United States v. Cheely: Leaving the Back Door Open for Arbitrary Death Sentencing

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UNITED STATES v. CHEELY: LEAVING THE BACK DOOR OPEN FOR ARBITRARY DEATH SENTENCING

I. INTRODUCTION

What I want people to know is, that they call me a cold-blooded killer. I shot a man who shot me first. The only thing that convicted me is that I'm a Mexican and he was a police officer. From there you call me a cold-blooded murderer. I didn't tie anybody to a stretcher. I didn't pump poison into anybody's veins from behind a locked door. You call this justice. I call this and your society a bunch of cold-blooded murderers.—Henry M. Porter, executed by lethal injection on July 9, 1985, in Texas.¹

Few issues have created greater controversy for our nation's criminal justice system than capital punishment.² At the center of this storm is the

1. Tom Kuntz, Word for Word: The Condemned; As Executions Mount, So Do Infamous Last Words, N.Y. TIMES, July 31, 1994, § 4, at 7. As his cutting final statement makes clear, Mr. Porter believed he had received the death penalty because of nothing more than blind chance. His statement echoes concerns voiced by the United States Supreme Court, which has been especially concerned with eradicating randomness in death sentencing. See Furman v. Georgia, 408 U.S. 238, 309-10 (1976) (per curiam) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); id. at 293 (Brennan, J., concurring) (“The punishment of death . . . smacks of little more than a lottery system.”). For a more detailed discussion of the Court's concern with inconsistent sentencing, see infra notes 6, 44, 47-53, 64-68 and accompanying text.


This controversy causes "severe and sometimes bitter conflicts between and among both state and federal courts." Hintze, supra, at 419. Disagreement between the Supreme Court Justices themselves best testifies to the depth of the controversy. Dissenting opinions in death penalty cases are typically scathing. Id. at 420 (citing Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (“Power, not reason, is the new currency of this Court's decisionmaking.”)); see Godfrey v. Georgia, 446 U.S. 420, 444-57 (1980) (plurality opinion) (White, J., dissenting) (describing murder in unusually graphic manner, and characterizing majority's decision as "shredded by its own illogic"); see also Herrera v. Collins, 506

(1461)
Eighth Amendment to the United States Constitution, which prohibits the infliction of “cruel and unusual” punishment. Not surprisingly, the Supreme Court has interpreted this terse phrase to require different measures from legislatures and sentencers at different times.

Further adding to the controversy, the Supreme Court identified two Eighth Amendment requirements for avoiding arbitrary death sentencing, based on opposing rationales. The first requirement, consistency, fo-

U.S. 390, 446 (1993) (Blackmun, J., dissenting) (“The execution of a person who can show that he is innocent comes perilously close to simple murder.”).


Outside the United States, 103 countries use the death penalty. David Mazie, Death Penalty Remains Alive Around World, Arousing Strong Passions, LA. TIMES, Jan. 16, 1994, at 2A1. Nevertheless, the United States is the only North Atlantic Treaty Organization nation other than Turkey that routinely executes criminals. Id.

3. U.S. CONST. amend. VIII. The amendment simply states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id. For a further discussion of the amendment, see infra note 32 and accompanying text.

4. See Project, Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988, 77 GEO. L.J. 1151, 1153-54 n.2848 (1989) [hereinafter PROJECT]. “[P]unishments once considered permissible have later been held to violate the Eighth Amendment.” Id. (comparing In re Kemmler, 136 U.S. 436, 447 (1890) (“stating that death penalty not cruel and unusual unless manner of execution is inhumane and barbarous”) with Gregg, 428 U.S. at 188 (“noting that death penalty cruel and unusual if sentencing procedures create substantial risk of arbitrariness”); see also Gregg, 428 U.S. at 172-73 (“[T]he Eighth Amendment has not been regarded as a static concept.”). Interpretation of the Eighth Amendment varies because courts first examine society’s “evolving standards of decency” to determine whether a particular practice violates the Eighth Amendment prohibition. See id. at 173 (citing Trop v. Dulles, 356 U.S. 86, 100-01 (1958)); Robinson v. California, 370 U.S. 660, 666 (1962); see also Hintze, supra note 2, at 408 n.75. While courts presume that a democratically chosen punishment represents societal standards, the punishment still needs to be weighed against the Eighth Amendment’s core requirements. See Gregg, 428 U.S. at 173-76. For a further discussion of varying interpretation of the Eighth Amendment and reliance upon societal values, see infra note 37-39 and accompanying text.

5. First, the Court identified the need for consistency in death sentencing. See Gregg, 428 U.S. at 220-21 (White, J., concurring) (“In Furman, this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly . . . .”); Furman v. Georgia, 408 U.S. 238, 242 (1972) (per curiam) (Douglas, J., concurring) (stating that Eighth Amendment prohibits “selective or irregular application of harsh penalties”); id. at 294 (Brennan, J., concurring) (arguing that statutory system must provide “rational basis that could differentiate . . . the few who die from the many who go to prison”). For a further
discussed on limiting sentencer discretion.\footnote{See \textit{Gregg}, 428 U.S. at 189 ("\textit{Furman} mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").} The second requirement, individualization, focused on permitting sentencer discretion.\footnote{See, e.g., \textit{Woodson}, 428 U.S. at 304 (holding that sentencer must be allowed to consider "the character and record of the individual offender and the circumstances of the particular offense"). Since \textit{Woodson}, a majority of the Court continues to express the need for individualized sentencing procedures. See, e.g., \textit{Lockett}, 438 U.S. at 608 ("To meet constitutional requirements, a death penalty statute must not preclude [the sentencer's] consideration of relevant mitigating factors."). Throughout his term on the Supreme Court, Justice Blackmun continued to express his support for more individualized consideration in sentencing. See \textit{id.} at 613 (Blackmun, J., concurring) (agreeing with plurality that Ohio statute did not "permit[] any consideration by the sentencing authority of the extent of [the defendant's] involvement, or the degree of [the defendant's] mens rea, in the

Second, the Court identified the need for individualized consideration in death sentencing. See \textit{Lockett}, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); \textit{Woodson}, 428 U.S. at 304 ("[W]e believe that . . . the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted). For a further discussion of the individualization requirement, see infra notes 48, 55-59, 75-77 and accompanying text.

As a result of its identification of two separate Eighth Amendment requirements, Supreme Court precedent embodies two distinct lines of cases, one based on consistency and one based on individualization. See Ronald J. Mann, \textit{The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment}, 29 Hous. L. Rev. 493, 495 (1992). Mann writes that \textit{Furman} and \textit{Gregg} are thought to stand for a 'consistency-based' principle, the general goal of which is to ensure that similarly situated defendants receive similar sentences.\footnote{Justice Douglas expressed a special concern in \textit{Furman} about the need to limit sentencer discretion. See \textit{Furman}, 408 U.S. at 248, 255 (Douglas, J., concurring) ("[Sentencers] have practically untrammeled discretion to let an accused live or insist that he die. . . . Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied . . . .") Sentencer discretion is dangerous if it "opens the door to a degree of arbitrariness in all the borderline cases where the just measure of punishment is unclear." See \textit{Gorecki}, supra note 2, at 22 (concluding that sentencer discretion inevitably "opens the door" to arbitrariness).} He further concludes that \textit{Woodson v. North Carolina . . . and Lockett} are thought to stand for a contrary principle requiring that specified procedures be followed before infliction of the death penalty.\footnote{See, e.g., \textit{Woodson}, 428 U.S. at 304 (holding that sentencer must be allowed to consider "the character and record of the individual offender and the circumstances of the particular offense"). Since \textit{Woodson}, a majority of the Court continues to express the need for individualized sentencing procedures. See, e.g., \textit{Lockett}, 438 U.S. at 608 ("To meet constitutional requirements, a death penalty statute must not preclude [the sentencer's] consideration of relevant mitigating factors."). Throughout his term on the Supreme Court, Justice Blackmun continued to express his support for more individualized consideration in sentencing. See \textit{id.} at 613 (Blackmun, J., concurring) (agreeing with plurality that Ohio statute did not "permit[] any consideration by the sentencing authority of the extent of [the defendant's] involvement, or the degree of [the defendant's] mens rea, in the
the two requirements were potentially contradictory.\footnote{8}

Unfortunately, the Court did not guide legislatures on how to design a statute that, taken as a whole, would satisfy the Eighth Amendment’s divergent directives.\footnote{9} Instead, the Court divided application of the re-

commission of the homicide\footnote{}). For a discussion of Justice Blackmun’s concern with this issue, see infra notes 82-83, 178, 197 and accompanying text. For a discussion of how the two Eighth Amendment requirements conflict, see infra notes 8, 60-63, 78-83, 177-83, 192-97 and accompanying text.

8. See Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring) (“I cannot possibly be guided by what seem to me incompatible principles . . . ”). For a further discussion of the contradictory nature of the two requirements, see infra notes 60-63, 78-83, 177-83, 192-97 and accompanying text.

9. See Zant v. Stephens, 462 U.S. 862 (1983) (separating requirements into two different sentencing stages); see also Staley v. Texas, 887 S.W.2d 885, 902 (Tex. Crim. App. 1994) (Baird, J., concurring) (stating that Supreme Court’s failure to explain how Furman—mandating consistency requirement—and Penry v. Lynaugh, 492 U.S. 302 (1989)—espousing individualization requirement—operating together leave lower courts with no choice but to adhere to most recent opinion “and await further guidance”), cert. denied, 115 S. Ct. 1366 (1995). At least one commentator agrees. See Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 GA. L. REV. 323, 328 (1992) (“Yet, the Court has provided no way to resolve [Woodson and Lockett] claims in harmony with Gregg.”). Howe concluded that the Court has been unsuccessful in its attempts to accommodate the two approaches. Id. at 379. For a further discussion of Zant’s separate sentencing stages, see infra notes 64-68, 84-87 and accompanying text. For a further discussion of Penry’s individualization requirement, see infra notes 75-83 and accompanying text.

The Court in Furman, however, addressed inconsistency resulting from death sentencing as a whole, presumably including both stages discussed in Zant. See Furman, 408 U.S. at 255 (Douglas, J., concurring) (stating that concern was for “discretion of judges and juries in imposing the death penalty”) (emphasis added); CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 56 (1974) (“[T]he 1972 Furman case . . . can be read . . . as a condemnation of standardless discretion in sentencing—a discretion often lodged in the jury or judge.”). For a further discussion of the consistency requirement, see infra notes 44, 47-53, 64-68 and accompanying text.

In addition, the Supreme Court in Woodson also addressed the lack of individualized consideration in death sentencing as a whole. See Woodson, 428 U.S. at 304 (“[W]e believe that . . . the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”) (citation omitted) (emphasis added). For a further discussion of the individualization requirement, see infra notes 48, 55-59, 75-77 and accompanying text.

Further, the different stages of sentencing detailed in Zant do not inherently lend themselves to application of one requirement or the other. Justice Blackmun stated: “It is the decision to sentence a defendant to death—not merely the decision to make a defendant eligible for death—that may not be arbitrary.” Callins v. Collins, 114 S. Ct. 1127, 1194 (1994) (mem.) (Blackmun, J., dissenting). The second stage outlined in Zant creates an even greater risk of inconsistency, because at this stage the sentencer ultimately determines who will die and who will live. See Zant, 462 U.S. at 878-79 (stating that second stage is where persons from eligible class are selected for death penalty). Along these lines, Justice Thomas noted that during actual sentencing, the second stage of Zant, “providing all relevant information for the sentencer’s consideration does nothing to avoid the central danger
quirements and established a two-tiered sentencing procedure. Only the threshold sentencing determination of who is eligible to receive a death sentence must comply with the consistency requirement. In the same way, only the selection of a defendant to actually receive a death sentence must meet the individualization requirement. Moreover, after separating them, the Court further developed its interpretation of the requirements, to the point that they cannot be logically applied side-by-side.

As a result, Court-approved death sentencing procedures fail to realize the Eighth Amendment's bar against arbitrariness. According to the Court's modern interpretation of the consistency requirement, a statutory system must limit sentencer discretion to select who is eligible for a death sentence. By complying with this requirement, however, a system turns that sentencing discretion may be exercised irrationally." Graham v. Collins, 113 S. Ct. 892, 910 (1993) (Thomas, J., concurring).

Moreover, in determining who is eligible for the death sentence, the focus of the first stage, the defendant's culpability—traditionally considered as a mitigating factor offered to fulfill the individualization requirement—could be very important. See Callins, 114 S. Ct. at 1133-34 (Blackmun, J., dissenting). Indeed, this is the very argument that the Ninth Circuit asserted in Cheely. United States v. Cheely, 36 F.3d 1139 (9th Cir. 1994). For a further discussion of the role culpability considerations played in the Cheely court's analysis, see infra notes 113-17 and accompanying text.

10. See Zant, 462 U.S. at 862. The Zant Court identified two separate stages of death sentencing, with the consistency requirement applied to the first and the individualization requirement applied to the second stage. Id. at 878-79. For a more detailed discussion of Zant's two stages, see infra notes 64-68, 84-87 and accompanying text.

11. Id.
12. Id.
13. Compare Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that statutory system cannot provide any limits on sentencer's discretion to consider and give effect to all relevant mitigating evidence offered by defendant) with Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (holding that statutory system must provide some limits on sentencer's discretion). For a further discussion of this contradiction, see infra notes 60-63, 78-83, 177-83, 192-97 and accompanying text.

14. See Callins, 114 S. Ct. at 1128 (Blackmun, J., dissenting). Justice Blackmun stated that a sentencing scheme in compliance with the Court's consistency requirement "would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense" as the individualization requirement mandates. Id. at 1136 (Blackmun, J., dissenting). Further, any statute or procedure that complied with the individualization requirement would "th[o]w open the back door to arbitrary and irrational sentencing" in violation of the consistency requirement and the Eighth Amendment. Id. (Blackmun, J., dissenting) (quoting Graham v. Collins, 506 U.S. 461, 494 (1993) (Thomas, J., concurring)). For a further discussion of the conflict between the two requirements, see infra notes 60-63, 78-83, 177-83, 192-97 and accompanying text.

blind eye to the Eighth Amendment's other mandate—that sentencer discretion to take into account individualized circumstances not be overly limited. Similarly, a statutory system that meets the Court's modern individualization requirement, by allowing complete sentencer discretion to choose who among those eligible will actually be sentenced to death, gives no consideration to the Eighth Amendment's mandate that sentencing results be consistent. Thus, rather than safeguarding the Eighth Amendment, the Court's requirements allow arbitrariness to enter through a "back door" that is always left open.

Recently, the United States Court of Appeals for the Ninth Circuit only heightened the likelihood of such an outcome. In United States v. Cheely, the Ninth Circuit relied on the consistency requirement to advocate complete limitation on sentencer discretion. At the same time, the

mandatory sentencing procedures). The Court, however, invalidated these statutes. See Howe, supra note 9, at 387 n.251 ("Under the [narrowing test], states should be able to make the death penalty mandatory for aggravated murder. But this is precisely the approach . . . that the Court has struck down on several occasions." (citing (Harry) Roberts v. Louisiana, 431 U.S. 633 (1977); Washington v. Louisiana, 428 U.S. 906 (1976); (Stanislaus) Roberts v. Louisiana, 428 U.S. 925 (1976) (plurality opinion))). The Court struck down these mandatory death penalty statutes based on the individualization requirement. Woodson, 428 U.S. at 280, 305; Roberts, 428 U.S. at 925.

Interestingly, the Furman decision actually suggested that this form of legislative response was appropriate. See Furman, 408 U.S. at 308 (Stewart, J., concurring) (implying that "automatic" death sentencing procedures would be acceptable). Specifically, the Furman Court criticized the Georgia and Texas death sentencing procedures on the grounds that they did "not provide[ ] that the death penalty shall be imposed upon all those who are found guilty of forcible rape . . . [a]nd [did] not ordain[ ] that death shall be the automatic punishment for murder." Id. (footnotes omitted).

For a further discussion of mandatory death penalty statutes, see infra notes 54-56. For a detailed explanation of the separate sentencing stages and their requirements, see discussion of Zant infra notes 64-68, 84-87 and accompanying text.

16. See Penry, 492 U.S. at 318 (stating that State may not "prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty" (citing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion))). Thus, no limitations on sentencer discretion may be made in this area. For a further discussion of Penry, see infra notes 75-77 and accompanying text.

17. Compare Penry, 492 U.S. at 302 with Gregg, 428 U.S. at 153. For a detailed comparison of the holdings of the two cases, see supra note 13. For a further discussion of Penry, see infra notes 75-77 and accompanying text.

18. See Graham v. Collins, 113 S. Ct. 892, 912 (1993) (Thomas, J., concurring) (discussing Court's contradictory Eighth Amendment arbitrariness requirements and concluding: "[W]e have thrown open the back door to arbitrary and irrational sentencing").

19. For a further discussion of the confusion in the area of law, as noted by legal scholars and Supreme Court Justices, see infra note 192 and accompanying text.

20. United States v. Cheely, 36 F.3d 1439, 1445 (9th Cir. 1994) ("The narrowing must be such that it forecloses the prospect of cruel and unusual punishment from 'wanton or freakish' imposition of the death penalty.") (emphasis added).
court failed to consider the individualization requirement or its underlying ideas. Thus, instead of harmonizing the two requirements, Cheely further intensified the conflict between the Constitutional mandates of consistency and individualization.

This Casenote discusses the history of judicial restriction on arbitrary sentencing in the United States, specifically focusing on how Cheely attempts to prohibit arbitrary death sentencing through drastic limitation of sentencer discretion. Part II of this Casenote traces the development of the Eighth Amendment’s protection against arbitrary application of the death penalty. Part III describes the facts of Cheely and details the Ninth Circuit’s analysis of prior caselaw in this area. Part IV focuses upon the inadequacies of the court’s analysis. Part V discusses the im-

For a discussion of the facts in Cheely, see infra notes 91-100 and accompanying text. For a discussion of the majority’s analysis in Cheely, see infra notes 101-20 and accompanying text. For a discussion of the dissenting opinion’s analysis in Cheely, see infra notes 121-32 and accompanying text. The Ninth Circuit in Cheely stated that

[w]hen 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 as to life or death is too great. The statute before us is unconstitutional because it utterly fails to foreclose this prospect.  

Id. (emphasis added). This surpasses the level of control on jury decision-making endorsed previously by the Supreme Court. See Gregg, 428 U.S. at 189 (stating that concern is for “wholly arbitrary” sentencing decisions); Furman v. Georgia, 408 U.S. 238, 248 (1972) (per curiam) (Douglas, J., concurring) (stating that concern is for “untrammeled discretion”). For a further discussion of the focus of Furman and Gregg, see infra notes 44-54 and accompanying text.

21. See Cheely, 36 F.3d at 1442 (applying “Death Penalty Jurisprudence” but not analyzing federal mail-bombing legislation’s compliance with individualization requirement).

22. The two mandates of complete limitation on sentencer discretion and lack of discretion are in direct contradiction. See Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (finding that sentencer had to have discretion to consider and give effect to all “factor[s] that may well lessen a defendant’s culpability for a capital offense”); see also State v. Winkle, 528 P.2d 467, 468 (Utah 1974). In Winkle, the court asked the Supreme Court to lead it out of the “morass” created by Furman and its progeny, stating, “[t]o say that Furman has created a (expletive deleted) quandary for state legislatures and courts is to put it mildly.” Id. For a further discussion of Penry, see infra notes 75-77 and accompanying text.

23. For a discussion of how Cheely drastically limits sentencer discretion, see infra notes 158-41 and accompanying text. For a discussion of the permissible range of limitation on sentencer discretion, see infra notes 48-59 and accompanying text.

24. For a discussion of the development of Eighth Amendment arbitrariness interpretation, see infra notes 30-90 and accompanying text.

25. For a discussion of the facts of Cheely, see infra notes 91-100 and accompanying text.

26. For a discussion of the Ninth Circuit’s analysis in Cheely, see infra notes 101-20 and accompanying text.

27. For a discussion of the Ninth Circuit’s reliance upon prior case law, see infra notes 105-20 and accompanying text. For inadequacies in this reliance, see infra notes 133-59, 172-83 and accompanying text.
pact Cheely will have upon Eighth Amendment analysis, the role of the judiciary in interpreting legislative enactments and recent federal legislation expanding use of the death penalty. Part VI concludes that, because Cheely unconstitutionally restricts sentencer discretion and misinterprets the concepts underlying prior caselaw, the decision inadequately safeguards criminal defendants from arbitrary death sentencing procedures.

II. THE DEVELOPMENT OF JUDICIAL RESTRICTIONS ON ARBITRARY SENTENCING


The Eighth Amendment prohibits governmental imposition of "cruel and unusual" punishment. Due to its severity and finality, the death penalty is clearly a unique form of punishment. Although the Supreme

28. For a discussion of Cheely's likely impacts, see infra notes 184-214 and accompanying text.

29. For this Casenote's conclusion that Cheely fails to protect criminal defendants from arbitrary death sentences, see infra notes 215-30 and accompanying text.

30. 408 U.S. 238 (per curiam) (1972).


33. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); see also Howe, supra note 9, at 395; cf. Randall K. Packer, Note, Struck by Lightning: The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 646 (1993-94) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (quoting Woodson, 428 U.S. at 304-05). Several Justices made similar statements in the Furman decision. See Furman, 408 U.S. at 258. Justice Brennan stated, "[d]eath is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." Id. at 290 (Brennan, J., concurring). Justice Stewart came to a similar conclusion. Id. at 306 (Stewart, J., concurring) ("The penalty of death . . . is unique in its total irrevocability."). The Court concluded that the death penalty should be treated uniquely in stages, with Furman representing the first time heightened procedural requirements were "elevated to the status of a doctrine." See NARELL & HARDY, supra note 2, at 30.

Court has found that application of the death penalty does not violate the Eighth Amendment per se, it closely scrutinizes capital sentencing for Eighth Amendment violations.

These are: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. See N.Y. Bid Puts Focus on Death Penalty Efforts, BOSTON GLOBE, Feb. 17, 1995, at 22 (predicting that “other states without the death penalty—particularly Iowa, Wisconsin and Massachusetts” will pass death penalty laws in near future).

The Court has not been unanimous, however, in its conclusion that the death penalty is not per se unconstitutional. In Furman, Justices Brennan and Marshall stated that the death penalty could not be constitutionally imposed under any circumstances. Furman, 408 U.S. at 305, 360 (containing statements, in separate concurrences, of Justice Brennan and Justice Marshall that death penalty is unconstitutional in all circumstances). After Furman, Justices Brennan and Marshall continued to adhere to their belief that the death penalty is per se unconstitutional, despite the contrary belief of the Court’s majority. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion) (Marshall & Brennan, J., concurring) (“I continue to believe that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.”).

Further, other Justices agreed with Justices Brennan and Marshall. First, Justice White expressed a changed view in Godfrey. See Godfrey, 446 U.S. at 438 (White, J., dissenting) (“[I] believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an even handed manner. But events since Gregg make that possibility seem increasingly remote.”).

Second, at the end of his tenure, Justice Blackmun fully revised his conclusion on the per se constitutionality of the death penalty. See Callins v. Collins, 114 S. Ct. 1127, 1129-30 (1994) (mem.) (Blackmun, J., dissenting) (stating that because of Court’s failure to reconcile conflicting requirements, the death penalty is per se unconstitutional); see also Aaron Epstein, After Twenty Years, Blackmun Rejects the Death Penalty, DET. FREE PRESS, Feb. 23, 1994, at 5A (“An anguished Supreme Court Justice Harry Blackmun, who for more than 20 years voted to enforce the death penalty in scores of cases, vowed Tuesday that he never will do it again.”). For a thorough treatment of the death penalty moral debate and the death penalty’s constitutionality, see generally THE DEATH PENALTY: OPPOSING VIEWPOINTS (Carol Wekesser ed., 1991).

35. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (“The qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”); Gregg, 428 U.S. at 187 (“When a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.” citing Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in result)); see also Hintze, supra note 2, at 399 (“[T]he Gregg decision makes clear that in order for a statute to pass constitutional muster, the death penalty must be surrounded by an especially heightened level of procedural safeguards . . . .”); Packer, supra note 33, at 641 (noting Supreme Court statement that qualitative difference of death sentence requires special “safeguards [that] are necessary to ensure that sentences of death comply with the requirement of the Eighth and Fourteenth Amendments”); Lori K. Redmond, Comment, Walton v. Arizona: The Supreme Court Clarifies the
Range Within Which a State's Death Penalty Must Fall in Order to Survive a Constitutional Challenge, 17 T. MARSHALL L. REV. 147, 147 (1991) ("The finality of carrying out a death sentence highlights the need for detailed and specific guidance when imposing a death sentence.").


In 1972, however, Furman invalidated all then-existing death penalty sentencing procedures, presumably including the federal capital punishment statutes. See Christian D. Marr, Note, Criminal Law: An Evolutionary Analysis of the Role of Statutory Aggravating Factors in Contemporary Death Penalty Jurisprudence—From Furman to Blystone, 32 WASHBURN L.J. 77, 77-78 (1992) (stating that Furman "implicitly" invalidated all existing death penalty statutes). In 1974, Congress reenacted one of the federal death penalty statutes, concerning aircraft piracy when death results. Tobolowsky, supra, at 47 (citing 49 U.S.C. § 1472(i), (n) (1994)). "To comply with the presumed Furman Court mandate to avoid arbitrary and totally discretionary imposition of the death penalty, Congress established a bifurcated guilt/sentencing proceeding" relying upon statutorily listed aggravating circumstances. Id. (citing 49 U.S.C. § 1473(c) (1994)). Eleven years later, Congress enacted its second post-Furman death penalty legislation, amending the Uniform Code of Military Justice to authorize a death sentence for military personnel convicted of certain aggravated forms of espionage. Id. (citing 10 U.S.C. § 906(a) (1988)). In 1988, Congress approved its first new death penalty legislation, authorizing the death sentence for drug-related "continuing criminal enterprises." Id. at 47 n.35 & 36 (citing 21 U.S.C. § 848(e) (1988)); see also Acosta, supra note 2, at 596 (discussing bill's history in detail). Although this bill over-complies with the Supreme Court's Eighth Amendment requirements, one scholar predicted it "will likely be [the source] of frequent litigation" due to the large number of defendants it is likely to encompass. Tobolowsky, supra, at 47 n.87-89.

Along with the historically small number of federal death penalty statutes, federal prosecutors supply another reason for the Supreme Court's limited scrutiny of federal death penalty procedures. For many years, federal prosecutors did not seek a death sentence even when so authorized by federal statute. See Paul D. Kamenar, Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement, 24 WAKE FOREST L. REV. 881, 881 (1989). The Department of Justice had concluded that all federal death penalty statutes were per se unconstitutional. Id. In 1988, however, the Department of Justice revised its opinion, stating that the existing federal statutes authorizing death
The Supreme Court has developed a set of heightened procedural safeguards to ensure that capital punishment does not constitute cruel and unusual punishment. Traditionally, the Supreme Court begins its Eighth Amendment death penalty analysis by examining contemporary societal perceptions of punishment. Consequently, the Court's interpretation of the Eighth Amendment may change as the nation's views of punishment shift. The Court, however, has consistently relied upon legislative and jury decisions as the foremost mirrors of what punishments society deems appropriate.

sentences Were not unconstitutional per se. Id. at 882 n.7 (quoting 3(a) U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.010 (rev. Oct. 1, 1988)). For a further discussion of the Department of Justice's reversal on this issue, see infra note 94.

The new willingness of federal prosecutors to seek death sentences when authorized is likely to combine with the growing number of federal capital crimes to place more prisoners on the federal death row. See Lori Montgomery, As Federal Death Row Forms, Ground is Broken, PHILA. INQUIRER, Apr. 3, 1994, at C1 (stating that new federal death row "could get crowded fast" due to quickening pace of federal prosecutions and passage of 1994 Crime Bill). Prior to 1994, the federal government had no need for its own death row. Id. Indeed, the federal government did not execute a single person for three decades. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ-143496, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1992, at 679 (1993). For a discussion of the 1994 Crime Bill, see infra notes 94, 209-14 and accompanying text. For a discussion of the significance of the number of federal executions, see infra note 136.


37. See Trop v. Dulles, 356 U.S. 86, 100-01 (1958). Overwhelmingly, concurring and majority Justices rely upon Trop to support their propositions. See Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion) (citing Trop, 356 U.S. at 100-01, 172); Gregg, 428 U.S. at 182 (citing Trop, 356 U.S. at 100); Furman v. Georgia, 408 U.S. 288, 242 (1972) (per curiam) (Douglas, J., concurring) ("[T]he Eighth Amendment must draw its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'") (quoting Trop, 356 U.S. at 101)). Further, even dissenting Justices consistently rely upon the Trop decision. Id. at 383 (Burger, C.J., dissenting) (citing Trop, 356 U.S. at 101); id. at 409 (Blackmun, J., dissenting) (same); id. at 428-29 (Powell, J., dissenting) (same).

38. See Trop, 356 U.S. at 100-01; see also William J. Brennan, Jr., Foreword: Neither Victims Nor Executioners, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1994). Justice Brennan stated that "even those who disagree with my ultimate position [that the death penalty is unconstitutional per se] must acknowledge that the Eighth Amendment definition of 'cruel and unusual' is not frozen in time." Id. at 6. For a more detailed discussion of changing Eighth Amendment requirements, see supra note 4 and accompanying text.

39. See Trop, 356 U.S. at 100-01; see also Woodson, 428 U.S. at 293 (stating that two crucial indicators of society's evolving opinion regarding punishment are legislative enactments and jury determinations). Legislative enactments reflect what society deems acceptable because they are enacted by the "people's chosen representatives." Id. at 294. In addition, it is an "obvious truth that legislatures have the power to prescribe punishments for
In the second part of traditional Eighth Amendment analysis, the Court measures legislative acts against a series of its own requirements. The Court has identified several types of punishment which violate the.

40. See Gregg, 428 U.S. at 182 (“As we have seen . . . the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.”) (citing Trop, 356 U.S. at 100-01). For a discussion of other cases relying on the Trop decision, see supra note 37.
Eighth Amendment, including barbaric, unnecessary, excessive and barbarous punishments are those that degrade human dignity. *Furman*, 408 U.S. at 272 (Brennan, J., concurring). Society condemns such punishments not only for the great level of pain that they induce, but also for their treatment of “members of the human race as nonhumans, as objects to be toyed with and discarded.” *Id.* at 272-75. Because society describes them as “extremely severe,” it follows that barbaric punishments may be considered a form of excessive punishment. *See id.*

41. See *Gregg*, 428 U.S. at 183 (“[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” (citing *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879))).

42. The most common theories of penological justification are retribution and deterrence. *Id.* When a punishment is without even one of these justifications, it is invalid as unnecessary. Jodi L. Short & Mark D. Spoto, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 Geo. L.J. 1199, 1201 n.2272 (1994) (“If a punishment fails to further penological goals of retribution or deterrence, it amounts to the unnecessary and wanton infliction of pain.” (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)); *cf Gregg*, 428 U.S. at 186 (“[I]n the absence of more convincing evidence ... the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.”). For a detailed discussion of case law illustrating the Court’s treatment of these penological justifications, see generally Steven G. Gey, Symposium, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. Rev. 67 (1992) (comparing Justice Scalia’s views on penological justification with those of other justices).

43. *See Gregg*, 428 U.S. at 173 (stating that punishment must, at least, not be “excessive”); *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (stating that justice requires punishments to be “graduated and proportioned to offense”); Short & Spoto, *supra* note 42, at 1200-01 (“The Court ... analyzes whether a particular sentence ‘amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense.’ ” (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion))). This requirement arises from the emphasis of the amendment’s language on excessive punishment. *See U.S. Const. amend. VIII.; see also Project, supra note 4, at 1153 n.2846 (“The Excessive fines clause of the eighth amendment prohibits the imposition of disproportionate fines in criminal cases.” (citing *Electro Servs., Inc. v. Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988); *Wisconsin Truck Ctr. v. Volvo White Truck Corp.*, 692 F. Supp. 1010, 1019 (W.D. Wis. 1988))).

44. The proportionality analysis attempts to compare (1) the gravity of the offense with the harshness of the penalty, (2) the sentence actually given with those given to others convicted of the same or similar offenses in the same jurisdiction, and (3) the sentence actually given with those given for the same or similar offenses in other jurisdictions. *Id.* at 1160 (citing *Solem v. Helm*, 468 U.S. 277, 292 (1983)).

The Court has found the death penalty to be disproportionate for any crime which does not involve the taking of a life. *See United States v. Cheely*, 36 F.3d 1439, 1457 n.3 (9th Cir. 1994) (Alarcon, J., dissenting) (“Supreme Court decisions suggest that the death penalty may not be imposed absent a homicide.”) (citing *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker*, 453 U.S. at 584; *see also Tison v. Arizona*, 481 U.S. 137, 148 (1987) (implying that taking of life must result before death sentence may be imposed); *Enmund*, 458 U.S. at 797 (holding death penalty disproportionate for defendant who aided and abetted bank robbery where death resulted); *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977) (per curiam) (finding death penalty disproportionate for defendant who engaged in kidnapping and rape where no death resulted); *Hooks v. Georgia*, 433 U.S. 917, 917 (1977) (per curiam) (holding death penalty disproportionate for defendant convicted of rape). Notably, the Court explicitly found that the death penalty is a disproportionate
arbitrary or capricious punishments. If a sentencing scheme results in such punishment, any presumption of validity based upon social acceptance is defeated and the Court may rule the scheme unconstitutional.

Modern death penalty regulation focuses on the prevention of arbitrary or capricious sentencing. In particular, the Court has identified two different indicators of arbitrariness in death sentencing procedures:

The few crimes which do not involve killing but for which federal law authorizes the death penalty are crimes which pose 'broad threats to the security of the Nation and the people's welfare,' such as treason, espionage, or airline hijackings. Acosta, supra note 2, at 602 (quoting 135 CONG. REC. S1, 367 (daily ed. Oct. 18, 1989) (statement of Assistant Attorney General Edward S.G. Dennis, Jr.)). For a detailed discussion of the history of these, and other, federal capital punishment statutes, see supra note 35 and accompanying text.

In addition, the proportionality analysis requires an examination of the defendant's mental culpability. See Tison, 481 U.S. at 137 (allowing death sentence for felony murder, where defendant was not minor participant in felony and exhibited at least reckless disregard for human life). According to Tison, the taking of life must at least result from a defendant's reckless act before the death penalty may be imposed. Id. at 157. For a discussion of the role proportionality considerations played in the Cheely majority decision, see infra notes 113-17 and accompanying text.

See Gregg, 428 U.S. at 188 ("Furman held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

See id. at 173 ("[O]ur cases make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive."); cf. id. at 175 ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity."); Woodson v. North Carolina, 428 U.S. 280, 294-95 (1976) (plurality opinion) ("[L]egislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency.").

See, e.g., Furman v. Georgia, 408 U.S. 238, 249 (1972) (per curiam) (Douglas, J., concurring) (stating that there is growing recognition that Eighth and Fourteenth Amendments prohibit imposition of arbitrary or discriminatory punishments (citing Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1790 (1970))).
inconsistency in result\(^47\) and lack of individualized consideration.\(^48\) To resolve arbitrariness in sentencing resulting from these two problems, the Court has concentrated on adjusting the level of discretion given to the sentencer.\(^49\)

\(^{47}\) See Furman, 408 U.S. at 238. In Furman, Justice Douglas expressed his concern for consistency in death sentencing, stating that “[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties.” Id. at 242 (Douglas, J., concurring). Justice Brennan voiced a similar concern, stating, “No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.” Id. at 294 (Brennan, J., concurring).

Following Furman, the Court continued to express concern with consistency in death sentencing. See Woodson, 428 U.S. at 285 (stating that North Carolina law that allowed “the jury in its unbridled discretion” to decide upon death sentence violated Furman); Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion) (stating that Texas law permitted death penalty to be imposed for only most serious crimes and for same kinds of offenses occurring under same kinds of circumstances); Gregg, 428 U.S. at 220-21 (Burger, C.J., White & Rehnquist, JJ., concurring) (“In Furman, this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual.”) (footnotes omitted).

The Court did not merely mean predictability when it used the word “consistency.” Justice Brennan noted that predictability existed at the time of Furman as well as today: “[I]t was then, and it remains today, an uncontested fact that the race of a capital defendant and that of his victim play a prominent role in determining whether the defendant lives or dies.” Brennan, supra note 38, at 1 (citing David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27 (1984); Michael L. Radelet & Glenn L. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 LAW & SOC'Y REV. 587 (1985)). Justice Brennan details the predictable ways in which sentencers rely upon race to mete out death sentences, writing that:

The vast majority of all murders, upwards of 90%, involve a perpetrator and victim of the same race. Among the relatively small group of cross-race murders, “black-on-white” murders are about two and one-quarter times more common than “white-on-black” murders. However, of the 228 persons executed over the last 17 years, 80 black defendants were executed for the murders of white victims (35% of all executions), and only one white defendant was executed for the murder of a black victim (0.44% of all executions).

Id. at 2 (citing “Victim/Offender Relationship by Race and Sex” tables printed annually in U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S.: UNIFORM CRIME REPORTS (1977-1992)). Thus, the Court was motivated by a concern for disparities—here, based on race—in sentencing selection. See id.

\(^{48}\) See Blystone v. Pennsylvania, 494 U.S. 299, 303-08 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Lockett v. Ohio, 438 U.S. 586, 606 (1978); Roberts v. Louisiana, 428 U.S. 325, 332-36 (1976) (plurality opinion); Woodson, 428 U.S. at 280. For a further discussion of the individualization requirement, see infra notes 55-59, 75-77 and accompanying text. For a further discussion of Penry, see infra notes 75-77 and accompanying text.

\(^{49}\) Compare Woodson, 428 U.S. at 280 (limiting amount sentencer discretion can be limited) with Furman, 408 U.S. at 238 (limiting sentencer discretion); see also Sundby, supra note 5, at 1148. Sundby states that:
First, a capital sentencing procedure violates the Eighth Amendment if it gives the sentencer so much discretion that inconsistent results may occur. In 1972, with Furman v. Georgia, a sharply divided Supreme Court

The United States Supreme Court has based its eighth amendment jurisprudence governing the death penalty on two fundamental commandments. The first commandment of "guided discretion" requires that the sentencer's discretion be narrowly guided as to which circumstances subject a defendant to the imposition of the death penalty. The second commandment of "individualized consideration" mandates that the sentencer be allowed to consider all evidence concerning the offender and the offense that might argue for a sentence less than death.

Id. (emphasis added).

Generally, the courts discount other sources of discretion in death sentencing, such as prosecutors, who decide whether to seek the death penalty, or state governors, who decide whether to grant sentence commutation. See Roberts, 428 U.S. at 348-50 (White, J., dissenting) ("Of course, someone must exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system."); Jurek, 428 U.S. at 279 (White, J., concurring) ("Nor . . . am I convinced that this conclusion should be modified because of the alleged discretion which is exercisable by other major functionaries in the State's criminal justice system."); Gregg, 428 U.S. at 199, 225 (Burger, C.J., White & Rehnquist, JJ., concurring) ("[D]efendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless . . . ."). But see Black, supra note 9, at 21 ("[T]he official choices—by prosecutors, judges, juries, and governors—that divide those who are to die from those who are to live are . . . often . . . made . . . under no standards at all or under pseudo-standards without discoverable meaning."); Julie Rigby, The Price of Justice; You've Heard the Pros and Cons on Capital Punishment. Here's the Bottom Line, CHI. TRIB., May 8, 1994, at C8 ("Whether a person is tried for execution depends on the state and county where the crime occurred and on the prevailing political winds of the state's attorney's office. Who the victims are may also influence whether the prosecution decided to seek death."). In Gregg, the Court stated:

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Gregg, 428 U.S. at 199. Thus, the Court attempted to clarify its holding in Furman, to mandate limitation on discretion to impose a death sentence, rather than discretion to not impose the death penalty. See id. This attempt, however, can also be viewed as an effort to justify the Woodson and Roberts decisions, handed down the same day, which granted sentencers the discretion to provide an individualized determination of whether the death sentence should be imposed. See Roberts, 428 U.S. at 325; Woodson, 428 U.S. at 280. For a further discussion of the Woodson and Roberts decisions, see infra notes 55-59 and accompanying text. For a detailed listing of the discretionary stages in capital sentencing, which range from the decision whether to arrest the defendant to the governor's decision whether to grant a pardon or commutation, see NARELL & HARDY, supra note 2, at 10-11.

50. See Furman, 408 U.S. at 238. The Court was particularly concerned with the inconsistency in existing death sentencing procedures. See id. at 309-10 (Stew-
declared the Georgia and Texas capital sentencing procedures unconstitutional because their application was producing inconsistent results. The states’ capital punishment schemes incorporated no statutory aggravating circumstances, allowed for no consideration of mitigating evidence and permitted the jury to choose between several alternative punishments. The Court held these procedures unconstitutional because they

In Furman, each Justice wrote his own separate opinion. Id. at 238. There were five separate concurrences and four separate dissents, none of which any other justice joined. Id. Because Justices Brennan and Marshall concurred on the grounds that the death penalty was per se unconstitutional, the Douglas, Stewart and White concurrences are the most important. See id. For a detailed discussion of these opinions, see Mann, supra note 5, at 501-06, and Nakell & Hardy, supra note 2, at 22-26. As a result of its array of opinions, Furman “engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment.” Lockett, 438 U.S. at 599.

Furman outlawed not only the Georgia and Texas sentencing schemes, but also all other existing death penalty statutes. Nakell & Hardy, supra note 2, at 26 & n.61; Matt, supra note 35, at 77-78; Packer, supra note 33, at 643. In total, Furman invalidated the capital sentencing procedures of 39 states and reversed more than 600 death sentences. Clarke, supra note 2, at 423-24.

As a result, Furman may be viewed as the beginning of Supreme Court capital punishment activism. See Hugo A. Bedau, The Courts, The Constitution, and Capital Punishment 35, 111 (1977) (stating that Court in Gregg “put aside [its] personal scruples against the death penalty in the name of federalism, judicial restraint, legislative deference”); Welsh S. White, The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment 4 (1991) (stating that Supreme Court’s regulation of death penalty truly got under way with Furman); Clarke, supra note 2, at 408 n.4 (stating that decision would have wide implications on “root principles of stare decisis, federalism, judicial restraint, and—most importantly—separation of powers”) (citing Furman, 408 U.S. at 417-18 (Powell, J., dissenting)); see also Pokorak, supra, at 240 (“The ‘cruel and unusual’ punishment clause of the eighth amendment became the constitutional vehicle for federal supervisory control of the states’ administration of capital cases.”); Richard A. Posner, The Meaning of Judicial Self-RestRAINT, 59 Ind. L.J. 1, 14 (1983) (stating that court is activist when it “enlarg[es] its power at the expense of any other government institution”); Sundby, supra note 5, at 1152 (“Furman was the legal equivalent of the Big Bang for capital punishment . . . .”). For a more detailed discussion of judicial activism, see infra note 201 and accompanying text.

Furman, 408 U.S. at 308 n.8. “Georgia law . . . left the jury a choice between the death penalty, life imprisonment, or ‘imprisonment and labor in the penitentiary for not less than one year nor more than 20 years.’” Id. (citing Ga. Code Ann. § 26—1302 (Supp. 1971) (effective prior to July 1, 1969) and Ga. Crim.
allowed the sentencer to exercise "untrammeled" discretion. Thus, for
the first time, the Court required that a sentencing scheme adequately
limit sentencer discretion to pass constitutional muster.

Second, a capital sentencing procedure also violates the Eighth
Amendment if it gives the sentencer too little discretion to consider an
individual's characteristics and the particular circumstances of a case. Just four years after Furman, in Woodson v. North Carolina, the Supreme
Court determined that the Constitution mandates individualized consider-
ation in sentencing. The North Carolina death sentencing procedure
considered in Woodson incorporated no statutory aggravating circum-
stances.

CODE § 26–2001 (1971 rev.) (effective July 1, 1969)). The Texas law similarly
"provide[d] that a 'person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five.' " Id. (citing_TEX. PENAL CODE ANN. art. 1189 (1925)).

53. See id. at 248 (Douglas, J., concurring) (stating that sentencer must not have "untrammeled discretion to let an accused live or insist that he die"). Justice Stewart expressed a similar concern. Id. at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."). Justice White, too, expressed a concern for the effects of unregulated sentencer discretion. Id. at 313 (White, J., concurring) ("[A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

In subsequent decisions, the Court interpreted Furman to require limitations on sentencer discretion. See Hopper v. Evans, 456 U.S. 605, 611 (1982) (stating that Furman and its progeny were "concerned with insuring that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided"); Gregg, 428 U.S. at 189 ("Furman mandates . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").


56. Woodson, 428 U.S. at 304. The Woodson Court stated:
While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. (citation omitted) (emphasis added). Woodson was one of five decisions handed down on the same day in 1972. See id.; see also Roberts, 428 U.S. at 325 (finding sentencing system unconstitutional, for lack of individualized consideration); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion) (finding sentencing proce-
stances, did not allow for consideration of mitigating evidence and gave the jury only one punishment alternative—death. The Woodson Court held that this sentencing scheme unconstitutionally prevented the sent-
duces constitutional); Profitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (same); Gregg, 428 U.S. at 207 (same).

Both of the death sentencing procedures that the Court held unconstitutional in 1976, based on the individualization requirement, involved mandatory statutes. See Roberts, 428 U.S. at 329 (“The legislature changed this discretionary statute to a wholly mandatory one, requiring that the death penalty be imposed whenever the jury finds the defendant guilty of the newly defined crime of first-degree murder.”); Woodson, 428 U.S. at 287 n.9. (“The mandatory nature of the North Carolina death penalty statute for first-degree murder presents a different question under the Eighth and Fourteenth Amendments.”).

Prior to Woodson, the Court questioned mandatory death sentences. See Woodson, 428 U.S. at 296-97 (Stewart, Powell & Stevens, JJ.) (“The ‘hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures . . . to allow some cases of murder to be punished by imprison-ment, instead of by death.’” (citing Winston v. United States, 172 U.S. 303 (1899); McCautha v. California, 402 U.S. 183, 198 (1971) (stating that Supreme Court “detailed the evolution of discretionary imposition of death sentences in this country, prompted by what it termed the American ‘rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers’”)); Williams v. New York, 337 U.S. 241, 247 (1949) (“The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”).

In Woodson and Roberts, the legislatures drafted capital punishment statutes in an attempt to completely constrain sentencer discretion. See Roberts, 428 U.S. at 330-31 (“Under the former statute, the jury had the unfettered choice in any case where it found the defendant guilty of murder . . . . [but now] the jury is required to determine only whether both conditions existed at the time of the killing . . . .”); Woodson, 428 U.S. at 302 (stating that North Carolina had tried, but failed because of jury nullification, to “withdraw[ ] all sentencing discretion from juries in capital cases”). As a result, the sentencer in each case was not free to consider an individual case’s facts, as required under the Court’s constitutional standard. See Penry v. Lynaugh, 492 U.S. 302, 353-54 (1989). The Court in Penry summed up the inade-
quacies in the different sentencing procedures, stating:

In Furman v. Georgia . . . we invalidated Georgia’s capital punishment scheme on the ground that, since there were no standards as to when it would be applied for a particular crime, it created too great a risk that the death penalty would be irrationally imposed. Four years later, however, we struck down the capital sentencing schemes of North Carolina and Louisiana for the opposite vice—because they unduly constricted sentencing discretion by failing to allow for individualized consideration of the particular defendant and offense, see Woodson v. North Carolina [and] Roberts v. Louisiana . . . .

Id. (citations omitted).

57. Woodson, 428 U.S. at 285 n.4. The statute at issue in Woodson stated: Murder in the first and second degree defined; punishment—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of
tencer from considering the "character and record of the individual offender and the circumstances of the particular offense."58 Thus, the Court determined that statutory law could not overly restrict a sentencer's discretion to select among punishment options.59

Absent clear delineation of the proper relationship between the Furman and Woodson holdings, the Court's requirements could create confusion.60 The decisions merely outline two unacceptable extremes in sentencing: total restriction and lack of restriction on sentencer discretion.61 Accordingly, in following these two cases the Court has found unconstitutional any sentencing scheme that, taken as a whole, approached either of not less than two years nor more than life imprisonment in the State's prison.

Id. at 286 (quoting N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975)).

‘Originally, the North Carolina murder statute stated:
Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starvation, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.’

Id. at 285 n.4 (quoting N.C. Gen. Stat. § 14-17 (1969)). The statute in this form, however, gave too much leeway to the jury and was revised to limit the jury's punishment alternatives to one—death. Id. Under the new statute, after "the return of a verdict of guilty of any such offense, the court [had to] pronounce a sentence of death." Id. at 286 n.5.

58. Id. at 304 (stating that process must accord "significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense"); see Roberts, 428 U.S. at 333 (stating that problem with mandatory death sentence statute is that it lacks "focus on the circumstances of the particular offense and the character and propensities of the offender").

Both Woodson and Roberts dealt with mandatory death sentencing schemes. See id. at 325; Woodson, 428 U.S. at 280. Roberts and Woodson were the only of the five cases handed down on the same day in 1976 to declare a statute unconstitutional based on the individualization requirement. Howe, supra note 9, at 370-73 (stating that Court employed different analysis in these two cases). But see id. at 367 ("[T]he two mandatory statutes would have been least open to attack because they eliminated all potential for arbitrariness from sentencing proceedings."). For a further discussion of the two cases, see supra note 56.


60. Compare Woodson, 428 U.S. at 280 with Furman, 408 U.S. at 238.

61. See Woodson, 428 U.S. at 280; Furman, 408 U.S. at 238. In Woodson, the Court found unconstitutional death sentencing procedures that completely restricted the sentencer's discretion. Woodson, 428 U.S. at 280. Previously, in Furman, the Court found unconstitutional death sentencing procedures that gave unlimited discretion to the sentencer. Furman, 408 U.S. at 238.
these extremes. 62 Although the Court presumably directed sentencing systems to forge a middle ground between limitation on and allowance of sentencer discretion, it has failed to more exactly specify the parameters of this middle ground. 63


63. See Sundby, supra note 5, at 1153. Sundby stated:

Gregg and its companion cases thus laid out the basic eighth amendment parameters for capital punishment: the sentencer's discretion must be controlled as to when the death penalty can be imposed, but sufficient discretion must remain so that the death penalty is not imposed without an opportunity to consider the specific circumstances of the defendant and the crime.

Id. For the two requirements to be met simultaneously, therefore, the statute must strike a careful balance. See Mann, supra note 5, at 495 n.6 (stating that Furman and Woodson establish "a spectrum of permissible outcomes ... with ... the Court accepting statutes that fall in the middle" (citing Sundby, supra note 5, at 1161; Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 905, 929; Leading Cases, 104 Harv. L. Rev. 129, 139-40 (1990)); Clarke, supra note 2, at 424-25 ("[The Court's] resolution of the discretion dilemma ... is ultimately as simplistic as Goldilocks's approach to dealing with the three bears: complete discretion is too arbitrary (Furman), no discretion is just as bad (Roberts and Woodson), but guided discretion is just right (Gregg, Proffitt, and Jurek.").") (footnotes omitted).

At no time, however, has the Court prescribed exactly what balancing is required. See id., at 425 ("What guided discretion entails or what it absolutely requires, however, remains unclear."). In 1978, the Court recognized the confusion in the area of law and attempted to rectify it. Lockett v. Ohio, 438 U.S. 586, 602 (1978) ("The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance."). The Court stated that a sentencing scheme which individually assesses the culpability of each capital defendant, while still providing standards to guide the sentencing decision in compliance with Furman, would be constitutionally sound. Id. at 600 (citing Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1690-1710 (1974)).

Post-Lockett decisions, however, confuse the issue once again. Howe, supra note 9, at 378 ("During the decade after Lockett, the Court continued to ignore the existence of the rift within its capital sentencing cases."). The decisions require more than a vague "individual assessment" of a capital defendant's culpability. See Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990) (upholding Pennsylvania procedure for "allowing the jury to consider all relevant mitigating evidence"); Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (striking down Texas procedure for failure to allow sentencer to consider and give effect to all mitigating evidence "relevant to the defendant's background or character or to the circumstances of the offense"); Lockett, 438 U.S. at 589 (striking down Ohio procedure for failure to allow sentencer to consider "circumstances of the crime and the record and character of the offender as mitigating factors").

The trend in these cases is toward an increasing reliance upon sentencer consideration of mitigating circumstances. Today, in order to pass constitutional muster, a statutory scheme must not prevent a sentencer from hearing and giving effect to any relevant mitigating evidence. See Penry, 492 U.S. at 302 (holding statute unconstitutional because it did not allow jury to give effect to mitigating evi-
B. The Conflict Intensifies: Zant v. Stephens\textsuperscript{64} and Penry v. Lynaugh\textsuperscript{65}

Since 1972, the Supreme Court has further refined Furman's consistency requirement.\textsuperscript{66} In Zant v. Stephens, the Court concluded that statutory systems need not specifically instruct the jury on how to sentence a defendant.\textsuperscript{67} Instead, statutory systems need only provide guidance on
dence of defendant's mental retardation and childhood abuse). Thus, while the analysis is more focused—in the sense that it centers upon one area, consideration of mitigating factors—it is at the same time more broad, by mandating that the discretion of the sentencer be completely unfettered in this one area. See id. This brings the requirement into potential conflict with Furman's requirement that the jury's discretion not be entirely unfettered. See Furman, 408 U.S. at 238. For a further discussion of the Court's holding in Furman, see supra notes 50-54 and accompanying text. For the Model Penal Code list of mitigating factors, see infra note 76.

\textsuperscript{64} 462 U.S. 862 (1983). The Georgia sentencing scheme at issue in Zant used statutory aggravating circumstances to determine a defendant's eligibility for a death sentence, but did not allow consideration of mitigating evidence. \textit{id.} at 865 n.1. The relevant Georgia statute stated:

\begin{quote}
In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions . . . (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim . . . (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
\end{quote}

\textit{id.} (citing GA. CODE ANN. § 27-2534.1(b) (1978)).

65. 492 U.S. 302 (1989). The Texas sentencing scheme at issue employed no statutory aggravating circumstances. \textit{id.} at 316. Instead, the scheme limited the death penalty to intentional and knowing murders in five circumstances. \textit{id.} Further, Texas law required the jury to answer three questions affirmatively before imposing a death sentence. \textit{id.} The Court found that the sentencing scheme was adequate even though it did not specifically employ statutory aggravating circumstances. \textit{id.} The Court stated that "although Texas had not adopted a list of statutory aggravating factors that the jury must find before imposing the death penalty, 'its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.' " \textit{id.} (quoting Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion)).


67. Zant, 462 U.S. at 875. Relying upon the holding in Gregg, the Zant Court validated a sentencing procedure that "clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." \textit{id.} (citing Gregg, 428 U.S. at 153). The Court stated that "[S]pecific standards for balancing aggravating against mitigating circumstances are not constitutionally required." \textit{id.} at 876 n.13 (citing Jurek, 428 U.S. at 262).
who may be sentenced.68 Ultimately, the Court found that Furman only ordered the state to narrow the class of persons eligible for death.69

A state may accomplish the requisite narrowing in a variety of ways.70 The state legislature may narrowly define the relevant offense.71 Alterna-

68. Id. at 878 ("Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."). The Court in Zant identified two separate stages of death penalty sentencing: (1) the class of persons eligible to receive death sentences is sketched out; and (2) persons are selected from that class to receive the death sentence. Id. at 878-79. The Furman requirement is met through narrowing in the first stage, while the Woodson requirement is met through individualized consideration in the second stage. Id. Thus, the two requirements remain separate from each other. Id.

69. Id.

70. Compare id. at 862 (upholding sentencing scheme using at least one statutory aggravating circumstance) and Gregg, 428 U.S. at 153 (upholding sentencing scheme using various statutory aggravating circumstances to meet Furman requirement) and Profitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (same) and Jurek, 428 U.S. at 262 (same) with Lowenfield, 484 U.S. at 231 (upholding statutory system using narrow statutory definition to meet Furman requirement) and McCleskey, 481 U.S. at 279 (same).

71. See Clarke, supra note 2, at 437 ("In Texas, the definition of capital murder substitutes for the list of statutory aggravating circumstances the Supreme Court deemed necessary in Gregg and Profitt. Thus, eligibility for the death penalty is determined at the guilt-innocence phase of a capital murder trial rather than at the penalty phase.") (footnote omitted).

Furman did not specifically answer the question of whether the Constitution required statutory aggravating circumstances. United States v. Cheely, 36 F.3d 1439, 1451 (9th Cir. 1994) (Alarcon, J., dissenting). Later decisions, however, answered this question. Id.; see, e.g., Lowenfield, 484 U.S. at 231; McCleskey, 481 U.S. at 279. The Lowenfield Court stated:

The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition to finding the elements of the crime is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Lowenfield, 484 U.S. at 246. According to the Court in Lowenfield, the Constitution requires narrowing and individualized consideration. See id. The narrowing need not be performed by statutory aggravating circumstances. See id.; see also Cheely, 36 F.3d at 1455 (Alarcon, J., dissenting); cf. Deputy v. Taylor, 19 F.3d 1485, 1501-02 (9th Cir. 1994) (relying upon Lowenfield to hold that statutory aggravating circumstance could repeat element of crime; when crime was felony-murder and aggravating circumstance was also felony-murder); Johnson v. Singletary, 932 F.2d 1360 (11th Cir.) (same), cert. denied, 502 U.S. 961 (1991); Ferguson v. State, 642 A.2d 772 (Del. 1994) (same).

Further, two Ninth Circuit cases agree that the narrowing function may be performed through narrow statutory definition. See McKenzie v. Risley, 842 F.2d 1525, 1538 (9th Cir. 1987) (stating that statute must, at stage of legislative definition, "carefully delimit...classes of crimes for which the death penalty is permissible punishment," without requiring statutory aggravating circumstances), cert. denied, 488 U.S. 9012 (1988); United States v. Harper, 729 F.2d 1216, 1224 (9th Cir. 1984) (stating that "the guidelines plainly required by Gregg and its compan-
tively, the legislature may broadly define the offense, but then include a list of aggravating circumstances to guide the sentencer's determination.\(^{72}\)

Although the Cheely majority interpreted Harper to require aggravating circumstances, the Ninth Circuit previously refused to read Harper in this way when deciding McKenzie. Cheely, 56 F.3d at 1458 (Alarcon, J., dissenting) (citing McKenzie, 842 F.2d at 1542 n.35). Harper should not be interpreted to require aggravating circumstances because it would then contradict Supreme Court precedent. \(^{Id.}\)

\(^{72}\) See generally Marr, supra note 35, at 89-95 (discussing cases using statutory aggravating circumstances (citing Blystone v. Pennsylvania, 494 U.S. 299 (1990); Clemons v. Mississippi, 494 U.S. 738 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Barclay v. Florida, 463 U.S. 999 (1983); Zant v. Stephens, 462 U.S. at 862; Profitt, 428 U.S. at 242 (plurality opinion))). “[A]n aggravating circumstance is simply a factor that the sentencer must find before it can impose the penalty of death.” Clarke, supra note 2, at 428. Most states spell out special aggravating circumstances, which are relatively specific and narrow, in the capital sentencing statute. \(^{Id.}\) But see Black, supra note 9, at 66-67 (arguing that statutory aggravating circumstances are so vaguely worded that they are “nonstandards”).


The Model Penal Code provides the following list of aggravating circumstances:

Aggravating Circumstances

a. The murder was committed by a convict under sentence of imprisonment.

b. The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
Both procedures, the Court has held, are acceptable means of narrowing the class of persons eligible for death. In addition, because it determines the constitutionality of each procedure on a case-by-case basis, the Court may determine that additional legislative narrowing attempts are also legitimate.

While refining Furman's consistency requirement, the Court has also refined Woodson's individualization requirement. In Penry v. Lynaugh,

c. At the time the murder was committed the defendant also committed another murder.
d. The defendant knowingly created a great risk of death to many persons.
e. The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
f. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
g. The murder was committed for pecuniary gain.
h. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.


73. See Lowenfield, 484 U.S. at 231 (holding that statutory definition performed constitutionally required narrowing); McCleskey, 481 U.S. at 280 (same); Jurek, 428 U.S. at 262 (same). In Jurek, the Court specifically noted that although Texas did not employ statutory aggravating circumstances like Georgia and Florida, the state still operated under constitutional death-sentencing procedures. Id. at 270 (“While Texas has not adopted a list of statutory aggravating circumstances . . . its action in narrowing . . . serves much the same purpose.”). For a further discussion of the Court's treatment of statutory aggravating circumstances, see infra notes 152-59 and accompanying text.

74. See Blystone, 494 U.S. at 309 (“The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice.”); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion) (“There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.”); Gregg, 428 U.S. at 195 (“We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis.”) (citation omitted).

75. See Blystone, 494 U.S. at 307 (upholding Pennsylvania procedure for “allowing the jury to consider all relevant mitigating evidence”); Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (striking down Texas procedure for failure to allow sentencer to consider and give effect to all mitigating evidence “relevant to the defendant's background or character or to the circumstances of the offense”);
the Court held that a statute could not prevent the sentencer from considering and giving effect to any relevant mitigating evidence.\textsuperscript{76} Thus, the state cannot limit the sentencer's discretion in this area.\textsuperscript{77}

In the years since the \textit{Furman} and \textit{Woodson} decisions, the Court has not provided a means of striking a balance between the two contradictory Eighth Amendment requirements.\textsuperscript{78} In fact, the Court has interpreted the consistency and individualization requirements such that they are mutually exclusive.\textsuperscript{79} On the one hand, a statutory scheme must limit sen-

\textit{Lockett}, 438 U.S. at 586 (striking down Ohio procedure for failure to allow sentencer to consider "circumstances of the crime and the record and character of the offender as mitigating factors").

76. \textit{Blystone}, 494 U.S. at 305 n.2 (citing \textit{Commonwealth v. Holcombe}, 498 A.2d 833, 856 n.26 (Pa. 1985)). The Court relied upon its decision in \textit{Lockett}. \textit{Id.}

Along these lines, the \textit{Model Penal Code} did not limit the sentencer to a specific list of mitigating circumstances, but instead allowed consideration of "any other facts that [the sentencer] deem[ed] relevant." See \textit{Model Penal Code} § 210.6(2) (Proposed Official Draft 1962). The \textit{Model Penal Code}, however, does provide the following list of mitigating circumstances:

\textbf{Mitigating Circumstances}

a. The defendant has no significant history of prior criminal activity.

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

f. The defendant acted under duress or under the domination of another person.

g. At the time of the murder, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

h. The youth of the defendant at the time of the crime.

\textit{Id.} § 210.6(4).

77. \textit{See Penry}, 492 U.S. at 927 (relying upon \textit{McCleskey}, 481 U.S. at 304).

78. \textit{See generally United States v. Cheely}, 36 F.3d 1439, 1451-55 (9th Cir. 1994) (following Supreme Court and failing to provide new standard for striking balance in Eighth Amendment interpretation).

79. \textit{Compare Penry}, 492 U.S. at 304-05 (deciding to permit limitation on sentencer discretion to take into account certain evidence when deciding which defendants would receive death sentence) with \textit{Zant v. Stephens}, 462 U.S. 862, 873-80 (1983) (requiring limitation on sentencer discretion to determine which defendants could receive death sentence). In 1978, Justice White recognized the possibility of conflict between \textit{Furman}'s requirement and the notion of allowing "consideration of all mitigating evidence that bears on the appropriateness of the death penalty." Sundby, \textit{supra} note 5, at 1161. In more recent individualized consideration cases, however, "the Court has begun to address the tension directly." \textit{Id.} at 1162.

In recent cases, the Court began to recognize the incompatibility of the two Eighth Amendment requirements. On the one hand, Justice Blackmun found the two requirements incompatible. \textit{See Callins v. Collins}, 114 S. Ct. 1127, 1192 (1994)
tencer discretion. On the other hand, a statutory scheme may not limit
(mem.) (Blackmun, J., dissenting) ("[T]he consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness."); id. at 1136 (Blackmun, J., dissenting) ("[T]he consistency promised in Furman and the fairness to the individual demanded in Lockett are not only inversely related, but irreconcilable in the context of capital punishment."); McCleskey, 481 U.S. at 363 (Blackmun, J., dissenting) (noting possibility of "an inherent tension" in area of law).

On the other hand, Justice Scalia also found the requirements incompatible. See Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that 'there perhaps is an inherent tension' between [the Lockett] line of cases and the line stemming from Furman . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II." (quoting McCleskey, 481 U.S. at 363 (Blackmun, J., dissenting) (citations omitted))).

Even in the Court's center, other Justices noted the incompatibility of the two requirements. See Franklin v. Lynaugh, 487 U.S. 164, 182 (1988) (Rehnquist, C.J., White, Scalia & Kennedy, J.J.) ("Arguably these two lines of cases . . . are somewhat in 'tension' with each other.") (citation omitted); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) ("[T]ension . . . has long existed between the two central principles [of consistency and individualized sentencing] of our Eighth Amendment jurisprudence."). Justice Scalia's criticism of the irreconcilability of the two requirements is the most scathing. For example, he stated that: "Woodson and Lockett are rationally irreconcilable with Furman . . . I would not know how to apply . . . both them and Furman—if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in Furman when I know that objective is in any case impossible of achievement because of Woodson-Lockett . . . Stare decisis cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

Walton, 497 U.S. at 673 (Scalia, J., concurring). Eighth Amendment scholars agree that inconsistency exists. See, e.g., Clarke, supra note 2, at 433 ("How can one procedure, combining both aggravating and mitigating circumstances, be both discretionary and non-discretionary?").

While so many agree upon the existence of tension between the two requirements, they disagree on what course of action the Court should take to remedy the problem. Justice Scalia advocates eliminating one of the requirements. See Walton, 497 U.S. at 673 (Scalia, J., dissenting) (arguing that two principles are incompatible, and one in plain error must be rejected). Justice Blackmun, on the other hand, believed that there was no way to correct the inconsistency and that the death penalty should be declared unconstitutional as a result. See Callins, 114 S. Ct. at 1134-36 (Blackmun, J., dissenting) (stating that because premise of Furman will continue to go unfulfilled, and arbitrariness cannot be expunged from system, death penalty should be abolished). For a further discussion of Justice Blackmun's conclusion that the death penalty should be declared unconstitutional, see infra notes 178, 197.

The tension recognized in recent cases may be a natural one. Sundby, supra note 5, at 1208 n.124. Indeed, the "tension between the desire to have certainty and uniformity in the application of rules and the desire to adapt the rules for particular individuals runs throughout the law." Id. (citing Compassion and Judging, 22 Ariz. St. L.J. 13 (1990)).

80. See Zant, 462 U.S. at 862 (holding that limited function served by jury does not invalidate statutory scheme under Furman); Gregg v. Georgia, 428 U.S. 153, 155 (1976) (plurality opinion) (finding Georgia statutory system for death penalty constitutional, because it was carefully drafted statute ensuring adequate informa-
sentencer discretion. After *Penry*, a constitutionally acceptable sentencing stage that did not limit sentencer discretion would directly contradict the original *Furman* requirement. Similarly, a statutory definition that

Pursuant to *Furman*, and in order "to achieve a more rational and equitable administration of the death penalty," we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.' " In the next breath, however, we say that "the State cannot channel the sentencer's discretion... to consider any relevant [mitigating] information offered by the defendant," and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death[.]"

The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.

**Walton**, 497 U.S. at 664-65 (Scalia, J., concurring) (citations omitted).

82. Compare *Penry*, 492 U.S. at 302 with *Furman*, 408 U.S. at 238. Justice Thomas stated that *Penry* was "wrongly decided" and expressed his concern for the confusion the *Penry* decision created between the individualization and consistency requirements. *See* Graham v. Collins, 113 S. Ct. 892, 904 (1993) (Thomas, J., concurring) ("As the most extreme statement in our 'mitigating' line, *Penry* states more than an unavoidable tension; it presents an evident danger."). Justice Thomas concluded that "[i]n holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned." *Id.* at 912 (quoting *Penry*, 492 U.S. at 360 (Scalia, J., concurring in part, dissenting in part)).

Justice Blackmun also noted the inconsistence between the Court's two requirements. *See* Collins, 114 S. Ct. at 1134 (Blackmun, J., dissenting) ("Thus, the Constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted."). Justice Blackmun, however, felt that the *Penry* decision only exposed the already existing inconsistence between the two Eighth Amendment requirements. *Id.* (Blackmun, J., dissenting) (stating that inconsistence between Court's consistency and individualization requirements "was laid bare" in *Penry*).

Either way, "[a]fter *Penry*, the paradox underlying the Court's post-*Furman* jurisprudence was undeniable. Texas had complied with *Furman* by severely limiting the sentencer's discretion, but those very limitations rendered *Penry's* death sentence unconstitutional." *Id.* (Blackmun, J., dissenting). For a further discussion of *Furman*, see *supra* notes 50-54 and accompanying text. For a further discussion of *Penry*, see *supra* notes 75-77 and accompanying text.
complied with the *Furman* holding and acceptably narrowed the class of death-eligible defendants eligible would limit sentencer discretion and directly contradict *Penry* if measured separately against its individualization requirement.88

Moreover, the Court has determined that a sentencing system should not be measured as a whole against the Eighth Amendment for arbitrariness.84 Instead, the Court has fractioned application of the Amendment.85 Only the sentencing stage where the death-eligible class is defined must meet the Amendment's consistency mandate, and only the stage where a defendant is selected from the eligible class must meet the

83. See *Callins*, 114 S. Ct. at 1136. Justice Blackmun stated:

Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing." *Id.* (Blackmun, J., dissenting) (citing *Graham*, 113 S. Ct. at 912 (Thomas, J., concurring)). Justice Blackmun concluded that "[a]ll efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death." *Id.* (Blackmun, J., dissenting). For a further discussion of Justice Blackmun's opinion on the death penalty, see infra notes 178, 197 and accompanying text.

84. See *Zant*, 462 U.S. at 878-79 (emphasizing central importance of individualized determination on basis of character of individual and circumstances of crime); see also Sundby, *supra* note 5, at 1164 ("Splitting the decision-making process into two distinct stages allows the Court to justify treating aggravating and mitigating factors differently by maintaining that they address distinct aspects of the sentencer's decision."). There were previous indications that the Court might split the sentencing procedure into two stages, with a different requirement applying to each stage. Justice White stated in *Gregg* that:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are 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, it becomes reasonable to expect that juries—even given discretion not to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

*Gregg*, 428 U.S. at 222 (White, J., concurring). In retrospect, other cases also foreshadowed *Zant*. See *Lockett v. Ohio*, 438 U.S. 586, 589 (1978) (plurality opinion) (stating that statute must "narrowly limit the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors"); *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion) (stating that state procedure correctly "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death").

individualization mandate. Thus, the Court absolved legislatures from the seemingly impossible task of designing death sentencing schemes that, in their entirety, comply with all of the Eighth Amendment’s essential components.

In United States v. Cheely, the United States Court of Appeals for the Ninth Circuit followed cases narrowing sentencer discretion, such as Furman and Zant, to strike down legislation as arbitrary because it did not provide adequate guidance to the sentencer. The federal mail-bombing legislation addressed in Cheely incorporated no statutory aggravating circumstances, allowed for the consideration of mitigating evidence and did not permit the jury to select from alternative punishments when death resulted. The Cheely court invalidated this sentencing system, relying on the premise of Furman and Zant: sentencer discretion must be limited to achieve the consistency of result mandated by the Eighth and Fourteenth Amendments.

86. The Court’s concerns in Furman and Woodson cannot be neatly cordoned off into the separate stages. See Callins, 114 S. Ct. at 1134 (mem.) (Blackmun, J., dissenting) (“It is the decision to sentence a defendant to death—not merely the decision to make a defendant eligible for death—that may not be arbitrary.”); Graham, 113 S. Ct. at 910 (Thomas, J., concurring) (“[P]roviding all relevant information for the sentencer’s consideration does nothing to avoid the central danger that sentencing discretion may be exercised irrationally.”). For a further discussion of the problems with Zant’s two stages, see supra note 9 and accompanying text.

87. See Blystone v. Pennsylvania, 494 U.S. 299 (1990) (holding that jury must be permitted to consider all relevant mitigating evidence); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that sentencer must be permitted to consider and give effect to all relevant mitigating evidence); Lockett, 438 U.S. at 586 (holding that sentencer must be allowed to consider mitigating factors); Gregg, 428 U.S. at 155-56 (holding that sentencer must not be left unfettered in punishment decision); Furman v. Georgia, 408 U.S. 153, 239-40 (per curiam) (finding that sentencer must not be given too much discretion in sentencing decision). For a further discussion of the possibility of striking a balance between the two requirements, see supra notes 60-63 and accompanying text. For a further discussion of the remote likelihood of any balancing occurring at the present time, due to the deep rift between the two requirements, see supra notes 78-86 and accompanying text.

88. See United States v. Cheely, 36 F.3d 1499, 1446 (9th Cir. 1994) (“We affirm the district court’s determination that the death penalty provisions . . . are unconstitutional because they do not ‘genuinely narrow the class of persons eligible for the death penalty’ [as stated in] Zant, and because they set the stage for capital punishment which may be ‘wantonly and . . . freakishly imposed’ [as stated in Furman].”) (citations omitted). For a discussion of Furman, see supra notes 50-54 and accompanying text. For a discussion of Zant, see supra notes 66-69, 84-87 and accompanying text.

89. See 18 U.S.C. §§ 94, 844(d) and 1716(a) (1988) (providing possibility of death penalty for perpetrators of mail bombings). For a further discussion of the statutory provisions, including the specifically relevant sections, see infra note 94 and accompanying text.

90. See Cheely, 36 F.3d at 1445 (“When juries are . . . allowed to decide who [among the broad eligible class] deserves death, the possibility of aberrational decisions as to life or death is too great.”).
III. UNITED STATES v. CHEELY

A. Facts

In Cheely, the defendant sought retribution against a man named George Kerr for his prior testimony in a murder trial. Cheely allegedly mailed a bomb to Kerr with the intent to kill him. However, the bomb killed Kerr's father instead. Cheely was subsequently charged under federal mail-bombing legislation, which made him eligible for a death sentence.

91. Id. at 1441. Another defendant, named Gustafson, and two of his relatives were also charged with the same offense. Id. Gustafson, however, stipulated to the dismissal of his appeal. Id. at 1441 n.2.

92. Id. at 1441. George Kerr witnessed Gustafson and Cheely kill Jeffrey Cain. Id. Kerr then testified in the subsequent murder trial that resulted in the conviction of Gustafson and Cheely. Id. Cheely and Gustafson proceeded to plan revenge from behind bars, enlisting Gustafson's relatives to mail a bomb to Kerr's address. Id. According to the Bureau of Alcohol, Tobacco and Firearms, revenge is the primary motive of mail bombers. See The Use of Mail to Send Bombs: Hearing Before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service, 103d Cong., 2d Sess. 14, 18 (1994) [hereinafter Hearing] (testimony of Edmund Kelso, Unit Chief, Bomb Data Center, Fed. Bureau of Investigations). For a further discussion of mail-bombing, see infra notes 157, 162-65 and accompanying text.

93. Id. at 1441. Kerr was out of town and his parents were collecting his mail for him. Id. When his father opened the package containing the bomb, it exploded and he was killed. Id. Kerr's mother was also seriously injured. Id.

Even though Cheely and Gustafson intended to kill Kerr, and not his father, the crime was still intentional under the doctrine of transferred intent. See Paul H. Robinson, Imputed Criminal Liability, 93 YALE L.J. 609, 615 n.19 (1984) ("[A]n intent to kill deceased may be imputed from the existence and proof of an intent to kill another." (citing People v. Forrest, 272 N.E.2d 813 (Ill. App. 1971))). The death penalty is permissible under the proportionality test for intentional killings. See Tison v. Arizona, 481 U.S. 137, 155-78 (1987) (holding that major participation in felony combined with reckless indifference to human life was sufficient to satisfy culpability requirement). Thus, Cheely and Gustafson had no disproportionality arguments under Tison. See Cheely, 36 F.3d at 1443 ("Cheely is not in a position to advance this argument, however, as he is charged with the intentional murder of David Kerr."). Judge Alarcon, in his dissent, agreed. See id. at 1449 (Alarcon, J., dissenting) ("Cheely is charged with sending an explosive device intentionally designed to kill the recipient."). For a further discussion of the proportionality requirement, see supra note 43 and accompanying text.

94. Specifically, Cheely was charged under three statutory provisions. Cheely, 36 F.3d at 1443. The first, 18 U.S.C. § 844(d) (1988), provides in pertinent part, that:

(d) Whoever transports or receives, or attempts to transport or receive, in interstate commerce ... any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if ... death results to any person, ... shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

18 U.S.C. § 844(d) (emphasis added).
Second, Cheely was also charged under 18 U.S.C. § 34 (1988), which generally provides what penalty is to be given when death results. Section 34 states that: "Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct." 18 U.S.C. § 34.

Third, Cheely was charged under 18 U.S.C. § 1716(a) (1988), which describes nonmailable injurious articles. Section 1716(a) provides that:

(a) [A]ll explosives . . . are non-mailable matter and shall not be conveyed in the mails . . .

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail[,] . . . anything declared non-mailable by this section[,] . . . with intent to kill or injure another, or injure the mails or other property, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct . . .


All of the applicable statutory sections were enacted prior to the Furman decision in 1972: Section 34 was added to Title 18 on July 14, 1956, the portion of § 1716 authorizing the death penalty was enacted on September 2, 1957 and the part of § 844 authorizing the death penalty was effective on October 15, 1970. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 956.

The Violent Crime Control and Law Enforcement Act of 1994 altered these sections somewhat. See H.R. 3555, 103d Cong., 2d Sess. (1994) [hereinafter 1994 Crime Bill]. Section 844(d) was amended to no longer make reference to § 34. Id. Section 1716 no longer authorizes the death penalty. Id. At the same time, the 1994 Crime Bill authorizes the death penalty for many new federal crimes, from car-jacking to drive-by-shooting. Id.; see also Henry J. Reker, A Bigger Role for the Feds: 60 Offenses Now Eligible for Death Penalty Under Bill, 80 A.B.A. J. 14 (Oct. 1994) (stating that bill increases to 60 number of federal crimes that could bring death penalty). For a discussion of the impact Cheely will have on the 1994 Crime Bill, see infra notes 209-14 and accompanying text.

Prior to 1988, the Department of Justice took the official position that federal death penalty statutes, like the ones above, were unconstitutional because they did not contain Furman procedures for regulating the imposition of the death penalty. Kamenar, supra note 35, at 881. In 1988, however, the Department of Justice modified its position, stating that

[T]he death penalty may be permissible for certain crimes in addition to aircraft hijacking. There are arguments, never considered by the Supreme Court, that imposition of the death penalty for narrowly drawn offenses against the United States and its officials remain viable under the rationale of Jurek v. Texas, 428 U.S. 262 (1976).

Id. at 882-83 n.7 (quoting 3(a) U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.010 (rev. Oct. 1, 1988)).

At least one authority has taken this position a step further, stating that all federal death penalty statutes are constitutional on their face because they already channel the sentencer's discretion "by focusing on the particular criminal and his [or her] particular crime." Id. at 884-85. This theory, however, does not consider the consistency requirement, the focus of Cheely. See id.; see also Cheely, 36 F.3d at 1439.
Cheely contended that a death sentence would be unconstitutional under the Eighth and Fourteenth Amendments. The Constitution, Cheely argued, prohibits the imposition of arbitrary death sentences. Cheely concluded that, because the federal mail-bombing legislation did not adequately narrow the class of those eligible for a death sentence, the legislation was unconstitutionally arbitrary.

The United States District Court for the District of Alaska agreed, finding the statute unconstitutional. The Ninth Circuit affirmed the district court's decision on the basis of the statute's failure to genuinely narrow the class of persons eligible for the death penalty. This failure, the court reasoned, would result in inconsistent sentencing and set the stage for arbitrary and capricious imposition of the death penalty.


The Ninth Circuit found the federal mail-bombing statute unconstitutional because it permitted arbitrary and capricious capital sentencing in violation of the Eighth and Fourteenth Amendments. The statute prohibits mailing an explosive with the intent to kill or injure a person or property, or with knowledge that such killing or injury might result. Where death results, the defendant is eligible for a death sentence. This language, the court reasoned, did not adequately narrow the class of
persons eligible for the death sentence, thereby leaving the decision to the sentencer's discretion.\textsuperscript{104}

In \textit{Cheely}, the Ninth Circuit began its analysis by acknowledging both the consistency and individualization requirements of the Eighth Amendment.\textsuperscript{105} The court states that \textit{Furman} stood for the proposition that a sentencer must not be permitted to exercise unbridled discretion in applying the death penalty.\textsuperscript{106} The court determined that the cases since \textit{Furman} have developed two specific requirements.\textsuperscript{107} First, the cases mandate that the legislature narrow the class of death-eligible defendants to achieve consistency in sentencing.\textsuperscript{108} Second, the cases require that the legislature allow the sentencer to consider and give effect to relevant mitigating circumstances to achieve individualization in sentencing.\textsuperscript{109}

The Ninth Circuit then evaluated the statute in question against the consistency requirement.\textsuperscript{110} As an initial matter, the court noted that the required narrowing of the death eligible class may be accomplished either at the guilt or sentencing phase.\textsuperscript{111} In the federal mail-bombing statute, the court implied, this narrowing function must occur by or at the stage of sentencing where a defendant's guilt or innocence is determined.\textsuperscript{112}

The \textit{Cheely} court found that the statute failed to meet the consistency requirement because it authorized death for acts less culpable than reckless homicide.\textsuperscript{113} The statute applies to mail-bombing where, at the least,

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\textsuperscript{104.} \textit{Cheely}, 36 F.3d at 1446 (citing \textit{Zant} v. Stephens, 462 U.S. 862, 877 (1983)). For a detailed discussion of \textit{Zant}, see \textit{supra} notes 64-69, 84-87 and accompanying text.

\textsuperscript{105.} \textit{Id.} at 1442 (citing \textit{Zant}, 462 U.S. at 877; \textit{Penry} v. \textit{Lynaugh}, 492 U.S. 302, 318 (1989)). For a detailed discussion of \textit{Penry}, see \textit{supra} notes 75-77 and accompanying text.

\textsuperscript{106.} \textit{Id.} (citing \textit{Furman} v. \textit{Georgia}, 408 U.S. 238, 310 (1972) (per curiam) (Stewart, J., concurring)). For a discussion of \textit{Furman}, see \textit{supra} notes 50-54 and accompanying text.

\textsuperscript{107.} \textit{Id.} ("The post-\textit{Furman} death penalty jurisprudential framework can be quickly sketched."). For a discussion of the evolution of \textit{Furman}'s requirement, see \textit{supra} notes 66-74 and accompanying text.

\textsuperscript{108.} \textit{Id.} (citing \textit{Zant}, 462 U.S. at 862).

\textsuperscript{109.} \textit{Id.} (citing \textit{Penry}, 492 U.S. at 302).

\textsuperscript{110.} \textit{Id.} at 1443-46. For a more detailed discussion of the consistency requirement, see \textit{supra} notes 6, 47, 50-54, 64-68 and accompanying text.

\textsuperscript{111.} \textit{Id.} at 1442 (citing \textit{Lowenfield} v. \textit{Phelps}, 484 U.S. 231 (1988)). For a discussion of \textit{Lowenfield}, see \textit{supra} note 71 and accompanying text.

\textsuperscript{112.} \textit{See id.} at 1444-45 ("[S]ections 844(d) and 1716(d) neither require the jury to find any of the aggravating factors present in \textit{Gregg}, nor account for these factors directly in their definitions of death-eligible conduct . . . ."); \textit{see also} 18 U.S.C. §§ 34, 844(d), 1716(a) (1988). For a detailed discussion of the statutory provisions, including a listing of the specifically relevant sections, see \textit{supra} note 94 and accompanying text.

\textsuperscript{113.} \textit{See Cheely}, 36 F.3d at 1445 ("[T]hese sections do not even restrict their focus to murderers, but rather sweep within their coverage those guilty of no more than involuntary manslaughter.").
the defendant knowingly or intentionally injured property. A defendant found guilty under the statute could receive a death sentence any time a death resulted from the mail-bombing. As a result, the Cheely court found that the statute's culpability threshold violated the Eighth Amendment's proportionality requirement. The Cheely court determined that the statute would permit death sentences for defendants who acted less than recklessly with regard to the life of another. For the same reason, the court decided that the statute also failed to guide the sentencer in distinguishing among defendants eligible for death.

The court found that even though the statute's application was inherently narrow in scope, it still failed to acceptably restrict the size of the death-eligible class. Although the statute applied only to an extremely small class of federal crimes, it did not list specific aggravating circumstances for the sentencer to consider. The required narrowing, the Ninth Circuit stated, necessarily centers around the type of statutory aggravating factors previously upheld by the Supreme Court and lacking from the mail-bombing legislation.

114. See 18 U.S.C. §§ 54, 844(d), 1716(a). For a further discussion of the statutory provisions, including the specifically relevant sections, see supra note 94 and accompanying text.

115. Cheely, 36 F.3d at 1445.

116. Id. at 1444-46. The court relied on the Supreme Court's decisions in Tison v. Arizona and Coker v. Georgia. Id. at 1444-46 & nn.17-18 (citing Tison v. Arizona, 482 U.S. 137, 155-58 (1987); Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion)). Prior to Tison, in Coker, the Court held that a death sentence is disproportionately severe where the defendant rapes an adult woman. Coker, 433 U.S. at 584. Coker implied that the death penalty is permissible on proportionality grounds when a homicide has occurred. See Menard, supra note 45, at 1126 (stating that Coker implicitly holds that death is permissible punishment for person who has committed homicide); cf. Cheely, 36 F.3d at 1446 n.18 ("Coker v. Georgia does not foreclose the possibility that grave injury to the interests of the United States would suffice."). In Tison, the Court held that the death penalty is permissible on proportionality grounds for a killing that occurs during commission of a felony only when the defendant exhibits a culpable mental state of at least reckless disregard for human life. Tison, 481 U.S. at 157-58. For a further discussion of the proportionality requirement, see supra note 43 and accompanying text.

117. Cheely, 36 F.3d at 1444 ("[U]nder the statute one jury could sentence the football field bombers to death, while another could reject the death penalty in a case where a paid assassin successfully used a mail-bomb to murder an NAACP leader.").

118. See id. at 1445 ("Surely, the death penalty cannot be imposed for each and every intentional act which is susceptible to federal legislative jurisdiction and which results in a death."). The court did not take into consideration that every act falling under federal legislative jurisdiction is not as rare and severe in result as mail-bombing. See id. For a discussion of the inherent danger of mail-bombing, see infra notes 162-65 and accompanying text.

119. See id. at 1445-46. For a discussion of the specific statutory provisions, see supra note 94 and accompanying text.

120. See id. at 1444-45 (discussing Lowenfield, Jurek and Gregg). For a further discussion of the narrowing requirement, see supra notes 66-74 and accompanying text.
C. Judge Alarcon's Dissenting Opinion

In his dissenting opinion, Judge Alarcon identified several errors in the majority’s analysis. First, Judge Alarcon argued that the majority incorrectly ignored the presumptive validity of legislative enactments. According to the Supreme Court, legislatively enacted punishments are presumed valid, and the burden is on the challenger to overcome this presumption. The dissenting Judge wrote that the majority failed to place this “heavy burden” on the defendant.

Second, Judge Alarcon contended that, because it limited the death penalty “to those who kill in a particularly appalling and heinous manner,” the federal mail-bombing legislation complied with the Supreme Court’s interpretation of the Eighth Amendment. Such a narrow statutory definition, Judge Alarcon stated, may adequately control the jury’s discretion. Further, Judge Alarcon noted that neither Supreme Court nor Ninth Circuit precedent specifically requires narrowing through statutory aggravating circumstances. Instead, Judge Alarcon determined that the text. For a further discussion of the role of statutory aggravating circumstances, see supra notes 70-74 and accompanying text.

121. Id. at 1448-59 (Alarcon, J., dissenting) (arguing that, as applied to Cheely, statutes fully complied with Eighth Amendment).

122. Id. at 1448 (Alarcon, J., dissenting). Judge Alarcon stated that the majority “ignored the presumption that ‘a punishment selected by a democratically elected legislature is constitutionality valid.’ ” Id. (Alarcon, J., dissenting) (citing Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) (en banc)).

123. Id. at 1449-50 (Alarcon, J., dissenting). Judge Alarcon stated that the Supreme Court “instruct[ed] us that we must presume that Congress lawfully performed its constitutional duties.” Id. (Alarcon, J., dissenting) (relying on Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion)). Judge Alarcon argued that “[a]lthough never acknowledged by the majority, it is Cheely who bears the heavy burden of demonstrating that section 844(d) and section 1716(a) are unconstitutional.” Id. (Alarcon, J., dissenting).

124. Id. (Alarcon, J., dissenting). Judge Alarcon concluded that, even if the court had placed this burden on the defendant, Cheely “ha[d] not met that burden.” Id. (Alarcon, J., dissenting).

125. Id. at 1449 (Alarcon, J., dissenting). Judge Alarcon stated that the federal mail-bombing legislation “limited the death penalty to those who kill in a particularly appalling and heinous manner. As applied to Cheely, these statutes fully comply with the Eighth Amendment as interpreted by the Court.” Id. (Alarcon, J., dissenting).

126. Id. at 1454 (Alarcon, J., dissenting). Judge Alarcon wrote that “the Court has held that the narrowing function can be provided in the definition of the crime applied during the guilt phase of trial, or in the specification of aggravating circumstances to be considered during sentencing proceedings.” Id. (Alarcon, J., dissenting). Judge Alarcon relied upon the Supreme Court’s approval of death sentencing procedures lacking statutory aggravating circumstances in both Jurek v. Texas and Lowenfield v. Phelps. Id. at 1454-57 (Alarcon, J., dissenting) (citing Lowenfield v. Phelps, 484 U.S. 231, 233, 235, 241-42 (1988); Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion)).

127. Id. at 1454-57 (Alarcon, J., dissenting). Judge Alarcon argued that, in Jurek, the Court found that a statute may sufficiently channel the jury’s discretion at the guilt phase through making the death penalty a sentencing option for a
federal mail-bombing legislation was constitutional even though it lacked statutory aggravating circumstances, because its definition was sufficiently narrow.128

Third, Judge Alarcon concluded that the majority confused the consistency requirement's mandate—that a statute adequately narrow the class of defendants eligible for a death sentence—with the Eighth Amendment's proportionality requirement.129 In the case at hand, the defendants were charged with intentional homicide.130 Thus, Judge Alarcon reasoned, they did not have standing to assert a proportionality challenge to the federal mail-bombing legislation.131 Yet, Judge Alarcon opined that because the majority was unable to proceed past the defendant's potential

smaller class of murderers. Id. at 1452-55 (Alarcon, J., dissenting) (citing Jurek, 428 U.S. at 270). Judge Alarcon distinguished United States v. Harper on the grounds that it did not require a demonstration that someone was injured. Id. at 1457-58 (Alarcon, J., dissenting) (citing United States v. Harper, 729 F.2d 1216 (9th Cir. 1984)). In Harper, the Ninth Circuit invalidated the federal espionage statute, which authorized a penalty of death for what seemed to be an inherently narrow offense. See id. at 1445-46 & n.17 (citing Harper, 729 F.2d at 1218 n.1) (stating that “[i]t is difficult to conceive of an offense category more narrow than espionage.’”). Judge Alarcon argues that unlike the statute invalidated in Harper, the federal mail-bombing legislation does not “lump[ ] together in one statute all forms of” a crime. Id. at 1457 (Alarcon, J., dissenting) (citing Harper, 729 F.2d at 1218 n.1). Instead, the statute at issue “distinguish[es] the types of [a crime] that in its judgment required the death penalty from other forms less threatening to our national defense of public safety.” Id. (Alarcon, J., dissenting). Judge Alarcon concluded that “Congress, in its definition of the crime, has confined the jury's ability to recommend the death penalty to a case wherein the defendant mailed a bomb with the intent to injure or kill the recipient, and caused the death of a human being.” Id. (Alarcon, J., dissenting).

128. Id. (Alarcon, J., dissenting).

129. Id. at 1450 (Alarcon, J., dissenting). Judge Alarcon stated that “[t]he majority’s analysis confuses the requirement that statutes narrow the class of persons subject to the death penalty with the rule prohibiting a punishment that is grossly disproportionate to the crime involved.” Id. (Alarcon, J., dissenting) (citing Coker v. Georgia, 433 U.S. 584, 592 (1976) (plurality opinion)). Judge Alarcon concluded that the Coker line of analysis, which focuses on a defendant's level of culpability, “more properly relates to the question of proportionality, a requirement which is fulfilled in this case.” Id. (Alarcon, J., dissenting).

130. Id. (Alarcon, J., dissenting). Judge Alarcon stated that Cheely has been “charged with what would have been identified as an especially vicious form of deliberate, premeditated, intentional murder at common law.” Id. (Alarcon, J., dissenting).

131. Id. (Alarcon, J., dissenting). In dissent, Judge Alarcon stated: [W]e lack the jurisdiction to give advisory opinions on hypothetical questions. Our authority is limited to actual cases and controversies presented by persons who have a concrete interest in the outcome of the litigation because of an alleged or threatened injury. The constitutionality of the portions of these statutes that make an intentional killing punishable by death is the sole issue before this court. Id. (Alarcon, J., dissenting). Judge Alarcon concluded that “Cheely simply lacks the standing to challenge these statutes” on proportionality grounds. Id. (Alarcon, J., dissenting).
proportionality challenge, they incorrectly evaluated the statute for arbitrariness.¹³²

IV. CRITICAL ANALYSIS: FAILURE TO CORRECTLY LIMIT ARBITRARINESS UNDER FURMAN AND ITS PROGENY

From the beginning, the Cheely court's arbitrariness analysis was unsatisfactory.¹³³ Foremost, the court measured the federal mail-bombing legislation against the arbitrariness standard without first considering societal values and the important role legislative enactments play in their measurement.¹³⁴ The Supreme Court has stated that social acceptance of punishment, although not determinative, must be weighed against excessiveness, necessariness and arbitrariness.¹³⁵ By failing to initially analyze whether the federal mail-bombing statute is representative of societal norms, the Ninth Circuit overlooked an integral part of Eighth Amendment analysis.¹³⁶

¹³² Id. at 1450 (Alarcon, J., dissenting). Judge Alarcon argued that the majority's hypothetical, where a person guilty of involuntary manslaughter could be sentenced to death under the federal mail-bombing legislation, distracted the court. Id. (Alarcon, J., dissenting).

¹³³ See id. at 1442. The court began its analysis with a discussion of Furman. Id. For a discussion of Furman, see supra notes 50-54 and accompanying text.

¹³⁴ See id. at 1443-46.

¹³⁵ See, e.g., Gregg v. Georgia, 428 U.S. 153, 172-73 (1976) (plurality opinion). For a further discussion of the balancing test between social acceptance and excessiveness, necessariness and arbitrariness when punishing a criminal, see cases cited supra note 45.

¹³⁶ See id. at 173. Because Congress enacted the federal mail-bombing legislation, the courts may owe it even greater deference. See Acosta, supra note 2, at 608 ("Many argue that congressional judgment in prescribing criminal penalties deserves even greater deference than that afforded to state legislatures."). Indeed, "Congress has significantly more latitude than any individual State in determining the necessary punishment for federal crimes that affect the security of the Nation as a whole." Id. This is because an act that has passed Congress, and the President's desk, has essentially been approved by the representatives of American society as a whole. Id.

Whether the federal mail-bombing statute actually measures up to societal norms is a separate question. The Court in Furman found the extremely small number of defendants actually sentenced to death to represent a societal disapproval of the penalty. See Furman v. Georgia, 408 U.S. 238, 249-51 (1972) (per curiam) (Douglas, J., concurring) (discussing inference of arbitrariness raised by death penalty's application); id. at 313 (White, J., concurring) (stating that "the [death] penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

Using the same reasoning, any federal death penalty statute would fare even worse than the statute at issue in Furman. From the mid-1960's through 1991, the federal government did not execute a single person. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, supra note 35, at 679. In sum, only 167 persons were executed during that 26-year period—an average of about six persons per year—and all by the states. Id. Indeed, "[a]n execution is not a common event in the United States." See Nakell & Hardy, supra note 2, at 1.

However, recent statistics indicate two important changes: 1) increasing popular approval for the death penalty and 2) rising numbers of death sentences im-
A second problem in the court's arbitrariness analysis was its erroneous interpretation of the consistency requirement. 137 To satisfy this requirement, the court concluded that a statute must foreclose the prospect of a jury deciding who among a broad class of defendants is eligible for the death penalty. 138 Furman and its progeny, however, exclusively addressed wholly arbitrary, excessively discretionary sentencing. 139 These cases do not support the foreclosure of sentencer discretion. 140 Thus, the Cheely decision violated the Eighth Amendment's consistency requirement, misinterpreting Furman and its progeny to permit the foreclosure of sentencer discretion. 141

A third deficiency in Cheely was the Ninth Circuit's failure to support its assertion that the federal mail-bombing legislation had not met the consistency requirement's narrowing function. 142 Initially, the court composed by the federal government. Acosta, supra note 2, at 596-608. A 1986 survey indicated that approximately 70% of Americans favor the death penalty as punishment for murder. Id. at 597 (citing American Survey: Capital Punishment, Economist, Mar. 19, 1988, at 28). Public approval for the death penalty drops when those polled are given a choice of sentences, but still hovers around 50%. Death Penalty Information Center, Facts About the Death Penalty 4 (1995) ("Public support for the death penalty drops to below 50% when voters are offered alternative sentences.") (hereinafter Facts About the Death Penalty). A 1989 poll indicated that 62% of Americans favor capital punishment for drug criminals. Acosta, supra note 2, at 606 (citing Strasser, One Nation Under Siege, Nat'l J., Aug. 7, 1989, at S2). And now, the federal government is building its first ever death penalty facility to accommodate the rising number of federal prisoners under sentence of death. See Montgomery, supra note 35, at C1.

137. See Gregg, 428 U.S. at 189 (holding sentencer discretion must not be left entirely unfettered); Furman, 408 U.S. at 328 (same). For a more detailed discussion of the consistency requirement, see supra notes 6, 47, 50-54, 64-68 and accompanying text.

138. See Cheely, 36 F.3d at 1445 (reasoning that statute was unconstitutional because it failed to foreclose prospect of aberrational decision-making).

139. See Sundby, supra note 5, at 1180 ("[I]t is important to remember that Furman did not condemn discretion in and of itself, but discretion that produced arbitrary and capricious results."). For a further discussion of the Court's concern for wholly arbitrary sentencing, see supra notes 5-6 and accompanying text.

140. Id. In fact, the Court stated that foreclosure of sentencer discretion would be unacceptable. See McCleskey v. Kemp, 481 U.S. 279, 303 (1987) (reasoning that some inconsistency is not only acceptable, but required by Woodson).

141. See McCleskey, 481 U.S. at 303-04 (finding discretion important to ensure "reasoned moral judgment"); Sundby, supra note 5, at 1180 (stating that sentencer discretion must be carefully constricted to ensure just results). For a discussion of the consistency requirement, see supra notes 6, 47, 50-54, 64-68 and accompanying text.

142. The court identified two main problems in Cheely. First, the statute's limited jurisdiction is not sufficient to perform the required narrowing. See Cheely, 36 F.3d at 1445 n.14 (agreeing with defendant's counsel that to say otherwise would permit state to "save its capital sentencing scheme simply by subdividing the homicide section of its criminal code to provide, for example, for murder by gun, murder by knife, by burning") (citing Appellee's Brief at 28, United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994) (Nos. 92-30257, 92-30504). Second, the necessary culpability requirement was missing. Id. at 1445 n.15.
rectly identified statutory jurisdiction and culpability as two areas where Congress' attempt to narrow the death-eligible class could potentially be undermined. Narrow jurisdiction, standing alone, is not enough to avoid inconsistent sentencing. While limiting the scope of a sentencing scheme to a small number of defendants could reduce the total number of death sentences given, inconsistent results could still occur if the sentencers retained unfettered discretion over the selection of those sentences.

Absence of a culpability requirement also could lead to inconsistent sentences. Courts have found that an examination of culpability is an appropriate part of the arbitrariness analysis. Further, without clear de-

143. Id. at 1445 n.14. But see Kamenar, supra note 35, at 882 n.7 (stating that narrowly drawn federal offenses may be viable under Jurek (citing 3(a) U.S. Dep't of Justice, U.S. Attorney's Manual § 9-10.010 (rev. Oct. 1, 1988))).

In Jurek, the Court held that Texas' action in narrowing capital offenses to five categories in essence requires the jury to find the existence of a statutory aggravating circumstance before the death penalty may be imposed, thus requiring the sentencing authority to focus on the particularized nature of the crime.

144. See Cheely, 36 F.3d 1445 n.14 (citing Appellee's Brief at 28, United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994) (Nos. 92-30257, 92-30504)). If the sole criteria was the number of defendants likely to come under the legislation, states could make all their capital punishment statutes constitutional by subdividing them into categories of murder for each different method that could be employed. Id. Such an action would make no change in the level of sentencer discretion. Id.

145. See Howe, supra note 9, at 334 (“If every justification a sentencer might rely on to impose a death sentence were proper, there would be no reason to proscribe unfettered sentencer choice.”).

146. See Tison v. Arizona, 481 U.S. 137, 156 (1987) (“A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime.”); see also Howe, supra note 9, at 396 & n.290 (discussing culpability consideration in individualization analysis (citing Enmund v. Florida, 458 U.S. 782, 801 (1982) (O'Connor, J., dissenting))). Likewise, individualization factors may arise within an evaluation of excessivity, the area where culpability is generally the central issue. Id. at 339. “Excessive punishment, at least as regards the death penalty, could be measured not simply against the definition of the crime committed, but also against the individual characteristics of the offense and the offender.” Id.

Considering culpability within the arbitrariness evaluation, however, may not be appropriate because it creates possible confusion between the excessivity and arbitrariness lines of Eighth Amendment analysis. See Cheely, 36 F.3d at 1451 (Alarcon, J., dissenting) (stating that majority opinion confuses narrowing requirement with proportionality requirement). For a general discussion of whether the individualization requirement mandates a culpability inquiry, or some other inquiry, see Howe, supra note 9. For a discussion of the excessivity/proportionality requirement, see supra note 43 and accompanying text.
lineation of which mental states are most culpable, sentencers may be confused about the legislative intent. One sentencer could view a premeditated killer as most deserving of death, while another sentencer could view a reckless killer most deserving. Consequently, the lack of a culpability provision could easily lead to discrepant sentences.

The Ninth Circuit, however, failed to support its contention that these issues actually undermined Congress' attempt at narrowing. Rather, the Cheely court misinterpreted precedent regarding what is required to narrow the death-eligible class. The Ninth Circuit required the use of statutory aggravating circumstances, which the Supreme Court previously examined. It is true that the Supreme Court has upheld several sentencing schemes employing lists of aggravating circumstances to guide sentencer discretion and narrow the class of persons eligible for death. The Court made it clear, however, that statutory aggravating fac-

147. See Graham v. Collins, 113 S. Ct. 892, 907 (1993) (Thomas, J., concurring) ("Without a focus on the characteristics of the defendant and the circumstances of his crime, an uninformed jury could be tempted to resort to irrational considerations, such as class or race animus."). In Gregg, the Court was very concerned with how the careful drafting of sentencing statutes could be used to control sentencer discretion. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion) (stating that Furman concerns could be allayed "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance"). Indeed, the failure of a statute to adequately control sentencer discretion could lead directly to constitutional infringements. Id. at 195 n.46. The Court stated that arbitrary and capricious sentencing can result from statutes with "standards so vague that they fail adequately to channel the sentencing decision patterns of juries." Id.; see also Cheely, 36 F.3d at 1444.


149. Cheely, 36 F.3d at 1443-44. For example, the court believed that under the federal mail-bombing legislation, "one jury could sentence the football field bombers to death, while another could reject the death penalty in a case where a paid assassin successfully used a mail bomb to murder an NAACP leader." Id.

150. The Ninth Circuit believed the federal mail-bombing statutes fail to adequately narrow the death-eligible class because they authorize death for less than reckless acts. Id. For a discussion of the role a culpability examination plays in the proportionality analysis, see supra note 43.


152. See Cheely, 36 F.3d at 1445 ("Whether statutes are state or federal, in narrowing the class of death-eligible defendants, they must focus on the type of aggravating factors described in Lowenfield, jurek, and Gregg, not on mere jurisdictional prerequisites.").

153. See, e.g., Zant, 462 U.S. at 862 (upholding statutory scheme where sentencer required to find at least one statutory aggravating circumstance before imposing death sentence); Profitt v. Florida, 428 U.S. 242, 252-53 (1976) (plurality
tors were not required. Aggravating circumstances are just one vehicle for legislative fulfillment of the Eighth Amendment's consistency requirement.

Indeed, the Court has specifically held that legislatures may narrow the death-eligible class through narrow drafting of statutory definitions. The federal mail-bombing legislation, as drafted by Congress, allows the death penalty for an extremely limited category of defendants—those found guilty of homicide through an intentional mail-bombing. In the

opinion) (upholding statutory system where sentencer required to weigh eight statutory aggravating circumstances against seven mitigating circumstances, with sentencer finding that former outweighed latter); Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion) (upholding statutory system where sentencer required to find, beyond reasonable doubt, at least one out of ten statutory aggravating circumstances before imposing death sentence). But see Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (upholding statutory system where narrow statutory definition performed required narrowing, such that aggravating circumstances need not perform any narrowing function); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (upholding statutory system where narrow statutory definition performed required narrowing).

154. See Arave v. Creech, 507 U.S. 463, 475-76 (1993) (finding state supreme court's limiting construction given to aggravating circumstance sufficiently narrow to defeat vagueness of aggravating circumstance in statute). The Arave Court implicitly based its entire analysis upon the assumption that aggravating circumstances are not a constitutional end, but are rather a means of accomplishing the requisite narrowing. Id. Otherwise, the Court would have had no need to examine the aggravating circumstance for vagueness amounting to a failure to meet the narrowing requirement. See id.; Godfrey, 446 U.S. at 420 (basing analysis of similar statute upon similar considerations).

155. See, e.g., Arave, 507 U.S. at 475-76; Godfrey, 446 U.S. at 420; see also Clarke, supra note 2, at 419 n.60 ("It is impossible to predict with any assurance just what state capital sentencing procedures the Court will approve or disapprove.").

156. See Lowenfield, 484 U.S. at 231 (holding that required narrowing was performed by statutory definition); McCleskey, 481 U.S. at 306 (same).

157. See United States v. Cheely, 36 F.3d 1439, 1449 (9th Cir. 1994) (Alarcon, J., dissenting) ("Congress limited the death penalty to those who kill in a particularly appalling and heinous manner."). Judge Alarcon contended that this narrow statutory definition met the Eighth Amendment requirements, stating that the statutory definition authorized death for a smaller class of defendants, as required by the Supreme Court. Id. at 1456-57 (Alarcon, J., dissenting). For the relevant provisions of the federal mail-bombing legislations, see supra note 94.

The U.S. Postal Service agrees that mail-bombing is a "relatively rare crime." See Bomb Summary, supra note 72, at 42. In 1993, the Postal Service reported 21 incidents of actual mail-bombing. See Hearing, supra note 92, at 14 (testimony of Edmund Kelso, Unit Chief, Bomb Data Center, Fed. Bureau of Investigations). In the same year, the Postal Service handled 171 billion pieces of mail. Id. at 3. In fact, over the last 10 years, the Postal Service reported that an average of only 15 bombs per year have been discovered in the mail. Id. In sum, mail-bombings account for about one percent of all the bombings in the U.S. Id. at 18.

At the same time, the Postal Service considers mail-bombing a "horrifying and deadly" crime. See Bomb Summary, supra note 72, at 42. As a result of the 21 bombs actually mailed in 1993, five persons were killed and 16 injured. Hearing, supra note 92, at 14 (testimony of Edmund Kelso, Unit Chief, Bomb Data Center, Fed. Bureau of Investigations). Even though it rarely occurs, mail-bombing "strike[s] at the very heart of a free society, promoting fear and anxiety among the
case of a narrow statutory definition, statutory aggravating circumstances may merely repeat a requirement contained within the statutory definition. 158 Thus, where a statutory definition is adequately narrow, no aggravating circumstances are required to achieve additional narrowing. 159

Moreover, the Ninth Circuit’s contention that the mail-bombing statute actually lacks the scienter requirement is debatable. 160 Superficially, the statute appears to authorize a death sentence for defendants who act merely negligently. 161 Mailing a bomb, however, is an activity that inherently poses grave risks to others. 162 By their nature, bombs are ready to explode at any minute. 163 An exploding bomb (detonated by intention or malfunction) exposes innumerable postal workers and innocent people to grave harm in areas near post offices, mail boxes and the city streets where mail trucks drive. 164 For these reasons, a person who mails a bomb must act, at the least, with reckless disregard for the lives of others. 165
Further, it is unclear whether a federal mail-bombing law that lacks a culpability requirement would necessarily lead to unconstitutional capital sentencing. The judicial system often calls upon juries and judges to distinguish between intentional, reckless and negligent acts. In this instance, the absence of a culpability requirement similarly gives a jury some freedom to determine a crime's severity on a case-by-case basis. In certain circumstances, a sentencer may reasonably consider an intentional and somewhat justified act to be less deserving of the death penalty than a grossly negligent or reckless—but unjustified—act. Thus, any "discrepancy" observable in the sentencing system might be entirely rational.

ference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' The Tison Court stated that:

[W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-58. For a further discussion of Tison, see supra note 43.

166. See Daniel Givelber, The New Law of Murder, 69 Ind. L.J. 375, 377-78 (1994) (noting that focus on aggravating/mitigating circumstances in death penalty procedures has superseded importance of culpability requirements and of defendant's state of mind and has, thereby, resulted in "marginally" reducing arbitrariness in death sentencing; see also Howe, supra note 9, at 356 (noting that “[a]ssessments of culpability alone do not capture some significant bases for distinction among the deserts of capital offenders”).

167. See Givelber, supra note 166, at 380. Traditionally, juries have to choose between different degrees of murder, each identified by a different state of mental culpability. Id.

168. Id. Legislatures had this in mind when they originally chose to grant discretion to juries in capital cases. See Woodson v. North Carolina, 428 U.S. 280, 291, 292-93 (1976) (plurality opinion). In Woodson, the Court noted that “[t]he inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases.” Id. at 291.

169. Tison, 481 U.S. at 157; see also Woodson, 428 U.S. at 291 (discussing juries refusing to impose death penalties in certain situations). The Tison Court stated: [I]ntentional homicides, though criminal, are often held undeserving of the death penalty—those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.

Tison, 481 U.S. at 157; see also Acosta, supra note 2, at 608 (noting that the Court [in Tison] acknowledged that reckless indifference to human life may be as morally culpable as murder”).

170. See Tison, 481 U.S. at 157 (noting that common law as well as criminal codes classify behavior of type discussed in Tison—reckless indifference to human life—with intentional murder). Ultimately, those who exhibit reckless indifference to human life may shock "the moral sense" just as much as those who intentionally kill. Id.
A fourth inadequacy of the court's analysis in Cheely was its failure to consider the principles of individualized sentencing. In its application of the consistency requirement, the Ninth Circuit did not address the individualization requirement as developed by Woodson and its progeny. Although the Ninth Circuit correctly identified the two Eighth Amendment arbitrariness requirements, it only considered the consistency requirement. In so doing, the court followed the Zant decision, where the Supreme Court relegated application of the two Eighth Amendment requirements to separate stages of sentencing. Thus, rather than providing legislative guidance for balancing the two requirements simultaneously, the Cheely court followed the Supreme Court's lead, directing separate fulfillment of the components of arbitrariness under the Eighth Amendment.

Ultimately, because the Ninth Circuit failed to accurately interpret the consistency requirement, it allowed arbitrariness to enter the sen-

171. See United States v. Cheely, 36 F.3d 1439, 1442-46 (9th Cir. 1994) (discussing constitutional requirements for death penalty statutes and applying them to mail-bombing statutes at issue). The Ninth Circuit identified the individualization requirement and noted that the statute must not prohibit consideration of background or character evidence of defendant and/or mitigating circumstances. Id. at 1442. However, the court neither applied this requirement nor took into consideration its underlying principles. See id. (discussing narrowing requirements and problems with consistency but failing to discuss individualization). For a further discussion of the underlying principles of the individualization requirement, see supra notes 5, 7, 48, 55-59, 75-77 and accompanying text.

172. See Cheely, 3 F.3d at 1442-46 (discussing and applying constitutional requirements for death penalty statutes). The court did not apply the constitutional mandate of allowing sentencer discretion through consideration of mitigating factors, or any of the other components of individualized consideration, to the statute at issue. See id.

173. Id. at 1442. The court noted that a death penalty statute must (1) narrow the class of people who are eligible for a death sentence and (2) not prevent consideration of evidence relevant to character or background of the defendant and/or mitigating circumstances. Id. For a further discussion of the two Eighth Amendment requirements, see supra notes 5-8, 46-59 and accompanying text.

174. See id. at 1442-46 (applying consistency requirement to statute at issue).


176. See Cheely, 36 F.3d at 1446 (citing to Zant decision and noting that statutory provisions are unconstitutional because they did not sufficiently narrow death-eligible class of persons).

177. See id. at 1442-46; see also Gregg v. Georgia, 428 U.S. 153, 188-95 (1976) (plurality opinion) (finding that sentencer discretion must not be left entirely unfettered); Furman v. Georgia, 408 U.S. 238, 247-48 (1972) (per curiam) (same). The Ninth Circuit interpreted Furman and Gregg to permit total limitation of sentencer discretion. See Cheely, 36 F.3d at 1442. For a more detailed discussion of consistency requirement, see supra notes 6, 47, 49-54, 66-69 and accompanying text. For a further discussion of the Ninth Circuit's inadequate interpretation of the consistency requirement, see supra notes 138-42 and accompanying text.
tencing determination through the "back door" left open when it failed to consider the principles of individualization. Consequently, the Ninth Circuit intensified the contradiction between the Supreme Court's two arbitrariness requirements, effectively mandating complete limitation of sentencer discretion. In affirming this mandate, Cheely violated Furman

178. See Graham v. Collins, 113 S. Ct. 892, 912 (1994) (Thomas, J., concurring). Justice Thomas argued that, in allowing juries to give full weight to mitigating circumstances of defendant's character and background, the Court permits juries to make "moral" verdicts, thereby "throw[ing] open the back door to arbitrary and irrational sentencing." Id.

Justice Blackmun voiced a similar concern in Callins v. Collins. 114 S. Ct. 1127, 1128-30 (1994) (mem.) (Blackmun, J., dissenting). In his dissent to the denial of certiorari, Justice Blackmun stated that:

[T]he problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death... can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.

Id. at 1129 (Blackmun, J., dissenting to denial of certiorari) (emphasis added) (citation omitted). Other commentators also observe the paradox, noted by Justices Blackmun and Thomas, that expanding or limiting one constitutional requirement creates other constitutional problems. See, e.g., Sundby, supra note 5, at 1174 ("[A]llowing the elimination or severe curtailment of sentencer discretion would simply be to chase the principle of individualized consideration down one hole and watch it later come up another."). For a further discussion of the Ninth Circuit's failure to consider the principles of individualization, see supra notes 171-76 and accompanying text.

179. Callins, 114 S. Ct. at 1129 (Blackmun, J., dissenting to denial of certiorari); Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring); see Graham, 113 S. Ct. at 912 (Thomas, J., concurring) (noting problems with arbitrariness). Prior to Zant v. Stephens and Penry v. Lynaugh the Court's two requirements were potentially contradictory, but there was the possibility that they could be applied simultaneously if the correct balance was struck. See Clarke, supra note 2, at 424-25 (discussing Court-approved "guided discretion" statutes); Mann, supra note 5, at 495 n.6 (noting that Court accepts statutes that have an effect somewhere between allowing "excessive discretion" and "insufficient discretion"); Sundby, supra note 5, at 1153 (discussing "the basic Eighth Amendment parameters" for death penalty cases). For a further discussion of the opinions of Justices Blackmun, Thomas and Scalia, see supra note 81-82 and accompanying text.

180. Cheely, 36 F.3d at 1445-46 (reasoning that statute was unconstitutional because it failed to foreclose prospect of aberrational decision-making). Cheely's endorsement of a complete limitation of sentencer discretion intensifies the conflict between the two requirements. Id. at 1444. At the same time, Cheely's endorsement frustrates the individualization requirement's mandate that sentencer discretion be completely unrestricted. See id. at 1444-46; see also Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (holding that sentencer discretion could not be restricted from considering and giving effect to relevant mitigating evidence). For a further discussion of the individualization requirement, see supra notes 5, 7, 48, 55-59, 75-77 and accompanying text. For a further discussion of the Ninth Circuit's concern for consistency in sentencing, see supra notes 90, 100-20 and accompanying text.
and its progeny. Moreover, because the Cheely court required any restriction of sentencer discretion, it violated the Woodson line of jurisprudence. Thus, even if the Ninth Circuit's determination complied with the consistency requirement, the court's flawed decision still allowed arbitrariness to sneak in through individualization's open "back door."

V. IMPACTS OF CHEELY

Cheely will have lasting effects upon Eighth Amendment interpretation. First, proportionality considerations played an important role in the court's analysis. The court used an examination of culpability, ordinarily part of a proportionality analysis, in its consistency analysis. The court's use of this approach enlarges the importance of the proportionality analysis itself.

Second, the Eighth Amendment consistency analysis in Cheely will increase the importance of including aggravating circumstances in statutes.

181. See Cheely, 36 F.3d at 1444-45; Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (stating that sentencer discretion should not be left unfettered); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (same). For a discussion of Furman and Gregg's mandate that sentencer discretion not be left unfettered, see supra notes 49-54 and accompanying text. For a discussion of how the Ninth Circuit surpassed this mandate, see supra notes 137-41 and accompanying text.


183. See Graham, 113 S. Ct. at 912 (Thomas, J., concurring) (discussing the "back door" of arbitrary sentencing). For a further discussion of the "back door" of arbitrary sentencing, see supra note 178 and accompanying text.

184. See Cheely, 36 F.3d at 1443 nn.9-10 (stating that lack of appropriate culpability requirement causes statute to fail arbitrariness test and would cause statute to fail proportionality test, if Cheely had acted less than recklessly).

185. See Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (stating that punishment must match severity of offense committed); Weems v. United States, 217 U.S. 349, 366-67 (1910) (stating that punishment should be proportional to offense). For a detailed discussion of the role that an examination of the defendant's culpability plays in the proportionality analysis, see supra note 43.

186. See Cheely, 36 F.3d at 1443-45. Culpability assessment, central to proportionality determination, would also become a part of the arbitrariness determination. See id. at 1443-45 (stating that statute was unconstitutional because, when juries faced diverse class of people with different levels of culpability, determination of appropriateness of capital punishment might be too "aberrational"). For a discussion of the proportionality/excessivity requirement, see supra note 43 and accompanying text. For a discussion of the arbitrariness requirements, see supra notes 44, 46-49 and accompanying text. For a discussion of the role of culpability in the Cheely decision, see supra notes 113-17 and accompanying text.

187. See generally Marr, supra note 35 (providing detailed discussion of aggravating circumstances in statutory systems).
These circumstances can serve as a tool for narrowing the death-eligible class of defendants. Indeed, legislatures already use statutorily listed aggravating circumstances, seeking assurance that the statutes they enact will pass constitutional muster. Cheely further underscores the importance of providing these statutory aggravating circumstances. Legislatures, faced with the Supreme Court's failure to provide a clear and consistent constitutional model, will take heed.

Third, the Cheely holding fails to eradicate confusion in the area of Eighth Amendment enforcement. The Supreme Court's original pur-
pose in *Furman* was to protect capital defendants from arbitrary death sentencing of the kind Henry Porter vehemently criticized in his final statement. To further this goal, the Court established the consistency and individualization requirements. As they have been developed, however, these two requirements cannot be applied simultaneously to a sentencing stage—even though they are integrally related because they arise from the same Eighth Amendment mandate. As a result, courts have no choice but to follow *Zant* and, like the Ninth Circuit, focus upon one requirement or the other when evaluating a sentencing scheme. Yet, when courts are forced to concentrate on only one of the requirements at

dence concerning arbitrariness, see *supra* notes 60-63, 78-83, 177-83 and accompanying text.

193. *See Furman*, 408 U.S. at 271-72 (Brennan, J., concurring) (discussing harm inflicted when excessive punishment is handed down). For a detailed discussion of *Furman*, see *supra* notes 50-54 and accompanying text. For Mr. Porter's last words, see *supra* note 1 and accompanying text.

194. *See*, e.g., Roberts v. Louisiana, 428 U.S. 325, 334 (1976) (plurality opinion) (“Louisiana's mandatory death sentence statute also fails to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences.”); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion) (“[T]here is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of [a sentencer's] power through a review of death sentences.”); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (Stewart, J., concurring) (“*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”); *Furman*, 408 U.S. at 448 (Powell, J., dissenting) (characterizing Justice Douglas' concurrence as stating that Eighth and Fourteenth Amendments prohibit imposition of "arbitrary or discriminatory" punishments). For a detailed discussion of the consistency requirement, see *supra* notes 6, 47, 49-54, 66-69 and accompanying text. For a detailed discussion of the individualization requirement, see *supra* notes 5, 7, 48, 55-59, 75-77 and accompanying text.

195. *See* Callins v. Collins, 114 S. Ct. 1127, 1129-38 (1994) (mem.) (Blackmun, J., dissenting to denial of certiorari) (stating Supreme Court's two Eighth Amendment arbitrariness requirements probably cannot be applied simultaneously); Graham v. Collins, 113 S. Ct. 892, 912-14 (1993) (Thomas, J., concurring) (arguing that Court's individualized consideration requirement as stated in *Penson* necessarily leads to arbitrary sentencing); Walton v. Arizona, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring) (concluding that conflict between two Eighth Amendment requirements "cannot be reconciled."); cf. Clarke, *supra* note 2, at 424-25 (recognizing inherent inconsistency between two requirements); Mann, *supra* note 5, at 495 n.6 (identifying same conflict and Court's approval of statutes that fall in between two extremes); Sundby, *supra* note 5, at 1153 (noting that "general discretion" statutes met Court's approval and concluding that sentencer discretion must be "sufficient" yet "controlled").

a time, they cannot prevent arbitrariness from entering into capital sentencing through the "back door." 197


197. See Graham, 113 S. Ct. at 912 (Thomas, J., concurring). Justice Thomas stated:

When our review of death penalty procedures turns on whether jurors can give "full mitigating effect" to defendant's background and character . . . and on whether juries are free to disregard the state's chosen sentencing criteria and return a verdict that a majority of this Court will label "moral," we have thrown open the back door to arbitrary and irrational sentencing.

Id. (Thomas, J., concurring) (citation omitted); see also Callins, 114 S. Ct. at 1129 (Blackmun, J., dissenting to denial of certiorari) ("[T]he problems that were pursued down one hole with procedural rules . . . have come to the surface somewhere else . . . .")

The reality that arbitrariness can enter into death penalty sentencing may have implications on the constitutionality of the death penalty as a whole. See id. at 1130 (Blackmun, J., dissenting) (noting that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies"). Justice Blackmun stated:

[O]ver the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.

Id. at 1132 (Blackmun, J., dissenting).

Justice Blackmun relied upon the Court's failure to reconcile the Eighth Amendment requirements in his conclusion that the death penalty was, after all, unconstitutional. Id. at 1138 (Blackmun, J., dissenting). The Justice stated: "Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands . . . I believe that the death penalty, as currently administered, is unconstitutional." Id. (Blackmun, J., dissenting). Justice Blackmun went on to state that "[t]he death penalty must be imposed 'fairly, and with reasonable consistency, or not at all.' " Id. at 1129 (Blackmun, J., dissenting) (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)). Justice Blackmun considered the Court's attempts at coherency in the area of capital punishment jurisprudence to be a "failed experiment." Id. at 1130 (Blackmun, J., dissenting). He stated: "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation exsicated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." Id. (Blackmun, J., dissenting). Further, Justice Blackmun remained convinced that the other Justices would join him and abandon their "experiment." Id. at 1138 (Blackmun, J., dissenting) ("[T]his Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.' " (alteration in original) (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (plurality opinion) (Marshall, J., concurring))).

One commentator likewise concludes, "if the two principles [of consistency and individualization] are of equal constitutional magnitude and truly cannot be reconciled, then the death penalty itself must be unconstitutional." See Sundby, supra note 5, at 1174. Accordingly, "[t]he death penalty would be invalid not because it is per se cruel and unusual, but because it cannot be procedurally implemented in a constitutional fashion." Id.
Additionally, the *Cheely* decision affects the judiciary's constitutionally defined role with respect to the legislature.\(^{198}\) In the past, courts have "explained" what legislatures must do to avoid arbitrary death sentencing only on a case-by-case basis.\(^ {199}\) Although the courts have sometimes encouraged legislatures to exercise more power, the courts have never stated clearly how legislatures may constitutionally exercise this power.\(^ {200}\) As a result, the courts have taken an implicitly activist role in death sentencing regulation.\(^ {201}\)

The *Cheely* court followed the Supreme Court's separate treatment of the individualization and consistency requirements, thereby providing no new legislative means for meeting both arbitrariness tests simultaneously.\(^ {202}\) After *Cheely*, therefore, the courts will continue to adopt an ac-

\(^{198}\) See generally Posner, *supra* note 51 (discussing role of courts with respect to other branches of government).
\(^{199}\) See, e.g., Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990) ("The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice."); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion) (Stewart, Powell & Stevens, JJ.) ("[E]ach distinct system must be examined on an individual basis."); see also Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell & Stevens, JJ.) ("There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.").

\(^{200}\) See Clarke, *supra* note 2, at 425 (stating that Court has not defined exactly what "guided discretion" requires or entails). For a further discussion of the Court's failure to provide a clear rule, see *supra* notes 60-63, 78-83, 177-83, 192-97 and accompanying text.

\(^{201}\) See Graham, 113 S. Ct. at 909 (Thomas, J., concurring) ("By discovering these two requirements in the Constitution, and by ensuring . . . that they would always be in play, the Court has put itself in the seemingly permanent business of supervising capital sentencing procedures."); Godfrey v. United States, 446 U.S. 420, 443 (1980) (plurality opinion) (Burger, C.J., dissenting) ("More troubling than the plurality's characterization of petitioner's crime is the new responsibility that it assumes with today's decision—the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence.").

Courts do not explicitly state that they are taking an activist role; instead, the observer must make this deduction. See Posner, *supra* note 51, at 18 ("Activists are ashamed to admit in public what they are about; they make you read between the lines."). For a discussion of the benefits of judicial restraint, see generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), and Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 463-69 (1977). For a thorough discussion of how the Court has usurped the power of the States to enact death penalty statutes, see RAUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 77-152 (1982). For a discussion of the role *Furman v. Georgia* played as an activist decision, see *supra* note 51.

\(^{202}\) See United States v. Cheely, 36 F.3d 1439, 1443-45 (9th Cir. 1994) (considering the two requirements separately); see also Zant v. Stephens, 462 U.S. 862, 878-79 (1983) (approving structure of Georgia statute with its separate treatment of two requirements, in different stages of sentencing process). For a further discussion of *Cheely*'s separate treatment of the two requirements, see *supra* notes 171-76 and accompanying text. For a detailed discussion of *Zant* and its requirements, see *supra* notes 66-69, 84-87 and accompanying text.
tivist position in regulating death penalty administration. Until the courts provide the legislatures with the means of self-regulation, the courts will continue to be the true regulators of Eighth Amendment compliance.

Cheely influences the balance of power between the legislative and judicial branches in another significant way. Legislative enactments are traditionally viewed as presumptively valid interpretations of public sentiment toward capital punishment. Because the Cheely court ignored any need to rebut this presumption, it implicitly asserted itself as the primary expositor of what society thinks is appropriate punishment. Thus, Cheely expands the judiciary's power in this realm.

Finally, Cheely has implications for the future enforceability of the Violent Crime Control and Law Enforcement Act of 1994. This legislation authorizes the death penalty for a large number of federal crimes. Thus, like the mail-bombing legislation, the Crime Act may be vulnerable to constitutional attack under Cheely for its failure to adequately narrow

203. See Hintze, supra note 2, at 416 (“T]he current system . . . requires constant judicial oversight and the active involvement of the judiciary if it is to operate correctly.”) (footnote omitted).

204. See id. at 416 (noting that Court's decisions have made judicial oversight necessary part of capital punishment system).

205. See generally Johnson, supra note 201; Posner, supra note 51 (discussing role of courts with respect to other branches of government).

206. See Gregg v. Georgia, 428 U.S. 153, 186-87 (1976) (plurality opinion) (stating that Court refrained from invalidating statute out of “[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction.”); see also Acosta, supra note 2, at 608 (recognizing that federal legislation concerning criminal punishments may be owed even greater deference by courts because it was enacted by the entire nations' chosen representatives) (citation omitted). But cf. Furman v. Georgia, 408 U.S. 238, 279 (per curiam) (Brennan, J., concurring) (“Legislative authorization, of course, does not establish acceptance.”).

207. See United States v. Cheely, 36 F.3d 1439, 1443-46 (9th Cir. 1994); see also Hintze, supra note 2, at 416 (noting that Supreme Court effectively mandated active judicial involvement in capital punishment area).

208. See Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (plurality opinion) (stating that legislative enactments and jury determinations are two main indicators of socially acceptable punishments). Traditionally, legislative enactments serve as a primary forecaster of social acceptance. Id. at 294-95 (citing Gregg, 428 U.S. at 173-81 (plurality opinion)). If the judiciary takes over the role of determining social acceptance, the judiciary usurps the legislative branch's power and, therefore, acts in an activist manner. See Posner, supra note 51, at 13 (discussing how court acts in activist manner and noting that federal courts "seem to be getting away with a big power grab from the political branches"). For a more detailed discussion of the role of legislatures and juries, see supra notes 39-45 and accompanying text.


VI. CONCLUSION

In the United States today, many consider rampant crime to be a "serious social ill."215 In search of a quick solution, Congress and the state legislatures frequently turn to capital punishment.216 The result: thousands of death row prisoners currently await execution.217 However, "our urgent need to curb the problem of crime does not justify our abandonment of the Constitution."218 Accordingly, the Eighth Amendment's prohibition against the arbitrary sentencing of capital defendants must still be respected.219

211. See id. (describing but failing to narrow class of death eligible defendants); Cheely, 36 F.3d at 1445 (recognizing that statute must narrow class of death-eligible defendants not merely with jurisdictional prerequisites but with aggravating factors as presented in Lowenfield, Jurek and Gregg). For a further discussion of the narrowing requirement, see supra notes 69-74 and accompanying text. For a further discussion of the role of statutory aggravating circumstances, see supra notes 70-74 and accompanying text.


213. See Cheely, 36 F.3d at 1445 (finding statute unconstitutional for failure to "foreclose" prospect of aberrational decision-making). For a further discussion of Cheely's attempt to foreclose sentencer discretion, see supra notes 104, 113-20 and accompanying text.

214. See Reske, supra note 94, at 14 ("The [1994 federal crime] legislation is certain to increase the workload of the federal judiciary, which already has complained of the crushing volume of criminal cases.").

215. Brennan, supra note 38, at 8. Justice Brennan stated that "rampant crime is a serious social ill, and that murderers deserve to be punished. The death penalty may be a reaction to the problem of crime in a particular sense, a "symbolic palliative for the fear of crime." " Id. (quoting Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1774 (1970)).

216. Id. at 2. For a discussion of the increasing number of states that have capital punishment statutes, see supra note 33. For a discussion of the growth of federal capital punishment, see supra note 35.

217. FACTS ABOUT THE DEATH PENALTY supra note 136, at 2. As of October, 1994, United States death rows housed 2,948 prisoners. Id. Since 1972, the number of persons on death row has risen steadily and dramatically. Id. at 3.


219. See id. at 4-9 (noting that Eighth Amendment's Constitutional requirements must be followed). Justice Brennan concluded that the language of the Eighth Amendment, although arguably vague, was determinative. Id. at 8.
In *United States v. Cheely*, the Ninth Circuit attempted to respect this prohibition and guard against arbitrary death sentencing by controlling sentencer discretion. The Ninth Circuit, however, made several important errors in its interpretation of Eighth Amendment precedent. First, the Ninth Circuit ignored precedent mandating analysis of whether the federal mail-bombing statute coincides with contemporary societal values. Second, the court improperly required statutory aggravating circumstances. Third, the Ninth Circuit misinterpreted the consistency requirement to permit complete restriction of sentencer discretion, and then failed to adequately explain how the statute failed to meet the consistency requirement. Finally, the *Cheely* court completely disregarded precedent outlining the principle of individualized consideration and its mandate that sentencer discretion should not be limited.

In this way, the Ninth Circuit failed to give due respect to the Eighth Amendment. Although to date the Supreme Court has provided only contradictory Eighth Amendment arbitrariness requirements, the Ninth Circuit could have guided legislatures in forging a new, middle ground of...
simultaneous adherence to both requirements. Instead, the Ninth Circuit only enlarged the degree of contradiction in this area of law. Thus, after Cheely, the capital defendant remains inadequately protected from arbitrary death sentencing.

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228. For a further discussion of the Supreme Court's creation of contradictory Eighth Amendment requirements, see supra notes 60-63, 78-87, 179-83, 192-97 and accompanying text.

229. For a further discussion of how the Ninth Circuit enlarged the degree of contradiction between the Court's two Eighth Amendment arbitrariness requirements, see supra notes 177-83 and accompanying text.

230. For a further discussion of the capital defendant's lack of adequate protections, see supra notes 177-83, 192-97 and accompanying text.