fact

The third defining feature of a constitutionally sound narrowing device is that it must be sufficiently determinate and factual so as to make “rationally reviewable the process for imposing a sentence of death.”⁵⁹ This requirement that the statutory narrowing be concrete and determinate is important as a predicate to understanding what stages of a criminal case might count as serving the constitutional requirement of

⁵⁷ Some lower courts have suggested that the only real requirement imposed by *Furman* was to ensure that juries are not given open-ended, unguided discretion in their sentencing selection decisions. See, e.g., *United States v. Sampson*, 486 F.3d 13, 24-25 (1st Cir. 2007) (suggesting that prosecutorial discretion cabined by things like training manuals suffices to cure concerns under *Furman* and *Gregg*). According to such reasoning, open-ended prosecutorial discretion is permitted under modern death penalty systems because the systems employ the use of aggravating factors and oftentimes a bifurcated penalty phase. Cf. *id.* at 23-24 (determining that arbitrariness, not frequency of application, may render a death penalty scheme unconstitutional). One problem with identifying the cure to *Furman*'s constitutional defect in limiting jury discretion is that the Supreme Court has held that juries may be afforded “unbridled discretion” without offending *Furman*. Cf. *Zant*, 462 U.S. at 875-76 (“[T]he absence of legislative or court-imposed standards to govern the jury in weighing the significance of . . . aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.”). Accordingly, if juries can be given broad discretion and there are no limits on prosecutorial discretion, then these lower courts are sub silentio overruling *Furman*.

⁵⁸ See, e.g., *Tuilaepa*, 512 U.S. at 975, 979 (narrowing involves a “legislatively defined category”); *Lowenfield*, 484 U.S. at 244 (narrowing must occur through “objective legislative definition”); *California v. Ramos*, 463 U.S. 992, 1008 (1983) (referring to narrowing as a “legislatively defined category”); *Zant*, 462 U.S. at 878 (narrowing plays a necessary function “at the stage of legislative definition”).

⁵⁹ *Arave v. Creech*, 507 U.S. 463, 471 (1993).

narrowing. In this regard, *Tuilaepa v. California* is instructive. In California, in order to sentence a defendant to death the jury must convict the defendant of first-degree murder and find beyond a reasonable doubt a special circumstance.⁶⁰ The California death penalty process, then, involves three steps: (1) a first-degree murder conviction; (2) the finding of a special circumstance; and (3) a consideration of enumerated penalty-phase factors and an open-ended assessment of whether death is an appropriate penalty. Penalty-phase factors, then, come into play only after an aggravating (or special) circumstance has been found beyond a reasonable doubt. Unlike the defendants in other *Furman* challenges, including *Arave*, *Maynard*, and *Godfrey*, *Tuilaepa* challenged three of the *penalty-phase* factors as unconstitutionally vague.⁶¹

In rejecting the challenge, the Court explained that not every part of a sentencing scheme would be judged by the demanding standards applied to narrowing factors.⁶² For those factors that make one eligible for death in a technical sense — those factors that do the narrowing — great care must be taken to ensure that they are clear, determinate, and factual. By contrast, factors that a sentencer merely uses to make its ultimate sentencing decision are subject to very little judicial oversight, and instead treated as largely moral determinations.

In rejecting the defendant's argument for requiring objectivity for non-narrowing, sentencing factors, the Court explained:

Petitioners argue, however, that selection factors must meet the requirements for eligibility factors . . . and therefore must require an *answer to a factual question as eligibility factors do*. . . . [However] [o]ur decisions in *Zant* and *Gregg* reveal that, at the selection stage, the States are not confined to submitting to the jury specific propositional questions.⁶³

The narrowing process, then, requires objective or propositional factors that can be readily identified by a sentencer as either true or false; such considerations almost “of necessity require an answer to a question with a factual nexus to the crime or the defendant.”⁶⁴ Unlike other parts of a capital penalty phase that can be — and often must be — “open-ended,” subjective, moral determinations,⁶⁵ the narrowing must differentiate

⁶⁰ See *Tuilaepa*, 512 U.S. at 969.

⁶¹ *Id.* at 969-70.

⁶² See *id.* at 980.

⁶³ *Id.* at 977-78 (emphasis added).

⁶⁴ *Id.* at 973.

⁶⁵ See *id.* at 978.

cases “in an objective, evenhanded, and substantively rational way”⁶⁶ *Tuilaepa* demonstrates, therefore, that vagueness at the selection phase of a sentencing proceeding is not specifically prohibited and that determinacy and objectivity are not required; indeed, the Court has approved determinations at these stages that are based on nothing other than “unbridled discretion.”⁶⁷

In short, the requirement of narrowing is satisfied only when a capital statute requires the finding beyond a reasonable doubt of “statutorily defined facts.”⁶⁸ This vision of narrowing as an objective, factual inquiry, has been reinforced in numerous contexts. For example, in considering the scope of the *Apprendi v. New Jersey* jury right in capital cases, the Supreme Court held that those requirements that “operate as the functional equivalent of an element” of capital murder must be found by a jury beyond a reasonable doubt.⁶⁹ By contrast, the ultimate selection of the sentence — a question that is more moral or subjective than factual and objective — does not trigger the right to a jury. Likewise, one is regarded as ineligible for the death penalty, and therefore “innocent of the death penalty,” only if during his appeal he presents evidence that the jury’s findings of fact regarding eligibility are somehow tainted or the aggravator is invalid; a showing of insufficient moral culpability or the discovery of new mitigating evidence does not suffice to render a defendant innocent of the death penalty.⁷⁰

Simply put, narrowing must occur at the stage of legislative definition and it must consist of factual findings that have the effect of ensuring that a substantial portion of the eligible defendants are actually being sentenced to death.⁷¹ As one leading scholar has sarcastically summarized the state of the law, “Justice White’s ‘the more death sentences the better’ view invited States to require sentencers to focus on *powerfully objective, statutorily enumerated* reasons to punish

⁶⁶ See *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

⁶⁷ See *Tuilaepa*, 512 U.S. at 979 (quoting *Zant*, 462 U.S. at 875). No doubt the reason that such ambiguity or randomness is permitted at the selection stage or the back end of the capital sentencing process is that the Court requires objective narrowing at the front end of the case through legislative narrowing.

⁶⁸ See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (discussing Missouri’s capital sentencing system as reviewed in *Bullington v. Missouri*, 451 U.S. 430 (1981)).

⁶⁹ See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (discussing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

⁷⁰ See *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992).

⁷¹ See *Gregg v. Georgia*, 428 U.S. 153, 222 (1976).

murderers . . .”⁷² Stated more concretely, whether a system narrows is inherently an objective, and therefore an empirically testable, fact.

B. *Individualization — The Counterweight to Narrowing*

As set forth above, a proper capital statute must succeed under three distinct metrics: it must avoid the problem of *infrequency*; it must do so through *legislatively defined* criteria; and such criteria must set forth categorical, *factual* requirements for death eligibility. Despite the relative clarity of this the three-part formulation of narrowing, *Furman*’s application to modern sentencing practices is largely obscured. The reason for such confusion is simple: another aspect of the Eighth Amendment has taken center stage, both in the case law and in the academic commentary.

On July 2, 1976, the Supreme Court decided five cases raising the constitutionality of state capital sentencing systems adopted in the wake of *Furman*. The most famous of the decisions, *Gregg v. Georgia*, approved of Georgia’s system, which followed the lead of the Model Penal Code⁷³ and used aggravating factors as the mechanism for narrowing the class of death eligible defendants and then provided for an open-ended sentencing selection proceeding.⁷⁴ Two other states that had similar capital structures — Texas and Florida — also had their capital sentencing systems upheld.⁷⁵ By contrast, the two states that had adopted automatic capital sentencing regimes in response to *Furman* — North Carolina and Louisiana — had those regimes invalidated.⁷⁶ In rejecting these automatic sentencing systems, the Court explained in *Woodson v. North Carolina* that although a system of mandatory death sentences for certain offenses served the function of narrowing the class of individuals eligible for the ultimate punishment, the Eighth Amendment was nonetheless violated by a system that failed to provide for “individualized sentencing.”⁷⁷ The July 2nd cases thus reflect the

⁷² Liebman, *supra* note 39, at 11 (emphasis added).

⁷³ See *Gregg*, 428 U.S. at 191 (citing the then current Model Penal Code provisions on capital punishment).

⁷⁴ See *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (referring to the selection phase in Georgia as a proceeding characterized by “unbridled discretion”).

⁷⁵ See *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976).

⁷⁶ See *Roberts v. Louisiana*, 428 U.S. 325, 330-37 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁷⁷ See *Woodson*, 428 U.S. at 303-05 (explaining that narrowing without individualization creates a situation in which defendants are treated as “members of a faceless, undifferentiated mass” rather than as unique individuals).

application of two separate Eighth Amendment rules. The absence of determinate legislative standards to narrow the class of death eligible defendants is unconstitutional under *Furman*, but so too is a death penalty system that limits discretion entirely such that the death penalty is automatic for certain classes of murders.⁷⁸ A constitutional system, then, both requires adequate legislative narrowing and permits the individualization of the sentence.

The individualization requirement is often misunderstood. For example, Justice Kagan's first major Eighth Amendment opinion summarizes the *Woodson*⁷⁹ requirement as follows: "[This Court has] requir[ed] . . . sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death."⁸⁰ While accurate, this simplistic formulation undersells a robust and intricate set of precedent.

Of seminal importance in this arena is the Court's 1978 decision in *Lockett v. Ohio*.⁸¹ Building on the holding of *Woodson* that a capital sentencing jury must be permitted to consider all relevant mitigating evidence, the Court held that essentially *all evidence* could be relevant to mitigation.⁸² The core holding of *Lockett* — the notion that limits on the presentation of mitigating evidence are not permitted — is memorably summarized by Professor Scott Sundby:

⁷⁸ See *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (striking down a Nevada statute that made death penalty automatic for anyone convicted of murder while serving a life without parole sentence).

⁷⁹ Three of the five decisions from July 2, 1976 emphasize the importance of individualized sentencing. See *Roberts*, 428 U.S. at 330-37; *Woodson*, 428 U.S. at 303-05; *Jurek*, 428 U.S. at 273-74.

⁸⁰ *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Woodson*, 428 U.S. 280) (rejecting mandatory life without parole for juveniles); see also *Lockett*, 438 U.S. at 604 (quoting *Woodson*, 428 U.S. at 304) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

⁸¹ *Lockett*, 438 U.S. at 586.

⁸² See *id.* at 604 ("[I]n all but the rarest kind of capital case, [the sentencer must] 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 . . ."); see also Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1157 (1991) ("Chief Justice Burger's plurality opinion is best characterized as an evidentiary ruling on what mitigating evidence is constitutionally relevant for the sentencer to consider when deciding whether to impose the death penalty.").

Although the *Lockett* Court certainly was correct that its decision was rooted in the principle of individualized punishment that had led the Court to find mandatory death penalties unconstitutional, *Lockett* broadened the principle. In declaring the mandatory death penalty unconstitutional, the Court simply had said that the state could not preclude consideration of all mitigating evidence. *Lockett*, on the other hand, declared off-limits any effort to limit the evidence a defendant could present as a defense to the death penalty so long as the evidence touched upon the defendant's character or the nature of the offense.⁸³

In *Eddings v. Oklahoma*, the Court took the next step and held that not only must the sentencer be *permitted* to consider all potentially mitigating evidence, but that the Eighth Amendment prohibited the sentencer from "refus[ing] to consider, as a matter of law any relevant mitigating evidence."⁸⁴ After *Eddings*, any fact is admissible as mitigating evidence and the sentencer *must* consider it;⁸⁵ even facts arising after the commission of the crime (and arrest) must be considered as potentially mitigating when presented by the defense.⁸⁶ In essence, the absence of a catch-all mitigation provision in the capital sentencing statute renders a capital sentencing system a per se Eighth Amendment violation.⁸⁷ Perhaps an even more salient way of stating the same principle is that a state may not require a *nexus* between the proffered mitigation evidence and either the crime or criminal.⁸⁸ In this way, evidence of a low I.Q. is relevant mitigating evidence even where the defendant cannot establish a nexus between his mental capacity and the fact that he committed the crime.⁸⁹

⁸³ Sundby, *supra* note 82, at 1158.

⁸⁴ *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

⁸⁵ *See id.* at 114; *see also Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (recognizing that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances . . .").

⁸⁶ *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

⁸⁷ *See Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (holding that the Eighth Amendment required sentencers be permitted to consider non-statutory mitigators).

⁸⁸ *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

⁸⁹ *See Mark J. Goldsmith*, Case Note, 17 CAP. DEF. J. 115, 116-17 (2004); *see also Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010). Some courts have taken the position that while a nexus need not be established, the absence of a nexus may impact the weight the mitigating evidence is afforded by the sentencer. *See, e.g., Hedlund v. Ryan*, 750 F.3d 793, 818-19 (9th Cir. 2014) (recognizing that while a sentencing court has an obligation to consider all mitigating evidence, it retains vast discretion as to the weight to assign such evidence); *State v. Styers*, 254 P.3d 1132, 1135-36 (Ariz. 2011)

The academic literature on this topic is broad and dense⁹⁰ and the Supreme Court continues to decide cases addressing limitations on the development of mitigation evidence on a regular basis.⁹¹ It suffices for our purposes to remember that the assessment of what counts as mitigation and what value to give the mitigation is necessarily an open-ended, subjective inquiry. The Supreme Court has mightily guarded against any suggestion that only certain types of factual matters count as mitigation. Indeed, the most straightforward way to get a death sentence overturned since *Gregg* is to identify some defect in the sentencing process that deprives the sentencer of the opportunity to “give a ‘reasoned *moral response*’ to a defendant’s mitigating evidence”⁹² Even if the evidence offered in mitigation is a “two-edged sword” — functioning to both mitigate and aggravate the crime — such evidence must be *admitted and considered* at the defendant’s request because the ultimate assessment of mitigation is an unguided moral response.⁹³

The requirement of individualization has generated far more litigation to date than has *Gregg*’s application of the *Furman* rule. It has been observed that the “*Woodson* plurality’s insistence on individualization to assure reliability has generated the Court’s longest line of cases

(acknowledging the defendant’s post traumatic stress disorder, but giving it little mitigating weight because no nexus was established to the defendant’s crime).

⁹⁰ Many have thoroughly recounted the Court’s mitigation jurisprudence. See generally Liebman & Marshall, *supra* note 39 (discussing the history of the Court’s mitigation jurisprudence); Sundby, *supra* note 82 (discussing the breadth of mitigation in capital cases); Peggy M. Tobolowsky, *What Hath Penry Wrought? Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345 (1992) (discussing mitigation jurisprudence in regards to Texas death penalty cases); James Michael Blakemore, Note, *Counsel’s Control Over the Presentation of Mitigating Evidence During Capital Sentencing*, 111 MICH. L. REV. 1337, 1349 (2013) (discussing whether presentation of mitigating evidence is strategic or fundamental); *Leading Cases*, 121 HARV. L. REV. 194 (2007) (discussing leading Eighth Amendment death penalty cases dealing with the consideration of mitigating evidence).

⁹¹ The Supreme Court has, for example, routinely reviewed applications of the Texas capital sentencing statute in an uncharacteristically error-correction style in order to enforce the mandate that anything and everything can be mitigating. Most recently, the Court granted relief under the deferential strictures of federal habeas review in order to stress that Texas courts were contravening the Eighth Amendment by failing to permit sentencers to give “meaningful effect to mitigating evidence.” See, e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 262 (2007) (discussing evidence of youth as mitigating); see also *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) (reversing Court of Appeals decision that did not allow evidence of mental illness and substance abuse as mitigating).

⁹² *Brewer*, 550 U.S. at 288 (emphasis added) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989)).

⁹³ *Id.* at 292-93.

overturning capital statutes and verdicts.”⁹⁴ Given the success of the *Woodson* challenge, it should come as little surprise that lower courts and lawyers have largely ignored the independent narrowing requirements imposed by *Furman*. But the viability of future *Furman* challenges requires courts and lawyers to take stock of the differences between these two doctrines. To avoid the confusion that is arising in lower courts over *Furman* litigation, it is useful at this stage to clearly define the requirement of individualization and to distinguish it from narrowing.

C. *Understanding the Various Requirements of the Eighth Amendment*

This brief sketch of the requirements of the Eighth Amendment has introduced a number of related but distinct terms — eligibility, narrowing, individualization, and selection. Before moving on, we want to define these terms, as we believe an understanding of the functioning of a constitutional capital system requires the reader (or a court) to distinguish them from one another. After doing so, we examine the tensions among the various Eighth Amendment requirements and the relationship between these requirements and the jury right in a capital case. At the outset, it is worth emphasizing that this definitional work is important not merely for some semantic clarity. Rather, the definitional conflation of these terms — each of which has independent constitutional import — muddles the dialogue, obscures the significance of the new empirical studies discussed in Part II, and unnecessarily hampers the awakening of *Furman*. Without clarity as to the meaning of these terms, the independent and distinctly measurable nature of the *Furman* requirement of narrowing is at risk of being lost in the shuffle with the consequence that unconstitutional systems might escape scrutiny.

1. Unpacking the Terms

a. *Eligibility*

In its broadest sense, eligibility is the blanket term used for all of those criteria that separate those defendants who may be subject to death from those who may not; eligibility criteria are thus the sine qua non of the imposition of the death penalty. So, for example, if a statute requires that before a defendant can be sentenced to death he must be convicted of first-degree murder, an aggravating factor must be found and the case in aggravation must be found to outweigh the case in mitigation; all three of those requirements — murder conviction, aggravating factor,

⁹⁴ Liebman & Marshall, *supra* note 39, at 1627.

and balancing aggravation against mitigation — are eligibility requirements. Unless each one is satisfied, the defendant is ineligible for death and cannot be condemned.⁹⁵

b. Narrowing

Narrowing, by contrast, is a more specific term. As used in the progeny to *Furman*,⁹⁶ narrowing describes those objective, legislative criteria that separate those who may be sentenced to death from those whom may not. These criteria must be defined by statute, pled in the charging document, and proved to a jury beyond a reasonable doubt. Understood thusly, narrowing is a subset of eligibility — all narrowing requirements are eligibility requirements, but not all eligibility requirements narrow. Although it is commonplace to refer to a defendant for whom one or more aggravating factors apply as “death eligible,”⁹⁷ there are often other criteria that must be satisfied before a

⁹⁵ More generally, all preconditions to a death sentence are eligibility requirements, including jury unanimity, the burden of proof, any stage of the sentencing proceedings required by the statute or the Constitution, and potentially even the prosecutor’s decision to seek death. The question of whether substantive eligibility requirements (like aggravating factors) are of greater or different constitutional import than procedural eligibility requirements (like the burden of proof) is not important for purposes of this Article. As we explain below, the key distinction is between narrowing and eligibility.

⁹⁶ The term “narrowing” is not actually used in *Furman* itself. The concept of arbitrariness because of a lack of concrete legislative guidance and the concomitant low death sentencing rates permeates the decision. See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (White, J., concurring) (“The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us.”); *id.* at 435 n.19 (Powell, J., dissenting) (using the phrase “statutorily permissible punishment”); see also *Jurek v. Texas*, 428 U.S. 262, 270 (1976) (recognizing that a constitutional death sentencing system “narrow[s] the categories of murders for which a death sentence may ever be imposed . . .”). Likewise, in *Gregg*, the Court was unequivocal that it was the act of legislative narrowing that rendered the revised Georgia system presumptively constitutional. See *Gregg v. Georgia*, 428 U.S. 153, 196-97 (1976) (“Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances . . .”); *id.* at 222 (White, J., concurring) (“As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries — even given discretion *not* to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined.”).

⁹⁷ In many jurisdictions there is a portion of the sentencing phase devoted to determining whether one or more aggravating factors exists, and this stage is referred

defendant may actually be sentenced to death. Accordingly, a death sentence cannot be imposed until all preconditions for eligibility are satisfied, but the *Furman* requirement of narrowing is only satisfied by certain, particular preconditions on the imposition of a death sentence.

c. Individualization

In addition, the terms selection and individualization are also distinct terms with Eighth Amendment meaning. Individualization, as discussed in detail above,⁹⁸ is a necessary part of the selection phase of sentencing. Individualization is the requirement that a defendant be permitted, before being sentenced to death, to present to the sentencer and have considered any relevant mitigating evidence.⁹⁹

d. Selection

Selection, in the capital sentencing context, refers solely to the actual decision on whether to impose a sentence of death¹⁰⁰ — whether it is a decision of “unbridled discretion”¹⁰¹ or one of cabined weighing; selection is the moral determination of who lives and who dies. Selection is distinct from narrowing because it lacks the categorical, determinate, and legislatively defined qualities that characterize narrowing — determining what penalty is appropriate, even in a jurisdiction that guides the discretion of the sentencer — and is different from the sort of categorical, historical fact necessary for a narrowing finding.¹⁰²

to as the “eligibility” stage. See Stephen P. Garvey, *As the Gentle Rain from Heaven: Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1016 (1996) (“The first level is the familiar death-eligibility stage. The second level is the ‘desert phase’ of the death-selection stage.”). It is, of course, true that an aggravating factor is a necessary precondition to any sentence of death, but it is more precise to think of the aggravating factors as serving the function of narrowing, and all other preconditions to a death sentence — including selection — as eligibility. In this way the concepts of narrowing and eligibility are given distinct meaning.

⁹⁸ See *supra* Part I.B.

⁹⁹ See *supra* Part I.B.

¹⁰⁰ See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (“What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”).

¹⁰¹ *Zant v. Stephens*, 462 U.S. 862, 875 (1983).

¹⁰² Even in the absence of any mitigating evidence, it is uncommon for a jurisdiction to require the imposition of a death sentence. *But see Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) (holding that it was constitutional to require the defendant to put on mitigating evidence to outweigh the aggravating evidence). Moreover, the Court has held that a presumption of death is permitted such that if the mitigating evidence does not outweigh the aggravating evidence, the jury is instructed to return a sentence of death.

2. The Relationship of Narrowing and Individualization —
Synonyms or Antonyms?

Combining the eligibility and narrowing requirements — the *Furman-Gregg-Zant* line of cases and the *Woodson-Lockett-Eddings* line — it becomes clear that the Eighth Amendment simultaneously requires that the class of death eligible defendants must be meaningfully narrowed and that the sentence must be individualized to a particular defendant through the consideration of mitigating evidence. The obvious question is whether these two requirements — narrowing and individualization — are both means to an equitable death penalty or whether they operate at cross purposes. Some scholars have concluded that both requirements are simply means of complying with *Furman*'s mandate to avoid “the arbitrary imposition of death sentences”¹⁰³ The two requirements function so differently, however, that many have recognized an inherent tension between the competing need to control discretion through predictable, rule-based narrowing and the need to broaden the scope of sentencer (and prosecutorial) review through individualization.¹⁰⁴ In this regard, Justice Scalia's characterization of the tension is useful: “These [individualization] decisions, of course, had no basis in *Furman*. One might have supposed that curtailing or eliminating discretion in the sentencing of capital defendants was not only consistent with *Furman*, but positively required by it”¹⁰⁵ Even more to the point, Justice Scalia explained:

It would misdescribe the sweep of this [individualization] principle to say that “all mitigating evidence” must be considered by the sentencer. That would assume some *objective criterion* of what is mitigating, which is precisely what we have forbidden. Our cases proudly announce that the Constitution effectively

See, e.g., Kansas v. Marsh, 548 U.S.163, 181 (2006) (holding Kansas statute that requires the imposition of the death penalty when the sentencing jury determines that aggravating and mitigating evidence are in equipoise does not violate the Constitution). This is yet another reason why the second step in Colorado, discussed in this Article under Section “Colorado's Four-Stage Penalty Phase and the Narrowing Requirement,” *see infra* Part II.C.1, cannot be an eligibility requirement. Although a jury is required by statute to determine whether or not mitigating evidence is present, the existence or non-existence of that evidence is not a precondition to the imposition of the death penalty.

¹⁰³ *See* Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 583 (2012).

¹⁰⁴ *See, e.g., Sundby, supra* note 82, at 1184 (arguing that less control being placed on the sentencer's consideration of mitigating evidence is one way to avoid the arbitrary and capricious imposition of the death penalty).

¹⁰⁵ *Walton v. Arizona*, 497 U.S. 639, 662 (1990).

prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime

To acknowledge that "there perhaps is an inherent tension" between this [individualization] line of cases and the line stemming from *Furman* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," is rather like referring to the twin objectives of good and evil. *They cannot be reconciled.*¹⁰⁶

Whether one agrees that the twin functions of Eighth Amendment regulation in the death penalty setting are actually irreconcilable or merely complimentary, the conclusion that they are logically distinct and serve different goals is beyond peradventure. While narrowing turns on predictable, determinate criteria, generally with a "factual nexus to the crime or the defendant,"¹⁰⁷ mitigation is an inherently moral and indeterminate question that need not have any particular nexus to either. One functions on the basis of objective factual findings (*Furman*-narrowing) while the other focuses on subjective impulses and unconstrained discretion (*Woodson*-individualization). Understanding this distinction is critical to appreciating the viability of a second round of systemic *Furman* challenges to state capital sentencing systems.¹⁰⁸

3. Relationship to the Sixth Amendment Right to a Jury

Having established a foundational death penalty vocabulary, one final piece definitional work is deserving of attention — the relationship

¹⁰⁶ *Id.* at 663-64 (emphasis added) (citations omitted).

¹⁰⁷ *Tuilaepa v. California*, 512 U.S. 967, 973 (1994).

¹⁰⁸ On this point, Justice Scalia's opinions are a pillar of laudable consistency. In the Sixth Amendment jury right cases, Justice Scalia recognized that the eligibility factors required for narrowing were the functional equivalent of elements and therefore must be found by a jury beyond a reasonable doubt. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002). In the double jeopardy context, he has gone to great length to note that a finding of no eligibility factors amounts to an acquittal of the death sentence, though the finding that mitigation was sufficiently weighty to outweigh aggravation is merely a moral decision that does not amount to a finding of death ineligibility. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 112-13 (2003). Likewise, in defining actual innocence of the death penalty, Justice Scalia has agreed that one is not innocent of the penalty as a matter of Eighth Amendment law simply because he produces new mitigating evidence or legal arguments; rather, innocence of the death penalty requires a showing that the constitutionally required narrowing did not occur in a lawful manner. *See Sawyer v. Whitley*, 505 U.S. 333, 347 (1992).

between these terms and the Sixth Amendment right to a jury. In recent years, the characterization of a portion of the penalty phase as either eligibility or selection has primarily shaped whether the Sixth Amendment jury right applied at that stage.¹⁰⁹ Generally speaking, the Sixth Amendment jury right has applied to eligibility determinations but not to the ultimate selection determination.

Significantly and confusingly, however, the Sixth Amendment right has been limited to factual propositions. If a *fact* makes a defendant eligible for increased punishment — if it is a precondition to the imposition of a death sentence — then it must be pled in the charging instrument and it must be proved to a jury beyond a reasonable doubt.¹¹⁰ Any fact that narrows the class of death-eligible persons is also a fact that increases the maximum possible sentence from life to death and requires a jury finding under the Sixth Amendment.¹¹¹ By contrast, a wide range of Eighth Amendment death eligibility determinations, including the selection phase of sentencing when the sentencer might conduct a moral “weighing” of the aggravators and mitigators is not a truly factual determination and thus does not implicate either the Sixth Amendment jury right or the Eighth Amendment narrowing right.¹¹² There is no Sixth Amendment right to a jury selection of punishment; if a trier of fact is merely selecting from among permissible punishments the Sixth Amendment does not require a jury make those findings.¹¹³

¹⁰⁹ Darian B. Taylor, *Capital Sentencing in Arizona: A “Weighing State” in Name Only*, ARIZ. ATT’Y, July–Aug. 2006, at 20, 21.

¹¹⁰ See *Ring*, 536 U.S. at 609; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹¹¹ See *Ring*, 536 U.S. at 606 (applying the Sixth Amendment principles and concluding that “we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to *narrow* its scope” (emphasis added)); cf. Taylor, *supra* note 109, at 20 (“Of course, it is true that Arizona’s capital sentencing statutes currently require juries to make the life or death decision, but it is only a statutory — not a constitutional — requirement. The U.S. Supreme Court’s 2002 decision in *Ring II* was limited in scope, in that it only mandated that Arizona juries find, beyond a reasonable doubt, the existence of aggravating factors.”).

¹¹² See, e.g., *Ortiz v. State*, 869 A.2d 285, 305 (Del. 2005) (“Although a judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors, it is not that determination that increases the maximum punishment. Rather, the maximum punishment is increased by the [jury’s unanimous] finding [beyond a reasonable doubt] of the statutory aggravator. At that point a judge can sentence a defendant to death, but only if the judge finds that the aggravating factors outweigh the mitigator factors. Therefore, the weighing of aggravating circumstances against mitigating circumstances does not increase the punishment. Rather, it ensures that the punishment imposed is appropriate and proportional.”).

¹¹³ See Taylor, *supra* note 109, at 20. But see Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury’s Role in Capital Sentencing*, 13 U. PENN. J. CONST. L. 529, 548-50 (2011). We have previously argued that there is an Eighth Amendment

Similarly, the requirement of individualization, though constitutionally compelled by the Eighth Amendment, is also not factual.¹¹⁴ Because individualization through the presentation of mitigating evidence does not involve factual determinations that can increase one's maximum penalty, it too does not trigger the jury right protections.

The interaction between the Sixth Amendment and the Eighth Amendment, then, is at best confusing. But one should not assume that because Sixth Amendment *eligibility* involves only the finding of aggravating factors, that Eighth Amendment *eligibility* means the same thing. Instead, eligibility in the Eighth Amendment sense has come to mean all preconditions to a death sentence, and *narrowing* is the requirement that some legislative criteria circumscribe the pool of otherwise eligible defendants. As we will show in the next Part, by expanding narrowing to include questions of selection and individualization, prosecutors and courts have perverted the term and expanded the concept beyond meaning. Narrowing is meant to be about determinacy and rules; but when it is conflated with selection, eligibility, or individualization, as in the examples discussed later in this Article, the term comes to stand for something meaning nearly the opposite.

II. EMPIRICAL NARROWING CLAIMS: CAN A STATUTE THAT IS FACIALLY COMPLIANT WITH *FURMAN* FAIL TO NARROW IN PRACTICE?

While *Furman* was, at least in part, an empirical challenge to the operation of the Georgia death penalty statute, the Court's use of statistics in that case has been more the exception than the rule in Eighth Amendment capital litigation. As Professor Steven Shatz has observed, the capital sentencing statutes at issue in the July 2, 1976 cases were reviewed "on their face without reference" to any quantitative data regarding whether they actually increased the death sentencing rates.¹¹⁵ The Supreme Court simply reviewed the text of each statute in order to assess whether the empirical problems of infrequency and arbitrariness identified by *Furman* had been addressed. The next round of *Furman* challenges, by contrast, will likely be empirical, alleging that statutes that appear to be formally compliant with *Furman* and *Gregg* fail to narrow in practice.

requirement that juries rather than judges conduct the weighing of aggravators and mitigators. *See id.* However, this is not a requirement of narrowing, but rather is predicated on general fairness concerns implicated by the Eighth Amendment.

¹¹⁴ *See Zant v. Stephens*, 462 U.S. 862, 875 (1983) (explaining that narrowing and individualization are actually in significant tension with each other).

¹¹⁵ Shatz & Rivkind, *supra* note 4, at 1290 n.34.

In order to understand a non-narrowing *Furman* challenge, it is also useful to distinguish it from a vagueness claim. The vagueness claim is often a semantic one — that there is nothing in the definition of the aggravating factor to guide juror discretion.¹¹⁶ The vagueness allegation is that the factor is so vague or overbroad that it could be applied to all or nearly all murderers. The non-narrowing challenge, by contrast, is an empirical one. A defendant bringing such a challenge argues not that the aggravating factors are incomprehensible *on their face* but that, *in operation*, they exclude few if any defendants. So, for example, an aggravating factor that merely repeated the elements of the offense would not be vague, but might be evidence that the statute failed to narrow the pool of murderers. Exactly how a defendant would prove such a claim is discussed in Subpart B, below.

A. Distinguishing McCleskey

Before turning to the modern *Furman* challenge, it is important to note what such a challenge is not. In this regard the most well known empirical analysis of the death penalty in which the Supreme Court has yet engaged is its decision in *McCleskey v. Kemp*.¹¹⁷ McCleskey brought a habeas challenge to the new Georgia capital statute first contested in *Gregg*. His challenge, though, was not to the statute as written, which had already been upheld in *Gregg*. Rather, he argued that Georgia's capital system *as applied* violated the Eighth and Fourteenth Amendments to the Constitution. Using extensive empirical data compiled by Professor David Baldus from more than 2,000 homicides committed in Georgia during the 1970s, McCleskey argued that African-Americans who were charged with killing Whites (those in McCleskey's position) were 4.3 times more likely than Whites who killed Blacks to be sentenced to death.¹¹⁸ Accepting the Baldus methodology as presumptively valid, the Court nonetheless rejected McCleskey's claims.¹¹⁹

His equal protection claim failed because McCleskey was unable to demonstrate discriminatory intent on the part of any government actor

¹¹⁶ See, e.g., *Arave v. Creech*, 507 U.S. 463 (1993) (deciding the Idaho Supreme Court's limiting construction of the phrase "utter disregard for human life" passes constitutional muster); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding Oklahoma's addition of the word "especially" to its statutory aggravating circumstance did not sufficiently guide the jury's discretion in deciding whether to impose the death penalty).

¹¹⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹¹⁸ See *id.* at 286-88.

¹¹⁹ See *id.* at 312-13.

in his case.¹²⁰ In fact, the Court appeared to have trouble coming to terms with the nature of McCleskey's claim: did he allege that the prosecutors, judges, and juries of Georgia had conspired to impose the death penalty on a discriminatory basis?¹²¹ In the absence of any evidence that intentional discrimination had taken place in McCleskey's own case, the Court concluded that he had failed to make out a prima facie equal protection claim.¹²² Ironically, it was precisely because McCleskey alleged systemic failure on the part of the Georgia capital system that his equal protection claim was doomed to fail; the Court seemed concerned about a study that showed that the operation of a multi-headed statewide criminal justice system resulted in discriminatory results. As the Court explained, there was no logical stopping point to such a line of argument:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.¹²³

Turning to the Eighth Amendment challenge, the Court cited Justice White's concurrence in *Furman* as expressing a concern about the infrequency with which the death penalty was imposed "even for the most atrocious crimes" especially when there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."¹²⁴ The *McCleskey* Court concluded that the discretion permitted by the Georgia system, even in light of the evidence provided in the Baldus study of racially disparate results, did not indicate that the Georgia death penalty statute was failing to do the

¹²⁰ See *id.* at 289.

¹²¹ See *id.* at 294.

¹²² See *id.* at 292 ("Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967))).

¹²³ *Id.* at 314 (citations omitted).

¹²⁴ *Id.* at 301 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972)).

work required of it by *Furman*.¹²⁵ Rather, the Court focused on the procedures the state had put in place to ensure the even-handed application of the death penalty, reasoning that states are entitled to significant deference in the operation of their capital systems.¹²⁶

Thus, it is important to see why the *McCleskey* decision is far from fatal to the new wave of *Furman* challenges that we discuss. The equal protection theory rejected in *McCleskey* was that discrimination permeated the application of the death penalty in Georgia in a way that rendered the imposition of the death penalty unconstitutional. But because the Supreme Court had previously read the Equal Protection Clause to require discriminatory intent in almost all cases,¹²⁷ the absence of evidence of discrimination in *McCleskey*'s own case was fatal to his allegations. What is more, the Court found nothing in the Baldus data to show that the infrequency and arbitrariness that typified the death penalty in Georgia prior to *Furman* had returned. Nothing in the Baldus data pointed to a failure of legislative narrowing.

By contrast, a *Furman* challenge does not require the defendant to demonstrate any evidence of discriminatory intent, let alone discrimination in his own case. Rather, a condemned defendant need only demonstrate that the death penalty in a particular state is being imposed in a small percentage of the cases in which it was available and that there was no rational way of explaining the difference between the few cases where the death penalty was imposed and the many cases in which it was not.

The Court's decision in *McCleskey* is susceptible to attack and many have done so vigorously;¹²⁸ but one thing that should be without

¹²⁵ See *id.* at 313 ("The discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.'" (quoting *Pulley v. Harris*, 465 U.S. 37, 54 (1984))).

¹²⁶ See *id.* at 313 ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.").

¹²⁷ Although the Court noted that in some cases discriminatory intent could be inferred from disparate impact, it was quick to distinguish those cases. See *id.* at 293-94.

¹²⁸ See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (arguing that *McCleskey* is grievously flawed and validated racially oppressive official conduct); Liebman, *supra* note 39, at 84 (arguing the Court "blinked" with its decision in *McCleskey* and has been on the defensive ever since). Indeed, when asked after his retirement whether he regretted any decisions, Justice Powell explained that he regretted casting the deciding vote in *McCleskey*. See Editorial, *Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), <http://www.nytimes>.

controversy is that the holding in *McCleskey* carries little import for the modern *Furman* challenges. *McCleskey* actually says very little about quantitative *Furman* challenges; it holds only that empirical evidence of racial discrepancies in sentencing do not give rise to the sort of infrequency and narrowing concerns addressed in *Furman*.

B. *The Future of Furman Challenges: Quantitative Data*

Recall that the concern in *Furman* was principally an empirical one; the three Justices making up the deciding plurality were concerned by the high ratio of eligible murderers to death sentences. That is, it was not just the shape of the Georgia statute, but also the facts of its operation that led them to invalidate it. In *Gregg v. Georgia*, several Justices expressed concern that the discretion that remained under the revised Georgia sentencing system might lead to death sentences just as infrequently and arbitrarily as present under the scheme rejected in *Furman*.¹²⁹ A majority of the Court, however, expressed an unwillingness to trust the defendants' "naked assertion" that the problem of arbitrariness would continue to arise.¹³⁰ Instead, the Court posited that a properly narrowed capital statute would necessarily have the effect of substantially decreasing death eligibility and thus likewise increasing the death-sentencing rates that had raised constitutional concerns.¹³¹ As we have seen, the Supreme Court adopted a similar approach in *McCleskey*, relying on the structure of the Georgia statute rather than the evidence of its results.¹³²

However, a recent wave of empirical research tends to confirm what could only be speculated at the time of *Gregg* and *McCleskey* — namely that the death penalty is just as rare in some jurisdictions today as it was in 1972 when the high eligibility, low death-sentencing rate, and unchecked discretion of prosecutors and jurors combined to violate the Eighth Amendment. No longer must litigants rely on "naked

com/1994/06/11/opinion/justice-powell-s-new-wisdom.html; see also Cassandra Stubbs, *The Dred Scott of Our Time*, ACLU BLOG OF RIGHTS (Apr. 16, 2012), <https://www.aclu.org/blog/capital-punishment/dred-scott-our-time> (referring to *McCleskey* as the *Dred Scott* of our time).

¹²⁹ See *Gregg v. Georgia*, 428 U.S. 153, 220-22 (1976) (White, J., concurring).

¹³⁰ *Id.* at 222 ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail.").

¹³¹ See *id.*

¹³² See *McCleskey*, 481 U.S. 279.

assertion[s]”¹³³ of non-narrowing, however. Based on the groundbreaking research of Professors David Baldus and Steven Shatz, among others, there is a growing body of empirical data suggesting that many state statutes are not effectively narrowing. Notwithstanding state statutes that follow the general template provided by *Gregg* (and the Model Penal Code), researchers are demonstrating that the application of many of these provides very little any narrowing in fact.¹³⁴ The balance of this Section briefly summarizes some of these studies — their methodology, findings, and conclusions.

Over time, researchers have committed themselves to empirically testing the operation of a number of jurisdictions’ death penalty statutes. In doing so, these researchers have generated a set of best practices for empirically studying state death penalty operations.¹³⁵ In each case, researchers identify a relevant time period and geographic location,¹³⁶ then collect data on all available homicide cases.¹³⁷ The cases are then coded to determine whether each defendant is statutorily eligible for death — whether a jury finding that a defendant meets the eligibility criteria set by statute would be upheld on appeal.¹³⁸ Using these determinations and the actual result in each case, researchers then calculate the percentage of all convicted murderers eligible for death (the death eligibility rate) and the percentage of eligible convicted murderers in fact sentenced to death (the death sentencing rate). Recall that it was a high death-eligibility rate and a correspondingly low death-sentencing rate that led the *Furman* Court to overturn Georgia’s death penalty statute in 1972.

To date, the most comprehensive empirical study of the death penalty remains the one conducted by David Baldus and his colleagues in

¹³³ See *Gregg*, 428 U.S. at 222.

¹³⁴ See *McCleskey*, 481 U.S. at 304-05 (recognizing that a statute that has twice been upheld on its face can be challenged in its application).

¹³⁵ See, e.g., David C. Baldus et al., *Perspective, Approaches, and Future Directions in Death Penalty Proportionality Studies*, in *THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 135 (Charles S. Lanier, William J. Bower & James R. Acker eds., 2009) (detailing the best methods for empirically studying state death penalty operations).

¹³⁶ Some researchers studied a county or other geographic subdivision rather than a state as whole.

¹³⁷ Some researchers focus on those charged with first-degree murder, some on lesser crimes.

¹³⁸ See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 326 (1979) (holding a rational trier of fact could reasonably have found that the petitioner committed murder in the first degree under Virginia law).

Georgia and considered in *McCleskey v. Kemp*.¹³⁹ That study covered 2,484 defendants charged with homicide and convicted of non-negligent homicide (either murder or manslaughter) over a six-year period. Baldus and his co-authors found that 23% of those made eligible for death under the Georgia statute ultimately received that punishment — a number that compared favorably with the 15–20% number that troubled the Court in *Furman*. Following his Georgia study, Professor Baldus then conducted similar studies of the death penalty in other states and in the military justice system, finding death sentencing rates of 4.6% in California,¹⁴⁰ 16% in Nebraska,¹⁴¹ and 15.5% in the military system.¹⁴² Similarly, Professor Steven Shatz has conducted three studies in California, using a data set of cases where the defendant was convicted of first-degree murder.

Using these methods, and following up on the work of those operating elsewhere, the two of us conducted a study of every Colorado murder charged between 1999 and 2010 and found the lowest death sentencing rate yet recorded in any jurisdiction.¹⁴³ Professor Shatz submitted an affidavit to the court attesting to the appropriateness of our methodology.¹⁴⁴ The findings of these studies, including our own, are summarized in the chart below:

¹³⁹ See *McCleskey*, 481 U.S. at 279; DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS I* (1990). Professor John Donohue may well have a claim to an equally comprehensive and important study. He studied almost 5,000 murders over a thirty-four year period. See John Donohue, *Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution I* (June 8, 2013) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue.

¹⁴⁰ See Amended Declaration of David C. Baldus at 27, *Ashmus v. Wong*, No. 93-594 (N.D. Cal. Sept. 19, 2010), ECF No. 473.

¹⁴¹ David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 545 (2002) [hereinafter *Arbitrariness and Discrimination*].

¹⁴² See David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1242 (2011) [hereinafter *Racial Discrimination*].

¹⁴³ Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1110 (2013) (“Colorado’s aggravating factor rate during the study period was 539 of 596, or 90.4%.”).

¹⁴⁴ See Declaration of Steven Shatz at 16, *People v. Lewis*, No. 2012-CrR-4743 (Dist. Ct. Douglas County, Colo. 2012) (on file with the authors) (describing the Colorado study as using the “state of the art methodology, fully consistent with best practices for such a research project.”).

Table 1. Death Sentence Rates in Statutory Narrowing Studies¹⁴⁵
(ranked highest to lowest)

Jurisdiction	Data Set	Rate ¹⁴⁶	Authors
Georgia	1,066 non-negligent homicides (sample)	23%	Baldus et al. ¹⁴⁷
Nebraska	689 homicides	16%	Baldus et al. ¹⁴⁸
Military	440 homicides	15.5%	Baldus et al. ¹⁴⁹
New Jersey	455 death-eligible defendants	13.2%	Baldus & Baime ¹⁵⁰
California (Alameda)	473 first-degree murders	12.8%	Shatz & Dalton ¹⁵¹
California (Appellate)	404 first-degree murders (sample)	11.4%	Shatz & Rivkind ¹⁵²
Maryland	6,000 murders	5.8%	Paternoster & Brame ¹⁵³
California (Statewide)	1,299 first-degree murders	5.5%	Shatz & Shatz ¹⁵⁴
California (Baldus)	1,900 non-negligent homicides (sample)	4.6%	Baldus ¹⁵⁵
Connecticut	205 death-eligible homicides	4.4%	Donohue ¹⁵⁶
Colorado	539 death-eligible homicides	0.56%	Marceau et al. ¹⁵⁷

¹⁴⁵ See *id.* at 11 (collecting data compiled in studies by Baldus, Baime, Paternoster, Brame, Donohue, and Shatz).

¹⁴⁶ Because each study draws on a different data set, we report here only the death-sentencing rate for each study (the percentage of those statutorily death-eligible murderers actually sentenced to death). It was this ratio that led the *Furman* Court to invalidate the Georgia statute.

¹⁴⁷ BALDUS ET AL., *supra* note 139, at 90.

¹⁴⁸ Baldus et al., *Arbitrariness and Discrimination*, *supra* note 141, at 545.

¹⁴⁹ See Baldus et al., *Racial Discrimination*, *supra* note 142, at 1242.

¹⁵⁰ See N.J. DEATH PENALTY STUDY COMM'N, STATE OF N.J., NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 24 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

¹⁵¹ Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1259-62 (2013).

¹⁵² Shatz & Rivkind, *supra* note 4, at 1332.

¹⁵³ RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 17-18 (2003), available at http://www.aclu-md.org/uploaded_files/0000/0376/md_death_penalty_race_study.pdf.

¹⁵⁴ See Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 93 (2012).

¹⁵⁵ See Amended Declaration of David C. Baldus, *supra* note 140, at 27.

¹⁵⁶ See Donohue, *supra* note 139, at 1.

¹⁵⁷ Marceau, Kamin & Foglia, *supra* note 143, at 1112.

Each of these studies has been used in what we call the new round of *Furman* litigation. The Shatz study was used in the *Ashmus* litigation in California, which remains pending.¹⁵⁸ Our study was presented in a number of cases in Colorado and was cited by the Governor in refusing to sign a death warrant.¹⁵⁹ The Donohue study was considered by the Connecticut legislature in voting to repeal the death penalty in 2012.¹⁶⁰ Although these claims have largely been considered by state courts to date, it is only a matter of time before one of them reaches the U.S. Supreme Court on direct review or other lower federal courts on federal habeas review. In the next Section we discuss the merits of such a claim and point out some pitfalls and often made in the analysis thereof.

C. *Colorado as a Case Study in Eighth Amendment Confusion*

As explained in Part II.B, above, a new era of narrowing studies are either in the making, or are already being litigated in capital cases. We have published one such study examining Colorado's death penalty system, which has been introduced in a number of ongoing capital cases. Notably, studies like ours can examine a defendant's statutory eligibility for the death penalty — whether the defendant fits within the clear categories of criminals made eligible by the first-degree murder statute and the definitions of aggravating factors. But the dormancy of *Furman* and the loose use of the terms narrowing and eligibility threaten to undermine the utility of such studies. If narrowing is regarded as immeasurable, then as a practical matter the next wave of *Furman* litigation is rendered impossible. For the reasons discussed in previous Sections, however, the notion that *Furman* narrowing is indeterminate and non-objective is doctrinal and reflects an abandonment of *Furman* itself.

¹⁵⁸ See Docket for *Ashmus v. Ayers*, No. 3:93-cv-00594-TEH, at *39 (N.D. Cal. Feb. 17, 1993).

¹⁵⁹ See Colo. Exec. Order No. D 2013-006 (May 22, 2013), available at <https://www.scribd.com/doc/143073608/Hickenlooper-Death-Sentence-Reprieve-for-Nathan-Dunlap>.

¹⁶⁰ Press Release, Dannel P. Malloy, Governor of Conn., Gov. Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012), available at <http://www.governor.ct.gov/malloy/cwp/view.asp?Q=503122&A=4010>; see Peter Appleborne, *Death Penalty Repeal Goes to Connecticut Governor*, N.Y. Times (Apr. 11, 2012), <http://www.nytimes.com/2012/04/12/nyregion/connecticut-house-votes-to-repeal-death-penalty.html> (“Democrats in favor of the bill cited support from many families of murder victims and the fact that capital punishment has long been banned by nearly all of the world’s democracies. In a review of 34 years of Connecticut death penalty cases, Prof. John Donohue of Stanford Law School concluded that ‘arbitrariness and discrimination are defining features of the state’s capital punishment regime.’”).

Colorado's initial judicial reaction to the narrowing study is illustrative. Prosecutors have responded to our empirical non-narrowing challenge by arguing that in Colorado the finding of aggravating factors is only a small part of the narrowing work done by the statute. They have argued that the finding of mitigating factors and the weighing of mitigators against aggravators also play an important part in the narrowing procedures required by the Eighth Amendment; more than one trial court opinion has accepted this argument and upheld the Colorado capital statute in the face of these challenges. In order to understand this argument and to generalize about its implications for other state capital sentencing systems, it is necessary to understand the stages of capital penalty phase in Colorado.

1. Colorado's Four-Stage Penalty Phase and the Narrowing Requirement

The Colorado capital sentencing statute has been interpreted to require four distinct steps at the penalty phase.¹⁶¹ First, the jury must find one of seventeen enumerated aggravating factors to be true beyond a reasonable doubt.¹⁶² Second, the jury considers evidence proffered by the defendant to determine "whether any mitigating factor exists."¹⁶³ Third, the prosecution is permitted to rebut the presented mitigating evidence and the jury is to assess whether the mitigating evidence outweighs the aggravating factors found by the jury.¹⁶⁴ Only if the jury finds beyond a reasonable doubt that mitigation does not outweigh the aggravating factor(s) previously found does the case proceed to the fourth stage at which the jury is presented with additional evidence and ultimately makes a decision as to whether death is the appropriate punishment.¹⁶⁵

As the Colorado Supreme Court has summarized the process: "[U]p to step three, Colorado's death penalty process resembles that of a weighing state. However, Colorado's fourth step, in which the jury considers all relevant evidence without necessarily giving special consideration to statutory aggravators or mitigators, resembles the selection stage of a non-weighing state."¹⁶⁶ Colorado, then, is unusual

¹⁶¹ See *People v. Tenneson*, 788 P.2d 786, 789 (Colo. 1990).

¹⁶² See COLO. REV. STAT. § 18-1.3-1201 (2014) (requiring that the specific alleged aggravating factors must be charged in advance of the trial); *Tenneson*, 788 P.2d at 789.

¹⁶³ *Tenneson*, 788 P.2d at 789; see COLO. REV. STAT. § 18-1.3-1201.

¹⁶⁴ See *Tenneson*, 788 P.2d at 789.

¹⁶⁵ See *id.*

¹⁶⁶ *People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999).

among death penalty states in that it contains both a pure weighing procedure¹⁶⁷ at stage three, and an unbridled non-weighing procedure at stage four;¹⁶⁸ while other states require either a weighing determination or a non-weighing determination, Colorado requires both.

It's possible that this two-stage procedure works to the benefit of capital defendants, giving them essentially two bites at the mercy apple. However, for *Furman* purposes the critical question is where in the Colorado sentencing process narrowing occurs. In practice, both stages three and four in Colorado operate as selection phases, which means that if Colorado abandoned its fourth stage altogether, a death sentence could be imposed without violating the Eighth Amendment. More importantly, however, neither of these two quintessentially selection procedures does the work of Eighth Amendment narrowing.

In the very limited number of death penalty appeals that the Colorado Supreme Court has reviewed under this statute, the narrowing question has never come up directly. The most relevant holding of the state's high court is that the "first three steps constitute the death penalty eligibility determination" in Colorado.¹⁶⁹ In one sense this is quite true. A defendant in Colorado is not eligible for death until the first three steps have been satisfied — the weighing of aggravators and mitigators at stage three is a precondition to a sentence of death. But in this sense stage four — the purely discretionary decision between life and death — is also an eligibility condition. The flaw in the Colorado Supreme Court's approach, then, is not in suggesting that stage three is an eligibility requirement, but rather in setting it aside as unique, and treating stage four as a selection process that has nothing to do with eligibility.¹⁷⁰ In so concluding, the court has implied that stage three (but not four) is doing some unique, constitutionally required narrowing work — the implication is that the first three stages in Colorado are all part of the constitutional narrowing determination.¹⁷¹

¹⁶⁷ See *Stringer v. Black*, 503 U.S. 222, 223 (1992) (defining a weighing jurisdiction as one that permits the sentencer to weigh only statutory aggravators against mitigating factors).

¹⁶⁸ See *id.* (defining non-weighing as a jurisdiction that allows the sentencer to consider in aggravating factors beyond the statutory aggravating factors when conducting the weighing analysis).

¹⁶⁹ See *People v. Montour*, 157 P.3d 489, 496 (Colo. 2007); *Dunlap*, 975 P.2d at 739.

¹⁷⁰ See *Dunlap*, 975 P.2d at 739 ("Step four, when the jury makes its final decision about life imprisonment or death, is the selection phase . . .").

¹⁷¹ Indeed, the court cites *Zant v. Stephens* as the template for understanding the first three stages, and it relegates stage four to the widely unregulated realm of selection. See *Dunlap*, 975 P.2d at 739 (concluding that the "distinction between the admissibility of evidence for the eligibility and selection stages rests on the unique purpose of the

Given the context in which the questions about the distinction between stages three and four have come up to date — instances where referring to stage three as uniquely linked to eligibility was regarded as creating additional procedural rights for the defendant — we do not read the Colorado Supreme Court's cases as having concluded that the balancing of mitigating and aggravating factors, which the jury instructions in Colorado explicitly refer to as a moral rather than a factual question, is an act of Eighth Amendment narrowing. Indeed on some occasions, the court has recognized that it is the finding of an aggravating factor that “narrows the group of persons” eligible for the death penalty as required by the Eighth Amendment.¹⁷² But the confusion surrounding the meaning of narrowing and eligibility and the court's suggestion that stage three plays a role that is constitutionally distinct from stage four invites confusion in the form of obfuscating the requirements of *Furman*.¹⁷³

And in fact, confusion is exactly what has ensued. In applying the language holding that the first three stages constitute “eligibility” stages, lower courts have concluded that stage three serves the narrowing function mandated by the Eighth Amendment under *Furman*. By defining narrowing in this manner, contrary to the *Furman* progeny, courts have untethered narrowing from its determinate roots and rendered it nebulous, immeasurable, and beyond quantitative rebuke.

eligibility stage”).

¹⁷² *People v. Tenneson*, 788 P.2d 786, 791 (Colo. 1990); see also *Dunlap*, 975 P.2d at 736 (describing the Colorado system by noting that “[f]irst, it narrows the group of individuals convicted of first degree murder at the eligibility stage by requiring that the jury be satisfied beyond a reasonable doubt of the existence of at least one of the statutorily specified aggravators” and explaining the subsequent stages without using the term of art “narrowing” to describe any of them (emphasis added)).

¹⁷³ The Colorado Supreme Court has also explained in *People v. Rodriguez* that “[o]nce the capital sentencing statute narrows the class of individuals eligible for the death penalty, as ours does, the federal Constitution does not prohibit the sentencer from considering aggravating facts or circumstances other than statutory aggravators.” *People v. Rodriguez*, 794 P.2d 965, 986 (Colo. 1990) (emphasis added). This, of course, is true under *Zant*. However, it elides the question of where in the process narrowing occurs. This language from *Rodriguez* has been cited in support of the conclusion that stage three — the weighing of aggravators and mitigators — is a narrowing stage. See *id.* (“If a jury completes steps one through three and finds a defendant to be death eligible, then the state and federal constitutions impose few guidelines concerning the scope of aggravating evidence that the jury may consider in its selection decision.”).

2. Weighing as Narrowing in Colorado

Our Colorado death-eligibility study¹⁷⁴ looked at every murder conviction over a twelve-year period and assessed whether one or more aggravating factors was present in each case.¹⁷⁵ The presence or absence of aggravating factors, in addition to the definition of first-degree murder was used to calculate a statutory death eligibility rate and a death-sentencing rate.¹⁷⁶ The study finds that the narrowing devices — the definition of first-degree murder and aggravating factors — only result in about 10% of all murders being “circumscribe[d] [from] the class of persons eligible for the death penalty.”¹⁷⁷ Moreover, the study finds a death-sentencing rate that is a mere fraction of the death-sentencing rate that was regarded as constitutionally problematic in 1972.¹⁷⁸ In other words, our study showed rather convincingly that the Colorado death penalty statute fails to do the work *Furman* required of it.

In response to this evidence of non-narrowing, lower courts have relied heavily on the dicta from the Colorado Supreme Court described above, which tends to conflate narrowing and eligibility. For example, in the case of James Holmes, the notorious defendant in the Aurora theater mass shooting, the chief district trial judge blithely dismissed a *Furman* challenge as a “straw man,” noting that: “[T]he narrowing function in Colorado’s capital sentencing scheme occurs during the first three stages of the sentencing process and involves statutory aggravating factors, as well as mitigating factors and the weighing of mitigation against aggravation.”¹⁷⁹ The judge goes on:

[R]elying on a law review article, the defendant alleges that “no court until now has had the benefit of empirical data demonstrating that Colorado’s capital scheme renders over 90 percent of first-degree murders in the state death-eligible.” The study suffers from the same flaw as [the motion]: its focus is solely on statutory aggravating factors. Accordingly, as relevant here, its conclusion — that at least one aggravating factor

¹⁷⁴ See Marceau, Kamin & Foglia, *supra* note 143, at 1098-114.

¹⁷⁵ This reflects the very definition of narrowing: “[the] finding of an aggravating factor ‘narrows the categories of murders for which a death sentence may ever be imposed.’” *Dunlap*, 975 P.2d at 749 (citation omitted).

¹⁷⁶ See Marceau, Kamin & Foglia, *supra* note 143, at 1102-07.

¹⁷⁷ *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

¹⁷⁸ See Marceau, Kamin & Foglia, *supra* note 143, at 1113-14.

¹⁷⁹ *People v. Holmes*, No. 12-CR-1522, slip op. at 6-7 (Colo. May 2, 2014) (order denying motion to declare death penalty statute unconstitutional).

potentially applied to 90.4% of the first-degree murders examined — is *nothing more than a red herring*.¹⁸⁰

Narrowing under this view is simply a synonym for eligibility, rather than a constitutionally required process for reducing the pool of otherwise eligible defendants. *Furman*-required narrowing, once conflated with eligibility more generally, means that all quantitative studies are irrelevant. Judge Samour is not the only judge to conclude that measuring aggravating factors alone is entirely irrelevant to measuring Colorado's compliance with the Supreme Court's seminal decision in *Furman*.¹⁸¹ If such a view ultimately prevails, then the notion that requiem is needed for *Furman* cannot be denied.¹⁸² If *Furman* narrowing means anything, then it cannot be so broadly defined as to be synonymous with the independent requirement of sentencing individualization or the more general concept of eligibility.¹⁸³

¹⁸⁰ *Id.* at 8-9 (emphasis added) (citations omitted).

¹⁸¹ *See, e.g.*, Order [2013-05-02] D-181, *People v. Montour*, No. 2002CR782, at 8-9, 11 (Dist. Ct., Douglas Cnty., Colo. May 2, 2013) (concluding that the Colorado death penalty study “does not fully capture the relationship between constitutional narrowing and the Colorado death penalty statute” because it does not measure the narrowing that occurs at the weighing stage and that “narrowing takes place during stages one through three” of the Colorado penalty phase).

¹⁸² *See* Shatz & Rivkind, *supra* note 4, at 1339-42.

¹⁸³ Whereas Eighth Amendment narrowing factors must be determinate and generally have a “factual nexus” to the crime, the consideration of mitigation may be considerably broader. *See* *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (“Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to ‘make rationally reviewable the process for imposing a sentence of death.’ The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s culpability.” (citations omitted)); *see also* *People v. Tenneson*, 788 P.2d 786 (1990) (“Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant’s character and crime.” (quoting *Satterwhite v. Texas*, 486 U.S. 249 (1988) (Marshall, J., concurring in part and concurring in the judgment))); Nathan Dunlap Sentencing Instructions No. 24, *People v. Dunlap*, No. 1993CR2071 (Dist. Ct. Arapahoe Cnty., Colo. May 1996) (“Each of you must make your own individual assessment as to whether Nathan Dunlap should be sentenced to death or life imprisonment without the possibility of parole. This entails a profoundly moral evaluation of the defendant’s background, character and crime.”).

D. Other Examples of the Blurring of Narrowing

Colorado is not alone in confusing Eighth Amendment narrowing and distorting the requirements of *Furman*.¹⁸⁴ Likely, this confusion arises because, for the most part, defining eligibility broadly has salutary procedural effects for a prisoner facing the death penalty.¹⁸⁵ Most notably, as we have seen, the Supreme Court has ruled that eligibility requirements trigger Sixth Amendment jury and notice rights.¹⁸⁶ However, this loose use of the term eligibility can have perverse constitutional consequences.

For example, the U.S. Court of Appeals for the Tenth Circuit briefly considered a defendant's challenge to his federal death sentence on non-narrowing grounds and concluded as follows:

¹⁸⁴ See, e.g., *Blanco v. McNeil*, No. 07-61249-CIV, 2010 WL 9098788, at *9 (S.D. Fla. Dec. 7, 2010) (“[T]he weighing of aggravating and mitigating factors under the Pennsylvania sentencing scheme provided the requisite narrowing function and ensured that the statute did not create a category of offenders who would automatically be sentenced to death.”). Moreover, the State of Mississippi, for example, has concluded that narrowing occurs only through the conviction of murder and does not extend to the finding of aggravating factors that are a prerequisite to the selection phase. See *People v. Bacigalupo*, 862 P.2d 808, 822 (Cal. 1993) (Panelli, J., concurring) (citing *Ladner v. State*, 584 So. 2d 743, 763 (Miss. 1991)) (describing the Mississippi system and concluding that “it makes no sense as a practical matter to say that the narrowing process has ended and a defendant is eligible for death before the jury has made a finding that must be made before the weighing process can begin”). In Justice Panelli's view, then, narrowing necessarily includes considerations beyond those required by *Furman*, which merely requires legislative narrowing in the definition of the crime or through aggravating factors. See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (recognizing that narrowing can occur through the definition of murder); *James v. Collins*, 987 F.2d 1116, 1119 (5th Cir. 1993) (stating “the Texas Legislature bifurcated Texas capital proceedings, and provided a further narrowing mechanism” of the consideration of special issues such as future dangerousness before a death sentence can be imposed).

What is interesting about each of these state's heightened procedures is that they are not constitutionally required, and they cannot serve the narrowing function required by *Furman*. The “narrowing” factors that exist in Mississippi or in Louisiana, or the special circumstances in Texas, just like the third stage in Colorado could be entirely eliminated and not, on its face, create an unconstitutional system. Narrowing is constitutionally required at the stage of legislative definition and the procedures that states provide above and beyond *Furman* are not substitutes for a diluted set of *Furman* protections. See *Lowenfield*, 484 U.S. at 244-45. Eliminating the requirement of considering aggravating factors during the selection phase and instead simply allowing for an open-ended, unbridled moral determination based on the mitigating evidence and all other facts, would not violate the Eighth Amendment.

¹⁸⁵ See, e.g., *People v. Dunlap*, 975 P.2d 723, 739 (Colo. 1999) (recognizing that certain “eligibility safeguards extend through the end of the weighing stage”).

¹⁸⁶ See *Ring v. Arizona*, 536 U.S. 584, 604-09 (2002).

[T]he jury must find beyond a reasonable doubt the existence of at least one other statutory aggravating factor. 21 U.S.C. § 848(k). Finally, a jury, considering both aggravating and mitigating factors, must determine that the death penalty is appropriate. *Id.* Thus, § 848 clearly narrows the class of persons eligible for the death penalty.¹⁸⁷

On the one hand, it seems unnecessary to criticize the Tenth Circuit for upholding a statute against a narrowing challenge when the statute, at least on its face, complies with the mandates of *Furman* and *Gregg* by requiring the finding of one or more aggravating factors. The problem with this holding, however, is that it provides the misleading impression that narrowing is accomplished by the act of weighing aggravators and mitigators. By explaining the requirement of weighing and then concluding that “thus [the statute] narrows,” one cannot help but conclude that Eighth Amendment narrowing occurs in whole or in part at the weighing stage of capital sentencing.

For all the reasons discussed above, however, such a process simply cannot satisfy the requirement of narrowing borne of the *Furman* line of cases.¹⁸⁸ To be sure, the Tenth Circuit and Colorado are not alone in their mistaken suggestion that a sentencer’s assessment of mitigating evidence constitutes *Furman* narrowing; a number of other federal courts have loosely applied the term narrowing so as to deprive it of distinct constitutional meaning¹⁸⁹ and in so doing have unwittingly

¹⁸⁷ *United States v. Barrett* 496 F.3d 1079, 1110 (10th Cir. 2007).

¹⁸⁸ *See supra* Part I.

¹⁸⁹ *See, e.g., Davis v. Mitchell*, 318 F.3d 682, 688-89 (6th Cir. 2003) (defining the “weighing of aggravating and mitigating circumstances in death penalty cases” as a “method of narrowing the class of persons eligible for the death penalty”); *Young v. Stephens*, No. MO-07-CA-002-RAJ, 2014 WL 509376, at *49 (W.D. Tex. Feb. 10, 2014) (conflating narrowing and the “eligibility decision”); *United States v. Sablan*, No. 1:08-CR-00259-PMP, 2014 WL 172533, at *2 (E.D. Cal. Jan. 15, 2014) (stating the Federal Death Penalty Act “performs the requisite narrowing function [by] requir[ing] a jury to consider the individual circumstances of a case through the weighing of aggravating a[nd] mitigating factors”); *Corcoran v. Buss*, No. 3:05-CV-389 JD, 2013 WL 140378, at *5, *11 (N.D. Ind. Jan. 10, 2013) (citing *Zant v. Stephens* for the rule that narrowing systems, which consider non-statutory aggravators during the selection phase are constitutional); *id.* at *13 (describing the “narrowing process” in broad terms to include more than legislatively defined criteria for limiting the pool of persons who may receive a death sentence); *Blanco v. McNeil*, No. 07-61249-CIV, 2010 WL 9098788, at *9 (S.D. Fla. Dec. 7, 2010) (“[T]he weighing of aggravating and mitigating factors under the Pennsylvania sentencing scheme provided the requisite narrowing function and ensured that the statute did not create a category of offenders who would automatically be sentenced to death.”); *Davie v. Mitchell*, 291 F. Supp. 2d 573, 624 (N.D. Ohio 2003), *aff’d*, 547 F.3d 297 (6th Cir. 2008) (defining weighing as a “method of narrowing”);

made the empirical study of narrowing, which by definition is objectively measurable, impossible.

To date, the U.S. Supreme Court has avoided explicitly lumping the consideration of mitigating evidence into its definition of narrowing. At times the Court has made clear that Eighth Amendment required narrowing is distinct from other Eighth Amendment requirements, including the sort of individualization also required by the Eighth Amendment. For example, in emphasizing the requirement that an aggravator not be vague, the Court has explained that, “Whether an aggravator is used for narrowing, or for weighing, or for both, it cannot be impermissibly vague.”¹⁹⁰ This sort of affirmation that narrowing is a requirement independent from other preconditions to a death sentence, including weighing, calls into serious doubt any effort to dispute the role of narrowing as an independent constitutional rule.

But at other times, the Court’s decisions dealing with the most important terminology on questions of life or death have not been the beacon of clarity one might expect. For example, the Court has at times suggested that the terms eligibility and narrowing are functionally identical. In *Brown v. Sanders*, for example, the Court held that aggravating factors are “sufficient to satisfy *Furman’s* narrowing requirement *and* alone rendered Sanders death eligible.”¹⁹¹ Such reasoning implies that narrowing and eligibility are synonymous — the very facts that do the narrowing work also suffice to make one death eligible. Even more explicitly, in *Tuilaepa*, the Court explained: “To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.”¹⁹² Thus suggesting that the very act of narrowing — legislatively defined facts that must be found by a jury — can be called eligibility, the Court’s own vocabulary has seemingly made the two concepts inseparable. Of course, this conflation standing alone works no

Hollaway v. State, 6 P.3d 987, 997 (Nev. 2000) (defining the “narrowing process” as including both “the enumeration and weighing of specific aggravators”).

¹⁹⁰ *Tuilaepa v. California*, 512 U.S. 967, 985 n.1 (1994) (Blackmun, J., dissenting).

¹⁹¹ *Brown v. Sanders*, 546 U.S. 212, 213 (2006) (emphasis added). Not surprisingly, this conflation has spread to the lower courts. See, e.g., *Young*, 2014 WL 509376, at *55 (“Texas capital sentencing scheme performs the constitutionally-mandated narrowing function, i.e., the process of making the ‘eligibility decision,’ at the guilt-innocence phase of a capital trial . . .”).

¹⁹² *Tuilaepa*, 512 U.S. at 971-72; see also *Sanders*, 546 U.S. at 216 n.2 (“Our cases have frequently employed the terms ‘aggravating circumstance’ or ‘aggravating factor’ to refer to those statutory factors which determine death eligibility in satisfaction of *Furman’s* narrowing requirement.” (emphasis added)).

harm to the *Furman* principle so long as both narrowing and eligibility are defined exclusively by reference to the legislatively defined factual criteria required for the imposition of a death sentence.¹⁹³

The problem arises, however, when eligibility is at once conflated with narrowing and defined loosely to include all (or most) preconditions to a death sentence, thereby suggesting that narrowing too is susceptible to a generic application. Illustrative is a case from earlier this Term in which the Supreme Court considered a petition for certiorari challenging the Alabama capital sentencing process in which a judge is permitted to override a jury sentence of life and impose the death penalty.¹⁹⁴ Although certiorari was denied, Justices Sotomayor and Breyer issued an opinion dissenting from the denial of certiorari, indicating that there is significant disagreement on the Court with the practice of judicial overrides.¹⁹⁵ Their dissent notes that only three states allow a judge to overrule a life sentence and that in practice, only a single state, Alabama, actually uses this power.¹⁹⁶ Based on this assessment of judicial override's rarity, the two Justices concluded that the practice violates evolving standards of decency under the Eighth Amendment.¹⁹⁷ Not unlike the recent district court decision in *Jones v. Chappell* striking down California's death penalty, the rarity and seeming arbitrariness of the procedure struck these two Justices as offensive to the Eighth Amendment.¹⁹⁸

In addition, Justice Sotomayor, writing for herself, explained that the judicial override of a jury sentence of life is "constitutionally suspect"

¹⁹³ Indeed, defining eligibility and narrowing as serving the identical interests of limiting the death penalty by determinate factual requirements imposed by the legislature makes Eighth Amendment eligibility (and narrowing) synonymous with Sixth Amendment eligibility. See *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) ("*Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements.>").

¹⁹⁴ *Woodward v. Alabama*, 134 S. Ct. 405, 405 (2013) (denying certiorari).

¹⁹⁵ See *id.* at 405-12 (Sotomayor, J., dissenting).

¹⁹⁶ *Id.* at 408 ("Alabama now stands as the only one in which judges continue to override jury verdicts of life without parole.>").

¹⁹⁷ See *id.* at 406-10.

¹⁹⁸ As to this point, we think Justices Sotomayor and Breyer are entirely correct. See, e.g., Kamin & Marceau, *supra* note 113, at 534 (2011) (agreeing that random, unpredictable, and unprincipled death sentences result from statutes that provide no guidance to the jury regarding how to determine a defendant's sentence).

under the *Apprendi*¹⁹⁹ and *Ring*²⁰⁰ line of Sixth Amendment cases.²⁰¹ In support of her conclusion that the Alabama system violates the Sixth Amendment, Justice Sotomayor writes: “[A] defendant is *eligible* for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented.”²⁰²

The use of the term eligibility to describe the weighing of aggravating and mitigating evidence lends confusion to the litigation that focuses a renewed emphasis on *Furman*'s requirement of narrowing. The syllogism for a state court looking to evade the requirement of narrowing as defined in Part I of this Article could not be more clear: Narrowing and eligibility are synonymous for Eighth Amendment purposes; eligibility includes the individualizing of the sentence and the weighing of mitigation and aggravation; therefore narrowing includes, among other things, penalty phase weighing. Stated differently, conflating narrowing and eligibility and using either term loosely to describe preconditions on the imposition of a death sentence affects a sub silentio overruling of any requirement under *Furman* to narrow the class of persons who may receive a death sentence through determinate, factual, legislative definitions.

In sum, there is a growing number of judicial opinions that say directly, or imply by reference to other decisions, that *Furman*'s command of narrowing either no longer applies, or more commonly, that narrowing includes a wide range of sentencing proceedings and considerations, including perhaps the weighing of aggravating and mitigating evidence. If narrowing is distorted so as to include within its constitutionally required sphere the assessment of mitigating evidence, then *Furman* itself imposes no independent restraints on capital sentencing systems and per force empirical narrowing studies measuring whether a state system complies with *Furman* will not be possible.²⁰³ *Furman*, in this view, is dead letter.

¹⁹⁹ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

²⁰⁰ See *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

²⁰¹ *Woodward*, 134 S. Ct. at 411 (Sotomayor, J., dissenting) (“Under our *Apprendi* jurisprudence . . . a sentencing scheme that permits such a result is constitutionally suspect.”).

²⁰² *Id.* at 410 (Sotomayor, J., dissenting) (emphasis added).

²⁰³ As to the requirement of individualization, there is no way to quantitatively test whether too much or too little mitigating evidence is being admitted. Professor Emily Hughes has conducted an impressive qualitative study of mitigation, finding that the current system invites far more arbitrariness than it solves. See Hughes, *supra* note 103, at 627-30. However, because the presentation of mitigation evidence is often a matter of defense strategy, a matter for which the burden falls on the defendant, and a question of moral judgment for the sentencer, there is no way to quantitatively measure whether

III. BARRIERS TO A NEW ERA OF *FURMAN* LITIGATION

As execution methods are increasingly called into question,²⁰⁴ as executions per year drop to levels unimaginable since the time immediately after *Gregg*²⁰⁵ — as fewer and fewer states retain the death penalty²⁰⁶ — and as the ultimate punishment's popularity sags to its lowest levels in decades,²⁰⁷ *Furman* challenges are sure to rise. The modern unpopularity of the death penalty is leading to challenges on the ground that the imposition of the penalty is so rare that it cannot serve any valid penological goal, the very challenge at issue in *Furman* itself. It is not inconceivable that a new era of *Furman* challenges could

a state's statute provides for adequate individualization opportunities. All that can be done is a purely legal assessment of whether the state impermissibly limits the presentation of mitigation evidence. *See id.* at 610 (stating that her goal was to obtain "a better understanding of the experiences of capital mitigation specialists, rather than to identify a statistically representative randomized sample"); *id.* at 627 ("The cases and interviews documented in this Article illustrate that even though mitigation investigation and advocacy are required by legislation nationwide, judges, attorneys, and mitigation specialists often implement that legislation in arbitrary ways."); *see also* *United States v. Sampson*, 486 F.3d 13, 45 (1st Cir. 2007) (rejecting as impractical the concept of presenting to a jury the aggravating and mitigating factors present in other FDPA cases in order to assess the appropriateness of the death penalty in Sampson's case); Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1041-53 (2001) ("[M]itigating factors play a disturbingly minor role in jurors' deliberations . . ."); John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1065 (2008); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561-67 (1998); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835-36 (2008).

²⁰⁴ For a brief summary of some of the litigation regarding lethal injection, see Justin Marceau & Alan K. Chen, *Federal Courts, Equitable Discretion, and the Continuing Problems with Lethal Injection*, AM. CONSTITUTION SOC'Y FOR LAW & POLICY (July 25, 2014), <http://www.acslaw.org/acsblog/federal-courts-equitable-discretion-and-the-continuing-problems-with-lethal-injection>.

²⁰⁵ *See New Resources: BJS Releases "Capital Punishment, 2012,"* DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5777> (last visited Oct. 25, 2014) ("The Bureau of Justice Statistics recently issued a new report, 'Capital Punishment, 2012,' analyzing the use of the death penalty in that year and revealing overall trends since the death penalty was reinstated. The report noted that 2012 was 'the twelfth consecutive year in which the number of inmates under sentence of death decreased.'"); *see also* SNELL, *supra* note 37, at 1.

²⁰⁶ *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 25, 2014).

²⁰⁷ *See Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last visited Oct. 25, 2014).

signal the end of America's prolonged tinkering with the "machinery of death."²⁰⁸ It was *Furman* that began the Court's oversight of the death penalty, and perhaps a new era of *Furman* challenges will end it.

The path to *Furman* relief, however, is not unobstructed. This Part considers the most salient barriers to obtaining Eighth Amendment relief based on quantitative narrowing studies. By considering the still-nascent lower court litigation over such challenges, a few revealing patterns emerge and it is easy to predict the sort of arguments that will be leveled against this new era of *Furman* challenges when they ultimately reach the Supreme Court.

A. *Defining "Narrowing" Generically to Include Many Pre-Conditions on the Imposition of a Death Sentence*

The most salient barrier to a *Furman* renaissance based on empirical data is the general conflation of narrowing with a wide variety of procedures designed to limit the death penalty's reach. In *Furman*'s dormancy, other cases and procedures, many arising under the Eighth Amendment, have become more familiar to judges than *Furman* and there is a risk that *Furman* will be lost in the shadow of these other rules. For example, the consideration of mitigating evidence, as required by the Eighth Amendment cases growing out of *Woodson*, has become a mainstay of death penalty litigation. And no jurisdiction allows the imposition of a death sentence without the consideration of mitigation evidence. But a review of mitigation, which is necessarily indeterminate, open-ended, and grounded in questions of subjective assessments, is not functionally equivalent to the narrowing requirement of *Furman*, which insists on rigid, propositional, legislatively-defined criteria.

Nonetheless, if *Furman*'s command is defined loosely to include the range of procedures that might make one ultimately eligible for execution, then narrowing is just as much implicated by the weighing of aggravating and mitigating factors as it is by the antecedent requirement that the jury find at least one aggravating factor. Based on this reasoning, the special factors required in Texas²⁰⁹ are part of narrowing, as is the consideration of sentencing factors in Louisiana²¹⁰ after a defendant is convicted of a restricted form of first-degree murder. Likewise, narrowing would include the weighing of aggravating and mitigating factors in Colorado (stage three) that precedes the pure

²⁰⁸ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (dissenting from denial of certiorari in a death penalty case).

²⁰⁹ See *Jurek v. Texas*, 428 U.S. 262, 269 (1976).

²¹⁰ See *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988).

selection phase (stage four).²¹¹ As one judge has memorably summarized this line of thinking, studying death penalty narrowing by focusing on first-degree murder and aggravating factors without also considering the weighing of mitigating factors is “nothing more than a red herring.”²¹²

The very breadth of these conceptions of narrowing would strip the doctrine of all practical meaning. *Furman*, under this view, will never awaken because it was killed in its sleep: the essential requirements of *Furman* would have been abandoned while the case lay dormant from non-use. Courts should see through this semantic bait-and-switch that would cast *Furman* out as a historic relic rather than a functioning Eighth Amendment rule. Courts must continue to consider empirical evidence that a facially valid statute is not in fact genuinely and measurably narrowing the class of death eligible defendants.

B. *Disregarding Low Death-Sentencing Rates as a Constitutional Problem*

Although conflating narrowing with other more generic death penalty terms is the most important limit on the viability of new *Furman* challenges, it is not the only such limit, as illustrated by a small handful of cases raising new *Furman* challenges to the Federal Death Penalty Act (“FDPA”).²¹³ For example, in *United States v. Sampson*, the defendant argued, based on anecdotal evidence, that “because the federal death penalty is rarely sought or imposed, the FDPA is no different from the Georgia statute invalidated in *Furman*.”²¹⁴ Rather than requiring that the defendant mount concrete statistical evidence, the U.S. Court of Appeals for the First Circuit simply noted that, on its face, the federal death penalty scheme closely resembles the Georgia statute that was upheld in *Gregg*.²¹⁵ In addition, the court explained that, in its view, the infrequency of the death penalty was not a point of constitutional

²¹¹ See *People v. Dunlap*, 975 P.2d 723, 735-36 (Colo. 1999).

²¹² See *People v. Holmes*, No. 12-CR-1522, slip op. at 6-7 (Colo. May 2, 2014) (order denying motion to declare death penalty statute unconstitutional).

²¹³ See, e.g., *United States v. Sampson*, 486 F.3d 13, 25-27 (1st Cir. 2007) (hearing a challenge to the FDPA on the basis of race, geography, and innocence).

²¹⁴ *Sampson*, 486 F.3d at 23; see also *United States v. Sablan*, No. 1:08-CR-00259-PMP, 2014 WL 172533, at *2 (E.D. Cal. Jan. 15, 2014) (“However, that the death penalty is infrequently sought or imposed does not, by itself, render the FDPA unconstitutional. Constitutional questions arise only when the risk of arbitrariness becomes ‘sufficiently substantial.’” (citations omitted)).

²¹⁵ See *Sampson*, 486 F.3d at 24 (explaining that the federal statute looks “[l]ike the statute upheld in *Gregg*”).

concern.²¹⁶ As another court has put the matter, “the mere fact that the federal death penalty is often not sought and is more rarely imposed does not render it unconstitutional.”²¹⁷

Other courts reviewing data about the federal death penalty have also selectively quoted from post-*Furman* case law to suggest that the problem of low death-sentencing rates is not itself of constitutional concern, so long as, quoting *Gregg*, there is a “carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”²¹⁸ In essence, so long as the statute has a facial similarity to the approved Georgia system, including the use of aggravating factors, the *Furman* inquiry is deemed to be complete. No doubt other courts, even in the face of more robust *Furman* data, will be tempted by the logic of these decisions.

But such reasoning finds no home in the current Supreme Court doctrine.²¹⁹ First, it would be a serious misreading of *Gregg* to suggest that the Court held there that so long as a state enacts a statute with aggravating factors similar to the model approved in Georgia, the system is inoculated from *Furman* scrutiny. On the contrary, *Gregg* approved the Georgia statute on its face, *because* it assumed that the existence of statutorily enumerated aggravators would result in higher death-sentence rates; it was anticipated that death sentences would obtain in a “substantial portion of the cases” for which an aggravating factor was present.²²⁰ Empirical evidence undermining the assumption upon which *Gregg* rested remains constitutionally relevant.

The existence of empirical data means that a court can look beyond the mere words comprising the statute and assess the true concern of the *Furman* Court: whether, on the ground, aggravating factors actually serve a narrowing function. To assume that the constitutional problem of infrequency identified in *Furman* is cured by the existence of a *Gregg*-like statute, even when the data contradicts this conclusion, is to assume that because a patient has taken her medicine, she is now cured of the disease

²¹⁶ *See id.*

²¹⁷ *United States v. Williams*, No. S100CR.1008(NRB), 2004 WL 2980027, at *6 (S.D.N.Y. Dec. 22, 2004).

²¹⁸ *United States v. Barnes*, 532 F. Supp. 2d 625, 631 (S.D.N.Y. 2008) (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 (1976)); *see id.* at 632 (noting a defense study asserting a death-sentence rate of 2.2% among federal defendants); *Williams*, 2004 WL 2980027, at *5.

²¹⁹ At least one lower court, though rejecting the claim in the case at hand, explained that it was not “discounting the possibility that . . . infrequency of application in a death penalty scheme could form the basis of a finding of unconstitutionality” *Williams*, 2004 WL 2980027, at *6.

²²⁰ *Gregg*, 428 U.S. at 222.

that afflicted her. It is to disregard the difference between a challenge to the form of a capital sentencing statute and a challenge to the functioning of a capital sentencing statute. The only other explanation for such reasoning is a belief that infrequency in the application of the death penalty is no longer a constitutional infirmity at all.

Some courts have said just that, implying that *Furman* has been overruled: “In the thirty-four years since *Furman* was decided, the Court has made clear that its decision was not based on the frequency with which the death penalty was sought or imposed.”²²¹ But such statements are flatly incorrect. *Furman* was concerned with infrequency arbitrariness — lightning strike concerns — at least as much as it was concerned with just deserts arbitrariness.²²² The Court’s subsequent opinions, far from making clear that infrequency is not a concern, emphasize just the opposite conclusion.²²³ As Justice Scalia has noted, the holding of *Furman* “focused on the infrequency and seeming randomness with which . . . the death penalty was imposed” and no subsequent holding has purported to question or minimize the importance of this rule.²²⁴

²²¹ *Sampson*, 486 F.3d at 23. Courts seem inclined to conclude either that *Furman* did not have any holding with regard to infrequency, or that *Gregg* eroded entirely any such concerns. Compare *id.*, with *Barnes*, 532 F. Supp. 2d at 632 (suggesting that to hold otherwise would require overruling *Gregg*).

²²² There are at least two distinct types of Eighth Amendment arbitrariness in this context. A system can be arbitrary insofar as it fails to apply the penalty to the truly worst offenders — a sort of just deserts theory. But a system could also be arbitrary if its imposition is so infrequent as to undermine the penological goals of deterrence or retribution and resemble, instead, a random lightning strike.

²²³ See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (stating that the Court’s cases since *Furman* “have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action”); *Sumner v. Shuman*, 483 U.S. 66, 70 (1987) (referencing Nevada Legislature’s decision, post-*Furman*, to replace “its unguided-discretion statute with one that created a category of ‘capital murder’”); *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972)); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (“[T]hat where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” (quoting *Gregg*, 428 U.S. at 189) (internal quotation marks omitted)); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (stating that a capital sentencing scheme must provide a “meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not” (quoting *Gregg*, 428 U.S. at 188) (internal quotation marks omitted)).

²²⁴ See *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring); see also *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (“[T]he infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying our

To reject infrequency as a concern of constitutional magnitude is to ignore *Furman* and treat it as having been sub silentio overruled. While it is true that the “primary emphasis of the Court’s death penalty jurisprudence” has shifted towards decisions about proportionality and individualization, the independent requirement of narrowing remains. Likewise, it is misleading in the extreme to cite *Gregg* for the proposition that so long as the capital statute contains carefully drafted aggravators upon which the sentencer must rely, there can be no Eighth Amendment infrequency problems. Under such a system, a state could enact a capital sentencing system with 50, 500, or even 5,000 aggravating factors such that every first-degree murder would qualify for a death sentence. Surely it requires overruling or sidestepping *Furman* to suggest that the pre-*Furman* status quo — of 100% death eligibility, limited only by the benign and statutorily unchecked discretion of the prosecutors and juries — is now constitutional.

Simply put, low death-sentence rates were a defining feature of the constitutional defects identified with Georgia’s capital system in 1972 and nothing in the forty-plus years since then has suggested an erosion of this principle. The assumption that the statutes reviewed in 1976, including the Georgia statute in *Gregg*, would remedy this problem by reducing the number of persons who could receive a death sentence (and thereby increase the death-sentencing rate) was just that, an assumption. Confronted with empirical data tending to show that the aggravating factors in a state’s capital system do not in *fact* narrow, courts will be forced to either ignore *Furman* or recognize that the assumption that the use of aggravating factors always narrows is one of the law’s greatest and longest-running fictions. If the Eighth Amendment is still concerned with the infrequency of the death penalty among those who are eligible — if *Furman* is still good law — then empirical data showing low death-sentencing rates among those who are statutorily eligible for the penalty is of considerable constitutional import.

C. *Misplaced Standing Concerns*

Confronted with data-based narrowing challenges to state capital sentencing systems, some will no doubt query whether any particular prisoner has standing to challenge the system as a whole. If a defendant is charged with capital murder and the jury finds two aggravating factors to be true — for example, that the defendant put others at risk of death and that the defendant had committed a prior violent felony —

judgment in *Furman v. Georgia* that the death penalty, as then administered in unguided fashion, was unconstitutional.” (citation omitted)).

the state will undoubtedly argue that the defendant can challenge only the two individual aggravators alleged in his case. That is, if the risk of death aggravator and the prior felony aggravator are not themselves unconstitutional, then the defendant cannot complain that his sentence is unconstitutional. Emphasizing its skepticism to a somewhat related challenge, the First Circuit explained:

Sampson's remaining challenges to the constitutionality of the FDPA are those related to race, geography, and innocence. Sampson (who is white) raises no argument that he was sentenced to death because of his race, the race of his victims, or the geographic location in which he was sentenced. Nor does he claim to be actually innocent. What, then, is his claim? In essence, Sampson attempts to assert the rights of other capital defendants.²²⁵

To the extent that such reasoning has any proper application, it certainly cannot be extended to *Furman* challenges. Racial bias and innocence are claims that the Court has explicitly distinguished from *Furman* challenges and for which it has required a showing of actual discrimination (or innocence) in the case at hand.²²⁶ *Furman* is not such a rule. The Court *did not* conclude that the *Furman* defendants were not among the worst-of-the-worst killers as a basis for invalidating their death sentences. Quite the contrary. The Court held that the Georgia system was unconstitutional because the system as a whole failed to narrow the class of otherwise eligible defendants such that the death-sentencing rate was “only 15–20%.”²²⁷ When a system fails to narrow at the stage of legislative definition it is, *per se*, unconstitutional — it fails to narrow in every case.

The conclusion that a statute that fails to narrow in a systemic way can be challenged by *every* defendant facing the death penalty is also consistent with the core of Article III's standing limitations.²²⁸ If every

²²⁵ *Sampson*, 486 F.3d at 25.

²²⁶ See *Herrera v. Collins*, 506 U.S. 390, 404 (1993); *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987).

²²⁷ See *Shatz & Rivkind*, *supra* note 4, at 1338-43 (citing *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting)).

²²⁸ Notably, even in rejecting the merits of a claim that racial disparity statistics can give rise to a *Furman* violation, the *McCleskey* Court did not doubt that the defendant had standing to challenge the state's capital system based on such statistics. *McCleskey*, 481 U.S. at 291 n.8 (noting that the “[s]tate argues that he has no standing to contend that he was discriminated against on the basis of his victim's race” but rejecting this argument by explaining that the defendant “does not seek to assert some right of his victim, or the rights of black murder victims in general. Rather, *McCleskey* argues that

defendant who commits a murder is facing a possible death penalty — subject only to the discretion by the prosecutor and the jury — then every defendant has standing to bring a *Furman* challenge to the statute.²²⁹ This conclusion is confirmed by the reasoning in *Maynard v. Cartwright*, where the Court addressed a challenge to a state’s cruel and heinous aggravating factor.²³⁰ In *Maynard*, the Court seemed to assume that the defendant, who shot one of his two victims before slitting her throat and stabbing her repeatedly, killed in a way that would be cruel and heinous under a valid construction of the statute. But the Court went on to hold that such a finding did not deprive the prisoner of standing insofar as the atrocious facts of his case could not “cure the constitutional infirmity of the aggravating circumstance.”²³¹ *Furman* challenges are constitutional claims²³² alleging the failure of a state system to impose legislative narrowing, and any defendant facing a death sentence has standing to challenge such a system as having failed, in his case and all cases, to genuinely narrow as required by *Furman*.

application of the State’s statute has created a classification that is an ‘irrational exercise of governmental power,’” and such a systemic challenge sufficed for standing purposes).

²²⁹ Similar reasoning has been applied across all variety of legal contexts. For example, in striking down the gun free school zone act under the commerce clause in *United States v. Lopez*, the Court did not pause to consider whether, in fact, Lopez’s prosecution might have been constitutional because his gun in particular was bought or sold in interstate commerce. Instead, the Court held that the statute could not be constitutionally applied because, as written, it was overbroad and violated the commerce clause limits on congressional action. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995) (applying similar reasoning to gun laws).

²³⁰ *See* *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988).

²³¹ *See id.*

²³² Some might wonder whether narrowing challenges can only be made through a facial as opposed to an as applied challenge. But there is growing debate about whether the distinction between facial and as applied challenges is a meaningful one or even one that is left to the discretion of the litigants. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *STAN. L. REV.* 235, 294 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 *HARV. L. REV.* 1321, 1341 (2000); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 *WM. & MARY BILL RTS. J.* 657, 659 (2010). For our part, we think the key point is that any defendant facing a death sentence under a statute that fails to perform the constitutionally required task of narrowing has a cognizable constitutional injury, regardless of which particular aggravating factors are alleged in his case. The challenge, of course, is whether over the universe of all cases the capital sentencing system meaningfully narrows, and if it does not it cannot be constitutionally applied in any case.

IV. TAKING STOCK OF CURRENT DEATH PENALTY JURISPRUDENCE:
CREATING DEATH PENALTY SWISS CHEESE

As discussed above, the most salient critique of new *Furman* challenges grounded in empirical data is that these challenges fail to appreciate all of the various aspects of a state's penalty phase that "narrow" the death penalty. Throughout this Article, we have attempted to make clear that narrowing as a constitutional command has content only if it describes legislatively required, discrete questions of historical fact.²³³ Narrowing is but one way to limit the class of persons who are ultimately eligible for a sentence to death, but it is a constitutionally distinct and required aspect of the final eligibility determination. To make this point concrete, in this Part we provide and describe a series of figures that illustrate the distinction between the general universe of "eligibility" and the smaller subset of legislative "narrowing." One metaphor more than any other is famous among death penalty lawyers and students of the death penalty — the pyramid from *Zant v. Stephens*.²³⁴ The Supreme Court upheld the Georgia system against a renewed constitutional attack by specifically referencing the pyramid as an illustration of the points at which discretion must be cabined or limited, with the apex of the pyramid setting forth a space where open-ended discretion is constitutionally permissible.²³⁵ As a metaphor, then, the pyramid has proven itself useful in illustrating the variety of preconditions that must be satisfied before a death sentence may be imposed, but it is not particularly helpful as a tool for distinguishing narrowing from eligibility.²³⁶ In this Part, we introduce a new metaphor — the block of Swiss cheese²³⁷ — to discuss how death eligibility and narrowing relate to each other.

In an effort to provide clarity for courts and commentators, what follows is a four-part set of figures and explanatory text. In each Figure,

²³³ See *supra* Part I.

²³⁴ In *Zant*, the Georgia Supreme Court introduced the concept of a pyramid pierced by planes, with each successive cut limiting the death-eligible pool until a small group of death eligible defendants arrived at the selection stage. See *Zant v. Stephens*, 462 U.S. 862, 870-71 (1983). Once at the selection stage, at the top of the pyramid, each juror was left to decide for herself on the appropriate punishment for a defendant. See *id.* at 871.

²³⁵ See *id.* at 879 ("The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore remain convinced, as we were in 1976, that the structure of the statute is constitutional.")

²³⁶ See *id.*

²³⁷ It is important for one of the authors to note that even this metaphorical cheese is vegan such that no animals were harmed in its creation.

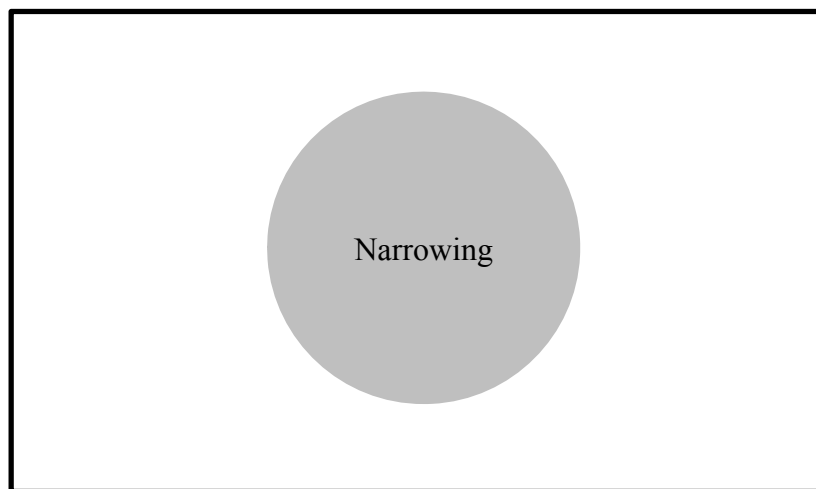
the block of cheese represents the universe of statutorily death eligible defendants. Every hole punched in the cheese is, therefore, a limitation on eligibility for the death penalty. The more the block looks like Swiss cheese — riddled with holes — the smaller the number of persons eligible for a death sentence. This metaphor, then, visually illustrates the distinction between narrowing and eligibility by showing that narrowing is but one of many holes in a blocks of cheese. Properly understood, the Swiss cheese metaphor provides a clear path forward for understanding narrowing and the reach of *Furman* litigation. *Furman* presents an empirical question — does a sentencing system meaningfully narrow — and only by methodically defining narrowing can an empirical answer to that question be provided.

Figure 1. Pre-*Furman*



Figure 1 simplistically depicts the sentencing regime the Court was confronted with prior to *Furman*. The large rectangle represents the set of death-eligible murderers and was coextensive with the set of first-degree murderers; some of these killers were selected by juries for condemnation but most were not. In *McGautha*, the Court approved this arrangement, finding that laws could not adequately explain to the jury how to choose killers from the pool; rather each juror was to use her best judgment regarding the moral worth of the defendant.²³⁸

²³⁸ See *McGautha v. California*, 402 U.S. 183, 207-208 (1971) (“In light of history, experience, and the present limitations of human knowledge, we find it quite impossible

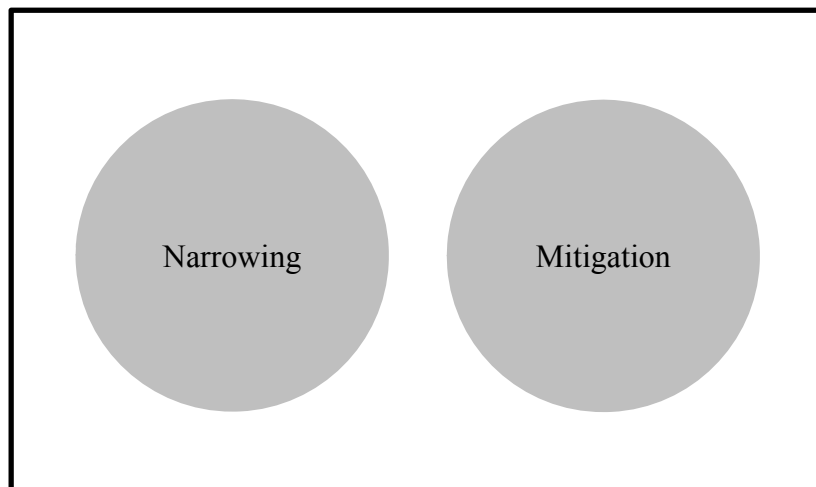
Figure 2. Post-*Furman* Narrowing

The very next year, the *Furman* Court overturned *McGautha*, holding that a state death penalty statute must make meaningful distinctions between who lives and who dies. Figure 2 depicts the state of the law after *Furman*. Again, the entirety of the rectangle represents the class of persons who are eligible for a death sentence, and any white space that remains outside of the hole represents the class of persons who are still eligible for death post-*Furman*. Accordingly, in any state complying with the Eighth Amendment command of narrowing, a number of defendants (those in the cheese but not in the hole) are still eligible for the death penalty, and the jury in any particular case may exercise its discretion whether to impose a death sentence or not. The size of the hole relative to the block of cheese will give the Court a sense of how much narrowing is in fact occurring. If the hole is vanishingly small, then the Court would have to conclude that the statute, in practice, operates no better than the one rejected in *Furman* and would be forced to invalidate any death sentence imposed under that statute. This is the

to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.” (footnote omitted)).

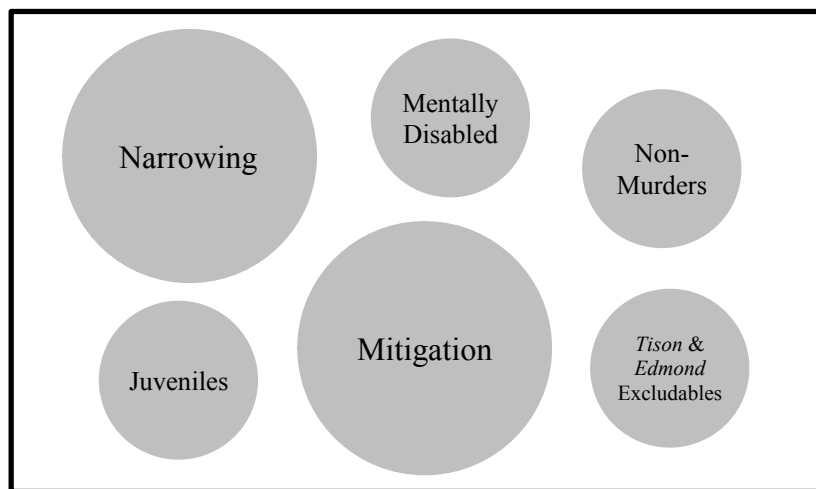
nature of the next round of *Furman* challenges: they are empirical, data-based claims that, notwithstanding the structure of a state's capital statute, the statute is not narrowing in practice.

Figure 3. Post-*Furman* Narrowing with Mitigation



Four years after *Furman*, the Court required that in every case, the jury must consider the mitigating evidence proffered by the defendant. There were now two holes in the block of cheese — those excluded through statutory narrowing and those excluded after consideration of mitigation. As we discussed above, the mitigation exclusion strikes very different defendants from the pool than does the narrowing requirement. Those excluded after consideration of mitigating evidence are those who have already cleared the narrowing hurdle; that is these are defendants who have been narrowed through the definition of murder or aggravating factors. Thus, not only does this exclusion serve a different purpose than narrowing, but there is essentially no overlap between those not sentenced to death because they fail to satisfy the narrowing criteria and those not sentenced to death because a trier of fact has decided that aggravating evidence fails to outweigh mitigating evidence. Nonetheless, if it is again assumed that the entire area within the rectangle represents the number of persons eligible for death, then this diagram shows that both narrowing as well as the act of weighing mitigation can punch sizeable holes in the block, thus reducing the number of persons eligible for the death penalty. Figure 3 depicts this situation graphically.

Figure 4. Today



Over time, capital litigation has focused on new and different challenges, often dealing with substantive Eighth Amendment claims rather than procedural ones. Many of these challenges were successful and the Court has made large numbers of defendants death ineligible. The intellectually disabled,²³⁹ those who committed their crimes when under the age of eighteen,²⁴⁰ and those not convicted of murder²⁴¹ were all made ineligible for death by the Supreme Court. Similarly, the Court has concluded that those convicted of murder who did not have a sufficiently culpable mental state and more than minor participation in the crime could also not be sentenced to death.²⁴²

Figure 4 demonstrates the status quo. Our block of cheese now truly resembles Swiss cheese. The pool from which a jury is permitted to select has now been shrunk significantly, as a result of both the Eighth Amendment's substantive requirements and its procedural ones. But it should be noted, once again, that these substantive exclusions are not doing the same work as the narrowing mandated by *Furman* and its progeny. The narrowing that *Furman* envisions is narrowing among *eligible* killers; states are obligated to create rules to separate those killers eligible for selection from all those against whom the penalty may

²³⁹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²⁴⁰ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

²⁴¹ *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

²⁴² *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

constitutionally be imposed. It may be that the Supreme Court decides in the future that the categorical exclusions it has created suffice to do the narrowing work. That is, the Court may decide that so long as a state statute excludes those already excluded by the Eighth Amendment on substantive grounds, a death penalty statute that merely requires consideration of mitigation will suffice. Notably, such an approach is something of the opposite medicine prescribed by *Furman* — rather than devising tools to identify the most culpable, such a system strikes from eligibility the least culpable. Moreover, *Furman* remains good law and until it is overturned states are obligated to make narrowing distinctions that go beyond those restrictions imposed by the substantive Eighth Amendment decisions.

As these diagrams show, narrowing involves findings of fact that trigger the availability of a death sentence as a matter of law, though other preconditions still exist before one is functionally eligible for the ultimate penalty. Narrowing as a constitutional command, therefore, must be analyzed as distinct from and serving related but distinct goals from the other limits or preconditions on death sentencing eligibility. Contrary to the conclusions of courts skeptical of *Furman's* independent value, the process of weighing mitigation and aggravation is simply not enough — in itself — to satisfy the procedural concerns of the Eighth Amendment. Such weighing constitutes its own freestanding hole in the cheese block, but it is not redundant with and does not supersede the requirement of narrowing. In fact, the mitigation-related procedures are patently inconsistent with the central pillars of narrowing — that the criteria be objective, factual, and legislatively defined. States are free to use the term narrowing in a colloquial sense to describe the weighing of aggravating and mitigating evidence, but such moral determinations do not do the constitutionally required work of narrowing. In this regard, Justice Scalia's thoughts regarding narrowing and individualizing are pertinent: “[The two concepts] *cannot be reconciled*.”²⁴³ To say that narrowing and individualization occur during the process of considering mitigation evidence, then, is to not only deny the incompatibility of the two processes, but to treat them as identical. The figures in this Part are designed to illustrate the separate, constitutionally distinct, territory that narrowing and other eligibility questions occupy. Accepting this view of

²⁴³ *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (emphasis added).

the various islands of Eighth Amendment protections in the death penalty realm, each related but distinct, will ensure that the reemergence of *Furman* as a central constitutional concern for most death penalty systems is not artificially foreclosed.

CONCLUSION

In describing the requirement of narrowing that emerged in *Furman*, the Supreme Court has repeatedly stressed that “[t]o pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty’”²⁴⁴ However, over the last twenty-five years of constitutional litigation over the death penalty, *Furman* has been relegated to the status of a historic relic. In theory, a properly constructed capital sentencing scheme must, in the words of the Supreme Court, “satisfy *Furman*’s narrowing requirement.”²⁴⁵ But increasingly, courts are conflating the narrowing requirement with procedures that are open-ended, moral determinations designed to individualize the sentence. Narrowing is at risk of losing all independent meaning and being treated as simply synonymous with any precondition required for the imposition of a death sentence. For the reasons described in Part I and illustrated in Part IV, such a view of narrowing is entirely untethered from the underlying concerns that were purportedly resolved in the *Furman* line of cases.

In this Article we have recommended that the relationship between narrowing and eligibility be analogized to a block of Swiss cheese and the respective holes in that cheese. Under this approach, narrowing is seen as but one very important hole in the block of persons otherwise eligible for a death sentence. Regardless of the metaphor employed, however, the important question underlying any *Furman* challenge remains an empirical one — does the state death penalty regime meaningfully reduce the large pool of murderers to a small pool from which those actually sentenced to death are selected? It would reduce the Eighth Amendment narrowing requirement to a form of words, for example, for a state to create a “narrowing” regime which made all or nearly all murderers eligible for death, subject only to prosecutorial and juror discretion. While the structure of such a state’s death penalty regime might conceivably resemble those approved by the Court — a clear definition of first degree murder, the use of aggravating circumstances, and weighing — it seems obvious that a statute that does

²⁴⁴ *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

²⁴⁵ *Brown v. Sanders*, 546 U.S. 212, 213 (2006).

not narrow in practice cannot survive a *Furman* challenge. If the Eighth Amendment's *Furman* protections retain any force, then surely they do not hinge on mere semantic labels. As Justice Scalia has written in another context, it is not the name that a state attaches to a particular part of the death penalty process that matters: It doesn't matter whether a state describes a part of its statute as narrowing, eligibility, or Mary Jane; whether it actually serves the narrowing function is inherently an empirical question.²⁴⁶ The *Furman* inquiry into whether a given procedure actually does the work of narrowing requires an examination of the *function* rather than merely the *form* of the proceeding in question.

Recognizing that the term narrowing is not talismanic such that its utterance cures Eighth Amendment concerns is the central purpose of this Article. Indeed, narrowing by definition requires factors that are objective and measureable, and this Article critiques the growing tendency to sloppily conflate narrowing with other preconditions on death sentences, including the weighing of mitigation, that have the effect of rendering the empirical study of a state's narrowing procedures impossible. The insistence that capital sentencing jurisdictions "rationally narrow the class of death eligible defendants"²⁴⁷ is nothing less than a call for the re-awakening of *Furman*. The seminal death penalty decision in the United States has been dormant for decades, but with the rise of empirical studies and the insistence on actual, as opposed to theoretical, narrowing, *Furman* may once again claim center stage. It has never been overruled or diminished and the force of a renewed *Furman* may be too strong for most capital sentencing systems to withstand.

²⁴⁶ *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt.").

²⁴⁷ *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976)).