ARTICLE

DESERVING OF LIFE: A MITIGATING FACTOR APPROACH TO THE NARROWING MANDATE IN CAPITAL SENTENCING

ANDY T. WANG*

I. INTRODUCTION

A few years before the landmark cases of *Furman v. Georgia*[1] and *Gregg v. Georgia*,[2] Justice Harlan said in *McGautha v. California*[3] that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[4] Justice Harlan's sage warning that it may be impossible to identify those most deserving of death rings true today. State death penalty statutes that use aggravating factors to identify deserving defendants have mostly failed.[5] In effect, these statutes have left the imposition of the death penalty largely to the whims of the sentencing jury.[6]

---

* B.A., Rice University, 2008; J.D. Candidate, Harvard Law School, 2015. The author would like to thank Professor Carol Steiker, Harvard Law School, who provided valuable guidance and whose class inspired this note. Thanks also go to Professor Jeffrey Kirchmeier, City University of New York School of Law, for his valuable input. And finally, thanks to Audra Herrera, Joshua Whitaker, Daniel Crossen, and William Burgess for their generous help and input.

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

[2] 428 U.S. 153 (1976).

[3] 402 U.S. 183 (1971).

[4] *Id.* at 204. Justice Harlan was not alone in this belief. "The American Law Institute, authors of the Model Penal Code, agreed the death penalty could not easily be put into a set of rules for jurors to follow: '[T]he factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . .'" RICHARD C. DIETER, DEATH PENALTY INFO. CTR., STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT IN 1976 16 (2011) (quoting MODEL PENAL CODE § 201.6 cmt. 3 (Tent. Draft No. 9, 1959)).

[5] For the sake of brevity, this note will use the term "aggravator" instead of "aggravating factor."

[6] For instance, many states that purport to use aggravators to narrow the class of death-eligible defendants do not actually narrow that class in an appreciable way. *See, e.g.*, John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 498–500 (2010) (noting that roughly eighty percent of convicted murderers in Charleston County, South Carolina meet at least one statutory aggravator); Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1091–93, 1109 (2013) (noting that around ninety percent of convicted murderers in Georgia, California, and Colorado would meet at least one aggravating circumstance and thus be death-

The Supreme Court mandated in *Furman* and subsequent cases that the death penalty is constitutional only if it is imposed in a non-arbitrary fashion.[7] Thus, a death penalty statute that neither meaningfully guides the jury in its sentencing determination nor narrows the field of death-eligible persons is unconstitutional.[8] The last four decades, however, have been marked by judicial weariness of the *Furman* mandate.[9] The Supreme Court has given up on the strict enforcement of the *Furman* mandate while still letting its principle stand, perhaps recognizing the flawed approach of using aggravators to choose those most deserving of death and the lack of plausible alternatives.[10] Due to the lack of meaningful judicial enforcement, unconstitutionally arbitrary death penalty statutes have proliferated and persisted.

This note outlines and advocates for a new legislative but court-driven approach to death penalty narrowing. Specifically, this note makes three sequential arguments. First, that the current use of aggravators to narrow the pool of death-eligible defendants by choosing those most deserving of death is an inherently flawed method for complying with the *Furman* mandate of a non-arbitrarily inflicted death penalty. Second, that the lack of plausible alternatives to aggravator narrowing has resulted in its persistence in spite of its flaws, because courts have no other option but to accept the continuation of such statutes. Third, that using *mitigating factors* to weed out those not deserving of the death penalty can be a conceptually sound approach to complying with the *Furman* mandate.[11] If courts realize that an alternative narrowing method exists, they might be more proactive in striking down unconstitutionally arbitrary aggravator statutes, thus forcing legislatures to pass mitigator narrowing statutes. In short, this note provides a viable approach to death penalty narrowing that would address the issue of arbitrariness in death penalty sentencing better than current aggravator statutes. Courts would no longer have to begrudgingly accept flawed aggravator narrowing statutes and could instead encourage states to adopt mitigator statutes that more successfully enforce the *Furman* mandate.

This note will begin by discussing the current use of aggravators in death penalty sentencing. Part II will explain how the use of aggravators to

---

eligible); Kathleen D. Weron, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances*, 1994 Utah L. Rev. 1107, 1138 (1994) ("With respect to Utah's statutory scheme . . . not only does this definitional scheme include more categories of death-eligible murders than that of any other state, but also it excludes almost no intentional killings at all.").

[7] *See* 408 U.S. at 277, 293.

[8] *See* Chelsea Creo Sharon, Note, *The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L. L. Rev. 223, 224 (2011).

[9] *See, e.g.*, Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 356 (1998) ("Although the Court has emphasized its concern with arbitrariness in several cases, the Court has retreated from this concern in practice.").

[10] *See id.*

[11] For the sake of brevity, this note will use the term "mitigator" instead of "mitigating factor."

narrow the class of death-eligible offenders came to be and how it evolved. Part III will explore how such an approach has failed to meet the *Furman* mandate—that the death penalty be imposed in a non-arbitrary manner—from legislative and judicial perspectives. Part IV will discuss existing solutions to this problem and how they too come up short.

This note concludes by proposing a new, court-driven legislative approach to meeting the *Furman* mandate. Part V will explain how *Furman*'s mandate can be met through a carefully crafted statute that narrows the number of death-eligible convicted murderers by using mitigators rather than aggravators. Part V will also discuss the potential benefits of adopting this method of narrowing through mitigators—specifically how such an approach may be easier to enforce judicially and thus stay true to the *Furman* mandate.

II. The Narrowing Requirement: Foundation, Purpose, and Application

A. *The Concern of an Arbitrarily Inflicted Death Sentence*

Prior to *Furman*, most offenders were automatically eligible for death (that is, the jury could impose death as a sentence) upon a finding of guilt for a capital offense.[12] The most common capital offense, and the only one that remains a capital offense today, was homicide.[13] However, state capital punishment statutes typically provided juries with no guidance as to how to select which murderers should actually receive the ultimate punishment.[14] As a result, after a finding of guilt, juries had absolute discretion in making the critical choice between life and death.[15] Such a sentencing system understandably resulted in unpredictable and inconsistent outcomes, with some convicted murderers being sentenced to death while others were spared despite committing virtually indistinguishable crimes.[16]

In a 1971 consolidated case before the Supreme Court, the petitioners in *McGautha v. California* and *Crampton v. Ohio* attacked this type of sen-

---

[12] Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 364–65 (1995) [hereinafter Steiker & Steiker].

[13] With the minor qualification that in *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008), the Court struck down the death penalty for all crimes in which "the victim's life was not taken" with the exception of crimes against the state (e.g. treason). Thus, *Kennedy* restricted the death penalty to homicides and offenses against the state. But given the rarity of offenses against the state, especially those resulting in a death sentence, for all practical purposes homicide is the only capital offense in existence today.

[14] *See* McGautha v. California, 402 U.S. 183, 189–190 (1971).

[15] *Id.*

[16] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 309–10 (1972) ("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." (citations omitted)).

tencing scheme. They argued that because the "decision whether [they] should live or die was left to the absolute discretion of the jury," such imposition of the death penalty without any governing standards was "fundamentally lawless and therefore violate[d] the basic command of the Fourteenth Amendment . . . ."[17] In a 6–3 decision with Justice Harlan writing for a five-justice majority,[18] the Court rejected this argument on two main grounds. First, the Court held that "[s]tates are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . ."[19] Second, the Court held that it was "beyond present human ability" to identify specific characteristics of crimes and criminals that would allow for a guided jury determination.[20] Further, the Court determined that any attempt to "catalog the appropriate factors" that warrant death would be futile, as "no list of circumstances would ever be really complete."[21] Thus, *McGautha*'s holding is two-pronged: first, even in the absence of guiding standards, the death penalty was not arbitrarily inflicted because jurors are presumed to act with due regard for the consequences; second, even if the death penalty were arbitrarily inflicted, it would be impossible to meaningfully distinguish the circumstances where death is warranted from those where it is not.[22]

Only one year later, however, the Supreme Court changed course in a 5–4 decision. In *Furman v. Georgia*, the Court put a stop to the death penalty on the grounds that, as imposed, it violated the Eighth Amendment's prohibition of cruel and unusual punishments.[23] *Furman* resulted in nine separate opinions.[24] Even the five-justice majority as to the judgment was split between Justices Marshall and Brennan, who believed that the death penalty was unconstitutional per se,[25] and Justices Stewart, White, and Douglas, who believed that the death penalty was unconstitutional only as applied.[26] Although there was no commanding majority opinion in *Furman*, the opinions of Justices Stewart and White are thought to be controlling, as they were the two justices who switched sides from *McGautha* to *Furman*.[27]

---

[17] *McGautha*, 402 U.S. at 185, 196.

[18] Justice Black concurred in judgment with Justices Douglas, Brennan, and Marshall in dissent.

[19] *McGautha*, 402 U.S. at 208.

[20] *Id.* at 204.

[21] *Id.* at 208.

[22] *See generally id.*

[23] 408 U.S. 238, 240 (1972).

[24] *Id.* at 239.

[25] *Id.* at 257, 314.

[26] *Id.* at 240, 306, 310.

[27] For instance, Chief Justice Burger regarded Justices Stewart and Whites' concurrences as the proper scope of *Furman*. *Id.* at 396–97 (Burger, C.J., dissenting) ("The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. *The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear*. This much, however, seems apparent: if the legislatures are

Justice Stewart's opinion directly addressed the problems of an arbitrarily applied death penalty. Determining that "of all the people convicted of rapes and murders in 1967 and 1968 . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," he concluded that the "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[28]

Justice White echoed Justice Stewart's arbitrariness concern but approached the issue from a different perspective. For Justice White, capital punishment, like any other punishment in the criminal justice system, must further two overarching social goals: deterrence and retribution.[29] However, if "the death penalty . . . [is seldom] imposed [then] it would cease to be a credible deterrent or measurably to contribute to any other end of punishment . . . ."[30] For Justice White, "the moment that [the death penalty] ceases realistically to further these purposes . . . its imposition in such circumstances would violate the Eighth Amendment . . . [as it would] then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[31] And in *Furman*, this threshold of infrequency of use had been "reached with respect to capital punishment."[32] Justice White concluded that, because "the death penalty is exacted with great infrequency even for the most atrocious crimes," "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[33]

Thus, Justice White's and Justice Stewart's opinions credited the very concern raised and rejected in *McGautha*: that unfettered jury discretion, which allowed death to be dealt in a fashion as random as that of a lottery,[34] was a problem of sufficient constitutional magnitude to put a stop to the death penalty as then applied. However, the key *Furman* opinions grounded the unconstitutionality of capital punishment on the death penalty as applied, rather than its per se imposition. As a result, it was only a matter of time before capital punishment resumed anew.

to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past." (emphasis added) (citations omitted)).

[28] *Id.* at 307–310 (Stewart, J., concurring).

[29] *See id.* at 311 (White, J., concurring).

[30] *Id.*

[31] *Id.* at 312.

[32] *Id.*

[33] *Id.* at 313.

[34] *Id.* at 293 (Brennan, J., concurring).

B. *Aggravators as a Solution to the Arbitrarily Inflicted Death Sentence*

Only a few years later, in *Gregg v. Georgia*,[35] the state of Georgia again appeared before the Court with a newly crafted capital punishment statute that seemingly addressed the problem of an arbitrarily inflicted death sentence. Under Georgia's new statute, an offender became death-eligible only if the offender was found guilty of a capital offense *and then* met at least one of the statutory "aggravating circumstances."[36] Aggravating circumstances (or "aggravators"), as their name suggests, identify circumstances of the crime or characteristics of the offender that made him or her particularly death-worthy.[37] In this fashion, the Georgia statute sought to restrict juror discretion to a smaller class of offenders: those who met at least one aggravator and who were thus particularly "bad."[38]

Although the Court acknowledged that the Georgia statute still gave some discretion to the jury, "'the discretion to be exercised [was to be] controlled by clear and objective standards so as to produce non-discriminatory application.'"[39] As a result, Georgia's "guided discretion" approach[40] of narrowing the death penalty to a particular class of especially "serious" or "appropriate" offenders—as well as the numerous other similar guided discretion statutes that states had adopted in the aftermath of *Furman*—received judicial approval, and the death penalty resumed again.[41]

The only other major approach adopted by states after *Furman* was a mandatory death penalty statute, which automatically imposed death on anyone convicted of a capital crime.[42] If *Furman* was concerned about jury discretion, then an obvious solution was to remove all jury discretion by mandating death after a finding of guilt. However, these statutes were subsequently found unconstitutional in *Woodson v. North Carolina*,[43] as they allowed no consideration of mitigating circumstances.[44] As a result, every state with the death penalty uses some variation of the aggravating-factor guided discretion approach to death penalty sentencing.

---

[35] 428 U.S. 153 (1976).

[36] *Id.* at 163–65.

[37] *Id.* at 198.

[38] Sharon, *supra* note 8, at 225.

[39] *Gregg*, 428 U.S. at 198 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

[40] Walton v. Arizona, 497 U.S. 639, 659 (1990) (describing such statutes as guided discretion schemes).

[41] *See* Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. Rev. L. & Soc. Change 641, 643–44 (1992–1994).

[42] *Id.* ("These new statutes took two forms, both of which purported to meet the *Furman* requirements. Fifteen states imposed mandatory death sentences on those convicted of capital crimes. Many of the remaining states enacted statutes based on the Model Penal Code, providing for guided discretion in sentencing." (footnotes omitted)).

[43] 428 U.S. 280 (1976).

[44] *Id.* at 302, 303–304.

After *Gregg*, the Court began to hash out the details of its new guided discretion jurisprudence. In *Godfrey v. Georgia*[45] and *Maynard v. Cartwright*,[46] the Court emphasized that the statutory aggravators cannot be so vague that a "person of ordinary sensibility could fairly characterize almost every murder" as meeting that statutory aggravator.[47] This judicial limitation was needed; otherwise, there would be no guiding jury discretion. Consequently, aggravators such as "the offense . . . was outrageously or wantonly vile, horrible or inhuman . . . ."[48] and other aggravators that could arguably be applied to every murder were no longer permissible because they failed meaningfully to guide the jury and narrow the pool of death-eligible offenders. However, as the Court worked to make sure that this guided discretion scheme did not return to the arbitrary practice that had permeated death penalty sentencing pre-*Furman*, signs were emerging that Justice Harlan's point—that defining the universe of those who deserve to die may be impossible—would be proven right.

First, the Court began developing and expanding a second line of jurisprudence stemming from the *Furman*, *Gregg*, and *Woodson* decisions: the requirement of individualized sentencing. As mentioned above, two approaches to death penalty sentencing manifested in the aftermath of *Furman*. The first was guided discretion, and the second was mandatory imposition of death. However, *Woodson* deemed these mandatory death statutes unconstitutional because the "process . . . accord[ed] no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense . . . ."[49] Subsequent cases in the *Woodson* line held that a jury must be permitted to consider any and all evidence that can be regarded as mitigating.[50] Thus, in a perplexing twist, the Court that had worked to stamp out jury discretion now forced the jury to consider any and all mitigating evidence. Of course, forcing the jury to consider such evidence without any guidelines or suggestions as to how it should do so is fundamentally at odds with *Furman*'s mandate[51]—that is to say, the *Woodson* mandate re-injected jury discretion into the sentencing decision.[52]

---

[45] 446 U.S. 420 (1980).

[46] 486 U.S. 356 (1988).

[47] *Godfrey*, 446 U.S. at 428–29.

[48] *See* GA. CODE ANN. § 17-10-30 (1983).

[49] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[50] *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

[51] *See* Walton v. Arizona, 497 U.S. 639, 664 (1990) ("To acknowledge that 'there perhaps is an inherent tension' between this line of cases and the line stemming from *Furman* . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II . . . . They cannot be reconciled." (citations omitted)) (Scalia, J., concurring in part and concurring in judgment).

[52] *See id.* at 664–65. ("Pursuant to *Furman*, and in order to achieve a more rational and equitable administration of the death penalty we require that States channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance. In the next breath, however, we say that the State *cannot* channel the sentencer's discretion . . . to consider any relevant [mitigating] information offered by the defendant and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the

Second, perhaps as a consequence of adopting the seemingly incompatible *Woodson* line of individualized sentencing cases, the Court's guided discretion requirement ceased to be an independent requirement in itself, instead collapsing into the more limited narrowing requirement.[53] *Gregg*'s approval of the Georgia statute was initially premised on the fact that the statute was "a carefully drafted statute that ensures that the sentencing authority is given adequate information and *guidance*."[54] Indeed, *Gregg* affirmed that "as a general proposition [arbitrariness in sentencing concerns are] best met by a system that provides for a bifurcated proceeding at which the sentencing authority is . . . provided with standards *to guide its use* of the information."[55] Thus, *Gregg* initially upheld a statute that guided the jury's decisionmaking while simultaneously narrowing the pool of offenders upon whom a jury could impose death through the use of aggravators.

The Supreme Court began collapsing this guided discretion requirement into the narrowing requirement, starting with *Zant v. Stephens*.[56] In *Zant*, the Court held that under Georgia's sentencing scheme, an aggravator "does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."[57] This collapse was completed in *Lowenfeld v. Phelps*[58] when the Court held that narrowing can occur at any stage in the trial process.[59] Thus, if a state adopts a death penalty statute where the number or scope of capital crimes is reduced, aggravators serve no additional purpose after a finding of guilt for any capital crime and do not have to further narrow the class of death-eligible offenders, since the constitutional requirement of narrowing was met at the guilt phase.[60] As a result, what the Court now requires to meet the *Furman* mandate is not that the jury be guided in its sentencing decision, but rather that its discretion be suffi-

defendant or the crime indicate that he does not deserve to be sentenced to death. The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve." (internal quotation marks omitted) (citations omitted)).

[53] The point of guided discretion statutes is to channel the discretion of the sentencing jury. But requiring that the jury be able to consider all mitigating evidence, and to give whatever weight to such evidence the jury deems appropriate, is fundamentally at odds with the goal of channeling discretion. The individualized sentencing requirement "exploded whatever coherence the notion of 'guided discretion' once had." *Id.* at 661 (Scalia, J., concurring); *see also* Steiker & Steiker, *supra* note 12, at 392 ("'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language." (quoting Brief for NAACP Legal Defense and Educ. Fund, Inc. and the National Office for the Rights of the Indigent as Amici Curiae supporting Petitioner at 69, McGautha v. California, 402 U.S. 183 (1971) (No. 71-203))).

[54] *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (emphasis added).

[55] *Id.* (emphasis added).

[56] 462 U.S. 862 (1983).

[57] *Id.* at 874.

[58] 484 U.S. 231 (1988).

[59] *Id.* at 244–45.

[60] *Id.*

ciently constrained through a narrowing of the possible circumstances in which it may impose death.[61]

C. Using Aggravators to Narrow and Resulting Consequences for Addressing Arbitrariness

The collapse of the guided discretion requirement as a stand-alone constitutional constraint for death penalty statutes has profound implications for addressing *Furman*'s root concern of an arbitrarily imposed death sentence. Given that aggravators no longer serve to guide the jury in making its decision but instead merely quantitatively reduce the set of circumstances in which the jury has the opportunity to make the life or death decision, meeting *Furman*'s mandate should now be a function of pure mathematics.[62] In other words, the test that courts should now use for determining whether a death penalty statute is consistent with *Furman* should be only quantitative.[63]

As a result of this switch from a qualitative "guiding" to a quantitative "narrowing" requirement, in order to meet *Furman*'s mandate of stamping out arbitrariness in death penalty sentencing under a pure narrowing approach, the class of death-eligible murderers must be narrowed to the point where jurors consistently impose death.[64] Put another way, a statute that relies solely on narrowing to prevent arbitrariness must constrain juries' discretion such that they are consistent in their sentencing decisions. To do this, the aggravators must narrow on the basis of culpable conduct so that what remains are only the worst of the worst offenses, for which juries will consistently impose death.[65] Hence, under the narrowing approach to *Furman*, it

---

[61] *Id.* ("To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder . . . . The use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." (internal quotation marks omitted) (citations omitted)).

[62] *See infra* note 63.

[63] *See, e.g.*, Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 351 (1984) ("[T]here are two requirements for a valid statutory aggravating circumstance: first, it must limit the class of murders numerically and, second, it must represent a 'good reason' for choosing this defendant to be eligible for death."); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1125 (1990) (referring to a "quantitative requirement" that prohibits including "too many defendants" and a "qualitative requirement[ ]" that prohibits including defendants "who are not necessarily more deserving of the death penalty").

[64] *See* Ledewitz, *supra* note 63; Rosen, *supra* note 63.

[65] *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[O]ur narrowing jurisprudence . . . seeks to ensure that only the most deserving of execution are put to death . . . ."); Sharon, *supra* note 8 at 232 ("[T]he Court's conclusion that narrowing alone could adequately guide discretion hinged on the assumption that aggravators would draw principled distinctions that would enable jurors to select those most deserving of death."); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 321 (2009) ("The purpose of statutory aggravators is to signifi-

is critical that the aggravators adopted by the state "genuinely narrow"[66] the pool of convicted murderers into a small pool of super-culpable offenders whom juries will consistently sentence to death.

Determining what "genuine narrowing" numerically entails is difficult, as no court has defined either the amount of narrowing needed (other than that narrowing is needed[67]) or how small the sub-group of death-eligible offenders should be. Some commentators have suggested that the death-eligible sub-group should be no greater than five or ten percent of the total class of convicted murderers in order to address arbitrariness in death penalty sentencing.[68]

Consider that, on average, only around one percent of those convicted of murder receive death as a sentence,[69] and a far lower percentage are actually executed.[70] If the class of convicted murderers who could receive death as a sentence is, as with Georgia's statute, so large that it includes essentially

---

cantly narrow the immense discretion that prosecutors wield in making decisions to seek the death penalty and juries wield in making decisions to impose the death penalty."); David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence? An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1, 4–6 (2009) (". . . I will work from the premise that the goal of any death penalty system is to limit death-eligibility to the 'worst of the worst' murderers. This assumption has only partial constitutional support inasmuch as the United States Supreme Court has held that death sentences can only be imposed on murderers who are somehow worse than 'normal' murderers, but has not required that they be among the 'worst of the worst.' Nonetheless, there is a compelling penological justification for limiting death-eligibility to the 'worst of the worst': public support for capital punishment is primarily based on retributive and denunciation principles, and particularly blameworthy murderers are the ones to whom those rationales most strongly apply. Further, there is a powerful practical justification for the 'worst of the worst' standard—the justice system simply has limited capacity to handle enormously resource-intensive death penalty cases. I am not alone in working from the 'worst of the worst' premise. In recent years there is a developing consensus among both scholars and death penalty litigators that the phrase 'worst of the worst' correctly describes the category of murderers who should be death-eligible." (citations omitted)); Packer, *supra* note 41, at 642 ("This 'narrowing' ensures that this qualitatively different punishment [of death] is imposed only upon those defendants who are most deserving of the harshest sanction possible."); Steiker & Steiker, *supra* note 12, at 372 (describing narrowing as a doctrine "designed to ensure that only those who are most deserving of the death penalty are eligible to receive it").

[66] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[67] *See supra* notes 57–62 and accompanying text.

[68] *See, e.g.*, McCord, *supra* note 65, at 3–4 ("As a rough approximation, the 'worst of the worst' designation should describe less than ten percent of murderers, and probably closer to five percent."); Steiker & Steiker, *supra* note 12, at 415 ("Thus, if experience over the past two decades reflects that one percent of all murders results in a death sentence, the class of the death-eligible should not be tremendously greater than, say, five or ten percent of all murderers."); Sharon, *supra* note 8, at 245 ("A better approach would be to measure statutory breadth by way of the death-eligibility rate a statutory scheme produces (the percentage of all first-degree murderers who qualify as death eligible under the statute) and require states to keep this figure below a threshold of 5 to 10%.").

[69] Dieter, *supra* note 4, at 4 ("Even in the 34 states that retain it, an execution is a rare event in all but a handful of states. Less than one in a hundred murders results in a death sentence, and far fewer defendants are executed."); Steiker & Steiker, *supra* note 12, at 415 (noting that "experience over the past two decades reflects that one percent of all murders results in a death sentence").

[70] *Id.*

every convicted murderer, then the few who do receive death as a sentence are likely to be chosen in an arbitrary manner.[71] The narrowing requirement therefore should be interpreted as requiring that death penalty statutes narrow the pool of convicted murderers to a small sub-group of extremely culpable offenders. The jury should be able to exercise its discretionary sentencing authority only on those in this small sub-group. In this fashion, the narrowing statute addresses the arbitrariness problem by constraining the jury's decision-making power only to those convicted murderers who are especially culpable and deserving of death.

Although this ten percent threshold is somewhat arbitrary,[72] the basic premise of the "genuine narrowing" argument is sound: to address arbitrariness in a narrowing regime, a death penalty statute must limit juries' sentencing power to a small fraction of the total class of convicted murderers. This note will therefore proceed from the premise that: first, constitutionally adequate narrowing should be judicially interpreted as meaning that no more than ten percent of convicted murderers can be subject to the discretionary death dealing power of the jury; and second, courts should strike statutes that allow for more than ten percent of convicted offenders to be death-eligible because such statutes fail to adequately constrain juries' discretion through narrowing.

Sections III and IV below discuss why the current approach of using aggravators to narrow and reach the ten-percent threshold is doomed to failure, and how none of the existing solutions can adequately remedy the flaws inherent in such an approach. Specifically, these sections explain how, even if courts were to implement a ten percent threshold, courts would be unable to achieve genuine narrowing by using aggravators. Section V proposes an alternative, preferable method to reach the ten percent narrowing threshold: narrowing through the use of mitigators, instead of aggravators.

III. The Failure of Aggravator Narrowing: How and Why States and Courts Have Failed to Reach *Furman*'s Mandate

The aggravators that many states adopt in their death penalty statute fail to properly or adequately narrow the range of circumstances in which a jury can use its discretion over life or death. For instance, during the years 1974–79, up to ninety percent of all persons convicted of murder in Georgia were eligible for death even after supposed narrowing done through aggravators.[73] Other states like Missouri,[74] California,[75] Colorado,[76] Utah,[77] and

---

[71] Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

[72] In other words, there are no persuasive reasons for why an eleven-percent or eight-percent threshold cannot constitute genuine narrowing. The point of choosing this ten-percent threshold is not to describe the current state of the law, but simply to give a fixed number for the sake of argument.

[73] David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 268 n.31 (1990).

South Carolina[78] also allow the vast majority of their capital offenders to be eligible for the death penalty. As discussed above, it is unclear exactly how much narrowing is needed to meet *Furman*'s goal of reducing arbitrariness in sentencing. However, it is clear that a statute that allows for potentially every convicted murderer to be sentenced to death is impermissibly broad, as jury discretion and arbitrariness will be present in the selection of the few offenders who do end up receiving a death sentence.[79] Courts have generally been complacent in letting the percentage of murderers who are death-eligible exceed this ten-percent threshold. Although there are a myriad of reasons why states and courts have failed properly to heed the narrowing requirement, they can generally be divided into two categories. First, states and courts are unable to narrow because of functional problems with the use of aggravators for narrowing. Second, states and courts are unwilling to narrow because of outside pressures.

A. Functional Problems with Aggravators

Aggravators functionally fail to narrow the pool of death-eligible offenders in three main ways. First, they may be too vague. Second, the aggravators may themselves be so broad as to include too much conduct. Third, state death penalty statutes may have so many aggravators that even if each is narrowly defined, the sheer number necessarily brings most capital offenders within the scope of death eligibility.

First, perhaps the greatest challenge to narrowing by way of aggravators is the use of vague aggravators to perform dichotomous functions. For instance, in the aftermath of *Furman*, many states adopted statutes that contained an aggravator that premised death-eligibility on the sheer depravity of the crime.[80] As discussed above, Georgia's statute had an aggravator which made death-eligible those offenders whose crimes were "outrageously or wantonly vile, horrible, or inhuman."[81] Other states have adopted

---

[74] Barnes et al., *supra* note 65, at 309 (noting that seventy-six percent of those convicted of murder were eligible for death under Missouri law).

[75] Marceau et al., *supra* note 6.

[76] *Id.*

[77] Weron, *supra* note 6.

[78] Blume et al., *supra* note 6.

[79] *See generally* Dieter, *supra* note 4, at 10–14 (comparing and contrasting various offenders and their sentences in a table to show how juries return inconsistent sentences).

[80] Sam Kamin & Justin Marceau, *Vicarious Aggravators*, 65 Fla. L. Rev. 769, 778 (2013) ("Searching for a politically viable, constitutional alternative to the purely discretionary sentencing that preceded Furman, many states turned to the Model Penal Code's (MPC) provisions on capital punishment."). At the time of *Furman*, Model Penal Code § 210.6 contained a list of possible statutory aggravators, one of which was the "heinous, atrocious or cruel, manifesting exceptional depravity" aggravator. *See* Model Penal Code § 210.6 (Proposed Official Draft May 4, 1962) (repealed 2009).

[81] *See* Gregg v. Georgia, 428 U.S. 153, 161 (1976).

similar aggravators, such as Oklahoma's "especially heinous, atrocious, or cruel" provision.[82]

The reason for adopting these "catch-all" aggravators is obvious: if every aggravator were specific, direct, and clearly defined, then absent a broad catch-all provision, offenders that may deserve death might escape death-eligibility because their conduct would not be fully covered by these other narrowly defined aggravators. As Professors Carol Steiker and Jordan Steiker have articulated, a "central drawback" in forcing states to "adopt[ ] more limited definitions of capital murder and . . . restrict[ ] both the number and breadth of aggravating circumstances" is that "[t]he narrowed category of death-eligible murders would be underinclusive in that many deserving murderers would be spared the death penalty."[83] Of course, states could mitigate this concern by expanding their list of aggravators to try to include every aspect of a truly "bad" offense. However, as Justice Harlan noted, it is nearly impossible to compile such a list; it is simply beyond human capability to imagine every possible permutation of human treachery that might call for death.[84] Therefore, broadly applicable catch-all aggravators are needed.

Now the problem becomes clear: how can an aggravator, designed to be catch-all, simultaneously perform its constitutionally mandated task of narrowing? There is a problem with using aggravators for this dual purpose: the vagueness that makes them broadly applicable also renders them unable to distinguish between conduct that is distasteful and conduct that is truly the worst of the worst. Moreover, what is "bad" is a subjective calculation.[85] Any capital offense can fairly be characterized as outrageously horrible or especially heinous.[86] There is an inherent tension between the goals of catching all possible offenses that may fall through the cracks and trying to narrow the pool of death-eligible offenders.

Although the Court has attempted to reconcile the use of such aggravators, problems of the sort that Justice Harlan identified inevitably arise. How can a state appropriately and concisely clarify when a crime is so bad that it warrants death-eligibility without completely invalidating the use of such aggravators, thereby posing the separate problem of forcing states to define in advance all circumstances of death-worthy conduct?[87]

---

[82] *See* OKLA. STAT. tit. 21, § 701.12(4) (1981).

[83] Steiker & Steiker, *supra* note 12, at 415–16.

[84] *See* McGautha v. California, 402 U.S. 183, 204 (1971).

[85] *See* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1431–33 (1988) (noting that there is an "irreducible degree of subjectivity that must adhere to any attempt to distinguish bad cases from 'worst cases'").

[86] *See, e.g.*, Michael Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523, 551 (1984) (stating that Florida's "heinous, atrocious or cruel" aggravator "covers virtually every kind of first degree murder imaginable").

[87] The complete invalidation of these catch-all aggravators is not usually a feasible option, as states prefer a catch-all aggravator to cover conduct that is truly deplorable but that other,

Courts have tried to clarify vague aggravators. For instance, in *Arave v. Creech*,[88] the Supreme Court upheld the Idaho Supreme Court's clarification that the aggravator "the defendant exhibited utter disregard for human life" meant "the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."[89] It is unclear, however, that even this clarification—using perhaps the most hyperbolic words available in the English language to show the required severity and gravity—would lead to the sort of narrowing that aggravators are supposed to provide. After all, cannot every first-degree murderer be characterized as a "cold-blooded, pitiless slayer"? And is this provision so much clearer than the "outrageously or wantonly vile" aggravator struck down by the Court in *Gregg* for being too ambiguous?[90]

The attempt to restrict this aggravator to only the most culpable of offenders fails entirely because juries may differ in determining what counts as truly heinous. Because of this difficulty in defining "who deserves to die," it is not surprising that aggravators that attempt to narrow on the basis of the crime's severity have led to perverse and illogical results.[91] It is also not surprising that the Supreme Court has backed off from strict enforcement of these aggravators[92] because they are unenforceable as a matter of logic and

more specific aggravators may not include. For instance, if a killing involved torture (and thus merits death) but a state statute does not have an "especially heinous" aggravator and the crime does not meet any other statutory aggravator, then the offender may escape death-eligibility even though his conduct may warrant it.

[88] 507 U.S. 463 (1993).

[89] *Id.* at 468 (quoting State v. Osborn, 631 P.2d 187, 201 (Idaho 1981)).

[90] Gregg v. Georgia, 428 U.S. 153, 161 (1976), *see supra* Part II.B.

[91] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 367 ("The 'heinous, cruel, or depraved' aggravator has been applied broadly. For example, courts have found the aggravator present both where the victim died slowly—because the victim suffered—and where the defendant used excessive force in killing the victim quickly. Such reasoning leads one to conclude that unless a defendant uses exactly the proper amount of force to kill, then the 'heinousness' aggravator is satisfied. In those cases, however, the aggravator often is found to be present where the victim anticipated his or her fate. Such applications are consistent with common sense—because all murders are heinous—but such applications are not consistent with the Eighth Amendment objectives of eliminating arbitrariness and narrowing the group of defendants eligible for the death penalty."). *Compare* State v. Martinez-Villareal, 702 P.2d 670, 680 (Ariz. 1985) (upholding a finding of depravity based on the offender's bragging that the killing showed his "machismo"), *with* State v. Graham, 660 P.2d 460, 463 (Ariz. 1983) (finding the depravity aggravator not met even though the offender bragged that his victim "squealed like a rabbit").

[92] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 365–67 ("In other more recent cases, however, the Court has upheld applications of the heinousness factor . . . . In 1993, the Court further retreated from its early concerns about arbitrariness by upholding a definition that was extremely similar to other definitions the Court previously had found unconstitutionally vague . . . . In earlier cases, the Supreme Court seemed more concerned about giving proper guidance to juries to ensure that the application of an aggravator provided clear guidelines. The Court was concerned about vague aggravators because they could lead to the arbitrary infliction of the death penalty. *Arave*, however, illustrates a shift in the Court's concern. The Court practically has abandoned its attempts to eliminate arbitrariness and instead only requires that an aggravator potentially eliminate some first-degree murderers.").

principle. Other vague aggravators also exist,[93] and they further demonstrate that the attempt to narrow through catch-all provisions is logically flawed. This attempt to narrow essentially asks states and courts to solve a paradox,[94] a task that is simply impossible.[95]

Second, some aggravators may extend to a vast set of circumstances even if the factor itself is clearly delineated. For instance, many statutes have a felony murder aggravator, which is fulfilled if murder is committed in the course of a felony like arson, rape, or robbery.[96] Similarly, many statutes have a pecuniary gain aggravator that is met if anything of value is taken during the murder.[97] These aggravators, which many offenders convicted of a murder may meet, expand rather than narrow the set of circumstances in which a jury can exercise its sentencing power.

Finally, many death penalty statutes have expanded the sheer number of aggravators that they contain, and all signs indicate that this trend will continue.[98] Over the past decades, numerous states have added aggravators to their death penalty statutes.[99] Though the addition of one or two aggravators may not pose major problems if they are narrow in scope and the statute has only a few aggravators to begin with, many contemporary state death penalty statutes have ten or more broadly applicable aggravators, effectively rendering nearly every offender convicted of murder death-eligible.[100]

These three problems in concert show the fundamental reason why narrowing through aggravators cannot work in practice: it is impossible to define in advance what conduct truly merits death. A concern underlying Justice Harlan's opinion in *McGautha* is that courts are unable to enforce a statute that attempts to objectively narrow by selecting only those offenders who are the worst of the worst, because culpability and offense are inher-

---

[93] For instance, another commonly employed aggravator is the future danger provision, wherein the jury is asked to determine whether the offender would pose a future danger. *See* Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 415 n.373 (listing states that employ the "future danger" aggravator). Such an aggravator fails to meaningfully narrow because it may apply to every offender. *See id*. at 371–72.

[94] Indeed, commentators have called narrowing through aggravators a "paradox" that needs to be resolved. *See, e.g.*, *id* at 453–54.

[95] *See* McGautha v. California*,* 402 U.S. 183, 204 (1971).

[96] Sharon, *supra* note 8, at 234. *See also* Model Penal Code § 210.6 (Proposed Official Draft May 4, 1962) (repealed 2009) ("The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnaping.").

[97] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 396. *See also* Model Penal Code § 210.6 (Proposed Official Draft May 4, 1962) (repealed 2009) ("The murder was committed for pecuniary gain.").

[98] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 444 ("The trend in legislatures is to expand the death penalty and to add aggravating circumstances instead of deleting them.").

[99] *See id*.; *see also* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepp. L. Rev. 1, 16–28 (2006).

[100] Kirchmeier, *Casting a Wider Net*, *supra* note 99, at 25 n.142 and accompanying text.

ently subjective inquiries.[101] Thus, the reason why aggravators are broad, vague, and numerous is that legislatures too are unable to define what conduct merits death, and so, to be safe, states include them all. Of course, including every instance of conduct that could be conceivably regarded as death-worthy would mark a return to the arbitrary sentencing of years past, and indeed, this is exactly what has happened.

B. Aggravators and Outside Pressures

Narrowing through aggravators also fails for a variety of reasons not related to their function; specifically, the incentives set up by such an approach do not favor strict adherence to the narrowing requirement. For instance, aggravators theoretically should be tied to culpability because the goal is to narrow by plucking out those offenders who are the worst of the worst.[102] In fact, aggravators are in many instances adopted not on the basis of culpability but on the basis of other concerns or interests. It is common for aggravators to be adopted in the aftermath of murders that receive considerable media attention, or worse, as a way to honor victims.[103] Although those who commit these murders may deserve the death penalty, the entire process of selecting aggravators from a victim-centric viewpoint conflicts with the goal of separating *offenders* on the basis of culpability. Such a selection process erases the offender-centric viewpoint that *Gregg* initially upheld[104] and should be a central characteristic of narrowing statutes. Indeed, modern aggravators adopted through a process divorced from offender culpability have been appropriately labeled as "tokens of esteem."[105]

To make matters worse, political pressures likely will prevent any reformation of this process. It is well understood that "tough on crime" legislation is easier to pass than legislation that could potentially benefit those labelled as offenders by the criminal justice system.[106] This reality impacts the way legislators approach aggravators. Legislators have little motivation to approach the question of narrowing from the perspective of the offender. After all, the dynamics of a legislative debate centered on whether to memorialize the victim of a crime are different from the dynamics of a debate centered on whether to adopt an aggravator as a measure of an offender's culpability. Legislators would rather be seen as eulogizing and protecting victims than considering the intrinsic culpability of heinous murderers, and

[101] *Cf.* McGautha v. California, 402 U.S. 183, 208 (1971).

[102] *See supra* Part II.

[103] Sharon, *supra* note 8, at 235–37.

[104] *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

[105] *See* Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81, 83 (Austin Sarat ed., 1999).

[106] Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("[It is a] well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.").

would not add a culpability-based aggravator out of fear that any other decision would result in fierce political backlash. Because anything that could be seen as weak on crime is politically unpopular, even if legislators do approach aggravators from the perspective of offender culpability, the result of any debate is hardly in doubt. This process of adopting statutory aggravators may explain some of the functional failures mentioned above. If states were serious about using aggravators as a measure of offender culpability, then many categories of aggravators would be erased from statutes, thus bringing these statutes more in line with the narrowing requirement and *Furman*'s promise of a non-arbitrarily imposed death penalty.

Courts too often are unable or unwilling to enforce the narrowing requirement. As discussed above, sometimes courts are unable to uphold it because the task is conceptually impossible. But courts are also limited because, like legislators, they are under tremendous political pressure. Although federal judges are appointed, many state judges are elected, including justices on the highest appellate court in a state for criminal matters. When judges are accountable to the public, and the public is pro-death penalty,[107] it is not surprising that courts rarely strike down unconstitutional aggravators.[108] This concern about the political vulnerability of elected judges is not new,[109] nor is this concern particular to death penalty issues. But given the stakes involved in death penalty decisions, the political vulnerability of judges over questions of life and death does result in life and death consequences.[110]

It is clear that the political inertia in favor of the status quo is a monumental obstacle to any possible reform. For this reason, this note focuses (primarily) on developing a palatable alternative approach that may show courts that narrowing can be successfully used to reach the *Furman* mandate. If *federal* courts can see that there are no functional or conceptual

---

[107] Historically, the death penalty has typically enjoyed majority support in this country. *See*, *Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx (last visited Mar. 12, 2015), *archived* at http://perma.cc/D2CJ-R8FG.

[108] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 444 ("Even judges have felt political pressure to impose death sentences, and in some instances, state supreme court justices have been voted off the bench where they have been perceived as being too lax in enforcing the death penalty.").

[109] Ledewitz, *supra* note 63, at 394 (noting that aggravators cannot be judicially enforced because it would be asking judges to tell states that their "repugnance truly felt concerning a type of homicide is an inadequate reason for consideration of the death penalty").

[110] Perhaps the most illustrative and somber recent example is *Woodward v. Alabama*, 134 S. Ct. 405 (2013), where petitioner Woodward sought Supreme Court review of Alabama's practice of allowing a judge to override a jury's sentencing recommendation. Although the Court denied the petition for certiorari, Justice Sotomayor noted in dissent that the rate of judicial overrides in Alabama correlated to election years for judges. As she stated, "[t]here is no evidence that criminal activity is more heinous in Alabama than in other states, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures." *Id.* at 407.

difficulties in narrowing to achieve the *Furman* mandate, then perhaps they, insulated from political pressure, can more readily toe the line and force state courts and legislatures to adopt a more constitutionally permissible statute, regardless of the state courts' and legislatures' motivations or political susceptibility.

IV. Existing Solutions to Existing Problems (and How They Come Up Short)

Many commentators have remarked that if there are too many aggravators, or the aggravators are too broad or vague, why not use the courts to enforce the ten-percent threshold and thereby force states to make aggravators concise, narrow, and few?[111] Thus, even if states include many aggravators or broad aggravators in their statute, courts could be used to constrain the states. Under this view, "genuine[ ] narrowing"[112] can be accomplished if the federal judiciary is more proactive in its enforcement of the narrowing requirement. However, this appealingly simple solution is insufficient because the fundamental problem of determining what conduct is the most deserving of death is also present.

As stated above, this note proceeds from the premise that narrowing is a quantitative requirement that no more than ten percent of convicted murderers be eligible for the death penalty.[113] However, it is not clear how this threshold percentage addresses the problem of arbitrariness in death penalty sentencing. First, what if more than ten percent of convicted murderers deserve to die? If that is the case, then even if courts impose a hard ceiling of ten percent, the decision of whom to include in that category will still be arbitrary. Because the inquiry into who deserves death is largely subjective, it is not clear how anyone could objectively select which ten percent of the convicted murderer class should be death-eligible.

Second, under a "genuine narrowing" approach, courts would force states to define vague aggravators, specify broad aggravators, and restrict the number of aggravators so that the death penalty is confined to only a few select circumstances. In these few circumstances, the jury should consistently find for death, thus reducing arbitrariness in death penalty sentencing. The problem with this approach is that though jury arbitrariness is reduced, the problem of legislative arbitrariness arises. Under such an approach, states would have to make discretionary, subjective, and arbitrary judgments as to which and how many aggravators would make up the statute.

For instance, some commentators who advocate for "genuine narrowing" statutes propose that such statutes should contain no more than five or

---

[111] *See, e.g.*, Sharon, *supra* note 8, at 245; Steiker & Steiker, *supra* note 12, at 415.
[112] Steiker & Steiker, *supra* note 12, at 415.
[113] *See supra* Part III.

six aggravators.[114] But which aggravators should make the cut? If a state attempts to break up a broad provision like the felony murder aggravator, it may need to limit the types of crimes covered by that aggravator. But who is to say, for example, that murder accompanied by rape is any more or less deserving of death than murder accompanied by torture?[115]

Moreover, if narrowing means reducing the number of death-eligible murderers to a small percentage of the total class of convicted murderers, then the number of aggravators is not determinative of the constitutionality of the statute. Under a "genuine narrowing" approach, it should not matter whether a statute has 200 aggravators or just two. If each aggravator in the 200-aggravator statute is so narrow that it covers only a small amount of conduct, then the statute might well be acceptable. On the other hand, provisions such as the felony murder aggravator or the "especially heinous or cruel" aggravator may never be acceptable due to their breadth, even if they were the only ones adopted by the state. Indeed, there is great "difficulty in arriving at a certain limit on the number of aggravating circumstances required by the Constitution. It seems impossible to draw a line and conclude that five aggravators are too many or that the Constitution requires the execution of a specific percentage of murderers."[116]

A "genuine narrowing" statute would constrain the jury's decision making, thus making sentencing decisions more consistent. In such a scheme, however, a separate problem of legislative arbitrariness would arise when the state legislature makes subjective and arbitrary judgments about which aggravators to include in the statute. Although the discretion of the jury is confined, the state legislature, in choosing which aggravators to keep, has already made the arbitrary judgment. As a result, all offenders who meet the supposedly narrow aggravators are already victims of arbitrariness. Granted, the problem of legislative arbitrariness is different from the problem of jury arbitrariness at issue in *Furman*, and in some ways legislative arbitrariness is less of a concern than jury arbitrariness,[117] but it is a concern nonetheless.

---

[114] *See, e.g.*, Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 443–46.

[115] *Cf.* The Associated Press, *Court Committee: Revamp Ohio Death Penalty Law by Narrowing List of Eligible Crimes*, THE BLADE, June 27, 2013, http://www.toledoblade.com/State/2013/06/27/Court-committee-Revamp-Ohio-death-penalty-law-by-narrowing-list-of-eligible-crimes.html, *archived at* http://perma.cc/4AKF-S2MG. An Ohio task force recommended that "murders committed during robberies, burglaries or rapes, [should] be stripped from Ohio's death penalty law . . . . [L]imit[ing] capital prosecutions to cases involving multiple victims, killings of children under 13, slayings of police officers and crimes committed to eliminate witnesses . . . ." *Id.* Although a state public defender remarked that such a change would "get rid of cases that are clearly not in society's eyes the worst of the worst," a state prosecutor argued that robberies and burglaries should be retained as aggravators because "[p]eople who are that callous and murderous deserve the death penalty." *Id.* This debate shows that reasonable people may disagree about what constitutes death-worthy conduct. As a result, any decision about which aggravators to retain will be somewhat arbitrary.

[116] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 445–46.

[117] Legislative arbitrariness in deciding which aggravators to keep in a "genuinely narrowed" death penalty statute is arguably less of a problem than jury arbitrariness because of at

Other solutions also fail. One advanced by Professor McCord is that to be death-eligible, several aggravators must apply.[118] However, such an approach would exclude many offenders who meet only a single aggravator but nonetheless deserve death. Should death be confined only to offenders whose killing was accompanied by multiple other crimes, such as rape, torture, and burglary? Might death not be a reasonable punishment for those who "only" killed? Again, the problem is that it is difficult to identify precisely who deserves death.

Perhaps the reason why all of these solutions are flawed is that they are based on a framework that is inherently incompatible with the goal of narrowing. Every proposed solution, whether it is reducing the number of aggravators or forcing states more concisely to define aggravators, suffers from the problem of defining who deserves to die. Perhaps "the possibility that we really cannot decide in advance who deserves the death penalty . . . is not merely an indictment of the strategy of forced narrowing; it is a concession that administration of the death penalty is inevitably arbitrary."[119]

V. Ending the Lottery of Death: Narrowing Through Mitigators

Out of concern that the "administration of the death penalty is inevitably arbitrary,"[120] many believe that the only ways to implement the principles laid out in *Furman* are either to end the death penalty altogether or to impose mandatory death sentences.[121] However, *Furman* did not demand that arbitrariness be completely eliminated; it simply required that arbitrariness be reduced to a constitutionally acceptable level. As *Gregg* made clear,

least two considerations. First, because all offenders are sentenced the same way (at least within the same state), even if the aggravators were arbitrarily adopted there would be consistency in sentencing decisions as similarly situated offenders would receive similar sentences. Second, because legislatures are politically accountable, it can be argued that legislative decisions about which aggravators to adopt reflect societal values about what actions and characteristics of the offender count as especially bad. Thus, a legislative decision is less arbitrary than individual jury sentencing decisions.

[118] *See* McCord, *supra* note 65, at 3 ("I will propose a model that allows for consideration of all depravity factors in the eligibility determination . . . but requires an accumulation of them for death-eligibility.").

[119] Steiker & Steiker, *supra* note 12, at 416.

[120] *Id. See also* Moore v. Parker, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting) ("I have been a judge on this Court for more than twenty-five years. In that time I have seen many death penalty cases and I have applied the law as instructed by the Supreme Court and I will continue to do so for as long as I remain on this Court. This my oath requires. After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.").

[121] Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 9, at 454–55 ("The two best alternatives to the constitutional paradox of today's arbitrary mandatory death sentencing scheme are the solutions that individual Supreme Court Justices have suggested . . . . One option is to impose it 'fairly' by following the suggestion of Justices Scalia and Thomas by completely embracing a mandatory death penalty . . . . The other option is to follow Justices Blackmun and Powell, who both originally voted to uphold today's death penalty scheme, and subsequently concluded that the death penalty should be imposed 'not at all.' ").

the goal of a state death penalty statute is not to erase all jury discretion but to ensure that the jury's discretion is sufficiently tempered and controlled.[122]

This section advocates a legislative approach that may be able to sufficiently reduce the amount of arbitrariness to constitutionally permissible levels in accordance with the *Furman* mandate. Specifically, if states were to change their conceptual approach to death penalty statutes from selecting those who most deserve death to selecting those who most deserve to be spared from death, many of the current difficulties in narrowing the class of convicted murderers could be minimized to constitutionally acceptable levels.

A. *The Theoretical and Conceptual Framework*

The root problem of the current approach to narrowing is that states have to select a small group of offenders who are more culpable than others. From a theoretical perspective, this is difficult.

Imagine that a company has one opening but 100 applicants for the position. Because it is hard to determine who "deserves" the job, the company institutes several objective screening guidelines articulating what characteristics a "qualified" applicant should have. For instance, the company might say that an applicant is qualified if the applicant has one of the following: 1) a post-high school degree, 2) five years of work experience, or 3) a competitive resume. Based on these requirements, some applicants will be ineligible for the job. However, many applicants will make the cut—let us assume 60. After the cut, because a large pool of qualified applicants still remains, the company must resort to somewhat subjective and arbitrary methods to select the person who gets the job. These methods may include interviews to determine who is the "best fit" for the company. The company hires the applicant determined to be the "best fit," but again, this determination is somewhat arbitrary because companies (or persons within the same company) may disagree about which applicant is the "best fit." This is analogous to the current state of death penalty sentencing. If there are a large number of broad aggravators, then many offenders will qualify for at least one. As a result, because many offenders are death-eligible, the jury must determine who among the offenders is the worst of the worst in an analogous process to a company determining who is the "best fit" for a job.

If the solutions offered by other commentators, and discussed above,[123] were applied to the hiring hypothetical, the following would result. First, the company would narrow its broad qualifications. For instance, the require-

---

[122] Gregg v. Georgia, 428 U.S. 153, 198 (1976) (acknowledging that while the Georgia statute still had "some jury discretion[,] . . . the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application," thereby indicating that the problem in *Furman* was not arbitrariness per se, but that there was too much of it (internal quotation marks omitted)).

[123] *See supra* Part IV.

ment that an applicant have a post high-school degree could specify that "applicants must have a master's degree from a tier one graduate school." This narrower requirement would catch fewer applicants and thus reduce the number of applicants that made it through the screening. The "competitive resume" qualification, which is a catch-all policy similar to the "especially heinous" aggravator, would be eliminated. Finally, the company would reduce the number of qualifications listed, further reducing an applicant's chances. After all of these changes, only ten applicants would pass the initial screening and go before the hiring committee, instead of the original 60.

Although the arbitrariness of the hiring committee would thereby be reduced, as the committee could exercise its hiring discretion only in this small pool of ten applicants, these solutions are themselves arbitrary, as explained above, and therefore fail to deal with the general problem of arbitrariness.[124] Who is to say that applicants with a master's degree from a tier-one school are qualified but applicants with a master's from a tier-two school are not? If the company does reduce the number of qualifications listed, which qualification should it remove? Additionally, the removal of the catch-all policy might exclude from consideration highly capable applicants who do not meet any listed qualifications. Thus, the ten applicants who make it through screening are screened in an arbitrary fashion. As a result, even though the hiring committee has fewer applicants to evaluate, and therefore fewer opportunities to exercise its decision-making discretion, the arbitrary decisions used to screen applicants have already occurred.

Perhaps a better way to approach this question would be as follows. Instead of trying to find the "best" job applicant, it may be easier to disqualify the other ninety-nine. Instead of trying to define a class that is numerically few (the ten percent of offenders who deserve death-eligibility based on their crimes), the goal of the statute should be to define a class that is numerically large (the ninety percent of offenders who do not deserve death). Under this approach, instead of specifying what qualities or qualifications an applicant should have, the company should list qualities and attributes that an applicant should *not* have. The same could be done in a death penalty statute. Instead of listing aggravators that attempt to narrow on the basis of culpability (choosing the small number of persons most worthy of death), a statute could list mitigators that narrow on the basis of mercy (choosing the large number of persons not worthy of death).[125] The following section begins to sketch a model for such a statute.

---

[124] Here, I mean "arbitrary" in the lay sense rather than in the constitutional context where a legislature's arbitrary selection of aggravators is inherently unconstitutional. After all, courts owe a degree of deference to state legislatures on matters of punishment and legislative policy. *See Gregg*, 428 U.S. at 176 (plurality opinion).

[125] A possible misconception must be cleared up. Mitigators are more than just the absence of aggravators. The categories of those who "deserve to live" and those who "deserve to die" are not mutually exclusive, because there is overlap. For instance, under a narrowing approach using mitigators, an offender convicted of the most heinous crime possible (and who thus would undoubtedly meet an aggravator under a traditional aggravator narrowing statute)

B. Toward a New Statute

A state statute that narrows through mitigators would explicitly list the statutory mitigators. After a finding of guilt for first-degree murder, the jury, during the sentencing phase, must determine whether the convicted murderer meets any of the listed statutory mitigators. If he does, then the jury cannot impose death. If he does not, then the jury moves onto phase two of sentencing, which requires the jury to weigh all non-statutory mitigating evidence and any aggravating evidence. If the jury finds that the aggravating evidence outweighs the non-statutory mitigating evidence, the jury may then impose the death penalty. Otherwise, the jury must give out a lesser sentence. Such a statute might read as follows:

> Section I.
> Where a person is convicted of first-degree murder upon a trial by jury, a sentence of death may be imposed if the jury recommends a sentence of death. A jury may not recommend a sentence of death issued pursuant to Section II or Section III. Where a sentence of death is recommended by the jury, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law.
>
> Section II.
> The judge shall consider, or shall direct the jury to consider, any applicable mitigating circumstances. A jury may not recommend a sentence of death if it determines that any one of the following mitigating circumstances is met:
> (1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
> (2) The defendant was under substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
> (3) The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
> (4) Another defendant or defendants, equally culpable in the crime, will not be punished by death.
> (5) The defendant did not have a significant prior history of other criminal conduct.

---

may also meet a mitigator and thus be death-ineligible. Similarly, it is possible that a "regular" murderer who does not meet any mitigators may receive a death sentence even though under a traditional aggravating statute he might not be death-eligible.

(6) The defendant committed the offense under severe mental or emotional disturbance.
(7) The victim consented to the criminal conduct that resulted in the victim's death.
(8) The defendant was under the age of 21 when the defendant committed the offense.

Section III.
If the jury considers and finds that none of the statutory mitigating circumstances listed in Section II are applicable, the jury may consider any non-statutory mitigating circumstances in its sentencing decision. The jury may recommend a sentence of death if it determines that the aggravating circumstances of the crime outweigh any and all non-statutory mitigating circumstances. The jury may not recommend a sentence of death if it determines that the non-statutory mitigating circumstances outweigh any aggravating circumstances of the crime.

C. Analysis and Advantages of Narrowing by Mitigators

There are several advantages to using mitigators to narrow the pool of death-eligible offenders. One, it is easier to define a class that is numerically large rather than a class that is numerically few. Two, narrowing by mitigators can avoid problematic line-drawing situations. Three, defining the total class of convicted murderers that do not deserve death may actually be possible, given the larger class. Four, this approach would allow a court to monitor and, if need be, adjust a state's death penalty statute. Five, a mistake in a death penalty statute that narrows via mitigators is less problematic than a mistake made in an aggravator statute. Six, such an approach would give states an incentive to carefully define their statutory mitigators, thus addressing vagueness issues currently plaguing aggravators. Seven, such an approach is more politically feasible. Eight, narrowing the death penalty using mitigators will ease tension with the individualized sentencing line of cases. I will address each advantage in turn.

First, the conceptual goal of narrowing is changed. Instead of trying to define a class that is numerically few (the ten percent of offenders who are death-eligible based on their crimes), the goal of the statute is to define a class that is numerically large (the ninety percent of offenders who do not deserve death). From a conceptual viewpoint, defining a larger class is a much easier task. The current problem with aggravator narrowing schemes is that because such statutes must define a small class, the aggravators must be extremely concise and few; otherwise, more than ten percent of the total class of convicted murderers will be swept up. But concision is difficult, if not impossible, given the uncertainty and subjectivity of what constitutes a truly death-worthy action. This problem is mitigated when defining a significantly broader class. Because the class is large, the screening criteria need

not be so finely worded or exact. A statute that has broad, vague, or numerous mitigators is of less concern (and perhaps may even be encouraged) because the size of the class can absorb the statute's ambiguity.

To illustrate this concept, again imagine that a company is hiring for a single position out of a pool of 100 applicants. Since there is only one opening, the company must be extremely specific about the candidate for whom it is looking. Otherwise the hiring committee must select from many qualified applicants—an arbitrary endeavor. However, what if the company had 90 openings? In that case, the company would not have to succinctly and concisely define its requirements. Simply stating that "applicants who have attained a high educational status are qualified" may be enough to narrow the field because there may be fewer than 90 applicants who have plausibly "attained a high educational status."

The statute listed above can further illustrate this concept. Take, for example, the duress mitigator (sample statute Section II(2)). It is, generally speaking, broadly worded and vague, in that there is no exact definition of what constitutes "substantial duress." However, this vagueness does not cause constitutional defects because the total class of convicted murderers who may have killed under any form of duress will almost certainly not exceed ninety percent of the total class of convicted murderers. Moreover, even if the mitigator applies to more than ninety percent of all convicted murderers, it is certainly not unconstitutional to refrain from imposing the death penalty. Thus, if there is any doubt, or if the decision as to whether this mitigator applies is in any way a "close call," the jury should err on the side of finding that it applies. Simply put, each mitigator should be read expansively. Given that it is hard to define with precision what constitutes a death-worthy (aggravating) or mercy-worthy (mitigating) circumstance, this approach of narrowing by mitigators deals with this definitional problem by bypassing it entirely.

Second, this conceptual switch addresses the main problem with narrowing through aggravators: line drawing. Because aggravator statutes attempt to identify a small subclass of extremely culpable offenders, the factors must be specific enough to carve out a small niche of extremely culpable conduct from the broader class of all first-degree murderers. The problem is that it is hard to be specific when it is unclear what constitutes extreme culpability. In other words, it is hard to draw lines when one does not know what falls on either side of the line.

Under this new scheme, because the goal is to identify not the small subclass but rather everything else, the fact that mitigators are broad or that it may be hard to define what constitutes mitigation is of lesser concern. The reason is simple: because the goal is to eliminate *at least* ninety percent of murderers from death-eligibility, if the state is unsure about whether a mitigator deserves to be in the statute, the state can always err on the side of inclusion, since doing so will not render the statute overbroad. This is unlike aggravator statutes, which attempt to define a universe of only ten percent.

In that case, states cannot resolve the problem simply by adding in a questionable aggravator, because that would make the universe too large. Rather, the state must make an arbitrary decision about which aggravator to keep. Thus, in the statute listed above, if the state is unsure about whether to include a mitigator, the state can always include it. The worst-case scenario is that one hundred percent of all convicted murderers meet a statutory mitigator, and therefore no murderers would be eligible for death, which is a constitutionally permissible result. As a result, the issues posed by line drawing can be avoided since line drawing itself is mostly avoided.

Third, narrowing through mitigators is more mathematically possible. As mentioned above, one problem with restricting the death penalty to only ten percent of offenders is that more than ten percent of offenders may deserve to die. If that is the case, then such an approach is doomed to be arbitrary. Under a mitigation statute, this concern does not present itself because the inquiry is focused not on the offender's conduct but rather on the offender's mitigating qualities. As a result, the question becomes whether the number of offenders that do not deserve to be executed exceeds ninety percent of the total class of convicted murderers. With the high allotment of ninety percent, there is a better chance that all those who truly deserve to avoid the death penalty would do so.

Even if more than ninety percent of those convicted of murder deserve mercy, courts can respond by allowing more than ninety percent of the class of convicted murderers to be rendered ineligible for the death penalty. Again, it is not unconstitutional for a state to adopt so many mitigators that essentially every convicted murderer will be spared from the death penalty. This is the fundamental conceptual benefit gained by switching from aggravator narrowing. Under aggravator narrowing, if more than ten percent of the convicted murderer class deserves the death penalty, courts do not have a feasible and constitutional answer. If courts allow more than ten percent of the class to be death-eligible, there would be a return to arbitrary jury sentencing. If courts were to maintain the ten percent threshold, as explained above, this would force the legislature to make arbitrary decisions about which aggravators to keep and which to toss. Mitigator narrowing, by contrast, allows courts and legislatures to avoid this subjective and arbitrary line-drawing.

Fourth, mitigator narrowing allows courts to monitor and fine-tune the death-eligibility rates of state death penalty statutes. Consider the statute above and imagine that a state hypothetically adopted the following statutory mitigators:

> Section II.
> The judge shall consider, or shall direct the jury to consider, any applicable mitigating circumstances. A jury may not recommend a sentence of death if it determines that any one of the following mitigating circumstances is met:

(1) Another defendant or defendants, equally culpable in the crime, will not be punished by death.
(2) The defendant did not have a significant prior history of other criminal conduct.
(3) The defendant was under the age of 21 when the defendant committed the offense.

In this example, a state has adopted only three statutory mitigators. Such a statute is likely unconstitutional. Only some convicted murderers will be under the age of twenty-one, have a co-defendant that was spared the death penalty, or have a relatively clean criminal background. Thus, the statute will render death-ineligible only a modest percentage—say forty percent—of the total class of convicted murderers. Since most offenders (sixty percent) will go on to phase two of sentencing and be subject to the jury's discretionary sentencing power, such a statute fails to meet the constitutional requirement for narrowing. Again, this note proceeds from the premise that constitutionally adequate narrowing means that ten percent or less of the total convicted murderer class should be subject to the jury's sentencing discretion.[126]

Under a mitigation narrowing approach, a court can simply strike down the statute and force a state to adopt more mitigators until at least ninety percent of all convicted murderers meet at least one statutory mitigator. This, in effect, allows courts to adjust a state's death penalty process to ensure that juries cannot exercise their sentencing power in the majority of cases. In other words, states would have to demonstrate to courts that under the state's death penalty statute, only ten percent or less of the state's convicted murderers are eligible for death after mitigator narrowing. This solution is unavailable under an aggravator narrowing approach. If a court determines that more than ten percent of offenders meet an aggravator, the court can force the state to reduce the number of aggravators the state statute has. But of course, this raises the arbitrariness issues examined above.[127] A mitigation narrowing approach is therefore preferable to an aggravation narrowing approach because it works with the inherent ambiguity and subjectivity that comes with defining culpability, instead of against it. Whereas an aggravation narrowing scheme maintaining the ten percent threshold forces states to pick and choose which aggravators make the cut, a mitigation narrowing scheme maintaining the ten percent threshold would expand the list of statutory mitigators, thus ensuring that a state does not have to arbitrarily pick and choose sentencing factors.

Fifth, the consequences of a statutory failure are less severe for a statute that narrows by mitigators than a typical aggravation narrowing statute. As previously discussed, overly broad or numerous aggravators expand the class of death-eligibility beyond what is constitutionally permissible. As a

---

[126] *See supra* Part III.
[127] *See supra* Part III.A.

result, an error in an aggravator statute makes more people eligible for death (Type I error). An overly broad mitigator statute, however, would have the effect of making more people ineligible for death (Type II error). Thus, although the problems of vagueness, arbitrariness, and subjectivity would cause errors in both statutes, the errors caused in the mitigation narrowing statute are less significant than the errors caused in an aggravation narrowing statute.[128] After all, an error in the former simply means that an offender who should have been death-eligible is not, whereas an error in the latter statute means that an offender who should not have been is death-eligible. Clearly, the latter Type I error is more problematic (and more irreversible) than the former Type II error.[129]

Sixth, such an approach sets up better incentives so that states are more likely to comply. Take Texas, for example (or any other state that desires maximum flexibility in its death penalty regime). Under the current aggravator approach, Texas has an incentive to word aggravators broadly and

---

[128] *Cf.* Scott Turow, Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty 114–15 (2003) ("Thus, for me, at the end of the day, the question is which mistake I prefer to see made by this system . . . . Allowing [John Wayne] Gacy or [Henry] Brisbon to live is infuriating . . . . But the furious heat of grief and rage . . . will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims. . . . [A]sked whether Illinois should retain capital punishment[,] I voted no.").

[129] The idea here is similar to the Court's rationale behind the seminal First Amendment case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Court held that in order for a public official to recover for defamation against a newspaper, the official must prove that the statement was made with actual malice (knowledge of falsity or reckless disregard for the truth). *Id.* at 279–80. The reason the Court opted for such a high standard of recovery was to protect free speech. *See id.* As the Court reasoned, although such a high standard meant that newspapers would sometimes be protected when they in fact should not have been, the danger in letting "bad" speech get out is not as bad as preventing "good" speech from getting out. *See id.* at 281. Thus, the Court believed the cost of allowing some lies to be disseminated was outweighed by the potential danger of suppressing true (and therefore valuable) speech.

In the hiring hypothetical posed above, a Type I error would be the erroneous determination that a job applicant is qualified when the applicant is in fact not qualified, and a Type II error would be the erroneous determination that a job applicant is not qualified when the applicant is in fact qualified. It is plausible to suggest that in the context of the hypothetical that a Type II error is more problematic than a Type I error. Hence, it may be argued that the hiring hypothetical is not completely analogous with death penalty sentencing. I agree that in this regard the hiring hypothetical may not parallel death penalty sentencing. However, it is important to make clear that the hypothetical serves only as a model to explain the different conceptual approaches in death penalty sentencing.

This concern is magnified given that hundreds who are sentenced to death may in fact be innocent. *See* Laila Kearney, *Hundreds of US Inmates Sentenced to Death are Innocent, Researchers Say*, Reuters, April 29, 2014, http://www.reuters.com/article/2014/04/29/us-usa-crime-death-penalty-idUSBREA3S03320140429, *archived at* http://perma.cc/7P2E-FX6J. Although the Court has never specifically held that the execution of an innocent is unconstitutional, it has come close. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. . . . The showing made by petitioner in this case falls far short of any such threshold."). As a result, assuming that execution of innocents is unconstitutional, narrowing by mitigators may not only be preferable but constitutionally necessary.

vaguely because this allows the state flexibility in determining who should get the death penalty. In other words, for states that are solidly pro-death penalty there is an incentive to word aggravators broadly and vaguely so that every possible circumstance of death-worthy conduct is able to fit under an aggravator. Of course, the problem with this incentive is that it runs contrary to the *Furman* mandate. As explained above, overly broad aggravators meant to be catch-all provisions are fundamentally at odds with the narrowing purpose of aggravators. Under a mitigator narrowing approach, the incentives are reversed. Indeed, overly broad or vague mitigators would constrain a state's ability to execute, as more conduct could fall within the scope of such a mitigator. As a result, states have a strong incentive to carefully word and define their statutory mitigators lest every murderer be deemed ineligible for death. This new approach sets up the correct incentive structure as it forces states clearly to define their narrowing criteria.

Seventh, this approach is more legislatively palatable than other currently proposed solutions. Although this note proceeds from the premise that a mitigator narrowing statute will be adopted by states because of judicial prodding, as opposed to on their own initiative, such a statute is nonetheless an easier pill to swallow than simply amending current aggravator statutes. A legislative approach to death sentencing reform from the perspective of offender culpability (aggravators) is a complicated "political sell" given the public pressure to be tough on crime. However, by switching the perspective—examining not how horrible the crime or the offender is, but rather what excuses or mitigating circumstances are applicable—changes made to death penalty statutes may be a better approach, given that the inquiry does not center on the heinousness of the offender's crime.

Eighth, narrowing the death penalty using mitigators will ease the tension with the individualized sentencing line of cases. As mentioned above, the narrowing line of cases, which seeks to constrain jury discretion, and the individualized sentencing line of cases, which gives the jury discretion, are fundamentally at odds with each other.[130] Narrowing through mitigation would effectively harmonize these two strands of death penalty jurisprudence because, in narrowing, the jury is already considering all facets of the offender's record or character.

D. Concerns with Narrowing by Mitigators

A ready criticism of narrowing through mitigating circumstances is that the same arbitrariness in selecting aggravators infects the selection of mitigators. Is defining what is "life-worthy" really easier and less arbitrary than defining what is "death-worthy"? Such criticism misses the mark. The point is not that it is easier to choose those who deserve to live than those who

---

[130] *See supra* Part II.

deserve to die, but rather that this decision will occur with less frequency and thus is of less consequence.

It must be emphasized again that aggravators must narrow the death-eligible pool to a small class of extremely culpable offenders. As a result, having too many aggravators would make the class too large, so the state must choose which aggravators to keep. This choice is discretionary and arbitrary. Under a mitigation statute, however, this choice may not even occur. Because the goal is to define a class of ninety percent instead of a class of ten percent, and because including too many in the death-ineligible class is less of a problem than including too many in the death-eligible class, courts can avoid constitutional problems by always interpreting mitigators broadly or by always erring on the side of including a mitigator. There would be less of a need for legislatures to choose which mitigators to keep. Thus, the problem of definition would be avoided.

Regardless of how conceptually difficult or easy it is to select those who deserve to live relative to those who deserve to die, there is more judicial guidance available to states on who deserves to live. For instance, the individualized sentencing line of cases deals specifically with mitigators.[131] Although these cases hold that juries must consider all evidence that can be considered to be mitigating, these cases generally mention some specific types of mitigators that are worth pursuing. For instance, in *Locket v. Ohio,*[132] the Court held that "a defendant's character or record and any of the circumstances of the offense" must be examined at the sentencing stage.[133] While these categories are broad, they suggest that a state could offer mitigators such as "the offender has no prior criminal history." Though the guidance here is admittedly minimal, it is still in stark contrast to the adoption of aggravators where the Court has offered no guidance at all, not even generalities, as to what types of conduct are aggravating.

Moreover, the Court's Eighth Amendment proportionality jurisprudence can also play a role in guiding the legislature in selecting statutory mitigators. As Professors Carol Steiker and Jordan Steiker have argued, the Court's proportionality jurisprudence has been narrowing by other means.[134] The Court has deemed broad swaths of conduct to be outside the scope of the death penalty. In each of these cases, the Court focused on the particulars of a class of offenders that made that class not worthy of death. The principles from these cases can provide guidance to states. For instance, *Atkins v. Virginia* prohibited the execution of intellectually disabled persons,[135] and

[131] *See supra* Part II.

[132] 438 U.S. 586 (1978).

[133] *Id.* at 604.

[134] *See* Steiker & Steiker, *supra* note 12, at 417.

[135] 536 U.S. 304, 321 (2002). *Atkins* uses the term "mentally retarded." *Id.* That term is now outdated as "intellectually disabled" is preferred. *See e.g.,* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) ("An Act To change references in Federal law to mental retardation to references to an intellectual disability, and change references to a mentally retarded individual to references to an individual with an intellectual disability.").

Roper v. Simmons prohibited the execution of those less than eighteen years of age.[136] Thus, a state may find it prudent to adopt a mitigator for mental competency or age. Though these mitigators would go further than what was already held in these cases, the point is that proportionality cases can inform a state as to what the Court believes are especially important mitigators. In fact, in the context of age, adopting a mitigator that goes slightly beyond what was held in *Roper* may be especially prudent given how the evidence the Court relied on in *Roper* was not limited to the age group to which the defendant belonged.[137]

Another criticism is that if an offender does not meet any mitigator, then the jury must generally balance all factors during phase two of the sentencing. How does this differ from the current system? Again, the solution proposed here rests on the assumption that courts will judicially enforce true narrowing: that is, the courts will enforce a statistical mandate that the percentage of death-eligible offenders relative to the total class of convicted murderers be extremely low.[138] As a result, to meet this bar, states will likely have to adopt many mitigators or broad mitigators, which will render most offenders ineligible for the death penalty. Thus, the situation and circumstances in which general weighing is performed should be in an extremely small class, ideally ten percent or less of the total class of convicted murderers. Although discretion does exist in the small class, the goal of narrowing has been achieved; the jury's discretion is sufficiently limited to only these small circumstances, and therefore, the *Furman* mandate is met.

Finally, criticism can be directed at the fact that such a proposal might allow extraordinarily unsavory murderers to be spared while merely "regular" murderers could be executed.[139] Because a mitigator narrowing statute examines not the circumstances of the crime but the excuses or defenses a convicted murderer has, it is possible that those who commit extremely heinous murders may be spared. For instance, Dzhokar Tsarnaev, one of the Boston Marathon bombers, would likely meet the requirements of any traditional aggravator statute. Under a mitigator narrowing approach, however, Tsarnaev's age, or the fact that he has no prior criminal history may well disqualify him from the death penalty. On the other hand, a "regular" murderer who would ordinarily not meet the requirements of an aggravator, and

---

[136] 543 U.S. 551, 578 (2005).

[137] Aliya Haider, *Roper v. Simmons: The Role of the Science Brief*, 3 Ohio St. J. Crim. L. 369, 374 (2006) ("Our biggest challenge in the brief was determining how to successfully argue the Court could—and should—draw a line at the age of eighteen. The emerging research applied to adolescence and "late adolescence"—but none of the data held that at eighteen years of age, cognitive functioning had fully matured. Indeed, how could the science assert an exact moment in time when the frontal lobe shifts from being underdeveloped to being fully developed, as it is by definition a gradual, imprecise process? We did not, however, push the science to support a point it could not. Rather, we relied on the Court to conclude that eighteen was a reasonable line to draw between adolescence and adulthood.").

[138] *See supra* Part II.C.

[139] *See, e.g.*, Turow, *supra* note 128, at 114.

therefore would be ineligible for death, might not have any mitigating circumstances to his credit and therefore he could be sentenced to death.

This particular criticism is misdirected for at least two reasons. First, a non-death sentence for Tsarnaev is a problematic result only to the extent that the determination of death-worthiness involves examining the aggravating circumstances of the crime. Given that the purpose of this note has been to develop a conceptual determination for death-worthiness that revolves around examining the mitigating characteristics of an offender, as opposed to the aggravating circumstances of an offense, the argument that Tsarnaev deserves death due to the nature of his crime is circular. Second, plenty of defenses that focus on the characteristics of the offender already exist to completely absolve an offender of either guilt or punishment. For instance, as mentioned above, in *Atkins* and *Roper,* the Court prohibited the execution of intellectually disabled offenders and those under eighteen years of age respectively. *Atkins* and *Roper* are therefore complete bars to execution irrespective of how heinous or extraordinary the circumstances of the offense, much like how mitigators would operate under this new statute.

Dzhokhar Tsarnaev was nineteen when he committed the bombing. The criticism—that a statute that would allow him to live is flawed—loses much of its force given that if Tsarnaev had committed the crime a mere year earlier, it would have been unconstitutional to execute him. It surely cannot be contended that this one-year difference somehow changes the calculus, from Tsarnaev deserving mercy to deserving death. Indeed, given that *Roper*'s cutoff of eighteen years is more or less arbitrary,[140] this criticism seems especially weak. Simply put, there are already clear examples of *only* viewing the characteristics of the offender for purposes of sentencing, and the proposed statute in this note is very much in the same vein. To be sure, *Atkins* and *Roper* have been heavily criticized precisely because they take a purely offender-centric approach to sentencing by ignoring the circumstances of the offense.[141] But if *Atkins* and *Roper* can command a majority of the Supreme Court and are the law of the land, a statute that relies on the same logic as these cases, and indeed is quite compatible with these cases, surely is justified on legal, if not philosophical, grounds.

---

[140] *See* Haider, *supra* note 137137, at 374.

[141] *See e.g.*, *Roper*, 543 U.S. at 618, 621 (Scalia, J., dissenting) ("At most, these studies conclude that, on average, or in most cases, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes . . . . It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults . . . . [It is a] false generalization that youth always defeats culpability."); CHARLES D. STIMSON & ANDREW M. GROSSMAN, THE HERITAGE FOUND., ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 19 (2009), *available at* http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens, *archived at* http://perma.cc/3BRT-RSXE.

To the extent that this criticism is persuasive, then the issue may lie with narrowing itself as a method of addressing arbitrariness in death penalty sentencing as opposed to the means of narrowing. Though narrowing through mitigating circumstances may alleviate some of the problems present in aggravator narrowing, the technique of narrowing is limited in its ability to address arbitrariness, regardless of the method used to narrow. By definition, narrowing means reducing the pool of convicted murderers to a smaller pool of death-eligible murderers, and to do this, difficult choices must be made irrespective of the narrowing criterion used. Though this note has attempted to develop a narrowing scheme that minimizes the number and scope of these difficult decisions, many difficult and arbitrary decisions remain.

But again, it is important to emphasize that this note does not purport to put forth a perfect approach to death penalty sentencing. This note has sought to provide an alternative narrowing approach preferable to the current aggravator narrowing schemes. Given that the death penalty still persists and is likely to continue for the foreseeable future, and that abolition or other drastic changes to the death penalty are not on the horizon, this note's proposal is an attempt to make the best of a bad situation. If the death penalty is to continue, it might as well continue in a way at least somewhat faithful to the *Furman* mandate. This does not mean that such an approach is perfect. Arbitrariness will no doubt still exist. And two similarly situated offenders may still receive different sentences. But this approach will at least be a considerable improvement over current aggravator statutes by reducing the incidence of such occurrences. Under this approach, it will at least be *possible* to reach the narrowing requirement of ten percent without the narrowing process being completely arbitrary.

VI. Conclusion

From a judicial perspective, there are two problems with using aggravators to narrow the class of death-punishable offenders. First, many courts, like legislatures, are constrained politically. This problem can be addressed by using the federal courts, specifically the Supreme Court, to uphold the narrowing requirement. However, federal courts have failed to do so up to this point because of the second problem: narrowing by aggravators simply does not work. Federal courts cannot do what is impossible.

The last four decades have been marked by the Supreme Court's repeated attempts to force narrowing through the use of aggravators. Each attempt has failed as again and again the Court ran into the conceptual challenge posed by having to define what is indefinable: conduct that is truly deserving of the death penalty. The purpose of this note has been to devise an alternative legislative approach to narrowing. Under a statute that narrows through the use of mitigators, these conceptual difficulties are not solved. However, they may be avoided or limited. Although it may be equally diffi-

cult to define what qualities are deserving of mercy, approaching the narrowing question from a mitigation perspective may allow for these impossible questions to be avoided rather than confronted head on. As a result, if the functional and conceptual difficulties of enforcing the narrowing requirement can be dealt with—if federal courts realize that they can actually reach *Furman*'s promise of a consistent death sentencing procedure—then perhaps they will do so, and drag states into compliance.

In spite of the efforts of this note and other writings that have tried to devise solutions to the problem of arbitrariness in death penalty sentencing, arbitrariness will still exist. Perhaps then, there really are only two truly perfect solutions to the problem: (1) refusing to further "tinker with the machinery of death"[142] and abolishing the death penalty; and (2) acknowledging that balancing, weighing, and arbitrariness are inherent in everyday life and that death penalty sentencing should not be treated differently.[143] Perhaps the administration of the death penalty is inevitably arbitrary to a degree, in which case courts, legislatures, and we as a society have to decide whether "death by lottery"[144] is an acceptable component of contemporary civilization.[145]

---

[142] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[143] *See generally* McGautha v. California, 402 U.S. 183 (1971).

[144] Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

[145] TUROW, *supra* note 128 at 115 ("After twenty-five years of attempting to establish laser-like guidelines, we still end up with a moral hodgepodge where Chris Thomas is condemned to die because he is poor and belligerent, while the likes of the Menendez brothers, who shotgunned their parents for millions, or the Unabomber, who killed and maimed and threatened the nation for years, get life . . . . I appear to have finally come to rest on the issue. Today, I would still do as I did when Paul Simon asked whether Illinois should retain the death penalty. I voted no.").