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The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment

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ARTICLE

THE INDIVIDUALIZED-CONSIDERATION PRINCIPLE AND THE DEATH PENALTY AS CRUEL AND UNUSUAL PUNISHMENT

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I. INTRODUCTION

The Eighth Amendment to the United States Constitution prohibits infliction of "cruel and unusual punishments."[1] The Supreme Court established the basic principles applying this amendment to the death penalty during a six-year period in the 1970's. First, in 1972, in *Furman v. Georgia*,[2] the Court invalidated all then-existing death penalty statutes. Second, in 1976, in *Gregg v. Georgia*[3] and its companions, the Court upheld some of the statutes promulgated in response to *Furman* but invalidated others. Finally, in 1978, in *Lockett v. Ohio*,[4] the Court invalidated an Ohio statute because it failed to give

1. U.S. CONST. amend. VIII. The entire text of the Eighth Amendment provides: "Excessive bail shall not be imposed, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

2. 408 U.S. 238, 239-40 (1976) (per curiam) (holding that the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

3. 428 U.S. 153, 168-87 (1976) (determining that imposing the death penalty for murder did not always violate the Eighth and Fourteenth Amendments).

4. 438 U.S. 586, 606 (1978) (deciding that the Ohio statute did not allow individualized consideration of mitigating factors as required by the Eighth and Fourteenth Amendments).

the sentencer a sufficient opportunity to give effect to mitigating factors that might have justified a sentence less than death.

In recent years some Justices have viewed these decisions as establishing two somewhat conflicting principles. *Furman* and *Gregg* are thought to stand for a "consistency-based" principle, the general goal of which is to ensure that similarly situated defendants receive similar sentences. By contrast, *Woodson v. North Carolina*[5]—the most important companion to *Gregg*—and *Lockett* are thought to stand for a contrary principle requiring that specified procedures be followed before infliction of the death penalty.[6] This understanding of the cas-

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5. 428 U.S. 280, 301 (1976) (holding that North Carolina's mandatory death sentence for first-degree murder violated the Eighth and Fourteenth Amendments).

6. Most secondary literature offers a similar understanding explaining the cases as establishing a spectrum of permissible outcomes, with *Furman* outlawing excessive discretion, *Woodson* and *Lockett* outlawing insufficient discretion, and the Court accepting statutes that fall in the middle. *See* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1161 (1991) (stating that "*Lockett*'s immunization of mitigating circumstances against state regulation appears to conflict with *Furman* and *Gregg*'s most fundamental premise that a sentencer must not be given unbridled discretion over whether to impose the death penalty"); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 325 (concluding that "*Lockett* seems inherently to subvert any pretenses of doctrine-making"); Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. L. REV. 407, 424-25 (1990) (describing the Court's approach as "ultimately as simplistic as Goldilocks's approach to dealing with the three bears: complete discretion is too arbitrary . . . , no discretion is just as bad . . . , but guided discretion is just right" (footnotes omitted)); Leading Cases, 104 HARV. L. REV. 129, 139-40 (1990) (discussing Walton v. Arizona, 497 U.S. 639 (1990), in which the Court upheld the constitutionality of Arizona's death penalty statute that required a death sentence if the judge found aggravating circumstances and the defendant failed to prove sufficient mitigation).

Probably the most careful attempt to reconcile the *Woodson-Lockett* line of cases with the *Furman-Gregg* line of cases is set forth in Sundby, *supra*, at 1174-86. Professor Sundby notes that both cases limit the pool of persons receiving the death penalty and thus concludes that the two cases "are complementary cases working towards the same end of identifying the group of defendants most deserving of death such that its imposition is not cruel and unusual punishment." *Id.* at 1176. The problem with this view, though, is that it still rests on the premise that *Furman* represents a condemnation of "discretion that yielded arbitrary and capricious death penalties." *Id.* As he acknowledges, this reading of *Furman* leaves its basic principle in conflict with the requirement of individualized consideration set forth in *Lockett*. *See id.* at 1177. In his view, though, the cases do not conflict because the amount of discretion required by *Lockett* generally does not leave jurors room to reach decisions sufficiently arbitrary to violate *Furman*. *Id.* at 1180-83. He acknowledges, however, that the "inconsistency [permitted by the existing system] ultimately may require invalidation of the death penalty as arbitrary." *Id.* at 1182. I believe it is more useful to articulate a reading of *Furman*, like the reading set forth in this article, that removes the possibility of conflict entirely.

Professor Bilionis recently has argued that *Lockett* and its progeny are best understood as furthering an understanding that capital punishment is "cruel" if it is

es is unsatisfactory because the principles of *Woodson* and *Lockett*—which effectively require the sentencing decision to be made on a case-by-case basis—inevitably conflict with the goal of the posited consistency-based principle: equality in sentencing.[7] Reference to the text of the Eighth Amendment—which states only that "cruel and unusual punishments" shall not be "inflicted"[8]—does little to resolve this difficulty because it is

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imposed in a case in which it has not been "reliably determine[d] that death is indeed the morally appropriate penalty." Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 288 (1991). He does not, however, seriously attempt to reconcile this formulation with his understanding that the Court's decision in *Furman* reflected a consistency-based principle demanding rationality in the imposition of death sentences. Rather, based on his obvious preference for rules limiting imposition of the death penalty, he simply asserts that "[i]f *Furman* does threaten the principle of *Woodson* and *Lockett*, then it is dead wrong." *Id.* at 298; *see id.* at 327 (stating that "[t]he principle advanced by *Furman* and its progeny requires that the potential for arbitrary or capricious results in capital sentencing must be minimized—but not at the expense of the discretion necessary to ensure a morally appropriate sentence"). Moreover, he cannot satisfactorily explain why a principle requiring moral appropriateness necessarily requires discretionary sentencing by juries and emphatically precludes attempts by state legislatures—the primary authorities regarding permissible morality under our constitutional system—to require juries to follow certain concepts of morality. Refer to note 122 *infra* (discussing Bilionis' rejection of mandatory sentencing schemes). Finally, and perhaps most significantly, his concept of moral appropriateness necessarily rests on the premise that an "appropriate" sentence exists in each case and that the purpose of the Constitution is to require states to do their best to ascertain and impose that "appropriate" sentence. As the discussion throughout this article demonstrates, the Court's decisions simply cannot be reconciled with any such concern with consistency. Refer to discussion *infra* part III.B. (discussing Woodson v. North Carolina, 428 U.S. 280 (1976)).

7. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, ___, 110 S. Ct. 3047, 3067-68 (1990) (Scalia, J., concurring) (describing these principles as "rationally irreconcilable," "incompatible," "lacking in support in constitutional text," and "plainly unworthy of respect under *stare decisis*"); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) (describing "the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence"). Indeed, Justice Scalia has become so dissatisfied with these two principles that he announced in *Walton* that he no longer would apply the *Lockett* principle. *See Walton*, 110 S. Ct. at 3059, 3067 (Scalia, J., concurring).

8. U.S. CONST. amend. VIII. The history of this phrase suggests that the word "unusual" may have no independent meaning. As Justice Marshall explained in *Furman*, the phrase "cruel and unusual" first appeared in the English Bill of Rights of 1689, and the "use of the word 'unusual' in the final draft appears to be inadvertent." *Furman*, 408 U.S. at 318 (Marshall, J., concurring). Accordingly, the Court generally has not endeavored to articulate a separate requirement based on the word "unusual" but has proceeded by analyzing the word "cruel" or without considering the specific text at all. *See* Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion of Warren, C.J.) (noting that "[o]n the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn").

In more recent years, though, opinions by Justice Scalia have placed an increasing amount of emphasis on the separate content of the word "unusual." *See, e.g.*, Harmelin v. Michigan, 111 S. Ct. 2680, 2691-2692 (1991) (Scalia, J., concurring)

not at all clear how the procedural principles established in *Woodson* and *Lockett* further the constitutional mandate of preventing cruelty. The difficulty is exacerbated by the Court's well-established unwillingness to rely on historical practice in interpreting the Eighth Amendment.[9]

This article argues that these cases are not inconsistent but can be interpreted in a way that ties them to the text of the amendment in a meaningful way. The article starts from the premise that justifies the Court's unwillingness to rely on historical practice: cruelty is a socially relative concept for which there can be no absolute definition; particular actions can be determined to be cruel only within the context of a particular society.[10] For example, although the Romans might have seen nothing cruel in throwing Christians to the lions, we

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(determining that the "cruel and unusual" provisions provided boundaries for judges at common law); Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (per Scalia, J.) (stating that the clause "proscribes only those punishments that are both 'cruel and *unusual*' "). The problem with this reading of the clause, though, is that it assumes that the Eighth Amendment prohibits only punishments that are both cruel and unusual. The text readily could bear a reading, consistent with the Court's tradition, that bars both cruel punishments *and* unusual punishments. *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 6.2, at 109-10 (2d ed. 1986) (discussing ambiguity in the use of "and" to join modifiers that are not mutually exclusive); Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or,"* 2 TEX. TECH. L. REV. 235, 240 (1971) (noting that "and" is particularly ambiguous when used to join two adjectives that modify a plural noun). The logical result of the reading offered by Justice Scalia would be that the clause would not bar commonly inflicted punishments, however cruel. Because this result is inconsistent with the Court's decisions and seems to make the amendment completely purposeless, it is better to read the clause as prohibiting both cruel punishments and unusual punishments, as the Court has done implicitly.

9. Every Justice who has served on the Court during the last decade (except Justices Souter and Thomas, who have not had an opportunity to address the point definitively) has agreed that the Eighth Amendment prohibits a variety of punishments thought acceptable when the amendment was ratified. *See, e.g., Stanford*, 492 U.S. at 369 (per Scalia, J., joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Kennedy) (agreeing that petitioners "are correct in asserting that this Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner' ") (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *id.* at 383 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens) (stating that deciding whether a punishment violates the Eighth Amendment requires an "evolving standard of decency"); Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting, joined by Justices Blackmun, Powell, and Rehnquist) (pointing out that "the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment").

10. *See Furman*, 408 U.S. at 382 (Burger, C.J., dissenting) ("The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.").

would.[11] This argument entails the conclusion that as a society develops, and arguably progresses, concepts of cruelty may develop to bar punishments once thought acceptable or recede to accept punishments once thought cruel.[12] Thus, it can be argued that changing conditions have made unconstitutional methods of punishment—such as the gas chamber or the electric chair—which decisions of the Court at one time suggested were clearly permissible.[13]

In determining what violates the Eighth Amendment in contemporary American society, the Court has included several different concepts within the meaning of the word "cruel." For example, most would agree that the word includes barbarous and torturous punishments.[14] The Court also has held that the clause prohibits certain "grossly disproportionate and excessive" punishments.[15] The thesis of this article is that the principal line of cases involving the constitutionality of the death penalty, from *Furman* through *Lockett* and its progeny, reflects the view—referred to in this article as the "individual-

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11. This example is offered only for illustrative purposes. In fairness to Roman culture, I doubt that sophisticated Romans viewed persecution of Christians with approval. The earliest detailed discussion of the topic is the discussion of Nero's persecution in the *Annals of Tacitus*. *See* TACITUS, ANNALS, Lib. XV, cap. 44 (N.P. Miller ed., MacMillan Education Ltd. (1973)). It is difficult to read this passage without understanding Tacitus' complete disgust with Nero. In this regard, see especially the end of the passage, in which Tacitus remarks that "pity arose [in the spectators] because [the Christians] were being destroyed not for the public good but to satisfy the cruelty of one [i.e., Nero]." *Id.* (author's translation).

12. "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-01 (1957) (plurality opinion of Warren, C.J.) (citing Weems v. United States, 217 U.S. 349, 373 (1910)); *see also* Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.").

13. *See, e.g.*, Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1655 (1992) (Stevens, J., dissenting) (arguing that the gas chamber is cruel because of society's experiences with the Holocaust and chemical weapons and because of the development of other less cruel methods of execution in the 55 years since the statute was first enacted); Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1057 (1992) (arguing that the electric chair is cruel).

14. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (concluding that "barbarous" methods of punishment outlawed in the 18th century are cruel and unusual).

15. *See* Solem v. Helm, 463 U.S. 277, 303 (1983) (life without parole for several offenses involving bad checks in combination with six prior felony conviction); Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty for rape). *But see* Harmelin v. Michigan, 111 S. Ct. 2680, 2696-99 (1991) (limiting *Solem* while upholding a sentence of life without parole for a drug offense involving about 670 grams of cocaine).

ized-consideration" principle—that infliction of the death penalty without first affording the defendant a realistic opportunity for individualized consideration is "cruel" and thus unconstitutional. To use the Court's words, infliction of the death penalty without individualized consideration is cruel because it treats defendants "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[16] Applying this principle, the statutes at issue in *Furman* were invalidated because they gave the sentencer so little guidance that, as a practical matter, individualized consideration did not occur;[17] the statute at issue in *Gregg* was upheld because it gave sufficient guidance to foster meaningful individualized consideration;[18] the statutes at issue in *Woodson* and *Lockett* were invalidated because they precluded individualized consideration.[19] To elucidate the application of this concept, this article first discusses in detail the decisions in *Furman v. Georgia* and in *Gregg v. Georgia* and its companion cases.[20] It then discusses *Lockett* and other cases that consolidate the principle outlined in *Furman* and *Gregg*.[21] Finally, the article closes by discussing application of this principle to several topics arising in Eighth Amendment cases decided during the last few years.[22]

II. INVALIDATION OF THE OLD SYSTEM: *FURMAN V. GEORGIA*

Furman v. Georgia[23] is a useful starting point for discussing the Court's modern application of the Cruel and Unusual Punishments Clause to the death penalty. In that 1972 case the Court considered a group of state statutes quite dif-

16. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

17. *See* Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (stating that the "petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed").

18. *See* Gregg v. Georgia, 428 U.S. 153, 196-98 (1976) (concluding that discretion retained by a jury is controlled by objective standards).

19. *See* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (finding that the North Carolina statute's failure to allow particularized consideration of the defendant violated the "fundamental respect for humanity underlying the Eighth Amendment"); Lockett v. Ohio, 438 U.S. 586, 606 (1978) (holding that "[t]he Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required").

20. Refer to discussion *infra* parts II-III.

21. Refer to discussion *infra* part IV.

22. Refer to discussion *infra* part V.

23. 408 U.S. 238 (1972).

ferent from current practices.[24] The typical statute of the time delegated to the sentencer (usually a jury) complete and undirected discretion to determine whether death was the appropriate punishment for any of a great number of serious crimes.[25] By present standards, the results of the system appear unacceptably arbitrary, with there being little or nothing to separate the few cases in which the death penalty was imposed from the much larger number of cases in which it was not.

A sharply divided Court held that the Cruel and Unusual Punishments Clause prohibited infliction of the death penalty under these circumstances.[26] Ten opinions explained the Court's disposition: a brief per curiam opinion announcing the judgment of the Court without analysis,[27] five separate opinions concurring in the judgment (none of which were joined by any of the other Justices in the majority), and four separate dissenting opinions. The five opinions concurring in the judgment fall naturally into two groups: the opinions of Justices Brennan[28] and Marshall,[29] which concluded that the death penalty is unconstitutional under all circumstances; and the opinions of Justices Douglas,[30] Stewart,[31] and White,[32] which did not decide whether infliction of the death penalty was unconstitutional under all circumstances. Because subsequent cases have rejected the view taken by Justices Brennan and Marshall,[33] the doctrinal basis for the decision is best understood by examination of the three less definitive opinions written by Justices Douglas,[34] Stewart,[35] and White.[36]

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24. *Id.* The opinions actually disposed of three consolidated cases, including, in addition to *Furman* itself, *Jackson v. Georgia* and *Branch v. Texas*, cases in which defendants convicted of rape had been sentenced to death. *Id.* at 239.

25. *Id.* at 253 (Douglas, J., concurring) (stating that "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned").

26. *Id.* at 239-40.

27. *Id.*

28. *Id.* at 257-306.

29. *Id.* at 314-74.

30. *Id.* at 240-57.

31. *Id.* at 306-10.

32. *Id.* at 310-14.

33. Although the Court's cases after *Furman* consistently have upheld the principle that the death penalty is constitutional in some circumstances, refer to discussion *infra* part III, Justices Brennan and Marshall consistently adhered to the view that the death penalty is unconstitutional in all circumstances. They dissented from each case in which the Court failed to invalidate a death sentence. *See, e.g.*, Barrow v. Illinois, 110 S. Ct. 3257, 3257 (1990) (Brennan and Marshall, JJ., dissenting from denial of certiorari) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence in this case." (citations omitted)).

34. *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring).

A. *The Douglas Opinion*

The first of these less definitive opinions was tendered by the senior Justice on the Court, Justice Douglas. His opinion is important because it is the clearest statement of the consistency-based principle.

After a brief introduction to earlier Eighth Amendment cases, Justice Douglas stated his view that "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[37] This interpretation of the word "unusual"—which does seem contestable to this writer[38]—seems to make the Eighth Amendment little more than a surrogate for the Equal Protection Clause, prohibiting discriminatory treatment based on illegitimate classifications.[39] Justice Douglas supported this novel approach by reading the historical materials—the English forerunners of the Eighth Amendment and the legislative history of its framing—as establishing that the Eighth Amendment was primarily directed at "selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."[40]

He then proceeded to recount his viewpoint of the history of the death penalty in this country, demonstrating with some force that the burden of this punishment principally falls on

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35. *Id.* at 306-10.

36. *Id.* at 310-14; *see* Weisberg, *supra* note 6, at 315 (stating that the "opinions [of Justices Brennan and Marshall] are no longer important parts of the history of the Court's doctrine . . . . The important opinions are those of Justices Stewart, Douglas, and White, which conditionally suspend the death penalty, and which are the source of the Court's later efforts in doctrine-making.").

37. *Furman*, 408 U.S. at 242.

38. However much our society agrees that discrimination is reprehensible, the fact remains that it is not "unusual" in our society in any sense.

39. Refer to note 8 *supra* (discussing the traditionally limited significance of the word "unusual" in the Cruel and Unusual Punishments Clause).

40. *Furman*, 408 U.S. at 242. An alternate explanation for Justice Douglas' approach can be gleaned from footnote 11 of his opinion. *Id.* at 248 n.11. This footnote explains his perception that the Court erred when it held in McGautha v. California, 402 U.S. 183 (1971), that the then-extant system of capital punishment was not so arbitrary as to violate the Due Process Clause. *Id.* Justice Douglas, having lost his argument on the Fourteenth Amendment point in *McGautha*, may have transferred his distaste for the arbitrary capital punishment practice of the time from that amendment to the Cruel and Unusual Punishments Clause of the Eighth Amendment, offering him a basis for voting against the death penalty on the basis of a second constitutional provision.

"minorities or members of the lower castes."[41] His analysis of that history led to the following conclusion:

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.
>
> Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.[42]

The fundamental problem with this consistency-based analysis is that it treats the Eighth Amendment as nothing more than a context-specific application of the Equal Protection Clause. This treatment deprives defendants of the benefit of the focus on cruelty that the Constitution commands.[43]

Finally, it is important to note the effects of his equal protection analysis on subsequent issues not raised in *Furman*. If the sole issue is consistency, then a mandatory death penalty—equally applied to all—should be constitutional.[44] Accord-

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41. *Furman*, 408 U.S. at 257.

42. *Id.* at 256-57. The notion of an "idea of equal protection . . . implicit" in the Eighth Amendment resembles the notion of the equal protection guarantee being implicit within the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (finding that racial segregation in the District of Columbia public schools was a denial of due process). In *Bolling*, of course, the analysis was used to find a basis for applying equal protection concepts to evaluate federal action, which otherwise would not be subject to review under these concepts. *Id.* In the context of the Eighth Amendment, though, Justice Douglas' analysis has the effect of rendering the Eighth Amendment duplicative of other provisions that already apply to limit state action.

43. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (stating that "[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect"). Refer to note 8 *supra* (discussing the need for an interpretation of the Eighth Amendment that proscribes cruel punishments). Of course, to the extent that Justice Douglas' analysis focuses only on the content of the word "unusual," he logically still could be free to invalidate other punishments as "cruel," but his analysis in *Furman* does not seem to support such an approach. Rather, he seems to be suggesting that the consistency-based principle reflects the substance of the entire clause. *See Furman*, 408 U.S. at 257 (noting that the "idea of equal protection of the laws . . . is implicit in the ban on 'cruel and unusual' punishments").

44. One still could argue that the class of persons convicted of capital crimes inherently is biased against the poor and minorities, who are less likely to employ capable legal counsel. *See* David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 50-61 (1991). This continuing bias might have led Justice Douglas to invalidate even a

ingly, Justice Douglas in the last paragraph of his opinion reserved the question "[w]hether a mandatory death penalty would otherwise be constitutional."[45]

B. *The Stewart Opinion*

Justice Stewart was the second Justice to decline to address whether the death penalty was cruel and unusual in all circumstances. His opinion is especially important because he was the only member of the *Furman* majority to join in the writing of the decisive opinions in *Gregg* and its companions four years later. In addition, the ambiguous phrasing of his *Furman* opinion provides the most frequently quoted source for the concept that the *Furman* judgment reflected a consistency-based principle like the analysis explicitly set forth by Justice Douglas.

Justice Stewart first noted that he did not think the cases raised the question of whether the death penalty is always unconstitutional but went on to offer some brief comments on the point.[46] In particular, he addressed the two principal justifications for the death penalty addressed by Justice Brennan in his *Furman* concurrence: deterrence and retribution.[47] As for deterrence, Justice Stewart acknowledged that empirical evidence suggests that the deterrent effect is slight.[48] As for retribution, he expressly rejected the view of Justices Brennan and Marshall[49] that retribution is not a legitimate end of punishment.[50] In a foreshadowing of the *Gregg* opinion, he explained:

> The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.[51]

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facially nondiscriminatory mandatory death penalty.

45. *Furman*, 408 U.S. at 257. The Court answered this question in the negative in Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Refer to discussion *infra* part III.B.

46. *See Furman*, 408 U.S. at 306-10.

47. *Id.* at 300-05 (Brennan, J., concurring).

48. *Id.* at 307 n.7.

49. *See id.* at 304-05 (Brennan, J., concurring); *id.* at 342-45 (Marshall, J., concurring).

50. *Id.* at 308.

51. *Id.*

Finally, in the last two paragraphs of his opinion, he turned to the constitutionality of the sentences before the Court. He started by offering two reasons for condemning the sentences, reasons that resonate with the tests offered by Justices Brennan and Marshall. First, he stated "it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary."[52] Second, he tentatively offered a more literal basis for his conclusion, explaining that "it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."[53] But he declined to "rest [his] conclusion upon these two propositions alone."[54] Instead, his vote rested at bottom on his belief that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[55]

At first glance, Justice Stewart's rationale seems to focus on equality of results and thus offers nothing more than a mandate for consistent and equal sentencing, much like the consistency-based principle articulated by Justice Douglas.[56] But Stewart's equivocal words support an alternate reading of this passage more consistent with future cases; a focus on the intent of the punishers rather than the results of the process suggests that the concern reflected is less with the imprecise results than with the state's unwillingness to bother to look at the circumstances of the individual defendants.[57] This process is cruel because, in Justice Brennan's words, the State treats

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52. *Id.* at 309. This reasoning resembles the excessiveness analysis offered by Justices Brennan and Marshall, both of whom argued in *Furman* that the Eighth Amendment prohibits punishments that are inordinately excessive. *See id.* at 279 (Brennan, J., concurring); *id.* at 331-332 (Marshall, J., concurring).

53. *Id.* at 309. But refer to note 8 *supra.*

54. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

55. *Id.* at 309-10.

56. *See id.* at 249-55 (Douglas, J., concurring) (explaining that "[a] penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily" and that "the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment").

57. As the Court has recognized in other contexts, the constitutional prohibition on "cruel and unusual *punishment*" suggests a focus on the intent of the punishing entity. *Id.* (emphasis added); *see* Wilson v. Seiter, 111 S. Ct. 2321, 2324-25 (1991). Poor or inequitable treatment alone, without regard to intent, would not violate the Eighth Amendment. *Id.*

the defendants as "objects to be toyed with and discarded."[58]

C. *The White Opinion*

The last of the three controlling *Furman* opinions was Justice White's. His opinion historically has been less important because in subsequent cases he frequently has differed from the Court on the meaning of the Cruel and Unusual Punishments Clause in this area.[59] The core of his analysis was what he perceived to be the "near truism" stated at the commencement of his opinion "that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[60] He concluded that the death penalty at the time of this decision was so infrequently imposed that "it would be very doubtful that any existing general need for retribution would be measurably satisfied"[61] and that "the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring . . . crimes."[62] He then concluded that the Constitution would not permit a penalty of such severity to be imposed in these circumstances, because the infrequency with which the death penalty was inflicted made it ineffective to serve the posited purposes.[63] In substance, his was a vote consistent with the tests offered by Justices Brennan and Marshall that prohibit unnecessarily severe punishments.[64]

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58. *Furman*, 408 U.S. at 273 (Brennan, J., concurring). As the quotation suggests, this reading of Justice Stewart's opinion—which views the concept of cruelty as focused on the intent of the punisher with respect to the individual circumstances of the defendant—bears a strong resemblance to the analytical framework articulated by Justice Brennan in his scholarly and pathbreaking *Furman* opinion. That opinion argued that the fundamental premise of the clause is the concept "that even the vilest criminal remains a human being possessed of common human dignity." *Id.* at 273. Applying this principle Justice Brennan explained that torturous punishments violate the clause not because of the pain they inflict but because we would not inflict them on people we respected as human individuals. *See id.* at 272-74. Similarly, he rejected arbitrary punishments not because they were unfair but because "the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others," *id.* at 274, and excessive punishments because "a severe punishment . . . cannot comport with human dignity when it is nothing more than the pointless infliction of suffering," *id.* at 279.

59. For example, he did not join any of the decisive opinions in Gregg v. Georgia, 428 U.S. 153 (1976), and its companions. Refer to discussion *infra* part III or any of the majority opinions discussed in Part IV.

60. *Furman*, 408 U.S. at 311.

61. *Id.* at 311.

62. *Id.* at 312.

63. *See id.* at 311-14.

64. Refer to note 52 *supra* and accompanying text.

III. THE COURT EVALUATES THE NEW SYSTEM: *GREGG* AND ITS COMPANIONS

Notwithstanding the Court's judgment in *Furman* that all existing capital punishment statutes were unconstitutional, most states tried to maintain capital punishment by passing revised statutes that attempted to deal with the defects identified in the various opinions concurring in the *Furman* judgment. Accordingly, the Court heard argument in cases challenging several different types of statutes. Its decisions in these cases, issued on July 2, 1976, mark a turning point in the development of cruel and unusual punishment jurisprudence. The Court decided five separate cases, upholding statutes from Georgia,[65] Florida,[66] and Texas,[67] all by seven-to-two votes, but invalidating statutes from North Carolina[68] and Louisiana,[69] both by five-to-four votes.

The failure of the Court to produce a majority opinion in any of these cases shows the difficulty the Court had in interpreting *Furman*. The judgment in each case was announced with a joint opinion written by three Justices: Justice Stewart (who had concurred in *Furman*), Justice Powell (who had dissented in *Furman*), and Justice Stevens (who had joined the Court since *Furman* was decided). These Justices were the only Justices who agreed with the results of all the cases.[70] The other six Justices saw no relevant distinctions among the various statutes. Justices Brennan and Marshall, following their *Furman* opinions that had concluded that the death penalty is always unconstitutional, found all of the statutes unconstitutional. Chief Justice Burger and Justices White, Blackmun, and Rehnquist found all of the statutes constitutional. A fair consideration of the substance of these decisions requires examination of the plurality opinions in *Gregg v. Georgia*,[71] which upheld the Georgia statute, *Woodson v. North Carolina*,[72] which inval-

65. Gregg v. Georgia, 428 U.S. 153 (1976).
66. Profitt v. Florida, 428 U.S. 242 (1976).
67. Jurek v. Texas, 428 U.S. 262 (1976).
68. Woodson v. North Carolina, 428 U.S. 280 (1976).
69. Roberts v. Louisiana, 428 U.S. 325 (1976).
70. For ease of reference, I refer to these justices as the plurality, even though this reference is not precisely accurate with respect to the Georgia, Florida, and Texas cases because another group of three justices (Chief Justice Burger and Justices White and Rehnquist) also supported those judgments for reasons different from those set forth in the Stewart/Powell/Stevens opinions.
71. 428 U.S. 153 (1976).
72. 428 U.S. 280 (1976).

idated the North Carolina statute, and *Jurek v. Texas*,[73] which ambiguously upheld the Texas statute.[74]

A. *The Court Approves Guided Discretion:* Gregg v. Georgia

After a statement of the facts, the plurality opinion in *Gregg* falls into three parts: a summary of the statute,[75] a consideration of whether any death penalty can be constitutional,[76] and a consideration of whether the Georgia death penalty is constitutional.[77]

1. The Statute. The Georgia statute upheld in *Gregg* apparently reflects an attempt to deal with the concerns about arbitrariness expressed in the *Furman* opinions by making the process more rational. By comparison to the earlier, completely unguided process, the process considered in *Gregg* must have appeared revolutionary. After a trial at which a person is convicted of a crime for which death is a permissible penalty, a separate proceeding is held to determine what sentence is appropriate.[78] At this presentence hearing, both the prosecutor and the defendant have relatively broad rights to present evidence that they believe either mitigates or aggravates the appropriate punishment.[79]

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73. 428 U.S. 262 (1976).

74. The Florida statute upheld in Profitt v. Florida, 428 U.S. 242 (1976), is much like the statute in *Gregg* except that it provides a judge, rather than a jury, as the sentencer. *Id.* at 249. The plurality opinion upholding this statute largely relied on the plurality opinion in *Gregg*. *See id.* at 247-60 (plurality opinion of Stewart, Powell, and Stevens, JJ.). Similarly, the Louisiana statute invalidated in Roberts v. Louisiana, 428 U.S. 325 (1976), was much like the North Carolina statute found unconstitutional in *Woodson*; the plurality opinion there relies heavily on the *Woodson* and *Gregg* opinions. *See id.* at 331-36 (joint opinion of Stewart, Powell, and Stevens, JJ.).

75. *Gregg*, 428 U.S. at 162-68.

76. *Id.* at 168-87.

77. *Id.* at 187-207.

78. *Id.* at 162-68.

79. In relevant part the statute provides:

> [T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed.

Act of March 20, 1974, No. 854, § 7, 1974 Ga. Laws 352, 357 (formerly codified at GA. CODE ANN. § 27-2503 (Harrison Supp. 1975)), *quoted in Gregg*, 428 U.S. at 163-64.

The sentencer then considers whether the evidence establishes either (1) any of ten statutory aggravating circumstances or (2) any mitigating circumstances, whether mentioned in the statute or not.[80] If the sentencer does not find any aggravating circumstances, it cannot impose the death penalty.[81] The statute gives the sentencer the discretion not to impose the death penalty even if aggravating circumstances are found. Presum-

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80. In relevant part the statute provides:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Act of March 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 163 (formerly codified at GA. CODE ANN. § 27-2534.1(b) (Harrison Supp. 1975)), *quoted in Gregg*, 428 U.S. at 165 n.9.

81. GA. CODE ANN. § 17-10-31 (Michie 1990) (current codification of Act of April 10, 1968, No. 1157, § 1, 1968 Ga. Laws 1249, 1335, *amended by* Act of April 25, 1969, No. 563, § 1, 1969 Ga. Laws 809, 809-10, *amended by* Act of March 28, 1973, No. 74, § 7, 1973 Ga. Laws 159, 170, which was previously codified at GA. CODE ANN. § 26-3102).

ably this use of discretion should be based upon whatever mitigating circumstances had been found, although the statute is not clear on this point.[82]

2. Can the Death Penalty Ever be Constitutional? The first issue before the Court in *Gregg* was whether any death penalty can be constitutional. As the discussion above indicates, *Furman* left this point open, with three Justices declining to express an opinion, two holding the death penalty unconstitutional, and four holding it constitutional. *Gregg* squarely posed this issue, and the plurality answered it by concluding that the death penalty is constitutional.[83]

This section of the plurality opinion opened with the determination that history and precedent strongly suggested that the death penalty was constitutional.[84] The penalty traditionally had been widely accepted in both America and England.[85] Specific provisions in the Constitution suggest the constitutionality of the death penalty.[86] Finally, quite a number of the Court's earlier cases had upheld death sentences.[87]

The plurality then addressed what it viewed as the two principal arguments against the death penalty: (1) standards of decency had evolved so far that the death penalty was unacceptable, and (2) the death penalty was so pointless that it was useless. On the standards of decency point, the plurality declined to debate philosophical and sociological issues and instead looked to the actions of legislatures and juries as the

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82. For discussion of whether the Constitution permits the states to require that any decisions not to impose the death penalty be based on mitigating factors, refer to discussion *infra* part V.B. (discussing Blystone v. Pennsylvania, 494 U.S. 299 (1990)). The statute also provides for a special appellate procedure commonly known as proportionality review, pursuant to which state appellate courts consider whether the death sentence is proportionate to sentences inflicted in other cases. GA. CODE ANN. 17-10-35(c)(3) (1990) (current codification of Act of March 28, 1973, No. 74, § 4, 1973 Ga. Laws 1959, 1965, which was previously codified at GA. CODE ANN. § 27-2537). The Court held in Pulley v. Harris, 465 U.S. 37, 43-51 (1984), that the Eighth Amendment does not require proportionality review.

83. Gregg v. Georgia, 428 U.S. 153, 176-87 (1976).

84. *Id.* at 168-72.

85. *See id.* at 176-77.

86. The Fifth Amendment, ratified contemporaneously with the Eighth Amendment, provides that the death penalty cannot be imposed "unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. Similarly, the double jeopardy clause of the same amendment prohibits "twice [being] put in jeopardy of life" for the same offense. *Id.* Finally, the Due Process Clause of that amendment proscribes depriving an individual of "life" without "due process of law." *Id.* Each of these provisions implies that an individual constitutionally could be deprived of life by government action. *See* Furman v. Georgia, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); *id.* at 419 (Powell, J., dissenting).

87. *See, e.g., Gregg*, 428 U.S. at 177-78 (discussing earlier cases).

primary indicators of these standards. According to this opinion, written only four years after *Furman*, the legislatures of 35 states and the United States Congress had responded to *Furman* by attempting to pass new death penalty statutes.[88] Similarly, juries in at least 254 cases between *Furman* and the end of 1974 had elected to impose death sentences.[89] Based on this evidence, the plurality concluded that society's evolving standards did not justify condemnation of the death penalty.[90]

Finally, the plurality considered whether legislatures plausibly could believe that the death penalty serves any useful purpose, focusing on what it perceived to be the two principal purposes posited to support the death penalty: retribution and deterrence.[91] On the first point, the plurality did not adopt the views presented in *Furman* by Justices Brennan and Marshall,[92] who contended that retribution was not a permissible goal of punishment.[93] Rather, the plurality accepted retribution as a goal and explained by quoting the rhetorical passage from Justice Stewart's *Furman* opinion, which concluded that "'channeling [the] instinct [for retribution] serves an important purpose in promoting the stability of a society governed by law'"[94] and that retribution is not "a forbidden objective nor

88. *Id.* at 179-80.

89. *See id.* at 182 (citing DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS BULLETIN, CAPITAL PUNISHMENT, 1974, at 1, 26-27 (1975)).

90. *See id.* at 181-82. This passage is doctrinally important because it is the first indicator of how the modern Court will evaluate these standards. The irony of this approach should be apparent. It generally would be thought unusual for the Court to reject a First Amendment challenge by relying on evidence that 35 other states and the national Congress had passed statutes similar to the challenged one. But this evidence is almost determinative under the Eighth Amendment—the amendment in the Bill of Rights that least constrains the Court to historical and textual concerns. The reason for the anomaly, of course, is that by relying principally on these objectively identifiable sources, the Court helps to defuse the idea that its relatively subjective Eighth Amendment jurisprudence is reducible to the personal views of the individual Justices. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.").

Through the intervening years, the practice of relying principally on legislatures and juries has become almost a point of dogma, to the point at which the Court now can debate whether it is even permissible to look elsewhere. *See* Stanford v. Kentucky, 492 U.S. 361, 377-80 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, J.J.) (refusing to examine other sources); *id.* at 382 (O'Connor, J., concurring) (declining to join this portion of the plurality opinion); *id.* at 391-93 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, J.J.) (contending that other sources are relevant).

91. *Gregg*, 428 U.S. at 183-86.

92. *Furman*, 408 U.S. at 304-05 (Brennan, J., concurring); *id.* at 342-45 (Marshall, J., concurring).

93. *Gregg*, 428 U.S. at 183-84.

94. *Id.* at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)). Refer

one inconsistent with our respect for the dignity of men."[95]

The core idea in the *Gregg* plurality's acceptance of retribution as an acceptable purpose seems to be one of responsibility. Society's insistence that individuals bear responsibility for their acts—paying the ultimate penalty for ultimate crimes—is not cruel, even if that penalty does nothing to further other goals like deterrence.[96] This analysis also is consistent with the reading of Justice Stewart's *Furman* opinion outlined above: there is nothing inconsistent in requiring a State to consider an individual's circumstances and yet permitting a State to require the individual to take responsibility for the consequences of his actions. Indeed, the retributive ends of the death penalty surely are furthered more by a system that carefully considers the merits—and the demerits—of the defendant's circumstances on a case-by-case basis; the more carefully that information is considered, the more likely it is that the penalty will be imposed in the cases in which society feels the greatest need to exact it. In sum, it may be primitive, barbaric, and distasteful to exact the death penalty, but—at least to the extent it is imposed based on society's insistence that individuals bear responsibility for their crimes and the harm they cause—it is not cruel in the sense in which the Constitution speaks, blindly inflicting the death penalty without bothering to consider whether the individual defendant truly deserves it.[97]

Because the plurality had found that retribution was an adequate motive, it was able to avoid a definitive position on the deterrence question, stating that "there is no convincing empirical evidence either supporting or refuting th[e] view" that the death penalty is a significantly greater deterrent than other penalties.[98] Thus, the plurality concluded that these two pur-

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to text accompanying note 51 *supra* for the entire passage in Justice Stewart's *Furman* concurrence.

95. *Gregg*, 428 U.S. at 183.

96. *See* Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

97. Professor Robin West, in the Foreword to a recent Supreme Court Issue of the *Harvard Law Review*, suggests that Eighth Amendment jurisprudence profitably could take account of the focus on civic responsibility set forth in the writings of Vaclav Havel. *See* Robin West, *The Supreme Court—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 85-93 (1990). The notion of "responsibility" on which she focuses, however, is quite different from the notion of responsibility proposed in the text. As the text makes clear, I read *Gregg* as upholding the death penalty at least in part on the notion that it furthers the desire to make defendants responsible for their actions. By contrast, Professor West focuses on structures that would cause *jurors* to discharge a sense of civic responsibility. *Id.* Thus, in her view, "[t]he juror's responsibility for his fellow citizen, and responsibility to reach the morally right decision, is precisely what defines the juror as citizen." *Id.* at 91.

98. *Gregg*, 428 U.S. at 185-86. Although it is beyond the scope of this essay to

evaluate the philosophical merit of the results reached by the Court, a comparison of the plurality's approach to Kant's theories of punishment is interesting. As discussed in the text, the plurality upholds the permissibility of capital punishment solely on the basis of retribution rather than as a means to further some other purpose of society. The plurality's unwillingness to rely on goals (like deterrence) other than simple retribution conforms well to the general understanding of Kant's views on criminal punishment, which prohibited punishment designed to serve extraneous social goals. *E.g.*, IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, 100 (John Ladd trans., 1965) [hereinafter I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE] (stating that "[j]udicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be . . . confused with the objects of the Law of things"); IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (William Hastie trans., 1887) [hereinafter I. KANT, THE PHILOSOPHY OF LAW] (parallel passage); *see also* JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW 121 (rev. ed., Westview Press (1990)) (explaining that the retributive theory of punishment does not seek to justify punishment in terms of social utility but that the retributist seeks "the punishment that the criminal . . . *deserves* or *merits*"). *But see* Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment*, 87 COLUM. L. REV. 509, 512-18 (1987) (discussing Kantian writings that conflict with this understanding of Kant's thought).

One problem with any attempt to see the plurality's opinion as expressing Kantian views is that Justice Stewart's explanation of what he means by retribution—"promoting the stability of a society governed by law," *Furman*, 408 U.S. at 308 (Stewart, J., concurring)—seems to conflict with the Kantian notion that punishment should not be inflicted on an individual to further other social goals (such as deterrence or the promotion of social stability). *See* MURPHY & COLEMAN, *supra*, at 120-21 (explaining Kant's retributive theory as seeking to justify punishment with "a theory based on *justice* or a respect for *rights*" as opposed to social utility). Although this criticism may be leveled at Justice Stewart's ambiguous explanation, it may not fairly be leveled at the core concept of retribution, which, as one recent text explains,

> is quite different from a commitment to such unattractive things as revenge or vindictiveness. These latter responses to wrongdoings are *personal* responses to perceived wrongs to oneself and motivated by a concern with one's own self-regard or self-respect. The narrow and personal nature of this concern is revealed in the fact that persons so motivated often seek to take personal and extralegal steps to redress their perceived wrongs. The demand for punishment as retribution is quite different, however, for it grows out of respect for the law (not simply oneself), the demand that attacks against the law (not simply against oneself) be taken seriously, and the belief that the only morally acceptable way to deal with such attacks is in terms of a theory based on *justice* or respect for *rights* (and not utility) as a primary value.

Id. at 120-21 (footnote omitted).

In any event, it is clear that Kant's precise views on punishment do not have immediate relevance to the debate at hand because Kant rather clearly believed that capital punishment should be inflicted much more widely than the Constitution seems to contemplate under current doctrine. *See* I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra*, at 98 (stating that "[i]f . . . he has committed a murder, he must die . . . . there is . . . no equality between the crime and the retribution unless the criminal is judicially condemned and put to death"). For example, Kant argued that the death penalty is required for each and every murder:

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the

poses were sufficiently plausible. Accordingly, it could not reject the judgment of the Georgia legislature that the death penalty served a significant purpose.[99]

3. Was the Georgia Death Penalty Constitutional? Finally, the plurality turned to the most difficult issue: whether the Georgia statute was constitutional. It started by summarizing *Furman* as mandating "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[100] As the plurality explained, the reason for affording this discretion is to allow the sentencer to consider "'the circumstances of the offense together with the character and propensities of the offender.'"[101] This summary resembles the language of Justice Stewart's concurrence in *Furman*,[102] which the plurality in *Gregg* seems to use as the holding of *Furman*.[103] It also should be mentioned that this summary of *Furman* is just as equivocal as Justice Stewart's opinion in *Furman*; it still leaves *Furman* susceptible to a reading favoring a consistency-based principle seeking uniform treatment of capital defendants, depending on whether the Court viewed the consideration of the particular circumstances as an end in itself or simply as a means to more consistent decision-making.[104]

> people because they fail to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Id. at 102; *see* I. KANT, PHILOSOPHY OF LAW, *supra*, at 198 (parallel statement of this thought). For a prominent discussion of Kant's views on punishment, see generally JOHN RAWLS, A THEORY OF JUSTICE 179-83 (1971) (explaining Kant's "notion of treating men as an ends in themselves and never as only a means"); BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 710-12 (1945) (discussing Kant's belief to "[a]ct as if the maxim of your action were to become through your will a general natural law"). For a recent discussion of the ambiguities in Kant's writings on punishment, see generally Murphy, *supra* (suggesting that the theory of punishment which would be predicted after examining most of Kant's writings is inconsistent with the theory which would be predicted after examining the writings of others).

99. *Gregg*, 428 U.S. at 186.

100. *Id.* at 189.

101. *Id.* at 189 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

102. *Furman*, 408 U.S. at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.")

103. The reliance on Justice Stewart's concurrence is not surprising, inasmuch as he is the only member of the *Furman* majority who joined in this opinion. *See Gregg*, 428 U.S. at 189; *Furman*, 408 U.S. at 240.

104. As the discussion below shows, later portions of the *Gregg* plurality opinion

Relying on this summary, the plurality concluded that it is not enough for the State simply to put this information before the sentencer because such an action "is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment."[105] The problem here is that, because "the members of a jury will have had little, if any, previous experience in sentencing,"[106] there is a risk that an unguided jury will fail to fulfill its role of providing an individualized application of contemporary values to the defendant's situation. The result then may approach the random results condemned in *Furman*.[107] The plurality concluded that this "problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision."[108] As with the initial test, this more developed analysis still can be read equivocally; it is not clear whether the procedures are necessary to ensure consistent results or because it is cruel to allow the decision to inflict the death penalty to be made by a sentencer that does not realistically consider the individual's circumstances. Applying these concepts to the Georgia statute, the plurality accepted the procedures that statute set out: "These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence . . . . [T]he jury's attention is directed to the specific circumstances of the crime . . . [and] is focused on the characteristics of the person who committed the crime."[109]

The opinion closed with the plurality rejecting the defendant's arguments that the system left so much discretion to the jury that it still fell afoul of the principles behind *Furman*.[110] First, the defendant noted that the system left prosecutors and juries "unfettered authority" to decline to seek or impose the death penalty, thus permitting inconsistent re-

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make it clear that it is the former reading which is correct: consideration of the circumstances is an end in itself. Refer to notes 110-118 *infra* and accompanying text.

105. *Gregg*, 428 U.S. at 192.

106. *Id.*

107. *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (stating that random imposition of the death penalty cannot be supported by our Constitution).

108. *Gregg*, 428 U.S. at 192.

109. *Id.* at 197.

110. *See id.* at 202-04 (stating that procedures requiring a jury to consider both the circumstances of the crime and the criminal before deciding on a sentencing recommendation are sufficient to meet the *Furman* standards).

sults.[111] The plurality rejected this argument summarily:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[112]

This explanation is somewhat disingenuous. *Furman*, with its five separate concurring opinions, can only with difficulty be characterized as holding *anything* other than that infliction of the particular sentences before the Court offended the Constitution. Moreover, the particularized reliance on individualized consideration set forth in this passage is much more developed than anything in the opinions (or, probably, even the thoughts) of the Justices when *Furman* was decided.

But the most important aspect of this passage is the ease with which the plurality rejected Gregg's argument. If the point of *Furman* (as seen through the *Gregg* plurality's eyes) is the point Justice Douglas made—that the Eighth Amendment demands consistency in sentencing[113]—then Gregg's argument is difficult to reject, for prosecutors and juries certainly have adequate room under the Georgia system to impose sentences in an unequal manner.[114] The plurality nevertheless could have rejected the argument along these lines by suggesting that the disparity was small enough to be accepted, but it did not take this tack.

Instead, the *Gregg* plurality suggested that the disparity was irrelevant, stating that the sole constitutional requirement was to cause the sentencer to "focus on the particularized circumstances of the crime and the defendant."[115] This analysis

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111. *Id.* at 199-200.

112. *Id.* at 199.

113. *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

114. Indeed, subsequent history shows that, to some degree, prosecutors and juries in Georgia in fact have used that discretion to impose inequitable sentences, although the situation seems far improved from pre-*Furman* days. *See* McCleskey v. Kemp, 481 U.S. 279, 286-87, 312-13 (1987) (upholding the Georgia statute in the face of evidence of the race-based exercise of prosecutorial and sentencing discretion).

115. *Gregg*, 428 U.S. at 199. This focus on individual circumstances resonates with the traditional focus of the liberal tradition on the primacy of the individual and, as mentioned above, with Justice Brennan's analysis in *Furman*. Refer to note 58 *supra*. It also is consistent with the Kantian focus on the individual discussed above. Refer to note 98 *supra*. As Kant argued:

> [O]ne man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right.

reveals the true basis for its holding. The *Gregg* statute is acceptable not because the results are more rational than those under the *Furman* statute but because it provides for an individualized consideration of the defendant, the consideration our society would accord anyone worthy of humane treatment.[116] In sum, where *Furman* condemned statutes that left the jury with broad discretion and few clear and objective standards,[117] *Gregg* upheld statutes that gave the guidance necessary to make meaningful consideration possible.[118] Thus, although nothing in the language of the *Gregg* opinion mandates a choice in favor of this individualized-consideration principle rather than the consistency-based principle articulated by Justice Douglas, the analysis in *Gregg* makes more sense under the individualized-consideration principle than under the consistency-based principle.

B. The Court Rejects Mandatory Sentences: Woodson v. North Carolina

The conflict between the consistency-based and individualized-consideration principles comes to the fore in *Woodson*,[119] the most important of *Gregg*'s companions. In contrast to Georgia—which dealt with the arbitrary exercise of discretion condemned in *Furman* by providing detailed guidance for the exercise of that discretion[120]—North Carolina responded by elimi-

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> Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality.

I. KANT, THE PHILOSOPHY OF LAW, *supra* note 98, at 195; *see* I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 98, at 100 (parallel statement of this thought). In the context of capital punishment, he made a similar point: "[T]he death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." *Id.* at 102; *see* I. KANT, PHILOSOPHY OF LAW, *supra* note 98, at 198 (parallel statement of this thought).

116. The firmness with which the Court holds to this concept is shown by its decision in McCleskey v. Kemp, 481 U.S. 279 (1987). In that case, the Court upheld the Georgia statute in the face of substantial evidence that, *inter alia*, Georgia juries were granting mercy based on racial considerations. *Id.* at 286-87, 312-13. The Court responded by quoting the passage from *Gregg* mentioned above, which explained that "the decision to afford an individual defendant mercy" cannot violate the Constitution. *Id.* at 307 (quoting *Gregg*, 428 U.S. at 199). A court pursuing a goal of consistency, rather than a goal of individualized consideration that entails allowing the sentencer discretion to grant mercy, could not so readily have accepted this situation.

117. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 293, 295 (Brennan, J., concurring).

118. *Gregg*, 428 U.S. at 162-67, 196-98 (upholding GEORGIA CODE ANN §§ 26-1101, 26-1902, 26-1311, 26-2001, 26-2201, 26-3301, 27-2503, 27-2534.1, 26-3102, 27-2514, 26-3102, 27-2537 (Michie 1972 & Supp. 1975)).

119. Woodson v. North Carolina, 428 U.S. 280 (1976).

120. *See generally* Gregg v. Georgia, 428 U.S 153, 162-67 (1976) (detailing and

nating any opportunity for discretion so that any person convicted of a capital crime would be sentenced to death without *any* consideration of individualized circumstances.[121] This statute squarely posed a conflict between the two suggested principles because a mandatory death penalty system would be one of the most consistent possible sentencing systems, even though it would accord the least consideration to the individual circumstances of the defendant.[122]

Following the framework set forth in its opinion in *Gregg*,[123] the plurality first considered whether evolving standards of decency could tolerate infliction of the penalty under the North Carolina statute.[124] When the Eighth Amendment was ratified, the death penalty generally was mandatory for capital crimes throughout the country.[125] But during the ensuing decades, in response to the increasing refusal of juries to convict defendants under these statutes, legislatures searched for alternate procedures that gave more discretion to the sentencer.[126] The plurality next examined current legislative treatment of the issue, stating that only one United States jurisdiction had passed a mandatory death penalty statute in the

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discussing Georgia death penalty statutes).

121. This approach initially derived from a North Carolina Supreme Court decision that invalidated the provision of the North Carolina death penalty statute that gave sentencers the option to find the defendant guilty without inflicting the death penalty. *See Woodson*, 428 U.S. at 285-86 (plurality opinion of Stewart, Powell, and Stevens, JJ.). The North Carolina General Assembly promptly followed suit by codifying this process. *Id.*

122. It is possible to argue, because the mandatory system does not accord any consideration to the individual circumstances of the defendant, that it is not consistent because it treats all defendants equally, even though we know that they are not equal. *See* Bilionis, *supra* note 6 ("Capital sentencing schemes that legislatively pre-set this moral calculus, or that subordinate moral considerations to legal form, do not reliably measure the moral appropriateness of any particular death sentence [because] [t]he range of moral considerations . . . relevant to the appropriateness of a particular death sentence is inestimably broad and impossible to articulate completely in advance."); *see also* McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."). Whatever the merits of this view, it still must be the case that a mandatory system—according capital punishment to all persons convicted of murder—is more consistent than a system—such as the one upheld in *Gregg*—which establishes no firm guidelines as to which individuals will receive the death penalty and which will not. Refer to note 114 *supra* (discussing results of that system). Thus, if the goal of the system is consistency, the statute rejected in *Woodson* must be thought superior to the one rejected in *Gregg*.

123. Refer to discussion *supra* part III.A.2.

124. *Woodson*, 428 U.S. at 294-301.

125. *See id.* at 289.

126. *See id.* at 289-93.

138 years immediately preceding *Furman*; that jurisdiction had repealed its mandatory death penalty in 1957, fifteen years before *Furman*.[127] Finally, the plurality examined the actions of jurors deciding cases under such statutes. Here, the plurality was impressed both by the anecdotal evidence from earlier eras indicating that juries often refused to obey mandatory death penalty statutes and by various studies indicating that juries deciding cases under systems which granted them discretion chose to impose the death penalty only in a small minority of the cases in which it was available.[128] Based on these factors, the plurality concluded that the North Carolina statute "departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'"[129]

The plurality bolstered this conclusion by criticizing the North Carolina statute's failure to satisfy the doctrinal requirement, announced earlier that morning in *Gregg*, that death penalty statutes provide standards for individualized consideration. The plurality explained:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense 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.
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> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we 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.[130]

Here for the first time the Court clearly shows that it will not interpret *Furman* as a mandate for equal and consistent

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127. *See id.* at 295 n.30.
128. *Id.* 293-95 & n.31.
129. *Id.* at 301 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).
130. *Id.* at 304 (citations omitted).

imposition of sentences; the mandatory death penalty is one of the best means to achieve this goal. Instead, *Furman* will provide a mandate for procedures that treat even the person convicted of a capital crime as an individual entitled to his day in court on the issue of whether he should live or die.[131] Most importantly, this understanding of the case leaves it perfectly consistent with the decision in *Gregg v. Georgia*,[132] announced by the same three Justices on the same day.[133] These cases are applications of the same individual-consideration principle to different situations; it is neither necessary nor appropriate to see them as establishing contradictory principles.

C. *The Hard Case in Between:* Jurek v. Texas

The Texas statute[134] considered by the Court in *Jurek v. Texas*[135] posed a difficult problem because it fell between the *Gregg* statute, which gave the jury complete discretion to weigh the evidence put before it at the sentencing hearing,[136] and the *Woodson* statute, which required infliction of the death

131. *See id.* at 304. Any fair summary of this opinion must point out that the opinion still contains relics of the idea that *Furman* mandates consistency in sentencing. For example, just before the passage quoted in text, the plurality suggests that another constitutional defect in the statute is its failure to cure the power of juries to exercise their discretion in an arbitrary manner. *See id.* at 303. Anecdotal evidence suggested that juries that did not believe a defendant deserved capital punishment frequently refused to convict the defendant. *See id.* at 302. It certainly is intolerably arbitrary for a defendant's fate to depend on whether a jury will "nullify" the judge's instructions and acquit the defendant in violation of state law. But I submit that, absent the problems discussed in text, the Court would have been unwilling, based solely on anecdotal evidence of arbitrary jury results, to invalidate the North Carolina statute. *Cf.* McCleskey v. Kemp, 481 U.S. 279, 292-98 (1987) (refusing to invalidate the Georgia statute despite substantial statistical evidence suggesting that in many cases prosecutors and juries were exercising their discretion on the basis of racial considerations).

Similarly, just after the passage quoted in the text, the plurality suggested that its demand for individualized consideration "rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. Focusing on the word "reliability," one might see this case as resting on the need for consistent decision-making. On the other hand, a focus on what is to be made reliable—the determination that death is appropriate—brings this passage closer to the individualized-consideration principle discussed in the text. I view this passage as just another equivocal statement, consistent with either of the posited readings of *Furman*.

132. 428 U.S. 153 (1976).

133. *See id.* at 197.

134. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

135. 428 U.S. 262 (1976).

136. *See Gregg*, 428 U.S. at 197.

penalty on all persons convicted of capital crimes.[137] The Texas statute, by contrast, completely prohibited infliction of the death penalty except for certain relatively aggravated crimes, generally narrower in scope than the categories of capital crimes established by Georgia.[138] If a person was convicted of one of these crimes, a sentencing hearing was convened at which the jury was asked three specific questions, generally (1) whether the crime was deliberate and death of the victim reasonably was to be expected, (2) whether the defendant probably would commit violent acts that make him a continuing threat to society, and (3) whether the killing was unreasonable in light of any provocation by the deceased.[139] If the jury answered "yes" to all of these questions, it was *required* to impose the death penalty, even if the evidence at the sentencing hearing had convinced the jury in the abstract that death was not an appropriate punishment.[140]

The plurality's analysis of this statute was somewhat confusing. It noted that

> a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in [*Woodson*] to be required by the Eighth and Fourteenth Amendments . . . . A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.[141]

The Texas statute certainly does not provide for consideration of as much evidence on why a death sentence should not be imposed as Georgia does. As mentioned above, the Georgia statute permits a jury to decline to impose the death penalty on the basis of *any* mitigating factor it may find relevant.[142] The Texas statute, by contrast, permits the jury to decline to

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

138. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 1974). In Georgia any murder is a potentially capital crime. *See Gregg*, 428 U.S. at 162 n.4 (joint opinion of Stewart, Powell, and Stevens, JJ.). In Texas, by contrast, the only potentially capital murders are murders of a peace officer or fireman, committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, committed for remuneration, committed in an escape or attempted escape from prison, or committed on a prison employee. *See Jurek*, 428 U.S. at 268 (joint opinion of Stewart, Powell, and Stevens, JJ.).

139. *See* Act of June 14, 1973, 63d Leg., R.S., ch. 426, art. 3, § 1, Tex. Gen. Laws 1122, 1125.

140. *See Jurek*, 428 U.S. at 269.

141. *Id.* at 271 (citations omitted).

142. *See Gregg*, 428 U.S. at 197.

impose the death penalty only if it answers "no" to one of the three defined questions.[143] In many cases, the question of whether the defendant can be expected to be violent in the future then becomes dispositive.

The most obvious logical alternatives for the plurality were either (1) to apply *Woodson* to invalidate the statute because of its failure to permit consideration of relevant mitigating evidence or (2) to uphold the statute on the theory that the Texas statute's questions represented a permissible determination by the legislature of what types of mitigating evidence were relevant. In light of the clear limitations the statute places on the types of mitigating evidence, a strong reading of the individualized-consideration principle applied in *Gregg* and *Woodson* would call for invalidation of the statute.[144]

The plurality avoided this problem and took neither course. Instead, it looked to the few cases in which Texas courts already had interpreted the statute.[145] In those cases, Texas courts had directed that juries answering the second question consider a wide range of mitigating factors as relevant to the statutory questions.[146] Based on these cases, the plurality concluded that Texas courts would "allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."[147] The plurality closed its analysis by asserting confidently: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."[148]

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143. Refer to notes 139-40 *supra* and accompanying text.

144. Subsequent cases have made it clear that such a reading would not have been out of line. Refer to discussion *infra* part IV.C. (discussing Penry v. Lynaugh, 492 U.S. 302 (1989)). Similarly, subsequent developments suggest that it would have been questionable for the Court to hold that the limitations the text of the Texas statute seemed to place on mitigating evidence constituted permissible determinations of relevance. Refer to note 162 *infra* (discussing Skipper v. South Carolina, 476 U.S. 1 (1986)).

145. *See Jurek*, 428 U.S. at 268-74.

146. *Id.* at 272-73.

147. *Id.* at 272.

148. *Id.* at 276. This rather confident evaluation of Texas law was somewhat unjustified and thus led to a major reevaluation of *Jurek* in Penry v. Lynaugh, 492 U.S. 302 (1989) (discussed *infra* part IV.C.). It seems likely that the Court at the time of *Jurek* had not yet developed the full sensitivity to the broad variety of mitigating evidence that it would show in later years. Only when cases such as Lockett v. Ohio, 438 U.S. 586 (1978), and *Penry* squarely placed such evidence before the Court could it fully evaluate the significance of these limitations.

Alternatively, one might say that over the years the Court has come to emphasize the importance of the individualized-consideration principle behind *Gregg* and *Woodson* and to de-emphasize its desire to allow states some flexibility in fashioning

Although some question remains about the accuracy of the plurality's evaluation of the Texas statute,[149] the analysis in *Jurek*, like the analysis in *Gregg* and *Woodson*, shows that the Court in 1976 already had advanced to an understanding of the Cruel and Unusual Punishments Clause that focused on the need for individualized consideration rather than on some need for consistency in sentencing.[150] If consistency had been the goal, the Court readily could have upheld the Texas statute as being even better than the statute upheld in *Gregg* because it focuses the jury's consideration more precisely, probably thus leading to more consistent results. Instead, it is clear from the opinion that the Texas statute, even if it is not facially unconstitutional, is not as satisfactory as the Georgia statute because of the potential limits it places on the jury's ability to consider relevant mitigating evidence.[151]

IV. THE COURT REFINES ITS REQUIREMENTS

The 1976 decisions in *Gregg* and its companions in no way settled the question of what types of procedures the Eighth

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capital sentencing procedures. *See* Sumner v. Shuman, 483 U.S. 66, 74 (1987). This increased or decreased emphasis may be due to its perception that the need for experimentation has passed; the procedures upheld in *Gregg* may seem to the Court to be procedures that adequately respect the states' need for practicality. Any procedures that accord less consideration to the defendant may find a skeptical reception from a Court that is sure the state easily could adopt a practical alternative that better attends to the defendant's individual situation.

149. Refer to note 144 *supra*.

150. *See* Jurek v. Texas, 428 U.S. 262, 271-76 (1976).

151. *Id.* at 271-74. Although I have noted above, refer to note 98 *supra*, a general coincidence between the principles articulated by the Court and certain views of Kantian philosophy, it is beyond the scope of this essay to evaluate the moral value of the Court's decisions. For an excellent discussion of retributive justice and its relationship to the Court's Eighth Amendment jurisprudence, see Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 247-66 (1989) (discussing the Court's "reliance on retributive principles . . . in three lines of cases [involving] the application of certain punishments to certain classes of defendants, the use of certain kinds of aggravating factors in sentencing, and the role of discretion in capital sentencing"). My purpose here, rather, is to establish that the principle I have outlined, or something like it, actually drives the Court's decisions. It is my guess that its decisions respond more to its perceptions of values inherent in the American ethos than to deep familiarity with philosophical writings. From this perspective, it is easy to see that the individualized-consideration principle certainly resonates, not only with the Kantian and liberalist notions discussed above, refer to notes 98 and 115 *supra*, but also with the "'deep-rooted historic tradition that everyone should have his own day in court,'" Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)). By proceeding in this way, the Court more readily can be seen to be furthering its concepts of societal values rather than concepts that, although respected in the academy, may not be so firmly based in our ethos as to be entitled to constitutional respect.

Amendment required for infliction of the death penalty. Intervening years have forced the Court repeatedly to refine and reinforce the principle articulated in 1976: that the death penalty violates the Eighth Amendment if it is imposed by a sentencer deprived of the opportunity to consider the individual circumstances of the defendant.[152] This part of the article discusses three of the leading cases refining this point: *Lockett v. Ohio*,[153] *Sumner v. Shuman*,[154] and *Penry v. Lynaugh*.[155]

A. *Individualized Consideration:* Lockett v. Ohio

The requirement of individualized consideration that began to show itself in *Gregg* and its companions emerged more clearly in 1978, when the Court invalidated Ohio's death penalty statute in *Lockett v. Ohio*.[156] The Ohio statute in question required imposition of the death penalty upon persons convicted of capital crimes unless the trial judge found that the victim of the offense had induced or facilitated the offense, that the offense had been committed under duress, coercion, or strong provocation, or that the offense was the product of some psychosis or mental deficiency of the defendant.[157] The murder for which Sandra Lockett had been convicted had been committed by another; she had been sentenced under the so-called felony-murder rule, which allows murder convictions in some circumstances for persons participating in a felony in the course of which someone is murdered.[158] The statute did not allow the jury to consider whether her relatively slight participation in the murder justified a lesser sentence.

The plurality in *Lockett*[159] responded with a firm exten-

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152. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).
153. 438 U.S. 586 (1978).
154. 483 U.S. 66 (1987).
155. 492 U.S. 302 (1989).
156. 438 U.S. 586 (1978).
157. *See id.* at 607 (plurality opinion of Burger, C.J.) (quoting OHIO REV. CODE ANN. § 2929.04(B) (1975)).
158. *See id.* at 593. The Eighth Amendment limits the circumstances under which death sentences can be imposed for convictions under the felony-murder rule. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 152-58 (1987) (limiting the felony-murder rule under the Eighth Amendment to offenses in which the requisite culpability of the defendant is found). Indeed, Justice Blackmun wrote separately in *Lockett*, calling for the reversal of Lockett's conviction, in part, on this basis. *See* 438 U.S. at 613-17 (Blackmun, J., concurring).
159. Chief Justice Burger wrote the decisive opinion and was joined by the authors of the plurality opinions in the *Gregg* cases, Justices Stewart, Powell, and Stevens. *Lockett*, 438 U.S. at 589-609. Justice Blackmun filed an opinion concurring on narrower grounds. *See id.* at 613-19. Justice Marshall filed an opinion concurring in the judgment on the ground that the death penalty always is unconstitutional. *Id.*

sion of the *Woodson* opinion, arguing that

> the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .
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> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[160]

The plurality offered only two limitations on this rule. First, it reserved judgment on whether mandatory death sentences could be permitted in certain limited circumstances, such as when life prisoners commit murders.[161] Second, it stated that it was not limiting "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[162]

It is important to note how this decision, which goes far towards requiring states to follow specified procedures before inflicting the death penalty, differs from the more common procedural due process cases that require the government to follow certain types of procedures before taking certain actions that infringe on individual interests. In procedural due process cases, one of the main motivating forces for the procedures is to increase accuracy of the decisions.[163] The procedures in the

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at 619-21. Refer to note 33 *supra* (discussing Justice Marshall's uncompromising views on the constitutionality of capital punishment). Justice Brennan did not participate. *Lockett*, 438 U.S. at 609. Justices White and Rehnquist were the only dissenters. *See id.* at 621-24 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court); *id.* at 628-36 (Rehnquist, J., concurring in part and dissenting in part).

160. *Lockett*, 438 U.S. at 604-05 (footnotes omitted).

161. *Id.* at 604 n.11. This issue was resolved in Sumner v. Shuman, 483 U.S. 66 (1987) (holding that mandatory death sentences are unconstitutional in all cases).

162. *Lockett*, 438 U.S. at 604 n.12. Nor would this exception be read broadly, as the Court's subsequent decision in Skipper v. South Carolina, 476 U.S. 1 (1986), shows. In *Skipper*, the Court held—over spirited disagreement by Justice Powell, one of the co-authors of the decisive opinions in the *Gregg* cases—that the sentencer must be allowed to hear evidence related to the defendant's demeanor in prison after commission of the crime, even though the state courts reasonably had concluded that the evidence was irrelevant to his moral culpability for the crime. *See id.* at 4-5.

163. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (including as factors in the decision "the risk of an erroneous deprivation of such interest to the proce-

death penalty context, by contrast, are not designed to produce a so-called "correct" result; indeed, it is hard to think that a definitively "correct" answer exists for the question of whether a particular individual should be sentenced to death. If anything, as discussed above, the requirement of these additional procedures in capital sentencing proceedings actually undermines the consistency of the results by increasing the possibility of discretion on the part of the sentencer.[164] Instead, the procedures are designed to enhance the likelihood that in passing sentence the sentencer will consider the individual characteristics of the defendant and the offense.

In sum, the Court in *Lockett* answered the question it left unaddressed in *Jurek*: whether the Eighth Amendment permits state legislatures to limit the range of moral bases upon which sentencers may decline to impose the death penalty.[165] The Texas statute considered in *Jurek* appeared to impose such limitations, but the plurality had argued that Texas courts would avoid those limitations.[166] In *Lockett*, the Court squarely faced, and condemned, a situation in which a state court had ordered infliction of a death sentence without allowing the sentencer to consider the mitigating force of factors that many in our society might find relevant.[167]

B. Mandatory Death Penalties: Sumner v. Shuman

On several occasions during the development of its Eighth Amendment jurisprudence, the Court declined to decide whether there were any circumstances under which a state automatically could impose a death penalty without requiring the sentencer to consider the individual circumstances of the defendant.[168] The most common example was that of a capital murder committed by a prisoner already serving a life sentence without opportunity for parole.[169]

If the Eighth Amendment seeks rationality and consistency in decision-making, a mandatory death penalty in such cases should be acceptable. For such a narrow class of persons committing such serious crimes, it hardly can be thought that a

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dures used, and the probable value, if any, of additional or substitute procedural safeguards").

164. Refer to notes 110-114 *supra* and accompanying text.

165. Refer to note 144 *supra* and accompanying text.

166. Refer to note 148 *supra* and accompanying text.

167. *See Lockett*, 438 U.S. at 608.

168. *See* Sumner v. Shuman, 483 U.S. 66, 77 (1987) (discussing prior refusals to decide this point).

169. *See, e.g., id.* at 77-78.

jury frequently would decline to follow a state statute mandating death in all instances. Moreover, the group of persons who have committed the most serious crimes would receive the most serious penalty. Imposition of this mandatory penalty would remove the inconsistency of one of these persons not receiving the death penalty, even though others who have committed crimes the legislatures view less seriously have received the death penalty.

Conversely, if the primary goal of the Eighth Amendment is a norm of individualized consideration, this case should be an easy follow-up to *Lockett*, the principles of which require such consideration. The Court's 6-3 rejection of such a statute in *Sumner* shows the vigor with which the Court holds the individualized-consideration idea to be the key to the meaning of the constitutional prohibition of cruelty in capital punishment.[170] After summarizing the prior decisions, which had left this point open, the Court concluded that the two elements of the crime did not even in these limited circumstances

> provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case. The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts . . . .
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> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death . . . .
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> . . . .
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> [T]he two elements that are incorporated in the mandatory statute . . . also say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct."[171]

The Court rejected the argument that its holding would leave the state effectively powerless to punish these individuals.[172] If they already were in prison for life without parole, and if the state could not impose the death penalty, the state

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170. *Id.* at 70-85.

171. *Id.* at 78, 80-82 (some brackets and ellipses in original) (quoting Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam)).

172. *Id.* at 83.

argued, how was it to punish such crimes?[173] The Court briefly, and somewhat implausibly, suggested that less severe sanctions were available: "An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization."[174] This argument, though, is relatively unpersuasive because these sanctions hardly seem adequate punishment for a first-degree murder. A firmer basis for rejecting this argument appeared in the rhetorical conclusion to the analytical portion of the opinion, in which the Court explained that "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence."[175] In substance, even if the state effectively is powerless to punish a particular crime, it cannot sentence people to death without according them a day in court to plead their own cases before the sentencer.

C. *Jurek Revisited:* Penry v. Lynaugh

As discussed above,[176] the Supreme Court's decision to uphold the Texas death penalty statute in *Jurek v. Texas*[177] was considerably more ambiguous than its decisions to uphold the Georgia statute in *Gregg v. Georgia*[178] and to invalidate the North Carolina statute in *Woodson v. North Carolina.*[179] In substance, the Court upheld the Texas statute based on its view of the types of evidence Texas courts would consider relevant to answering the statutory questions.[180] The decision posed a particularly difficult problem for the Court in later years because it became clear that the statute did not permit consideration of all of the factors deemed relevant in such cases as *Lockett* and *Sumner.*[181] The seriousness of Texas' problem was revealed by the Court's 1988 decision in *Franklin v. Lynaugh,*[182] in which the Court upheld a Texas death sentence by a 5-4 vote, with Justice O'Connor's decisive vote ex-

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173. *Id.*
174. *Id.* at 84.
175. *Id.* at 85.
176. Refer to discussion *supra* part III.C.
177. 428 U.S. 153, 207 (1976).
178. 428 U.S. 262, 276 (1976).
179. 428 U.S. 280, 305 (1976).
180. *See Jurek*, 428 U.S. at 269-76.
181. *See, e.g.*, Franklin v. Lynaugh, 487 U.S. 164, 182 (1988) (recognizing that the rule of *Lockett* is broader than the Texas scheme considered in *Jurek*).
182. 487 U.S. 164 (1988).

plained in a concurring opinion in which she concluded that the *Lockett* problem was not squarely presented because the defendant Franklin had not shown any relevant mitigating evidence that would have affected the result.[183]

The Court finally resolved this issue in *Penry v. Lynaugh*.[184] Speaking for a 5-4 majority, Justice O'Connor sharply limited *Jurek* to take account of the concerns expressed by the Court's decision in *Lockett*.[185] Penry presented substantial evidence that he was mentally retarded and had suffered abuse while a child.[186] He contended that these circumstances diminished his responsibility for the murder he committed but that the Texas statute—which asked the jury only a series of specific questions—prevented the jury from giving due consideration to these factors.[187] The Court agreed, describing "*Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced that was relevant to the defendant's background, character, and to the circumstances of the offense."[188]

The Court then examined the evidence Penry introduced and its relation to the special issues presented to the jury. The first special issue asked whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased . . . would result."[189] Although Penry's evidence may have been relevant to this question because it cast some doubt upon his ability to form a sufficiently firm intent to commit a "deliberate" act, the Court concluded that Penry's evidence

> "had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]." Personal culpability is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed [the victim] to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but

183. *Id.* at 184-85 (O'Connor, J., concurring).
184. 492 U.S. 302 (1989).
185. *See id.* at 328 (finding the Texas scheme insufficient because of its failure to give weight to potentially mitigating evidence as required by *Lockett*).
186. *See id.* at 307-10.
187. *See id.* at 310-11, 322.
188. *Id.* at 321.
189. *Id.* at 322.

who acted "deliberately" as that term is commonly understood.[190]

The second special issue asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[191] Penry's evidence was relevant to this point "only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness."[192] The Court found this unsatisfactory because "Penry's mental retardation and history of abuse . . . may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[193] It approved of Judge Reavley's comments for the Fifth Circuit: "What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? . . . [The second question] did not allow the jury to consider a major thrust of Penry's evidence as *mitigating* evidence."[194]

Thus, it is clear that the questions presented to the sentencer at Penry's trial did not allow mitigating force to be given to all of the mitigating evidence.[195] In response to what seems an obvious violation of *Lockett*, the state argued that authorizing the jury to "render a discretionary grant of mercy . . . would be to return to the sort of unbridled discretion that led to *Furman v. Georgia*."[196] The Court disagreed.[197] First, it repeated the explanation offered by the plurality in *Gregg v. Georgia* that, even though the "'decision to impose [the death penalty] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant,' . . . there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant."[198] It then explained, with some arguable inconsistency, that the jury must be allowed to "'*decline to impose* the death sentence' [so that it can] give effect to mitigating evi-

190. *Id.* at 322-23 (quoting Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) and California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (some brackets in original) (citations omitted).
191. *Id.* at 323.
192. *Id.*
193. *Id.* at 324.
194. *Id.* (quoting Penry v. Lynaugh, 832 F.2d 915, 925 (5th Cir. 1987)).
195. Indeed, the State conceded as much at oral argument. *See id.* at 326.
196. *Id.*
197. *Id.*
198. *Id.* at 326-27 (quoting Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

dence relevant to a defendant's character or record or the circumstances of the offense," even though that effect necessarily causes its judgment to depart from the standards described above as being constitutionally required.[199]

This type of explanation cannot logically be reconciled with a reading of *Furman* as standing for a consistency-based principle. If *Furman* did establish such a mandate, then *Penry* seems to create a defendant-biased jurisprudence finding consistency important only in the process of imposing sentences (that is, when inconsistency *hurts* defendants) and finding inconsistency that *aids* defendants (that is, by granting mercy) to be constitutionally mandated.[200] The individualized-consideration principle described in this article explains the cases in a more satisfactory manner. *Gregg* and *Lockett* are two aspects of that one principle: *Gregg* requires guidance so that the sentencer will have some notion of how to consider the defendant's circumstances; *Lockett* requires that the defendant be permitted to introduce mitigating evidence so that the jury will have the evidence it needs to accord the defendant that consideration. The Texas statute struck down in *Penry* impermissibly limited the nature of the evidence that could enter into the decision of the sentencer.

After this article was in page proofs, the Supreme Court decided *Graham v. Collins*.[201] In that case, the court rejected a claim raised by a defendant under *Penry*, reasoning that the claim sought a "new rule" that a federal court could not recognize on habeas corpus under *Teague v. Lane*.[202] Although the decision technically holds only that Graham's claim sought a new rule, the Court's discussion of *Penry* strongly indicates that the Court will not interpret *Penry* as broadly as this article suggests.[203] In particular, *Graham* suggests that *Penry* adopted a special rule limited to cases in which the defendant presented mitigating evidence that had no relevance whatsoever to any of the Texas questions.[204] Because Graham's evidence had some relevance to the issue of dangerousness (although the question "did not allow the jury to consider a major thrust of

199. *Id.* at 327-28 (quoting McCleskey v. Kemp, 481 U.S. 279, 304 (1987)).

200. For a vigorous statement of the difficulty of reconciling those cases when they are read from the traditional perspective, see Walton v. Arizona, 110 S. Ct. 3047, 3063-64 (1990) (Scalia, J., concurring).

201. No. 91-7580 (U.S. Jan. 25, 1993).

202. 489 U.S. 288 (1989); *see Graham*, No. 91-7580 at 5-17.

203. *See Graham*, No. 91-7580 at 12-16.

204. *See id.* at 14.

evidence"[205]), the Court indicated in *Graham* that it would be consistent with *Penry* to apply the Texas statute as written, without offering the jury an additional basis to consider the evidence.[206]

V. NEW FRONTIERS: THE STATES ATTEMPT TO STRUCTURE THE JURY'S CONSIDERATION

Recent years have forced the Court on several occasions to attempt to apply the principles established above in new sorts of cases.[207] Now that the Court has made it clear that the Eighth Amendment's requirement of an individualized decision leaves little room for the states to limit the bases on which the defendant can attempt to individualize himself to the jury, the states increasingly are testing their ability to structure other aspects of the decision-making process. This Part first explores two areas in which states have encouraged the jury to act rationally, whether by discouraging reliance on sympathy and other nonrational factors or by requiring the jury to have a basis for a decision to grant mercy.[208] This Part then considers efforts by states to balance the individualizing determination by attempting to introduce victim-impact evidence to establish the weight of the retributive interest in the death penalty and to offset the evidence the defendant uses to argue for mercy.[209]

A. *Anti-Sympathy Instructions*

One of the most troubling issues the Court has faced in its recent Eighth Amendment cases deals with so-called anti-sympathy instructions.[210] The Court first considered such an instruction in *California v. Brown*.[211] In that case, the instructions directed the jury to refrain from basing its sentencing decision on such matters as "'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'"[212] Although defendants argue that instructions like these violate

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205. *Penry*, 487 U.S. at 324
206. *Graham*, No. 91-7580 at 14.
207. Refer to discussion *supra* parts III and IV.
208. Refer to parts V.A. and V.B. *infra*.
209. Refer to part V.C. *infra*.
210. This type of instruction has produced three Supreme Court cases in the last five terms: Saffle v. Parks, 494 U.S. 484 (1990); Boyde v. California, 494 U.S. 370 (1990); and California v. Brown, 479 U.S. 538 (1987).
211. 479 U.S. 538 (1987).
212. *Id.* at 540 (quoting the trial court's instructions to the jury).

Lockett by prohibiting the jury from considering relevant mitigating evidence,[213] prosecutors contend that they further the constitutional mandate for rational and consistent sentencing established by *Furman* and *Gregg*.[214] In *Brown*, the Court upheld the anti-sympathy instruction, taken in context with another instruction, which directed the jurors to consider "'any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition.'"[215]

The Court's analysis in *Brown* proceeded by reaffirming that juror consideration of mitigating evidence is a "'constitutionally indispensable part of the process of inflicting the penalty of death.'"[216] The Court concluded that the instructions, taken as a whole, would not have led a reasonable juror to decline to consider this evidence.[217] The Court then explained that the disputed instruction permissibly directed the jury not to consider other evidence and thus "foster[ed] the . . . 'need for reliability in the determination that death is the appropriate punishment in a specific case.'"[218]

Justice O'Connor's separate concurrence made similar points.[219] She saw the case as one that "squarely present[ed] the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence": the consistency-based rule she saw in *Gregg* requiring standard-guided decision-making and the rule she saw in *Lockett* requiring that the sentencer must be permitted to consider all relevant mitigating evidence.[220] As had the Court, she reaffirmed the need for consideration of all relevant mitigating evidence because "punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to

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213. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 492 (1990); *Brown*, 479 U.S. at 545-46.

214. *See, e.g., Saffle*, 494 U.S. at 493; *Brown*, 479 U.S. at 544.

215. *Id.* (quoting CAL. PENAL CODE § 190.3 (West Supp. 1987)).

216. *Brown*, 479 U.S. at 541 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

217. *Id.* at 542. As Justice Brennan argued in the bulk of his forceful dissent, this interpretation of the instructions certainly is subject to question. *See id.* at 547-60. For my purposes, though, the important question is the legal standard such instructions should convey to the sentencer, not whether the state has failed to convey that standard.

218. *Id.* at 543 (quoting *Woodson*, 428 U.S. at 305 (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

219. *Id.* at 544-46.

220. *See id.* at 544 (O'Connor, J., concurring).

the defendant's background, character, and crime rather than mere sympathy or emotion."[221] Also as had the Court, she nevertheless accepted the instruction "[b]ecause the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence."[222] From her perspective, the *Gregg* mandate is not offended by the use of an anti-sympathy instruction because the instruction actually furthers rationality and consistency; the *Lockett* mandate is satisfied because the procedures permit the sentencer to consider all mitigating evidence.

Justice O'Connor's analysis of the earlier cases is unsatisfactory. *Gregg* did not require procedures for the sake of rationality and consistency in decision-making, but rather to focus the attention of the sentencer on the moral issue at hand.[223] If the sentencer is not directed to pay attention and "listen" to the defendant's individual story,[224] infliction of the death penalty is nothing more than a cruel rejection of the human dignity of convicted defendants, pursuant to which the state discards these defendants as worthless without taking the time to consider on an individual basis whether the blanket judgment truly is justified. Put another way, *Lockett* does not establish a principle in tension with *Gregg*; it offers instead a further description of the items which the Constitution requires to be considered so that a decision is based on an adequate assessment of the defendant's individual circumstances.

California v. Brown is a difficult case to assess because it requires delineation not just of the types of evidence to be considered, as *Lockett* had, but of the type of consideration the sentencer must give to that evidence to prevent the decision from being cruel.[225] Justice O'Connor thoughtfully describes the desired result as a moral response from which the state legitimately may exclude purely emotional factors.[226] The term "emotional," though, is rather equivocal in this context. Justice O'Connor, like the Court, seems to use the term to refer only to random and irrelevant factors. It surely is correct that the Constitution permits, and in fact should encourage, states to discourage sentencers from basing their decisions on this

221. *Id.* at 545.
222. *Id.*
223. *See* Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).
224. *See* Eddings v. Oklahoma, 455 U.S. 104, 115 n.10 (1982) ("*Lockett* requires the sentencer to listen [to relevant mitigating evidence].").
225. *See* California v. Brown, 479 U.S. 538, 540-41 (1987).
226. *Id.* at 545.

type of factor.[227]

However, as Justice Blackmun cogently pointed out in dissent, it is difficult to contend that all "emotional" responses are irrelevant to the decision, at least if that decision is made the way we expect sentencers in our culture to decide:

> [W]e adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of "contemporary values," we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.
>
> In the real world, as in this case, it perhaps is unlikely that one word in an instruction would cause a jury totally to disregard mitigating factors that the defendant has presented through specific testimony. When, however, a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be "swayed" by sympathy well may arrest or restrain this humane response, with truly fatal consequences for the defendant.[228]

Because the Court interpreted the anti-sympathy instruction not to affect the sentencer's consideration of mitigating evidence, *California v. Brown* hardly can be read as a square holding permitting jurors to disregard the emotional impact mitigating evidence may have; but it certainly suggests that the Court is not terribly concerned about incidental limitations on that emotional impact.[229]

In its more recent decision in *Saffle v. Parks*,[230] the Court explored this issue further.[231] The Court there explained its conclusion, based on *Brown*, that it

> is no doubt constitutionally permissible . . . for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpa-

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227. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion of Stevens, J.) (noting that it is "of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than on caprice or emotion").

228. *Brown*, 479 U.S. at 562-63 (Blackmun, J., dissenting) (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

229. *See id.* at 543.

230. 494 U.S. 484 (1990).

231. The discussion in the case is *dictum* because it was made in the course of determining whether the relief sought by the plaintiff would require a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (1989). *See Saffle*, 494 U.S. at 487. Because the Court concluded that relief would have required a new rule, it declined to consider the habeas petitioner's claims on the merits. *See id.* at 486.

> bility of the defendant, and not an emotional response to the mitigating evidence." Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and non-arbitrary.[232]

This explanation, like the discussion in *Brown*, is somewhat ambiguous and arguably could be read to prohibit only emotional responses based on "the vagaries of particular jurors' emotional sensitivities"[233] as opposed to emotional responses based on the circumstances of the crime or the defendant. The Court went on, however, to address this point more specifically, describing Parks as arguing "that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence."[234] The Court did not expressly reject this argument, but it certainly expressed considerable hostility toward it, indicating that "we doubt that this inference follows from *Brown* or is consistent with our precedents."[235]

After *Saffle*, it seems clear that the Court is unlikely to impose significant restrictions on the ability of states to use anti-sympathy instructions. This inaction is not entirely inappropriate because the instructions certainly do further the constitutional mandate of having sentencers focus their attention on the individual circumstances of the crime and the defendant. For the reasons outlined in Justice Blackmun's dissenting opinion in *Brown*, however, these instructions pose a significant risk of confusing jurors regarding the nature of the evidence they should focus their attention on, thus causing the jurors to fail to exercise their judgment with respect to mitigating evidence that they might have found compelling.[236] On the other hand, notwithstanding the comments in *Saffle*, the Court should not abandon the individualized-consideration principle in this context: at a minimum, the Court should insist that, upon

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232. *Saffle*, 494 U.S. at 492-93 (some brackets by *Saffle* Court) (citation omitted) (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring)).

233. *Id.* at 493.

234. *Id.* at 494.

235. *Id.*

236. 479 U.S. at 562-63 (Blackmun, J., dissenting) (recognizing the inherent conflict between a juror's desire to be merciful toward a defendant in the presence of certain mitigating circumstances and an instruction telling the juror that her decision cannot be influenced by sympathy).

the request of a capital defendant, a trial judge should clarify the anti-sympathy instruction so that it does not undermine the jurors' power and obligation to make a reasoned, moral judgment about the weight of the mitigating evidence.[237]

B. *Requiring a Reason for Mercy:* Blystone v. Pennsylvania

In *Blystone v. Pennsylvania*,[238] the Court considered a related question when it upheld a Pennsylvania statute that requires the sentencer to impose a death sentence if it finds at least one aggravating circumstance and no mitigating circumstances.[239] The Court's analysis started from the precept set forth in *Penry* requiring that "'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.'"[240] The statute in question met this requirement because it did not limit the types of mitigating evidence that could be considered, provided an illustrative and nonexclusive list of potential mitigating factors, and included a catch-all category providing for the consideration of "'[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.'"[241] In response to these provisions the Court concluded that the statute was not "impermissibly 'mandatory' as that term was understood in *Woodson*" because

> [d]eath is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances.[242]

The principal issue in this case presents an easier variation

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237. Professor Sundby argues that the decision in *Brown* reflects a rejection of a system in which jurors would be permitted to rely on "intangibles based on human responses outside the traditional realm of logic and reason." Sundby, *supra* note 6, at 1198-99. Relying on his view of *Furman* as a condemnation of unbridled discretion, he argues that a contrary result would make the cases "even more difficult to reconcile." *Id.* at 1199. As the text indicates, this article's thesis that *Furman* is the fount of the individualized-consideration principle suggests exactly the opposite: that principle, as reiterated and expanded in *Lockett*, strongly suggests that the jury should be permitted to base its verdict on its emotional reaction to the mitigating evidence.

238. 494 U.S. 299 (1990).

239. *Id.* at 301.

240. *Id.* at 304-05 (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989)).

241. *Id.* at 305 (quoting 42 PA. CONS. STAT. § 9711(e)(8) (1988)).

242. *Id.* at 305.

of the question posed by the anti-sympathy instruction cases. In the anti-sympathy instruction cases, the Court has permitted states—in the pursuit of rationality—to attempt to limit the way in which jurors consider mitigating factors to exonerate a defendant.[243] In cases like *Blystone*, the state also has attempted to regulate the way in which jurors reach their decisions, but only by imposing a minimal requirement that the jurors have *some* basis for their decision not to impose the death penalty.[244] Surely if the state is permitted by the anti-sympathy instruction cases to prohibit as irrelevant to the sentencing decision certain emotional responses, it is entitled to prohibit decisions that are based on no articulable factor whatsoever, whether emotional or otherwise.

The principal argument raised by the dissent in *Blystone* is that the statute effectively provides for a mandatory death penalty in cases in which no mitigating evidence has been offered and the crime falls into the realm of offenses defined as capital crimes.[245] In such cases, the statute may deprive the defendant of the opportunity to convince the sentencer that the particular crime should not be one for which the death penalty is available.[246] If so, the Court's acceptance of this situation necessarily would include the conclusion that the constitutionally mandated individualized consideration need extend only to the question of whether there is any reason the jury should decline to impose the death sentence. Under this reading, the Constitution would not require the state to allow the jury independently to determine whether it agrees with the state's conclusion that the crime is one for which the death penalty should be available.

But it is not at all clear that the Pennsylvania statute so limits the sentencer's powers. The jury clearly has the authority to decline to impose the death sentence because of "[a]ny . . . evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."[247] Surely a jury that believed a defendant did not deserve to die would simply decline to impose the death sentence based on this provision.[248] Accordingly, it is difficult to read *Blystone* as a clear holding on this point.

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243. Refer to part V.A. *supra*.
244. *Blystone*, 494 U.S. at 307-08.
245. *Id.* at 313-24 (Brennan, J., dissenting).
246. *See id.* at 316 (Brennan, J., dissenting).
247. 42 PA. CONS. STAT. § 9711(e)(8) (1988) (quoted in *Blystone*, 494 U.S. at 305).
248. *But see Blystone*, 494 U.S. at 319 n.8 (Brennan, J., dissenting) (rejecting this argument).

C. *The Scope of the Decision: From* Booth v. Maryland *to* Payne v. Tennessee

One other way in which states have attempted to structure capital sentencing procedures involves the use of victim-impact statements, which describe the effects of a murder on those individuals close to the victim. In the 1987 case of *Booth v. Maryland*,[249] the Supreme Court held that the Eighth Amendment prohibited introducing a victim impact statement into evidence at a capital sentencing hearing, principally because the evidence was not related to "'the character of the individual and the circumstances of the crime'"[250] and had no "bearing on the defendant's 'personal responsibility and moral guilt.'"[251] Four years later, however, in *Payne v. Tennessee*,[252] the Court overruled *Booth* and held that the Eighth Amendment does not bar admission of victim-impact evidence at a capital sentencing hearing.[253]

These cases pose a fundamental question about the direction of the Court's Eighth Amendment jurisprudence regarding capital sentencing hearings: what is the scope of information relevant to the sentencer's decision? As the discussion above makes clear, the defendant may introduce any information that is relevant to the defendant's character or the circumstances of the crime.[254] Justice Stevens argued eloquently in *Payne* that this issue is the *only* one relevant in the capital sentencing proceeding, finding no relevance in the character and reputation of the victim and the effect of the crime on the victim's family because it is "irrelevant to the defendant's 'personal responsibility and moral guilt' and therefore cannot justify a death sentence."[255]

To the extent Justice Stevens is suggesting that the state can introduce no evidence on any topic other than the defendant's personal culpability, he is seeking to focus the inquiry more narrowly than the Court's earlier cases. Indeed, in the joint opinion in *Gregg v. Georgia*,[256] which he co-authored, the plurality explained that the sentencer should consider not only "'the circumstances of the offense'" but also "'the charac-

249. 482 U.S. 496 (1987).
250. *Id.* at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).
251. *Id.* at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
252. 111 S. Ct. 2597 (1991).
253. *Id.* at 2608-11.
254. Refer to part IV.A. *supra*.
255. *Id.* at 2628 (Stevens, J., dissenting) (quoting *Enmund*, 458 U.S. at 801).
256. 428 U.S. 153, 189 (1976).

ter and *propensities* of the offender.'"[257] Later that day in *Jurek v. Texas*,[258] the Court upheld a Texas death-sentencing scheme that focused the jurors' attention on three questions, the second of which asked the jurors to evaluate the defendant's future dangerousness.[259] The problem in reconciling these statements with Justice Stevens' position is that the defendant's propensities for future dangerousness—although traditionally relevant in assessing criminal sentences—have nothing to do with the defendant's culpability. Similarly, in *Skipper v. South Carolina*,[260] the Court required South Carolina to admit evidence related to the defendant's demeanor in prison *after* the crime—evidence not relevant to the defendant's culpability.[261] Accordingly, it was clear even before *Payne v. Tennessee* that the capital sentencing inquiry constitutionally could—and, in some circumstances, must—consider evidence on aspects of the defendant's character that are not relevant to the defendant's culpability.

In *Payne*, the Court went further, rejecting the approach to relevance set forth in *Booth* and concluding that the "'reasoned moral response'" to be made by the capital sentencing jury fairly could rest on consideration of a broader range of evidence.[262] The Court noted that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law"[263] and concluded that evidence of this kind is sufficiently relevant that a state constitutionally can allow it to be considered.[264] A contrary rule would "depriv[e] the State of the full moral force of its evidence and . . . prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."[265]

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257. *Id.* at 189 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)) (emphasis added).

258. 428 U.S. 262 (1976).

259. *Id.* at 276. As discussed above, the Court largely invalidated the Texas scheme in Penry v. Lynaugh, 492 U.S. 302 (1989), but that case turned on the Texas statute's *exclusion* of relevant mitigating evidence, not on its *admission* of evidence related to future dangerousness. Refer to part IV.C. *supra*. On this point *Jurek* is still valid.

260. 476 U.S. 1 (1986).

261. *See id.* at 11-14 (Powell, J., concurring) (arguing that the evidence does not "say anything necessarily relevant about a defendant's 'character or record,' as that phrase was used in *Lockett* and *Eddings*").

262. Payne v. Tennessee, 111 S. Ct. 2597, 2616 (1991) (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989)).

263. *Id.* at 2605.

264. *Id.* at 2608.

265. *Id.*

The key to understanding *Payne* lies in the basis for the Court's acceptance of the death penalty. As discussed above, the plurality in *Gregg* determined that the death penalty is acceptable to the extent that it is being imposed to further the retributive goals of society.[266] To the extent that retribution justifies a punishment based on society's desire to "pay back" the injury it has suffered,[267] the extent of the injury is relevant in determining the appropriate extent of the punishment. The most logical way to allow a detailed assessment of the injury to society—and thus to make the capital sentencing decision responsive to the level of injury inflicted by the defendant—is to allow the jury to evaluate the harm inflicted on a personal level, just as the Eighth Amendment *requires* that the jury be allowed to evaluate the defendant's circumstances on a personal level.[268] *Payne* reflects a determination, as a matter of constitutional law, that states are free to decide that evidence relevant to the extent of the state's retributive need for exacting the ultimate penalty may be as relevant to the sentencing decision as evidence regarding the defendant's character and personal circumstances.[269]

Regardless of this determination, of course, victim-impact evidence still has its problems. The opinion in *Booth* demonstrates with some persuasive force that evidence of this sort in many cases will be much more prejudicial and inflammatory than probative of any of the state's legitimate concerns.[270] Moreover, it certainly is unseemly for capital sentencing hearings to be reduced to mini-trials on the social value of the victim, which, even under *Payne*, must be thought of as having only marginal relevance. But, in the end, it is hard to see these concerns as relevant to the constitutional proscription on cruelty, which, at least in this context, seems to be principally directed at individualized consideration rather than consistency in

266. Refer to discussion *supra* part III.A.2.

267. As noted above, it is not at all clear that the Court's interpretation of the scope of the retribution rationale is identical with more traditional philosophical explications, but the extent of harm caused by the act seems to me to be relevant under either formulation. Refer to note 98 *supra*.

268. *See Payne*, 111 S. Ct. at 2608; Jurek v. Texas, 428 U.S. 262, 271-72 (1976).

269. *Payne*, 111 S. Ct. at 2609. Justice Powell made a similar argument in Skipper v. South Carolina, 476 U.S. 1 (1986), in which he argued that the state should be permitted to exclude evidence that was not relevant to determining the state's interest in retribution. *See Skipper*, 476 U.S. at 14 (Powell, J., concurring). Powell argued that a state could exclude evidence related to post-conviction behavior because "[s]ociety's interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence." *Id.*

270. *See* Booth v. Maryland, 482 U.S. 496, 506-08 (1987).

decision-making. In cases in which these concerns about undue prejudice have weight, they more properly should be considered under the Due Process Clause, a constitutional provision more customarily applied to ensure accuracy in decision-making and to prevent unfair prejudice.[271]

VI. CONCLUSION

As the history of these cases has shown, Eighth Amendment jurisprudence provides a fascinating example of the slow and gradual development of a constitutional doctrine. Ranging from its 1972 decision in *Furman*—when the Court instinctively rejected a system for reasons on which nobody could agree—to its 1976 decisions in the *Gregg* cases, when a rationale acceptable to three Justices began to emerge, to its 1978 decision in *Lockett*, in which the full meaning of the earlier cases finally was evidenced, the Court has shown a step-by-step path toward a doctrine that—even if not consciously known to the Justices when they wrote their opinions in *Furman*, and to some extent even in the *Gregg* cases—provides a more plausible explanation of those cases than most of the language in those cases themselves. Finally, the more recent cases show a Court that may be starting to drift from these principles as it struggles to apply them without a firm recollection of the basis for the original holdings. For the Court's decisions to be made more consistent, and its opinions to be made more persuasive, it must more directly and consciously address the principle that informed those decisions—a principle that treats as cruel any decision which sends a defendant to death without taking the time to consider the defendant's individual circumstances.

271. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2608 (1991) (stating that when evidence introduced is so prejudicial that it renders the trial fundamentally unfair, the Due Process Clause provides a mechanism for relief); *id.* at 2614-15 (Souter, J., concurring) (stating that a trial judge has the authority and responsibility to control trial proceedings in a manner consistent with due process, and if he fails to do so, the defendant may object and appeal on Fourteenth Amendment grounds).