

# The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes

---

*Chelsea Creo Sharon\**

## I. INTRODUCTION

In recent years, many commentators have noted the “illusory” nature of the death penalty in the United States, observing that, while the penalty is perceived to be broadly applied, it is in fact rarely imposed.<sup>1</sup> Indeed, over the last decade there has been a marked decline in the number of death sentences imposed across the nation: 106 offenders were sentenced to death in 2009, compared to the approximately 300 sentenced to death each year in the mid-1990s.<sup>2</sup> Yet, while death sentences have waned nationwide, state legislatures have crafted broad capital sentencing statutes designed to execute large numbers of defendants. In most states, a defendant cannot be eligible for the death penalty unless a jury finds that a statutorily enumerated aggravating factor applies to the defendant’s case.<sup>3</sup> However, the number and breadth of these aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states.<sup>4</sup> Thus, although most states sentence a small number of individuals to death each year,<sup>5</sup> their death

---

\* Harvard Law School, J.D. Candidate, 2011. Brown University, B.A., 2006. I would like to thank Professor Michael Klarman and Professor Carol Steiker for their valuable comments and insight, as well as the editors of the Harvard Civil Rights-Civil Liberties Law Review for their extraordinary guidance throughout the editing process.

<sup>1</sup> See, e.g., Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 29 (1984) (describing death sentences as “highly uncommon events”); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 3 (1995) (noting that due to declining execution rates, “we have little more than an illusion of a death penalty in this country”).

<sup>2</sup> See *Death Sentences By Year: 1977–2008*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2008> (last visited Aug. 22, 2010).

<sup>3</sup> See, e.g., IDAHO CODE ANN. § 19-2515(3) (West 2010) (“[A] sentence of death shall not be imposed unless . . . [t]he jury . . . finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance. . . .”). Aggravating factors may also be referred to as aggravating circumstances or eligibility factors. In California, the term “special circumstance” is used to express this concept. CAL. PENAL CODE § 190.2 (West 2010).

<sup>4</sup> See *infra* notes 67, 72–73 and accompanying text.

<sup>5</sup> In 2008, for example, most states with the death penalty sentenced fewer than five individuals to death. See *Death Sentences in the United States from 1977 to 2008*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Aug. 22, 2010).

penalty statutes make it possible for nearly every murderer to be eligible for this penalty.

When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily. This arbitrariness motivated the Supreme Court's temporary invalidation of the death penalty in 1972 in *Furman v. Georgia*.<sup>6</sup> In the words of Justice Stewart, the petitioners in *Furman* were a "capriciously selected random handful" of the many defendants who could have faced execution.<sup>7</sup> Four years later, the Court reinstated the death penalty in *Gregg v. Georgia*,<sup>8</sup> concluding that the revised Georgia statute adequately guided jurors' discretion by requiring them to find at least one statutory aggravating factor before the defendant could be eligible for the death sentence.<sup>9</sup> In *Zant v. Stephens*,<sup>10</sup> the Court set forth a narrowing requirement for these aggravating factors, explaining that such factors must "genuinely narrow" the class of offenders eligible for the death penalty to a smaller group of offenders deemed particularly deserving of death.<sup>11</sup> The Court believed that, by limiting death eligibility in this fashion, considerations of culpability would be more likely to drive sentencing decisions than arbitrary or discriminatory considerations.<sup>12</sup>

This Note argues that the proliferation of aggravating factors in state death penalty statutes violates the narrowing requirement set forth in *Zant* and constitutes a wholesale retreat from the principles of *Furman*. As Part II explains, the Court's narrowing jurisprudence requires states to limit the death-eligible class to a subset of particularly culpable offenders for whom jurors and prosecutors will more consistently deem death sentences to be warranted. Part III argues that death penalty statutes with a litany of aggravating factors violate this command, rendering death eligible the vast majority of murderers, many of whom cannot be classified as the "worst" offenders, and thus increasing the risk of arbitrary capital sentencing. Part IV explains that, despite the constitutional concerns these statutes raise, courts have consistently refused to invalidate them and have failed to require that meaningful narrowing take place. Part IV further suggests that this failure stems from courts' inability to find a coherent and politically palatable methodology for assessing a statute's breadth and for determining what factors properly render a defendant deserving of death. Part V offers solutions

---

<sup>6</sup> 408 U.S. 238 (1972).

<sup>7</sup> *Id.* at 309–10 (Stewart, J., concurring). Each of the nine Justices wrote separately in *Furman* and none of the five Justices in the majority joined another's opinion. The opinions of Justices Stewart, White, and Douglas controlled the outcome and are cited as representing the holding of *Furman*. See James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1614 (2006).

<sup>8</sup> 428 U.S. 153 (1976) (plurality opinion).

<sup>9</sup> *Id.* at 206–07.

<sup>10</sup> 462 U.S. 862 (1983).

<sup>11</sup> *Id.* at 877.

<sup>12</sup> See *infra* notes 41–56 and accompanying text.

for overcoming these obstacles, proposing methods courts should adopt to ensure that death eligibility is confined to only the most heinous offenders.<sup>13</sup>

## II. THE NARROWING REQUIREMENT: REDUCING THE RISK OF ARBITRARINESS BY LIMITING DEATH ELIGIBILITY TO THOSE OFFENDERS MOST DESERVING OF DEATH

The narrowing requirement demands that aggravating factors limit the death-eligible class to the most heinous offenders, whom jurors are likely to deem especially deserving of death sentences. This requirement sprang from the Court’s concerns in *Furman* that so many offenders were eligible for the death penalty and that jurors were given so little guidance regarding which offenders to sentence to death that jurors used arbitrary or discriminatory considerations.<sup>14</sup> The Court’s primary solution for this risk of arbitrariness was to restrict jurors’ discretionary decisionmaking to cases involving a smaller class of offenders who were particularly death worthy.<sup>15</sup> The Court believed that if the death-eligible class were “genuinely narrow[ed]”<sup>16</sup> to only the most heinous offenders, jurors would impose the death sentence more consistently, on the basis of heightened culpability, rather than pure caprice or discriminatory considerations.<sup>17</sup>

In describing the narrowing requirement as a means to reduce arbitrariness by confining the death-eligible class to the most culpable offenders, this Note coheres with most scholarship in the field. Many scholars have envisioned the narrowing requirement in qualitative terms, as a command that states render death eligible only the “worst of the worst” offenders.<sup>18</sup> Others have seen the requirement as containing both qualitative and quantitative prongs, such that states must not only identify a more culpable group of offenders, but must also ensure that this group is substantially smaller than the universe of all first-degree murderers.<sup>19</sup> Still others have framed the nar-

---

<sup>13</sup> This Note’s proposal of methods for improving capital sentencing statutes should not be read as an endorsement of capital punishment. While adequately narrowing the class of death-eligible offenders is a constitutionally required first step towards reducing the arbitrariness that plagues capital sentencing, this reform is not necessarily preferable to abolishing the death penalty entirely.

<sup>14</sup> See *infra* notes 30–40 and accompanying text.

<sup>15</sup> See *infra* notes 41–56 and accompanying text.

<sup>16</sup> *Zant*, 462 U.S. at 877.

<sup>17</sup> See *infra* notes 41–56 and accompanying text.

<sup>18</sup> See, e.g., Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 642 (1994) (“This ‘narrowing’ ensures that this qualitatively different punishment [of death] is imposed only upon those defendants who are most deserving of the harshest sanction possible.”); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 372 (1995) (describing narrowing as a doctrine “designed to ensure that only those who are most deserving of the death penalty are eligible to receive it”).

<sup>19</sup> See, e.g., Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 351 (1984) (“[T]here are two requirements for a valid statutory aggravating circumstance: first, it must limit the class of murders

rowing requirement in terms of the outcome it seeks to achieve: consistency in death sentencing.<sup>20</sup> Most notably, Steven Shatz and Nina Rivkind have argued that the narrowing requirement's core command is consistent treatment of offenders. In this view, aggravating factors must select a small group of murderers whom jurors will consistently deem death worthy.<sup>21</sup> All three of these approaches are consistent with this Note's focus on the arbitrariness-reducing function of the narrowing requirement: in order for jurors and prosecutors to make decisions on the basis of culpability rather than caprice, the death-eligible class must be a smaller, more heinous group of offenders for whom death sentences are in practice more regularly sought and imposed.

This Note does differ, however, from the vision of the narrowing requirement that many courts have articulated. As will be discussed in Part IV, courts often treat the narrowing requirement as a procedural formality, satisfied by the mere presence of an aggravating factor, no matter how broad the aggravator is or how many are listed. This conception is incorrect: the Supreme Court's narrowing jurisprudence is clearly substantive in nature, even if its mandate can be understood in multiple ways.

#### A. *The Narrowing Process*

Before delving into the Supreme Court's jurisprudence, it is important to understand the mechanics of the narrowing process. "Narrowing" the class of death-eligible offenders generally refers to the enumeration by a death penalty statute of aggravating factors, at least one of which a jury must find before the defendant can be eligible for a death sentence.<sup>22</sup> To understand how narrowing functions in practice, one must examine the death penalty trial as a whole.

---

numerically and, second, it must represent a 'good reason' for choosing this defendant to be eligible for death."); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1125 (1990) (referring to a "quantitative requirement" that prohibits including "too many defendants" and a "qualitative requirement[ ]" that prohibits including defendants "who are not necessarily more deserving of the death penalty").

<sup>20</sup> See, e.g., Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 321 (2009) ("The purpose of statutory aggravators is to significantly narrow the immense discretion that prosecutors wield in making decisions to seek the death penalty and juries wield in making decisions to impose the death penalty."); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 749 (2007).

<sup>21</sup> See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1289 (1997) (arguing that *Furman* was a mandate to states to limit the death-eligible pool to those whom jurors sentenced to death at least 20% of the time). Shatz and Rivkind's approach is most consistent with this Note's in that they focus on the end result that narrowing aims to achieve—consistency in sentencing—rather than viewing narrowing as an end in itself. I am particularly indebted to their scholarship for guiding my thinking in this respect.

<sup>22</sup> See Rosen, *supra* note 19, at 1122.

In most states that authorize the death penalty, the process of imposing a death sentence consists of four main decisional points.<sup>23</sup> The first is the charging decision: the prosecutor must decide whether to seek the death penalty by charging the defendant with capital murder or instead avoid the death penalty by charging the defendant with non-capital murder. Because in most states a broad range of first-degree murders qualifies as capital crimes,<sup>24</sup> the prosecutor often has discretion whether to seek the death penalty.

The jury makes the second main decision: whether to convict the defendant of the capital murder. If the defendant is convicted, the case progresses to a sentencing proceeding, where the jury hears aggravating and mitigating evidence about the defendant and the circumstances of the crime.<sup>25</sup> The jury then makes the third main determination: whether the evidence supports a finding of one of the statutory aggravating factors so as to render the defendant eligible for the death penalty.<sup>26</sup> If the defendant is deemed eligible, the jury then makes its fourth and final decision: whether the particular defendant, in light of all the aggravating and mitigating evidence, deserves to be executed. For ease of reference, this Note refers to the third determination of whether a statutory aggravator exists as the “eligibility” stage and the fourth determination of whether the death penalty should be imposed as the “selection” stage.<sup>27</sup>

Statutory aggravating factors thus constrain discretionary decision-making at two stages of this process. First, prosecutors make a predictive decision in seeking the death penalty that a jury will find at least one of these aggravating factors applicable to the defendant’s case.<sup>28</sup> Second, jurors may not impose the death penalty without first determining that a defendant is death eligible based on the existence of at least one statutory aggravating

---

<sup>23</sup> For a general explanation of death-sentencing decisionmaking, see David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1, 3–4 (2009). For the sake of brevity, this Note’s description of the narrowing process necessarily sacrifices some of the complexity of the many different approaches to death penalty procedure that states have adopted.

<sup>24</sup> See Steiker & Steiker, *supra* note 18, at 374. Some states provide a more restrictive definition of capital murder by including only a more limited subset of first-degree murders. States with a sufficiently narrow definition of capital murder need not narrow again through the use of aggravating factors. See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding that because Louisiana’s definition of capital murder was limited to five narrower categories of murders, there was no requirement that statutory aggravating factors further narrow the class of death-eligible offenders).

<sup>25</sup> Death penalty trials are typically bifurcated, with separate guilt and sentencing proceedings. While the Supreme Court has never overturned its holding in *Crompton v. Ohio* that bifurcation is not constitutionally required, 402 U.S. 183, 221 (1971), all states now use a bifurcated model. Rosen, *supra* note 19, at 1122 n.50.

<sup>26</sup> This eligibility determination must be made by a jury, *Ring v. Arizona*, 536 U.S. 584, 609 (2002), but either a judge or jury may decide whether or not to actually impose the death penalty, *id.* at 612–13 (Scalia, J., concurring). For ease of reference, this Note uses the term “jurors” to describe those who make the final decision whether to impose the death sentence.

<sup>27</sup> See *Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994) (using this terminology).

<sup>28</sup> See McCord, *supra* note 23, at 3.

R

R

factor. The narrowing requirement seeks to ensure that aggravating factors adequately perform this function of constraining discretion and reducing arbitrariness in death penalty decisionmaking.

*B. Furman's Concern with Arbitrary Sentencing*

The narrowing requirement sprang from the concern in *Furman v. Georgia*<sup>29</sup> that the death penalty was being administered arbitrarily and capriciously, under statutes that conferred unfettered discretion on juries and prosecutors to determine who should be sentenced to death. Prior to *Furman*, state death penalty schemes rendered the vast majority of capital offenders eligible for the death penalty and provided no guidance as to how to select who should be executed.<sup>30</sup> In *Furman*, the Supreme Court held this framework unconstitutional, invalidating the death penalty as it then existed.<sup>31</sup> *Furman* consisted of nine separate opinions, with the five Justices in the majority diverging as to whether the death penalty was unconstitutional per se (the view of Justices Brennan and Marshall)<sup>32</sup> or unconstitutional as then applied (the view of Justices Stewart, White and Douglas).<sup>33</sup> While the sheer number of opinions in *Furman* hindered the articulation of a unified rationale, a common theme emerged from the opinions of Justices Stewart, White and Douglas, which controlled the outcome. Underlying all three opinions was a concern with the fact that, of the vast array of offenders eligible for execution, only a miniscule percentage was actually being sentenced to death,<sup>34</sup> and a corresponding fear that jurors were choosing these few offenders on an arbitrary and discriminatory basis. As Justice Stewart explained, “of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>35</sup> Thus, Justice Stewart’s main concern was that death sentences were “cruel and unusual in the same way that being struck by lightning is cruel and unusual”<sup>36</sup>—instigated by mere chance rather than considered judgments of desert.

Justice White agreed that the infrequency of death sentences was indicative of a situation where there was “no meaningful basis for distinguishing

---

<sup>29</sup> 408 U.S. 238 (1972).

<sup>30</sup> Sentencing decisions were typically left to the full discretion of jurors, to be made according to their conscience. See Steiker & Steiker, *supra* note 18, at 364–65.

<sup>31</sup> *Furman*, 408 U.S. at 239–40.

<sup>32</sup> *Id.* at 305 (Brennan, J., concurring); *id.* at 358–60 (Marshall, J., concurring).

<sup>33</sup> *Id.* at 256–57 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310–11 (White, J., concurring).

<sup>34</sup> *Furman* cited studies finding that only 15 to 20% of those convicted of murder in states where capital punishment was authorized were actually sentenced to death. 408 U.S. at 386 n.11 (Burger, C.J., dissenting); see also Shatz & Rivkind, *supra* note 21, at 1288.

<sup>35</sup> 408 U.S. at 309–10 (Stewart, J., concurring).

<sup>36</sup> *Id.* at 309.

the few cases in which [the death penalty] is imposed from the many cases in which it is not.”<sup>37</sup> In addition, he was concerned that infrequency of the imposition of the death penalty undermined the penalty’s ability to serve as “a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.”<sup>38</sup>

For Justice Douglas, the problem with selecting only a few defendants from the many death-eligible defendants was the risk that these choices would be based on impermissible factors like race or class. He believed the pre-*Furman* framework was “pregnant with discrimination,”<sup>39</sup> giving rise to a situation where death sentences were “disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”<sup>40</sup>

Thus, these three Justices in *Furman* were concerned with the fact that the vast majority of capital offenders were death eligible, that very few of those eligible were sentenced to death, and that no mechanisms guided jurors to select those who were most deserving of a death sentence.

### C. *The Emergence of the Narrowing Requirement as a Response to Furman’s Concerns*

Following *Furman*, states moved swiftly to revise their death penalty statutes.<sup>41</sup> While fifteen states enacted mandatory death-sentencing schemes,<sup>42</sup> the remaining states adopted “guided discretion”<sup>43</sup> statutes that required the finding of at least one statutory aggravating factor before the death penalty could be imposed.<sup>44</sup> Four years after *Furman*, the Court upheld this model in *Gregg v. Georgia*,<sup>45</sup> a plurality opinion authored by Justice Stewart and joined by Justices Powell and Stevens. The *Gregg* plurality praised the aggravating factor requirement for restricting jurors’ discretion

---

<sup>37</sup> *Id.* at 313 (White, J., concurring).

<sup>38</sup> *Id.* at 311.

<sup>39</sup> *Id.* at 257 (Douglas, J., concurring).

<sup>40</sup> *Id.* at 249–50 (quoting THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

<sup>41</sup> See Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81, 83 (Austin Sarat ed., 1999) (noting that within two years of *Furman*, twenty-eight states had adopted new death penalty statutes).

<sup>42</sup> Packer, *supra* note 18, at 643. Mandatory death-sentencing schemes require the imposition of the death penalty upon a conviction for a capital crime. The Court later invalidated such schemes. See *infra* note 45.

<sup>43</sup> See *Walton v. Arizona*, 497 U.S. 639, 659 (1990) (describing *Gregg v. Georgia* as upholding three “guided discretion” death penalty schemes against Eighth Amendment challenge).

<sup>44</sup> Simon & Spaulding, *supra* note 41, at 83–84.

<sup>45</sup> 428 U.S. 153 (1976) (plurality opinion). The Court also decided four other cases on the same day it decided *Gregg*. *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), approved variations on the “guided discretion” schemes addressed in *Gregg*. *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), invalidated mandatory death-sentencing schemes.

R

R

R

and making it less likely that they would act “wantonly and freakishly.”<sup>46</sup> Justice White’s concurring opinion argued that this feature would also counteract the infrequency of death sentences characteristic of pre-*Furman* sentencing. In his view, as the types of murders that were death eligible became “more narrowly defined and . . . limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement,” jurors would be more likely to “impose the death penalty in a substantial portion of the cases so defined.”<sup>47</sup> Thus, *Gregg* envisioned a death penalty scheme in which aggravating factors genuinely narrowed the scope of jurors’ discretion to a smaller, more culpable subset of offenders for whom death sentences would be more consistently imposed.

In *Zant v. Stephens*,<sup>48</sup> the Court formally articulated the narrowing function that *Gregg* suggested aggravating factors would fulfill. The defendant in *Zant* argued that his death sentence should be vacated because one of the aggravating factors that jurors considered at the selection stage was later ruled unconstitutionally vague by the Georgia Supreme Court.<sup>49</sup> The Court refused to vacate the sentence, concluding that aggravators were only required to narrow at the eligibility stage and not to “channel” jurors’ discretion<sup>50</sup> at the selection stage in deciding whether to ultimately impose the death penalty.<sup>51</sup> Because two other valid aggravating factors had been found at the eligibility stage, there was no constitutional flaw.<sup>52</sup>

In describing when and how aggravating factors were required to narrow, Justice Stevens, writing for the Court, noted that *Gregg*’s holding that the Georgia statute “adequately protected against the wanton and freakish imposition of the death penalty” rested on the assumption that aggravating factors would truly guide jurors’ discretion.<sup>53</sup> In what would become the canonical statement of the narrowing requirement, Justice Stevens explained that, to “avoid th[e] constitutional flaw” of arbitrary sentencing, aggravating factors “must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>54</sup> *Zant* thus suggested that aggravating factors could only serve their “constitutionally necessary function”<sup>55</sup> of preventing arbitrariness if they demarcate

---

<sup>46</sup> 428 U.S. at 206–07 (plurality opinion).

<sup>47</sup> *Id.* at 222 (White, J., concurring).

<sup>48</sup> 462 U.S. 862 (1983).

<sup>49</sup> *Id.* at 864. The invalid aggravator was that the defendant had a “substantial history of . . . assaultive . . . convictions.” *Id.* at 865–67.

<sup>50</sup> *Gregg* had praised Georgia’s statute for “channeling” jurors’ discretion at the selection stage through the guidance of aggravating factors. 428 U.S. at 206–07 (plurality opinion).

<sup>51</sup> 462 U.S. at 878–89.

<sup>52</sup> *Id.* at 879.

<sup>53</sup> *Id.* at 876–77 (citing *Gregg*, 428 U.S. at 206–07 (plurality opinion)).

<sup>54</sup> *Id.* at 877.

<sup>55</sup> *Id.* at 878.



a class of offenders particularly deserving of death, for whom a more severe sentence would be “reasonably justif[ied].”<sup>56</sup>

*D. The Narrowing Requirement as the Sole Means of Guiding Discretion in Capital Sentencing*

The abandonment in *Zant* of any requirement that discretion be channeled at the selection stage<sup>57</sup> rendered the narrowing requirement the sole constitutionally mandated means of constraining discretion in the capital sentencing process. This abandonment of channeling was largely inevitable due to the Court’s individualized sentencing requirement, which prevented a sentencing procedure from “preclud[ing] consideration of relevant mitigating factors” at the selection stage.<sup>58</sup> The Court realized that the unregulated nature of individualized sentencing “exploded whatever coherence the notion of ‘guided discretion’ once had.”<sup>59</sup>

The Court’s response to this impasse was to transfer its efforts to guide discretion to the eligibility stage, entrusting the narrowing requirement with the entire responsibility for reducing arbitrariness in sentencing. It intended narrowing to serve as a substitute for channeling by providing the “meaningful basis” for distinguishing among offenders found lacking in *Furman*.<sup>60</sup>

---

<sup>56</sup> *Id.* at 877. The footnote immediately following this formulation of the narrowing requirement invoked several cases enshrining the notion that the death penalty should be reserved for the worst offenders. For example, the Court cited to Justice Brennan’s opinion in *Furman* noting that “it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment,” *id.* at 877 n.15 (quoting *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring)), and to the *Gregg* plurality’s assertion that capital punishment should be limited to “extreme cases” that are “so grievous an affront to humanity that the only adequate response may be the penalty of death,” *id.* (quoting *Gregg*, 428 U.S. at 184 (plurality opinion)). Subsequent cases have also framed the *Zant* requirement as demanding that aggravating factors capture only the most culpable offenders. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))); *Atkins*, 536 U.S. at 319 (“[O]ur narrowing jurisprudence . . . seeks to ensure that only the most deserving of execution are put to death.”); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (“[A]ggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not.”).

<sup>57</sup> *See supra* notes 48–52 and accompanying text.

<sup>58</sup> *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *see also Penry v. Lynaugh*, 492 U.S. 302, 319–20 (1989); *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976).

<sup>59</sup> *Walton v. Arizona*, 497 U.S. 639, 661 (1990) (Scalia, J., concurring); *see also Steiker & Steiker, supra* note 18, at 392 (“‘Kill him if you want’ and ‘Kill him, but you may spare him if you want’ mean the same thing in any man’s language.” (quoting Brief Amici Curiae of the NAACP Legal Defense and Educ. Fund, Inc. and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 71-203))).

<sup>60</sup> *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring); *see, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (“Our response to this [tension between these doctrines] has been to insist upon confining the instances in which capital punishment may be imposed.”); *Callins v. Collins*, 510 U.S. 1141, 1152 (1994) (Blackmun, J., dissenting from denial of certiorari) (“The theory [for reconciling the two doctrines is that] the demands of

R

R

Thus, the Court's conclusion that narrowing alone could adequately guide discretion hinged on the assumption that aggravating factors would draw principled distinctions that would enable jurors to select those most deserving of death.<sup>61</sup>

The Supreme Court's narrowing jurisprudence thus establishes a "constitutionally necessary function"<sup>62</sup> for aggravating factors: they must limit the death-eligible class to the most culpable offenders, for whom jurors will more consistently deem death sentences to be justified.

### III. THE RISE OF EXPANSIVE CAPITAL SENTENCING STATUTES AND THE ABANDONMENT OF THE NARROWING FUNCTION OF AGGRAVATING FACTORS

Aggravating factors frequently fail to perform this constitutionally required function designated for them by *Furman* and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder and are motivated more by political exigency than careful efforts to identify those who are most culpable.

#### A. *The Rise of Expansive Death Penalty Statutes*

In their efforts to draft death penalty statutes that complied with *Furman*, most state legislatures adopted the Model Penal Code's guided discretion model, which specified eight aggravating factors and required the jury to find at least one such factor before a defendant could be death eligible.<sup>63</sup> However, since the initial drafting of post-*Furman* statutes, aggravating factors "have been added to capital statutes . . . like Christmas tree ornaments,"<sup>64</sup> rendering more and more offenders eligible for the death penalty. Throughout the 1980s and 1990s, state legislatures added a series of

---

Furman are met by 'narrowing' the class of death-eligible offenders according to objective, fact-bound characteristics . . . . Once the pool of death-eligible defendants has been reduced, the sentencer retains the discretion to consider whatever relevant mitigating evidence the defendant chooses to offer.").

<sup>61</sup> Justice Stevens in particular has championed the view that the discretion mandated by individualized sentencing is less problematic when confined to the most heinous offenders. See *Walton*, 497 U.S. at 716 (Stevens, J., dissenting) (arguing that, if aggravating factors identify a small class of extremely serious crimes, this may sufficiently reduce the "risk of arbitrariness . . . even if a jury is then given complete discretion to show mercy" to individual defendants).

<sup>62</sup> *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

<sup>63</sup> See Simon & Spaulding, *supra* note 41, at 83–84. The eight Model Penal Code factors are available at Model Penal Code § 210.6 (Revised Commentary 1980). Many states also included a few additional aggravators, such as murders committed by lying in wait or murders committed against a witness in a judicial proceeding. See Jeffrey Fagan, Franklin E. Zimring & Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1815 (2006).

<sup>64</sup> Simon & Spaulding, *supra* note 41, at 82.

R

R

factors addressing drug offenses and criminal gang membership and drive-by shootings.<sup>65</sup> Since then, state legislatures have continued to expand their lists of aggravating factors, with more than twenty states making additions since 1995.<sup>66</sup> The vast majority of death penalty statutes list ten or more aggravating factors and more than fifty such factors appear in total in death penalty statutes across the country.<sup>67</sup>

Several commentators have expressed concern about this proliferation of aggravating factors, describing these “ever-expanding lists of ever-more-broadly interpreted capital eligibility factors” as the “most significant remaining flaw in the administration of the capital justice system . . . .”<sup>68</sup> Reform commissions tasked with improving state capital punishment systems have also recommended that statutory lists of aggravators be significantly reduced.<sup>69</sup>

However, state legislatures have proved largely unwilling to address these concerns and recommendations. For example, although a reform commission in Illinois unanimously recommended reducing the state’s list of aggravating factors, this proposal was excluded from a death penalty reform bill passed by the state legislature.<sup>70</sup> James Liebman and Lawrence Marshall observe that “[e]ven as many legislatures have examined flaws in their death-penalty systems, and even as study commissions have called for narrowed capital-eligibility criteria, the states have taken virtually no steps to restrict their statutory lists of factors . . . .”<sup>71</sup>

<sup>65</sup> *Id.* at 91; Fagan, Zimring & Geller, *supra* note 63, at 1815.

<sup>66</sup> Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 25 (2006) [hereinafter Kirchmeier, *Casting a Wider Net*]. Professor Kirchmeier has produced several analyses documenting the proliferation of aggravating factors in capital-sentencing schemes. See *id.*; Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 397–99 (1998) [hereinafter Kirchmeier, *Aggravating and Mitigating Factors*].

<sup>67</sup> Kirchmeier, *Casting a Wider Net*, *supra* note 66, at 39.

<sup>68</sup> Liebman & Marshall, *supra* note 7, at 1665. Even leading supporters of the death penalty agree that its use must be limited to the most culpable offenders. See, e.g., Kozinski & Gallagher, *supra* note 1, at 29 (“[W]idening the circumstances under which death may be imposed . . . will not do a single thing . . . to ensure that the very worst members of our society . . . are put to death.”); Robert Blecker, *Among Killers, Searching for the Worst of the Worst*, WASH. POST, Dec. 3, 2000, at B1 (“Our responsibility is to figure out who should be included in the small minority—the very worst of the worst—who deserve to die.”).

<sup>69</sup> Reform commissions in Illinois and Massachusetts have recommended reducing statutory lists of aggravators to just five or six factors. See REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 23–24 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/summary\\_recommendations.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf); MASS. GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT 6–12 (2004), available at <http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf> [hereinafter Massachusetts Report].

<sup>70</sup> Liebman & Marshall, *supra* note 7, at 1671.

<sup>71</sup> *Id.* at 1658.

R

R

R

R

R

*B. Expansive Statutes Fail to Narrow the Death-Eligible Class to the “Worst” Offenders*

*1. Near-Universal Death Eligibility Prevents Meaningful Narrowing Based on Culpability*

Expansive death penalty statutes fail to circumscribe a particularly blameworthy group of offenders because they do not carve out a subset at all, instead listing so many aggravating factors that nearly every murderer becomes death eligible. A study by the Baldus group concluded that 86% of all persons convicted of murder in Georgia over a five-year period were death eligible under the state’s post-*Furman* statute.<sup>72</sup> Studies in other states reveal similarly broad scopes of death eligibility.<sup>73</sup>

Indeed, creating near-universal death eligibility may be the goal of some state legislators. The Voters’ Pamphlet in support of the 1977 Briggs Initiative, which more than doubled California’s list of aggravating factors,<sup>74</sup> defended the measure as follows: “[I]f you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature’s weak death penalty law does not apply to every murderer. Proposition 7 would.”<sup>75</sup>

In addition, many of the individual aggravating factors that appear in these lengthy statutory lists are themselves so broad as to be capable of application to nearly every offender. Two prime culprits are the felony murder aggravator, which applies to murders committed in the course of felonies like arson, rape or robbery, and the “especially heinous, atrocious or cruel” aggravator, which denotes murders that are, in some subjective way, seen as more horrific than others.<sup>76</sup> The extraordinary breadth of both of these aggravators is well documented, with studies revealing that these factors apply to most first-degree murders in a given state.<sup>77</sup>

---

<sup>72</sup> DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 268 n.31 (1990); Steiker & Steiker, *supra* note 18, at 375.

<sup>73</sup> A recent study in Missouri concluded that 76% of those convicted of homicide were death eligible under the state’s statute. Barnes, Sloss & Thaman, *supra* note 20, at 309. In California, more than 90% of adults convicted of first-degree murder are death eligible. Steven Shatz, SUMMARY OF TESTIMONY AT THE PUBLIC HEARING ON THE FAIR ADMINISTRATION OF THE DEATH PENALTY 1 (2008), available at <http://www.ccfaj.org/documents/reports/dp/expert/Shatz%20Testimony.pdf> [hereinafter Testimony of Steven Shatz].

<sup>74</sup> Shatz & Rivkind, *supra* note 21, at 1312–13.

<sup>75</sup> *Id.* at 1310 (quoting STATE OF CAL., VOTER’S PAMPHLET 34 (1978)).

<sup>76</sup> The Supreme Court has required that “heinousness” factors be given a limiting construction to cure their breadth and vagueness. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 428–33 (1980). However, these limiting constructions are often themselves notoriously vague. *See* Richard Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 968 (1986).

<sup>77</sup> *See, e.g.*, David C. Baldus, Charles A. Pulaski, Jr. & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme*

R

R

R

Other aggravating factors apply to nearly all murderers because they replicate elements necessary for a first-degree murder conviction. For example, the “lying in wait” and “cold, calculated, and premeditated” aggravators by definition track premeditation and deliberation so closely that they arguably apply to all first-degree murders.<sup>78</sup> Judge McKeown of the Ninth Circuit has argued that the “lying in wait” aggravator performs no meaningful narrowing from the pool of all first-degree murders: while the “Constitution demands a funnel narrowing the pool of defendants eligible for the death penalty,” the aggravator “gives us a bucket.”<sup>79</sup>

Expansive lists of broadly defined aggravators thus fail to confine death eligibility to the most heinous offenders because they sweep the vast majority of murderers within their scope.

## 2. *Adoption of Aggravating Factors is Motivated by Considerations Other Than Culpability*

Even when aggravating factors do weed some offenders out of the death-eligible pool, the distinctions they draw frequently do a poor job of tracking culpability. Many such factors appear calculated to serve as symbolic gestures to particular victims rather than to isolate the worst murderers. Jonathan Simon and Christina Spaulding have described such aggravators as “tokens of our esteem”: methods of recognizing the suffering of particular victims by declaring their murders punishable by death.<sup>80</sup> While these aggravating factors may capture heinous offenders, the timing and manner of their adoption suggests that political exigency rather than reasoned judgment about comparative death-worthiness motivated their addition to death penalty statutes.<sup>81</sup> For example, many aggravating factors are adopted immediately after tragic murders<sup>82</sup> or apply to groups or situations that are so

---

*Courts*, 15 STETSON L. REV. 133, 138 n.14 (1986) (collecting studies); Barnes, Sloss & Thaman, *supra* note 20, at 323 tbl.2.2 (noting that “wantonly vile” aggravator is present in over 90% of all cases and felony murder aggravator in over 52%); McCord, *supra* note 23, at 1 (noting that more than 60% of defendants committed murder in the course of one of five predicate felonies, triggering death eligibility under the felony murder aggravator).

<sup>78</sup> See, e.g., *People v. Ballard*, 794 N.E.2d 788, 826 (Ill. 2002) (McMorrow, J., concurring) (noting the breadth of the “cold, calculated and premeditated” factor); Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. REV. 1249, 1275 (1996) (arguing that virtually all first-degree murders satisfy California’s “lying in wait” aggravator).

<sup>79</sup> *Morales v. Woodford*, 388 F.3d 1159, 1185 (9th Cir. 2004) (McKeown, J., concurring in part and dissenting in part).

<sup>80</sup> Simon & Spaulding, *supra* note 41, at 82.

<sup>81</sup> See Kirchmeier, *Casting a Wider Net*, *supra* note 66, at 27–33 (arguing that aggravating factors were added for political reasons or in response to specific events).

<sup>82</sup> In Colorado, an aggravating factor that applied to pregnant victims was added immediately following the highly publicized murder of a young pregnant woman. See Kirchmeier, *Casting a Wider Net*, *supra* note 66, at 32. Similarly, in Florida, an aggravating factor for murders committed by sex offenders was passed as part of the Jessica Lunsford Act, which enacted harsher punishments for sex offenders following the death of a nine-year-old girl. See

R  
R

R  
R

R

specific or esoteric – such as murders committed with a remote stun gun,<sup>83</sup> murders of emergency medical technicians,<sup>84</sup> and murders of news reporters<sup>85</sup> – as to virtually compel the conclusion that such factors perform a primarily symbolic function of honoring particular victims.

Indeed, many legislators have justified the addition of new aggravators by pointing to the need to memorialize specific crimes or victims. For example, one state senator who proposed adding an aggravator in Illinois for “murders committed in the furtherance of gang activities” explained during floor debate that “the reason for the inclusion of this aggravating factor is the result of a circumstance that happened in the house district of Representative Mendoza” where a fifteen-year-old boy had been killed by gang members.<sup>86</sup> Similarly, when the Connecticut state legislature added an aggravating factor for murders of environmental conservation officers to the state’s death penalty statute, the debate centered on the comparative worthiness of victims rather than the comparative death-worthiness of offenders. One legislator justified the addition as follows: “[W]hen you list out public safety officers . . . and you include volunteer firemen, and you don’t include conservation officers, I think there’s a problem with that . . . . [I]t’s a matter of importance and a feeling of respect by those conservation officers who are putting their lives on the line.”<sup>87</sup> These legislators largely failed to address the question of whether those who killed conservation officers should be considered particularly deserving of death.<sup>88</sup>

The problem with adding aggravators to recognize particularly sympathetic victims is not that each individual’s death is not atrocious in its own right, but rather that the inquiry strays from the constitutionally mandated consideration of the comparative culpability of offenders. Rather than examining which categories of crimes reflect particularly depraved mental states of offenders, legislators often add aggravating factors in a piecemeal fashion to respond to the murders of individuals seen as in need of special recognition. In addition, the proliferation of such factors is hard to constrain. Because it is impossible to argue that one victim’s life is more valuable than another, there is pressure to add a new aggravating factor every time

---

*Florida Governor OKs Tough Child Molester Bill*, MSNBC.COM (May 2, 2005), <http://www.msnbc.msn.com/id/7712095/>.

<sup>83</sup> ARIZ. REV. STAT. ANN. § 13-701(D)(22) (2010).

<sup>84</sup> TENN. CODE ANN. § 39-13-204(i)(9) (West 2010).

<sup>85</sup> WASH. REV. CODE ANN. § 10.95.020(12) (West 2010).

<sup>86</sup> Ill. 92d Gen. Assem., Regular Session Senate Transcript, May 15, 2001, at 44 (statement of Sen. Petka), available at <http://www.ilga.gov/senate/transcripts/strans92/ST051501.pdf>.

<sup>87</sup> Conn. Gen. Assem., House of Representatives Transcript for May 24, 2001 (statement of Rep. Boughton), available at [http://search.cga.state.ct.us/dtSearch\\_lpa.html](http://search.cga.state.ct.us/dtSearch_lpa.html) (search for “conservation” in year 2001 within “transcripts, house and senate”; then follow the hyperlink for the May 24, 2001 House Transcript).

<sup>88</sup> Some legislators did ask for clarification as to whether the perpetrator had to know that the victim was a conservation officer, but no legislators engaged in direct discussion about why such knowledge would render a defendant more heinous than other murderers. See *id.*

a high-profile murder occurs, causing death eligibility to steadily expand based on “a slippery slope of what-about-hims” designed to accommodate the “fundamental equality of each survivor’s loss.”<sup>89</sup>

Thus, aggravating factors frequently do not aim to isolate the most death-worthy offenders and are so broad and numerous as to apply to nearly every first-degree murder. As a result, many statutory schemes fail to narrow death eligibility to the most culpable offenders.

### C. *Expansive Statutes Give Rise to the Arbitrariness Condemned in Furman*

Empirical evidence about jury decisionmaking supports the hypothesis that aggravating factors fail to identify a particularly culpable subclass of defendants. As in *Furman*, only a miniscule percentage of the death eligible are sentenced to death,<sup>90</sup> suggesting that jurors and prosecutors view the majority of these offenders to be insufficiently heinous to justify imposing a death sentence.<sup>91</sup> When aggravating factors present juries and prosecutors with a broad class of offenders of average culpability, arbitrary and discriminatory considerations are more likely to be used in distinguishing among these offenders.<sup>92</sup> Indeed, studies suggest that death-sentencing decisions

---

<sup>89</sup> SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 114 (2003). Indeed, one Connecticut legislator responded to concerns about favoring certain victims by declaring her intent to render all murders death eligible. Conn. Gen. Assem., *supra* note 87 (statement of Rep. Diamantis (“I support [the aggravator] because I support adding everyone to the list . . . I think each and every life is equally as important.”)).

R

<sup>90</sup> It is important to note that this percentage can be calculated in at least two ways. One method is to calculate the percentage of death sentences among all convicted, death-eligible murderers whose cases proceed to a death penalty sentencing proceeding. The other method is to calculate the percentage of death sentences among all *prospectively* death-eligible cases (those for which a prosecutor could plausibly argue that a statutory aggravating factor is present). When this Note cites death-sentence rates, it will indicate which approach the studies adopted.

<sup>91</sup> In California, only about 4.8% of death-eligible murderers presently receive death sentences. Testimony of Steven Shatz, *supra* note 73 (calculating the percentage with relation to all prospectively death eligible). In Maryland, less than 6% of all death-eligible defendants received death sentences. See Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 1, 20 (2004) (calculating the percentage with relation to all prospectively death eligible). One study in South Carolina measured the percentage of prospectively death-eligible cases that resulted in capital charges, finding figures of less than 5% in two counties. See John H. Blume et al., *When Lightning Strikes Back: South Carolina’s Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 499–500 (2010).

R

<sup>92</sup> See *United States v. Cheely*, 36 F.3d 1439, 1445 (9th Cir. 1994) (“When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions . . . is too great.”); Massachusetts Report, *supra* note 69, at 10–11 (“If the statutory list is overly broad, then the discretionary decisions of prosecutors, judges, and juries must carry the entire burden of ensuring that the death penalty is applied narrowly and reasonably consistently.”).

R

tend to significantly correlate with the race of the victim and the location of the defendant's prosecution.<sup>93</sup> Thus, the proliferation of aggravating factors in death penalty statutes undermines the key goals of the narrowing requirement: to confine the discretion of prosecutors and jurors to those worst offenders who will more consistently be deemed deserving of a capital charge or a death sentence.

#### IV. THE FAILURE OF COURTS TO REQUIRE MEANINGFUL NARROWING BY DEATH PENALTY STATUTES

Despite the constitutional concerns these expansive statutes raise, the vast majority of courts have rejected narrowing challenges to such statutes. The refusal of courts to enforce rigorous narrowing has been two-fold: First, courts have approved aggravating factors that, alone or in combination, are so broad as to plausibly apply to every murderer. Second, courts have not required that aggravating factors designate a particularly culpable subset of offenders. The following discussion describes these failures in greater depth and analyzes why they have occurred. First, it argues that courts' approval of broad aggravating factors stems from courts' inability or unwillingness to discern a coherent methodology for measuring whether aggravators are impermissibly broad. Second, it argues that courts' failure to require that aggravating factors apply to only the "worst" offenders is due to the fact that courts are hesitant to second-guess state legislatures' determinations of what factors make a defendant death worthy.

##### A. Failure to Confine Statutory Breadth

###### 1. Approval of Broad Aggravating Factors and Statutory Schemes

Courts have approved particular aggravating factors that, alone or in combination, are so broad as to plausibly apply to every murder. For example, the Supreme Court has approved aggravating factors that apply to all defendants deemed to be "cold-blooded, pitiless slayers"<sup>94</sup> or to have committed "senseless" crimes.<sup>95</sup> State courts have also lent broad interpretations

---

<sup>93</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 355 (1987) (Blackmun, J., dissenting) (noting the Baldus group's conclusion that murdering a white victim makes an offender 4.3 times more likely to be sentenced to death); Paternoster et al., *supra* note 91, at 28–34 (finding capital-charging disparities based on geographic location); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 164 (2006) (same); Gross & Mauro, *supra* note 1, at 105 (finding capital-sentencing disparities based on race of the victim).

<sup>94</sup> *Arave v. Creech*, 507 U.S. 463, 475–78 (1993). The Court determined the "cold-blooded" language to be a sufficiently narrow limiting construction for an aggravating factor that asked whether the defendant "exhibited utter disregard for human life." *Id.*

<sup>95</sup> *Walton v. Arizona*, 497 U.S. 639, 694–97 (1990) (Blackmun, J., dissenting) (describing the broad interpretation by the Arizona Supreme Court of the "especially heinous" aggravator).



to aggravators that they considered constitutionally permissible. For example, the Missouri Supreme Court has applied the “pecuniary gain” aggravator, typically targeted at murders for hire, to all murders where theft was involved.<sup>96</sup> The Illinois Supreme Court, for its part, has interpreted the “cold, calculated and premeditated” aggravator to apply to defendants who deliberate for as little as three hours before committing their crimes.<sup>97</sup>

Courts have also approved statutory schemes that, by their sheer number of aggravating factors, are capable of applying to nearly every offender. State and lower federal courts have uniformly rejected challenges arguing that the sheer number of aggravating factors in a statute rendered it unconstitutional.<sup>98</sup> While some of these courts have dismissed such challenges with little analysis,<sup>99</sup> most have not rejected the premise that a statute *could* violate the narrowing requirement by listing so many aggravators that nearly all murders became death eligible.<sup>100</sup> Instead, as will be discussed next, most courts have based their rejection of such challenges on an inability to measure whether the statutory scheme in question was impermissibly broad.

## 2. Courts’ Flawed Methodologies for Measuring Statutory Breadth

Courts have often adopted incorrect or purely speculative methodologies for assessing whether aggravating factors are likely to render the majority of offenders death eligible. For example, the Supreme Court in *Arave v. Creech* surmised that a sentencing judge “might conclude” that every first-degree murderer is “pitiless” but “reasonably could find” that not all defendants are “cold-blooded.”<sup>101</sup> Similarly, the Ninth Circuit, in considering whether the “lying in wait” aggravator was unconstitutionally broad, ac-

<sup>96</sup> See Barnes, Sloss & Thaman, *supra* note 20, at 358–59.

<sup>97</sup> See *People v. Brown*, 661 N.E.2d 287, 303 (Ill. 1996).

<sup>98</sup> See, e.g., *Montoya v. Wong*, No. CIV S-06-2082-FCD-CMK-P, 2009 WL 2781024 (E.D. Cal. Aug. 31, 2009); *People v. Ballard*, 794 N.E.2d 788 (Ill. 2002); *State v. Steckel*, 708 A.2d 994 (Del. Super. Ct. 1996), *aff’d* 711 A.2d 5 (Del. 1998); *People v. Crittenden*, 885 P.2d 887 (Cal. 1994); *State v. Young*, 853 P.2d 327 (Utah 1993); *State v. Wagner*, 752 P.2d 1136 (Or. 1988). The Supreme Court has never been presented with such a challenge.

<sup>99</sup> See, e.g., *Karis v. Calderon*, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002) (summarily concluding that California’s aggravating factors “identif[y] a subclass of defendants deserving of death”); *People v. Carter*, 117 P.3d 544, 588 (Cal. 2005) (concluding with no analysis that the statutory aggravators “are not overinclusive by their number or by their terms”).

<sup>100</sup> See, e.g., *Ballard*, 794 N.E.2d at 826 (McMorrow, J., concurring) (suggesting that, if future statistics demonstrated high death-eligibility rates, statute might be unconstitutional); *Steckel*, 711 A.2d at 13 n.11 (noting that “too many aggravating circumstances may violate the principles enunciated in *Furman*” but concluding that such a “limit has not yet been reached in Delaware”); *Crittenden*, 885 P.2d at 933–34 (Mosk, J., concurring) (expressing concern about California’s high death-eligibility rate and reserving the question of whether this violates the Eighth Amendment); *Young*, 853 P.2d at 413 (Zimmerman, J., concurring in part and dissenting in part) (“This legislative lengthening of the list of aggravating circumstances has created a real danger that some of these factors will not make reasonable qualitative distinctions between those murders that are eligible for the death penalty and those that are not, thus violating the standards fixed by the federal constitution for imposing the death penalty.”).

<sup>101</sup> 507 U.S. 463, 475–76 (1993).

cused the dissent of being “unimaginative” in failing to envision cases of first-degree murder that would fall outside the scope of the aggravator.<sup>102</sup> Judge McKeown responded that hypothetical scenarios should not be the touchstone for constitutional analysis: “I do not dispute that, with imagination and creativity, one can explain away the constitutional infirmities of the California death penalty. But that is beside the point.”<sup>103</sup>

These problems have been particularly pronounced in measuring the breadth produced by a statutory scheme as a whole. Several courts have attempted to assess narrowing challenges by counting the number of aggravating factors in a given statute.<sup>104</sup> However, this number provides no concrete evidence as to whether the majority of offenders are death eligible. As Justice Zimmerman explained, concurring in rejecting a narrowing challenge to Utah’s death penalty scheme: “[S]imply . . . counting the aggravating circumstances listed in a statute and comparing the length of that list with similar lists from other states” provides no “empirical basis for [the dissent’s] assertion that, factually, few Utah murders are not eligible for the death penalty.”<sup>105</sup> Because the number of aggravating factors does not necessarily correlate with the rate of death eligibility, courts that count aggravators often reject narrowing challenges because they cannot discern a constitutionally derived “threshold” above which the number of aggravators becomes unacceptably high. The Delaware Superior Court, for example, refused to strike down the state’s death penalty statute without guidance as to the proper threshold number of aggravators:

While the Court does not dispute that at first blush the defendant’s argument appears logical, it is disturbed by the prospect of how one determines the point at which the number of aggravating circumstances causes the death penalty statute to be generally unconstitutional. . . . Can the Court arbitrarily declare that fifty aggravating circumstances is too many but forty-nine is permissible?<sup>106</sup>

Other courts, however, have accepted this imprecise methodology of counting aggravators in order to uphold death penalty statutes. These courts have typically deemed the statutes to be sufficiently narrow because the number of aggravating factors compared favorably with that in other states or did not strike the judges as impermissibly high.<sup>107</sup> Neither of these ap-

---

<sup>102</sup> *Morales v. Woodford*, 388 F.3d 1159, 1176 (9th Cir. 2004).

<sup>103</sup> *Id.* at 1188 (McKeown, J., concurring in part and dissenting in part).

<sup>104</sup> *See, e.g., State v. Wagner*, 752 P.2d 1136, 1157–58 (Or. 1988).

<sup>105</sup> *Young*, 853 P.2d at 412 (Zimmerman, J., concurring in part and dissenting in part).

<sup>106</sup> *State v. Steckel*, 708 A.2d 994, 1000 (Del. Super. Ct. 1996); *see also People v. Ballard*, 794 N.E.2d 788, 818 (Ill. 2002) (“Even assuming that a death penalty statute could have ‘too many’ aggravating factors rendering a first degree murder defendant eligible for the death penalty, how many aggravating factors are ‘too many’?”).

<sup>107</sup> *See, e.g., Wagner*, 752 P.2d at 1158 (“Oregon’s ten kinds of aggravated murder . . . compares favorably in number with the 10 sentencing aggravating factors of the Georgia stat-

proaches properly measures the actual death-eligibility rate produced by the statute.

This failure to adopt a workable methodology for assessing a statute’s breadth may be due in part to the fact that many defendants have not provided empirical evidence regarding death-eligibility rates. Indeed, many courts have identified the death-eligibility percentage as the correct measure of statutory breadth but have rejected narrowing challenges due to a lack of “factual support” regarding the relevant statistics.<sup>108</sup> For example, Justice McMorro, concurring in rejecting a challenge to Illinois’ statute, insisted that:

[T]o determine whether the Illinois death penalty statute is actually narrowing the pool of death-eligible defendants . . . [w]e must have some idea . . . what percentage of first degree murder defendants are potentially death eligible . . . . Although one might suspect that relatively few first degree murders in Illinois are not death eligible, suspicion is not a substitute for evidence. We cannot answer defendant’s argument without the pertinent empirical data.<sup>109</sup>

Although more defendants have begun incorporating death-eligibility statistics in their briefs,<sup>110</sup> such studies are expensive and remain beyond the grasp of many indigent defendants.<sup>111</sup> This lack of concrete evidence of high death-eligibility rates has made it easier for courts to assess narrowing challenges in abstract terms rather than adopt an empirical methodology.

Some courts have recently granted discovery or held evidentiary hearings to enable defendants to substantiate their failure-to-narrow claims, suggesting that the defendants may be entitled to relief if they can demonstrate

---

ute [approved in *Gregg*] and with the eight sentencing aggravating factors of the Florida statute [approved in *Proffitt*.”]; *Steckel v. State*, 711 A.2d 5, 13 (Del. 1998) (“Delaware has approximately the same number of statutory aggravating circumstances as other states.”); *see also* *Shatz & Rivkind*, *supra* note 21, at 1300 (noting that Courts have resolved narrowing cases “by counting [aggravators] . . . or by relying on logic or intuition to determine the narrowing effect”).

<sup>108</sup> *See, e.g.*, *Montoya v. Wong*, No. CIV S-06-2082-FCD-CMK-P, 2009 WL 2781024, at \*21 (E.D. Cal. Aug. 31, 2009); *People v. Herrera*, No. B189842, 2007 WL 1429524, at \*10 (Cal. Ct. App. May 16, 2007).

<sup>109</sup> *Ballard*, 794 N.E.2d at 826 (McMorro, J., concurring).

<sup>110</sup> For example, several defendants have cited the statistical studies of death eligibility of Professors Shatz and Rivkind. *See, e.g.*, *Ayala v. Ayers*, No. 01cv1322-IEG(PCL), 2007 WL 2019538, at \*11–12 (S.D. Cal. July 9, 2007); *Sanders v. Woodford*, No. Civ. F-92-5471-REC-P, 2001 WL 34882452, at \*45 (E.D. Cal. Aug. 24, 2001), *aff’d in part, rev’d in part*, 373 F.3d 1054 (9th Cir. 2004), *rev’d on other grounds sub nom*; *Brown v. Sanders*, 546 U.S. 212 (2006).

<sup>111</sup> *See, e.g.*, *Hall v. Bell*, Slip Op., No. 2:06-CV-56, 2010 WL 908933 (E.D. Tenn. Mar. 12, 2010) (noting the defendant’s admission that “he lacked the resources to investigate and provide the statistical evidence to prove his claim” that the Tennessee death penalty statute failed to adequately narrow the death-eligible class); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1850 (1994) (noting the “exceptionally short shrift” defendants receive with respect to “investigative and expert assistance,” since underpaid lawyers must fund their own investigations).

sufficiently high death-eligibility rates.<sup>112</sup> In other cases, however, even when defendants have presented statistical evidence of high death eligibility, their narrowing challenges have still been rejected on the ground that a more abstract assessment of whether the aggravator meaningfully distinguished among offenders was required.<sup>113</sup> While this may reflect a genuine difference of opinion among courts as to what the proper methodology for assessing narrowing challenges is, the refusal of courts to invalidate statutes even in the face of statistical evidence of high death eligibility raises the question of whether courts' claims of the lack of a workable methodology are merely a pretext for avoiding politically unpopular decisions constraining the use of the death penalty.<sup>114</sup> In some cases, it may not be that courts are unable to measure the breadth of a statutory scheme but simply that they prefer not to do so.

Thus, with the exception of a few courts that have taken promising steps toward considering the empirical underpinnings of narrowing claims,<sup>115</sup> courts have largely been unable or unwilling to impose a rigorous methodology for assessing statutory breadth and have therefore failed to invalidate overly-broad aggravating factors and statutory schemes. The discussion that follows examines why courts have failed to enforce another important component of the narrowing requirement: that aggravating factors apply only to the "worst" offenders who are particularly deserving of death.

*B. Failure to Require that Aggravating Factors Select the Most Culpable Offenders*

Courts have shied away from imposing their own substantive vision of who is most deserving of death, instead rubber-stamping states' selections of aggravating factors, regardless of how tenuous the factors' link to offenders' culpability. While some courts have engaged in more rigorous scrutiny of

---

<sup>112</sup> See, e.g., Order at 6, *Frye v. Goughnour*, No. CIV. S-99-628 LKK/JFM (E.D. Cal. July 27, 2004); Order at 6, *Riel v. Goughnour*, No. CIV. S-01-507 LKK/KJM (E.D. Cal. July 27, 2004) ("[T]he success of petitioners' legal theory with respect to the narrowing claim hinges upon whether the death penalty scheme in California actually results in as capricious an application of the penalty as under the pre-*Furman* schemes. Adequate factual support is thus critical to petitioners' ability to [substantiate their claims]."); Transcript of Proceedings at 1159-1228, *Ashmus v. Wong*, No. C 93-0594 TEH (N.D. Cal. Jan. 28, 2010) (testimony of Steven Shatz during evidentiary hearing regarding statistical studies of death-eligibility rates in California).

<sup>113</sup> See, e.g., *Ayala*, 2007 WL 2019538, at \*14 (rejecting narrowing challenge where studies suggested death-eligibility rate was 83%); *Sanders*, 2001 WL 34882452, at \*49-50 (same).

<sup>114</sup> Indeed, some courts have avoided taking a stand by adopting agnostic positions noting that high death-eligibility rates may or may not be sufficient to prove a narrowing violation. See, e.g., *People v. Wader*, 854 P.2d 80, 114 (Cal. 1993) ("[D]efendant has not demonstrated on this record . . . that his claims are empirically accurate, or that, if they were correct, this would require the invalidation of the death penalty law.").

<sup>115</sup> See *supra* note 112.

the qualitative narrowing performed by aggravating factors,<sup>116</sup> this has been the exception rather than the rule. The majority of courts have instead granted complete deference to legislatures’ assessments of death-worthiness,<sup>117</sup> prompting dissents from several judges arguing that aggravating factors fail to properly track offenders’ culpability. For example, Judge Gregory of the Fourth Circuit objected to the court’s philosophy that:

eligibility factors are constitutional so long as they do not apply to every murder defendant and so long as they are supported by some conceivable legislative goal. By substituting rational basis review for the appropriate Eighth Amendment analysis, the majority glosses over the very serious way in which the eligibility factors [challenged here] fail to narrow the class of death-eligible offenders in the way required by the Constitution.<sup>118</sup>

One primary reason for courts’ failure to require qualitative narrowing is that determining whether a particular aggravating factor – or a combination of them – does a good job of selecting the ‘worst’ offenders is an inherently subjective enterprise. Justice Harlan articulated this problem in *McGautha v. California*,<sup>119</sup> concluding that it was impossible to “identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty” and “express [those] characteristics in language which can be fairly understood and applied by the sentencing authority.”<sup>120</sup> Several scholars have agreed with Justice Harlan that any attempt to enumerate the most death-worthy offenders *ex ante* through aggravating factors is futile. For example, Professor Randall Kennedy has argued that such efforts simply “replicate[ ] the intractable line-drawing

---

<sup>116</sup> See, e.g., *United States v. Cheely*, 36 F.3d 1439, 1443 (9th Cir. 2009) (invalidating federal death penalty provisions because they “authorize the death penalty . . . for a much broader class of less culpable persons”); *Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) (invalidating construction of torture-murder aggravator because it “may have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder”) (citations omitted), *overruled on other grounds by Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003); *State v. Middlebrooks*, 840 S.W.2d 317, 345 (Tenn. 1992) (criticizing the felony murder aggravating circumstance for not sufficiently tracking individual culpability).

<sup>117</sup> See, e.g., *People v. Hale*, 661 N.Y.S.2d 457, 466 (N.Y. Sup. Ct. 1997) (“Winnowing death-eligible murders from those not worthy of the ultimate sanction is a task left to the Legislature. It is not for the courts to second-guess the Legislature’s determination of which factors set apart certain killings as particularly atrocious . . .”).

<sup>118</sup> *United States v. Caro*, 597 F.3d 608, 637 (4th Cir. 2010) (Gregory, J., dissenting); see also *Morales v. Woodford*, 388 F.3d 1159, 1188 (9th Cir. 2004) (McKeown, J., concurring in part and dissenting in part) (The “lying in wait” aggravator fails to “select[ ] those more deserving of the ultimate punishment. To the extent that the special circumstance can be said to limit death eligibility, it does so in an arbitrary and capricious manner.”).

<sup>119</sup> 402 U.S. 183 (1971).

<sup>120</sup> *Id.* at 204. *McGautha* concluded that standardless jury discretion in the administration of the death penalty did not violate the Due Process Clause. *Furman* effectively overturned this holding, although *Furman* was decided on Eighth Amendment rather than Due Process grounds.

problems that have beset the Court's post *Furman* approach to capital punishment jurisprudence," due to the "irreducible degree of subjectivity that must adhere to any attempt to distinguish bad cases from 'worst cases.'" <sup>121</sup>

In addition to the challenges they face in crafting a coherent methodology for identifying the "worst" cases, courts also encounter political obstacles in attempting to impose this vision on state legislatures. In a prescient article written immediately after *Zant* was issued, Bruce Ledewitz predicted that courts would be reluctant to strike down aggravating factors for failing to select the most culpable defendants, as that would amount to telling states that their "repugnance truly felt concerning a type of homicide is an inadequate reason for consideration of the death penalty."<sup>122</sup> Indeed, judges face tremendous political pressure to deem all murders sufficiently heinous for death eligibility. Several state court judges have faced successful campaigns for their removal based on allegations that they were "too soft" on murderers whose cases they adjudicated. For example, Justice Penny White of the Tennessee Supreme Court was ousted from office after a contentious campaign in which the Tennessee Republican Party sent out a mass mailing declaring that "Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty—so she struck it down."<sup>123</sup> In reality, Justice White had never discussed the gravity of the crime but had merely joined a unanimous opinion remanding the case for a new sentencing hearing due to legal errors.<sup>124</sup> Given that judges striking down aggravating factors on qualitative grounds would have to actually state that they did not believe such murders to be the most heinous, this course of action would likely provoke even more severe political backlash.

Thus, courts' failure to enforce meaningful narrowing stems largely from their inability to find coherent and politically palatable methodologies for assessing statutory breadth and for determining what factors properly render a defendant death worthy. Part V offers potential strategies for overcoming these obstacles.

#### V. TOWARDS EFFECTIVE ENFORCEMENT OF THE NARROWING REQUIREMENT

This section proposes several strategies that courts should adopt to ensure that state death penalty statutes meaningfully narrow the class of death-eligible offenders. Part A suggests that courts can more effectively address

---

<sup>121</sup> Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1431–33 (1988).

<sup>122</sup> Ledewitz, *supra* note 19, at 394.

<sup>123</sup> Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 314 (1997) (quoting TENN. REPUBLICAN PARTY, JUST SAY NO! 1 (1996)).

<sup>124</sup> *Id.*

the problem of statutory breadth by measuring the death-eligibility rate produced by a given statute and requiring states to keep this rate below a certain threshold. Part B argues that courts should address the qualitative function of aggravating factors by invalidating death penalty statutes that fail to produce high death-sentence rates and by conducting a more rigorous review of the legislative motivation behind adoption of certain aggravating factors to determine whether the comparative culpability of offenders was considered. These solutions would work best in conjunction, as they each seek to achieve an essential component of the narrowing requirement: ensuring that the death-eligible class is smaller, more culpable, and consistently deemed death worthy by jurors and prosecutors.

#### A. Restricting Death-Eligibility Rates

One reason courts have failed to limit death eligibility to a smaller group is that they have relied on flawed methodologies for assessing statutory breadth, such as counting the number of aggravators in a given statute. A better approach would be to measure statutory breadth by way of the death-eligibility rate a statutory scheme produces (the percentage of all first-degree murderers who qualify as death eligible under the statute) and require states to keep this figure below a threshold of 5 to 10%.<sup>125</sup> While *Furman* did not specify a numerical threshold, a small figure is compelled by the Court’s concern that only a miniscule percentage of death-eligible offenders were actually being sentenced to death.<sup>126</sup> Given the small death-sentence rates that adhere in most states,<sup>127</sup> the only way to ensure the consistent treatment required by *Furman* is to drastically confine death eligibility to a small group of extremely heinous offenders whom jurors will sentence to death a substantial portion of the time.<sup>128</sup>

This method would prove relatively easy to administer, as such statistics are amenable to empirical study and have been presented to courts by defendants on several occasions.<sup>129</sup> Courts could continue to grant discovery to allow defendants to conduct this analysis. For example, in *Frye v. Goughnour* the magistrate judge’s discovery order set out the parameters for a statistical analysis of death eligibility. It instructed the defendant to create a random sample of 700 probation reports and determine how many of those

---

<sup>125</sup> Other scholars have recommended a figure in this range. See McCord, *supra* note 23, at 6 (“As a rough approximation, the ‘worst of the worst’ designation should describe less than ten percent of murderers, and probably closer to five percent.”); Steiker & Steiker, *supra* note 18, at 415 (suggesting a death-eligibility rate of 5-10%).

<sup>126</sup> See *supra* note 34.

<sup>127</sup> See *supra* note 91.

<sup>128</sup> See Steiker & Steiker, *supra* note 18, at 415 (explaining that a figure of approximately 5 to 10% is necessary to ensure that the number of death-eligible offenders “corresponds in some meaningful sense to the proportion of offenders who will actually receive the death penalty”).

<sup>129</sup> See *supra* note 110.

R

R

R

R

R

R

would have been death eligible, measured by whether they were first-degree murders and whether they contained sufficient evidence to support the finding of an eligibility factor.<sup>130</sup> However, as noted in Part IV, many defendants cannot afford counsel with the resources to perform such studies.<sup>131</sup> Short of more sweeping reforms to the indigent defense system, such as adequate funding for expert and investigative assistance, defendants could overcome this problem by relying on the many statistical analyses of death eligibility already conducted by scholars.<sup>132</sup> Another desirable option would be for courts to commission a study or appoint a Special Master to review the issue, as New Jersey did when addressing racial discrimination in its death penalty system.<sup>133</sup>

Another advantage to this approach is that it allows courts to avoid the political discomfort of superintending states' conceptions of death-worthiness, as states are free to select those characteristics they deem most aggravated, as long as the death-eligibility rate minimum is cleared. As a result, this approach may be more politically palatable than other strategies, as it allows courts to strike down aggravators on the basis of objective statistics rather than subjective notions of culpability. Yet, this objectivity also has some drawbacks. An inflexible numerical threshold has the potential to be arbitrary and underinclusive, with a 5 to 10% figure potentially excluding from death eligibility some defendants who are deserving of death.<sup>134</sup>

While the risk of underinclusion is undoubtedly present, this is inevitable in any narrowing scheme. Indeed, the very premise underlying the narrowing requirement is that lines must be drawn somewhere and that only the very "worst" offenders can be death eligible, even if some defendants who are "very bad" end up escaping the death penalty's grasp. In sum, imposing a death-eligibility threshold would be a desirable means of confining the breadth of statutory schemes, as it would prove relatively easy to administer and would not require courts to second-guess states' conceptions of death-worthiness. The solutions that follow complement this approach by working to ensure heightened culpability of the death-eligible class.

---

<sup>130</sup> Order at 3–4, *Frye v. Goughnour*, No. CIV S-99-0628 LKK JFM (E.D. Cal. Mar. 22, 2004).

<sup>131</sup> See *supra* note 111.

<sup>132</sup> For example, in the course of litigation, several defendants have cited past death-eligibility studies conducted by Professor Shatz and Rivkind. See *supra* note 110.

<sup>133</sup> The New Jersey Supreme Court commissioned a study of proportionality review methods involving complex statistical techniques and appointed Professor David Baldus as a Special Master. See David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 41 No. 2 CRIM. L. BULL. 6 (2005).

<sup>134</sup> See Steiker, *supra* note 18, at 416 (explaining that the "central drawback to such forced narrowing is that it might force states to exclude factors from their definitions of capital murder that actually do capture the worst offenses and offenders").

R

R

R



*B. Assessing Whether Aggravating Factors Identify a More Culpable Sub-Class*

*1. Invalidate Statutes that Do Not Produce High Death-Sentence Rates*

The narrowing requirement’s primary aim is to reduce arbitrariness by confining the discretion of jurors and prosecutors to a particularly heinous group of offenders, making it more likely that culpability rather than caprice will drive their decisionmaking. Thus, if aggravating factors do not define a group that decisionmakers consistently deem death worthy, these factors are not doing their job properly. One means of assessing how well aggravators perform this function is to examine the death-sentence rate a statute produces. This rate can be calculated by examining the percentage of all death-eligible defendants sentenced to death in a given state.

Under this approach, statutory schemes that produce death-sentence rates falling below a certain percentage would be invalidated. Steven Shatz and Nina Rivkind have persuasively argued that *Furman*’s concerns with arbitrariness stemmed largely from the fact that only 15 to 20% of capital offenders were sentenced to death under the impugned statutes.<sup>135</sup> Accordingly, they read *Furman* as invalidating any statute under which less than 20% of convicted death-eligible murderers are actually sentenced to death.<sup>136</sup> While Shatz and Rivkind are correct that a rate of less than 20% is clearly inadequate, an even higher percentage – of at least 85% – is necessary to adequately address *Furman*’s concerns with arbitrariness in sentencing. Thus, a statutory scheme should be invalidated if the offenders it renders death eligible are not sentenced to death in at least 85% of cases.<sup>137</sup>

The main reason a higher figure is necessary is that, according to studies, racial disparities in sentencing remain significant for all but the most aggravated of cases, for which offenders are sentenced to death close to 90% of the time.<sup>138</sup> Thus, if narrowing is to fulfill its primary purpose of confin-

---

<sup>135</sup> Shatz & Rivkind, *supra* note 21, at 1288.

<sup>136</sup> *Id.* at 1289.

<sup>137</sup> As noted previously, there are multiple methods for measuring death-sentence rates. See *supra* note 90. This proposal would measure the death-sentence rate in relation to all prospectively death-eligible cases. This method is preferable because it requires consistency not only on the part of jurors deciding who should be sentenced to death but also on the part of prosecutors deciding when to seek the death penalty. Moreover, the conclusions of the Baldus group regarding racial disparities in death-sentence rates measured those rates in relation to those who had been indicted for murder, but whose cases had not necessarily proceeded to the penalty phase. See Baldus, Woodworth & Pulaski, *supra* note 72, at 313–14. The findings of that study provide a primary justification for the death-sentence rate threshold proposed by this Note. See *infra* note 138 and accompanying text.

<sup>138</sup> In particular, the Baldus group’s study of racial discrimination in Georgia, relied upon by the petitioner in *McCleskey v. Kemp*, reached this conclusion. The study found that, among cases with nearly universal death sentencing, there was only a 2% difference between death-sentence rates for black and white defendants with white victims. See Baldus, Woodworth & Pulaski, *supra* note 72, at 329 tbl.57. Among less aggravated cases, where death sentences

R

R

R

R

ing death eligibility to those cases where culpability is so extreme that it overwhelms bias, the death-sentence rate required must be much higher than 20%.

Legislatures would have to redraft death penalty statutes to contain aggravating factors capable of producing high death-sentence rates. Certain aggravating factors would be ripe for elimination under this approach, such as the murder-in-the-course-of-a-robbery aggravator. Studies reveal uniformly low death-sentence rates for such murders, often as low as 5%.<sup>139</sup> However, identifying those aggravating factors that *do* meet this standard may be a more difficult task. It is unlikely that any one aggravating factor could capture the kind of extreme culpability capable of provoking near-universal death sentencing among jurors. Indeed, even for aggravating factors one would expect to be extremely aggravating – such as murder of three or more victims during the same crime – the death-sentence rate tends not to rise much higher than 50%,<sup>140</sup> leaving ample room for bias to operate. One solution that legislatures could adopt is that proposed by David McCord, who recommends replacing the current “one-aggravator-is-sufficient-and-all-are-equal model” for death eligibility with a multi-factor, weighted system, where a combination of factors must be found.<sup>141</sup> Under McCord’s approach, the legislature would craft a list of “depravity factors,” assign each a point value, and set a threshold number of points that a jury must find in the defendant’s case during the eligibility stage.<sup>142</sup> Legislatures could adopt the same approach in implementing a death-sentence rate minimum, by setting the threshold number of points at a sufficiently high level to regularly produce rates of at least 85%. This approach would likely offer a finer chisel

---

were imposed only 41% of the time, this racial variation rose to 26%. *Id.*; see also McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”).

<sup>139</sup> See Shatz, *supra* note 20, at 745. The Shatz study found a death-sentence rate of 4.5% in Alameda County for defendants eligible on the basis of murders committed in the course of robberies or burglaries, and a rate of 5.5% statewide. *Id.* (calculating as a percentage of all convicted death-eligible murderers). Other studies have found similarly low death-sentence rates for robbery-murders. See, e.g., Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 82 tbl.5 (2002) (finding a death-sentence rate of just 4.1% for murders committed in the course of armed robbery).

<sup>140</sup> Pierce & Radelet, *supra* note 139, at 87 tbl.15 (finding a death-sentence rate of 55.6% where the defendant had killed three or more victims). The next highest death-sentences rates – for aggravators such as prior murder conviction, murder in the course of a kidnapping, and murder in the course of sexual assault – were all 25% or below. See *id.* at 81–91 tbls.3–24. Another study by David Baldus and his colleagues also found that the cases with the highest death-sentence rates were characterized by the presence of several different aggravating characteristics. See Baldus, Pulaski & Woodworth, *supra* note 77, at 179 (describing the most aggravated cases as containing an armed robbery aggravating factor and also mutilation, arson, or a contract or execution-style killing).

<sup>141</sup> McCord, *supra* note 23, at 44.

<sup>142</sup> *Id.*

R

R

R

R

for carving out the most aggravated cases, as opposed to the more blunt device of individual aggravating factors.

Requiring that statutes produce high death-sentence rates is a desirable strategy for narrowing because it effectuates the principal goal of the narrowing requirement: confining death eligibility to the most heinous cases where culpability overwhelms bias in sentencing decisions.

2. *More Rigorously Scrutinize the Motivations Behind Adoption of Aggravating Factors*

Another approach to qualitative narrowing that courts could adopt is to conduct a more rigorous review of the legislative motive behind the addition of certain aggravating factors. Such review would be warranted where the aggravating factor relates exclusively to the identity of the victim or to facts about the perpetrator that are not related to the circumstances of the offense. Examples include aggravators that apply to defendants who are gang members<sup>143</sup> or drug dealers,<sup>144</sup> or that single out unique traits about victims relevant to only a handful of crimes.<sup>145</sup> These aggravators are appropriate to trigger a heightened standard of review because they raise an inference that the legislative process broke down, with political concerns or bias against particular groups of defendants overwhelming careful consideration of offenders' culpability.

In conducting this review, courts would examine the legislative history behind the addition of aggravating factors to determine whether legislators engaged in careful consideration of the comparative culpability of the offenders they sought to target with the aggravator.<sup>146</sup> This approach would differ from rational basis review, in that it would not require merely that the legislation was rationally related to *any* legitimate legislative purpose but instead that the legislation was aimed at identifying the most culpable offenders. An aggravator would survive such review if the legislature studied or otherwise assessed the culpability of the targeted group and compared it against other categories already deemed death eligible. An aggravator would not survive such review, however, if legislative history revealed an overwhelming focus on memorializing particular victims (such as the Con-

---

<sup>143</sup> Several states make gang membership an aggravating factor. See H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601, 603 n.15 (collecting statutes). Commentators have noted this factor's divergence from typical culpability considerations. See *id.* at 646–47 (“The other death qualifiers focus either on the circumstances of the specific murder . . . or the status of the victim . . . . For the first time in the history of this country, association or membership in a particular type of organization has been made a predicate event for capital treatment.”).

<sup>144</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 5/9-1(b)(13) (West 2010) (defendant's position of authority in organized drug conspiracy).

<sup>145</sup> See *supra* notes 84–85 and accompanying text.

<sup>146</sup> In this sense, the standard of review would resemble analysis under the Equal Protection Clause where legislative history is also consulted to assess motive.

necticut State Legislature's emphasis on respect for conservation officers)<sup>147</sup> or a desire to expand the statute towards universal death eligibility (as with the Voters' Pamphlet in support of the 1977 Briggs Initiative).<sup>148</sup>

One advantage of this strategy is that it could deter legislators from proposing aggravators feared to be too attenuated from the culpability of the offender. The current toothless review of aggravating factors allows legislators to add aggravators for whatever reason they wish, as they are aware that all that is required of them is an articulation of some plausible legislative purpose rather than a reasoned assessment of death-worthiness. For example, Jonathan Simon and Christina Spaulding argue that much of the testimony during the public hearing concerning Nevada's expansions of the peace officer aggravator in 1995 was merely "aimed at establishing a rational basis (in the weak sense that is used in equal protection analysis)" for adding more law enforcement agents to the aggravator.<sup>149</sup>

The main drawback of this approach is that it would require courts to scrutinize legislative motive, a course of action likely to be seen as encroaching on states' prerogatives to craft their own definition of death-worthiness.<sup>150</sup> However, under this approach, a court need not second-guess the legislature's opinion about which offenders were most death worthy; instead, it need only determine that the legislature was motivated by *some* reasonable conception of comparative death-worthiness, even if it is not the conception to which the court adheres.

### C. Summary

This section has proposed three strategies that courts could adopt to require that state legislatures comply with the constitutional mandate of confining death eligibility to a smaller, more culpable subset of offenders. These three solutions work best in conjunction, as they each seek to achieve an essential component of the narrowing requirement: limiting death-eligibility rates ensures that the class is smaller; requiring high death-sentence rates ensures that the death-eligible class is in practice consistently deemed more death worthy during sentencing; and scrutinizing legislative motive helps ensure that the class is more culpable.

## VI. CONCLUSION

The narrowing requirement demands that aggravating factors limit the class of death-eligible offenders to a subset of particularly culpable individuals for whom prosecutors and jurors are more likely to deem death sentences

---

<sup>147</sup> See *supra* note 87 and accompanying text.

<sup>148</sup> See *supra* note 75 and accompanying text.

<sup>149</sup> Simon & Spaulding, *supra* note 41, at 92.

<sup>150</sup> For more on political constraints on judges, see *supra* notes 122–24 and accompanying text.

consistently to be warranted. Narrowing was the Court’s primary solution for the risk of arbitrariness condemned in *Furman*. The Court believed that if only the most heinous offenders were eligible for death, jurors would impose death sentences more consistently, on the basis of heightened culpability rather than pure caprice or discriminatory considerations.

Over time, it has become clear that the narrowing requirement is the only barrier to unfettered discretion that the Court is willing to impose in regulating capital-sentencing schemes. Yet courts have largely retreated from this safeguard as well, refusing to address the proliferation of aggravating factors that render more than 90% of murderers death eligible in many states. If courts are to fulfill the mandate of *Furman*, they must admit that their approach to narrowing has until now been toothless and adopt new methods for ensuring that state capital-sentencing schemes confine death eligibility to only those most culpable offenders. This Note has suggested several such strategies for working towards a jurisprudence of meaningful narrowing. These represent a first step towards addressing the arbitrariness that continues to plague death penalty statutes. However, if courts continue to treat the narrowing requirement as little more than a procedural formality, they must admit that *Furman*’s command that the death penalty be administered in a non-arbitrary manner has been decisively abandoned. In that case, given that the death penalty “must be imposed fairly, and with reasonable consistency, or not at all,”<sup>151</sup> capital punishment should be abolished.

---

<sup>151</sup> *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) (internal quotations omitted).

