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Capital-Sentencing Law and the New Conservative Court

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Why Both Death-Penalty Abolitionists and Proponents Should Defend Most Capital-Sentencing Doctrines

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With the Supreme Court now dominated by a solidly conservative majority, recent, well-grounded hopes for prompt judicial abolition of the death penalty have vanished. Furthermore, existing Eighth Amendment doctrines that limit the death penalty could be in jeopardy. Historically, many advocates for abolition have criticized these doctrines. They claim that the Eighth Amendment prohibition on Cruel and Unusual Punishments requires "consistency" in capital selection and that current capital-sentencing doctrines do not satisfy—and sometimes conflict with—this requirement. However, these advocates failed to anticipate the need to defend these doctrines should judicial abolition become an impossibility and the rolling-back of current limitations become a distinct possibility. And that is where we are today.

This essay aims to show that the true core of what the Eighth Amendment demands is not consistency but a "deserts-limitation"—a requirement that no person receive the death penalty who does not deserve it. That is a goal on which even conservatives could agree. It is also a goal that many of the existing death penalty doctrines help to fulfill. Thus, this essay aims to explain why a conservative Court should not repudiate the heart of existing Eighth Amendment jurisprudence

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on capital selection.

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INTRODUCTION

Beginning in 2015, many proponents of abolishing the death penalty dared to imagine that the Supreme Court might soon inflict a coup de grâce to capital punishment.[1] In *Glossip v. Gross*,[2] Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, issued an extraordinary dissenting opinion calling for a categorical challenge to capital punishment and laying out a variety of supporting arguments.[3] Believing that Justice Breyer was signaling that Justice Anthony Kennedy, who had long been moderate on the death penalty,[4] might be ready to provide the fifth vote for abolition, anti-death penalty lawyers geared up to bring such a challenge to the Court.[5] When Justice Antonin Scalia died in February 2016, abolitionists became even more hopeful that judicial abolition was near.[6] After a Democratic president—if not Barack Obama, then his

1 *See, e.g.*, Adam Liptak, *Death Penalty Foes Split over Taking Issue to Supreme Court*, N.Y. TIMES (Nov. 3, 2015), https://www.nytimes.com/2015/11/04/us/politics/death-penalty-opponents-split-over-taking-issue-to-supreme-court.html, *archived at* https://perma.cc/TM8D-DC76; Chris Geidner, *The Most Ambitious Effort Yet to Abolish the Death Penalty is Already Happening*, BUZZFEED NEWS (Nov. 8, 2015, 8:32 PM), https://www.buzzfeednews.com/article/chrisgeidner/the-most-ambitious-effort-yet-to-abolish-the-death-penalty-i, *archived at* https://perma.cc/236F-VNBX.

2 135 S. Ct. 2726 (2015).

3 *See id.* at 2755–80 (Breyer, J., dissenting).

4 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (Kennedy, J., writing for the 5-4 majority, held that sentencing people to death for crimes they committed before the age of 18 categorically violates the Eighth Amendment prohibition on cruel and unusual punishments).

5 *See supra* note 1.

6 *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME

expected Democratic successor, Hillary Clinton—appointed a liberal Justice to replace the conservative Justice Scalia, abolitionists believed there might be five Justices ready to declare the death penalty unconstitutional even without Justice Kennedy.[7]

But, alas, it was not to be. After the Republican majority in the Senate stalled on Obama's nominee, Merrick Garland, and Republican Donald Trump's surprising victory over Hillary Clinton for the presidency, Justice Scalia was replaced by Justice Neil Gorsuch, who is expected to interpret the Eighth Amendment narrowly.[8] The basis for hope was not lost, but it was back to a five-vote victory dependent on Justice Kennedy. However, in 2018, even those dreams evaporated when Justice Kennedy announced his retirement.[9] With the appointment of Justice Brett Kavanaugh, a solid conservative, to replace him, there is no longer any basis to believe that there are five votes to promptly end the death penalty.[10]

The central question now about the Supreme Court and capital punishment is whether the story will turn decidedly negative for those who had hoped the Court would abolish the sanction. With five conservative Justices, abolitionists may fear that the Court will roll-back regulations on when states can impose death sentences. In its most pronounced form, conservative change could mean abandoning the "individualized sentencing" doctrine from *Woodson v. North Carolina*,[11] which requires states to conduct a separate sentencing trial in capital cases.[12] In softer form, change could involve allowing mandatory death penalties in certain extreme cases and limiting the evidentiary breadth of the individualized-sentencing rule, which the Court described expansively in *Lockett v. Ohio*.[13] Along with abandoning or limiting the individualization doctrine, conservative change could involve overturning one or more of the Court's "proportionality" rulings that

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7 *See id*. at 270.

8 *See* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html, *archived at* https://perma.cc/G3EX-ETS3.

9 *See* Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire,* N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html, *archived at* https://perma.cc/2J48-765S.

10 *See* Richard Wolf, *Abortion, Race, Gay Rights, Death Penalty: Supreme Court Nominee Brett Kavanaugh Could Make the Difference,* USA TODAY (Aug. 19, 2018), https://www.usatoday.com/story/news/politics/2018/08/19/abortion-crime-race-gays-areas-where-brett-kavanaugh-matters/1008303002, *archived at* https://perma.cc/WE3C-AURW (noting that Justice Kavanaugh's prior statements suggest he will be more conservative on the death penalty than was Justice Kennedy).

11 428 U.S. 280 (1976) (plurality opinion).

12 *Id*. at 304–05; *see also* Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976) (plurality opinion) (striking down Louisiana's mandatory death-penalty statute).

13 438 U.S. 586, 604 (1978) (plurality opinion). For more on *Lockett*, see *infra* notes 33–54 and accompanying text.

categorically limit the use of the death penalty for some types of crimes and some types of offenders, such as minors.[14] The most vulnerable example may be *Kennedy v. Louisiana*,[15] in which the Court categorically rejected the death penalty for child rape.[16]

While conservatives have plausible reasons to roll back those doctrines, I offer a retributive argument that is decidedly non-liberal for the Court to substantially retain them. My argument does not focus on an originalist approach to interpreting the Cruel and Unusual Punishments Clause.[17] Since 1958, in *Trop v. Dulles*,[18] the Court has consistently purported to interpret the clause according to "evolving standards of decency,"[19] and I accept that methodology. Even so, I contend that the Court should reject as implausible the commonly repeated rhetoric that the clause mandates consistency in the use of the death penalty.[20] The Court's Eighth Amendment doctrines on capital sentencing support only a single, more modest goal—that no person should receive the death penalty who does not deserve it, a concept I call the "deserts-limitation."[21] Believing this deserts-limitation to be a sensible understanding of how the Eighth Amendment applies to capital punishment, I urge conservatives to accept it and acknowledge that, in the main, current doctrines on "individualized sentencing" and "proportionality" serve it.

I. THE TRUE COMMAND OF THE EIGHTH AMENDMENT: CONSISTENCY OR A DESERTS-LIMITATION?

The Eighth Amendment as it applies to capital selection is simply about ensuring that no person receives the death penalty who does not

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14 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring the death penalty for intellectually disabled offenders).

15 554 U.S. 407 (2008).

16 *See id.* at 413.

17 U.S. CONST. amend. VIII, cl. 3. The clause's original meaning is contested among those who have tried to identify it, with some claiming that the clause was understood to prohibit only certain modes of punishment, others claiming more broadly that it was understood to prohibit disproportional or discriminatory punishments, and others claiming that the effort to identify an original meaning was inconclusive. *See* Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 461 n.135 (2007).

18 356 U.S. 86 (1958) (plurality opinion).

19 *See, e.g.*, Atkins v. Virginia 536 U.S. 304, 311–12 (2002) (quoting *Trop*, 356 U.S. at 101 (plurality opinion)).

20 *See, e.g.*, California v. Brown, 479 U.S. 538, 541 (1987) (asserting the need to avoid "arbitrary and unpredictable" death sentences); Eddings v. Oklahoma, 455 U.S. 104, 111 (1982) (asserting the goal of "measured, consistent application" of the death penalty).

21 I have presented this view several times previously. *See, e.g.*, Scott W. Howe, *Repudiating the Narrowing Rule in Capital Sentencing*, 2012 BYU L. REV. 1477, 1481–82 [hereinafter Howe, *Repudiating the Narrowing Rule*]; Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 797 (1998) [hereinafter Howe, *The Failed Case*].

deserve it. As I have argued before, if consistency were the aspiration of Eighth Amendment regulation, "a system involving unrelenting harshness in the imposition of death sentences should succeed, while a system giving officials discretion to extend merciful reprieves should fail."[22] As Professor Randall Kennedy has noted, where race-of-victim discrimination predominates, which is typical, a state could pursue consistency by increasing the death-sentencing rate for killers of blacks to match the death-sentencing rate for similarly-situated killers of whites.[23] Yet, the profound ironies in any view that the prohibition on cruel and unusual punishments is indifferent between leveling up and leveling down[24] may help explain why the Court has not seriously pursued the "consistency" view.[25] The call for "consistency" has essentially operated as only a rhetorical flourish,[26] although one that has obscured the first question to be addressed by the Eighth Amendment: When is capital punishment appropriate for an individual offender? Only after we answer that question should we ask the "consistency" question: Must everyone for whom the death penalty is appropriate receive it? We will see that the answers reflected in capital-sentencing doctrines are that the death penalty is only appropriate under the Eighth Amendment when an offender deserves it and the Eighth Amendment is not offended by undeserved leniency.

II. THE VALUE OF CAPITAL-SELECTION DOCTRINES IN PROTECTING AGAINST UNDESERVED DEATH SENTENCES

In this Section, I aim to show that the core of existing capital-sentencing jurisprudence implements a deserts-limitation and that, even for a conservative Court, it makes sense to honor that principle. The individualized-sentencing and proportionality doctrines comprise the core of capital-sentencing jurisprudence and conservatives should concede that these doctrines have a plausible Eighth Amendment explanation. At the same time, I concede that a conservative Court could logically reject a less-important doctrine known as the "narrowing" rule.[27] Under that doctrine, a state must require the jury to find an

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22 Howe, *The Failed Case*, *supra* note 21, at 824.

23 *See, e.g.,* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court,* 101 HARV. L. REV. 1388, 1392 (1988).

24 One "disturbing irony" is that it "might actually lead to the execution of more black defendants." *Id*.

25 Howe, *The Failed Case*, *supra* note 21, at 825 (noting the irony in the view that executing more people would serve the Eighth Amendment).

26 *See id*. at 824–28.

27 *See, e.g*., Kansas v. Marsh, 548 U.S. 163, 173–74 (2006) (asserting that a capital sentencing system must "rationally narrow the class of death-eligible defendants"); *see also* LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 143 (4th ed. 2018) ("Every death penalty statute must narrow the class of cases that are eligible for a

"aggravating circumstance" to justify a death sentence, and the circumstance must supposedly "genuinely narrow" the class of people who may be subjected to the death penalty.[28] The Court has rationalized the narrowing rule as an effort to promote consistency.[29] However, the effort has accomplished little, if anything. And in any event, consistency is not an Eighth Amendment aspiration that can justify regulation as opposed to abolition.[30] If any death penalty doctrine warrants repudiation, it is the narrowing rule.

A. *Individualized-Sentencing Doctrine*

The Supreme Court's individualized-sentencing doctrine requires states to conduct an expansive penalty trial—after conviction at the trial on the merits—in all capital cases. This doctrine is central to what makes death so much more difficult for states to impose and maintain on appeal than a prison sentence. Regardless of how aggravating the circumstance and narrowly defined the capital crime, the state must provide a separate penalty trial[31] at which the defendant has an opportunity to present mitigating evidence to avoid capital punishment.[32] According to *Lockett*, the defendant must be free to present, and the sentencer must be free to consider as a basis for reprieve, "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."[33] With the benefit of this broad evidentiary standard,[34] the best capital defense lawyers can make a powerful case for sparing almost any defendant, if only so that jurors can avoid the emotional weight for the rest of their lives of having voted for the death penalty.[35]

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sentence of death.").

28 *See, e.g.*, Lewis v. Jeffers, 497 U.S. 764, 776–80 (1990).

29 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 436 (2008) (asserting that narrowing serves to "ensure consistency in determining who receives a death sentence").

30 *See* Howe, *Repudiating the Narrowing Rule*, *supra* note 21, at 1491–97.

31 The state must allow a jury to decide whether there exists an aggravating circumstance, a requirement that most states fulfill at the sentencing stage, using a jury. *See* CARTER ET AL., *supra* note 27, at 147. Whether a jury must decide the ultimate sentencing question remains uncertain, although all states presently use a jury. *See id*. at 148.

32 In *Sumner v. Shuman,* 483 U.S. 66, 67, 85 (1987*),* the Court rejected a mandatory death penalty even for a murder committed by an inmate serving a prison sentence of life without possibility of parole.

33 438 U.S. at 604; *see also id*. at 620–21 (Marshall, J., concurring in the judgment).

34 Although a capital defendant may not be able to present everything that he desires, the Court "has liberally construed when evidence is relevant to the circumstances of the crime or the character and record of the defendant." CARTER ET AL., *supra* note 27, at 184.

35 The case of Brian Nichols provides an example. He was in custody and on trial in Atlanta for rape when he overpowered a guard and murdered the trial judge, a court reporter, a sheriff's deputy and, later, a federal agent. Convicted of four counts of felony murder, among other crimes, Nichols was represented by a strong legal team that convinced three members of the jury to spare him from the death penalty. *See* Robbie Brown, *In Georgia, Push to End Unanimity for Execution*,

The individualized-sentencing doctrine also makes death penalty trials and appeals expensive and slow. Jury selection is protracted because of the requirement to discover and excuse jurors whose views on the death penalty would prevent them from being fair to both sides at sentencing.[36] The sentencing trial itself can also become extended where defense counsel and the prosecutors present many witnesses. And because of that sentencing trial, many additional issues arise, which can extend the appellate litigation and sometimes require a new sentencing hearing.[37] The rarity of capital-sentencing trials exacerbates those effects because neither judges, prosecutors, nor defense attorneys have typically tried many capital cases to a sentencing verdict and thus make more errors. Many of those complications might disappear if states could simply impose a mandatory death penalty upon conviction of certain crimes.

Putting aside policy considerations, the Eighth Amendment grounding for requiring the sentencing trial and imposing the expansive *Lockett* rule[38] is also questionable. The most plausible explanation is that the Cruel and Unusual Punishments Clause[39] imposes a deserts-limitation on the use of the death penalty. The sentencing trial is not suited to resolving the utilitarian question of crime deterrence. That issue is one for legislatures to decide on a categorical basis rather than sentencers to decide in individual cases, particularly when the sentencers receive no relevant data about the deterrent effects of capital punishment generally.[40] Moreover, the aim could not be to ensure "consistency" or "non-arbitrariness," given that the ability of the jury under *Lockett* to extend mercy[41] and the absence of controls to limit reprieves at other stages of

N.Y. TIMES (Dec. 16, 2008), www.nytimes.com/2008/12/17/us/17death.html, *archived at* https://perma.cc/UJ7D-26F6; Jeffrey Toobin, *Death in Georgia,* THE NEW YORKER (Feb. 4, 2008), https://www.newyorker.com/magazine/2008/02/04/death-in-georgia, *archived at* https://perma.cc/36FY-UXLB; *see also* BRANDON GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 256–58 (2017) (discussing how legendary death penalty attorney David Bruck helped secure a reprieve for Susan Smith in her South Carolina capital trial for the murder of her two children).

36 *See, e.g.*, Brown, *supra* note 35. (discussing anti-death penalty jurors who elude *voir dire* about their willingness to consider the death penalty).

37 *See, e.g.,* Penry v. Johnson, 532 U.S. 782 (2001) (reversing death sentence based on confusing instructions given at second sentencing trial that was held after previous death sentence was reversed based on error at the first sentencing trial).

38 See *supra* note 33 and accompanying text.

39 U.S. CONST. amend. VIII, cl. 3.

40 The evidence would not bear on the defendant's character, record, or crime. *See supra* note 33 and accompanying text. If utilitarian interests, such as crime deterrence, were alone sufficient to support a death sentence, the Court could not logically reject a legislature's decision to follow a categorical approach, focusing on deterrence of other putative criminals, and to eschew an individualized approach, focusing on the deterrence of the individual capital defendant. Nothing in the Eighth Amendment proscription seems to favor one kind of utilitarian justification for punishment over another.

41 See *supra* notes 33–35 and accompanying text.

the selection process promotes inconsistency.[42]

Yet the defect is not with the idea that a jury should spare any defendant who does not deserve death. In theory, that idea makes sense under the Eighth Amendment because it probably comports with the societal consensus about justice. The conundrum arises because the Court cannot specify with much precision when a death sentence is deserved because there is no clear societal consensus on this issue. The *Lockett* rule punts on that problem by merely articulating a broad definition of what evidence a jury may consider when deciding to impose the death sentence without clarifying what issue the sentencer is to resolve, and by what standards, based on that evidence.[43] Should jurors sentence only the most culpable offenders to death? Should they spare those who have done many good acts in the past but are extremely culpable for their charged crime? Under the current doctrine, it is unclear. As the doctrine stands, jurors can impose death based on concepts as abstract and unproven as a prosecutor's plea that if they do so it will deter future crime by other offenders.[44] Because of this weakness in the doctrine, if consensus quickly dissolves over how to refine the deserts-measures, it is unclear why the Court should reject legislative judgments about how to structure the capital-sentencing decision, even if they seek to impose automatic death sentences for some crimes.

Logically, the Court could achieve the goal by relying on the "proportionality" doctrine, discussed below, and eliminating the individualized-sentencing doctrine completely. A conservative Court could articulate some basic protections that it thinks reflect the societal consensus about deserts, such as a rule that minors should not receive the death penalty, and, with those protections in place, it could avoid claiming that the Eighth Amendment tells states how to run capital-sentencing trials. If legislators conclude, for example, that a prisoner serving life imprisonment without the possibility of parole who kills a prison guard should receive a death sentence automatically, the Court could abstain from interfering. Indeed, why should the Court, when unable to explain the precise problem, rule that jurors hearing the *Lockett* evidence are, mysteriously, more appropriate decision-makers than legislatures to resolve not only whether the offender fits in the category of the deserving but also how that category should be defined?

There are also good reasons to criticize the breadth of *Lockett*'s evidentiary mandate. Allowing offenders to present anything about their character, record, or crime potentially makes the sentencing inquiry not

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42 *See* Howe, *The Failed Case, supra* note 21, at 811–23. *See also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 288 (2002) (noting many arbitrary factors that influence the capital-sentencing process).

43 See *supra* notes 33–35 and accompanying text.

44 *See* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 115–16 (1991) (noting that prosecutors argue in favor of the death penalty on both deterrence and retribution rationales and discussing some common arguments relating to deterrence that they employ).

just about their "culpability" for their capital offences but also, or instead, about their "general-deserts" based on all of their life's works.[45] Under *Lockett,* the Court has held that capital defendants are free to introduce sentencing evidence about their life that lacks a "nexus" to their capital crimes.[46] The defendant was good with dogs as a child. He was nice to his siblings. He displayed talent and dedication in his middle-school art class. Is such evidence relevant? There is doubt whether a societal consensus exists that the offender's positive attributes and good deeds should matter rather than only his moral responsibility for an act of homicidal brutality. *Lockett* arguably goes too far.[47]

However, despite all of these plausible reasons to roll-back the individualized-sentencing doctrine, there are also reasons for even conservatives to favor retaining the doctrine largely as it is. First, there is a wide range in the culpability of those who commit murder and thus are subject to the death penalty. Murder includes many unintentional killings,[48] and even many people convicted of murder who intended to kill are mentally ill or impaired.[49] The culpability range has gotten modestly narrower in recent years due to the Court's proportionality decisions. In the new millennium, for example, the Court has categorically shielded intellectually disabled people[50] and juveniles[51] from capital punishment. Those decisions arguably help protect against some undeserved death sentences on the view that almost all members of those groups fall on the very low end of the culpability spectrum. Yet, the Court has not done much more with the proportionality doctrine in capital-murder cases, and without rulings that protect more people convicted of murder who have diminished culpability, the individualized-

45 *See, e.g.,* Hitchcock v. Dugger, 481 U.S. 393, 397–99 (1987) (reversing death sentence because list of mitigating factors in the Florida statute, when viewed by the trial judge as exclusive, prevented consideration of, among other things, evidence that defendant had been a "fond and affectionate uncle").

46 *See* Tennard v. Dretke, 542 U.S. 274, 283–86, 289 (2004) (rejecting lower court test that required, inter alia, that evidence, to be mitigating, have a nexus to the capital crime); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (reversing death sentence based on exclusion from sentencer consideration of defendant's good conduct in jail, although "it did not relate specifically to petitioner's culpability for the crime he committed").

47 Commentators have disagreed on this issue. *See* Howe, *The Failed Case*, *supra* note 21, at 838 n.167.

48 *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 158 (1987) (rejecting claim that the death penalty is disproportionate for one who neither intended to kill nor actually killed and ruling that "major participation in the felony committed, combined with reckless indifference to human life" is enough for the death penalty to apply).

49 Regarding the impairments of capital offenders, see Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 SANTA CLARA L. REV. 547, 609 (1995) (contending that capital offenders often have suffered from "family poverty and deprivation, childhood neglect, emotional and physical abuse," and "institutional failure and mistreatment in the juvenile and adult correctional system[,]" and that evidence of their social histories can help juries better understand them as humans).

50 *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

51 *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

sentencing doctrine arguably remains crucial. Before the need for individualized sentencing would conceivably disappear, the Court would have to shield people convicted of murder who are seriously mentally ill and who are guilty but lacked an intent to kill.[52] Without those protections, allowing defendants to plead their low culpability to a sentencing jury could still help avoid the imposition of the death sanction on the undeserving. We cannot be sure. Juries may not consistently honor evidence of low culpability, given that they are not required to give it any weight and are not told that the ultimate issue concerns "deserts," even with individualized-sentencing rules in place.[53] Nonetheless, if juries regularly do weigh such evidence in focusing on deserts, that helps protect against death sentences that amount to retributive excess.

Whether we should maintain the broad *Lockett* test of relevant evidence covering general-deserts is more debatable, but it might also help to avoid undeserved death sentences. One can see why that is so by asking whether prosecutors should have the chance to present the offender's record of unrelated crimes and convictions. Many of us, perhaps most, would probably think this evidence relevant to what the offender "deserves," even if, given the alternative of life imprisonment without parole, we do not need to worry about social protection. But why are all of an offender's other unrelated crimes relevant to their culpability for the charged crime? There is no compelling explanation. Also, from the defense perspective, what if a capital defendant who is incarcerated pending trial steps in to save a guard from attack by risking their own life? Or what if that capital defendant acted heroically during war-time military service? In *Porter v. McCollum*,[54] the Supreme Court reversed a death sentence for ineffective assistance of counsel in failing to investigate and present at sentencing, among other things, evidence of Porter's heroic military service in the Korean War.[55] Is that evidence relevant to whether an offender "deserves" the death penalty? Maybe most of us, including most conservatives, would say yes, although the information has nothing to do with his culpability for the capital crime. Those examples suggest that general-deserts is a measure we care about, suggesting that the *Lockett* test is correct.

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52 Despite the addition of such proportionality protections, impairments reducing the culpability of some capital offenders that could not be considered absent individualized sentencing would arguably remain. *See* Haney, *supra* note 49, at 609.

53 *See, e.g.*, Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases,* 94 MICH. L. REV. 259, 259 (1996) (contending that states should tell capital-sentencing juries, among other things, that the death penalty is reserved only for offenders who deserve it).

54 558 U.S. 30 (2009) (per curiam).

55 *See id*. at 43–44 (declaring the evidence significant because it reflected impressive military service in addition to substantiating a source of Porter's subsequent mental and emotional struggles).

B. *Proportionality Doctrine*

The Supreme Court's capital-proportionality doctrine holds that the Eighth Amendment categorically prohibits the death penalty for some offenses, such as rape, and some offenders, such as the intellectually disabled.[56] The existence of the individualized-sentencing doctrine may be reason enough for the Court not to have categorically protected any group of capital offenders through this proportionality doctrine. Both the individualized-sentencing and proportionality doctrines aim to help ensure that no person receives the death penalty who does not deserve it. Yet the imposition of categorical barriers reflects a lack of trust in juries in individual cases to get the deserts-determination correct. Conservatives could plausibly conclude that at least a few people convicted of murder who are, for example, intellectually disabled or under eighteen, deserve the death penalty. Nonetheless, the Court has shielded from the death penalty everyone in those groups. The Court has also prohibited the death penalty for crimes on the fringes of the felony-murder doctrine,[57] and all non-homicide crimes against individual persons, even child rape.[58] Conservatives who accept the deserts-limitation could plausibly reject all of those decisions on grounds that the individualized-sentencing doctrine correctly allows a more discriminating approach.

Conservatives could also plausibly object to some of the Court's proportionality rulings more than others. Probably the most objectionable is the Court's protection of adults convicted of raping children in *Kennedy*.[59] Rape of a child under the age of twelve, as the Louisiana statute proscribed,[60] can easily be considered as heinous as an act of murder that could carry the death penalty. Such a crime is typically calculated, and the harm to the victim is potentially severe. The Court was testing the limits of its credibility in claiming a societal consensus against the death sanction in all such cases. Even President Obama, as a candidate, said that he disagreed with the Court's decision in *Kennedy*.[61]

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56 *See, e.g.,* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (ruling the death penalty disproportionate for intellectually disabled defendants); Coker v. Georgia, 433 U.S. 584, 600 (1977) (ruling the death penalty disproportionate for rape of an adult);.

57 In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court exempted an accomplice in a felony murder who had not himself killed nor attempted to kill the victim. *Id*. at 798, 801. In *Tison v. Arizona,* 481 U.S. 137 (1987), the Court cut back on the protection, ruling that "major participation in the felony committed, combined with reckless indifference to human life" was sufficient for the death penalty to apply. *Id*. at 158.

58 In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court not only exempted adults convicted of raping children but stated that as "to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken." *Id*. at 437.

59 *See id*. at 407.

60 *See id*. at 416.

61 Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES (June 26, 2008), https://www.nytimes.com/2008/06/26/washington/26scotus.html, *archived at* https://perma.cc/6MN4-GYRT.

On the whole, however, the Court's proportionality rulings arguably do appropriately protect against undeserved death sentences. The Court has only categorically shielded a small portion of people convicted of murder from a possible death sentence, and they are generally on the very low end of the culpability spectrum, which, overall, furthers a deserts-limitation. For example, even if culpability should be the primary deserts-limitation, and one believes that a small number of intellectually disabled people convicted of murder are culpable enough to deserve death, there is still great difficulty in determining which ones they are, even with the best expert assistance and top-notch defense counsel. Relegating all of those offenders to imprisonment for life without parole avoids death-penalty mistakes without much cost.[62] Conservatives who are charitable could agree.

There is also strong evidence that decisionmakers sometimes err on desert-judgments due to racial bias when given the death option in certain kinds of cases involving defendants of marginal culpability. The historical data on the racialized use of the death penalty for rape of adult victims, where consent and mistake as to consent are possible defenses, makes this point. From 1930, when national statistics began to be kept, to 1972, when the Court struck down standardless systems of imposing the death penalty in *Furman v. Georgia*,[63] 405, or eighty-nine percent, of the 455 men executed for rape were African-American, and "virtually all . . . were accused of raping white women."[64] At the same time, it appears that "no white man has ever been executed for raping a black victim."[65] Those statistics imply mistakes in desert-judgments based on racial prejudice, which surely helps explain why the Court, in *Coker v. Georgia*,[66] declared the death penalty disproportionate punishment for the rape of an adult victim,[67] although it avoided discussing the racial-bias problem.[68]

This potential for error based on racial bias might also be a reason never to allow the death penalty for child rape.[69] The argument may be more tenuous than for adult rape. Rapes of very young children by adults are arguably more consistently despicable than rapes of adults in that a

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62 Regarding the relative costs of the death penalty compared to life imprisonment without parole, see CARTER ET AL., *supra* note 27, at 20–23 (noting that "existing studies suggest that a death penalty system may be more expensive from a total-cost perspective than a system with a maximum punishment of life imprisonment without parole").

63 408 U.S. 238 (1972).

64 Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past,* in DEATH PENALTY STORIES 171, 193 (John H. Blume & Jordan M. Steiker, eds. 2009).

65 *Id*.

66 433 U.S. 584 (1977).

67 *Id*. at 597, 600

68 *See* Johnson, *supra* note 64, at 179–83.

69 In *Kennedy*, the Court effectively acknowledged this concern when it conceded "no confidence" that use of the death penalty to punish child rape could avoid the arbitrariness problem that the Court faced in *Furman*. 554 U.S. 407, 439 (2008).

heinous level of wrongdoing is almost always premeditated and without a plausible defense of mistake regarding consent. On the other hand, the level of violence and trauma involved can still vary widely with child rape, leaving plenty of space for racial biases to operate, and thus, to produce erroneous death sentences. On that view, *Kennedy*[70] was correct. But, if a conservative Court were to disagree, it should at least not overrule *Kennedy*[71] unless it leaves the individualized-sentencing doctrine largely intact.

C. *The Narrowing Rule*

The Supreme Court's narrowing rule requires that states articulate "aggravating circumstances" and that the capital-sentencer find at least one aggravating circumstance present in order to impose a death sentence.[72] This rule warrants repudiation more than any other aspect of capital-sentencing law. This "narrowing" doctrine arose under the pretense of being required by *Furman*'s purported call for non-arbitrariness in capital sentencing when, in 1976, the Court upheld three new capital-sentencing statutes that actually allowed for arbitrariness.[73] In upholding those statutes as constitutional, the Court pointed to provisions in the statutes that required an aggravating circumstance in order to impose a death sentence. The Court claimed that these provisions showed that the statutes promoted consistency.[74] This narrowing rule, and the ideal of consistency that purportedly underlies it, could be seen as justification for rolling-back the individualized sentencing doctrine. Because such narrowing categorically—and through legislation—limits who is subject to the death penalty, the argument goes, individual sentencing is less critical to ensure that only the deserving receive the death penalty.

But the proposition that the narrowing rule actually promotes this goal is wildly unrealistic. For example, Georgia's statute[75] was one of those under scrutiny, and with ten statutory aggravating circumstances

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70 *Id*.

71 *Id*.

72 *See, e.g*., Maynard v. Cartwright, 486 U.S. 356, 361–63 (1988); Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion);.

73 *See* Gregg v. Georgia, 428 U.S. 153, 198, 207 (1976) (opinion of Stewart, Powell, & Stevens, JJ.); *id*. at 222, 226 (White, J., Burger, C.J., & Rehnquist, J. concurring in the judgment); Proffitt v. Florida, 428 U.S. 242, 251–53, 259–60 (1976) (opinion of Stewart, Powell, & Stevens, JJ.); *id*. at 260–61 (White, J., Burger, C.J., & Rehnquist, J. concurring in the judgment); Jurek v. Texas, 428 U.S. 262, 276–77 (1976) (opinion of Stewart, Powell, & Stevens, JJ.); *id*. at 278–79 (White, J., Burger, C.J., & Rehnquist, J. concurring in the judgment).

74 *See* Howe, *Repudiating the Narrowing Rule, supra* note 21, at 1486–88 (discussing the opinions).

75 For the language of the statute as it appeared at the time, see *Gregg v. Georgia,* 428 U.S. 153, 165 n. 9 (1976) (plurality opinion). For the language of the Georgia statute today, see O.C.G.A. § 17-10-30 (2010).

that together covered almost all murders,[76] no serious narrowing occurred.[77]

To be sure, individualized sentencing also conflicts with the goal of achieving consistency in capital sentencing because individual juries still decide who receives the death penalty and who does not. However, this argument is a red herring. As we have seen, the Eighth Amendment as a regulatory tool is about a substantive standard—the deserts-limitation—not the idea that there is justice in equality. The Court has never required that sentencing systems limit the articulation of aggravating circumstances.[78] For nearly three decades, the Court has declined to require that individual aggravating circumstances genuinely narrow who is subjected to the death penalty.[79] That means there is still no meaningful narrowing required. The Court's reluctance to demand substantial narrowing makes sense if the Cruel and Unusual Punishments Clause[80] regulates capital sentencing simply by revealing a substantive standard that only the deserving should receive the death sanction.

On that view, conservatives should not use the purported "equality" mandate of *Furman* as a reason to neuter the individualized-sentencing doctrine. It would be more consistent with the deserts-limitation to repudiate the idea that the Eighth Amendment demands consistency and, thus, eliminate the narrowing rule.

III. SYMBOLISM AND OTHER FORCES FAVORING THE STATUS QUO

Death sentences have become increasingly uncommon since the 1990s,[81] and there may be few, if any, states that want to revert to a robust use of the sanction. The penalty brings problems beyond those caused by Supreme Court regulation that make its use, except in the most extraordinary cases, a questionable policy. For example, concerns about the conviction and condemnation of innocent persons helped convince New Mexico officials to abolish the death penalty in 2009[82] and Illinois

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76 *See* Howe, *Repudiating the Narrowing Rule, supra* note 21, at 1493–94 & n. 109.

77 *See* EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 362 (2013).

78 *See* STEIKER & STEIKER, *supra* note 6, at 160 ("Though the Court goes through the motions of assessing whether *individual* aggravators narrow the class of death-eligible offenders, the Court has never inquired whether aggravating factors *taken collectively* accomplish anything along those lines.").

79 *See* Howe, *Repudiating the Narrowing Rule, supra* note 21, at 1492–93 (noting that the Court has not demanded that individual aggravators narrow the group of death-eligible offenders in any meaningful sense).

80 U.S. CONST. amend. VIII, cl. 3.

81 *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, https://deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Aug. 14, 2018), *archived at* https://perma.cc/CJ5U-2GX9 (revealing that annual death sentences dropped from 295 in 1998 to 39 in 2017).

82 *See* CARTER ET AL., *supra* note 27, at 485.

officials to do so in 2011.[83] Studies in many states have also revealed evidence of race-based prosecutorial decision-making at stages other than sentencing.[84] There is also doubt that the death sentence deters crime more than a life sentence without the possibility of parole.[85] Those kinds of concerns favor avoiding the death penalty. States may thus see benefits in providing a separate sentencing trial and in following *Lockett*'s broad evidentiary standard, even if not required to do so by the Supreme Court. We should not forget that in the pre-*Furman* era, the movement among states had been toward allowing a separate and expansive capital-sentencing inquiry.[86] To the extent that such views hold sway today, there may be few, if any, states that will ask the Court to significantly roll-back restrictions on the death penalty.

If only a small number of states seek to overturn doctrines favorable to capital defendants, a conservative Court majority might decline to reverse course because there is little to be gained and more to be lost. As we have seen, the Court's capital-sentencing law generally can be understood to serve an Eighth Amendment goal of ensuring that only the most deserving offenders suffer the death penalty. While that is far from perfect justice to those conservatives who believe that many who deserve the sanction gain reprieves, it is a worthwhile form of justice nonetheless.

The symbolism of the death penalty also remains sharply disputed. Capital-sentencing law is in some sense like a contested monument in a corner of a town square. One group sees white supremacy, while another sees the American dream. For some, it represents a history of racial oppression and savagery. For others, it represents the idea that by our good and bad deeds the world will know us and we might get what we deserve. The Court's work on capital-sentencing doctrines since the 1960s may have had only a modest influence in promoting fairness and thus influencing the debate about the meaning of the death penalty.

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83 *See* Rob Warden, *How and Why Illinois Abolished the Death Penalty,* 30 L. & INEQUALITY 245 (2012).

84 *See, e.g.*, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment,* 45 HOUS. L. REV. 807, 829–39 (2008) (finding that Harris County, Texas prosecutors exhibited race-based decision-making in pursuing capital trials). For additional studies finding race-based decision making by capital prosecutors in other states, see Scott W. Howe, *Race, Death and Disproportionality,* 37 N. KY. L. REV. 213, 226 n.86 (2010).

85 *See* CARTER ET AL., *supra* note 27, at 10–14. There is also doubt that the death sanction is more retributive than life imprisonment. *See, e.g.*, Douglas Mossman, *The Psychiatrist and Execution Competency:* Ford*ing Murky Ethical Waters,* 43 CASE W. RES. L. REV. 1, 58 n.231 (1992) (expressing doubt on the question and noting that several prominent commentators "have viewed life imprisonment as a worse fate than death"). However, this doubt cuts both for and against avoidance of the death penalty, as reflected in a dispute on that point between Justice Breyer and Justice Scalia in *Glossip v. Gross,* 135 S. Ct. 2726 (2015). *Compare id.* at 2769 (Breyer, J., dissenting) (arguing that the death penalty's lack of marginal punitive force over life imprisonment without parole favors abolition) *with id.* at 2748 (Scalia, J., concurring) ("My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it?").

86 *See* Howe, *The Failed Case*, *supra* note 21, at 842 n.181.

Nonetheless, the Court's restrictions on the death sanction have been viewed as important constitutional reforms to many, and thus the Court could receive substantial criticism for attempting to roll them back. And as we have seen, these existing restrictions generally further the fundamental goal of the Eighth Amendment. On that view, a conservative Court may believe it has more important matters on which to weather the controversy involved with backtracking on past decisions.

CONCLUSION

When viewed in its totality, the Supreme Court's capital sentencing jurisprudence reveals a motivating principle of ensuring that only offenders who deserve the death penalty receive it. The doctrines that have been developed under this jurisprudence may seem imperfect both to those who believe that no one deserves the death penalty and to those who believe that many people who deserve the death penalty evade it. However, on whole, the Supreme Court's current death penalty doctrines help achieve a worthy goal. From an abolitionist perspective, it would be a mistake to roll-back these protections and subject more people to the death penalty in the name of consistency. And from a conservative perspective, any attempt to roll-back these protections to capture more offenders who they believe deserve the death penalty would not be worth the political, symbolic, and human costs.