

Forgetting *Furman*

Robert J. Smith*

ABSTRACT: Furman v. Georgia is the darling of death penalty scholars and defense lawyers. Indeed, a fair characterization of the bulk of capital punishment scholarship and litigation is that it seeks to establish that the concerns that motivated the Court to strike down the death penalty in 1972—namely, arbitrariness and discrimination in the assessment of crime severity—necessitate the same result today. But these commentators have hitched themselves to the wrong doctrinal star. The better argument against the constitutionality of capital punishment is that the death penalty is imposed with regularity upon offenders with insufficient personal culpability. These are people with major functional impairments—severe mental illness, intellectual deficiencies, and other serious cognitive and behavioral deficits—that rival the impairments that death-ineligible intellectually disabled and juvenile offenders endure. This Article explains why commentators should forget about Furman and focus instead on further development of the Court’s blossoming mitigation jurisprudence. It predicts that unlike the post-Furman overhaul of capital punishment, the insufficient culpability problem is not amenable to tinkering and should result in judicial abolition.

* Assistant Professor of Law, University of North Carolina School of Law. I owe thanks to Mark Bennett, Joseph Blocher, Jack Boger, Alfred Brophy, G. Ben Cohen, John Coyle, David Harris, Emily Hughes, Richard Myers, Charles Ogletree, Dana Remus, Zoe Robinson, Richard Rosen, Meredith Rountree, David Sklansky, Christopher Slobogin, and Carol Steiker. Thanks also to Justin Davis, Dawn Milam, Joey Polonsky, and especially to Lauren Demanovich for excellent research assistance.

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INTRODUCTION

Even the most heinous murder is not automatically death-eligible. The person who commits the crime must be someone with extreme culpability; in other words, the person must have “a consciousness materially more depraved than that of” the typical person who commits murder.¹ Juries are entrusted to determine on a case-by-case basis whether defendants exceed this extreme culpability threshold.² But juries do not—and cannot—succeed at reliably sorting out those offenders with functional impairments serious enough to render them insufficiently culpable for a death sentence.

States routinely execute people with major functional impairments. Consider John Ferguson, a paranoid schizophrenic who became increasingly hostile and delusional after suffering a gunshot wound to the head;³ or Daniel Cook, who endured years of sadistic sexual and physical abuse and later attempted to kill himself after numerous hospitalizations for depression;⁴ or 18-year-old Richard Cobb, who “suffered brain damage” and had “serious emotional problems.”⁵ Most of the last hundred people executed in America suffered from the aftermath of complex trauma, endured a serious mental illness, or had a significant intellectual impairment.⁶ Some were not even old enough to buy a beer.⁷

This insufficient culpability problem is the biggest obstacle to a constitutionally sound death penalty, and it is a fatal one. It is not, however, the theory most often advanced by scholars or relied upon by defense lawyers. Instead, *Furman v. Georgia*⁸ remains the darling of capital punishment scholars and lawyers.⁹ *Furman* described two specific concerns: arbitrariness, which is the absence of legitimate grounds for explaining which crimes result in a

1. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (internal quotation marks omitted); *see also Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (stating that capital punishment “must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution” (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal quotation marks omitted))); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that “the culpability of the average murderer is [] insufficient to justify the most extreme sanction available to the State”).

2. *See Roper*, 543 U.S. at 572. This case-by-case approach does not extend to intellectually disabled offenders or juveniles. *See id.* at 551 (exempting juveniles from capital punishment); *Atkins*, 536 U.S. at 319 (exempting intellectually disabled persons from capital punishment).

3. Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1240 (2014) (describing the mitigating evidence presented in the cases of 100 recently executed offenders).

4. *Id.* at 1246–47.

5. *Id.* at 1235–36.

6. *Id.* at 1228–29.

7. *See id.* at 1236–37 tbl.2.

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

9. *See, e.g., James S. Liebman, Slow Dancing with Death: The Supreme Court and Capital Punishment*, 1963–2006, 107 COLUM. L. REV. 1 (2007); David McCord, *Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the Court’s Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997); Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323 (2003).

death sentence; and discrimination, which is the concern that race is a ground upon which one crime or another is deemed sufficiently serious.¹⁰ Scholars and defense lawyers treat *Furman* as anchoring and prophetic.¹¹ By anchoring, I mean that commentators describe arbitrariness and discrimination in the assessment of crime severity as the most important obstacle to a fair death penalty. By prophetic, I mean that scholars and defense lawyers treat the *Furman* concerns as if the prospect of abolition rises or falls with their consideration. Indeed, a fair characterization of the bulk of modern capital punishment scholarship and litigation is that it seeks to establish that the concerns that motivated the Court to strike down the death penalty in 1972 necessitate the same result today.¹²

Though misdirected, the focus on *Furman* is understandable. It remains difficult to determine why one eligible crime warrants death and another does not.¹³ Studies continue to show that race influences how the death penalty is imposed.¹⁴ Nonetheless, the shape and magnitude of crime-based arbitrariness and discrimination has shifted dramatically. The jury that decided Mr. Furman's case received no guidance on how to assess whether he deserved the death penalty, and no standards governed that determination.

10. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring); see also *infra* Part I (discussing arbitrariness and discrimination and explaining their roles in the *Furman* concurring opinions).

11. See, e.g., John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1941 (2012) (calling for judicial abolition because “despite all the efforts by legislators and the courts since *Furman*, the death penalty remains as arbitrary and as problematic as ever”); Liebman, *supra* note 9, at 121 (arguing that death sentencing today has “replicate[d] almost perfectly the arbitrary, capricious, and discriminatory patterns of death verdicts the Court condemned in *Furman*”); Lincoln Caplan, *The Random Horror of the Death Penalty*, N.Y. TIMES (Jan. 7, 2012), http://www.nytimes.com/2012/01/08/opinion/sunday/the-random-horror-of-the-death-penalty.html?_r=0 (concluding that the Court should abolish the death penalty because there is “powerful evidence that death sentences are haphazardly meted out, with virtually no connection to the heinousness of the crime”); John Ingold, *Lawyers for James Holmes Seek to Throw Out the Death Penalty*, DENVER POST (Sept. 3, 2013, 12:44 PM), http://www.denverpost.com/breakingnews/ci_24005074/lawyers-james-holmes-seek-throw-out-death-penalty (noting that “lawyers for [James] Holmes [who was accused of killing 12 people at a movie theater in 2012] say the state’s death penalty is rare, unusual, freakish, and inconsistently applied throughout the State of Colorado” (internal quotation marks omitted)).

12. See, e.g., Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2095 (2004); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997).

13. See, e.g., John J. Donohue III, *Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution 2* (June 8, 2013) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue (“The Connecticut death penalty regime does not select from the class of death-eligible defendants those most deserving of execution. At best, the Connecticut system haphazardly singles out a handful for execution from a substantial array of horrible murders.”).

14. See, e.g., Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 670–73 (2011) (finding that prosecutors pursued cases capitally far more often when the victim was white than when the victim was black).

Today, death penalty cases have a separate penalty phase where the jury is presented with aggravating and mitigating evidence to guide its sentencing decision.¹⁵ When the Court decided *Furman*, some non-homicide offenses could be charged capitally. Today, only homicides are death-eligible.¹⁶

Is the murder of an elderly gentleman during a home invasion worse than the murder of a young convenience store clerk during a robbery gone wrong?¹⁷ The difficulty in ranking the severity of statutorily death-eligible murders illustrates a broader problem with the focus on *Furman*: the crime-based inequities that remain are less dire, more difficult to regulate through additional procedural mechanisms, and less compelling as grounds for abolition or reform than they were in 1972. As a route to abolition or reform, then, *Furman* is a treadmill. Advocates can push harder and faster, but their efforts will not result in much forward progress.

Death penalty scholars and defense lawyers have hitched themselves to the wrong doctrinal star. The thing that is most wrong about the death penalty today is our inability to reliably gauge personal culpability. Juvenile offenders and the intellectually disabled are categorically exempt from capital punishment due to their insufficient culpability; yet, most of the last hundred people executed in America possessed functional impairments that rivaled or outpaced those endured by the typical adolescent or intellectually disabled person. How do we assess how serious a traumatic brain injury must be before it substantially interferes with cognition or impulsivity? How paranoid does a person with paranoid schizophrenia need to be before she becomes insufficiently culpable to receive a death sentence? There are no metrics for these determinations that are as easy to apply as chronological age or IQ scores. This and other intractable systemic obstacles undermine the reliability of jury verdicts and raise insurmountable concerns about the ability of death penalty regimes to weed out insufficiently culpable offenders.

The Article proceeds in four parts. Part I discusses the limitations of focusing on arbitrariness and discrimination in the assessment of crime severity. It traces the development of these two *Furman* themes, and then outlines how scholars and litigants wield them today to assert that the death

15. See *infra* notes 38–44 and accompanying text (discussing the post-*Furman* Georgia statute that the Court assesses in *Gregg v. Georgia*, 428 U.S. 153 (1976), and noting its use of a separate penalty phase and jury consideration of aggravating and mitigating factors).

16. See *Kennedy v. Louisiana*, 554 U.S. 407, 432–35 (2008) (noting that child rape is the most serious non-homicide offense against an individual and then holding that the death penalty is an excessive punishment for the crime of the rape of a child).

17. If so, how do we guide jurors in making such a determination? How do we ensure that race, which is a neutral factor, is not the basis for gauging whether the murder is aggravated enough to deserve death? See Transcript of Oral Argument at 30, *Kennedy*, 554 U.S. 407 (No. 07343) (“My problem is I can think of many, many awful, truly horrible circumstances that categorized in many different . . . under many different criminal statutes; I’m not a moralist. I’m a judge.”).

penalty is unconstitutional. It also demonstrates why claims of crime-based arbitrariness and discrimination have limited traction in the courts.

Part II turns to the claim that scholars and litigants should forget *Furman* and focus instead on the Court's blossoming mitigation jurisprudence. The Part traces the history of the Eighth Amendment through the lens of insufficient culpability. It examines the Court's recognition that factors that reduce the agency of the perpetrator are crucial for assessing moral culpability. It also describes the post-*Furman* rise of the mitigation function in capital cases and the more recent imposition of categorical exemptions for classes of offenders whose members possess insufficient personal culpability. Taken together, the Part provides the framework necessary to evaluate the claim that we execute too many people with insufficient culpability. It also provides the tools to question whether modification of the existing framework would suffice.

Part III explores common forms of mitigating evidence that involve functional deficits similar to those identified as a basis for excluding juveniles and intellectually disabled offenders from death-eligibility. It then catalogues how offenders with serious functional impairments continue to be subjected to the death penalty with a regularity that requires abolition or reform. Finally, given that insufficient culpability appears to be a common characteristic among offenders subjected to the death penalty, the Part concludes by challenging the core conceptualization of the typical death-eligible murderer as pitiless and cold-blooded. A more nuanced and realistic view of the people who populate our death rows provides necessary context for considering whether the death penalty should be reformed or repudiated.

Part IV argues that the insufficient culpability problem identified in this Article is not amenable to judicial tinkering because there are intractable structural barriers that preclude accurate assessment of personal culpability. To that end, this Article makes the affirmative case that the death penalty is unconstitutional because of the high risk of executing offenders with insufficient personal culpability.¹⁸ Rather than attempting another major overhaul of capital punishment, the Supreme Court should abolish the death penalty—an outcome that scholars have begun to treat as worthy of serious consideration for the first time since *Furman*.¹⁹ The Part reviews the potential doctrinal pathways for assessing the constitutionality of the death penalty and

18. See Smith et al., *supra* note 3 (defining insufficient culpability as diminished personal culpability relative to the typically developing adult and situating this level of culpability close to that possessed by juvenile offenders and those offenders with mental retardation).

19. See, e.g., Steiker & Steiker, *supra* note 9, at 340 (“[W]e mean to illustrate in a dramatic way that such abolition is more possible now, both jurisprudentially and politically, than it has been at any time since *Furman* itself.”).

evaluates the strength of a culpability-driven challenge under the Court's Eighth Amendment categorical exemption framework.²⁰

I. ARBITRARINESS AND DISCRIMINATION IN THE ASSESSMENT OF CRIME
SEVERITY ARE NOT THE BIGGEST OBSTACLES TO A CONSTITUTIONALLY SOUND
DEATH PENALTY

This Part analyzes the dominant themes in death penalty jurisprudence: arbitrariness and discrimination. Originating in the *Furman* Court's concern that the imposition of the death penalty across multiple states failed to rationally sort offenders based on the severity of their crimes and to account for race discrimination by jurors and prosecutors, these themes continue to be the most prominent ideas in death penalty scholarship and litigation.²¹ But this disproportionate attention is ill-advised because, as this Part explains, *Furman*'s analytical framework is divorced from the trajectory of the Court's modern capital punishment jurisprudence. The fact that *Furman* has commanded so much intellectual capital, however, necessitates a careful discussion of how its themes figure into the future of the death penalty. Accordingly, this Part explores both arbitrariness and discrimination in turn, describing their development and evolution, the arguments and evidence used when wielding them today, and finally, stating why, despite their descriptive validity, neither concern captures the gravest threat to the constitutionality of the death penalty.

A. THE LIMITATIONS OF FOCUSING ON CRIME-BASED ARBITRARINESS

The issue of arbitrariness identified by the *Furman* Court can be defined as an intolerable risk that death penalty systems do not meaningfully sort offenders based upon the aggravated nature of their crimes.²²

Litigants routinely make this argument. For example, in a pending federal habeas case, *Ashmus v. Martel*, the petitioner claimed that the California statute promotes arbitrary death sentencing because it fails to

20. The Court used the same doctrinal framework to bar the death penalty both for juveniles and mentally retarded offenders. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (mentally retarded). This doctrine is discussed in detail in Part II.B.

21. See, e.g., Bessler, *supra* note 11, at 1941 (calling for judicial abolition because "despite all the efforts by legislators and the courts since *Furman*, the death penalty remains as arbitrary and as problematic as ever").

22. The Court in *Furman* did not focus on, or even give significant attention to, the personal characteristics of the offender. See *Furman v. Georgia*, 408 U.S. 238, 293–94 (1972) (Brennan, J., concurring). Instead, the focus was on the assessment of the aggravated level of the crime committed. *Id.*; see also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) (discussing the lack of mitigating evidence and *Furman*).

adequately narrow the pool of eligible offenders.²³ Similarly, in *State v. Montour*, the defendant argued that capital punishment in Colorado is “unusual, freakish, and inconsistently applied throughout the State.”²⁴ Finally, four separate petitioners recently urged the United States Supreme Court to hold that the failure of their respective states to engage in meaningful proportionality review of death sentences gives rise to an inference of arbitrariness.²⁵

Jurists and academics have raised similar doubts.²⁶ Most prominently, the American Law Institute, whose model statute formed the basis for many modern death penalty schemes,²⁷ withdrew support for its statute citing “intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”²⁸ Judges continue to criticize the possibility that the imposition of the death penalty can be anything but arbitrary. Judge Boyce Martin of the Sixth Circuit Court of Appeals is the bluntest: “[T]he idea that the death penalty is fairly and rationally imposed in this country is a farce.”²⁹ Scholars, too, have asserted that “the death penalty remains as arbitrary and as problematic as ever”³⁰ and queried whether the modern landscape is a “[r]equiem for *Furman*.”³¹

But, in the face of these concerns, two critical questions remain unanswered: Is this modern focus on crime-based arbitrariness warranted? And, if so, is it plausible to think that arbitrariness is likely to function as the theme that drives judicial abolition or major reform?

23. Petitioner’s Opening Brief on Claim Seven at 31, *Ashmus v. Martel*, No. 3:93-cv-00594-TEH (N.D. Cal. May 16, 2011) (“California’s special circumstances are so broad that they cannot provide the narrowing function required by the Constitution [and] only a fraction of those eligible for capital punishment are actually sentenced to death, producing the same arbitrary results found unconstitutional in *Furman*.”).

24. Motion to Strike the Death Penalty at 44, *State v. Montour*, No. 02CR95 (Colo. Dist. Ct. May 31, 2013) (“Colorado’s death penalty statute [has] failed to do its job [of distinguishing] between the most culpable murders and all the others.”).

25. *Fields v. Kentucky*, 274 S.W.3d 375 (Ky. 2008), cert. denied, 78 U.S.L.W. 3237 (U.S. Oct. 20, 2009) (No. 09-5389); *Holmes v. Louisiana*, 5 So.3d 42 (La. 2008), cert. denied, 78 U.S.L.W. 3181 (U.S. Oct. 5, 2009) (No. 08-1358); *O’Kelley v. Hall*, 670 S.E.2d 388 (Ga. 2008), cert. denied, 78 U.S.L.W. 3172 (U.S. Oct. 5, 2009) (No. 08-10451); *Furnish v. Kentucky*, 267 S.W.3d 656 (Ky. 2008), cert. denied, 78 U.S.L.W. 3171 (U.S. Oct. 5, 2009) (No. 08-10046).

26. See, e.g., *Moore v. Parker*, 425 F.3d 250, 268–70 (6th Cir. 2005) (Martin, J., dissenting) (stating that “the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair”).

27. See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354–60 (2010).

28. Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment, in REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY*, Annex B, at 7 (2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

29. *Moore*, 425 F.3d at 270.

30. Bessler, *supra* note 11, at 1941.

31. Shatz & Rivkind, *supra* note 12, at 1338–43.

To answer these questions, we need to step back from recent jurisprudence and examine the concerns that motivated the *Furman* decision. Indeed, it is important to understand that concerns about arbitrariness reverberate back to *Furman* itself. The problem with the imposition of the death penalty, the *Furman* Court stated, was the lack of mechanisms to control its imposition in similarly situated cases. Four concurring justices raised this issue. Justice Brennan stated that the death penalty “smacks of little more than a lottery system.”³² Justice Stewart similarly compared being sentenced to death to “being struck by lightning.”³³ Justice White found “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”³⁴ And Justice Douglas wrote that the “extreme rarity” with which death sentences are imposed “raises a strong inference of arbitrariness.”³⁵ Taken together, then, the arbitrariness problem with the pre-*Furman* death penalty was both that there was no mechanism for gauging which eligible offenders should receive a death sentence and that the infrequency with which the punishment was imposed gave rise to an inference of randomness.

In response to *Furman*, state legislatures drafted new statutes that aimed to reduce the risk of arbitrariness. Some states required the death penalty for every person convicted of first-degree murder.³⁶ Other states narrowed eligibility and provided more guidance to jurors charged with making the death determination.³⁷

While the Court rejected reforms that required mandatory imposition of the death penalty, in *Gregg v. Georgia*, the Court put its stamp of approval on

32. *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring); *id.* at 294 (Brennan, J., concurring) (emphasizing that given the low death-sentencing rates in America “it [was] highly implausible that only the worst criminals or the criminals who commit the worst crimes” received death sentences).

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

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

35. *Id.* at 249 (Douglas, J., concurring) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1792 (1970)) (internal quotation marks omitted).

36. North Carolina and Louisiana were two states that adopted such laws. But the Court rejected this approach for reasons discussed in Part II. See *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (“The Louisiana statute thus suffers from constitutional deficiencies similar to those identified in the North Carolina statute in *Woodson v. North Carolina*.”); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (striking down North Carolina’s mandatory death penalty scheme based, in part, on “its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death”).

37. Georgia, Texas, and Florida were three states that took this approach. See *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (holding that the Texas statute adequately “narrow[ed] its definition of capital murder” and “ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function”); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (“On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*.”); *Gregg v. Georgia*, 428 U.S. 153, 162–68 (1976).

Georgia's statutory reforms, providing a roadmap to other states interested in maintaining a death penalty scheme.³⁸ In *Gregg*, the Court held that Georgia's statutory reforms to correct the arbitrariness concerns raised by the *Furman* Court brought capital punishment back within the realm of the constitutionally permissible.³⁹ Georgia divided capital trials into two discrete phases.⁴⁰ Jurors first decided whether the defendant was guilty of a death-eligible offense.⁴¹ If he was, then the trial proceeded to the penalty phase where jurors decided whether to impose a death sentence after considering factors that both aggravated and mitigated the crime.⁴² In approving these reforms, the *Gregg* Court noted that a juror's consideration of aggravating and mitigating factors at the penalty phase was important because it helped channel discretion and encouraged a more rational administration of the death penalty.⁴³ The Court also emphasized that the statute narrowed death-eligibility by prohibiting juries from returning a death sentence unless they found at least one aggravating factor—such as if the offender killed more than one person.⁴⁴

Georgia's statute also provided for automatic appellate review of every death sentence to ensure that each sentence was neither "excessive or disproportionate" nor "imposed under the influence of passion, prejudice, or any other arbitrary factor."⁴⁵ The *Gregg* Court lauded Georgia's appellate review, finding that it "serve[d] as a check against the random or arbitrary imposition of the death penalty" and "substantially eliminate[d] the possibility that a person will be sentenced to die by the action of an aberrant jury."⁴⁶ Citing the automatic review provision, the Court expressed confidence

38. *Gregg*, 428 U.S. at 207.

39. *Id.* at 206–07.

40. *Id.* at 162–68 (detailing the post-*Furman* Georgia statute); *id.* at 191–92 ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.").

41. *Id.* at 163.

42. *Id.* at 163–66.

43. *Id.* at 193–95 (describing the benefits of directing the jury to consider aggravating and mitigating circumstances and concluding that "[w]hile such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary").

44. *Id.* at 196–98 (describing how the Georgia statute narrows death-eligibility by requiring, among other things, a jury finding of the existence of "a statutory aggravating circumstance before recommending a sentence of death" and concluding that "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application'" (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974))).

45. *Id.* at 204 (quoting GA. CODE ANN. § 27-2537(c) (3) (Supp. 1975)) (internal quotation marks omitted).

46. *Id.* at 206.

that “death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside.”⁴⁷

But to be clear, *Gregg* did not demonstrate that post-*Furman* statutes such as Georgia’s had eradicated arbitrariness. Rather the Court upheld the Georgia statute on the grounds that “a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance” sufficiently reduces the risk of arbitrary death sentencing so as to make the death penalty constitutional.⁴⁸

Given that *Gregg* provides a clear roadmap to the states as to how to craft a death penalty scheme that alleviates—at least in the eyes of the Court—the arbitrariness concerns in *Furman*, the question remains: What has happened since *Gregg* to bring arbitrariness concerns back to the forefront of constitutional challenges to capital punishment? If a state followed the *Gregg* roadmap, how then could the Colorado death penalty be, as Montour has alleged, “unusual, freakish, and inconsistently applied throughout the State”?⁴⁹ What led the American Law Institute to conclude that there are “intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment”?⁵⁰

Scholars offer two specific diagnoses for the persistence of claims that states’ death penalty schemes are unconstitutionally arbitrary. The first diagnosis consists of two interrelated ideas: narrowing—the failure of existing capital statutes to genuinely narrow death-eligibility; and numerousness—the rarity with which the death penalty is imposed upon eligible offenders, which renders the statutes unconstitutionally arbitrary.⁵¹ The second diagnosis focuses on the failure of the Court to ensure substantive appellate review of capital punishment outcomes. I consider both diagnoses in turn.

1. Narrowing and Numerousness

The narrowing and numerousness components of the first diagnosis are closely related: If death-eligibility is narrowed, one would expect death sentences to be imposed more regularly because the baseline culpability of the crime should be higher and there should be less variance between eligible offenders. Conversely, as eligibility widens, one might expect a decrease in the

47. *Id.* at 224 (White, J., concurring).

48. *Id.* at 195 (majority opinion).

49. Motion to Strike the Death Penalty, *supra* note 24, at 44.

50. Steiker & Steiker, *supra* note 28.

51. See James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1658 (2006) (describing both the narrowing and numerousness approaches and arguing that “numerousness is a likely cause of the problems . . . and additional narrowing is a promising if only partial cure”). I do not read Justice Stewart as endorsing a low imposition-to-eligibility ratio so long as eligibility is narrowed, or read Justice White as endorsing an increase in the absolute number of death sentences that does not improve the imposition-to-eligibility ratio.

percentage of eligible cases that result in a death sentence. Increased eligibility should decrease baseline crime severity and increase variance between eligible offenders. Thus, to determine whether arbitrariness exists, it makes sense to focus first on eligibility and then to gauge the frequency of death sentencing within the class of eligible offenders.

Critics argue that the narrowing requirement largely fails to serve its purpose of restricting death-eligibility because legislatures have expanded the list of eligible crimes and increased the number of aggravating circumstances.⁵² In *Ashmus v. Martel*, for example, the petitioner detailed studies revealing that between 77% and 91% of offenders convicted of first-degree murder in California are death-eligible.⁵³ Similarly, in Colorado, 91% of homicides qualified as first-degree murders, of which 90.4% qualified as death-eligible given the presence of one or more aggravating factors.⁵⁴ Against the backdrop of expansive eligibility, though, the imposition of death sentences is increasingly rare. In *Furman*, 15% to 20% was the worrisome eligibility-to-imposition ratio.⁵⁵ But today, roughly 11% of offenders convicted of first-degree murder in California receive the death penalty.⁵⁶ In Colorado, the death-eligibility to death-sentence rate is 0.56%.⁵⁷

Scholars suggest that reinvigorating the narrowing requirement could fix the arbitrariness problem. Professors Carol Steiker and Jordan Steiker, for instance, argue that “the continuing failure of states to narrow the class of the death-eligible invites the possibility that some defendants will receive the death penalty in circumstances in which it is not deserved according to wider community standards.”⁵⁸ Professors James Liebman and Lawrence Marshall

52. See, e.g., *id.* at 1664 (“[T]he States have greatly exacerbated the problem through ever-growing statutory lists and ever-broader interpretations of aggravating factors.”). Death-eligibility can be narrowed at either the crime-definition stage by the legislature or through a finding of aggravating circumstances at trial. See *Lowenfield v. Phelps*, 484 U.S. 231, 244–45 (1988).

53. Petitioner’s Opening Brief on Claim Seven, *supra* note 23. The architect of the California statute, Donald Heller, testified that he intended to draft the statute to be “as broad and inclusive as possible” and to ensure that it “appl[ied] to every murderer.” *Id.* at 2 (citations omitted) (internal quotation marks omitted).

54. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1109–10, 1113 (2013).

55. *Furman v. Georgia*, 408 U.S. 238, 386 n.11 (1972) (Burger, C.J., dissenting) (“Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.”). Given the excruciatingly low rate of death sentences relative to both annual homicide totals and expansive death-eligibility, there is no indication that these figures reflect states with more liberal jury pools. Indeed, the prosecutors who exercise their discretion not to charge a case capitally or to accept a non-death plea outcome prior to trial are the most likely drivers of these low rates.

56. Petitioner’s Opening Brief on Claim Seven, *supra* note 23, at 32 (citing Ex. 30 ¶ 9). Among all first-degree murder convictions in California, regardless of the charge, death-eligibility is at roughly 95% and the death-sentencing rate is under 5%. *Id.* at 34 (citing Ex. 219 ¶ 38, 61).

57. Marceau et al., *supra* note 54, at 1112.

58. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 375 (1995).

also propose that limiting death eligibility to only those homicides that routinely result in death sentences would ensure that only the most culpable offenders are executed.⁵⁹ For instance, “a state might choose to limit the availability of the death penalty to murders involving police officers or prison guards, murders in the course of certain felonies, or murders committed by offenders who have killed previously.”⁶⁰

But giving states another opportunity to narrow eligibility would not fix what is most broken about the death penalty. Arbitrariness has changed its shape since *Furman*. Whereas pre-*Furman* it was the utter lack of standards guiding the judge or jury tasked with making the death determination that raised the arbitrariness concern,⁶¹ the risks associated with arbitrariness are different today. First, the Court has barred the death penalty for non-homicide offenses, which siphoned off the least culpable crimes.⁶² Second, a lack of standards is no longer a problem.⁶³ *Furman*, then, was effective only as a blunt instrument used to impose some process on, and draw some rough boundaries for, the administration of capital punishment.

These transformations make distinguishing offenders based on the relative aggravation of the offense an almost mystical undertaking.⁶⁴ Nonetheless, these distinctions are comparatively minor variations up or down the culpability spectrum. Arbitrariness is now mostly about consistency and not desert. While inconsistency is not ideal, the consistency objection states a lesser evil than the type of pre-*Furman* arbitrariness that risked significant over-inclusion of offenders who committed insufficiently culpable offenses.⁶⁵

59. Liebman & Marshall, *supra* note 51, at 1663 (citation omitted).

60. Steiker & Steiker, *supra* note 58, at 416. Interestingly, even restricting the death penalty to homicides involving police officers would not increase consistency among eligible offenders. See Petition for Writ of Certiorari at 20–21, *Williams v. Louisiana*, 560 U.S. 905 (2010) (No. 09-1092), 2010 WL 2771715, at *20–21 (“397 officers have died in the line of duty in Louisiana, with at least 70 killed by gunfire, and 16 by vehicular assault between 1976 and 2009, [which] includes 16 different officers who have died in the line of duty in Baton Rouge. Yet, the Louisiana Supreme Court only identified death sentences from the deaths of two different police officers.”).

61. See McCord, *supra* note 9, at 548 (asserting “that the Court has had only one primary goal for its regulation of capital punishment: decreasing *overinclusion*”).

62. See *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (precluding the death penalty for “nonhomicide crimes against individual persons, even including child rape”).

63. See *supra* notes 39–48 and accompanying text.

64. See *State v. Marshall*, 613 A.2d 1059, 1142 (N.J. 1992) (Handler, J., dissenting) (“Is it worse to kill for money or for hatred? Is it worse to kill over a woman or over a dog? Is it worse to kill to support a gambling habit or to support a drug habit? Is it worse to kill a relative or a stranger? To pose those questions is to pose insoluble moral conundrums.”).

65. See Scott W. Howe, *Repudiating the Narrowing Rule in Capital Sentencing*, 2012 BYU L. REV. 1477, 1520–21. The rarity of imposition is still important. A punishment that is not imposed consistently on equally culpable offenders signals the hesitation of society to impose the punishment and carries an inference of excessiveness.

2. Meaningful Appellate Review

The second diagnosis for the persistence of arbitrariness in the administration of the death penalty is the failure of appellate courts to engage in the type of meaningful appellate review envisioned in *Gregg*. The Georgia statute challenged in *Gregg* required appellate review of every death sentence to determine whether it was “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”⁶⁶ The *Gregg* Court emphasized that this appellate review “guard[s] further against a situation comparable to that presented in *Furman*.”⁶⁷ For several years following *Gregg*, states took this review seriously.⁶⁸ But, eight years later in *Pulley v. Harris*, the Court held that the Eighth Amendment does not compel states to engage in proportionality review.⁶⁹ The *Pulley* Court acknowledged that *Gregg* “made much of the statutorily required comparative proportionality review” as an “additional safeguard against arbitrary or capricious sentencing,” but nonetheless found that *Gregg* “did not declare that comparative review was so critical that without it the Georgia statute would not have passed constitutional muster.”⁷⁰

Following *Pulley*, most states stopped engaging in meaningful proportionality review.⁷¹ Georgia is among them.⁷² In 2008, in *Walker v. Georgia*, Justice Stevens highlighted how the absence of meaningful proportionality review helps to undermine *Furman*’s arbitrariness concerns.⁷³ Stevens labeled the Georgia Supreme Court’s proportionality review “utterly

66. *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (quoting GA. CODE ANN. § 27-2537(c)(3) (Supp. 1975)) (internal quotation marks omitted).

67. *Id.* at 198.

68. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice”?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996) (explaining that “state legislatures . . . read *Gregg* as a how-to manual for constructing a constitutional capital punishment statute,” which resulted in “[o]ver thirty states almost immediately enact[ing] proportionality review procedures similar to those upheld in *Gregg*”); see, e.g., *State v. Sonnier*, 380 So. 2d 1, 9 (La. 1979) (reversing the death sentence of the younger, less culpable co-defendant in a rape and murder case).

69. *Pulley v. Harris*, 465 U.S. 37, 46 (1984) (holding that “the Court of Appeals erred in concluding that *Gregg* required proportionality review”).

70. *Id.* at 45.

71. Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUST. SYS. J. 257, 259 (2008) (explaining that *Pulley* held that comparative proportionality review is not a constitutionally indispensable aspect of every capital punishment scheme and noting that “[s]hortly thereafter, nine states repealed their statutory comparative proportionality review provisions and several others that had been required to adopt such review by state supreme court mandate abandoned the practice as well” (citations omitted)).

72. *Walker v. Georgia*, 129 S. Ct. 453, 457 (2008) (Stevens, J., separate statement concerning the denial of certiorari) (noting that “[s]ince *Pulley*, the Georgia Supreme Court has significantly narrowed the universe of cases from which it culls comparators,” and highlighting that “[i]t now appears to be the court’s practice never to consider cases in which the jury sentenced the defendant to life imprisonment” (citation omitted)).

73. *Id.* at 454.

perfunctory”⁷⁴ and found that it “creat[ed] an unacceptable risk that it will overlook a sentence infected by impermissible considerations.”⁷⁵

Scholars, too, have urged the Court to revive proportionality review. Professor Liebman suggested a “constitutionally mandated capital appellate review to include comparative proportionality analysis and examination of the pattern of each factor’s application across the run of all cases.”⁷⁶ Professor White, a former Justice on the Tennessee Supreme Court, also argued for robust proportionality review: “Quite simply, comparative proportionality review is the only means of assuring that death sentences are not arbitrarily imposed” because “juries lack the experience needed to evaluate the propriety of a sentence in light of sentences in similar cases” and “the trial judge may be unaware of statewide sentencing practices.”⁷⁷

One problem with the proportionality review prescription is the same one that plagues the narrowing-based prescriptions: Arbitrariness has shifted its shape. Substantive monitoring is less important today because the death penalty is limited to homicide offenses and is only meted out after a bifurcated trial where jurors are instructed to consider both aggravating and mitigating evidence.⁷⁸ Thus, proportionality review, like narrowing, promotes consistency but fails to address excessiveness adequately.

Another problem is that, pragmatically, monitoring arbitrariness is both time-consuming and difficult to do on an ongoing basis.⁷⁹ There also are a number of inherent difficulties. For instance, do only cases charged capitally count? The problem with this approach is that it misses arbitrariness upstream; equally aggravated cases could exist that for whatever reason the prosecutor did not charge capitally. On the other hand, if you include all potentially death-eligible cases, asking even the most basic questions, such as whether a homicide is death-eligible, is an exercise fraught with subjective judgment calls.⁸⁰ The rub is that it is prohibitively difficult to gauge accurately whether one death sentence is proportionate to another death sentence.

Moreover, the narrowing and appellate monitoring prescriptions evoke *Furman* not only in substance, but also call for a *Furman*-like reset of death

74. *Id.* at 455.

75. *Id.* at 456.

76. Liebman & Marshall, *supra* note 51, at 1672 (citations omitted).

77. Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 863 (1999).

78. *See supra* notes 38–44 and accompanying text.

79. For example, there must be a continually updated database of all capital cases in every jurisdiction (including those in which the defendant did not receive the death penalty).

80. Such a study usually includes all cases that are potentially death-eligible as opposed to only those cases in which the prosecution sought the death penalty. This means that the study authors (and their research assistants) must make a determination from the facts of the case about whether the crime is death-eligible. *See, e.g.,* Marceau et al., *supra* note 54 (discussing Colorado death-eligible cases); Shatz & Rivkind, *supra* note 12 (discussing California death-eligible cases).

penalty law. As Professor David McCord has asked: "After such extensive failed experimentation, is there any persuasive reason to believe that a non-arbitrary death penalty system, even if theoretically imaginable, is practically attainable?"⁸¹ Justice Blackmun concluded not, shortly before his retirement. He wrote, "the death penalty experiment has failed"; and, instead of operating under the "delusion" that more regulation could fix its problem, "I no longer shall tinker with the machinery of death."⁸² In sum, giving states another opportunity to narrow eligibility or perform meaningful proportionality review would not fix that which is most broken about the death penalty.

B. THE LIMITATIONS OF FOCUSING ON CRIME-BASED RACE DISCRIMINATION

Like arbitrariness, race discrimination as an Eighth Amendment concept emerged from *Furman*. Justice Marshall, for example, explained in his concurrence that he was troubled "that Negroes were executed far more often than whites in proportion to their percentage of the population," even after accounting for a "higher rate of crime" among black Americans.⁸³ Justice Douglas echoed Justice Marshall's concerns and identified the availability of capital punishment for rape in certain jurisdictions as a leading cause of the disparities.⁸⁴ Unlike Justices Marshall and Douglas, Justice Potter Stewart concluded in his concurrence that race discrimination had not been proved, but he nonetheless acknowledged "that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."⁸⁵ These concurring opinions illustrate that the *Furman* Justices worried not only that arbitrariness plagued capital punishment, but also that race discrimination helped to explain the absence of rational and consistent results.

Though race discrimination was an important consideration in *Furman*, it has bubbled mostly below the surface of the Court's death penalty jurisprudence. Five years after deciding *Furman*, the Court held in *Coker v. Georgia* that the death penalty is an excessive punishment for the crime of rape.⁸⁶ This holding impacted race discrimination because *Coker* had the

81. David McCord, *Lightning Still Strikes: Evidence from the Popular Press That Death Sentencing Continues to Be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797, 870 (2005).

82. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

83. *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring).

84. *Id.* at 250-51 (Douglas, J., concurring) (quoting Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969)) ("Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.").

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

86. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is an excessive punishment for the crime of the rape of an adult woman).

effect of drastically reducing race-of-the-defendant effects because such effects originated mostly from capital rape cases, in which black defendants disproportionately (and almost exclusively) received death sentences.⁸⁷ It was not until 1987, in *McCleskey v. Kemp*, that the Court first considered a discrimination claim head-on.⁸⁸ The claim raised in *McCleskey* was not that black defendants were more likely to receive the death penalty, but rather that defendants (and especially black defendants) that kill white victims were disproportionately sentenced to death.⁸⁹ As evidence of this race of the victim effect, *McCleskey* cited a comprehensive statistical analysis that demonstrated that defendants who killed white victims were sentenced to death 4.3 times more often than defendants who killed black victims.⁹⁰ Black defendants who kill white victims received the death penalty the most often.⁹¹ The Court accepted the results of the study for the sake of argument, but nonetheless affirmed the death sentence because it found that statistical studies could not prove race discrimination in *McCleskey*'s particular case.⁹²

Despite the rebuff from the Court, scholars and litigants alike have drawn upon *Furman*'s racial discrimination theme to craft challenges to the modern death penalty. For example, in North Carolina, the state legislature passed—and later repealed—the Racial Justice Act (“RJA”) that in 2012 led to sentencing relief for four death-sentenced offenders on the grounds that their trials had not been free of racial bias.⁹³ Though each of the North Carolina cases were reversed based on race discrimination in the jury selection

87. See Scott W. Howe, *Race, Death and Disproportionality*, 37 N. KY. L. REV. 213, 235–36 (2010) (highlighting that the “[t]he starkest racial disparities in the use of capital punishment in the pre-*Furman* era had existed for rape” (emphasis added)).

88. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting on both Eighth and Fourteenth Amendment grounds a challenge to the death penalty based on statistical evidence demonstrating that the race of the victim influenced whether a death sentence was imposed in Georgia).

89. *Id.* at 286–88.

90. *Id.* at 287.

91. *Id.* at 286–87. While 22% of black defendant and white victim cases resulted in a death sentence, in black victim and white defendant cases the death-sentencing rate fell to 3%. *Id.* at 286. The study traced the disparities to the decision of prosecutors to pursue death-eligible cases: capital charges were pursued in 10% of white defendant and black victim cases, but 70% of black defendant and white victim cases proceeded capitally. *Id.* at 287.

92. *Id.* at 308–09 (underscoring that “[e]ven Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in *McCleskey*'s particular case,” and explaining that “[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions”).

93. See Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES (June 5, 2013), http://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html?_r=1& (describing the passage and subsequent repeal of the Racial Justice Act (“RJA”)).

process,⁹⁴ the RJA's passage spawned a study of 15,000 North Carolina homicide cases that spanned 27 years.⁹⁵ The study found that a defendant is three times more likely to receive a death sentence if the victim was white than if the victim was black.⁹⁶ Studies of racial disparities in other jurisdictions have reached similar results.⁹⁷

Beyond statistical disparities, recent scholarship has sought to triangulate the proof that racial disparities persist in the administration of the death penalty. Some scholars focus on the psychological processes that drive racial disparities. For instance, Professor Jennifer Eberhardt found that the degree to which a capital defendant has stereotypically Afrocentric features predicts death-sentencing outcomes.⁹⁸ Other scholars focus on how community spatial patterns could influence racial disparities. For example, Professors Liebman and Clarke note that "[h]eavy use of the death penalty . . . seems to occur when the worst effects of crime have spilled over from poor and minority neighborhoods and are particularly salient to parts of the community that we can predict will have greater influence over local law enforcement, prosecution, and judicial officials."⁹⁹ Taken together, this modern scholarship on race discrimination has led to renewed calls for abolition in both the scholarly literature, as well as in capital litigation.¹⁰⁰

Unfortunately, though, race-based rationales for reform or judicial abolition face damning difficulties. Like arbitrariness, race discrimination has

94. *Id.* (noting that four defendants received sentencing relief under the RJA based on a finding that North Carolina prosecutors struck prospective black jurors twice as often as prospective white jurors).

95. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2121–23 (2011).

96. *Id.* at 2140.

97. See, e.g., Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1940 (2012) (finding that white defendants are three times less likely to receive a death sentence when they kill a white victim than a black defendant who kills a white victim); Pierce & Radelet, *supra* note 14, at 654 (finding that prosecutors prosecuted cases capitally far more often when the victim was white than when the victim was black).

98. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383–85 (2006) (finding that even after controlling for nonracial factors known to have an impact on capital sentencing, black defendants were more than twice as likely to receive a death sentence if they possessed "a stereotypically Black appearance" (e.g., broad nose, thick lips, dark skin) in the top half of the stereotypicality distribution).

99. James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 270 (2011).

100. See *State v. Addison*, 87 A.3d 1, 184, 187 (N.H. 2013) (per curiam) (noting that the defendant challenged the constitutionality of the death penalty based, in part, on the role of implicit racial bias; relaying expert testimony from Harvard University Professor Banaji on the likely role of implicit racial bias on the death penalty in New Hampshire). Ultimately, the *Addison* court rejected the claim because "the defendant's social science research [was] insufficient to establish his claim of purposeful racial discrimination." *Id.* at 196; see also Howe, *supra* note 12, at 2095 ("[U]nconscious racial prejudice in capital selection justifies judicial abolition.").

changed its shape since *Furman*. Recall that *Coker*, the decision that barred the death penalty for rape, drastically reduced discrimination based on the defendant's race.¹⁰¹ As a result, the main source of discrimination today revolves around the victim's race.¹⁰² The idea that white lives might be valued more than black lives is disturbing, but the harm to the defendant nonetheless is more attenuated because the result of discrimination in this context is that the defendant does not receive a death sentence. As one commentator notes, "[i]f mere racial inconsistency among those deserving death sentences [is] the problem, we should feel badly for those murder victims whose killers escape death, not the death-sentenced murderers who receive their just deserts."¹⁰³ Or, stated as a proposed remedy, one way to eliminate race-of-the-victim effects is to more vigorously pursue capital punishment in black victim cases.

Professor Scott Howe nonetheless calls for judicial abolition not on consistency grounds, but rather, on the notion "that death sentences influenced by racial bias are not deserved."¹⁰⁴ The argument is that race influences how decision-makers evaluate the existence of the aggravating circumstances necessary to render a defendant death-eligible. This is a theoretically plausible account. Race *could* be a tipping point factor. But it is unlikely. First, we do not *know* that race can tip crime severity assessments. Race-of-the-victim effects are noisy: Space, class, and stranger-danger are all possible confounds.¹⁰⁵ Second, black Americans are less likely to support capital punishment than white Americans.¹⁰⁶ Thus, prosecutors who rely, in part, on the vigorousness with which victims' families press for capital punishment might be less likely to pursue death sentences in black victim

101. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 289 (2002) ("Rape had always been the crime for which the race of the defendant made the biggest difference, so *Coker* instantly wiped away more discrimination than any reform of murder sentencing could have.").

102. See *supra* note 97 and accompanying text (listing studies that find strong race-of-the-victim effects, but not statistically significant race-of-the-defendant effects).

103. Howe, *supra* note 12, at 2165.

104. *Id.*

105. See John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 202 n.70 (2004) ("For [some] states, the difference in stranger-victim rates can explain part, but not all, of the larger differences in death sentence rates between black defendant-white victim cases and black defendant-black victim cases."); Liebman & Clarke, *supra* note 99, at 272 ("The use of the death penalty in response to perceived threats to influential members of insular communities from cross-boundary crime helps explain the high death-sentencing rate in communities that otherwise do not fit the capital punishment stereotype. . . . The consistent pattern across the United States of a two to five times greater chance of being sentenced to die for killing a white victim than for the same killing of a black victim may be a more generalized repercussion of the same dynamic."). Thank you to Richard Myers for suggesting the term "stranger-danger."

106. See Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397, 414–16 (2003) (describing the different level of support for the death penalty among white and black Americans).

cases.¹⁰⁷ Third, in some jurisdictions, most black homicide victims live in locations where juries repeatedly refuse to impose death sentences.¹⁰⁸ Furthermore, even if race discrimination can tip the assessment of crime severity, the magnitude of the problem is still less severe today than before *Furman* because the baseline culpability of eligible offenders has increased, and jurors are given a process to follow when considering whether to impose death.

Today, racial discrimination poses far more of a consistency concern than an excessiveness concern. The degree of the problem matters from a pragmatic standpoint because of the radioactivity of race as a grounds for interpreting contentious constitutional rules. Professor Stuart Banner has observed that the brilliance of the legal strategy in *Furman* was in its willingness to relegate racial discrimination to a secondary role in the litigation.¹⁰⁹ Indeed, the thrust of the petitioner's argument in *Furman* was that no legitimate factor explained which offenders received a death sentence.¹¹⁰ Race was simply one factor that might contribute to this lack of consistency and rationality.

Contrast this understated approach with the legal strategy in *McCleskey*, the case in which the Court directly confronted the race discrimination issue and refused to hold that the study showing race-of-the-victim effects warranted reversal of the death sentence.¹¹¹ *McCleskey* thrust race discrimination into the spotlight, which caused three insurmountable obstacles. These obstacles are instructive when thinking about future constitutional challenges to the death penalty. First, it is much easier to prove that no legitimate factor predicts

107. The extent to which prosecutors rely upon the wishes of the victim's family when deciding whether to seek death varies from prosecutor to prosecutor and jurisdiction to jurisdiction. For a recent example of a clash between the desires of the victim's parents and the prosecution, see Andrew Cohen, *When Victims Speak Up in Court—In Defense of the Criminals*, ATLANTIC (Jan. 28, 2014, 2:07 PM), <http://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/>.

108. One salient example among many is New Orleans, Louisiana. See G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 446 (2010) ("Orleans is a majority-minority group parish [and] Orleans Parish juries have sentenced only one person to death in the past twelve years. This is not for lack of opportunity: New Orleans[, which is the largest city in the Parish,] consistently leads the nation in the infamous 'most murders per capita' category, with 64 per 100,000 people in 2008." (footnotes omitted)).

109. See BANNER, *supra* note 101, at 265 ("The genius of Amsterdam and the LDF attorneys was to find a way to put racism in the case within the confines of preexisting Eighth Amendment doctrine, a move that allowed [Justice] White and [Justice] Stewart to fight racism while claiming to fight only case-by-case inconsistency.").

110. See Brief for Petitioner, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003), 1971 WL 134167; Brief for Petitioner at 6-7, *Aikens v. California*, 404 U.S. 812 (1971) (No. 68-5027), 1971 WL 134168.

111. *McCleskey v. Kemp*, 481 U.S. 279, 282-83, 292 (1987) ("This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.").

which offenders receive a death sentence than it is to prove that race is the factor that explains death sentencing inconsistencies. Second, because race is still a highly politicized and explosive subject, reforming or overturning a punishment that has been practiced since before the birth of the nation on the grounds that it is unfair to defendants that kill white victims is highly implausible, especially given the current Court's recent retrenchment from voting rights and affirmative action.¹¹² Third, though admittedly an unlikely result, acknowledging that race discrimination infects the administration of capital punishment could radiate throughout the criminal justice system and pose a fundamental challenge to the system's legitimacy.¹¹³ At the very least, then, reforming or barring the death penalty based on racial discrimination in its application imposes psychological and political obstacles that the Court seems unlikely to bear.

Taken together, arbitrariness and discrimination are predominantly concerned with fairness in choosing which of the offenders that committed adequately culpable homicides receive the death penalty. These are important problems that deserve careful attention and scrutiny. But both problems pose insurmountable obstacles as pathways to major reform or abolition. First, both are less of a blatant problem today than when the Court decided *Furman*. Second, both suggest that the correct remedy is another reset of death penalty law. Yet, as this Part has discussed, if the reset button is pressed, there are thorny and probably intractable problems that will re-emerge. Thus, it is time to forget *Furman* and its focus on arbitrariness and discrimination in the assessment of crime severity.¹¹⁴

Where do we go from here? Recall that the central Eighth Amendment concern is about excessive punishment. As *Furman* illustrated, the death penalty can be excessive because it is too severe of a punishment for the crime

112. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (finding unconstitutional section 4 of the Voting Rights Act); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (striking down affirmative action plans in the Seattle, Washington, and Louisville, Kentucky, public schools); see also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282–83 (2011).

113. *McCleskey*, 481 U.S. at 314–15 (emphasizing that “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system” because “[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties”); *id.* at 339 (Brennan, J., dissenting) (referring to this “open[ing] the door” concern as a “fear of too much justice”).

114. My suggestion to forget *Furman* does not mean that I think the *Furman* reforms are no longer important to capital punishment systems. *Furman* is shorthand for a focus on more reliably gauging the aggravated nature of a crime, and the opportunity cost of spending additional time trying to perfect assessments of crime-based arbitrariness and discrimination is too high. Moreover, pragmatically, in terms of either major reform or a global challenge to the continued constitutionality of the death penalty, the trajectory of the Court’s recent jurisprudence has moved away from *Furman* and towards a focus on insufficient culpability. Part IV discusses these transitions in detail.

committed.¹¹⁵ Capital punishment also can be excessive because it is too severe of a punishment for the person who committed the crime. Parts II and III focus on the mitigation function, which is the personal culpability side of the excessiveness inquiry. Unlike the *Furman* concerns, problems with the mitigation function prohibit accurate determinations of which offenders deserve death. It is this power to reduce the culpability of offenders who commit even the most aggravated crimes that renders the mitigation function the key factor that will result in judicial abolition (or at least major reform).

II. THE ORIGINS AND ASCENDANCY OF MITIGATION

This Article claims that the biggest problem with the death penalty is no longer that arbitrariness and discrimination influence how jurors calculate culpability for a crime, but rather, that offenders that are sentenced to death are often arguably ineligible for that sentence due to their insufficient culpability. For these offenders, despite the horrific nature of the crime, the death penalty is an excessive punishment. This is a startling claim that requires some unpacking.

As an initial matter, although discussed in detail in the following Part, it is critical to outline briefly the foundations of judicial considerations of culpability in capital cases in order to understand the direction of this Part. The requirement that jurors and courts assess personal culpability of a defendant has its roots in the legislative responses to *Furman*. Some states responded to *Furman*'s command to reduce the risk of arbitrariness and discrimination by eliminating discretion altogether. In North Carolina, for example, any person convicted of first-degree murder received a mandatory death sentence.¹¹⁶ In *Woodson v. North Carolina*,¹¹⁷ decided on the same day as *Gregg*, the Court invalidated the statute and held that jurors in every case must consider whether mitigating factors suggest that a death sentence would be an inappropriately harsh punishment.¹¹⁸ Thus, unlike when the Court decided *Furman*, a death sentence today is unconstitutionally excessive either

115. See *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.” (footnotes omitted)); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” (footnote omitted)).

116. *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976).

117. *Id.*

118. *Id.* at 305.

if a person commits an insufficiently culpable crime *or* if his personal culpability is diminished relative to the typical adult.¹¹⁹

As described in this Part, the Court has followed two complementary approaches for implementing the requirement that jurors consider the personal culpability of each capital defendant before imposing a death sentence. First, the Court has imposed a burden on capital defense teams to investigate and present evidence that tends to suggest that death is an inappropriately severe punishment.¹²⁰ Unfortunately, however, the mitigation function performed in individual cases is not powerful enough to reliably prevent the execution of offenders with insufficient culpability.¹²¹ Second, the Court also has barred the application of the death penalty to entire classes of offenders, including juveniles and the intellectually disabled. As a whole, this Part details the centrality of mitigation. It both provides an alternative to the *Furman* narrative for why the death penalty is unconstitutional, and it lays the groundwork for Parts III and IV, which make the affirmative case that the two doctrinal approaches described in this Part—individualized consideration and categorical exemption—are inadequate to resolve the insufficient culpability problem. Instead, the risk that a person will be executed despite insufficient personal culpability is intolerably high, and thus, it warrants judicial abolition of the death penalty.

A. THE EVOLUTION OF CAPITAL MITIGATION IN INDIVIDUAL CASES

1. *Woodson v. North Carolina* and the Emergence of Capital Mitigation

The Court rejected a mandatory death penalty—a system that surely would have reduced the arbitrariness and discrimination concerns that *Furman* raised—in favor of a system that requires jurors to consider each defendant as a unique person.¹²² This individualization requirement calls for an assessment of culpability not based on the aggravated nature of the crime

119. See *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) (holding that intellectually disabled offenders are not subject to capital punishment because they possess diminished culpability relative to the typical adult).

120. See *infra* Part II.A (describing the rise of this mitigation function in individual cases and its increasing prominence in practice and within capital jurisprudence).

121. See *supra* note 1 and accompanying text (defining insufficient culpability as personal culpability that is diminished relative to the typically developing adult and locating insufficient culpability somewhere close to the culpability level of intellectually disabled offenders and juveniles).

122. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (explaining that *Furman* commanded states to “channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance,” whereas the *Woodson* line of cases “say that the State cannot channel the sentencer’s discretion . . . to consider any relevant mitigating information offered by the defendant” (citations omitted) (internal quotation marks omitted)); *id.* at 664–65 (Scalia, J., concurring) (asserting that “[t]he latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve”).

alone, but also upon any characteristics of the defendant that suggest that death would be too severe a punishment. For, no matter how aggravated the crime, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."¹²³

In *Woodson*, the Court developed the individualization requirement, and thus, gave rise to the mitigation function in capital cases.¹²⁴ The plurality opinion, authored by Justice Stewart, held that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a . . . constitutionally indispensable part of the process of inflicting the penalty of death."¹²⁵ Underscoring the "diverse frailties of humankind," the plurality wrote that juries must give "particularized consideration of relevant aspects of the character and record of each convicted defendant" so that they can make an informed choice about whether to impose a death sentence due to "compassionate or mitigating" circumstances.¹²⁶

Woodson set the constitutional floor: Capital defendants must be given some opportunity to present mitigating evidence. But it left open the questions about *how much* and *what kind of* mitigating evidence the state must permit capital defendants to present.

The Court clarified the scope of the mitigation requirement a decade later in *Lockett v. Ohio*.¹²⁷ The Court stated that "in all but the rarest kind of capital case, [the jury 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 that the defendant proffers as a basis for a sentence less than death."¹²⁸

In addition to clarifying the broad scope of the mitigation requirement, the *Lockett* Court offered a more penetrating explanation for why the Eighth Amendment requires the opportunity to present mitigation evidence. It stated that:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered

123. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (internal quotation marks omitted).

124. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

125. *Id.* at 304.

126. *Id.* at 303-04.

127. *Lockett v. Ohio*, 438 U.S. 586 (1978).

128. *Id.* at 604.

in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.¹²⁹

In other words, because the death penalty must be reserved for the most egregious offenders, only capital defendants who commit the most heinous offenses *and* those whose personal background and characteristics suggest that they are among the most culpable are eligible for a death sentence.

The mitigating evidence authorized by *Woodson* and *Lockett* humanizes the person who committed the unspeakable act and communicates that the defendant is indeed a person with a constellation of background experiences and character traits. Unfortunately, though *Woodson* and *Lockett* opened the door to presenting mitigating narratives, the Court did little to ensure that defense lawyers would be prepared to walk through it. Creating a right to present mitigating evidence does not ensure that such evidence will be adequately investigated and presented—even when it exists in abundance. Preparing an adequate mitigation theme is an extraordinarily difficult and time-consuming task.¹³⁰ For example, there are scores of areas to be researched, conclusions to be drawn, and themes to be developed and readied for presentation, just to prepare for the *possibility* that the case reaches the penalty phase. When lawyers fail to conduct adequate mitigation investigation, jurors are unable to perform their moral and legal function of deciding which offenders are truly among the most culpable offenders.

2. Taking the Mitigation Function Seriously

Woodson and its progeny have provided the necessary doctrinal framework to determine whether a capital defendant possessed insufficient personal culpability to warrant a death sentence.¹³¹ Yet, the doctrinal framework only matters if defense lawyers adequately investigate and present mitigating evidence. This Subpart describes two developments that have increased the quality of the mitigation function and have thus facilitated the discovery of capital defendants with diminished culpability. First, the Court has begun to bolster the mitigation function by reversing cases in which

129. *Id.* at 605.

130. This task often takes thousands of hours. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 259 (2012) (noting that “[l]awyers are expected to ‘leave no stone unturned’ as they search for the documents and witnesses who can construct a narrative of the client’s life from birth through the present,” and explaining that this task often takes thousands of hours (citation omitted)).

131. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQUALITY 211, 233 (2012) (noting that “[t]he transformation of capital-trial defense, reflected in the ABA standards (though not fully in capital practice) has been destabilizing to the continued use of the death penalty” and “has dramatically raised the cost[s] of capital punishment,” which now “are stunningly greater than their noncapital counterparts”).

defense counsel performed deficiently.¹³² Second, the mitigation function has benefited tremendously in recent years from increased professionalization.¹³³

This is not a tale of transformation from across the board inadequate representation to across the board superb (or even adequate) representation. As discussed in Parts III and IV, the difficulty with providing adequate representation remains one potentially insurmountable obstacle to the continued constitutionality of the death penalty. The developments described in this Subpart, however, have driven enough change to make the insufficient culpability problem salient and to have permanently changed the expectations for representation in capital cases.

The first boost to the mitigation function has been the Court's newfound willingness to enforce the mitigation requirement through the Sixth Amendment's guarantee of effective assistance of counsel. The door that *Woodson* and *Lockett* opened is of little value to the capital defendant whose lawyer puts forward a weak mitigation presentation and an affirmatively damaging closing argument.

Consider *Williams v. Taylor*, which the Court decided in 2000.¹³⁴ A Virginia jury had sentenced Terry Williams to death for murdering a man who refused to lend him "a couple of dollars."¹³⁵ When the time came to present mitigating evidence, the defense offered very little. The defense put on only the testimony of two of Williams's neighbors—one of whom the defense never even interviewed prior to trial—and the testimony of Williams's mother.¹³⁶ All three testified broadly that Terry Williams was not violent and "a nice boy."¹³⁷ A taped statement by a psychiatrist noted that Williams had taken bullets out of his gun in prior robberies so that no one got hurt.¹³⁸ Williams's lawyer ended his less-than-resounding closing argument by stating: "Admittedly it is very difficult to get up and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would."¹³⁹

Williams received new lawyers to represent him in habeas proceedings. These new lawyers uncovered troves of mitigating information not made

132. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005) (reversing a death sentence and remanding for a new sentencing hearing because Rompilla's trial counsel provided prejudicially deficient representation in the penalty phase of Rompilla's capital trial); *Wiggins v. Smith*, 539 U.S. 510, 534–38 (2003) (same).

133. See Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 615 (2012) (describing the professionalization of the mitigation function and discussing, for example, "the numerous capital defense training programs that have emerged to hone skills necessary for effective mitigation investigation").

134. *Williams v. Taylor*, 529 U.S. 362 (2000).

135. *Id.* at 367–68.

136. *Id.* at 369.

137. *Id.* (internal quotation marks omitted).

138. *Id.*

139. *Id.* at 369 n.2 (citation omitted) (internal quotation marks omitted).

available to the jury. Williams was “borderline mentally retarded”¹⁴⁰ and had obtained only a sixth-grade education.¹⁴¹ Williams also suffered from “dramatically described mistreatment, abuse, and neglect during his early childhood” and was committed to an institution as an 11-year old.¹⁴² Moreover, the lawyers discovered that:

Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.¹⁴³

Trial counsel failed to find these “extensive records graphically describing Williams’ nightmarish childhood.”¹⁴⁴ The Court reversed the death sentence because the performance of the defense at the “sentencing phase fell short of professional standards” and because there was a reasonable probability that but for the ineffective lawyering, a jury might have chosen a life sentence.¹⁴⁵

In *Wiggins v. Smith*,¹⁴⁶ the Court again reversed a death sentence due to trial counsel’s failure to perform an adequate mitigation investigation, even though the lawyer in *Wiggins* conducted a much more thorough investigation than Williams’s lawyers had done.¹⁴⁷ For instance, the lawyers representing Kevin Wiggins had a psychologist examine him, which indicated that he possessed a low IQ score.¹⁴⁸ The lawyers also obtained a Pretrial Sentencing Report, which indicated that Wiggins suffered from “misery as a youth,” and they “tracked down” Department of Social Services files that documented Wiggins’s placement in a number of different foster homes.¹⁴⁹ The Court characterized this investigation into Wiggins’s background as one that produced only “rudimentary knowledge” culled from “a narrow set of sources” that ignored other areas of recommended inquiry including: “medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.”¹⁵⁰

140. *Id.* at 370.

141. *Id.* at 396.

142. *Id.* at 370.

143. *Id.* at 395.

144. *Id.*

145. *Id.*

146. *Wiggins v. Smith*, 539 U.S. 510 (2003).

147. *Id.* at 537–38.

148. *Id.* at 523.

149. *Id.*

150. *Id.* at 524.

If Wiggins had received effective representation at trial, the jury would have learned not only of the vague statements that Wiggins suffered “misery as a youth,” but also that he floated around foster care. The jury would have also learned of the much darker, more grim narrative that he “experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother”;¹⁵¹ that “[h]e suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care”;¹⁵² and that “[t]he time Wiggins spent homeless, along with his diminished mental capacities, further augment[ed] his mitigation case.”¹⁵³ In other words, had the jury been privy to the “nature and extent” of the abuse Wiggins suffered, it would have been able to make a more informed moral decision about whether Wiggins should live or die.¹⁵⁴

Completing its trilogy of sentencing-phase ineffective assistance of counsel cases, the Court reversed yet another death sentence based on an insufficient investigation into the defendant’s life history in *Rompilla v. Beard*.¹⁵⁵ In that case, trial counsel had put forward only “relatively brief testimony” from Rompilla’s “family members argu[ing] in effect for residual doubt, and beseech[ing] the jury for mercy, saying that they believed Rompilla was innocent and a good man.”¹⁵⁶ Rompilla’s post-conviction lawyers, however, discovered a wealth of mitigation evidence.¹⁵⁷ His mother, an alcoholic, drank while she was pregnant with him.¹⁵⁸ His father “beat him when he was young with his hands, fists, leather straps, belts and sticks” and locked him “in a small wire mesh dog pen that was filthy and excrement filled.”¹⁵⁹ He “had no indoor plumbing in the house, he slept in the attic with no heat, and [he was] not given clothes and attended school in rags.”¹⁶⁰ Rompilla also received mental health testing prior to committing the capital offense that “the defense’s mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.”¹⁶¹ Finding a reasonable probability that this “new” mitigating evidence could lead a different jury to return a non-death sentence, the Court again reversed the death sentence.¹⁶² Moreover, taken together, these three cases sent a clear message that the

151. *Id.* at 535.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Rompilla v. Beard*, 545 U.S. 374 (2005).

156. *Id.* at 378.

157. *See id.* at 378–79.

158. *Id.* at 391–92.

159. *Id.* at 392.

160. *Id.*

161. *Id.* at 391 (citation omitted).

162. *Id.* at 393.

Court stood willing to enforce the promise of *Woodson* and *Lockett* when threatened by ineffective lawyering.

Around the same time that the Court signaled this preparedness to enforce *Woodson* and *Lockett* through regulating ineffective lawyering at the sentencing phase of capital trials, the mitigation function received an additional boost in the forms of increased professionalization. Specifically, the legal profession increased recognition of the mitigation function as one that requires specialized skills and a careful delineation of performance expectations of those who investigate the bio-psycho-social histories of capital defendants in preparation for trial.¹⁶³

This increased professionalization has coincided with a rise in appointments of mitigation specialists in capital cases and the hiring of staff mitigation specialists at many public defender offices that handle capital cases.¹⁶⁴ Training opportunities for mitigation specialists—and capital defense teams generally—increased in both frequency and quality.¹⁶⁵ The American Bar Association (“ABA”) had long called for the appointment of a mitigation specialist in capital cases and had set some basic parameters for the mitigation function, including that at least one person on the defense team must be “qualified by training and experience to screen for the presence of mental or psychological disorders or impairments.”¹⁶⁶ In 2008, however, the ABA released a full set of Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.¹⁶⁷ These guidelines aimed to “summarize prevailing professional norms for mitigation investigation, development and presentation by capital defense teams, in order to ensure high quality representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction.”¹⁶⁸ The guidelines set standards relating to the recommended membership formation, compensation, skillset, performance standards, and cultural competencies of mitigation specialists.¹⁶⁹

163. See Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL’Y 337, 339 (2009) (noting that “[t]he clarity of the Court’s decisions [in *Williams*, *Wiggins*, and *Rompilla*] has also coincided, whether directly or indirectly, with a surge in hiring mitigation specialists in capital public defender offices, as well as with increased training opportunities for mitigation specialists nationwide”).

164. *Id.*

165. See *id.*

166. AM. BAR ASS’N, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952 (2003). For a discussion of when and how lead defense counsel should assemble a defense team, see *id.* at 999–1000.

167. AM. BAR ASS’N, SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES (2008), *reprinted in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

168. *Id.* § 1.1 (A).

169. *Id.*

The increased opportunity for appointment and training, along with a clear set of guidelines and a suggestion from the Court that it would enforce the mitigation function, suggested that mitigation presentations would be more frequent and would be of higher quality. Indeed, as Professors Steiker and Steiker have noted:

High profile cases yielding life sentences in the wake of extensive mitigation cases—such as those involving Terry Nichols (who participated in the Oklahoma City bombing), and Brian Nichols (who killed a state court judge and others while escaping from his rape trial in a Georgia courthouse)—reflect the new reality that no crimes, no matter their severity, are invariably punished by death.¹⁷⁰

This does not mean, however, that individual determinations of insufficient culpability suffice to guard against the imposition of the death penalty on offenders with insufficient personal culpability. As one means of addressing this problem, the Court has created categorical exclusions for groups of offenders whose culpability is reliably insufficient.

B. CATEGORICAL EXCLUSIONS FOR INSUFFICIENTLY CULPABLE CLASSES OF OFFENDERS

The Court's mitigation jurisprudence reflects an understanding that the excessiveness of the death penalty cannot be gauged by considering the crime apart from the personal characteristics of the criminal. There is no doubt that the development of the mitigation function in individual cases has spared countless insufficiently culpable offenders from the execution chamber. More than simply changing the way the death penalty is assessed in individual cases, however, the *Woodson-Lockett* approach also has spawned categorical exemptions from capital punishment for certain classes of offenders whose members tend to possess diminished culpability relative to the typical adult.

This Subpart describes the Court's creation of categorical exemptions as a supplement to the mitigation function performed in individual capital cases. It aims to explain the set of questions that the Court asks in order to gauge whether a categorical exemption is necessary. It also seeks to establish whether the insufficient culpability shared by intellectually disabled and juvenile offenders is typical of condemned offenders; or, instead, if most executed offenders possess the type of extreme culpability that the Court envisioned. The Subpart begins with *Atkins v. Virginia* and *Roper v. Simmons*, respectively, in which the Court held that mental retardation and juvenile status, once proven, are not factors to be weighed by jurors.¹⁷¹ Instead, once

170. Steiker & Steiker, *supra* note 131, at 233.

171. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Prior to *Roper*, the Court in *Thompson v. Oklahoma* barred the death penalty for juveniles under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

they are proven, these characteristics establish the insufficient culpability that categorically exclude the defendant from the death penalty.¹⁷²

Recall that the Court finds a punishment practice to be excessive for Eighth Amendment purposes when the practice fails to “measurably contribute” to the permissible aims of punishment.¹⁷³ In the capital punishment context, retribution is the punishment objective that anchors the Court’s analysis.¹⁷⁴ In order to measurably contribute to the retributive purposes of capital punishment, the “[death] penalty must be reserved for the worst of crimes and limited in its instances of application.”¹⁷⁵ This “limited in its instances of application” is operative because it requires that the death penalty is not appropriate for a defendant whose baseline culpability is lower than that of a typical adult.¹⁷⁶

In *Atkins*, the Court clarified at the outset that, akin to the typical adult, “[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial.”¹⁷⁷ Moreover, like the typical adult, intellectually disabled offenders are not absolved of legal responsibility.¹⁷⁸ Nonetheless, “[b]ecause of their impairments,” intellectually disabled offenders “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁷⁹ If the death penalty is not a “just desert[]” for the typical adult who commits murder, the Court reasoned, then the personal culpability of the typical intellectually disabled offender

172. See, e.g., *Roper*, 543 U.S. at 571 (“Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”).

173. *Id.* at 593.

174. *Id.* at 571 (“Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”). In *Kennedy*, the Court defined retribution as “society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused.” *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008). The Court focuses most heavily on retribution, though it acknowledges that deterrence is also a ground upon which the death penalty is justified. See *id.* at 441 (citing *Gregg v. Georgia*, 428 U.S. 153, 185–86 (1976)) (“[T]here is no convincing empirical evidence either supporting or refuting th[e] view [that the death penalty serves as a significantly greater deterrent than lesser penalties].” (alteration in original) (internal quotation marks omitted))).

175. *Kennedy*, 554 U.S. at 446–47.

176. *Atkins*, 536 U.S. at 318.

177. *Id.* at 318.

178. *Id.*

179. *Id.*

definitely is insufficient.¹⁸⁰ Hence, the execution of an intellectually disabled offender does not meaningfully contribute to the goal of retribution.

Children under 18, too, possess insufficient personal culpability. In *Roper v. Simmons*, the Court explained that, unlike the typical adult, children possess “[a] lack of maturity and an underdeveloped sense of responsibility” that “often result in impetuous and ill-considered actions and decisions.”¹⁸¹ Juveniles, therefore, “cannot with reliability be classified among the worst offenders,”¹⁸² even though they, like mentally retarded offenders, know the difference between right and wrong. Other characteristics—including that they are “vulnerable or susceptible to negative influences and outside pressures, including peer pressure” and that they possess “more transi[ent], less fixed” identities—further corroborate that the death penalty is not “proportional if [it] . . . is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”¹⁸³ As a result, because juveniles tend to have diminished culpability relative to the typical adult, sentencing these offenders to death also does not meaningfully contribute to retribution.

Taken together, then, the Court in *Atkins* and *Roper*, respectively, held that entire classes of people are ineligible for the death penalty. The Court reached this conclusion because, in part, their shared insufficient culpability meant that the death penalty is not a just desert.

Atkins and *Roper* took the *Woodson–Lockett* concept of the right to present a mitigation narrative in a particular case and expanded its application to constitutional challenges against a punishment practice for particular classes of offenders. These cases signal that the mitigation function is not only critical to individual capital cases, but also that the assessment of personal culpability—as opposed to crime severity—is at the center of the Court’s current thinking about the constitutionality of the death penalty more broadly. The question that remains, however, is how successful the Court’s mitigation project has been in terms of ensuring that those offenders without sufficiently extreme culpability are not executed. Part III assesses whether insufficient culpability is a widespread problem. Finding that it is a widespread problem, the following Part concludes by querying whether the mitigation function has exposed the truth that diminished culpability is the rule—not the exception—among the limited class of offenders that commit death-eligible homicides.

180. *Id.* at 319 (internal quotation marks omitted).

181. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (alteration in original) (internal quotation marks omitted).

182. *Id.*

183. *Id.* at 569–71.

III. INSUFFICIENT CULPABILITY: RULE OR EXCEPTION?

This Article claims that insufficient culpability—and not arbitrariness or discrimination in the assessment of crime severity—presents the gravest threat to a constitutional death penalty today. This Part advances this claim by illustrating that diminished personal culpability is not limited to intellectually disabled or juvenile offenders, but instead, that it is possessed by most of the people who are executed in America. This Part also considers whether the insufficient culpability problem stems from a broken capital punishment system, or instead, if the extreme culpability standard that the Court's Eighth Amendment jurisprudence contemplates is mostly mythical.

A. INSUFFICIENT CULPABILITY IS A WIDESPREAD PROBLEM

Carving out exceptions for juveniles and intellectually disabled individuals was an important first step in preventing the execution of offenders that possess culpability that is mitigated relative to the typical adult. But the logic of *Roper* and *Atkins* extends far beyond these two specific types of mitigation. To illustrate the power and breadth of mitigation, this Part describes several types of mitigating evidence that suggest intellectual and behavioral deficits similar to those associated with mental retardation and juvenile status. Then, borrowing from previous work,¹⁸⁴ I show that most recently executed offenders possess one—and often two or three—of these functional deficits.

The existing exclusions for mental retardation and juvenile status themselves do not adequately capture the universe of offenders whose intellectual impairments and youthfulness mitigate their culpability relative to the typical adult. The categorical bar against executing intellectually disabled offenders captures only a subset of offenders with culpability-diminishing intellectual disabilities. Consider *Atkins*-ineligible offenders with borderline intellectual functioning, a condition which describes roughly 9% of the population.¹⁸⁵ Several states place IQ cutoffs for mental retardation at 70 or below, whereas borderline functioning extends through 79.¹⁸⁶ Practically speaking, the problems associated with mental retardation are also associated with borderline functioning. An IQ of 80 “diminishes [an offender’s] capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand the reactions of others.”¹⁸⁷

184. See Smith et al., *supra* note 3 (examining the mitigating evidence presented in the cases of 100 recently executed offenders).

185. *Id.* at 1230–31 (citing WECHSLER INTELLIGENCE SCALE FOR CHILDREN (4th ed. 2004)).

186. See Alexis Krulish Dowling, Note, *Post-Atkins Problems with Enforcing the Supreme Court’s Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 790–91, 799 n.232 (2003).

187. Smith et al., *supra* note 3, at 1231; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

Further complicating matters, the recently released Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”), considered the definitive source for the field, underscores the difficulty of relying on IQ scores in a forensic context as functional deficits are often more severe than the IQ score would otherwise indicate.¹⁸⁸

Nor does the bar on juvenile executions solve the problem of the diminished culpability of youthful offenders. The *Simmons* Court itself recognized that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”¹⁸⁹ Brain development in the areas associated with things like impulse control, empathy, and judgment is not completed until the mid-20s.¹⁹⁰ Indeed, the same studies that the Court relied upon to draw inferences that juveniles tend to lack maturity, are susceptible to peer pressure and negative influence, possess an underdeveloped sense of responsibility, and have unformed characters also suggest that these deficits persist into young adulthood.¹⁹¹ There is a reason why a person cannot buy alcohol until 21 and why car insurance is so much more expensive for drivers under 25.¹⁹² Recognizing that the functional deficits that characterize youthfulness do not dissipate when a person reaches their eighteenth birthday, courts have routinely acknowledged youthfulness as a mitigating factor in death penalty cases.¹⁹³

If these boundary problems were the only obstacle to *Atkins* and *Roper* solving the insufficient culpability problem, then there would be little need for systemic concern. But it is one thing to acknowledge the need to draw lines to make a rule administrable, and another thing altogether when the problem of insufficient culpability extends far beyond the edges around the categorical boundaries the Court already has drawn.

Consider traumatic brain injuries, which have become more prevalent in recent years as veterans return home from war. People who suffer a traumatic brain injury often have great difficulty controlling their “irritability or anger”

188. Smith et al., *supra* note 3, at 1231.

189. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

190. Smith et al., *supra* note 3, at 1239.

191. *Id.* at 1238–39; *see also Roper*, 543 U.S. at 569–70.

192. See Ruth A. Shults et al., *Reviews of Evidence Regarding Interventions to Reduce Alcohol-Impaired Driving*, 21 AM. J. PREVENTIVE MED. 66, 66 (2001) (noting that “[b]y 1987, all states had enacted a minimum legal drinking age of 21 years”); *Frequently Asked Questions: How Old Do I Have to Be to Rent a Car from Thrifty?*, THRIFTY.COM, <https://www.thrifty.com/CustomerCare/content/FAQ.aspx> (last visited Jan. 24, 2015) (“The renter must be at least 21 years of age, though there are a few areas in which those under 21 have the opportunity to rent. Renters under the age of 25 will be subject to a daily surcharge.”).

193. See THERESA E. FARLEY, FLORIDA DEATH CASES WHERE NON-STATUTORY MITIGATORS WERE FOUND 62 (2012), available at <https://sociology.colorado.edu/sites/default/files/nonstat2012.pdf> (listing mitigating factors found in Florida capital cases that resulted in a death sentence, including, for example, the Florida Supreme Court’s finding that a defendant’s “[v]ery young” age of 21 was a nonstatutory mitigating factor).

and often engage in “uninhibited or impulsive behavior.”¹⁹⁴ Despite their association with significant functional deficits, traumatic brain injuries that occur after an offender has turned 18 are *Atkins*-ineligible because the scientific community understands intellectual disability to onset before 18.¹⁹⁵ Consider *Sears v. Upton*, in which the Court recently reversed a death sentence in a case where the defendant “perform[ed] at or below the bottom first percentile in several measures of cognitive functioning and reasoning” due to “significant frontal lobe brain damage [he] suffered as a child, as well as drug and alcohol abuse in his teens.”¹⁹⁶ The Court concluded that “[r]egardless of the cause of his brain damage,” *Sears* was “among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli” and his “ability to organize his choices, assign them relative weight and select among them in a deliberate way [was] grossly impaired.”¹⁹⁷

Or consider the functional deficits often associated with offenders that have a severe mental illness. As Professor Christopher Slobogin has noted, “[t]he same types of assertions that *Atkins* and *Thompson* make about people with retardation and juveniles can be made about people with significant mental illness.”¹⁹⁸ By definition, mental illness can interfere profoundly with a person’s behavior, thought, and mood. Consider a person with schizophrenia, which is not atypical among capital defendants with severe mental illness.¹⁹⁹ Untreated, schizophrenia can cause “delusions (fixed, clearly false beliefs); hallucinations (clearly erroneous perceptions of reality); extremely disorganized thinking; or very significant disruption of consciousness, memory, and perception of the environment.”²⁰⁰ Similarly, bipolar-induced mania is characterized by agitation, impulsivity, and an

194. Smith et al., *supra* note 3, at 1232 (quoting CTR. FOR DISEASE CONTROL, DEP’T OF HEALTH & HUMAN SERVS., TRAUMATIC BRAIN INJURY IN PRISONS AND JAILS: AN UNRECOGNIZED PROBLEM 2 (2013), available at http://www.cdc.gov/traumaticbraininjury/pdf/Prisoner_TBI_Prof-a.pdf (internal quotation marks omitted) (finding that traumatic brain injuries are highly correlated with violent offenses among male offenders)).

195. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18”).

196. *Sears v. Upton*, 561 U.S. 945, 945–46 (2010).

197. *Id.* at 949 (emphasis added) (citations omitted) (internal quotation marks omitted).

198. Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 297 (2003).

199. See, e.g., Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013, 6:02 AM), <http://www.motherjones.com/politics/2013/01/death-penalty-cases-mental-illness-clemency> (listing seven offenders sentenced to death despite being diagnosed with paranoid schizophrenia).

200. Ronald J. Tabak, *Mental Disability and Capital Punishment: A More Rational Approach to a Disturbing Subject*, HUM. RTS., Spring 2007, at 5, 6.

increased willingness to engage in high-risk behaviors.²⁰¹ Major depression, too, can trigger “[c]ontrolling, violent or abusive behavior . . . [i]rritability or inappropriate anger [and] [r]isky behavior.”²⁰²

Drug addiction, too, has important implications for capital punishment. Addiction is “a chronically relapsing disorder characterized by a compulsion to seek and take a drug, loss of control in limiting intake, and emergence of a negative emotional state . . . when access to the drug is prevented.”²⁰³ And like juvenile status or intellectual disability, addiction is strongly associated with “impairment in behavioral control, . . . diminished recognition of significant problems with one’s behaviors and interpersonal relationships,” and impaired “perception, learning, impulse control, compulsivity, and judgment.”²⁰⁴ While addiction is often perceived as a failure of willpower, modern research demonstrates that addicts often had “a vulnerability to becoming addicted [that] was biologically based and inheritable.”²⁰⁵ Moreover, “[m]ost problematic drug use is related to stress, trauma, genetic predisposition, mild or serious mental illness, use at an early age, or some combination of those.”²⁰⁶

Addiction reduces culpability in several different senses. First, the state of being addicted is itself highly correlated with the type of functional deficits that the Court attributed to juveniles in *Roper*; including, most importantly,

201. The ABA has concluded that offenders whose conduct was impaired by serious mental illness should be exempt from the death penalty. See Paul M. Igasaki et al., *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668, 670 (2006) (defining a “severe” disorder or disability, which is meant to signify a disorder that is roughly equivalent to disorders that mental health professionals would consider the most serious “Axis I diagnoses,” and noting that they “include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders”). Indeed, recognizing the potential impact of mental illness on cognition and behavior, the ABA has called for a bar on executions for severely mentally ill offenders whose “disorder significantly impaired cognitive or volitional functioning at the time of the offense.” Ronald J. Tabak, *Individual Rights & Responsibilities: Mental Disability and Capital Punishment*, GPSOLO, Mar. 2008. Scholars, too, have suggested the inappropriateness of executing severely mentally ill offenders. See, e.g., Slobogin, *supra* note 198, at 303–14 (arguing that some set of mentally ill offenders should be categorically ineligible for capital punishment); Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 435 (2009) (same); Bruce J. Winick, *The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 789 (2009) (same).

202. *Male Depression: Understanding the Issues*, MAYO CLINIC (May 15, 2013), <http://www.mayoclinic.org/diseases-conditions/depression/in-depth/male-depression/art-20046216>.

203. Floyd E. Bloom, *Does Neuroscience Give Us New Insights into Drug Addiction?*, in A JUDGE’S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 42, 43 (Andrew S. Mansfield ed., 2010).

204. *Definition of Addiction*, AM. SOC’Y ADDICTION MED. (Apr. 19, 2011), <http://www.asam.org/for-the-public/definition-of-addiction>.

205. Bloom, *supra* note 203, at 44.

206. DAVID SHEFF, CLEAN: OVERCOMING ADDICTION AND ENDING AMERICA’S GREATEST TRAGEDY, at xi (2013).

impaired judgment and impulse control problems.²⁰⁷ Second, addicted offenders are often under the influence of drugs or alcohol during the capital offense. Indeed, as many as half of all homicides are committed while the offender is intoxicated.²⁰⁸ This is an important consideration because, as the Court recently suggested, even a “vicious murder” is mitigated, in part, if the defendants were “high on drugs and alcohol.”²⁰⁹

Moreover addiction is an important part of the conversation about drug use during a crime because the status of being addicted decreases the voluntariness of drug use on any particular occasion. Justice White made this very point in his concurring opinion in *Powell v. Texas*.²¹⁰ “Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion.”²¹¹ Finally, addiction reduces culpability when it is considered in conjunction with mental illness. Mental illness can cause individuals to use the drugs that ultimately leave them addicted, creating sort of a downward spiral of diminished culpability.²¹²

Exposure to complex trauma can also reduce culpability because it can lead to serious functional deficits that rival those that tend to define juvenile status and intellectual disability. Veterans are a relevant subset of people whose exposure to traumatic events have led to Posttraumatic Stress Disorder (“PTSD”), a condition which can encompass “sleep problems, hypervigilance, exaggerated startle response, irritability, outbursts of anger, difficulty concentrating, difficulty completing tasks, ‘flashbacks’ that involve reliving the traumatic event, impulsive behavior, and, in some cases, psychotic behavior.”²¹³ Recently, in *Porter v. McCollum*, the Court reversed the death sentence of a veteran when the jury in his case did not have the opportunity to fully consider “his heroic military service and the trauma he suffered

207. See Bloom, *supra* note 203, at 42–44.

208. See *Montana v. Egelhoff*, 518 U.S. 37, 49 (1996) (citing SEC’Y OF HEALTH, EDUC. & WELFARE, THIRD SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 64 (1978)) (noting that “[a] large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides”).

209. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

210. *Powell v. Texas*, 392 U.S. 514, 548–54 (1968) (White, J., concurring).

211. *Id.* at 548.

212. Fredrick E. Vars, *When God Spikes Your Drink: Guilty Without Mens Rea*, 4 CALIF. L. REV. 209, 215 (2013) (stating in a related context that “mental illness itself [can] cause[] the person to drink or use drugs,” and noting that “[s]elf-medication with drugs and alcohol is a common phenomenon”).

213. Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2975, 2993 (2009) (“[T]he Court should find that both PTSD and TBI symptoms significantly affect judgment so as to render combat veterans suffering from those conditions similar to, if not less culpable than, the mentally retarded and juveniles.”).

because of it.”²¹⁴ During his military service, “Porter suffered a gunshot wound to the leg” but continued to fight with his unit for five “bitter cold night[s],” despite “little or no sleep” and “little or no food.”²¹⁵ Several months later, Porter’s unit again “defended itself for two days and two nights under constant fire” and his fellow soldiers “were just dropping like flies as they went along.”²¹⁶ The Court noted, “Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.”²¹⁷ Porter’s superior testified that many veterans came back from war as “nervous wrecks.”²¹⁸ Among other things, Porter “suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night.”²¹⁹ His family also reported that he “developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all.”²²⁰ As the Court noted, PTSD symptoms are “not uncommon among veterans returning from combat.”²²¹

For many capital defendants, however, the trauma did not occur on the battlefield in Iraq or Afghanistan, but rather, it occurred in the form of unrelenting physical and sexual abuse in their homes, schools, or other places where children are supposed to be safe. In addition to his horrific experience at war, Porter had been the “favorite target” of his “violent” father, “particularly when [he] tried to protect his mother.”²²² The Court described one instance where “Porter’s father shot at him for coming home late, but missed and just beat Porter instead.”²²³ Porter’s experience with childhood abuse is not unique among capital defendants. Indeed, it is common in capital cases to see complex trauma dating back to the defendant’s childhood that has contributed to negative outcomes throughout the person’s life.²²⁴ Adults

214. Porter v. McCollum, 558 U.S. 30, 33 (2009). Nor did the jury have the opportunity to consider the defendant’s “abusive childhood,” “long-term substance abuse,” or “impaired mental health and mental capacity.” *Id.*

215. *Id.* at 34.

216. *Id.*

217. *Id.* at 35.

218. *Id.*

219. *Id.*

220. *Id.* at 36.

221. *Id.* at 35 n.4 (citing *The Fiscal Year 2010 Budget for Veterans’ Programs: Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. 30 (2009) (testimony of Eric K. Shinseki, Secretary, U.S. Department of Veterans’ Affairs) (reporting that approximately 23% of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD).

222. *Id.* at 33.

223. *Id.*

224. See, e.g., *id.* at 449–51; see also Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 683 n.244 (2004) (citing Clint Williams, *Paths Paved in Violence: Consequences of Abuse Evident on Death Row*, ARIZ. REPUBLIC, Nov. 21, 1993, at A25 (“For many death-row inmates, there simply isn’t enough available information . . . Probation officers rarely dig deeply into a killer’s family history. The

who were maltreated as children also are far more likely to engage in criminal activity as adults; this is true for a variety of serious crimes, including assaults and armed robberies.²²⁵

The link between abuse and criminality becomes stronger still as the seriousness of the maltreatment increases or when a child suffers from multiple forms of maltreatment.²²⁶ Indeed, though growing up in poverty is itself a form of trauma, maltreatment and poverty together are associated with functional deficits that exceed either maltreatment or poverty separately.²²⁷ As Professor Craig Haney underscores, “there is much research that documents the negative effects of poverty on early childhood development—including the ways in which severe forms of deprivation can lead to [among other things] poor impulse control, and problematic intellectual performance and achievement.”²²⁸ Children raised in poverty—and often death-penalty defendants have been raised in poverty—are both more likely to be maltreated and more likely to commit a crime after being maltreated than the typical child who suffered maltreatment.²²⁹

From intellectual disabilities and youthfulness to severe mental illness and PTSD, the presence of any number of mitigating factors represents a high risk that a capital defendant can be executed despite functional deficits that suggest that death is an inappropriate sentence. The presence of one or more mitigating factors in a capital case that results in an execution is widespread. Along with Sophie Cull and Professor Zoe Robinson, I recently reviewed pleadings and judicial opinions associated with the cases of 100 recently executed offenders.²³⁰ We found that 87% of the executed offenders “possessed an intellectual impairment, had not yet reached their twenty-first birthday, suffered from a severe mental illness, or endured marked childhood

killers themselves are seldom candid.”); *see also id.* at 683 (noting that “[o]ne informal review of court records in one state found that approximately 50% of the state’s death row inmates had evidence they had been victims of childhood abuse or neglect, and the actual number was certainly higher”).

225. Janet Currie & Erdal Tekin, *Does Child Abuse Cause Crime?* 3, 25–26 (Nat’l Bureau of Econ. Research, Working Paper No. 12171, 2006), *available at* http://www.nber.org/papers/w12171.pdf?new_window=1; *see also* Dorothy Otnow Lewis et al., *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 AM. J. PSYCHIATRY 1161, 1166 (1985) (reporting that delinquents’ experience of suffering child abuse, when combined with neuropsychiatric symptoms, is strongly correlated with the commission of a homicide later in life). This finding held true even among twins, where one twin was maltreated while the other was not. Currie & Tekin, *supra*, at 6–7.

226. Currie & Tekin, *supra* note 225, at 31.

227. *Id.* at 26.

228. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 865 (2008).

229. Currie & Tekin, *supra* note 225, at 9.

230. *See* Smith et al., *supra* note 3, at 1255.

trauma,” and “[o]ver half of these offenders fell into multiple mitigation categories.”²³¹

The executed offenders had a variety of functional deficits and had manifested mitigated culpability based on these traits. One example is Clarence Carter, who “suffered from organic brain dysfunction,” demonstrated great difficulty understanding spoken words and processing complex information, and had an IQ score that placed him in the borderline intellectual functioning range.²³² Another example is Richard Cobb, sentenced to death at 18-years-old; brain damaged from birth because his mother had used alcohol and drugs during her pregnancy, he subsequently developed “serious emotional problems.”²³³ After losing his father, John Ferguson became depressed, started seeing “shadow people,” and had “delusions that his father was still alive and would speak to him.”²³⁴ After later suffering “a gunshot wound to the head,” Ferguson’s condition worsened; he became “paranoid and hostile” and was “diagnosed with paranoid schizophrenia.”²³⁵ He became convinced that he was the “Prince of God,” a delusion that led to his forced psychiatric commitment.²³⁶ The psychiatric hospital released Ferguson “months before he committed the crime” for which he was executed.²³⁷ His last words prior to execution were, “I just want everyone to know that I am the Prince of God and I will rise again.”²³⁸ A final example is Daniel Cook, whose mother and grandparents repeatedly raped and molested him and whose father beat and otherwise abused him, such as when he burned Cook’s genitals with a lit cigarette.²³⁹ Subsequently, in a foster home, Cook was chained naked to a bed and raped by his foster parent as other adults watched through a one-way mirror from outside the room.²⁴⁰ Later, on separate occasions, he was forcibly circumcised, gang raped, and molested.²⁴¹ From his teenaged years onward, he was addicted to alcohol, barbiturates, and hallucinogens; he attempted to kill himself and was hospitalized on numerous occasions for depression and suicidal ideations.²⁴² As the mitigating evidence in these cases and as the other go-odd offenders

231. *Id.* at 1252.

232. *Id.* at 1233 n.68.

233. *Id.* at 1235–36 (internal quotation marks omitted).

234. *Id.* at 1240 (internal quotation marks omitted).

235. *Id.* (internal quotation marks omitted).

236. *Id.* (internal quotation marks omitted).

237. *Id.*

238. *Id.* (internal quotation marks omitted); see also John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 959, 962 (2005) (finding that “there have been 106 successful volunteers in the modern era,” of which “88% had documented mental illness or severe substance-abuse disorders”).

239. Smith et al., *supra* note 3, at 1246.

240. *Id.*

241. *Id.*

242. *Id.*

studied show, many executed offenders exhibit “functional deficits that rival—and in some respects outpace—those associated with [mental retardation] and juvenile status.”²⁴³

As Professor Jeffrey Kirchmeier has explained, these types of mitigation are important for the assessment of personal culpability because they have the tendency to “show that the defendant is less able to control herself or himself” and because they help to provide a more complete picture of the context “that led the defendant to commit the crime.”²⁴⁴ Intellectual deficits, youthfulness, mental illness, and complex trauma are types of mitigation that show why mitigation marks the path to abolition of the death penalty. Suffering brain damage like Clarence Carter, or being youthful like Richard Cobb, or experiencing schizophrenia like John Ferguson, or enduring unspeakable trauma like Daniel Cook reduces culpability. Permitting capital punishment when we regularly execute people with these types of vulnerabilities makes impossible the Eighth Amendment command of only executing those with the most extreme culpability.

B. THE MYTH OF EXTREME CULPABILITY?

Neither the mitigation function in individual cases nor the existing categorical exemptions suffice to ensure that insufficiently culpable offenders are not executed. It undersells the point, though, to suggest that offenders with insufficient culpability are only sometimes sentenced to death and executed. Indeed, insufficient culpability appears to be the rule, rather than the exception.²⁴⁵ One question, then, is whether better procedures for investigating, presenting, and assessing personal culpability could be devised and implemented to help guard against the imposition of the death penalty in cases in which the punishment would be excessive. Yet, with the Court’s mitigation project in full bloom, and in light of contemporary knowledge of the role of mitigating factors on personal culpability, it makes sense to contemplate an even more fundamental question: If we challenge the narrative of extreme culpability will it hold?

The extreme culpability requirement reflects an understanding that a person sentenced to death must possess “a consciousness materially more ‘depraved’ than that of any person guilty of murder.”²⁴⁶ Legislatures and judges often express this notion of extreme culpability with words like

243. *Id.* at 1252.

244. Kirchmeier, *supra* note 224, at 684.

245. See Smith et al., *supra* note 3, at 1226–28 (detailing mitigation for 100 recently executed offenders).

246. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); see also *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[C]apital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution.” (internal quotation marks omitted)); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (explaining that “the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State”).

“monster” or “pitiless” or “cold-blooded.”²⁴⁷ Prosecutors, too, use non-human terminology to reference offenders whom they believe possess the requisite extreme culpability. In *Darden v. Wainwright*, for example, the Court discussed a case where the prosecution referred to the defendant during closing arguments as an “animal” that “shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.”²⁴⁸ This translation of extreme culpability into dehumanizing terminology creates caricatures of the nuanced people who commit admittedly terrible acts.

Apart from this informal dehumanization, capital defendants often are labeled as “sociopaths,” or “psychopaths,” or terms indicating a total lack of concern for other human beings.²⁴⁹ As Professor Carter Snead has emphasized, introducing evidence of antisocial personality disorder or psychopathy “has proven to be a highly effective strategy for prosecutors given that the diagnostic criteria for each sound to the lay juror essentially like a straightforward description of ‘irreparable corruption’” and “that no rehabilitation is possible and that future criminal violence is inevitable.”²⁵⁰ Taken together, the informal animalistic references and the formal labeling of the offender as someone who is somehow not fully human reveals an important aspect of our collective understanding of extreme culpability as a minimum standard for death-eligibility.

Another problem with the notion of extreme culpability is that the characteristics that diminish culpability are not always as visible as severe mental illness or juvenile status. Indeed, for some offenders with the most innately compromised functional capacity, without an fMRI we might not be able to detect the source of their diminished culpability. The notion of extreme culpability emerges from an inability to comprehend the *why*.²⁵¹

247. See, e.g., *Arave v. Creech*, 507 U.S. 463, 471–74 (1993) (upholding an Idaho Supreme Court construction of a statutory aggravating circumstance as requiring a finding that the defendant is a “cold-blooded, pitiless slayer”).

248. *Darden v. Wainwright*, 477 U.S. 168, 180 & n.12 (1986).

249. O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1326 (2007) (“Prosecutors regularly invoke diagnoses of psychopathy or antisocial personality disorder in capital sentencing, likely because both are highly correlated with recidivist violence.”).

250. *Id.* at 1326–27 (internal quotation marks omitted).

251. See generally Susan T. Fiske, *From Dehumanization and Objectification to Rehumanization: Neuroimaging Studies on the Building Blocks of Empathy*, 1167 ANNALS N.Y. ACAD. SCI. 31 (2009) (explaining that among the most socially stigmatized groups, of which murderers certainly qualify, one pathway to dehumanization is that others do not recognize them as fully human on a neurological level). Mitigation is the antidote to dehumanization. See Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 261 (2008) (“Mitigation provides the biography of mental disability. It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed.”). An fMRI is one way of measuring brain activity. D.D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727, 727 (2002).

When considering the gravity of murder, a juror (or legislator or judge) puts herself in the shoes of the perpetrator: Would I ever kill another person? The idea itself is unimaginable for most of us. Homicide is such a massive deviation from our shared social norms and morality that it is difficult to empathize with a person who *could* commit a murder. And when a person cannot imagine herself pulling the trigger, then the natural conclusion is that the person who *could* kill is not like you.²⁵²

In this way, the process of assessing culpability is necessarily an act of empathy. When we recreate the scene inside our own heads, we ask ourselves what thoughts and impulses would propel us forward or cause us to stop or slow down. The problem, though, is that not everyone shares the same degree of agency in their actions, the same impulse control, and the same ability to process information or respond to stress. It is not necessary to look any further than the cases of Clarence Carter, Daniel Cook, Richard Cobb, or John Ferguson to find ample evidence for that proposition.

To be clear, the argument is not that people who commit murder have *no agency*. As the Court noted in *Atkins*, “mentally retarded persons frequently know the difference between right and wrong.”²⁵³ Insufficient culpability simply embraces the notion that “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”²⁵⁴ In other words, if life is a treadmill and most of us are walking on level ground, people with insufficient culpability who commit horrific murders tend to be those for whom the incline has been sharply elevated.

Consider that some people appear to have deficits in the so-called “empathy circuit,” which is the name for the multiple regions of the brain that regulate empathic response.²⁵⁵ Such a deficit illustrates why the notion of extreme culpability is itself flawed. Brain abnormalities, like those associated with empathy deficits, illustrate that even the rare offender who has not suffered from an intellectual impairment or severe mental illness, who was

252. Haney, *supra* note 22, at 550 (describing how the idea of a murderer for many people, created by the media, is that of a non-human, pure demonic agent, with “no personal history, no human relationships, and no social context”).

253. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

254. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

255. SIMON BARON-COHEN, *THE SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY* 23 (2011). *But see* Kent Kiehl, *Can Neuroscience Identify Psychopaths?*, in *A JUDGE’S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION* 47, 50 (Andrew S. Mansfield ed., 2010) (“[A] strong argument can be made for the presence of abnormalities in limbic brain systems in psychopathy. However, research still needs to clarify the specificity of these deficits, their origin and stability over the lifespan, and their diagnostic utility. Thus, we are not currently at the point where we can use neuroscience to definitively identify, or diagnose, individuals with psychopathy.”).

not youthful when he committed the offense, and who did not suffer from a traumatic background, nonetheless can possess diminished culpability relative to the typical adult.²⁵⁶ As Professor Kent Kiehl noted, if a “psychopath has an emotional IQ that’s like a 5-year-old,” then it would make sense to “make the same argument for individuals with low emotional IQ—that maybe they’re not as deserving of punishment, not as deserving of culpability”—as the Court did in *Atkins* and *Roper*.²⁵⁷

Another problem with the idea of extreme culpability is that people can change over time. An offender who presents as the embodiment of evil at sentencing can be transformed by the time he is executed—which often occurs many years, even decades, later. For example, recall that in *Roper* the Court emphasized that juvenile status is transitory. The Court recently expanded on this notion of personal transformation when it applied its categorical bar framework in *Graham v. Florida*.²⁵⁸ to hold that juveniles who commit a non-homicide offense cannot be sentenced to life without the possibility of parole.²⁵⁹ In *Graham*, the Court “forbid States from making the judgment at the outset that those offenders never will be fit to reenter society,” reasoning that juveniles evolve as they grow into adults and often transform their lives once they “achieve maturity of judgment and self-recognition of human worth and potential.”²⁶⁰ To hold otherwise, the Court found, would risk a finding that the juvenile “will receive a life without parole sentence for which he or she lacks the moral culpability.”²⁶¹ The same point applies to adult offenders that suffer from untreated mental illness or drug addiction, as the behavioral and cognitive deficits that accompany these conditions frequently

256. See *supra* note 1 and accompanying text. Whether *anyone* is the typical adult the Court references in cases like *Atkins* is beyond the scope of this Article, but what is clear is that the broad swath of people subjected to capital punishment do not meet the standard. Perhaps the problem is that no one has the kind of extreme culpability the Court holds that capital offenders must possess. Or maybe it is that people who commit murder are not representative of the general adult population in terms of their cognitive and behavioral limitations. The latter is probably closer to being correct.

257. Barbara Bradley Hagerty, *Inside a Psychopath’s Brain: The Sentencing Debate*, NPR (June 30, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=128116806>; see also Greg Miller, *Did Brain Scans Just Save a Convicted Murderer From the Death Penalty?*, WIRED (Dec. 12, 2013, 6:30 AM), <http://www.wired.com/2013/12/murder-law-brain/> (listing several recent death penalty cases in which the defendant did not receive a death sentence after the jury was shown brain scans suggesting that the defendant possessed brain abnormalities that could influence his behavior—for instance, “a Miami jury rejected the death sentence for Grady Nelson, who stabbed his wife to death and raped her developmentally-disabled 11-year-old daughter, after hearing evidence that Nelson had abnormal brain activity. Afterwards, some jurors said they’d been swayed by the brain recordings presented by the defense. ‘It turned my decision all the way around,’ said one”).

258. *Graham v. Florida*, 560 U.S. 48, 61–62 (2010).

259. *Id.* at 82 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

260. *Id.* at 75, 79.

261. *Id.* at 77.

rival—or exceed—deficits associated with mental retardation and juvenile status.²⁶² But a determination that a defendant deserves to die—that he is “irretrievably depraved”²⁶³—ignores the potential for transformation that can occur once the addict is rehabilitated or the mentally ill offender is treated.²⁶⁴

If extreme culpability is mostly mythical, then why do juries across the United States still sentence between 50 and 100 people to death each year? First, for perspective, there are more than 16,000 homicides in the United States each year.²⁶⁵ The excruciating infrequency—especially given widening death-eligibility—suggests that prosecutors and jurors do not favor the death penalty as a punishment, even for homicide.²⁶⁶ Nonetheless, here are a few theories about why people are sentenced to death each year despite their insufficient culpability.

In many cases that result in death, the full mitigation case is not presented at trial. In one subset of those cases, the post-conviction claim takes center stage. Exhaustive re-investigation uncovers the strongest mitigating evidence in those cases—*Williams* and *Wiggins* are two obvious examples.²⁶⁷ Post-conviction judges are not jurors, however. They do not reassess personal culpability on a blank slate. Rather, they only reverse a death sentence where the defense attorney performed deficiently, and an assessment of the new and old evidence, considered together, indicates that the failure to present the new mitigating evidence at trial prejudiced the defendant.²⁶⁸ Moreover, often the thorough mitigation investigation is conducted on federal habeas review, in which the federal court must be doubly deferential—to the jury verdict and the state court determination.²⁶⁹ In a different subset of those cases, a

262. See Smith et al., *supra* note 3, at 1224, 1229, 1246.

263. See *id.* at 1245–46.

264. Cf. SHEFF, *supra* note 206, at xxii (explaining that, once treated, “[a]ddicts can lead full lives free from the pain that plagued them and the disease that controlled them”).

265. See CTRS. FOR DISEASE CONTROL & PREVENTION, DEATHS: FINAL DATA FOR 2011 (2011), available at http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf; see also James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052 (2000) (“Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence.”).

266. See *infra* Part IV.B.

267. See *supra* Part II.A.

268. See *Rompilla v. Beard*, 545 U.S. 374, 380–81 (2005) (explaining that “[i]neffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness under prevailing professional norms,” and noting that “[i]n judging the defense’s investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to counsel’s perspective at the time investigative decisions are made and by giving a heavy measure of deference to counsel’s judgments” (citations omitted) (internal quotation marks omitted)).

269. See *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (“When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a ‘doubly deferential’ standard of review that gives both the state court and the defense attorney the benefit of the doubt.” (internal quotation marks omitted)).

thorough mitigation investigation is never conducted; therefore, a reliable personal culpability determination is simply not possible.

Juries may also sentence offenders to death because the brutal nature of the crime can overshadow any evidence of diminished culpability.²⁷⁰ After all, Ronald Rompilla was “convicted of stabbing a man repeatedly and setting him on fire.”²⁷¹ Kevin Wiggins “drowned a 77-year-old woman in her bathtub.”²⁷² Christopher Simmons “broke into [the victim’s] home in the middle of the night, forced her from her bed, bound her, . . . drove her to a state park,” and then “walked her to a railroad trestle spanning a river, ‘hog-tied’ her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle.”²⁷³ Noting that the victim ultimately drowned, Justice O’Connor referred to the killing as “premeditated, wanton, and cruel in the extreme.”²⁷⁴ These examples illustrate that some of the most heinous crimes can mask some of the most insufficient culpability.

The biggest reason why jurors return death sentences despite the incoherence of the extreme culpability standard, though, is the reality that powerful mitigating evidence often arouses both empathy and fear. A fear that the defendant will pose a danger to others even while incarcerated often overpowers empathy, meaning that an inherently mitigating characteristic can serve to aggravate the punishment.²⁷⁵ This is known as the two-edged sword problem.²⁷⁶ As the Court indicated in *Atkins*, the inability to abstract from experience and learn from mistakes reduces culpability, but it also increases the likelihood that the offender could be a future danger to others—including other inmates and prison staff.²⁷⁷ Or consider that the prosecutor in *Roper* argued to the jury that Simmons’s youth should be treated as a factor militating towards a death sentence: “Think about age. Seventeen

270. Justice Sotomayor recently highlighted this dynamic as she chastised the Kentucky Supreme Court for implicitly finding that for some crimes a “jury would return a death sentence regardless” of mitigating factors, such as a “terrible childhoo[d].” *Hodge v. Kentucky*, 133 S. Ct. 506, 510 (2012) (Sotomayor, J., dissenting) (alteration in original) (internal quotation marks omitted). Yet, as Justice Sotomayor explained, such a “view is contrary to [the Court’s] cases.” *Id.*

271. *Id.* (citing *Rompilla*, 545 U.S. at 377).

272. *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 514 (2003)).

273. *Roper v. Simmons*, 543 U.S. 551, 600 (2005) (O’Connor, J., dissenting).

274. *Id.* at 600–01 (“Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons’ actions unquestionably reflect a consciousness materially more depraved than that of . . . the average murderer.” (citations omitted) (internal quotation marks omitted)).

275. See John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397, 398–99 (2001) (explaining that future dangerousness is important to capital jurors regardless of “what the prosecution says or does not say”).

276. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.” (citing *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989))).

277. See *Penry*, 492 U.S. at 323–24.

years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."²⁷⁸ The aggravated side of the sword applies with equal force to other types of mitigating evidence. As Professor Kirchmeier explained, "mental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness."²⁷⁹ Thus, regardless of the validity of the extreme culpability standard—that is, despite the widespread nature of insufficient culpability—factors, such as insufficient investigation and presentation of mitigation evidence to the jury, the visceral repulsiveness of the homicide, and the operation of the two-edged sword, help to explain why American juries return even the small number of death sentences that they do impose each year.

In Parts I and II, this Article described the shift in focus away from the crime and towards the assessment of the personal culpability of the offender. Along with the shift in attention came two new tools for assessing personal culpability. First came the mitigation function in individual cases. Second, the creation of categorical exemptions for intellectually disabled offenders and juveniles. But rather than civilize the death penalty, however, the focus on insufficient culpability has opened a Pandora's Box. As this Part has demonstrated, the behavioral and cognitive deficits that serve as hallmarks of diminished capacity are regularly found in the case histories of recently executed offenders. This Part then queried whether, rather than merely reflecting a problem that can be fixed with procedural overhaul, the notion of extreme culpability—the standard-bearer for death-eligibility—is itself flawed. Part IV considers which doctrinal pathway best aligns with the problems posed by capital punishment today. It concludes that a categorical challenge focused on mitigated culpability offers a pragmatic, workable approach that is aligned with the trajectory of the Court's most recent capital jurisprudence.

IV. INSUFFICIENT CULPABILITY AS THE PATH TO JUDICIAL ABOLITION

Though urging scholars and lawyers to stop analogizing to *Furman* and its focus on arbitrariness and discrimination in the assessment of crime severity, this Article ultimately is in accord with commentary that suggests that the death penalty is too broken to fix. This Part focuses on how to map what is most broken about the death penalty—its insufficient culpability problem—onto available doctrinal pathways. It begins by testing the familiar *Furman*

278. *Roper*, 543 U.S. at 558 (internal quotation marks omitted).

279. Kirchmeier, *supra* note 224, at 707 n.344 (citing John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 90 (2003)); see also Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 3, 14 (citing Bruce G. Link & Ann Stueve, *New Evidence on the Violence Risk Posed by People with Mental Illness*, 55 ARCHIVES GEN. PSYCHIATRY 403, 403 (1998) (noting the "widespread belief among the American public that people with mental illness pose a significant violence risk"))).

approach, though in reverse: Perhaps litigants should focus on arbitrariness and discrimination in the assessment of personal culpability? Then, rejecting the reverse-*Furman* route, this Part concludes with an explanation of why the Court's categorical exemption framework—the same one it used in *Atkins* and *Roper*—is the doctrinal approach that best aligns with the insufficient culpability problem.

A. THE REVERSE-FURMAN ROUTE

One doctrinal pathway through which to express the insufficient culpability problem is a *Furman*-style focus on arbitrariness and discrimination. But it is the less desirable of the two available options. Though focused on roadblocks that inhibit the accurate assessment of personal culpability, many of the same critiques that apply to the focus on obstacles regarding the assessment of crime severity apply with equal force here. Most importantly, the remedy in *Furman* was to reset death penalty law: The *Furman* Court invited states to impose new standards aimed at reducing the risk of arbitrariness and discrimination. Such a reset will not work here. First, the more one agrees with the proposition that the extreme culpability requirement is itself flawed, the less likely one is to accept major overhaul as a potentially viable option. Second, even taking the extreme culpability standard on its own terms, further procedural reform will not fix that which is most broken about the death penalty.

Though the reverse-*Furman* route is not a strategically sound basis for frontal assault on capital punishment, the notion that the concerns about arbitrariness and discrimination that troubled the *Furman* Court persist in the context of assessing personal culpability is important for understanding the constitutional shortcomings of capital punishment. To that end, the following discussion considers how arbitrariness and discrimination continue to function in the administration of capital punishment.

1. Arbitrariness

The arbitrariness relevant here is the lack of a meaningful basis for sorting between offenders with similarly diminished culpability. There are a number of potential drivers of arbitrariness.²⁸⁰ This Subpart focuses on the

280. Some scholars have argued that the creation of categorical exemptions for intellectually disabled offenders contributes to this arbitrariness. Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 860–61, 887–88 (2009) (asserting that the Court had “invited” the “unequal and arbitrary result” by which Greg Brown, a death row inmate in Louisiana who suffered a severe brain injury—damage to “the right frontal lobe and temporal regions of his brain,”—at the age of 22, was found ineligible for categorical exclusion from the death penalty despite possessing similar “cognitive, behavioral, and adaptive functioning” as those individuals who became exempt from the death penalty after *Atkins*); Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211, 1215 (2007) (noting that “not all offenders who[,] after *Atkins* and *Roper*[], became]

most important driver: the inadequate investigation and presentation of mitigating evidence.

Jurors assessing the person culpability of a capital defendant during the penalty phase of a capital trial can only consider the mitigating evidence that the defense team investigates, discovers, and presents. Similarly, a prosecutor deciding whether to seek a death sentence can only assess whether the defendant deserves to be spared from a death sentence if the prosecutor is made aware of any characteristics of the defendant that mitigate his culpability. Unfortunately, however, the quality of the mitigation function varies from jurisdiction to jurisdiction and from lawyer to lawyer.²⁸¹

Indeed, it is often still the case that an exhaustive mitigation investigation is not performed until after the defendant is sentenced to death.²⁸² Recall Daniel Cook who was executed despite the horrific sexual and physical abuse that he endured and the mental illness and addiction that led him to attempt suicide.²⁸³ His lawyers uncovered most of this powerful mitigating evidence after he had been tried, convicted, and sentenced to death.²⁸⁴ Indeed, the trial prosecutor supported Cook's clemency petition and testified that he would not have pursued a death sentence had he known about Cook's background.²⁸⁵

In other cases, the question is not if the investigation is done before the trial, but rather, when and how exhaustively the investigation is done. Consider the experience of capital defense bar in Los Angeles County, California. Los Angeles County imposed 33 death sentences between 2004 and 2009.²⁸⁶ Despite handling 50% of the county's capital caseload, the Los

ineligible for the death penalty are necessarily less culpable than those who may still be sentenced to death[, which] means that the sentences are 'arbitrary'").

Another driver of arbitrariness includes the variability of the heinousness of the offenders, which can interfere with the jury's assessment of personal culpability by creating a disproportionately high emotional or repulsive response. *See supra* Part III. Another driver is the tension between assessing future dangerousness and assessing the retributive desert owed to a particular offender based on his diminished culpability. In cases where the prospect of future dangerousness is higher, the ability to give effect to mitigation is lower. *See supra* Part III.

281. Professor Emily Hughes recently conducted an empirical study of mitigation specialists that highlighted this variability in the quality and quantity of the mitigation investigation and presentation across cases and jurisdictions. *See Hughes, supra* note 133, at 627 ("The experiences of the mitigation specialists interviewed through this research reveal that the absence of national consistency in understanding what constitutes thorough capital mitigation can lead to wide disparity in mitigation investigations and advocacy. The research also suggests that arbitrary professional norms within mitigation investigations and advocacy may introduce arbitrariness into the administration of the death penalty.").

282. *See supra* Part II.A (describing cases in which the Court reversed death sentences and remanded for a new sentencing trial due to deficient performance in terms of inadequate preparation for the penalty phase of the trial).

283. *See supra* text accompanying notes 239–42.

284. *See Smith et al., supra* note 3, at 1246.

285. *Id.*

286. *Smith, supra* note 130, at 231.

Angeles County Public Defender's Office is not responsible for any of those death sentences.²⁸⁷ The Public Defender's Office credits their success to a thorough mitigation investigation that begins as soon as the office receives the capital case.²⁸⁸ This frontloaded mitigation investigation allows the defense to explain to the prosecution why its office should not pursue a capital case against their client before the final decision to proceed capitally has been made.²⁸⁹ Contract lawyers representing capital defendants often do not develop the mitigation case this early.²⁹⁰ Moreover, contract lawyers often are not even *appointed* to a case until after much of the 90-day window between the arrest and the deadline for deciding whether to proceed capitally has passed.²⁹¹ Moreover, not all contract lawyers are aware that the defense has a right to meet with the prosecution before the death determination is made.²⁹²

This failure to build an adequate mitigation case early enough is one that the California Commission on the Fair Administration of Justice has found to plague many California counties:

Many county public defender offices assign two counsel to every death eligible case when the appointment is initially accepted. Where private counsel is appointed, however, only one lawyer is ordinarily appointed until the decision is made to file the case as a death case, which will not occur until after the preliminary hearing, as much as one year later. This may delay the mitigation investigation to the prejudice of the defendant. The results of mitigation investigations are frequently employed to persuade the district attorney not to seek the death penalty. If the investigation is delayed until second counsel is appointed, the decision to seek the death penalty has already been made.²⁹³

The successes (and failures) of performing the mitigation function in Los Angeles suggest that the inconsistent quality of representation across lawyers and jurisdictions raises an inference of arbitrariness for which the failings of post-*Furman* crime severity assessments simply do not account. Whether a prosecutor offers a life-saving plea deal or a jury decides to return a life sentence could turn not only on differing assessments of mitigating evidence, but also on whether a mitigation investigation and presentation adequately captures the personal culpability of the capital defendant.

287. *Id.* at 262.

288. *Id.* at 262–63.

289. *Id.*

290. *Id.* at 263.

291. *Id.*

292. *Id.*

293. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 29 (2008), available at <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

One response is that the problem of executing people with insufficient culpability can be solved by more robustly policing the mitigation requirement in individual cases. But the biggest impediment to adequate investigation is an extremely difficult one to fix: the lack of adequate resources.²⁹⁴ Mitigation investigations can be frightfully expensive.²⁹⁵ They require the appointment of mitigation specialists; the consultation of experts, such as medical doctors, psychologists and social workers, among others; the investigation—over countless hours—of family members, friends, teachers, employers, and others; and the collection and review of hundreds or thousands of medical, school, prison, and other records.²⁹⁶ Moreover, in many states, including, for example, Georgia and Louisiana, inadequate defense budgets can lead to years of delay between arrest and any eventual trial.²⁹⁷

Jurisdictions often have dozens of (sometimes more than 100) pending capital cases.²⁹⁸ Because mitigation investigation must begin at the earliest moments of representation, the costs of the mitigation function in cases that do not proceed to a capital trial nonetheless rival the costs in cases that

294. See, e.g., *id.* at 43 (noting that “[t]he cost of meeting the standards of the [ABA Mitigation] Guidelines is very difficult to estimate,” but concluding that the costs “will be substantial”); *id.* at 80 (“The Commission’s recommendations for adequate funding of defense costs for death penalty trials, especially the necessary investigation of mitigation, will easily increase this cost differential by 50%. If the same pace of 40 death penalty trials were maintained, the needed reforms would then require an annual expenditure of \$30 million, rather than \$20 million.”); Am. Bar Ass’n, *supra* note 166, at 952 (stating that Guideline 4.1(A)(1) requires the appointment of “no fewer than two attorneys [], an investigator, and a mitigation specialist”).

295. See, e.g., Rhonda Cook & Steve Visser, *Murderer Nichols’ Tab: \$3 Million and Growing*, ATLANTA J.-CONST. (July 22, 2009, 6:49 PM), www.ajc.com/news/news/local/murderer-nichols-tab-3-million-and-growing/nQHgF/ (estimating the cost of the Brian Nichols trial in Georgia to be \$3 million dollars and detailing over \$500,000 worth of state and county expenditures on the defense investigation of mental health issues alone).

296. See SUPPLEMENTARY GUIDELINES, *supra* note 167, § 4.1(A); Sean D. O’Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 758–59 (2008) (“‘An effective case in mitigation—one that genuinely humanizes a capital defendant—requires deep commitment to one’s client, a moderately sophisticated grasp of human psychology, and hundreds of hours to assemble.’ Representing a capital client is a labor-intensive, time-consuming undertaking; there are no shortcuts. A half-hearted effort will create only a ‘veneer of competence’ likely to result in the client’s execution.” (footnotes omitted)).

297. See *Boyer v. Louisiana*, 133 S. Ct. 1702, 1704 (2013) (Sotomayor, J., dissenting) (“Jonathan Boyer waited in jail for more than seven years from the date of his arrest until the day his case went to trial. The Louisiana Court of Appeal . . . found that most of the delay in Boyer’s case was caused by the State’s failure to pay for his defense due to a ‘funding crisis’ experienced by the State of Louisiana”); Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691–92 (2010) (“The [Georgia Supreme] [C]ourt held, by a vote of 4-3, that the state could proceed to seek the death penalty against Jamie Ryan Weis despite Georgia’s failure to provide funds for his legal representation for all but six months of the three and a half years his case had been pending.” (citing *Weis v. State*, 694 S.E.2d 350, 354–58 (Ga. 2010))).

298. See, e.g., Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 216 (2012) (noting that “140 capital cases [were] pending in Maricopa County Superior Court” as of March 2007).

proceed to verdict.²⁹⁹ This reality makes the costs of adequate funding across the board prohibitively difficult to meet. Yet, even in places where adequate funding is available, an adequate capital defense bar often is not.³⁰⁰ Capital trials require mastery of a complicated and evolving jurisprudence, the ability to successfully navigate additional trial procedures, such as the death qualification of juries, and the ability to undertake extensive mitigation investigations that resemble the work of social workers and psychologists more than traditional criminal defense work.³⁰¹ Among those few who are qualified to represent capital defendants at trial, it is only a subset that is willing to accept the meager or abysmally meager pay.³⁰² These financial and representational realities are why providing adequate counsel to everyone facing capital punishment is so unlikely to happen. Yet, in the absence of consistently adequate representation, arbitrariness in the assessment of personal culpability will remain a problem.

2. Race Discrimination

Furman focused on whether race was a reason why jurors considered defendants death-eligible,³⁰³ but the problem today is whether race interferes with the determination of whether otherwise eligible offenders should be removed from death-eligibility due to their insufficient culpability. Recall that *Coker* mostly solved the problem of defendant-based race discrimination.³⁰⁴ But it only mostly solved the problem since race-of-the-defendant disparities continue to be identified, including in recent studies that focus only on those cases that reach the penalty phase of a capital trial. The vast majority of potential capital cases never go to trial, so the capital penalty phase restriction

299. See Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 518–19 (2009) (noting that the additional costs of capital cases are incurred regardless of whether the case proceeds to a capital trial due, in part, to the added costs of appointing a second defense lawyer in death penalty cases).

300. See, e.g., CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 293, at 47 (“The Commission learned that at least twenty of the lawyers handling California death penalty appeals can no longer afford to live in California, and are currently residing in other states [T]he low level of income is certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals.”); Paul Murphy, *Death Penalty Attorneys in Louisiana in Short Supply*, WWLTV (Oct. 3, 2012, 3:29 P.M.), www.wwltv.com/story/news/2014/09/03/14549990 (quoting Richard Bourke, Director of the Louisiana Capital Assistance Center, “[i]f the district attorney indicts someone on first-degree murder and is seeking the death penalty, there is going to be a problem finding a lawyer almost anywhere in the state because the system is full [and] only a limited number of lawyers . . . are interested, willing and qualified to do the work[, while a] whole other bunch of lawyers [have] stopped doing this or won’t take it because the pay is so bad”).

301. See SUPPLEMENTARY GUIDELINES, *supra* note 167, § 4.1; O’Brien, *supra* note 296, at 709.

302. See generally CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 293; Smith, *supra* note 130.

303. See *supra* notes 83–85 and accompanying text.

304. See *supra* notes 86–87 and accompanying text.

is a major one.³⁰⁵ Nonetheless, race-of-the-defendant effects are particularly troublesome in this context because the penalty phase focuses disproportionately on the personal culpability of the defendant.³⁰⁶ Indeed, in *Turner v. Murray*, the Court envisioned that the mitigation function could be racialized as stereotypes about black Americans and might leave some jurors “less favorably inclined toward [the defendant’s] evidence of . . . mitigating circumstance[s].”³⁰⁷

Researchers who have interviewed actual jurors from death penalty trials have highlighted the “very different conclusions” reached by black jurors and white jurors over how they perceived and weighed the “remorsefulness, dangerousness, and . . . ‘cold-bloodedness’” of black defendants.³⁰⁸ Writing about what they term “the empathic divide,” Professors Mona Lynch and Craig Haney concluded that defendant-based racial disparities “were likely the result of the jurors’ inability or unwillingness to empathize with a defendant of a different race.”³⁰⁹ Since capital jurors are predominately white, the empathic divide is about the inability of white jurors “to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.”³¹⁰ Unlike discrimination in the assessment of crime severity, the nature of discrimination in the assessment of personal culpability influences both consistency and insufficient culpability. In other words, the nature of discrimination today, in terms of the consideration of mitigating evidence, is analogous to pre-*Coker* discrimination.

Though discrimination that influences the assessment of personal culpability is a problem that strikes at the core of the Eighth Amendment excessiveness question, the proof problem here is bigger than it was in

305. *Felony Defendants*, BUREAU JUST. STAT., <http://bjs.gov/index.cfm?ty=tp&tid=231> (last visited Jan. 25, 2015).

306. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 586 (“The intriguing finding that the race of victim appears to be an important factor—consciously or not—for prosecutors with the power to seek a death sentence, but that juries appear to be more influenced by defendant characteristics can be explained by the context in which both groups—prosecutors and jurors—operate. The prosecutor’s staff (attorneys, investigators, victim-witness staff) is much more likely to interact with and focus on the victim’s family, particularly in the early stages of case processing, so differential empathic bonds may be formed as a function of race (among other influences).”).

307. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

308. Lynch & Haney, *supra* note 306, at 580.

309. *Id.* at 584 (internal quotation marks omitted).

310. *Id.* Discrimination might interfere with the evaluation of personal culpability, but it nonetheless is not a promising angle for major reform or judicial abolition. The *McCleskey* problem of not being able to prove discrimination in a *particular* case still exists. Nor does framing discrimination through the lens of insufficient culpability change the reality that race remains an explosive topic or alter the fact that it is out-of-step with the Court’s broader retrenchment on remedies for race discrimination in areas like voting rights and education. Thus, scholars and lawyers seeking major reform or judicial abolition might do well to follow the example of *Furman* and keep race as a background consideration.

McCleskey. The Court in *McCleskey* accepted the validity of the evidence showing racially disparate outcomes in the Georgia capital punishment regime, but nonetheless held that McCleskey could not prove that he himself had been discriminated against based on his race.³¹¹ That remains a problem in the insufficient culpability context, too. Further aggravating the problem, though, is the difficulty in constructing a comprehensive statistical study linking racially disparate outcomes to the evaluation of mitigating evidence. Unlike basic descriptions of a crime and evidence for the existence of aggravating factors, both of which are reconstructed fairly easily from publically available sources, the record of any available mitigating evidence often is not preserved when a case does not result in a death sentence. Thus, from a proof perspective, litigants proceeding on the theory that discrimination infects the assessment of mitigating evidence would be in a worse position than those lawyers who brought the challenge in *McCleskey*.

B. THE CATEGORICAL EXEMPTION ROUTE

The preceding Subpart illustrated that arbitrariness and discrimination still play a role in capital punishment. Moreover, when it comes to the assessment of personal culpability, both arbitrariness and discrimination can interfere with efforts to ensure that insufficiently culpable offenders are not executed. Unfortunately, though, these arguments are not good candidates for judicial abolition of the death penalty. This is so because they are not plausible from a doctrinal perspective and because they evoke *Furman* in that they suggest the start of a conversation with state legislatures, as opposed to the resolution of an ongoing conversation about capital punishment. By contrast, this Subpart maps the insufficient culpability argument onto the categorical ban framework. It is an agreed upon framework for deciding Eighth Amendment challenges to the constitutionality of punishment practices, and most importantly, it is one that resolves constitutional conversations.³¹² Thus, if the Court passes on the constitutionality of capital punishment, it should not decide whether to press the reset button again, but whether to turn off the switch.

The categorical ban framework that the Court uses to evaluate a categorical challenge to the death penalty has two prongs: the independent judgment prong and the consensus prong.³¹³ The independent judgment

311. *McCleskey v. Kemp*, 481 U.S. 279, 292–97, 308–09 (1987).

312. *Steiker & Steiker*, *supra* note 131, at 242 (“Perhaps more importantly, the Court’s proportionality cases have developed a new methodology for gauging evolving standards of decency, and the new measures are particularly hospitable to judicial abolition, especially if more states were to reject the penalty.”).

313. *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002) (explaining that the Court looks at “objective evidence” to determine if Americans have repudiated the challenged punishment practice, and “in cases involving a consensus [against the punishment], our own judgment is

prong is the one in which the discussion of *Atkins* and *Roper* is situated.³¹⁴ Recall that it centers on the consideration of how the challenged punishment fits with accepted justifications for punishment—for example, retribution.³¹⁵ The Court finds a punishment to be cruel and unusual under this framework either when it is disproportionate to the culpability of the offender or when it serves no social purpose above that which could be accomplished by a non-death sentence.³¹⁶ Severe mental illness, addiction, complex trauma, and youthfulness all tend to reduce both personal culpability and undermine the retributive benefit of the death penalty. Thus, if one accepts the basic premise of this Article—that insufficient culpability is a widespread problem—the independent judgment prong is the easier of the two prongs for litigants to satisfy.

The second prong of the categorical bar framework is the consensus prong, in which the Court looks for “objective indicia” of a national consensus against a particular sentencing practice.³¹⁷ Those objective indicators generally fall into one of two categories: legislative authorization or usage.³¹⁸ In terms of legislative authorization, the Court looks primarily to the absolute number of jurisdictions that authorize a practice.³¹⁹ In terms of usage, the Court looks to the frequency with which juries impose the death penalty and how often executions are performed.³²⁰

Taken together, the authorization and usage of the death penalty in America is so low today that the best understanding is that Americans have repudiated the punishment. Before detailing the evidence for this repudiation, though, it is important to briefly anticipate the objection that outright abolition is an extravagant remedy for the insufficient culpability problem. In other words, one might wonder whether it would be wiser to instead seek the establishment of new categorical exemptions—for instance,

‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators” (citations omitted)).

314. See *supra* Part II.B.

315. *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (“Our decision is consistent with the justifications offered for the death penalty. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”); *id.* at 443 (considering “serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense”).

316. *Id.* at 419–21.

317. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The beginning point is a review of objective indicia of consensus.”).

318. Robert J. Smith et al., *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2406 (2014) (explaining that the Court “considers a number of factors [in its Eighth Amendment categorical challenge] cases: the number of states that authorize the punishment; legislative direction of change; the number of sentences imposed; in the death penalty context, the number of executions carried out; and the degree of geographic isolation”).

319. *Id.* at 2407.

320. *Roper*, 543 U.S. at 564; *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

a bar on executing the severely mentally ill. It would not.³²¹ No jurisdiction permits the death penalty generally, while disallowing it for mentally ill offenders.³²² Nor are there any clear reductions in the use of the death penalty as a punishment for offenders with severe mental illness relative to death-eligible offenders generally. Overall, usage of the death penalty is excruciatingly low, and there is substantial evidence that most of the people that American jurisdictions execute possess diminished culpability relative to the typical adult. But, relative to the total pool of offenders sentenced to death, there is no proof that there are differences in death sentencing outcomes for mentally ill and youthful offenders, for those suffering from traumatic brain injuries, or for those who have endured childhood trauma. Indeed, since most people who are executed have significant functional deficits, disaggregating capital defendants into additional subclasses based on their particular variant of insufficient culpability is more likely to weaken—not strengthen—a mitigation-driven argument that Americans have repudiated the death penalty.

With the doctrinal pathway to additional categorical exemptions for particular subclasses of offenders blocked, the next step is to test the strength of a claim that challenges the death penalty generally. Eighteen states have abolished capital punishment, including six that have done so since the Court decided *Atkins* and *Roper*.³²³ Compared to the 30 states that de-authorized the death penalty in *Atkins* and *Roper*, however, an 18-state tally is not too impressive.³²⁴ Fortunately, though, the consensus determination extends beyond legislative authorization. In *Graham*, for example, the Court found a consensus against life without the possibility of parole for juveniles who commit non-homicide offenses and did so despite widespread legislative authorization for the punishment.³²⁵ As the *Graham* Court explained, consensus against a punishment can also be deduced from its practical

321. Slobogin, *supra* note 198, at 297 (explaining that “despite the Court’s willingness to look at more ‘subjective’ factors, a determination that evolving standards of decency have been abridged still requires some evidence of statutory evolution, and that evidence simply does not exist with respect to the execution of people with mental illness” (footnote omitted)).

322. Winick, *supra* note 201, at 815. Connecticut used to fall into this category, but it has since abolished the death penalty generally. *Id.*; *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 25, 2015).

323. *States with and Without the Death Penalty*, *supra* note 322 (listing Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York among the “States Without the Death Penalty,” and noting that the earliest of the six repeals occurred in 2007). New York, unlike the other states, did not legislatively repeal the death penalty—its highest court held the state death penalty statute unconstitutional and no new statute has been authorized in its place. *Id.*

324. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313–15.

325. *Graham v. Florida*, 560 U.S. 48, 65–66 (2010).

disuse.³²⁶ More recently, in *Hall v. Florida*, the Court counted Oregon on the abolitionist “side of the ledger” because the state “ha[d] suspended the death penalty and executed only two individuals in the past 40 years.”³²⁷

Today, in 27 states, there either is no valid death penalty statute or the state has infrequently used the penalty (as shown by the imposition of no new death sentences or the failure to execute someone since 2004).³²⁸ And, despite a deep pool of death-eligible crimes, only a handful of states regularly impose at least one death sentence and execute at least one offender per year.³²⁹ Thus, the death penalty is used so rarely in America that “obsolete” has become the best word to describe the punishment.³³⁰

A challenge to the death penalty based on the insufficient culpability of those whom we regularly condemn could meet both the independent judgment and objective consensus prongs. But this begs the question of whether mitigated culpability helps to explain why Americans have repudiated the punishment. In *Atkins*, for example, the Court determined that the “consensus [against executing intellectually disabled offenders] unquestionably reflects widespread judgment about the relative culpability of [intellectually disabled] offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”³³¹ As in *Atkins*, there is little doubt that the consensus against capital punishment generally reflects, in some significant part, an aversion to executing offenders with insufficient culpability.

Recall Los Angeles County’s experience, where all of the cases handled by the Public Defender’s Office—which was 50% of the total number of capital cases in the County—did not result in a single death sentence between 2004 and 2009.³³² The major distinguishing feature between the Public Defender’s Office and the other lawyers who handle capital trials in Los Angeles is that the public defenders build strong mitigation cases from the onset of their representation.³³³ Mitigation, therefore, appears to drive prosecutorial discretion away from capital punishment. Los Angeles is one powerful example of this phenomenon. So, too, is the fact that Rompilla, Wiggins, and Williams all accepted non-death plea-bargains after the Court

326. *Id.* at 62 (finding a consensus based on low usage indicators despite the fact that “[t]hirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances”).

327. *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014).

328. Smith et al., *supra* note 318, at 2450–51.

329. *Id.* at 2451.

330. *Id.* at 2451–52.

331. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

332. See Smith, *supra* note 130, at 262–63.

333. See *id.*

granted them new resentencing trials.³³⁴ Though this is anecdotal evidence to be sure, there also is overlapping evidence in the form of both experimental studies and interviews with actual jurors from death penalty cases.³³⁵ Professors Michelle Barnett, Stanley Brodsky, and Cali Davis have, for example, demonstrated that death-qualified study participants will assign a death verdict with less frequency when the defendant presented evidence of: “schizophrenia, not medicated, and suffered from severe delusions and hallucinations”; “drug addicted and high at the time of the murder”; “diagnosed as borderline mentally retarded during childhood”; or “severely physically and verbally abused by his parents during childhood.”³³⁶ Finally, reporting on the results of interviews with actual jurors who served in a capital case, Professors John Blume, Sheri Johnson, and Scott Sundby have emphasized that “[s]uccessfully humanizing the defendant through the mitigating evidence” tended to result in the jurors finding “that the crime was not as heinous” and “the defendant [not] as dangerous” or “remorseless.”³³⁷ Taken together, then, the available evidence—though admittedly scant—supports the proposition that an increase in the quality of the mitigation function has helped to drive the repudiation of the death penalty.

Given that the case for abolition fits with the Court’s doctrinal structure, and the plausibility of meaningful reform remains exceedingly low, the best option for the Court is to simply turn off the switch. Using *Atkins* and *Roper* as its guide, the Court should find a consensus against the death penalty based on its excruciatingly infrequent use, and then, after exercising its independent judgment to illustrate that American jurisdictions routinely execute offenders despite their insufficient culpability, the Court should hold that the death penalty is no longer a constitutionally permissible punishment practice.

334. See Brooke A. Masters, *Deal Gets Inmate off Death Row*, WASH. POST, Nov. 15, 2000, at B01 (noting that Williams accepted a life-without-parole plea deal); Jennifer McMenamin, *Wiggins Accepts Offer of Life Term*, BALT. SUN (Oct. 8, 2004), http://articles.baltimoresun.com/2004-10-08/news/0410080174_1_death-sentence-parole-hearing-wiggins; *Allentown Man to Spend Life in Prison for 1988 Murder*, DAILY AM. (Aug. 13, 2007), http://articles.dailyamerican.com/2007-08-13/news/26304740_1_ronald-rompilla-allentown-tavern-owner-allentown-man (noting that Ronald Rompilla accepted a life-without-parole plea deal); .

335. It is possible that the vigor of representation is driving the results more than the focus on mitigation. See Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1948 (2006) (noting that “while a prosecutor’s decision to some extent inevitably will be idiosyncratic, certain factors are likely to enter into almost all of the decisions, including how vigorous the prosecutor expects the defense to be”).

336. Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 751 (2004).

337. John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1038 (2008).

CONCLUSION

The most pressing constitutional infirmity surrounding the administration of capital punishment today is the execution of offenders whose insufficient culpability suggests that a death sentence is an inappropriate punishment. Indeed, insufficient culpability is more pressing than the presence of either arbitrariness or discrimination in the assessment of crime severity—even despite the greater salience of the latter ideas in scholarly and litigation circles. Insufficient culpability renders a death sentence excessive whereas crime-focused arbitrariness and discrimination tends only to cause inconsistent—and perhaps irrational—results among people who have committed murder. Thus, scholars and lawyers should forget about *Furman* and focus instead on defects in the assessment of personal culpability.