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The Eighth Amendment Power to Discriminate

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THE EIGHTH AMENDMENT POWER TO DISCRIMINATE

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Abstract: For the last half-century, Supreme Court doctrine has required that capital jurors consider facts and characteristics particular to individual defendants when determining their sentences. While liberal justices have long touted this individualized sentencing requirement as a safeguard against unfair death sentences, in practice the results have been disappointing. The expansive discretion that the requirement confers on overwhelmingly White juries has resulted in outcomes that are just as arbitrary and racially discriminatory as those that existed in the years before the temporary abolition of the death penalty in *Furman v. Georgia*.[1] After decades of attempting to eliminate the requirement, conservative justices have recently employed a new tactic: extinction through expansion. By relying on the individualized sentencing requirement to discourage jury instructions that enhance consideration of mitigation evidence, these justices have stretched the doctrine well beyond its intended meaning. This broad interpretation renders individualized sentencing ephemeral to the point of insignificance, ensuring that the problems with capital sentencing will continue in the years to come.

While an examination of individualized sentencing is overdue, the solution is not to jettison the requirement, but instead to permit states to channel juror discretion. This Article is the first to contend that states may achieve the goals of individualized sentencing, not by expanding juror discretion to consider mitigation evidence, but, counterintuitively, by narrowing it. It proposes that states employ specific jury instructions that: (1) require jurors to consider certain types of evidence as legally mitigating; (2) address the historically racist application of the death penalty; and (3) permit unfettered discretion solely in the direction of leniency. Channeling and redirecting discretion will minimize racist and arbitrary outcomes and realize true individualized sentencing.

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

INTRODUCTION

Conventional wisdom holds that the demise of the death penalty is inevitable.[2] A recent wave of states has formally put an end to their capital punishment systems—at least temporarily—through judicial opinion,[3]

2. *See, e.g.*, David Von Drehle, *The Death of the Death Penalty*, TIME (June 8, 2015), https://time.com/deathpenalty/ [https://perma.cc/JRC4-9YQS] (arguing that capital punishment will soon become extinct due to poor implementation, low crime rates, declining justifications, lack of financing, and Supreme Court intervention); Garrett Epps, *The Supreme Court's Death Drive*, ATLANTIC (Apr. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/04/supreme-court-majority-defends-death-penalty/587749/ [https://perma.cc/9HHC-LRA8] ("Capital punishment is a relic of a harsher time, now stumbling toward extinction, unpopular with both right and left."); Dan Frosh, *Republicans Leading New Charge to End the Death Penalty*, WALL ST. J., https://www.wsj.com/articles/republicans-leading-new-charge-to-end-the-death-penalty-11550572205 [https://perma.cc/WM8D-4PMK (highlighting recent efforts of Republican legislators to introduce bills to end capital punishment); Brandon L. Garrett, *Guest Post: The End of the Death Penalty in America as We Know It*, WASH. POST (Mar. 18, 2019), https://www.washingtonpost.com/crime-law/2019/03/18/guest-post-end-death-penalty-america-we-know-it/?utm_term=.95004b165ea4 [https://perma.cc/2VLM-BXYB] (indicating California moratorium "can point the way forward" for the death penalty nationwide); *see also* Carol S. Steiker & Jordan M. Steiker, *Will the U.S. Finally End the Death Penalty?*, ATLANTIC (Mar. 15, 2019), https://www.theatlantic.com/ideas/archive/2019/03/gavin-newsoms-death-penalty-moratorium-may-stick/584977/ [https://perma.cc/2MKB-3SEE] (observing that "[t]he death penalty is not so clearly a left/right, progressive/conservative debate, which opens a space for further restriction and even abolition").

3. On October 11, 2018, the Washington State Supreme Court found that the state's capital punishment system violated the Eighth Amendments of the federal and state constitutions because of its arbitrary and racially discriminatory administration. State v. Gregory, 192 Wash. 2d 1, 427 P.3d 621 (2018).

legislation,[4] or executive fiat.[5] And, as Justice Ruth Bader Ginsburg predicted in 2017, even in jurisdictions that have not formally abolished the death penalty, "[w]e may see an end to capital punishment by attrition as there are fewer and fewer executions."[6] The number of annual death sentences—significantly down since their peak in the 1990s—seems to support this conclusion,[7] as do the polls that indicate declining national support for the death penalty.[8]

But the most recent trends are not all towards abolition. While Justice Ginsburg observed in 2017 that "only three states . . . actually administer the death penalty,"[9] by the end of that year eight states had carried out executions.[10] The following year also saw executions by eight states, including Nebraska, which performed its first execution in twenty-one years,[11] after a successful 2016 ballot initiative reinstated the death penalty despite the legislature having repealed it the year before.[12]

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4. The New Hampshire state legislature overrode the governor's veto to pass legislation ending the state's death penalty on May 30, 2019. Mark Berman, *New Hampshire Abolishes Death Penalty After Lawmakers Override Governor*, WASH. POST (May 30, 2019), https://www.washingtonpost.com/national/new-hampshire-will-abandon-death-penalty-after-lawmakers-override-governor/2019/05/30/d0bdec8e-824c-11e9-bce7-40b4105f7ca0_story.html?utm_term=.8be80788b3c2 [https://perma.cc/T36Y-LRN3]. On March 23, 2020, the governor of Colorado signed legislation to repeal the state's death penalty. Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html [https://perma.cc/SBM6-ACZP].

5. After signing legislation that repealed the state's death penalty, the governor of Colorado commuted the sentences of the remaining three people on death row to life without parole. *See* Vidgor, *supra* note 4.

6. Washington Council of Lawyers, *2017 Summer Forum with Justice Ruth Bader Ginsburg*, YOUTUBE (July 24, 2017), https://www.youtube.com/watch?v=rGNPBT4wS4c&feature=youtu.be [https://perma.cc/UF9T-6MBH]; *see also* Adam Liptak, *On Justice Ginsburg's Summer Docket: Blunt Talk on Big Cases*, N.Y. TIMES (July 31, 2017), https://www.nytimes.com/2017/07/31/us/politics/ruth-bader-ginsburg.html [https://perma.cc/YHW8-HG6B]; Keri Blakinger, *Ruth Bader Ginsburg Predicts Possible End to Capital Punishment*, HOUST. CHRON. (Aug. 2, 2017), https://www.chron.com/news/houston-texas/article/Ruth-Bader-Ginsburg-predicts-possible-end-to-11729635.php [https://perma.cc/AA9U-NE63].

7. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (May 31, 2019), https://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/AV6C-38EZ].

8. On March 13, 2019, California Governor Gavin Newsom imposed a moratorium on executions for the duration of his time in office. *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx [https://perma.cc/YDY6-LVE3].

9. Liptak, *supra* note 6.

10. *Execution List 2017*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/execution-list-2017 [https://perma.cc/99TS-HJDD].

11. Jon Herskovitz, *Nebraska carries out its first execution since 1997*, REUTERS (Aug. 14, 2018), https://www.reuters.com/article/us-nebraska-execution/nebraska-carries-out-its-first-execution-since-1997-idUSKBN1KZ11M [https://perma.cc/HN4B-AB7T].

12. Josh Sanburn, *Nebraska Restores the Death Penalty One Year After Eliminating It*, TIME (Nov. 9, 2016), http://time.com/4563703/nebraska-restores-death-penalty-election/ [https://perma.cc/76FT-2WAT]. South Dakota also resumed executions after a substantial break, performing an execution in 2018—its first since 2012. Dave Kolpack & James Nord, *South Dakota Executes Inmate Who Killed Prison Guard in 2011*, U.S. NEWS & WORLD REP. (Oct. 29, 2018),

Executions resumed in six states that had temporarily halted them due to lethal injection litigation or the shortage of execution drugs.[13] Even the 2019 moratorium on executions in California announced by the Governor cannot obscure the fact that voters in the state voted to reject repealing capital punishment twice in the last seven years.[14] Similarly, while the Washington State Supreme Court found the state death penalty unconstitutional as applied, to date, the legislature has been unable to pass legislation that would codify the ruling and repeal the death penalty.[15] After hitting its nadir in 2016 at thirty-one, the number of death sentences has begun to rise again, with states sentencing thirty-nine people to death in 2017 and forty-two in 2018.[16] President Donald Trump has called for the death penalty for those convicted of trafficking drugs, and, in July of 2019, the Justice Department announced its intention to resume federal

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https://www.usnews.com/news/us/articles/2018-10-29/south-dakota-to-carry-out-first-execution-since-2012 [https://perma.cc/2EVM-SUMY].

13. These states included Alabama, Arkansas, Nebraska, Ohio, South Dakota, and Tennessee—all of which resumed executions in the wake of *Glossip v. Gross*, 576 U.S. ___ , 135 S. Ct. 2726 (2015), in which the Court found that lethal injections using the drug midazolam did not violate the Constitution. *Id.* Alabama resumed executions in 2016, after a five-year period where it had carried out only one execution: that of a man who waived all of his appeals. *Executions*, ALA. DEP'T CORRECTIONS, http://www.doc.state.al.us/Executions [https://perma.cc/BBY6-AT7U]; *see also* Mike Cason, *Andrew Lackey Executed for 2005 Murder of World War II Veteran (updated)*, AL.COM (July 25, 2013), http://blog.al.com/wire/2013/07/hold_dont_publish_andrew_lacke.html [https://perma.cc/26R8-HWDR]. Arkansas resumed executions in 2017 after a twelve-year hiatus by seeking the execution of eight men and ultimately carrying out the executions of four of them. Mark Berman, *Fourth Arkansas Execution in Eight Days Prompts Questions About Inmate's Movements*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire/?utm_term=.b1b1738ab2fe [https://perma.cc/XH8X-22FV]. Also, in 2017, Ohio performed its first execution in three years. Mark Berman, *Ohio Executes Ronald Phillips, Resuming Lethal Injections After Three-year Break*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/26/ohio-prepares-to-resume-executions-seeking-to-end-three-year-lull/?utm_term=.fb2bd5f96633 [https://perma.cc/K4P2-7SLN]. In 2018 Nebraska carried out its first execution in twenty-one years. Herskovitz, *supra* note 11. South Dakota carried out its first in six years. Kolpack & Nord, *supra* note 11. Tennessee carried out its first in almost ten years. Jonathan Mattise, *Tennessee Carries Out Its 1st Execution in Nearly a Decade*, AP NEWS (Aug. 9, 2018), https://www.apnews.com/f82e6173e6a340bb82231232f1c79dd2 [https://perma.cc/PK6E-729V].

14. Californians voted against Proposition 62 in 2016 and Proposition 34 in 2012, both of which would have ended the state's death penalty. Jim Miller, *California Votes to Keep Death Penalty*, SACRAMENTO BEE (Nov. 9, 2016), https://www.sacbee.com/news/politics-government/capitol-alert/article113661704.html [https://perma.cc/N4AA-ML5H].

15. *See* Editorial, *Legislature*, *Abolish Washington's Death Penalty*, SEATTLE TIMES (Apr. 11, 2019), https://www.seattletimes.com/opinion/editorials/legislature-abolish-washingtons-death-penalty/ [https://perma.cc/ZJ53-4W6T]; James Drew, *Abolition of Death Penalty Won't Happen in 2019. House Democrats Cite Other Priorities*, NEWS TRIB. (Apr. 18, 2019), https://www.thenewstribune.com/latest-news/article229414449.html [https://perma.cc/3G89-PRWP].

16. *See Facts about the Death Penalty*, *supra* note 7. In 2019, death sentences decreased, but, at thirty-four, they remained greater than they were in 2016. *The Death Penalty at 2019: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 17, 2019), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report [https://perma.cc/YK9N-RR3H].

executions after a sixteen-year hiatus.[17] Popular support for the death penalty has also begun to grow again—albeit slowly. While a 2016 Pew Research Center survey indicated that, at 49%, public support for the death penalty was the lowest in four decades, 2018 saw support increase to 54%.[18]

In short, there is no end in sight for the American death penalty. Certainly, the changing composition of the U.S. Supreme Court, with the retirement of Justice Anthony Kennedy and the appointments of Justices Neil Gorsuch and Brett Kavanaugh, makes judicial abolition an unlikely outcome.[19] The best course for death penalty opponents appears to be to weather the storm nationally, while advocating for abolition in liberal states and increasing procedural fairness in conservative ones.

Against this backdrop, it is important to reevaluate and, if necessary, rethink the procedural protections designed to achieve a less arbitrary, and less racially discriminatory system of capital punishment: in particular, the individualized sentencing requirement of the Eighth Amendment. Long touted as the key to achieving a fairer death penalty, the individualized sentencing requirement refers to the Supreme Court's mandate that capital jurors consider facts and characteristics particular to an individual defendant and his[20] crime when determining sentence. But

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17. Press Release, Office of Public Affairs, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [https://perma.cc/SG5B-YCLU]; Eli Roseberg, *Trump is 'Most Excited' About Death Penalty for Drug Dealers. Rights Groups Say It's a Terrible Idea*, N.Y. TIMES (Feb. 15, 2019), https://www.washingtonpost.com/politics/2019/02/15/trump-again-praises-strongmen-who-execute-drug-dealers-rights-groups-say-its-terrible-idea/ [https://perma.cc/B6TC-JLK7]. In late 2019, federal courts issued a preliminary injunction, blocking the execution of five men. Katie Benner, *Judge Blocks Scheduled Executions of Federal Death Row Inmates*, N.Y. TIMES (Nov. 21, 2019), https://www.nytimes.com/2019/11/21/us/politics/justice-department-death-penalty-barr.html [https://perma.cc/8BBS-SPPL]. The United States Supreme Court voted to deny the Trump administration's request to stay or vacate the preliminary injunction, holding that the matter would be better addressed by federal appeals courts. Barr v. Roane, 589 U.S. __, 140 S. Ct. 353 (2019). However, Justice Alito, in a statement joined by Justices Gorsuch and Kavanaugh, revealed his belief that "[t]he Government has shown that it is very likely to prevail when this question is ultimately decided." *Id.*

18. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ [https://perma.cc/5VRW-6UJN].

19. *See infra* notes 304–308 and accompanying text.

20. Throughout this article, I use masculine pronouns, rather than gender-neutral language, to refer to individuals charged with or convicted of capital crimes because evidence suggests that an individual's gender presentation matters to those charging, sentencing, and enforcing the death penalty. *See* Amanda Oliver, *The Death Penalty Has a Gender Bias*, HUFFINGTON POST (Oct. 1, 2015), https://www.huffpost.com/entry/are-women-getting-away-wi_b_8227690 [https://perma.cc/SY43-2WNG]; Christina Sterbenz, *Why the Death Penalty in America is Sexist*, BUS. INSIDER (Apr. 13, 2015), https://www.businessinsider.com/the-death-penalty-has-a-gender-gap-2015-4 [https://perma.cc/4AKE-48WY]. The overwhelming number of people on death row are classified as men: roughly 2,600 are men, and fewer than sixty are women. *Women*, DEATH PENALTY

has individualized sentencing functioned as an adequate procedural protection for capital defendants from the racist and arbitrary application of the death penalty? Or has the Court's interpretation of individualized sentencing instead rendered it a meaningless formality or worse—a constitutional "power to discriminate?"[21] This Article proposes that the modern interpretation of the individualized sentencing requirement has stripped jurors of the guidance necessary to make principled sentencing decisions. Only by restoring this guidance will the individualized sentencing requirement survive as a meaningful procedural protection against the darkest tendencies of capital punishment.

Many scholars and several of the justices themselves have noted that an inherent tension exists between the Eighth Amendment's individualized sentencing requirement and its goal of consistent, predictable death sentences.[22] Justice Antonin Scalia once wrote that to acknowledge as much "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."[23] The Court's efforts to navigate this tension have resulted in different requirements for the jury's assessment of different types of evidence at the penalty phase of a capital trial.

Like a hand-held fan, the amount of discretion that states give jurors expands as the penalty phase unfolds. When first determining a defendant's eligibility for the death penalty, jurors' discretion is limited to the consideration of a specific list of aggravators—criteria that exist to narrow the class of death eligible defendants.[24] In a typical capital sentencing scheme, only if the jury has found the existence of an aggravator beyond a reasonable doubt does it then consider the existence of mitigating circumstances to select the appropriate sentence.[25] Unlike

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INFO. CTR., https://deathpenaltyinfo.org/death-row/women [https://perma.cc/B4HR-SD5R]; NAACP Legal Defense and Educational Fund, *Death Row U.S.A. Summer 2019*, at 1 (2019), https://www.naacpldf.org/wp-content/uploads/DRUSASummer2019-1.pdf [https://perma.cc/5P2F-N9YG]. Consequently, capital punishment disproportionately impacts male defendants.

21. The title of this article comes from an observation made by Justice Powell in his majority opinion in *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987): "Of course, 'the power to be lenient [also] is the power to discriminate.'" *Id.* (quoting K. DAVIS, DISCRETIONARY JUSTICE 170 (1973)); *see infra* notes 114–119 and accompanying text.

22. *See infra* section I.C.

23. Walton v. Arizona, 497 U.S. 639, 665 (1990) (Scalia, J., concurring in part), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

24. The Supreme Court established this "narrowing requirement" in *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

25. *See, e.g.*, Ala. Pattern Jury Instr., Penalty Proceedings—Capital Cases § II(B)(4)(e), http://judicial.alabama.gov/docs/library/docs/Penalty_Phase_Capital_18Plus.pdf [https://perma.cc/F2FL-EBGX] (Where Defendant was 18 Years or Older at Time of Offense ("In the event that you do not find that any aggravating circumstance(s) has/have been proven by the State, you need not concern yourself with the mitigating circumstances in this case. If you find beyond a reasonable doubt that [the aggravating circumstance]/[one or more of the aggravating circumstances]

the specifically enumerated aggravators, mitigators are broadly defined: any aspect of a defendant's character or background or any aspect of the crime that inclines the sentencer to impose a sentence of life without parole instead of death can serve as a mitigator.[26] The Court has resisted efforts to limit juror discretion with respect to mitigators, defining the ultimate decision of whether to impose a death sentence, not as a legal decision, but as a "reasoned moral response."[27]

On its face, such an imbalance may appeal to death penalty opponents: there are limitations on who is death eligible, but no limitations on who may be spared from death. Indeed, liberal justices have long embraced the individualized sentencing requirement as a mechanism to increase the death penalty's reliability and decrease its racist application.[28] They have also argued that, in structuring a mitigation determination that is theoretically over-inclusive, fewer people overall should be sentenced to death. Yet after more than forty years of this particular experiment with death, the results are not promising. While the number of death sentences has declined in recent years, the identity of those who receive death has remained the same. Numerous studies show that application of the death penalty remains racially skewed, with primarily White jurors exercising discretion to spare White defendants and defendants with Black victims at a greater rate than Black defendants with White victims.[29]

Institutional forces, such as death qualification and the State's discriminatory use of peremptory strikes, that result in disproportionately White juries have limited the efficacy of the individualized sentencing requirement.[30] The Court's rulings have either enshrined these practices or have provided inadequate remedies for the harm that they have caused. As capital juries continue to be disproportionately White, the unfettered discretion that individualized sentencing requirement bestows on them perpetuates outcomes that are both unreliable and racially discriminatory.

Steps must be taken to reinvigorate the individualized sentencing requirement so that it might achieve its original goals; however, there is reason to believe the Court is not an ideal forum for change. Indeed, the very survival of the individualized sentencing requirement may be in jeopardy. In his final decision, *Kansas v. Carr*,[31] Justice Scalia relied on

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on which I instructed you does exist in this case, then you must proceed to consider and determine the mitigating circumstances.")) .

26. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

27. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

28. *See infra* section I.B.

29. *See infra* Part II.

30. *See infra* section II.C.

31. 577 U.S. __, 136 S. Ct. 633 (2016).

liberal justices' conception of the individualized sentencing requirement to overturn the Kansas Supreme Court's decision requiring an instruction that mitigating evidence need not be proved beyond a reasonable doubt.[32] By framing consideration of mitigating evidence as so personal a value judgment that trial courts are neither required, nor advised, to provide jurors with guidance on how to determine the existence or worth of mitigating factors, Justice Scalia stripped the individualized sentencing requirement of all context. If Justice Scalia's reasoning has staying power, it will render the individualized sentencing requirement hollow to the point of insignificance, ensuring that racially discriminatory and arbitrary death sentences will continue in the years to come.

This Article re-examines the individualized sentencing requirement and argues that changes in its implementation are necessary both to achieve its original aims and to ensure its survival. Given the trajectory of today's Supreme Court, the best answers lie in state legislatures and rule-making bodies. First, I propose the counterintuitive solution that states should require mitigation instructions that channel juror discretion during the penalty phase. Successful instructions would inform jurors that certain types of evidence are legally mitigating. These instructions would also explain that the law *requires* the jury to consider this evidence as supporting a life sentence. While such instructions cabin juror discretion, I argue that they do not run afoul of the Court's individualized sentencing requirement and, to the contrary, reinvigorate that requirement. To curb race-based decision-making, I propose a "race salient debunking instruction" that informs jurors of the historically racist application of the death penalty and explicitly forbids them from considering race in their sentencing decision. Finally, I propose that states continue to employ unfettered discretion in one direction only: towards mercy. I propose a mercy instruction that informs the jury of its power to spare a defendant's life irrespective of the evidence presented at the penalty phase. While such an instruction may result in some arbitrary outcomes, by channeling juror discretion towards leniency, it will also achieve one of the goals of the individualized sentencing requirement: it will shrink the class of those sentenced to death—and by extension those wrongly sentenced to death.

This Article makes the case for this solution in four parts. Part I recounts the relevant history of the Supreme Court's individualized sentencing jurisprudence. I argue that, although the requirement was the brainchild of moderate justices, liberal justices soon embraced it as a mechanism to improve reliability and reduce racism. As the Court began to equate individualized sentencing with expansive juror discretion,

32. *Id.* at 642.

conservative voices began to decry this change as inconsistent with *Furman*'s mandate of consistent application,[33] leading to distinct ideological camps on the Court. Part II explores the modern system of capital punishment and reveals that, despite the exercise of individualized sentencing, racist application of the death penalty continues to be the norm. This Part proposes that the liberal goals of the individualized sentencing requirement are unlikely to be realized while the practices of death qualification and the race-based exercise of peremptory strikes continue to result in disproportionately White juries. Part III argues that the Supreme Court is unlikely to mend individualized sentencing in the near future. This Part explores the majority decision in the most recent individualized sentencing case, *Kansas v. Carr*, and argues that *Carr* proposes the broadest interpretation to date of the Eighth Amendment's individualized sentencing requirement. Authored by Justice Scalia in an intellectual about-face, *Carr* imposes a level of abstractness on the jury's assessment of mitigating circumstances that may one day render the individualized sentencing requirement meaningless. Part IV argues that because judicial solutions are unlikely, legislative ones are required to reinvigorate the individualized sentencing requirement. This Part proposes that states enact specific jury instructions that channel discretion during the mitigation portion of the penalty phase, counteract race-based decision-making, and permit jurors to exercise discretion only in favor of leniency.

I. TWO OPPOSING PRINCIPLES

In this Part, I recount the origin of the Eighth Amendment's twin requirements of consistency and individualization, in the years following the Supreme Court's abolition and reinstatement of the death penalty in the 1970s. I then argue that liberal justices championed the expansion of the individualized sentencing requirement as a way of enhancing the reliability of capital punishment and reducing its racist application. Finally, I explore how the tension between consistency and individualized sentencing resulted in competing ideological camps on the Court.

A. The Origin of the Requirements of Non-arbitrariness and Individualized Sentencing

In the late 1960s, popular support for the death penalty was at an all-time low, with less than 50% of the country approving of the

33. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

punishment.[34] Only just over 600 people were on death row nationwide, and executions were declining.[35] In 1963, there were only twenty-one executions; in 1964 there were fifteen; and in 1965 there were only seven.[36] In 1966, a single execution was carried out, and in 1967, there were only two executions.[37]

In 1972, the United States Supreme Court found the death penalty to be unconstitutional in *Furman v. Georgia*,[38] a fractured, 5-4 decision.[39] The decision itself was a one-paragraph per curiam decision.[40] Each of the nine justices wrote a separate opinion, with five of them writing concurrences giving their individual reasons for finding that the death penalty violated the cruel and unusual punishment prong of the Eighth Amendment. Two of the justices, Justices Brennan and Marshall, would have found that the death penalty was unconstitutional in all circumstances.[41] While Justice Brennan emphasized the death penalty's arbitrary application,[42] Justice Marshall argued that the "untrammeled discretion" of juries amounted to an "open invitation" to engage in racial discrimination.[43] A third justice, Justice Douglas both decried the arbitrariness of capital punishment and explained how unfettered discretion led to racist results.[44]

The remaining two concurring justices, Justices Stewart and White, found no need to decide definitively whether capital punishment violated the Eighth Amendment. Instead, these justices found merely that the capital punishments systems of the states of Texas and Georgia, as they were applied in the cases before the Court, violated the Eighth Amendment.[45] Both opinions emphasized arbitrariness instead of racism,

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34. According to a 1966 Gallup poll only 42% of Americans supported the death penalty. *The Abolitionist Movement*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement [https://perma.cc/NF3C-VCZQ].

35. *Furman*, 408 U.S. at 291–92 (Brennan, J., concurring).

36. *Id.* at 293.

37. *Id.*

38. 408 U.S. 238 (1972) (per curiam).

39. *Id.* at 239–40.

40. *Id.*

41. *Id.* at 305 (Brennan, J., concurring); *id.* at 365–69 (Marshall, J., concurring).

42. *Id.* at 294 (Brennan, J., concurring) ("When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."). Although Brennan doubted any laws could be drawn to parse so fine a distinction, he noted that contemporary state capital sentencing statutes exacerbated the problem: "our procedures in death cases, rather than resulting in the selection of 'extreme' cases for this punishment, actually sanction an arbitrary selection." *Id.* at 294–95.

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

44. *Id.* at 248–250 (Douglas, J., concurring).

45. *Id.* at 306, 309–10 (Stewart, J., concurring); *id.* at 310–11, 314 (White, J., concurring).

but under different theories. Justice White argued that the death penalty was too infrequently applied to be anything other than an arbitrary punishment.[46] White argued that the state legislatures had ceded too much discretion to judges and juries, suggesting that a constitutional system of capital punishment would be one in which the penalty were mandated for certain crimes.[47] Stewart put to the side the question of whether such a mandatory scheme would be constitutional and instead found that the Texas and Georgia statutes violated the Eighth Amendment because they were "so wantonly and so freakishly imposed."[48] Stewart's opinion is best summed up in its oft-quoted line: "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[49]

As the narrowest opinions, Justice Stewart and Justice White's reasoning became law.[50] As a result, the takeaway from *Furman* was that the death penalty was unconstitutional, not because it was racist or an affront to human dignity, but because it was arbitrarily applied.[51] The Court later described *Furman* as mandating that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[52]

The *Furman* decision proved wildly unpopular—something with which the fractured opinions did not help.[53] During the four years in which the death penalty ceased to function in the United States, thirty-five states and the federal government wrote and enacted new capital punishment statutes, designed to address the arbitrariness complaint.[54] These statutes typically took one of two forms. First, states like Georgia and Florida

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46. *Id.* at 313 ("[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.").

47. *Id.* at 314.

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

49. *Id.* at 309.

50. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) ("Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White.").

51. Justice Stewart considered and dismissed as unproved the argument that the true problem was not that the death penalty was imposed in an arbitrary manner, but that it was imposed in a racist manner. *Furman*, 408 U.S. at 310 (Stewart, J., concurring) ("My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side." (citation omitted)).

52. *Gregg*, 428 U.S. at 189.

53. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 219 (2016) [hereinafter STEIKER & STEIKER, COURTING DEATH] (discussing Gallup poll results that indicated an increase in public support of the death penalty following *Furman*).

54. *Gregg*, 428 U.S. at 179 n.23, 179–80 n.24.

responded most directly to Justice Stewart's lightning strike concerns. They bifurcated capital trials into two phases: a culpability phase and a penalty phase.[55] They attempted to narrow discretion by establishing criteria that determined both if an individual were eligible for the death penalty and if the punishment were a good fit under the circumstances.[56] In a second approach, states like North Carolina and Louisiana strove to attain perfect consistency.[57] They interpreted Justice White's infrequency concerns as a call to eliminate discretion entirely and established a capital punishment scheme where the death penalty was mandatory for certain crimes.[58]

Four years later, the Court declared the death penalty constitutional in certain circumstances in five decisions all released on July 2, 1976.[59] In *Gregg v. Georgia*[60] and *Proffitt v. Florida*,[61] the Court approved of similar capital sentencing statutes in Georgia and Florida, both of which contained mechanisms designed to channel sentencer discretion and promote consistency.[62] Most notably, these states limited the number of death eligible crimes and required jurors to weigh aggravating and mitigating circumstances to determine punishment.[63] The Court held that

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55. *Id.* at 162–63.

56. *Id.* at 162–64, 180–81; *see generally* Proffitt v. Florida, 428 U.S. 242 (1976) (discussing Florida capital sentencing scheme that employed a balancing test of statutory mitigating and aggravating factors to determine if a death sentence should be imposed); Jurek v. Texas, 428 U.S. 262 (1976) (involving Texas capital sentencing scheme that permitted a jury to impose a death sentence only after answering three statutorily-mandated questions in the affirmative).

57. *See generally* Woodson v. North Carolina, 428 U.S. 280 (1976) (discussing these states' post-*Furman* decision to mandate the death penalty as punishment for first-degree murder, rather than allowing for jury discretion).

58. *Gregg*, 428 U.S. at 180; *Woodson*, 428 U.S. at 280.

59. *Gregg*, 428 U.S. at 153–54; *Proffitt*, 428 U.S. at 242; *Woodson*, 428 U.S. at 280; Roberts v. Louisiana, 428 U.S. 325, 325 (1976); *Jurek*, 428 U.S. at 262.

60. 428 U.S. 153 (1976).

61. 428 U.S. 242 (1976).

62. *Gregg*, 428 U.S. at 153–54; *Proffitt*, 428 U.S. at 248.

63. The Georgia and Florida statutes had three key components, each designed to limit arbitrariness: bifurcated capital trials, required weighing of aggravating and mitigating factors, and mandatory appellate review. First, both statutes required bifurcated capital trials and instructed jurors to consider enumerated factors, which aggravated or mitigated the crime or the defendant's culpability, to determine an appropriate punishment. *Gregg*, 428 U.S. at 164; *Proffitt*, 428 U.S. at 248. Second, the Court explained that Georgia and Florida had sufficiently narrowed the class of those eligible for the death penalty. Georgia accomplished this by requiring the jury to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before the death penalty could be imposed. *Gregg*, 428 U.S. at 196–97. Florida's statute was similar, requiring the jury to find that an aggravating circumstance existed *and* that the mitigating circumstances did not outweigh the aggravating circumstances. *Proffitt*, 428 U.S. at 250 (citing FLA. STAT. § 921.141(3) (1976)). Georgia juries did not have to find the existence of any mitigating factors in order to choose mercy. *Gregg*, 428 U.S. at 197. As a result, the Court held, the jury's discretion was no longer unguided and directionless in these states, as the jury's attention was drawn to specific characteristics of the crime. *Gregg*, 428 U.S. at 197; *Proffitt*, 428 U.S. at 248–50. Third, as a final bastion against arbitrariness,

these limits on discretion adequately addressed the "basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily."[64]

While championing fettered discretion as the path to non-arbitrariness in *Gregg* and *Proffitt*, the Supreme Court bristled at a uniform imposition of the death penalty that would have eliminated discretion entirely. The North Carolina and Louisiana mandatory sentencing schemes, which required a death sentence for certain crimes, did not fare well, despite their aims of perfect consistency.[65] In finding the former state's statute unconstitutional in *Woodson v. North Carolina*,[66] the Court emphasized the historical discomfort Americans had exhibited toward mandatory capital punishment, noting that states initially responded to this discomfort by limiting the classes of crimes for which the death penalty could be imposed.[67] When this remedy proved insufficient, jurors took matters into their own hands by employing jury nullification, or refusing to convict legally guilty defendant of crimes that required death.[68] Second, the Court posited that a mandatory system would lead to an imposition of the death penalty that was too frequent to be consistent with contemporary values, noting that "even in first-degree murder cases juries with sentencing discretion do not impose the death penalty 'with any great frequency.'"[69]

In striking down perfect consistency, the Court recognized that the Eighth Amendment required individualized sentencing: "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."[70] In other words, the Court recognized that sentencing a capital defendant on an individual, case-by-case, basis was "a constitutionally indispensable" part of any state's capital sentencing scheme.[71] The *Woodson* plurality

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both Georgia and Florida provided for mandatory appellate review by the state supreme court. *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 250.

64. *Gregg*, 428 U.S. at 206.

65. Woodson v. North Carolina, 428 U.S. 280, 286, 287 n.6 (1976) ("The North Carolina General Assembly in 1974 followed the court's lead and enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory.").

66. 428 U.S. 280 (1976).

67. *Id.* at 289–90.

68. *Id.* at 290–91.

69. *Id.* at 295 (quoting HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 436 (1966)).

70. *Id.* at 301.

71. *Id.* at 304. The plurality opinion in *Roberts v. Louisiana* similarly found that the Louisiana scheme violated the Eighth Amendment because it provided "no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." 428 U.S. 325, 333–34 (1976).

explained that the Eighth Amendment rested on a "fundamental respect for humanity" that required that consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense," as well as "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[72] Mandatory sentencing offended the constitution because it treated those convicted of capital crimes "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[73] Thus, the Court held that consistency alone was not sufficient: only state capital sentencing statutes with mechanisms designed to ensure the twin values of consistency and individualized sentencing comported with the Eighth Amendment.[74]

The Court made these two requirements explicit in a fifth case, *Jurek v. Texas*,[75] in which it upheld the constitutionality of the Texas capital sentencing statute. Unlike in Georgia or Florida, the Texas statute contained no reference to aggravating or mitigating circumstances. Instead, it fettered discretion, both by limiting the crimes eligible for capital punishment to five specific types of murder[76] and by requiring the jury to answer specific questions in its sentencing determination, regarding the deliberate nature of the crime; the likelihood the defendant would be dangerous in the future; and the existence of provocation by the victim.[77]

The Court found that, although it differed from the Georgia and Florida schemes, the Texas statute was constitutional because it included aspects both of fettered discretion and of individualized sentencing. The Court found that narrowing the number and types of crimes that rendered one

72. *Woodson*, 428 U.S. at 304.

73. *Id.*

74. Gregg v. Georgia, 428 U.S. 153, 153–54 (1976); Proffitt v. Florida, 428 U.S. 242, 248 (1976); *Woodson*, 428 U.S. at 301–04.

75. 428 U.S. at 262 (1976).

76. These were "murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee." *Id.* at 268 (citing TEX. PENAL CODE § 19.03 (1974)).

77. Specifically, these questions were "'(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.'" *Jurek*, 428 U.S. at 269 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1975)). An answer of "no" to any of the questions resulted in a life sentence, while answers of "yes" to all applicable questions resulted in a sentence of death.

77. *Id.* The statute further provided for bifurcated trials: following a guilty verdict, a separate sentencing proceeding would be conducted. *Id.*

eligible for capital punishment served the same purpose as a required finding of aggravating and mitigating circumstances.[78] In a holding it would later refine in subsequent cases,[79] the Court also found that the Texas statute, through its special issues, provided for "the individualized sentencing determination that we today have held in *Woodson v. North Carolina* . . . to be required by the Eighth and Fourteenth Amendments."[80] The Court's conclusion turned on Texas's promise to interpret the second question to permit defendants to introduce and argue mitigating circumstances.[81] So holding, the Court made clear that, just like consistency, individualized sentencing was a constitutional mandate.[82]

B. The Liberal Embrace of the Individualized Sentencing Requirement

More moderate members of the Court—those who believed capital punishment should be improved, not abolished, such as Justice Stewart, Justice Powell, and even Chief Justice Burger—originally championed the expansion of the individualized sentencing requirement as a corrective measure for the problems noted in *Furman*. Over time, as the likelihood of abolition grew more and more remote, liberal justices like Justice Brennan and Justice Stevens took up the cause, turning to the requirement as a way to increase the death penalty's reliability and decrease its racist application.

1. The Expansion of the Doctrine

Over the next decade, the Court expanded the meaning of the individualized sentencing requirement to preclude states from limiting jurors' consideration of a broad range of evidence. The result was an unfettering of sentencer discretion.

In two key cases, *Lockett v. Ohio*[83] and *Eddings v. Oklahoma*,[84] the Court reversed death sentences, where states had too narrowly limited the sentencer's power to consider factors that justified a life sentence. In

78. *Id.* at 270. ("[E]ach of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.").

79. *See* Abdul-Kabir v. Quarterman, 550 U.S. 233, 262 (2007); Brewer v. Quarterman, 550 U.S. 286, 293–94 (2007); Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 328 (1989).

80. *Jurek*, 428 U.S. at 271.

81. *Id.* at 271–72. Chief Justice Burger explained that the expansion of juror discretion was permissible because it enabled jurors to bestow mercy: "[t]he statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *Id.* at 279.

82. *See id.* at 271.

83. 438 U.S. 586 (1978).

84. 455 U.S. 104 (1982).

Lockett, a plurality found that an Ohio statute violated the Eighth Amendment because it confined sentencer discretion to the consideration of only three specific mitigating circumstances.[85] The Court held that the statute was constitutionally deficient because none of the enumerated mitigators allowed the sentencer to consider Lockett's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime" as evidence in mitigation.[86] The Court explained that while *Woodson* had made clear that capital statutes preventing the consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" would be struck down as unconstitutional, it had failed to answer the question of what constituted a "relevant facet" of the offender or the offense.[87] The *Lockett* Court took the widest possible view, mandating that capital sentencing statutes permit sentencers to consider as mitigating factors "*any aspect of a defendant's character or record and any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death."[88]

Four years later, a majority of the Court ratified the *Lockett* plurality in *Eddings*. The Court invalidated a death sentence because the sentencing judge had not considered the defendant's background in his decision to impose death.[89] The Court distinguished between considering a mitigating factor at all and ascribing little weight to it, finding that the individual

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85. These were: whether the victim had induced or facilitated the defense; whether the defendant acted under duress or coercion; and whether the crime resulted primarily from the defendant's psychosis or mental deficiency. *Lockett*, 438 U.S. at 589, 594 (citing OHIO REV. CODE §§ 2929.03–2929.04(B) (1975)).

86. *Id.* at 597. Sandra Lockett was a particularly sympathetic capital defendant, as she never actually killed anyone. *Id.* at 590. Lockett and three co-defendants planned to rob a pawn shop, they but did not plan to kill the pawnbroker. *Id.* Lockett never entered the pawnshop and served only as the group's getaway driver. *Id.* The unintentional killing occurred when the pawnbroker unexpectedly grabbed a co-defendant's gun, causing it to go off. *Id.* Prior to trial, the prosecution offered Lockett a plea bargain with a maximum sentence of twenty-five years imprisonment, provided she testify against a co-defendant, but Lockett refused the offer. *Id.* at 591. Lockett had a minimal criminal history, with no convictions for crimes of violence. *Id.* at 594. Psychiatric and psychological reports concluded that Lockett had a high probability of rehabilitation and that she had experienced success in a drug treatment program. *Id.* The inability to consider any of these factors struck more than just the Justices as unfair. The trial judge himself lamented that "he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Id.*

87. *Id.* at 604.

88. *Id.* (emphasis added). In cabining the opinion to capital cases only, the Court explained that capital sentences differed from noncapital ones, not only in terms of severity, but also because of their relative inalterability. Unlike noncapital sentences, capital sentences cannot be modified after they are imposed by mechanisms like parole or work furloughs. *Id.* at 605.

89. *Eddings*, 455 U.S. at 105, 109. Although the Oklahoma sentencing statute stated that "evidence may be presented as to any mitigating circumstances," the sentencing judge made statements indicating his belief that, as a matter of law, he could not consider the defendant's violent upbringing as mitigating evidence. *Id.* at 106, 112–13 (citing OKLA. STAT. ANN. Tit. 21, § 701.10 (1980)).

sentencing requirement mandated consideration: "[t]he sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[90] The Court then appeared to endorse the particular factual circumstances of the case as indisputably mitigating evidence, calling these circumstances "particularly relevant."[91] Among these were the defendant's "turbulent family history, of beatings by a harsh father, and of severe emotional disturbance," his young age (sixteen), and "the background and mental and emotional development of a youthful defendant."[92]

In two later cases, the Court doubled down on its expansion of juror discretion by resisting states' efforts to define mitigating circumstances in such a way that excluded any evidence that "might serve 'as a basis for a sentence less than death.'"[93] In *Skipper v. South Carolina*,[94] the Court reversed a death sentence because the trial judge precluded the capital defendant from introducing evidence of his good behavior while incarcerated, despite the Court's acknowledgement that such evidence had no relationship to the defendant's culpability.[95] A year later in *Hitchcock v. Dugger*,[96] the Court made clear that mitigation could not be limited to a statutory list of enumerated factors.[97] The Justices unanimously reversed a death sentence where the trial court had instructed the jury that it should consider a list of mitigating circumstances in reaching its sentencing decision.[98]

Thus, the Court established that after the jury determined that the defendant was guilty of a death-eligible crime, individualized sentencing required an unfettering of juror discretion. To comply with *Furman*, a constitutional capital sentencing statute must include a model of juror discretion that is fan-shaped; that is, discretion starts off narrow as the sentencer determined whether a particular crime is death eligible, and it expands as the sentencer determines whether a particular individual was

90. *Id.* at 114–15.

91. *Id.* at 115–116.

92. *Id.*

93. Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (quoting *Lockett*, 438 U.S. at 604); *see also* Hitchcock v. Dugger, 481 U.S. 393, 398 (1987).

94. 476 U.S. 1 (1986).

95. *Skipper*, 476 U.S. at 4–5, 8. The *Skipper* Court did recognize that some limits might be put on a capital defendant's ability to introduce mitigating evidence: "[w]e do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement of the Supreme Court of South Carolina that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination." *Id.* at 7 n.2.

96. 481 U.S. 393 (1987).

97. *Id.* at 398–99.

98. *Id.*

deserving of death. The Court's subsequent jurisprudence cemented the notion that constitutionality is achieved only by limiting jury discretion during what came to be known as the eligibility phase of the trial and unfettering it during what came to be known as the selection phase.[99]

2. The Goals of Individualized Sentencing

While many of the justices who championed the individualized sentencing requirement viewed it purely as a measure to preserve human dignity,[100] others also saw it as a possible check on the excesses of capital punishment.[101] These justices contended that individualized sentencing made death sentences more reliable and less racist.

The notion that broad discretion to consider mitigation evidence was consistent with the Eighth Amendment's heightened reliability requirement might seem a curious one, but the idea was first put forth by the more moderate justices, including Chief Justice Burger in *Lockett*.[102] Unlike Justices Brennan and Marshall who continued to press for abolition, these justices subscribed to the *Gregg* idea of a better death penalty, where punishment was meted only to the most deserving. Perfect reliability could only be achieved when 100% of death sentences were reserved for the "death worthy."[103]

In expressing his concern that the Ohio statute at issue in *Lockett* created a presumption in favor of death, Chief Justice Burger noted that "[o]nce a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty *must* be imposed" unless the jury found that one of the three enumerated factors

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99. Tuilaepa v. California, 512 U. S. 967, 971 (1994) ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision."). States must comply with requirements for each decision. *See* Kansas v. Marsh, 548 U.S. 163, 173–74 (2006) ("Together, our decisions in *Furman v. Georgia*, 408 U. S. 238 (1972) (*per curiam*), and *Gregg v. Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing scheme must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.")).

100. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases the *fundamental respect for humanity underlying the Eighth Amendment* requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (emphasis added) (citation omitted)).

101. See, for example, Justice Powell's opinion in *McCleskey v. Kemp*, 481 U.S. 279, 310–11 (1987) (observing that jury sentencing based on "unique characteristics of a particular criminal defendant" serves as a safeguard against racial prejudice).

102. Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

103. Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 993, 1004–07 (1996) (discussing the death-worthiness framework and its goal of minimizing false positives).

existed beyond a reasonable doubt.[104] His plurality opinion envisioned a wide net of sentencer mercy that captured and saved the largest possible number of capital defendants. The Court's concern was not that a wide net would spare too many worthy of death, but that too narrow a net would create a "risk that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty."[105] It was this latter risk that Burger found to be inconsistent with the Eighth Amendment.[106] In widening discretion for mitigation evidence, the *Lockett* Court subtly shifted the meaning of "heightened reliability" from a concept that sought outcomes of death for the death-worthy and life for the life-worthy, equally, to a concept that focused on minimizing death sentences by erring on the side of preventing "false positives."[107]

Liberal justices repeatedly argued that the individualized sentencing requirement could operate to curb racist death sentences. In *McCleskey v. Kemp*,[108] the Court upheld the constitutionality of the Georgia capital sentencing statute[109] despite empirical research that Georgia sentencers factored in the race of the defendant and the race of the victim when bestowing death sentences.[110] The now-famous "Baldus study"[111] indicated that individuals accused of killing White victims were 4.3 times as likely to receive a death sentence as those accused of killing Black victims.[112] In addition, the study showed that Black defendants were 1.1 times more likely to receive a death sentence than non-Black

104. *Lockett*, 438 U.S. at 607 (emphasis added). In his concurring opinion, Justice Marshall referred to the Ohio capital sentencing scheme as a "virtually mandatory approach to imposition of the death penalty." *Id.* at 620 (Marshall, J., concurring).

105. *Id.* at 605 (majority opinion).

106. *Id.*

107. Garvey, *supra* note 103, at 993, 1004–07 (discussing the death-worthiness framework and its goal of minimizing false positives). In his dissenting opinion in *Lockett*, Justice Rehnquist characterized the plurality opinion as a departure from *Gregg* and *Woodson's* mandate of non-arbitrariness, noting that a failure to guide jurors with respect to mitigation evidence would result in more lighting strikes: "the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it." *Lockett*, 438 U.S. at 631 (Rehnquist, J., dissenting).

108. 481 U.S. 279 (1987).

109. *Id.* at 282–83, 290–91.

110. *Id.* at 287, 290–91.

111. The "Baldus study" consisted of two statistical studies performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth that analyzed over 2,000 Georgia murder cases. *Id.* at 286. In reaching their conclusions, the researchers accounted for 230 variables that could have provided nonracial explanations for the discrepancies. *Id.* at 287. Thus, the Baldus study provided evidence that Black defendants accused of killing White victims had the greatest likelihood of being sentenced to death. *Id.*

112. *Id.* at 287.

defendants.[113] In this 5-4 decision, multiple justices touted the individualized sentencing requirement as the key weapon against racist outcomes.

Writing for the majority, Justice Powell suggested that, but for the individual sentencing requirement, the racial discrepancies would likely be worse.[114] While Powell acknowledged that "the power to be lenient [also] is the power to discriminate,"[115] he contended that, on whole, the benefits of expansive juror discretion outweighed the costs.[116] Praising the jury as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice,'"[117] Powell cited broad jury discretion as a boon to criminal defendants because jury decisions to acquit or to bestow mercy are not reviewable.[118] The implications of Powell's words were that the individualized sentencing requirement permitted jurors to rely on racial considerations to *spare* White defendants and defendants convicted of murdering Black victims, for instance, that a few "undeserving" individuals were receiving mercy. Powell's opinion did not contemplate the equally possible outcome that there existed some number of "deserving" defendants who were being denied mercy on racial grounds.[119]

In his dissent, Justice Brennan invoked the individualized sentencing requirement in support of his contrary position that the Georgia capital sentencing scheme was unconstitutional:

> Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color,

113. *Id.*

114. *Id.* at 310–11 (describing juror discretion as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice'" and capital sentencing decisions as building "discretion, equity, and flexibility into a legal system").

115. *Id.* at 312 (quoting K. DAVIS, DISCRETIONARY JUSTICE 170 (1973)).

116. *Id.* The majority opinion also held that Georgia did not violate the Fourteenth Amendment because McCleskey could not provide evidence of intentional racial discrimination in his individual case. *Id.* at 292–93, 299.

117. *Id.* at 310 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

118. *Id.* at 311.

119. In his article, "*As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, Stephen P. Garvey employs the "deserving" v. "undeserving" terminology to describe the relationship between two hypothetical groups of capital defendants to the sentences they received. *See* Garvey, *supra* note 103, at 993. Like Garvey's article, this Article assumes that that a hypothetical group of offenders exist, who are "deserving" of the death penalty.

> insensitive to whatever qualities the individuals in question may possess.[120]

Justice Brennan cautioned that discretion was "a means, not an end" and contended that the individualized sentencing requirement should function as a bulwark against racist outcomes: "[discretion] is bestowed in order to permit the sentencer to 'trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual.'"[121]

Elements of both of these views appeared in Justice Stevens' dissent in 1993's *Graham v. Collins*.[122] Responding to Justice Thomas's claim that too much juror discretion could permit racist decision-making, Justice Stevens contended that individualized sentencing required that jurors have the opportunity to consider specific mitigating evidence about both the individual crime and the individual offender.[123] According to Stevens, the jury's focus on specific individual characteristics "reduce[d] still further the chance that the decision will be based on irrelevant factors such as race."[124] Stevens explained that when a statute excluded "relevant" mitigating evidence, "there is more, not less, reason to believe that the sentencer will be left to rely on irrational considerations like racial animus."[125]

As the *Furman* ruling grew more distant and liberal justices' hopes of abolishing the death penalty dimmed, they grew to embrace the individualized sentencing requirement's emphasis on procedural justice. If America must have a death penalty, individualized sentencing could ensure that it did as little damage as possible.

C. Navigating the Tension in the Eighth Amendment's Twin Requirements

Scholars have long noted that a tension exists between the unfettered discretion that became synonymous with the individualized sentencing requirement and *Furman*'s mandate against arbitrary outcomes.[126]

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120. *McCleskey*, 481 U.S. at 336 (Brennan, J., dissenting).

121. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

122. 506 U.S. 461 (1993).

123. *Id.* at 503 (Stevens, J., dissenting).

124. *Id.*

125. *Id.*

126. *See, e.g.*, Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1080 (1991); Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323 (1992) (arguing that due to tension between ensuring individualized sentencing and limiting arbitrariness, the Court has not resolved whether a sentence should concern a defendant's culpability or general deserts); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV.

Professor Vivian Berger has compared the Eighth Amendment requirements of consistency and individualized sentencing to conjoined twins—"locked at the hip but straining uncomfortably in opposite directions."[127] Professor Scott Sundby has explored "the *Lockett* paradox" and has examined the question of whether the tension is irreconcilable.[128] In their comprehensive book about the Supreme Court's death penalty jurisprudence, Professors Carol and Jordan Steiker recently described the "central tension in American death penalty law: its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live."[129]

This tension was not lost on the justices, several of whom had commented on it as early as *Lockett*.[130] These concerns were brought to the forefront in a series of cases where the justices explored whether states could place *any* limits on a jury's consideration of mitigation evidence. During this time, clear camps on the Court emerged. The more conservative justices favored non-arbitrariness, seeking to limit juror discretion by bolstering state power to narrow consideration of mitigation evidence.[131] The more liberal justices took the opposite approach, finding that individualized sentencing not only forbade a state's capital sentencing statute from precluding the consideration of relevant mitigating evidence, but also required state statutes to permit jurors to "give effect to" that evidence.[132] Justice Stevens maintained that the two requirements were not only reconcilable, but they were also both critical to achieving a

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1147, 1206 (1991); *see also* STEIKER & STEIKER, COURTING DEATH, *supra* note 53, at 165–66; Garvey, *supra* note 103, at 995–1002 (discussing the "paradox" created by the dual aims of consistency and individualized sentencing).

127. *See* Berger, *supra* note 126, at 1080.

128. *See* Sundby, *supra* note 126, at 1206 ("For while the cases necessitate different approaches to sentencer discretion, *Furman* narrowing it and *Lockett* expanding it, they share the goal of identifying which defendants are within the state's power to execute under the eighth amendment. The crucial question, therefore, is whether the means of implementing their principles invariably are drawn into conflict.").

129. *See* STEIKER & STEIKER, COURTING DEATH, *supra* note 53, at 165.

130. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting) ("[T]he new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.").

131. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 368, 373 (1993); Blystone v. Pennsylvania, 494 U.S. 299, 301, 305 (1990); Boyde v. California, 494 U.S. 370, 377 (1990); Walton v. Arizona, 497 U.S. at 639, 649–51 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002); Franklin v. Lynaugh, 487 U.S. 164, 174–75, 181 (1988); California v. Brown, 479 U.S. 538, 543 (1987).

132. *Penry I*, 492 U.S. 302, 322–33 (1989); *see also* Mills v. Maryland, 486 U.S. 367, 369, 384 (1988); Hitchcock v. Dugger, 481 U.S. 393, 398 (1987); Sumner v. Shuman, 483 U.S. 66, 73–78 (1987).

constitutional capital punishment scheme.[133] The most extreme members of both camps ultimately drew the same conclusions in favor of opposite results. Justices Scalia and Thomas found the individualized sentencing requirement to be irreconcilable with *Furman*'s aim of consistency and repeatedly argued to abandon individualized sentencing.[134] Justice Blackmun agreed that the two requirements were irreconcilable, but argued that the only solution was abandonment of the death penalty altogether.[135]

Justice O'Connor was the first to attempt to reconcile the tension, introducing the concept of the sentencing decision as "a reasoned moral response" that encompassed both logic and some degree of emotion.[136] In O'Connor's framing, states could properly place some standards on the sentencer's consideration of mitigation evidence by urging a dispassionate view of that evidence: that is, by imposing reason and/or reigning in emotion.[137]

Justice O'Connor's conception of the mitigation question has undergirded the Court's individualized sentencing jurisprudence for the last thirty years. In her majority opinion in *Penry v. Lynaugh*[138] in 1989, O'Connor invalidated the Texas "special issues"—which asked jurors to determine whether the defendant acted deliberately, whether he was likely to be a continuing threat to the community, and whether his response was unreasonable in response to any provocation by the deceased—because she found that they prevented jurors from giving mitigating effect to the evidence that defense counsel presented to argue for a sentence of life without parole.[139]

Justice Scalia, on the other hand, pronounced the goals of non-arbitrariness and individualized sentencing fundamentally

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133. *Walton*, 497 U.S. at 716–18 (Stevens, J., dissenting).

134. *See, e.g.*, Graham v. Collins, 506 U.S. 461, 493–95 (1993) (Thomas, J., concurring); *Walton*, 497 U.S. at 664–66 (Scalia, J., concurring in part); *Penry I*, 492 U.S. at 359–60 (Scalia, J., concurring in part).

135. Callins v. Collins, 510 U.S. 1141, 1142–46 (1994) (Blackmun, J., dissenting).

136. *Brown*, 479 U.S. at 544 (O'Connor, J., concurring) (emphasis omitted).

137. In *Brown*, the Court upheld California's instruction that jurors could not base their penalty phase verdict on sympathy. 479 U.S. at 543 (majority opinion). The four dissenters in *Brown* rejected this limitation because they believed that the very essence of mitigation evidence is to elicit sympathy: "[i]n forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered." *Id.* at 548 (Brennan, J., dissenting). The instruction thus foreclosed the defendant's "only hope of gaining mercy from the sentencer." *Id.* at 561. In his dissent, Justice Blackmun rejected O'Connor's idea of sentencing as a reasoned moral response, arguing that while sentencing decisions could be rational, they more often resulted from feelings of mercy or sympathy that were unquestionably emotional. *Id.* at 561–62 (Blackmun, J., dissenting).

138. 492 U.S. 302 (1989).

139. *Id.* at 307.

irreconcilable.[140] He mocked O'Connor's characterization of the sentencing decision as a reasoned moral response, chiding "reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional 'moral response' that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy."[141] Scalia then warned that the *Penry* decision would reproduce the *Furman*-era sentencing patterns that formerly concerned the Court: "'[f]reakishly' and 'wantonly,' . . . have been rebaptized 'reasoned moral response.'"[142] Finally, he rejected the notion that there was value in a fan-shaped discretion model: "[t]he Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by 'narrow[ing] a sentencer's discretion to *impose* the death sentence,' but expanding his discretion 'to *decline to impose* the death sentence[.]'"[143]

Ultimately, Justice Scalia announced that he would no longer apply the line of cases that forbade states from limiting juror discretion to consider mitigation evidence.[144] Scalia argued that this "*Woodson-Lockett* principle," departed in an unjustified way from *Furman*'s narrowing principle,[145] pronouncing the two as fundamentally incompatible as "the Allies and the Axis Powers in World War II."[146]

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140. *Id.* at 354–55 (Scalia, J., dissenting) (finding that O'Connor's majority opinion "requir[ed] individualized consideration to displace the channeling of discretion").

141. *Id.* at 359.

142. *Id.* at 360.

143. *Id.* at 359–60 (quoting McCleskey v. Kemp, 481 U.S. 279, 304 (1987)). Scalia viewed *Penry I* as a misreading of *Lockett*, which he contended merely prevented states from precluding the *introduction* of evidence related to the defendant's crime or character. *Id.* at 357–60. No *Lockett* violation existed because "Texas permits *all* mitigating factors to be considered, though only for purposes of answering the three Special Issues (and there is no question that the specific mitigation offered was relevant to at least one of them)." *Id.* at 357; *see also id.* at 358–59 ("In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence.").

144. Walton v. Arizona, 497 U.S. at 639, 673 (1990) (Scalia, J., concurring in part), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002). In *Walton*, the Court upheld the constitutionality of the Arizona capital sentencing scheme, which placed the burden of establishing mitigating circumstances on the defendant and required judges to impose death if they found the existence of one or more aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 644 (majority opinion).

145. *Id.* at 662 (Scalia, J., concurring in part) ("In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required.").

146. *Id.* at 664; *see also id*. at 666 ("[T]he question remains why the Constitution demands that the aggravating standards and mitigating standards be accorded opposite treatment. It is impossible to understand why."). Scalia explained that he did not take issue with the requirement of individualized sentencing *per se*, but merely with the Court's prohibition on rationalizing the process: "[t]he issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all

Justice Thomas expounded on Scalia's concerns about the expansiveness with which the Court had begun interpreting the individualized sentencing requirement.[147] Thomas agreed with Scalia that the tension between the Court's requirement that states narrow discretion for aggravating circumstances but widen it for mitigating circumstances was untenable.[148] Thomas contended that unfettered discretion in the consideration of mitigation evidence increased the opportunity not only for arbitrary sentencing outcomes, but also for racist ones: "[t]o withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on the basis of negative bias, and it matters not how narrow the class of death-eligible defendants or crimes."[149] Thomas argued that by deeming the sentencing decision a moral one, the Court enshrined a mushy quality to capital sentencing that permitted racial animus:

> [B]eware the word 'moral' when used in an opinion of this Court. This word is a vessel of nearly infinite capacity—just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a 'moral response' may secretly be based on caprice or even outright prejudice.[150]

In contrast to the conservative wing, Justice Stevens found the tension between non-arbitrariness and individualized sentencing easily reconcilable if one conceives of the law as applied to all homicide crimes as a pyramid with three planes.[151] The possible punishment for each crime increases as one moves up the pyramid.[152] The first plane at the base of

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sentencers making the individualized determinations apply the same standard." *Id.* at 665–66. According to Scalia, the Court's extension of individualized sentencing to prevent states from guiding consideration of mitigation evidence could only lead to arbitrary outcomes. *Id.* at 666–67. ("[R]andomness and 'freakishness' are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity.").

147. Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring).

148. *Id.* In Thomas's view, *Lockett* and *Eddings* sought to preserve a fair, adversarial process by guaranteeing the admissibility of the evidence that the defense contended was mitigating. *Id.* at 490. When the *Penry I* Court prevented the State of Texas from guiding the jury's consideration of the defense mitigation through the special issues, it rendered the decision to spare a defendant standard-less. *Id.* at 493–94.

149. *Id.* at 495.

150. *Id.* at 494 (arguing that by "throw[ing] open the back door to arbitrary and irrational sentencing," the Court had turned *Furman* on its head).

151. Walton v. Arizona, 497 U.S. at 639, 716–18 (1990) (Stevens, J., dissenting), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002). Justice Stevens borrowed the pyramid model from the Georgia Supreme Court, as quoted by the Court in *Zant v. Stephens*. *Id.* at 716 (quoting Zant v. Stephens, 462 U.S. 862 (1983)).

152. *Id.* at 716.

the pyramid separates homicides from killings generally; the middle plane consists of homicides eligible for the death penalty; and the plane just below the apex consists of cases selected for death.[153] If the sentencer's discretion is inversely proportional to punishment, for instance, fan-shaped, the twin objectives of non-arbitrariness and individualized sentencing are achievable.[154] Justice Stevens explained that Scalia's analysis was reductive:

> Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.[155]

To Justice Stevens, the Eighth Amendment's heightened reliability requirement justified the disparate treatment: a fan-shaped discretion model minimized the number of death sentences to the class of defendants most "worthy" of death.[156]

Unlike his liberal ally, Justice Blackmun eventually had enough of this debate. In his dissent from the denial of certiorari in *Callins v. Collins*,[157] Blackmun agreed with his most conservative colleagues that the goals of individualized sentencing and non-arbitrariness were irreconcilable: "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."[158] Unlike Justices Scalia and Thomas, Blackmun's solution was not to abandon the individualized sentencing requirement or to allow states to limit discretion to consider mitigation evidence.[159] Justice Blackmun decreed that the only

153. *Id.* at 716–17.

154. *Id.* at 716–18.

155. *Id.* at 718.

156. *Id.* at 718–19.

157. 510 U.S. 1141 (1994).

158. *Id.* at 1144 (Blackmun, J., dissenting).

159. *Id.* at 1145. Justice Scalia's opinion supporting the denial of certiorari in *Callins* specifically responded to Justice Blackmun, agreeing that while the two requirements of consistency and individualized sentencing were fatally in conflict, the text of the Constitution and the Framers' intent clearly contemplated a system of capital punishment. *Id.* at 1141–42 (Scalia, J., concurring). Scalia proposes another solution: "[s]urely a different conclusion commends itself—to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong." *Id.* at 1142.

fair solution was to abandon the death penalty entirely.[160] Shortly after his *Callins* dissent, Blackmun retired; no other justice took up his argument.

Instead, in the years following *Callins*, the Court jumped back into the weeds on the individualized sentencing debate and issued what Chief Justice Roberts later referred to as "a dog's breakfast of divided, conflicting, and ever-changing analyses."[161] The Court embarked on a case-by-case basis, determining whether particular state jury instructions precluded jury consideration of mitigation evidence.[162] In many of these cases, Justices Scalia and Thomas underscored their opposition to the disparate treatment of jury consideration of mitigators and aggravators[163]—often simply citing, without elaboration, to their prior concurring and dissenting opinions.[164]

This approach culminated in 2007's holdings in *Abdul-Kabir v. Quarterman*[165] and *Brewer v. Quarterman*,[166] where Justice Stevens's majority opinion emphasized *Penry*'s mandate that jurors not be

160. *Id.* at 1145–46 (Blackmun, J., dissenting).

161. Abdul-Kabir v. Quarterman, 550 U.S. 233, 267 (2007) (Roberts, C.J., dissenting). Roberts noted that the majority opinion relied on Justice O'Connor's concurrence in *Franklin* instead of the plurality opinion that "rejected the argument that a jury must be permitted to give 'independent' effect to mitigating evidence—beyond the special issues." *Id*. at 269.

162. *See generally, e.g.*, Tennard v. Dretke, 542 U.S. 274 (2004) (holding, on habeas review, that the petitioner was entitled to a certificate of appealability because he had a colorable *Penry* claim where special issues did not allow jurors to give mitigating effect to his low IQ score); Smith v. Texas, 543 U.S. 37 (2004) (finding the Texas jury instruction that permitted jurors to nullify their sentencing decision based on an effective mitigation presentation violated the Eighth Amendment because it created a logical impossibility for jurors to follow opposing instructions and did not adequately allow jurors to give effect to mitigation); Penry v. Johnson (*Penry II*), 532 U.S. 782 (2001) (holding, on habeas review, that a supplemental mitigation instruction did not allow jurors to give effect to mitigating evidence of mental retardation when the special issues were the same as those in *Penry I* and the mitigation instruction was a best a confusing directive to nullify); *see also* Smith v. Texas (*Smith II*), 550 U.S. 297 (2007) (finding that the petitioner's *Penry* claim was properly preserved); Ayers v. Belmontes, 549 U.S. 7 (2006) (holding that there was no reasonable likelihood that jurors in penalty phase interpreted trial court's instruction to preclude consideration of petitioner's forward-looking mitigation evidence—specifically, that he would lead a constructive life if incarcerated rather than executed); Brown v. Payton, 544 U.S. 133 (2005) (applying AEDPA deference to hold that the ruling of the California Supreme Court—that the jury instruction plus the prosecutor's misstatements of law did not preclude the jury from considering evidence of post-arrest religious conversion—did not constitute an unreasonable application of clearly established federal law).

163. *See, e.g.*, *Ayers*, 549 U.S. at 24–25 (Scalia, J., concurring); *Brown*, 544 U.S. at 147 (Scalia, J., concurring); *Tennard*, 542 U.S. at 293–94 (Scalia, J., dissenting), 294–95 (Thomas, J., dissenting); *Smith*, 543 U.S. at 49 (Scalia, J., dissenting); *Penry II*, 532 U.S. at 810 (Thomas, J., concurring in part and dissenting in part) (citing *Penry I*, 492 U.S. 302, 355–56 (1989) (Scalia, J., dissenting)).

164. *See, e.g.*, *Smith*, 543 U.S. at 49 (Scalia, J., dissenting) (citing Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002)); *Ayers*, 549 U.S. at 24–25 (Scalia, J., concurring); *Brown*, 544 U.S. at 147 (Scalia, J., concurring) (citing *Walton*, 497 U.S. at 673 (Scalia, J., concurring in part).

165. 550 U.S. 233 (2007).

166. 550 U.S. 286 (2007).

precluded from "giving effect" to mitigation evidence.[167] In these cases, the Court found that the Texas special issues precluded meaningful consideration of mitigating evidence because neither the deliberateness nor the future dangerous issue contemplated the defendant's mitigation evidence.[168] Writing for five justices, Justice Stevens made clear that the fact that the special issues allowed the jury to give effect to some of the mitigating evidence was not sufficient; the jury must be able to "fully consider" and "give meaningful effect" to all of that evidence.[169] The Court resurrected *Penry*'s command that "the evidence be permitted its mitigating force beyond the scope of the special issues"[170]—that it be given, not "sufficient mitigating effect," but "full effect."[171]

Chief Justice Roberts, writing on behalf of four dissenting justices, argued that the individualized sentencing requirement did not demand that juries be able "to give effect to mitigating evidence in every conceivable manner," and effectively embraced the case-by-case approach.[172] Roberts did not join in the second dissent, which was authored by Justice Scalia and joined by Justices Thomas and Alito. Scalia confirmed that the debate concerning the individualized sentencing requirement was alive and well, stating, "I remain of the view 'that limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment.'"[173]

By 2007, the divide in the Court remained clear. The liberal justices, led by Justice Stevens, remained champions of the individualized sentencing requirement and sought to minimize state restrictions on juror discretion to consider mitigating circumstances, with an eye toward

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167. *See Penry I*, 492 U.S. at 318.

168. The Court found that Abdul-Kabir's evidence of his traumatic childhood and self-control problems did not rebut the special issues of future dangerousness or deliberation; instead, it provided jurors with "an entirely different reason for not imposing a death sentence." *Abdul-Kabir*, 550 U.S. at 259. Similarly, in Brewer's case, jurors were only told to assess his future dangerousness and deliberateness; they were given no avenue to consider "any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence." *Brewer*, 550 U.S. at 294. Because the Court decided both of these cases in the federal habeas context, its actual holdings were that the state courts opinions should be overturned as unreasonable applications of *Penry I*. *Abdul-Kabir*, 550 U.S. at 259; *Brewer*, 550 U.S. at 289.

169. *Abdul-Kabir*, 550 U.S. at 253–60.

170. *Id.* at 257.

171. *Brewer*, 550 U.S. at 295.

172. *Abdul-Kabir*, 550 U.S. at 277 (Roberts, C. J., dissenting) (quoting Johnson v. Texas, 509 U.S. 350, 372–73 (1993)). Roberts ended glibly, criticizing Justice Stevens' overreach:

> Still, perhaps there is no reason to be unduly glum. After all, today the author of a dissent issued in 1988 writes two majority opinions concluding that the views expressed in that dissent actually represented 'clearly established' federal law at that time. So there is hope yet for the views expressed in *this* dissent, not simply down the road, but *tunc pro nunc*. Encouraged by the majority's determination that the future can change the past, I respectfully dissent." *Id.* at 280.

173. *Id.* (Scalia, J., dissenting). Scalia then questioned the majority's good faith: "nothing of a legal nature has changed since *Johnson*. What *has* changed are the moral sensibilities of the majority of the Court." *Id.* at 283–84.

sparing more individuals from a death sentence. The moderate justices accepted the requirement but contended that states could limit juror discretion in certain circumstances. The most conservative justices, including Justices Scalia and Thomas, and, later, Justice Alito, believed states should be permitted to narrow juror discretion to consider only certain, specific mitigators, just as they had with aggravators; these three justices believed the Court's individualized sentencing jurisprudence had no constitutional basis and feared that expansion of the doctrine would result in the kind of arbitrary and racist results the *Furman* Court strove to prevent.

II. REPEATING THE SINS OF THE PAST: THE MODERN DEATH PENALTY

For the last forty years, since the Court's decision in *Woodson*, capital sentencing statutes have implemented the individualized sentencing requirement. The question is, to what extent has individualized sentencing been effective? Are the results those predicted by first the moderate and then liberal justices: that the requirement would result in fewer death sentences or a death penalty that is less racially discriminatory? Or were Justice Scalia and Thomas correct that the expansive discretion read into the individualized sentencing requirement would allow arbitrary and racist outcomes to continue to plague the death penalty?

In this Part, I argue that common practices that result in disproportionately White juries have limited the efficacy of the individualized sentencing requirement. Consequently, at best, the individualized sentencing requirement is a fig leaf for justice, covering up the ugly reality of disparate sentencing by encouraging the evaluation of the individual defendant irrespective of his peers. At worst, the requirement legitimizes a systemically racist death penalty, by falsely insisting that each capital defendant has been evaluated as an individual human being.

*A. Pre-*Furman *Outcomes Persist in the Modern Application of the Death Penalty*

The identity of those chosen to live and those chosen to die has not changed substantially in the post-*Furman* era. In the past forty years, capital punishment has consistently exhibited arbitrary and racist outcomes. A mere ten years into the renewed experiment with death, the results were not promising. As the Baldus study presented in *McCleskey v. Kemp* demonstrated, the Georgia capital sentencing scheme deemed constitutional in *Gregg* was producing racially discriminatory outcomes

throughout the 1970s.[174] That study demonstrated that the most salient determiner of death was the race of the victim, with individuals convicted of killing White victims 4.3 times as likely to receive a death sentence as those convicted of killing Black victims.[175] Race of the defendant also mattered: Black defendants were 1.1 times more likely to receive a death sentence than non-Black defendants.[176]

Another decade showed results no less discouraging. In his dissent from a denial of certiorari in *Callins v. Collins*, Justice Blackmun famously proclaimed that he would no longer "tinker with the machinery of death."[177] Blackmun's decision was informed, in part, by evidence that race continued to be a factor in sentencing outcomes: "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."[178] Blackmun noted that in the years since the Baldus study, death penalty proponents had provided no evidence that its results were inaccurate or that they applied only to Georgia.[179] Moreover, Blackmun had no confidence that the Court's jurisprudence had reduced arbitrariness:

> The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative . . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[180]

Indeed, the overwhelming majority of empirical studies between 1990 and 2014 confirmed that the death penalty remains racially discriminatory, finding that death sentences are more probable when the victim is White, the defendant is Black, or both.[181] A subsequent study by David Baldus in 1998 found that jurors were more likely to find the existence of aggravating circumstances in cases involving White victims and Black defendants: "the presence of a nonblack victim simply

174. McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

175. *Id.* at 287.

176. *Id.*

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

178. *Id.* at 1153.

179. *Id*. at 1154.

180. *Id.* at 1145–46.

181. Ross Kleinstuber, McCleskey *and the Lingering Problem of "Race," in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 38 (David P. Keys & R.J. Maratea eds., 2016) (indicating that thirty-two of thirty-six empirical studies on racial discrimination in capital punishment concluded that death sentences were more likely imposed in circumstances where the victim was White, the defendant was Black, or both).

enhances the average juror's perception of the deathworthiness of the offense."[182] A 2011 summary of American Bar Association studies in eight death penalty states concluded that the system of capital punishment in each of the eight states exhibited significant racial disparities, especially when factoring in the race of the victim.[183] Most recently, a Washington State study concluded that jurors are four and a half times more likely to recommend a death sentence for Black defendants than for White defendants.[184]

Not only has the unfettered discretion given to jurors assessing mitigation evidence failed to cure the death penalty's racial imbalance, it has also failed to decrease the class of individuals sentenced to death in the post-*Furman* years. As far back as *Lockett*, the Court indicated that a goal of individualized sentencing was to minimize the number of false positives who received a death sentence by shrinking the class generally.[185] Justice Blackmun similarly contended in *Callins* that there was one value in the individualized sentencing requirement: "[i]t simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing."[186]

Yet even this modest achievement is questionable. Until recent years, the number of executions has continued to steadily increase. Capital punishment scholar Franklin Zimring observed that "[b]y the year 2000 the volume of executions by American states had bounced back to levels quite close to those experienced during the early 1950s."[187] Zimring noted that this statistic, in isolation, is misleading because it fails to consider the dramatic increase in individuals awaiting execution.[188] In 1953, although states executed sixty-two individuals, only 131 awaited execution.[189] In 2000, states executed eighty-five prisoners; however, the number of individuals on Death Row numbered more than 3,500.[190] Thus, while the number of annual executions mimicked pre-*Furman* levels, the number of

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182. David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1722 (1998) [hereinafter Baldus et al., *Racial Discrimination*].

183. Gennaro F. Vito & George E. Higgins, *Capital Sentencing and Structural Racism: The Source of Bias*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 74 (David P. Keys & R. J. Maratea eds., 2016).

184. Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State*, *1981–2014*, 6 COLUM. J. RACE & L. 77, 100 (2016).

185. *Lockett*, 438 U.S. 586, 604–05 (1978).

186. Callins v. Collins, 510 U.S. 1141, 1152 (1994) (Blackmun, J., dissenting).

187. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 6 (2003) [hereinafter ZIMRING, CONTRADICTIONS].

188. *Id.* at 7.

189. *Id.*

190. *Id.*

death sentences had increased more than twenty-five times. Professor Zimring concluded that, despite the Supreme Court's efforts to craft procedural safeguards, "there are no observable differences between outcomes in the 'standardless' discretion disapproved of in *Furman* and the 'guided discretion' upheld in *Gregg*."[191] While the number of death sentences and executions has declined significantly since 2000, scholars typically attribute this phenomenon, not to changes in the Court's interpretation of the individualized sentencing requirement—but to increased awareness of wrongful convictions and financial burdens.[192]

These studies reveal that the modern death penalty continues to result in the same racist and arbitrary outcomes that it exhibited in its pre-*Furman* days.[193] There is no evidence to suggest that the individualized sentencing requirement has had the effects for which the liberal justices had hoped – either in sparing those least deserving of the death penalty or in encouraging jurors to see the humanity of individual defendants beyond their mere membership in a racial group.[194] While the liberal justices considered the only harm of the individualized sentencing requirement as being the sparing of a small number of individuals deserving of death, it is at least as likely that individuals deserving of mercy have received death instead.

B. Jury Composition and Modern Death Sentences

Numerous studies have shown that the racial composition of the jury matters with respect to whether the death penalty is imposed. While most of these results are attributed to unconscious bias,[195] a 2007 study found

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191. *Id.* at 9.

192. Richard C. Dieter, *Racial Bias and Capital Punishment*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 3 (David P. Keys & R. J. Maratea eds., 2016).

193. *See, e.g.*, David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973–2010*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 126 (David P. Keys & R.J. Maratea, eds., 2016) (arguing that "Oklahoma's administration of capital punishment, irrespective of the reforms approved in *Gregg*, is not fundamentally different in character from the pre-*Furman* conditions (1915–1972), but has merely added a thin veil of procedural correctness").

194. This is not to say that the individualized sentencing requirement has *caused* these results. *See* Sundby, *supra* note 126, at 1182 ("Substantial evidence exists that the death penalty is not being applied evenhandedly, but the inconsistency appears to be entering through a variety of portals, such as the exercise of prosecutorial discretion, inadequately defined aggravating circumstances, vague sentencing instructions, the lack of meaningful appellate proportionality review, sentencers' racial attitudes and the quality of defense representation.").

195. *See, e.g.*, R. J. Maratea, *Overcoming Moral Peril: How Empirical Research Can Affect Death Penalty Debates*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 64 (David P. Keys & R. J. Maratea eds., 2016) ("[T]he justice system is so historically embedded in inequality it reproduces subtle yet disparate outcomes despite our best efforts to root out discrimination and achieve fairness.").

that Whites actually became "more supportive" of capital punishment "upon learning that it discriminates against blacks."[196] All-White juries are the most likely to impose death sentences, doing so in 75% of cases involving Black defendants and White victims.[197] In what William J. Bowers has termed the "'white male dominance' effect," juries with greater numbers of White males tend to vote for death in cases involving Black defendants and White victims.[198] Bowers' findings demonstrated that a jury with five or more White male members "dramatically increase[s]" the likelihood of a death sentence in these cases.[199] Conversely, the "'black male presence' effect" indicates the presence of at least one Black man on a capital jury tends to turn the tide against death in capital cases with Black defendants and White victims.[200] Bowers found that when at least one of the jurors was an African-American male, the jury imposed a death sentence in only 42.9% of cases, compared to 71.9% when none of the jurors were African Americans.[201]

Many scholars have noted that African Americans' mistrust of the death penalty often stems from their history and life experiences.[202] From the earliest days of the capital punishment in America, the death penalty was disproportionately applied against African Americans. Southern Whites used the death penalty as another means of social control, codifying scores of crimes that could earn enslaved people the death penalty, but limiting capital crimes for Whites to just a few.[203] Professor Zimring has drawn a connection to the modern death penalty and the southern lynching of African Americans following the Civil War.[204] Of the 455 men executed for rape between 1930 and 1972, 405, or 89.5%, were Black.[205] No White man has ever been executed for the non-

196. *Id.* at 52 (citing Mark Peffley & Jon Hurwitz, *Persuasion and Resistance, Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996–1012 (2007)).

197. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Compositions*, 3 U. PA. J. CONST. L. 171, 193 n.104 (2001) [hereinafter Bowers et al., *Death Sentencing*].

198. *Id.* at 192, 193.

199. *Id.*

200. *Id.*

201. *Id.* at 193–94.

202. *See, e.g.*, STEIKER & STEIKER, COURTING DEATH, *supra* note 53, at 17–26; ZIMRING, CONTRADICTIONS, *supra* note 187, at 89–118.

203. *See, e.g.*, Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, *in* DEATH PENALTY STORIES 191 (John H. Blume & Jordan M. Steiker eds., 2009) (observing that Virginia had over sixty capital crimes for which enslaved people were death eligible, but far fewer crimes for which Whites were death eligible).

204. ZIMRING, CONTRADICTIONS, *supra* note 187, at 89–118.

205. Hugo Adam Bedau, *The Case against the Death Penalty*, *in* CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 215 (Elihu Rosenblatt ed., 1996); *see also* Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC.

homicide rape of a Black woman or child.[206] With this history in mind, modern African Americans are more likely than Whites to believe that racial discrimination infects the criminal justice system generally, as well as the imposition of the death penalty, in particular.[207]

In aggregate, jurors of different races assess sentencing evidence differently. Black jurors are more likely to have lingering doubts about the defendant's culpability and to factor these doubts into their sentencing decision.[208] Black jurors are also more likely to conclude that the defendant is genuinely remorseful, particularly in cases involving Black defendants and White victims, while White jurors are especially unlikely to conclude the defendant is remorseful when he is Black.[209] Blacks and Whites also exhibit different conclusions about a capital defendant's future dangerousness. White jurors believe Black defendants are more likely to be dangerous than White ones, while Black jurors believe that any defendant who kills a Black victim is more likely to be dangerous.[210]

In a 2009 study, Professors Mona Lynch and Craig Haney observed a race-of-the-defendant effect in jurors' assessment of mitigation evidence.[211] The study tested simulated jurors' receptivity to classic categories of mitigation evidence: a defendant's history of child abuse, psychiatric problems, substance abuse, and familial love.[212] In each of the categories, jurors were more likely to inappropriately interpret the evidence as aggravating—and thus as a reason to impose a death sentence—for Black defendants than for White defendants.[213] Baldus observed that the race of the victim may also determine jurors' receptivity to specific mitigators.[214] Juries were more likely to find the defendant's

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SCI. 119, 123 (1973) (citing Marvin E. Wolfgang, Testimony at Hearings before the Subcommittee of the Committee on the Judiciary (Mar. 16, 1972)).

206. Brief for American Civil Liberties Union, the ACLU of Louisiana, and the NAACP Legal Defense and Educational Fund as Amici Curiae Supporting Petitioner at 7, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 503591.

207. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148, 152 (2018) [hereinafter Lynch & Haney, *Death Qualification*].

208. Bowers et al., *Death Sentencing*, *supra* note 197, at 207–08.

209. *Id.* at 215–16. Black jurors cite remorsefulness as the primary factor in their decision to grant mercy in cases involving White defendants and Black victims. *Id.* at 218.

210. *Id.* at 222–23. White jurors cite a defendant's future dangerousness as the primary reason to impose the death penalty in cases involving Black defendants and White victims. *Id.* at 225–26.

211. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 351 (2000) [hereinafter Lynch & Haney, *Discrimination*].

212. *Id.* at 352.

213. *Id.* at 352–53.

214. Baldus et al., *Racial Discrimination*, *supra* note 182, at 1718–19.

age to be mitigating when the victim was Black.[215] Similarly, they were more receptive to a "catchall" mitigation argument, which allowed them to consider any additional evidence relating to the circumstances of the crime or the character of the defendant, when the victim was Black.[216]

Explanations for jurors' racist behavior depend on the concept of stereotype activation, where unconscious bias fueled by White supremacy infiltrates decision-making.[217] Current social psychology research reveals that individuals subconsciously construct positive or negative associations based on group membership in, among other things, a particular race.[218] Scholars have noted that in the United States, this commonly takes the form of associating Blackness with negative traits, such as criminality and deviance, and Whiteness with positive traits, such as good citizenship and a propensity for victimhood.[219] Environmental cues activate these stereotypes, often unconsciously; in the capital jury context, race images trigger these pre-existing notions of criminality or victimhood.[220] Attitudes based on stereotypical thinking lead to confirmation bias, where individuals discount contrary evidence: "[e]vidence supporting our attitudes is seen as more compelling than evidence that disagrees with our attitudes."[221]

Several factors may temper racist decision-making.[222] First, the composition of the jury plays a role.[223] A diverse jury motivates individuals to avoid engaging in racist behavior—hence why the presence

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215. *Id.* at 1719.

216. *Id.* at 1646, 1719.

217. Jamie L. Flexon, *Addressing Contradictions with the Social Psychology of Capital Juries and Racial Bias*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 113–19 (David P. Keys & R. J. Maratea eds., 2016) (discussing stereotype activation).

218. *See generally* KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY AT OHIO STATE UNIV., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014), http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf [https://perma.cc/X94H-MZMM] (cataloguing thirty years of social science research on unconscious racial bias).

219. Bowers et al., *Death Sentencing*, *supra* note 197, at 219 ("[C]ulturally rooted racial stereotypes may tend to demonize and dehumanize blacks accused of lethal violence by portraying them as especially dangerous."); Flexon, *supra* note 217, at 113.

220. Flexon, *supra* note 217, at 114; *see also* BRYAN C. EDELMAN, RACIAL PREJUDICE, JUROR EMPATHY, AND SENTENCING IN DEATH PENALTY CASES 2 (2006) ("Jurors bring their pre-existing schemas and attitudes toward the defendant and victim into the sentencing phase of a capital trial.").

221. Jon A. Krosnick & Richard E. Petty, *Attitude Strength: An Overview*, *in* ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 8 (R. E. Petty & J. A. Krosnick eds., 1995).

222. EDELMAN, *supra* note 220, at 73–74. Professor Jamie L. Flexon posits that the additional factors of awareness, motivation, and external social control curb stereotypical thinking. Flexon, *supra* note 217, at 115. Not only are none of these common features of the modern capital trial, but studies have shown that the individuals most likely to inhibit their own stereotypical thinking are egalitarian, due-process-oriented individuals who are less likely to be chosen to serve on a capital jury. *Id.*

223. EDELMAN, *supra* note 220, at 74.

of a Black male juror reduces the likelihood of a death sentence.[224] Second, strong evidence may overcome stereotypical beliefs.[225] During capital sentencing, jurors tend to rely most on stereotypes to choose a punishment when the evidence does not strongly favor either side; closer calls are more likely to render racist outcomes.[226] A Philadelphia study found that, when the evidence of the defendant's culpability is ambiguous, the victim's race significantly impacts the likelihood that the jury will find the existence of a mitigating factor.[227] Finally, the quality of the jury instructions affects how much jurors fall back on racist beliefs.[228] Complex jury instructions may cause jurors to rely more on stereotypical thinking to render a punishment decision.[229] Studies have repeatedly demonstrated that racial and ethnic stereotypes have a prominent role when decisions require high information processing.[230] Lynch and Haney's 2009 study demonstrated that when participants exhibited lower comprehension of jury instructions they were more likely to sentence black defendants to death.[231] The same is true when the instructions fail to provide the jury with adequate guidance.[232] Because the jurors lack guidance on how to interpret mitigating evidence, they fall back on their unconscious stereotypical beliefs when imposing a capital sentence. The power to decide becomes the power to discriminate.[233]

C. Disproportionately White Juries Limit the Impact of the Individualized Sentencing Requirement

Two practices arising alongside the evolution of the individualized sentencing requirement have increased this likelihood: (1) the Supreme

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224. *Id.* at 73–74.

225. *Id.*

226. *Id.* at 26, 32; Baldus et al., *Racial Discrimination*, *supra* note 182, at 1716; Lynch & Haney, *Discrimination*, *supra* note 211, at 340.

227. Baldus et al., *Racial Discrimination*, *supra* note 182, at 1714–16, 1720–21.

228. EDELMAN, *supra* note 220, at 73–74.

229. Lynch & Haney, *Discrimination*, *supra* note 211, at 340 ("[T]he influence of race in capital jury decision-making may be amplified by the complexities of the information-processing task faced by capital jurors.").

230. Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotypic Use*, 55 J. PERS. & SOC. PSYCH. 726, 726–37 (1988); Galen V. Bodenhausen & M. Lictenstein, *Social Stereotypes and Information Processing Strategies: The Impact of Task Complexity,* 52 J. PERS. & SOC. PSYCH. 871, 871–80 (1987); Galen V. Bodenhausen & Robert S. Wyer, *Effects of Stereotypes on Decision-making and Information-processing Strategies*, 48 J. PERS. & SOC. PSYCH. 267, 267–82 (1985).

231. Lynch & Haney, *Discrimination*, *supra* note 211, at 347.

232. EDELMAN, *supra* note 220, at 74.

233. *McCleskey*, 481 U.S. at 312 ("[T]he power to be lenient [also] is the power to discriminate . . . .") (quoting K. DAVIS, DISCRETIONARY JUSTICE 170 (1973)).

Court's failure to prevent prosecutors' use of racially discriminatory peremptory strikes; and (2) the ubiquity of death qualification of capital jurors. These practices work in tandem to create disproportionately White juries in capital cases.

To begin with, evidences suggests that prosecutors continue to strike Black prospective jurors with impunity, despite the Supreme Court's decision in *Batson v. Kentucky*,[234] which sought to create a remedy for such behavior. The *Batson* decision set up a three-part test for trial judges to evaluate claims of racially discriminatory strikes.[235] First, defense counsel must establish that the prosecutor's pattern of strikes constitutes a prima facie case of racial discrimination.[236] Having done so, the burden shifts to the prosecution to supply a race-neutral reason for the strike.[237] Finally, the court evaluates the prosecutor's reason to determine if it is credible or a pretext for racial discrimination.[238]

Over time, many scholars have observed that the problem with the *Batson* remedy is that it is toothless: it is simply too easy for the prosecutor to fabricate a race-neutral reason to defeat the defendant's claim.[239] Just a year after the Court decided *Batson*, the Philadelphia District Attorney's Office produced a training video advising new prosecutors to ask more questions of Black jurors, "so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race."[240] In its 2010 report on racial discrimination in jury selection, the Equal Justice Initiative concluded that the racially discriminatory use of peremptory strikes "remains widespread, particularly in serious criminal cases and

234. 476 U.S. 79 (1986)

235. *Batson*, 476 U.S. at 96–98.

236. *Id.* at 98.

237. *Id.*

238. *Id.*

239. *See, e.g.,* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 403 (2016) (discussing criticism of *Batson*); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116 (2011) (discussing a trial judge's reluctance to find a *Batson* violation that would harm the professional reputation of the offending attorney); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 (1999) ("Any trial attorney with the wherewithal to refrain from using gender or race words in the explanation and the discipline to avoid accepting a juror to whom the exact same 'neutral explanation' would apply has beaten what one court calls the *Batson* 'charade.'"). In his concurrence in *Batson*, Justice Marshall correctly predicted that the *Batson* test would be ineffective. 476 U.S. at 102–03 (Marshall, J., concurring).

240. *See* Gilad Edelman, *Why is it So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/L2Z5-TDQC] (discussing video). A complete copy of the video is available online. *See* YouSchtupp, *Jury Selection with Jack McMahon*, YOUTUBE (Nov. 3, 2015), https://www.youtube.com/watch?v=HPIZ6pe3ScQ (last visited May 2, 2020).

capital cases."[241] In Houston County, Alabama, prosecutors struck 80% of Black jurors in capital cases, while in Jefferson Parish, Louisiana, prosecutors removed eligible Black jurors "at more than three times the rate that they strike [W]hite prospective jurors."[242] Studies in North and South Carolina have similar findings. Authors of the North Carolina study concluded, "[i]n the 114 cases decided on the merits by North Carolina appellate courts, the courts have never found a substantive *Batson* violation where a prosecutor has articulated a reason for the peremptory challenge of a minority juror."[243] In South Carolina, researchers determined that prosecutors struck eligible Black jurors at nearly three times the rate that they struck eligible White jurors.[244] A reporter for *The New Yorker* recently summed up *Batson*'s legacy: "[t]he most remarkable thing about *Batson*, it turns out, is how easy it has been to ignore."[245]

More insidious than the direct removal of Black jurors is their indirect removal through the facially race-neutral practice of death qualification in capital trials. Death qualification refers to the process of removing potential jurors who indicate that their opposition to capital punishment would prevent them from imposing a death sentence under any circumstances.[246] Although the Supreme Court had tacitly approved of this process in *Witherspoon v. Illinois*,[247] a case that pre-dated *Furman*, it did so explicitly in 1985's *Wainwright v. Witt*.[248] In *Wainwrigh*t, the Court held that a juror could be excused for cause when the juror's beliefs would "prevent or substantially impair the performance of his duties as a juror in

241. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5, 14 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/9KU7-H8L2].

242. *Id.* at 5, 14.

243. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1957 (2016); *see also* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1554 (2012) (finding that Black prospective jurors in North Carolina are more than twice as likely as all other prospective jurors to be struck by prosecutors).

244. Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L. REV. 299, 299–300 (2017).

245. *See* Edelman, *supra* note 240 (emphasis added).

246. *See* Wainwright v. Witt, 469 U.S. 412, 439 (1985) (Brennan, J., dissenting) (defining death qualification as "the exclusion for cause, in capital cases, of jurors opposed to capital punishment").

247. 391 U.S. 510, 522 & 522 n.21 (1968) (overturning a death sentence where the trial court permitted the prosecutor to exclude all jurors who indicated general objections to capital punishment, but indicating that State exclusion of jurors who stated they could not impose death would create a neutral jury). Although the Supreme Court has never indicated that the U.S. Constitution requires the death qualification of capital juries, *Witherspoon* legitimized the process, and it soon became the norm nationwide. Lynch & Haney, *Death Qualification*, *supra* note 207, at 3.

248. 469 U.S. 412, 424 (1985).

accordance with his instructions and his oath."[249] The following year, in *Lockhart v. McCree*,[250] the Court upheld the constitutionality of death qualification, despite social science evidence that indicated the process rendered a jury that was more conviction-prone.[251]

Many scholars have noted that death qualification disproportionately removes African Americans from capital juries[252] because African Americans are more likely to oppose the death penalty.[253] Analyzing data from two recent surveys in Solano County—the county in California with the largest percentage of African-American residents—Lynch and Haney determined that significant differences existed between Whites and African Americans in both the amount and the strength of their support for capital punishment.[254] Of the Solano jurors who would have been excluded during death qualification, between 80% and 90% of the African Americans opposed the death penalty, while Whites were equally likely to strongly support the death penalty as they were to oppose it.[255] As a consequence, the African Americans who survived death qualification were a much smaller group than those originally in the venire and typically had views that made them outliers among their peers.[256]

Lynch and Haney also concluded that Black and White prospective jurors assessed sentencing phase evidence differently: African Americans were much more likely to consider classic mitigation evidence—such as an impoverished childhood, familial substance abuse, mental illness, and a positive institutional history—as a thumb on the scale for mercy, while Whites often interpreted such evidence as supporting a death sentence.[257] Specifically, in the first Solano survey, 12–13% of White participants

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249. *Id.* at 424 (internal quotations marks omitted) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980). Importantly, as Professor Elisabeth Semel has made clear, the Court has never *required* death qualification in capital cases. *See* Notice of Motion and Motion to Oppose Death Qualification at 2–3, People v. Leroy Johnson, No. F09904296 (Fresno Sup. Ct. July 11, 2017) [hereinafter Notice of Motion] (on file with author); Seminar, Elisabeth Semel, Dir. Berkeley Law Death Penalty Clinic, Plenary Session at the California Attorneys for Criminal Justice (CACJ) and California Public Defender Association (CPDA) Capital Case Defense Seminar: *Selecting a Fair Jury:* Witherspoon*,* Witt*, and* Batson (Feb. 2018).

250. 476 U.S. 162 (1986).

251. *See id.* at 165, 168–171.

252. *See generally* Eisenberg, *supra* note 244; Aliza P. Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1140–43, 1147 (2014); Alec T. Swafford, Note, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 158 (2011).

253. Lynch & Haney, *Death Qualification*, *supra* note 207, at 3–4.

254. *Id.* at 11.

255. *Id.* at 12.

256. *Id.*

257. *Id.* at 12–17.

stated that evidence indicating the defendant had a loving family who opposed his execution, had an impoverished childhood, had been raised by a single disabled parent, had himself been a good husband and parent, and had adjusted well to incarceration, would have made them *more* likely to impose a death sentence.[258] Whites were especially unreceptive to evidence concerning a capital defendant's social history or background, expressing the most enthusiasm for mitigation concerning the crime itself, such as lingering doubt and lack of premeditation.[259] Lynch and Haney concluded that death qualification not only results in "the significant underrepresentation of African Americans . . . . but also leaves behind a subgroup that does not represent the views of its community."[260]

The interplay between death qualification and *Batson* results in the maximal exclusion of African Americans from the jury.[261] Because death penalty views function as "proxies for race,"[262] not only can prosecutors rely on death qualification to remove African Americans from the jury, they can also use the process as cover to survive a *Batson* challenge. Courts have deemed even mild opposition to or discomfort with the death penalty as a valid, non-racial reason to exercise a peremptory strike, and death qualification requires jurors to voice these opinions.[263] Lynch and Haney have noted that jurors who survive death qualification "may nonetheless become prime targets to be dismissed through the use of peremptory challenges."[264]

The juries who sentence capital defendants are thus disproportionately White. White capital jurors are more skeptical that classic mitigation evidence supports a life sentence. The few African Americans chosen to serve on capital juries have views that make them outliers in their peer group. Thus, the jurors with the power to decide are those who are most likely to rely on explicit or implicit racial bias to impose sentence and/or those who are least representative of the community. These are the jurors who have unfettered discretion to evaluate mitigation evidence. Through its individualized sentencing jurisprudence, the Court has bestowed upon these jurors an Eighth Amendment power to discriminate.

258. *Id.* at 17.
259. *Id.*
260. *Id.* at 18.
261. *Id.*
262. *Id.* at 19.
263. *Id.*
264. *Id.*

III. *KANSAS V. CARR*: A NEW ATTACK ON THE INDIVIDUALIZED SENTENCING REQUIREMENT

Does a judicial solution exist to this problem? The Court could decrease these negative outcomes and reinvigorate the individualized sentencing requirement in the process, simply by injecting context into its conversation. Thus far, the Court's individualized sentencing requirement has centered on the amount of juror discretion, rather than the quality of that discretion: the liberal justices favor expansive juror discretion while the conservative justices champion the states' rights to limit that discretion. As a result, the death penalty remains arbitrary and racist, and neither camp is happy. Instead, the Court should interpret the Eighth Amendment not only to forbid states from limiting a jury's consideration of mitigating evidence, but also to permit states to *require* jurors to consider certain types of evidence as mitigation. Indeed, the Court's decisions in *Lockett*, *Eddings*, *Penry*, *Abdul-Kabir*, and *Brewer* all support such an interpretation because all forbade states from *precluding* the consideration of the defendant's relevant mitigation evidence.[265] However, there is reason to believe this solution may be out of reach.

In this Part, I argue that *Kansas v. Carr*,[266] the Court's most recent decision involving the assessment of mitigation evidence, subtly altered the Court's individualized sentencing jurisprudence by questioning both the efficacy and the legality of providing jurors with any guidance

265. *See supra* Part I.

266. 577 U.S. __, 136 S. Ct 633 (2016). Justice Scalia's opinion held only that the Eighth Amendment did not *require* such guidance, not that it forbade it. *See id.* at 642. However, Scalia went further and speculated that a state that chose to instruct the jury that mitigation need not be proven beyond a reasonable doubt would be issuing an instruction that was, at best, confusing, and, at worst, logically impossible. *Id.* Scalia holds himself out as protecting the state of Kansas's decision not to issue such an instruction, but, in reality, what he was protecting was the actions of an individual trial judge. As Justice Sotomayor notes, while the Kansas capital sentencing statute was silent on the matter, the Kansas Supreme Court had issued a directive to give the reasonable doubt instruction in 2001. *See id.* at 650 (Sotomayor, J., dissenting). Kansas did not revise the pattern jury instructions to include that instruction until 2011, and the Carr brothers were tried in the interim. *Id.* The Pattern Instructions for Kansas, or PIK, are written by the Judicial Council, which is made up of the Chairs of the Kansas Senate and House Judiciary Committees and other individuals appointed by the Kansas Supreme Court. *See* State v. Gleason, 329 P.3d 1102, 1145 (Kan. 2014), *rev'd and remanded sub nom. Carr*, 136 S. Ct. 633 (2016) ("Following this court's ruling in *Kleypas*, the PIK committee amended the PIK instruction on mitigating circumstances to reflect *Kleypas*' second statement regarding jury unanimity. But inexplicably, the committee did not amend the instruction to include the first statement—that mitigating circumstances need only be proven to the satisfaction of the individual juror and not beyond a reasonable doubt."); Judicial Council Members, KANS. JUD. COUNS., https://www.kansasjudicialcouncil.org/about/judicial-council-members [https://perma.cc/TSZ5-RERW]. In her dissent, Sotomayor scolds the Court for granting certiorari for what amounts to "an intrastate dispute." *See Carr*, 136 S. Ct. at 647 (Sotomayor, J., dissenting).

whatsoever.[267] If *Carr*'s interpretation persists, it may render the individualized sentencing requirement meaningless.

In 2016, Justice Scalia wrote what would be his final majority opinion in *Carr*.[268] On the surface, the most noteworthy thing about *Carr* appeared to be its horrendous facts. Scalia's majority opinion began with a detailed account of "the acts of almost inconceivable cruelty and depravity" for which the Carr brothers were convicted.[269] What was known as "the Wichita Massacre" consisted of multiple acts of kidnapping, robbery, rape, attempted murder, and the murder of four people.[270] Scalia famously interrupted oral argument to recount the chilling facts in detail.[271] Both the result and the holding of the case are unsurprising for a Scalia capital punishment opinion. The Court overturned the judgment of the Kansas

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267. At first glance, *Carr* may not appear to be a decision about the individualized sentencing requirement. Justice Scalia contended that the case was the intellectual heir to *Buchanan v. Angelone*, 522 U.S. 269 (1998), and *Weeks v. Angelone*, 528 U.S. 225 (2000). *See Carr*, 136 S. Ct. at 642. Both *Buchanan* and *Weeks* held that the Eighth Amendment does not require specific, affirmative instructions on mitigation. *See Buchanan*, 522 U.S. at 276 ("[W]e have never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."); *Weeks*, 528 U.S. at 233. But in basing the Court's opinion on *Buchanan* and *Weeks*, Scalia re-framed the respondent's argument. Carr argued that the trial court's ambiguous instructions failed to allow the jury to give effect to the entirety of the defense mitigation evidence. Final Brief for Respondent Reginald Dexter Carr, Jr. at 35–37, *Carr*, 136 S. Ct 633 (2016) (No. 14-450). Specifically, the trial court had instructed the jury that aggravation evidence had to be proven beyond a reasonable doubt, but said nothing about the burden of proof with respect to mitigation evidence. *Id.* at 44. Because the aggravation instructions were juxtaposed with the mitigation instructions, the jury could have reasonably believed the burden applied to both types of evidence. *Id.* at 44–45. As the Kansas Supreme Court ruled, the instructions violated the individualized sentencing requirement because there was a reasonable likelihood that it prevented the jury from giving effect to any mitigation evidence that the jury believed had not been proven beyond a reasonable doubt. *See Gleason*, 329 P.3d at 1148 ("[J]urors may have been prevented from giving meaningful effect or a reasoned moral response to Gleason's mitigating evidence, implicating Gleason's right to individualized sentencing under the Eighth Amendment."); State v. Carr, 331 P.3d 544, 732 (2014) ("When nothing in the instructions mentions any burden other than 'beyond a reasonable doubt,' jurors may be 'prevented from giving meaningful effect or a reasoned moral response to' mitigating evidence, implicating a defendant's right to individualized sentencing under the Eighth Amendment.") (citing *Gleason*, 329 P.3d at 1148).

268. 136 S. Ct. at 633 (consolidating petitioner's challenge to the Kansas State Supreme Court's ruling in *Gleason*, 329 P.3d at 1102, which employed the same penalty phase instruction). Unlike *Gleason*, *State v. Carr* also held that the Eighth Amendment did not require severance of the brothers' capital sentencing proceedings. *Carr*, 331 P.3d at 544.

269. *Id.* at 638–39, 646. Notably, the Carr brothers are Black and their victims were White, presenting the racial scenario, which, as discussed in Part II, is most likely to result in a death sentence. *See* Dion Lefler, *Kansas Supreme Court Hears Carr Brothers' Death Penalty Appeals*, WICHITA EAGLE (Aug. 13, 2014, 10:46 AM), https://www.kansas.com/news/special-reports/carr-brothers/article1129860.html [https://perma.cc/Z66V-AG9E]; Ron Sylvester, *Victims in 2000 Quadruple Homicide Aren't Forgotten*, WICHITA EAGLE (Aug. 13, 2014, 10:49 AM), https://www.kansas.com/news/local/crime/article1049543.html [https://perma.cc/V3JW-668V].

270. *Carr*, 136 S. Ct. at 638–39.

271. Oral Argument at 31:28-33:11, *Carr*, 136 S. Ct. at 633, https://www.oyez.org/cases/2015/14-449 [https://perma.cc/T3C3-8XCK].

Supreme Court and reinstated the brothers' death sentences.[272] The majority held that the Eighth Amendment did not require that states affirmatively instruct jurors that mitigation evidence need not be proved beyond a reasonable doubt.[273]

What is noteworthy, however, is Justice Scalia's explanation of the jury's selection process in capital cases.[274] Conceiving of the jury's evaluation of mitigation as "a judgment call (or perhaps a value call)" and the ultimate sentencing decision as "mostly a question of mercy," Scalia expresses doubt that it would even be possible to apply a burden of proof to this evaluation process.[275] This reasoning is an about-face from Justice Scalia who repeatedly championed states' rights to rationalize mitigation assessment in his dissents in *Penry I*[276] and *Abdul-Kabir*,[277] as well as in his concurrences in *Walton*[278] and *Johnson.*[279] He once mocked Justice O'Connor's notion of the "reasoned moral response" as lacking in reason and as just another way of saying "freakishly and wantonly."[280] But here, Scalia does O'Connor one better: he strips the selection decision of reason entirely. His assertion that the mitigation decision is too ephemeral for a specific burden of proof is particularly ironic given his *Walton* concurrence, which supports the plurality's approval of Arizona's preponderance of the evidence burden of proof for mitigation evidence.[281]

What's more, Justice Scalia had the option of reaching the same result by employing language that was consistent with his previous opinions. He has argued all along that the Eighth Amendment permits states to exact limitations on a jury's consideration of mitigation evidence. He once lamented, "[t]here is little guidance in a system that requires each individual juror to bring to the ultimate decision his own idiosyncratic

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272. *Carr*, 136 S. Ct at 646.

273. *Id.* at 642–43.

274. That Justice Scalia recognizes that the selection phase has unique characteristics is itself remarkable. Scalia formerly deemed the differing constitutional requirements ascribed to the eligibility phase and the selection phase as "an arbitrary line." Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (Scalia, J., concurring).

275. *Carr*, 136 S. Ct at 642.

276. *See* Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 353–58 (1989) (Scalia, J., dissenting).

277. *See* Abdul-Kabir v. Quarterman, 550 U.S. 233, 280–84 (2006) (Scalia, J., dissenting).

278. *See* Walton v. Arizona, 497 U.S. 639, 656–74 (1990) (Scalia, J., concurring).

279. *See* Johnson v. Texas, 509 U.S. 350, 373–74 (1993) (Scalia, J., concurring).

280. *See Penry I*, 492 U.S. at 359–60 (Scalia, J., dissenting) (internal quotation marks omitted).

281. *Walton,* 497 U.S. at 650 ("We . . . decline to adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence."); *id.* at 657 (Scalia, J., concurring) ("I agree with the Court's analysis of petitioner's first claim, and concur in its opinion as to Parts I, II, and V.").

notion of what facts are mitigating . . . ."[282] Scalia needed only to have framed the *Carr* opinion as a permissible state limitation, in the spirit of *Walton* or *Buchanan*, for instance, one that does not preclude the sentencer from considering mitigation evidence.[283]

What accounts for Justice Scalia's about face on the selection process? It is almost certainly not stare decisis. Scalia made clear in his *Walton* concurrence that he would not be guided by stare decisis with respect to the Court's jurisprudence on the individualized sentencing process: "I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under *stare decisis*."[284] Perhaps such language was required to gain the support of the liberal justices? This also seems unlikely. Seven justices signed on to Scalia's majority opinion, with only Justice Sotomayor dissenting.[285] It seems likely Scalia could have gained the support from four of these justices—Roberts, Kennedy,[286] Alito, and Thomas, all of whom had voted with Scalia in the past on this issue[287]—without the added language describing sentencing selection as a moral value judgment.

After years of attempting to kill the unfettered discretion ascribed to the individualized sentencing requirement—first by pointing out its contradictions, then by refusing to apply it[288]—Justice Scalia embraced it

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282. McKoy v. North Carolina, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) ("Until today, I would have thought that North Carolina's scheme was a model of guided discretion.").

283. *See Walton*, 497 U.S. at 656 (Scalia, J., concurring in part); Buchanan v. Angelone, 522 U.S. 269, 276 (1998) (Scalia, J., concurring) ("[T]he state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.").

284. *Walton*, 497 U.S. at 673 (Scalia, J., concurring).

285. Kansas v. Carr, 577 U.S. __, 136 S. Ct. 633, 636 (2016). Justice Sotomayor's dissent indicated not that she disagreed with the substance of the Court's holding, but that she did not believe the Court should have granted certiorari in the case:

> I do not believe these cases should ever have been reviewed by the Supreme Court. I see no reason to intervene in cases like these—and plenty of reasons not to. Kansas has not violated any federal constitutional right. If anything, the State has overprotected its citizens based on its interpretation of state and federal law. *Id.* at 646.

286. It is possible that Justice Scalia was seeking the support of Justice Kennedy who had not always sided with Scalia in cases involving the individualized sentencing requirement. While Kennedy, like Scalia, dissented in *Penry I*, the two justices were on opposite sides in *Penry II*, *Smith*, *Abdul-Kabir*, and *Brewer*. That said, both Kennedy and Scalia were in the majority in *Buchanan* and *Weeks*, the two cases Scalia relied on to hold that the constitution does not require any particular affirmative instructions on mitigation. *Id.* at 642. Accordingly, it is improbable that Scalia's explanation of the selection decision as a moral choice was a concession to Justice Kennedy.

287. See, for example, Justices Scalia and Thomas joining in Justice Kennedy's majority opinion in *Brown v. Payton*, 544 U.S. 133 (2005); Justices Alito, Scalia, and Thomas joining in Justice Roberts' dissents in *Abdul-Kabir*, 550 U.S. at 265–80 (Roberts, J., dissenting) and *Brewer*, 127 S. Ct. at 1714–23 (Roberts, J., dissenting); and Justices Alito and Thomas joining in Justice Scalia's dissent in *Abdul-Kabir*, 550 U.S. at 281–85 (Roberts, J., dissenting) and *Brewer*, 127 S. Ct. at 1723–25 (2007) (Scalia, J., dissenting).

288. For an example of the former, see *Penry I*, 492 U.S. at 359–60 (Scalia, J., dissenting) ("The Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness

fully in *Carr*. According to Scalia's opinion, states *cannot* guide jurors' consideration of mitigation evidence because this decision is too much of a "judgment call."[289] In doing so, Scalia embraced a state limitation on juror discretion that *encouraged* consideration of the defendant's mitigation evidence; that is, any evidence the defendant had presented that he was unable to prove beyond a reasonable doubt.

In so holding, Justice Scalia reinstated three death sentences and watered down the individualized sentencing requirement in the process—all with the support of seven other justices.[290] Only Justice Sotomayor appeared to grasp the significance of the move: "[t]he Eighth Amendment has nothing to say about whether such an instruction is wise as a question of state law or policy. But the majority nonetheless uses this Court's considerable influence to call into question the logic of specifying *any* burden of proof as to mitigating circumstances."[291] Justice Sotomayor pointed out that not only was such a finding unnecessary, it was disingenuous given that "many States . . . *do* specify a burden of proof for the existence of mitigating factors as a matter of state law, presumably under the belief that it is, in fact, 'possible' to do so.'"[292] Sotomayor indicated that the horrible facts of the case provided cover for the overreach of the majority opinion: "[t]he standard adage teaches that hard cases make bad law. I fear that these cases suggest a corollary: Shocking cases make too much law."[293]

The Court had once before employed the individualized sentencing requirement in this way, in *Buchanan v. Angelone*.[294] Chief Justice Rehnquist wrote the decision, which upheld a Virginia death sentence where the trial judge did not instruct jurors on mitigation evidence

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avoided, by 'narrow[ing] a sentencer's discretion to impose the death sentence,' but expanding his discretion 'to decline to impose the death sentence[.]'" (quoting McCleskey, 481 U.S. at 304)). For an example of the latter, see *Walton*, 497 U.S. at 673 (Scalia, J., concurring) ("I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under stare decisis. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.").

289. *Walton*, 497 U.S. at 673 (Scalia, J., concurring).

290. *See id.* at 636.

291. *See id.* at 648 (Sotomayor, J., dissenting) (emphasis in original).

292. *Id.* at 648 (Sotomayor, J., dissenting) (emphasis in original) (citing Brief for Respondent Sidney J. Gleason at 28–29, n.6, Kansas v. Carr, 577 U.S. __, 136 S. Ct. 633 (2016) (No. 14-452), 2015 WL 4624623 at *28–29, 28 n.6). Justice Sotomayor also notes that at least two states employ a jury instruction that mitigation need not be proven beyond a reasonable doubt. *Id.* at 648–49 (citing Idaho Crim. Jury Instructions 1718 (2010); Okla. Uniform Jury Instructions-Crim., 4-78 (2015)).

293. *Carr*, 136 S. Ct. at 651 (Sotomayor, J., dissenting) (citations omitted).

294. *See* 522 U.S. 269, 270 (1998). Chief Justice Rehnquist also wrote *Weeks v. Angelone,* 528 U.S. 225 (2000), which upheld a death sentence where the jury received the same instructions approved of in *Buchanan* and where the trial court reiterated these instructions in response to a jury note. *Id.* at 227, 231.

generally or on specific mitigating factors requested by the defense.[295] Rehnquist, like Justice Scalia, opposed the individualized sentencing requirement's unfettered discretion because he believed it "codif[ied] and institutionalize[d]" arbitrariness.[296] He dissented in *Woodson* and *Lockett* and routinely joined the dissenting justices in the subsequent cases that expanded the individualized sentencing requirement.[297] In *Buchanan*, however, Rehnquist sang a different tune, finding that states were not required to give affirmative mitigation instructions and explaining that "our decisions suggest that *complete* jury discretion is constitutionally permissible."[298]

Perhaps inspired by Chief Justice Rehnquist's move of using liberal language to support a conservative decision, Justice Scalia chiefly relied on *Buchanan* in *Carr.*[299] By signaling his conversion on the view that the selection process is a moral judgment, Scalia gained the support of the liberal justices and thus their complicity in watering down the demands of the individualized sentencing requirement. The takeaway from *Carr* is that, while individualized sentencing may forbid states from employing jury instructions that preclude the sentencer from giving effect to mitigation evidence, it does not mandate that states affirmatively instruct jurors on the extent of their ability to do so; thus, a jury that is confused or uninformed about state law is constitutionally permissible—at least under the Eighth Amendment. The greater danger of *Carr* is, of course, that by characterizing the selection process as purely moral, the Court signals a willingness to endorse a regime that opposes state efforts to guide jurors' discretion—even for the purpose of maximizing the mitigation they consider. In such a regime, with no guidance, disproportionately White juries are even more likely to rely on unconscious racism to determine punishment.[300]

Justice Scalia died suddenly three weeks after the Court issued the *Carr* opinion. With his death, the question becomes: will Scalia's rhetorical maneuver die with him, or does *Carr* have legs? While the Court has yet

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295. *See Buchanan*, 522 U.S. at 270, 278

296. Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, C.J., concurring in part and dissenting in part).

297. *Id.* at 628–33; Woodson v. North Carolina, 428 U.S. 280, 308–24 (1976) (Rehnquist, C.J., dissenting). *See also, e.g.*, Penry v. Johnson (*Penry II*), 532 U.S. 782, 804 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 350 (1989) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Kennedy, J.); Mills v. Maryland, 486 U.S. 367, 390 (1988) (Rehnquist, C.J., dissenting); Sumner v. Shuman, 483 U.S. 66, 86 (1987) (White, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); Eddings v. Oklahoma, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting, joined by White, J., Blackmun, J., and Rehnquist, J.).

298. *Buchanan*, 522 U.S. at 278 (emphasis added).

299. Kansas v. Carr, 577 U.S. __, 136 S. Ct. 633, 642 (2016).

300. *See* EDELMAN, *supra* note 220, at 74; Lynch & Haney, *Discrimination*, *supra* note 211, at 347.

to revisit the individualized sentencing requirement, there is reason to believe that the current justices may be open to gutting the requirement through expansion. From his earlier opinions, the Justice most likely to push back on Scalia's re-characterization of the selection process, ironically, was Justice Thomas. Justice Thomas repeatedly echoed Justice Scalia's concerns about the requirement, arguing that unlimited discretion to consider mitigation would result in an arbitrary and racist death penalty.[301] Thomas even once warned the Court to "beware the word moral" which could serve as a cloak for racist decision-making.[302] Despite his previous reservations, Justice Thomas also joined the majority opinion in *Carr*.[303] While the views of Justices Neil Gorsuch and Brett Kavanaugh are not fully known, there is reason to believe that neither man would create a barrier. To date, Justice Gorsuch has voted to affirm the convictions and sentences in nearly every capital case.[304] Moreover, his opinion in *Bucklew v. Precythe*,[305] jettisoned standard Eighth Amendment analysis, which evaluates cruel and unusual punishments based on evolving standards of decency, in favor of a Thomas-like approach, which focused on public understanding of capital punishment at the time of the

301. *See* Graham v. Collins, 506 U.S. 461, 494–95 (1993) (Thomas, J. concurring).

302. *See id.* at 494 (internal quotation marks omitted).

303. *Carr*, 136 S. Ct. at 636.

304. As of January 2020, the only case in which Justice Gorsuch had sided with a capital defendant was *Ayestas v. Davis*, 584 U.S. __, 138 S. Ct. 1080 (2018), a narrow procedural decision in which the Court unanimously held that the Fifth Circuit applied the wrong standard when they denied Carlos Ayestas's funding request for investigative services. *Id.* at 1085. In Gorsuch's first term, 2017–2018, he voted against capital defendants in: *McCoy v. Loui*siana, 584 U.S. __, 138 S. Ct. 1500, 1512 (2018) (joining Justice Alito's dissent); *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188, 1197 (2018) (Gorsuch, J., dissenting) (voting against Court's ruling to reverse the Eleventh Circuit's interpretation of federal habeas reviewing procedure); *Tharpe v. Sellers*, 583 U.S. __, 138 S. Ct. 545, 547 (2018) (joining Justice Thomas's dissent from the per curiam decision); *Dunn v. Madison*, 583 U.S. __, 138 S. Ct. 9 (2017) (per curiam). Justice Gorsuch also voted to deny the stay applications in each of the cases where the Court granted a stay of execution: *Bucklew v. Precythe*, __ U.S. __, 138 S. Ct. 1323 (2018); Madison v. Alabama, __ U.S. __, 138 S. Ct. 943 (2018); *Tharpe v. Sellers*, __ U.S .__, 138 S. Ct. 53 (2017). During the 2018–2019 term, Justice Gorsuch again sided against the capital defendant in the five cases argued before the court: *Flowers v. Mississippi*, 588 U.S. __, 139 S. Ct. 2228, 2252 (2019) (joining Justice Thomas's dissent in part); *Bucklew v. Precythe*, 587 U.S. __, 139 S. Ct. 1112 (2019); *Madison v. Alabama*, 586 U.S. __, 139 S. Ct. 718, 731 (2019) (joining Justice Alito's dissent); *Moore v. Texas*, 586 U.S. __, 139 S. Ct. 666, 673 (2019) (joining Justice Alito's dissent from the per curiam decision); *Shoop v. Hill*, 586 U.S. __, 139 S. Ct. 504 (2019) (per curiam). He also voted to deny Patrick Murphy's application for a stay of execution, which the Court granted in *Murphy v. Collier*, 586 U.S. __, 139 S. Ct. 1475 (2019), and joined Justice Alito in dissenting from a grant, vacate, and remand order in *White v. Kentucky*, 586 U.S. __, 139 S. Ct. 532 (2019).

305. 587 U.S. __, 139 S. Ct. 1112 (2019).

Founding.[306] While Justice Kavanaugh's rulings exhibit more nuance,[307] he has publicly praised Chief Justice Rehnquist's death penalty jurisprudence.[308] Thus, only Justice Sotomayor, the lone dissenter in *Carr*, is likely to push back.

IV. RETHINKING THE INDIVIDUALIZED SENTENCING REQUIREMENT

To have an individualized sentencing requirement with no boundaries is to have no individualized sentencing requirement at all because it fails to protect capital defendants from the race-based decision-making of disproportionately White juries. What, if anything, may be done to reinvigorate the requirement? In this Part, I explore possible judicial solutions to this problem, before arguing that states should implement jury instructions that limit juror discretion by requiring them to consider

306. *See id.* at 1123–24; *id.* at 1144 (Breyer, J., dissenting) ("[W]e have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today.").

307. *See, e.g.*, *Collier*, 139 S. Ct. at 1475–76 (concurring in grant of stay of execution of condemned man for whom Texas denied the presence of a Buddhist cleric in the execution chamber, but indicating that the execution could go forward if Texas were to ban all spiritual advisors from the execution chamber). Justice Kavanaugh wrote the majority opinion granting relief to capital defendant Curtis Flowers but made clear his ruling was limited to that unique situation: "[i]n reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case." *Flowers*, 139 S. Ct. at 2235.

308. *See* American Enterprise Institute, Remarks by Brett M. Kavanaugh at the 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017), *in* FROM THE BENCH: THE CONSTITUTIONAL STATESMANSHIP OF CHIEF JUSTICE WILLIAM REHNQUIST 9 (2017), http://lc.org/PDFs/Attachments2PRsLAs/2018/071018KavanaughSpeech2017.pdf [https://perma.cc/8MU4-4WTC] (stating that Rehnquist's dissent in *Furman* "packed a punch"). Justice Kavanaugh further stated:

> A mere five and a half pages in the US reports deftly summarize the fundamental problems [Rehnquist] saw in the core of the Court's holding. As he explained, the decision "brings into sharp relief the fundamental question of the role of judicial review in a democratic society." He continued, "The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." The Court's ruling, Rehnquist stated, was "not an act of judgment, but rather an act of will."
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> But the story did not end there. In the wake of *Furman*, many states enacted new capital punishment statutes. In 1976, the Court turned around and upheld many of them. To this day, the death penalty remains constitutional. Many judges and justices no doubt have policy or moral concerns about the death penalty. But Rehnquist's call for the Court to remember its proper and limited role in the constitutional scheme has so far proved enduring in the death penalty context.
>
> In short, today's constitutional jurisprudence in the field of criminal procedure and the death penalty has Rehnquist's fingerprints all over it. Those are the cases that Rehnquist cared about most. That was his mission primarily, and it is fair to say that he had a dramatic and enduring effect on the course of constitutional law in those areas. *Id.* at 11–12 (endnotes omitted) (quoting Furman v. Georgia, 408 U.S. 238, 466–68 (1972)).

certain types of evidence as inherently supportive of a life sentence. I argue that states should issue these instructions alongside a "race salient debunking instruction," designed to curb racist decision-making. Finally, I contend that states may realize the intended outcomes of the individualized sentencing requirement by maintaining expansive juror discretion only for the purpose of imposing mercy. I propose that a mercy instruction will achieve the goal of minimizing "false-positive" death sentences.

A. Shifting to State Solutions

As *Kansas v. Carr* reveals, the Supreme Court is unlikely to require specific mitigation guidelines in the future, having held that the Constitution does not require states to issue affirmative instructions on mitigation. If anything, *Carr* suggests that the Court might be moving toward a model of favoring even greater discretion for the jurors making this "moral judgment call."[309] Another approach is to challenge the two practices that ensure the failure of the individualized sentencing requirement to reduce the arbitrariness and racism of the capital punishment: (1) death qualification of capital juries; and (2) prosecutors' use of racially discriminatory strikes. Here, state trial courts appear to be a better venue for these challenges than the current U.S. Supreme Court. Although Justice Breyer and Justice Ginsburg's dissent in *Glossip v. Gross*[310] signaled that the Court might be willing to re-assess the constitutionality of death qualification, this no longer seems likely given the current makeup of the Court.[311] Scholars and advocates have undertaken the short-term strategy of arguing that trial judges may use their discretion to decline to death qualify capital jurors, along with the long-term strategy of creating records in state trial courts that include modern social science data on the harms of death qualification.[312] Similarly, the Court has little motivation to re-think its *Batson*

309. *See supra* Part III.

310. 576 U.S. __, 135 S. Ct. 2726 (2015).

311. *Id.* at 2758 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 772–93, 807 (2006)) ("[F]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death."). Despite the current makeup of the United States Supreme Court, advocates continue to challenge death qualification in state courts. *See* Notice of Motion, *supra* note 249, at 2–3; Semel, *supra* note 249.

312. *See* Notice of Motion, *supra* note 249, at 2–3; *see also* Lynch & Haney, *Death Qualification, supra* note 207, at 2 (discussing data from a county survey that served as the basis for a challenge to death qualification in state court). *See generally* Semel, *supra* note 249. Professor Aliza Plener-Cover has argued that the Court should adjust its Eighth Amendment assessment of the evolving standards of decency to consider the impact death qualification has had on jury composition. Cover, *supra* note 244, at 115.

jurisprudence—particularly having recently decided *Flowers v. Mississippi*[313] and *Foster v. Chatman*[314] in favor of the capital defendant. Because of this reality, scholars and advocates continue to propose new ways to curb racially discriminatory strikes in trial courts.[315]

Consequently, the best solutions for reinvigorating the individualized sentencing requirement will likely have to come from state legislatures.[316] While the Court will not compel states to act, it is also unlikely to interfere with those that do choose to develop instructions to guide juror discretion for the consideration of mitigation evidence, provided the instructions come from state legislatures or state jury instruction committees, and not from state courts interpreting the U.S. Constitution.[317] To date, the only formal limitation on state-required penalty-phase instructions is that they not preclude the consideration of mitigation evidence.[318]

One might think that the simplest solution would be for states to mimic the ways in which they guide juror discretion with respect to aggravating circumstances. States typically enumerate individual aggravators in their capital sentencing statutes.[319] The trial judge then instructs the jury that it

313. Flowers v. Mississippi, 588 U.S. __, 139 S. Ct. 2228, 2235 (2019) (holding, in a case where the same prosecutor had tried the capital defendant six times for the same crime, that the trial court could consider findings that the prosecutor had discriminated against Black jurors in the previous trials in evaluating whether he did so in the sixth trial).

314. 578 U.S. __, 136 S. Ct. 1737, 1754 (2016) (holding the prosecutor had discriminatory intent when he struck multiple Black perspective jurors, as evidenced by "shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file").

315. *See, e.g.*, Johnson, *supra* note 239, at 415–18 (proposing that defense attorneys attack peremptory strikes based on the purportedly race-neutral factor of prior arrest history as thinly veiled race-based strikes).

316. While it is debatable whether state legislatures possess the political will to change their capital sentencing statutes, presumably even the staunchest death penalty proponents prefer a capital punishment system that minimizes unfair, arbitrary, and racially discriminatory outcomes.

317. The issue in *Carr* was whether the Eighth Amendment required a specific burden of proof instruction for mitigation evidence, not whether the Kansas Constitution or capital sentencing scheme required the instruction. Kansas v. Carr, 577 U.S. __, 136 S. Ct 633, 641–43 (2016). The Court reversed the Kansas Supreme Court's interpretation of the federal Constitution. *Id.*

318. *See* Buchanan v. Angelone, 522 U.S. 269, 276 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.").

319. *See* ALA. CODE § 13A-5-40(a)(1)–(20) (2019); ARIZ. REV. STAT. ANN. § 13-751(F)(1)–(10) (2019); ARK. CODE ANN. § 5-10-101(a)(1)–(10) (2018); CAL. PENAL CODE § 190.2(a)(1)–(22) (2019); COLO. REV. STAT. § 18-1.3-1201(5)(a)–(q) (2018); FLA. STAT. § 921.141(6)(a)–(p) (2019); GA. CODE ANN. § 17-10-30(b)(1)–(12) (2018); IDAHO CODE § 19-2515(9)(a)–(k) (2019); IND. CODE § 35-50-2-9(b)(1)–(16) (2019); KAN. STAT. ANN. § 21-5401(a)(1)–(7) (2018); KY. REV. STAT. § 532.025(2)(a)(1)–(8) (2020); LA. STAT. ANN. § 14:30(A)(1)–(10) (West 2015); MISS. CODE ANN. § 97-3-19(2)(a)–(h) (2018); MO. REV. STAT. § 565.032.2(1)–(17) (2013); MONT. CODE ANN. § 46-18-303(1)–(4) (2019); NEB. REV. STAT. § 29-2523(1)(a)–(i) (2018); NEV. REV. STAT. § 200.033(1)–(15) (2019); N.H. REV. STAT. ANN. § 630:1(I)(a)–(g) (2019); N.C. GEN. STAT. § 15A-2000(e)(1)–(11) (2019); OHIO REV. CODE §§ 2903.01(A)–(G), 2929.02(A), 2929.04(a)(1)–(10) (2019); OKLA. STAT. ANN. tit. 21, § 701.12(1)–(8) (West 2020); OR. REV. STAT. § 163.095(1)–(2) (2019); S.C. CODE ANN. § 16-3-20(C)(a)(1)–(12) (2019); S.D. CODIFIED LAWS § 23A-27A-1(1)–(10) (2019); TENN.

may consider only the applicable aggravators when assessing the defendant's eligibility for the death penalty or when selecting the appropriate punishment.[320] But, the reality is most states already have specifically enumerated statutory mitigators.[321] These states also typically instruct jurors that they may consider these statutory mitigators in addition to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[322] Studies show that these instructions are ineffective because, when presented with an enumerated list, jurors typically limit their consideration to the factors on the list.[323]

B. Guiding Sentencer Discretion

If enumeration is inadequate, what kinds of jury instructions are most effective at guiding juror discretion, particularly on the mitigation question? I propose that jurors be instructed not only on what they may consider, but also on *how* to consider it. Instructions should not merely list possible mitigating factors to consider; instead, they should explain that jurors must consider these factors as evidence weighing in favor of a life sentence—for instance, that these factors are mitigating as a matter of law. Support for this idea can be gleaned from the Supreme Court itself.

CODE ANN. § 39-13-204(i)(1)–(18) (2019); TEX. PENAL CODE ANN. § 19.03(a)(1)–(10) (West 2019); UTAH CODE ANN. § 76-5-202(1)–(2) (2019); VA. CODE ANN. § 19.2-264.2 (West 2020); WYO. STAT. ANN. § 6-2-102(h)(i)–(xii) (West 2020).

320. *See, e.g.*, OHIO REV. CODE ANN. § 2929.03(D)(1), (2) (West 2020) (explaining the role of aggravating factors in capital sentencing determination). That section in the Ohio code frames the jury instructions. *See* OHIO CRIM. JURY INSTR. § 503.011(1), (8), (9) (2020) (instructing jurors how to consider aggravating factors in capital sentencing decision).

321. *See, e.g.*, ALA. CODE § 13A-5-51 (listing statutory mitigators); ARIZ. REV. STAT. ANN. § 13-701E (2019) (same); ARK. CODE ANN. § 5-4-605 (2018) (same); CAL. PENAL CODE ANN. § 190.3 (West 2020) (same); COLO. REV. STAT. § 18-1.3-1201(4) (2018) (same); FLA. STAT. § 921.141(7) (2019) (same); IND. CODE ANN. § 35-50-2-9(c) (same).

322. Lockett v. Ohio, 438 U.S. 586, 604 (1978). For example, California instructs jurors that they may consider "[a]ny other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above." JUDICIAL COUNCIL OF CAL. CRIMINAL JURY INSTR. 763 (2017) [hereinafter CAL. CRIMINAL JURY INSTR. 763], https://www.justia.com/criminal/docs/calcrim/500/763/ [https://perma.cc/P256-93Q2].

323. *See, e.g.*, Marc W. Patry & Steven D. Penrod, *Death Penalty Decisions: Instruction Comprehension, Attitudes, and Decision Mediators*, 13 J. FORENSIC PSYCHOL. PRACT. 204, 215 (2013) (finding that "providing jurors with a List of case-specific mitigators does not necessarily cue jurors in to mitigating factors present in the case at hand"); *id.* at 222 (finding that the presence of a list of case-specific mitigators did not interact with non-listed mitigator of emotional abuse to influence juror sentencing decisions); *see also* Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 432 (1990) ("Merely listing the circumstances to be considered has not provided enough guidance to sentencing authorities.").

In *Penry I*, Justice O'Connor found that some factors are inherently mitigating, due to shared societal values.[324] O'Connor wrote:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.[325]

Taken to the next logical step, an instruction would guide jurors that such evidence *is* mitigating and that jurors *must* consider it as evidence supporting a punishment of life imprisonment.

What evidence should constitute mitigation as a matter of law? Some examples are obvious. Taking a cue from Justice O'Connor, evidence of a disadvantaged background or a defendant's emotional or mental problems would constitute mitigation as a matter of law.[326] Evidence that falls just short of rendering a defendant ineligible for the death penalty, such as the defendant's youth[327] or cognitive limitations,[328] would also merit a legal mitigation instruction. Current state statutory mitigators would qualify because their codification indicates their endorsement by state legislatures as legally mitigating.

Some types of evidence are ambiguous. Take, for example, evidence that a defendant has a substance abuse history. Courts often refer this type of evidence as a "double-edged sword" because, while the defense contends it is evidence of a disadvantaged background and/or a need to self-medicate mental health issues, the State will counter that it is the result of the defendant's bad choices.[329] Several solutions exist for this type of evidence. First, the legislature can decide to make such evidence statutorily mitigating, rendering it mitigation as a matter of law. Second, the court could decide if the evidence is legally mitigating prior to the penalty phase, after hearing arguments from both sides. A third, least good

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324. Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 319 (1989). Justice O'Connor first proposed this idea in her concurrence in *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

325. *Penry I*, 492 U.S. at 319 (O'Connor, J., concurring) (quoting *California*, 479 U.S. at 545) (internal quotation marks omitted).

326. *See id.*

327. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding individuals who are under eighteen at the time of their crime are ineligible for the death penalty).

328. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding individuals who are intellectually disabled are ineligible for the death penalty).

329. *See, e.g.*, Davis v. State, 9 So. 3d 539, 557 (Ala. Crim. App. 2008) (finding that defense counsel's conclusion that defendant's alcohol and drug use was "a double-edged sword" was reasonable); People v. Ward, 718 N.E.2d 117, 126–27 (Ill. 1999) ("With respect to the evidence of defendant's alcohol and drug abuse, we initially note that we have recognized that evidence of a history of substance abuse is a double-edged sword because this evidence can be viewed as either aggravating or mitigating."); Smith v. State, 245 P.3d 1233, 1243 (Okla. Crim. App. 2010) (citing cases from the Seventh, Tenth, and Eleventh Circuits that deem evidence of substance abuse a "double-edged" or "two-edged" sword).

option is that the jury could retain its discretion to evaluate this evidence in the manner it sees fit. This option is the least desirable because, as discussed previously, the wide discretion will allow racism and arbitrariness to creep into sentencing decisions, albeit on a somewhat smaller scale than under current conditions. That said, even in a system where jurors are instructed that some evidence constitutes mitigation as a matter of law, the court would likely also need to give an additional "catch-all" instruction—that jurors may also consider any aspect of a defendant's background or character or the circumstances of the crime as mitigation evidence—or risk violating the Court's mandate in *Lockett*, *Eddings*, and *Penry I*.

To successfully guide discretion, jury instructions must exhibit several additional characteristics. The best instructions are simple, involving plain, non-legal language. There is substantial evidence that jurors consistently misunderstand jury instructions.[330] Most jurors are unfamiliar with the terms "aggravation" and "mitigation," and do not find that current instructions adequately define them.[331] Studies involving simulated capital sentencing phases have found that jurors demonstrate greater comprehension when provided with simplified instructions than they do with a state's model jury instructions.[332] When jury instructions are too complex, jurors are likely to misunderstand them and fall back on their own personal beliefs, including racial bias.[333]

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330. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming, Aggravation Requires Death, and Mitigation Is No Excuse,* 66 BROOK. L. REV. 1011, 1042, 1058 n.176, 1072–73, 1076 (2001) ("Even when jurors do report a discussion of mitigating factors, their understanding of what the law defines as mitigation is extremely limited. In the relatively rare instance when mitigating evidence is mentioned, jurors either seem not to understand what they are to do with such evidence or they dismiss it out of hand as no excuse for the murder."); James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-Sentencing Instructions*, 44 CRIME & DELINQUENCY 412, 419–23 (1998); Richard L. Wiener et. al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL. PUB. POL'Y & L. 516, 529–30 (2004).

331. *See* Lynch & Haney, *Discrimination*, *supra* note 211, at 339, 347 ("[S]izable numbers of participants were confused enough about the process to use aggravating evidence to support life verdicts and mitigating evidence to support death.").

332. *See, e.g.*, Wiener et al., *supra* note 330, at 539, 555, 564 (discussing results of Missouri studies that showed that instructions which "used simple language and relied on abstract legal terms only when those terms were indispensable to the meaning of the instructions" outperformed the state's model instructions in terms of juror comprehension).

333. *See* Lynch & Haney, *Discrimination*, *supra* note 211, at 340 ("[T]he influence of race in capital jury decision-making may be amplified by the complexities of the information-processing task faced by capital jurors."); Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 L. & HUM. BEHAV. 507, 508–11 (1993) (indicating studies have shown that jurors often rely on prior knowledge of legal concepts derived from popular media when presented with contrary jury instructions); Wiener et al., *supra* note 330, at 532 (indicating prior studies demonstrate that "people rely heavily on their own general knowledge of social reality, that is, their stored declarative knowledge about the law when they process trial-like information").

Several interpretation errors are common. First, as discussed above, some jurors, particularly White jurors, interpret evidence intended to be mitigating as aggravating.[334] Second, although many states have a statutory presumption in favor of life without parole,[335] jurors frequently misunderstand this, and err on the side of selecting death.[336] Many believe that the mere existence of an aggravating factor requires a death sentence.[337] These effects skew capital juries toward death.[338] Using the death-worthiness framework, this results in more false positives,[339] i.e., the execution of those who did not deserve the death penalty—something proponents of the individualized sentencing requirement sought to minimize.

334. *See, e.g.*, Lynch & Haney, *Death Qualification, supra* note 207, at 165 (discussing tendency of White juror-eligible survey respondents to "inappropriately use mitigating evidence in support of a death sentence").

335. States that permit a death sentence only when the jury finds the aggravating factors *outweigh* the mitigating factors have a presumption of life without parole because that is the appropriate punishment if the factors are in equipoise. *See, e.g.*, ALA. CODE § 13A-5-46(e) (2019) ("(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return a verdict of life imprisonment without parole; (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return a verdict of death."); ARK. CODE ANN. § 5-4-603(a) (West 2020) ("The jury shall impose a sentence of death if the jury unanimously returns written findings that: (1) An aggravating circumstance exists beyond a reasonable doubt; (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt."); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2020) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [a lesser sentence]."); TENN. CODE ANN. § 39-13-204(f)(2) (West 2020) ("If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or to imprisonment for life."); UTAH CODE ANN. § 76-3-207(5)(b) (West 2020) ("The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.").

336. Lynch & Haney, *Discrimination*, *supra* note 211, at 339.

337. Bentele & Bowers, *supra* note 330, at 1013 (finding that "jurors erroneously assume that aggravating factors require a death sentence to be imposed").

338. Lynch & Haney, *Discrimination*, *supra* note 211, at 339, 347 ("Instructional confusion created a bias in favor of death verdicts that was more focused and circumscribed than we had expected.").

339. *See* Garvey, *supra* note 103, at 993, 1004–07.

Jury instructions that directly address and "debunk" jurors' mistaken beliefs are more effective.[340] Studies have shown that simple language alone does "not completely de-bias" jurors' decision-making.[341] A 2009 study confirmed that "[t]o be successful, pattern instructions . . . need to replace an incorrect knowledge structure with one that contains content directly contradicting the juror's initial, and incorrect, understanding."[342] As an example, a successful mitigation as a matter of law instruction would not only tell jurors that they must consider particular evidence as mitigating, but it would also tell jurors that they could *not* consider the evidence as aggravating. Employing these principles, I propose the following instruction:

> You have heard evidence that [insert specific mitigating circumstance].[343] If you believe this evidence, you must consider it as evidence that supports a sentence of life without parole. You may not consider this evidence in support of a death sentence.

To curb racially discriminatory decision-making, successful jury instructions should also be "race salient."[344] Researchers Samuel Sommers and Phoebe Ellsworth first coined "race salience" in their groundbreaking research that demonstrated that the inclusion of explicit racial bias in the facts of a crime, such as racial slurs or hate speech, reduced the impact of implicit bias in a simulated jury setting.[345] Sommers and Ellsworth concluded that when race was made salient in this way, White jurors treated Black and White defendants equally; conversely, when race was merely a silent background issue, White jurors were more likely to treat White defendants better than Black defendants.[346] As

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340. *See, e.g.*, Wiener, *supra* note 330, at 542, 555, 564–65, 570 ("Our current data show that a debunking instruction designed to correct common errors may improve jury understanding of, at least, the concepts that make up the law.").

341. *Id.* at 532.

342. *Id.* at 535; *see also id.* at 570 ("[J]urors bring to the sentencing process errors in understanding some of the basic elements of law (i.e., the nature of aggravation and mitigation). Unless the instructions correct these errors, there is a great likelihood that jurors will make these same errors when they deliberate and assign a sentence.").

343. Among others, some examples might include "that the defendant suffered from physical abuse as a child"; "that the defendant suffered repeated head injuries"; "that the defendant exhibits symptoms of schizophrenia"; or "that the defendant has been addicted to methamphetamine since age fourteen."

344. Ellen S. Cohn, et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953 (2009) (concluding that race salience also reduces impact of overtly racist jurors).

345. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) [hereinafter Sommers, *Race in the Courtroom*].

346. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1014–16 (2003) [hereinafter Sommers, *How Much*]; Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in*

explanation, Sommers and Ellsworth concluded that explicit discriminatory language reminded White jurors of their egalitarian values. These jurors typically both were "loath to appear prejudiced" and often "genuinely desire[d] to avoid bias."[347] Building on this research, others have contended that jury instructions employing race salience may have a similar impact.[348] Racially salient instructions would function as debunking instructions, first advising jurors of the pitfall to be avoided: namely, that capital sentencing has a long, dark history of being racially discriminatory both against African Americans and against individuals convicted of killing White victims. Then the instructions would advise jurors that they must not employ discriminatory thinking or rely on racial stereotypes when forming their sentencing decision. Specifically, I propose the following instruction:

> Historically, juries have unfairly sentenced capital defendants to death based on their race or the race of their victim. Black defendants have been disproportionately sentenced to death. Defendants convicted of killing White victims have been disproportionately sentenced to death. To determine a fair sentence for this defendant, this jury must not consider the defendant's race or the race of the victim in determining an appropriate punishment.[349]

Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions, 27 BEHAV. SCI. & L. 599, 599–600 (2000) [hereinafter Sommers, *Race Salience*].

347. Sommers, *Race Salience*, *supra* note 346, at 599–601; Sommers, *Race in the Courtroom*, *supra* note 345, at 1371 ("[W]hen racial norms are salient in a situation, most Whites will respond in an appropriately nonprejudiced manner, but in situations with more ambiguous racial norms, bias will often emerge . . . .").

348. *See, e.g.*, Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1597–1600 (2013) (discussing use and possible impact of race salient jury instructions); Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1698–99 (2015) (hypothesizing that jury instructions incorporating "implicit race salience" reduce implicit bias by reminding White jurors of their egalitarian values).

349. Several jurisdictions are already employing jury instructions that address unconscious bias and racial discrimination. For example, a committee formed in the United States District Court for the Western District of Washington proposed instructing jurors on the dangers of unconscious bias before jury selection and during its opening and closing instructions. *See* U.S. DIST. CT. FOR THE W.D. WASH., CRIMINAL JURY INSTRUCTIONS, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf [https://perma.cc/PME4-9RPV]. Similarly, Judge Mark Bennett of the Northern District of Iowa has long instructed jurors on implicit bias during jury selection and before opening statements. *See* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181–83 (2012). In March of 2017, the United States District Court for the Western District of Washington also began requiring all prospective jurors to watch an eleven-minute video informing them of the dangers of unconscious bias. *See* U.S. DIST. CT. FOR THE W.D. WASH, UNCONSCIOUS BIAS JUROR VIDEO, https://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Apr. 11, 2020); Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, MARSHALL PROJECT (June 21, 2017), https://www.themarshallproject.org/2017/06/21/a-federal-court-asks-jurors-to-confront-their-hidden-biases [https://perma.cc/RD7W-JBD6] [hereinafter *Hidden Biases*]. To date, no one has conducted a study concerning the efficacy of the above instructions. The racial debunking

B. Instructing the Jury on its Power to Grant Mercy

Another, perhaps surprising, solution to the problems posed by the current interpretation of the individualized sentencing requirement is the use of a mercy instruction. A mercy instruction informs jurors that, regardless of the aggravating and mitigating evidence presented, a juror could choose to impose a life sentence for any reason. Mercy instructions have fallen out of favor in modern capital trials. The Supreme Court has held that the Eighth Amendment does not require states to issue a mercy instruction and has approved a now-commonly issued jury instruction that jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[350] Instructions authorizing the jury to bestow mercy are comparatively rare,[351] a few states require them by statute,[352] while others leave the decision to the discretion of the trial judge.[353]

I propose that states issue the following mercy instruction: "Regardless of the evidence presented, you may vote to impose a sentence of life

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instruction this Article proposes goes beyond merely informing jurors of the dangers of implicit biases; it specifically informs jurors of the type of bias—racial bias—that historically resulted in disproportionate sentencing. While I believe research suggests this difference improves the instruction because it serves to "debunk" racist decision-making, further study is warranted.

350. California v. Brown, 479 U.S. 538, 540–43 (1987); *see also* Johnson v. Texas, 509 U.S. 350, 371 (1993) ("[W]e have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant.").

351. *See, e.g.*, State v. Lorraine, 613 N.E.2d 212, 216–17 (Ohio 1993) (finding "[m]ercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors," and an instruction forbidding jurors from considering mercy "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors").

352. *See, e.g.*, GA. CODE ANN. § 17-10-2(c) (2018) ("Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the accused."). Georgia's mercy instruction lacks the clarity of the ones proposed in this Article and conflates mercy and mitigation: "[m]itigating or extenuating facts or circumstances are those that you, the jury, find do not constitute a justification or excuse for the offense in question but that, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame." 2.15.30 *Death Penalty; Determination of Punishment*, GA. SUGGESTED PATTERN JURY INSTR. - CRIMINAL 2.15.30. Similarly, California instructs jurors that they may consider "[a]ny other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above." *See* CAL. CRIMINAL JURY INSTR. 763, *supra* note 322, at 763. This instruction, confusingly, is often given alongside the instruction from *Brown* that states that jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." 479 U.S. at 540–43.

353. *See, e.g.*, Fox v. State, 779 P.2d 562, 574 (Okla. Crim. App. 1989) (jury was instructed that "[m]itigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame"); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 372 (discussing a 1982 case where a California jury was instructed that it was allowed "to consider pity, sympathy, and mercy as those factors may constitute a mitigating circumstance").

without parole for any reason." On the surface, this instruction appears to be the opposite of effective guidance, making juror discretion nearly limitless. While the instruction, admittedly, may result in some arbitrary outcomes, it would also bring about one of the two goals of the individualized sentencing requirement: shrinking the class of those who receive a death sentence to minimize false positives.[354] This is consistent with the original vision of the individualized sentencing requirement, as set forth by Justice Burger in *Lockett*.[355] The modern Court has also recognized the value of such an instruction in achieving reliability, noting that a "'mercy' jury instruction alone forecloses the possibility of *Furman*-type error as it 'eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty.'"[356] Finally, scholar Stephen Garvey has also advocated for mercy instructions, arguing that informing jurors of their power to grant mercy to capital defendants would "restructure" the discretion jurors already have toward minimizing sentences.[357]

Because it is less clear that a mercy instruction would reduce racial disparities in death sentence[358]—and, in fact, quite possible such an instruction would do the opposite—I propose that mercy instructions always be paired with racially salient debunking instructions. For example:

> You have the power to grant mercy to this defendant and impose a sentence of life without parole, regardless of the evidence presented. Historically, jurors have unfairly determined punishment based on the race of the defendant or the race of the victim. You must not consider the racial identities of the parties when determining whether to grant mercy. However, regardless of the evidence presented in this case, you may vote to impose a sentence of life without parole for any other reason.

Because the relationship between mercy and race salience is hereto unexplored, more empirical research is needed before implementing this proposed solution.

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354. *See* Garvey, *supra* note 103, at 993, 1004–07 (indicating that Garvey's conclusions, like my own, rely on the assumption that there is a theoretical class of individuals who are deserving of the death penalty).

355. *See supra* notes 102–107 and accompanying text.

356. Kansas v. Marsh, 548 U.S. 163, 176 n.3 (2006) (alteration in original) (quoting Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting)). *Marsh* was a 5–4 decision written by Justice Thomas. *Id.* at 165.

357. *See* Garvey, *supra* note 103, at 1040. Garvey has also argued for reform on the front-end of the sentencing process: "[i]f we want greater consistency in capital sentencing, we should narrow the death-eligible class, not deny the jury the power to grant mercy." *Id.*

358. The Georgia capital sentencing statute, at issue in *McCleskey*, 481 U.S. 279 (1987), requires jurors to be instructed on mercy (albeit in a less straightforward way). The Baldus study has demonstrated that the statute produces racially disparate outcomes based on the race of the defendant and the race of the victim. *Compare* notes 120–136 and accompanying text, *with* note 332.

CONCLUSION

While liberal Justices have long believed the individualized sentencing requirement to be a critical component of a fair capital punishment system, in practice, the results have been disappointing. The expansive discretion that the requirement confers on overwhelmingly White juries has resulted in outcomes that are just as arbitrary and racially discriminatory as those that existed in the years before *Furman.* After years of attempting to limit the requirement, conservative justices led by Justice Scalia recently changed tactics in *Carr*, now pursuing extinction through expansion. While a rethinking of individualized sentencing is in order, the solution is not to end the requirement. Instead, states should employ jury instructions that provide guidance as to what evidence jurors must consider as mitigation and how they must consider it only as support for a life sentence. By channeling discretion, racist and arbitrary outcomes will be minimized and true individualized sentencing will be achieved.