THE ILLUSION OF HEIGHTENED STANDARDS IN CAPITAL CASES

*Anna VanCleave**

The death penalty has gained its legitimacy from the belief that capital prosecutions are more procedurally rigorous than noncapital prosecutions. This Article reveals how a project of heightened capital standards, set in motion when the Supreme Court ended and then revived the death penalty, was set up to fail.

In establishing what a constitutional death penalty would look like, the Court in 1976 called for heightened standards of reliability in capital cases. In the late 1970s and early 80s, the Supreme Court laid out specific constitutional procedures that must be applied in capital cases and left the door open for the Eighth Amendment to do even more. In the decades that followed, state and federal courts have fueled a perception of heightened procedural rigor in capital cases by referring repeatedly to the heightened standards applicable in capital cases.

A review of courts' application of a standard of "heightened reliability," however, reveals that (1) courts routinely use the language of "heightened" standards while simultaneously applying exactly the same constitutional tests that are used in noncapital cases and demonstrating no serious effort to tie procedural rigor to the severity of punishment; and (2) even more problematic, some courts have shown a willingness to use the "heightened reliability" language to justify lesser procedural protection for capital defendants than that applied to noncapital cases—a perverse application of what was clearly intended to be an added measure of assurance that the death penalty is reserved only for those who are truly guilty and who are the most culpable.

* Associate Professor and Director of the Criminal Defense Clinic, University of Connecticut School of Law. My thanks go out to Bethany Berger, Steve Bright, Sanjay Chhablani, Brad Colbert, Todd Fernow, Catherine Hancock, Alexandra Harrington, Katie Kronic, Vida Johnson, Leslie Levin, Kathryn Miller, Josh Perry, Judith Resnik, and Carol Steiker; and members of the NYU Clinical Writers Workshop and the Criminal Law and Procedure discussion group at the 2019 Southeast Association of Law Schools annual conference. I owe special thanks to Shiv Rawal and Hannah Lauer for their incredible research assistance, and to the wonderful editorial team at the *University of Illinois Law Review*, including Alex Bailey, Bryce Davis, Sarah Storti, Joe Self, Dylan Burke, and Blythe Cardenas. All mistakes are, of course, my own.

This decades-long failure to observe meaningfully heightened constitutional standards calls into question the death penalty's institutional legitimacy and raises particular concerns in light of current Supreme Court trends.

TABLE OF CONTENTS

I. INTRODUCTION

Last year marked the fiftieth anniversary of the Supreme Court's decision to end the death penalty, at least in the form it took across the country in 1972.[1] A half-century after its demise and forty-seven years after its modern revival, the institution of capital punishment is in a strange place. On one hand, public support for the death penalty is in steep decline,[2] and state-by-state abolition moves

1. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

2. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021: YEAR-END REPORT 35–38 (2022), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf [https://perma.cc/2BSL-SJSY] (hereinafter DPIC YEAR-END REPORT). The latest Gallup poll shows support for the death penalty is at its lowest point in half a century. *Id*.

forward.[3] On the other hand, the federal government lifted a moratorium on executions and pushed forward a record number of executions in 2020 and 2021.[4] Although the public has increasing concerns that death penalty procedures are not adequate to prevent wrongful executions,[5] the Supreme Court's recent speedy disposition of capital cases with execution dates suggests far more confidence in the judicial proceedings that came before.[6]

When former Attorney General William Barr announced that federal executions would resume in 2020, he and others in the federal government emphasized the degree to which those prioritized for execution[7] had had been afforded a procedurally rigorous judicial process.[8] In a series of briefs opposing late-stage stays and appellate review in these cases, the federal government repeatedly portrayed the legal processes as robust, with many layers of review.[9] The Supreme

3. In 2021, Virginia became the twenty-third state to abolish the death penalty (along with Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Washington, Wisconsin), and three other states have moratoria (California, Oregon, and Pennsylvania), marking the first time in history that a majority of states have effectively ended the death penalty. *Id*. at 1–2; DEATH PENALTY INFO. CTR., EXECUTIONS OVERVIEW: STATES WITH NO RECENT EXECUTIONS, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [https://perma.cc/T5DW-45CN] (hereinafter DPIC EXECUTIONS OVERVIEW). Fourteen states (California, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, Wyoming,) have not carried out executions in the last ten years. *See id.*

4. *See, e.g.*, DEATH PENALTY INFO. CTR., FEDERAL EXECUTION UPDATES, https://deathpenaltyinfo.org/stories/federal-execution-updates [https://perma.cc/RK55-5ZS3] (hereinafter DPIC FEDERAL EXECUTION UPDATES).

5. *See* DPIC YEAR-END REPORT, *supra* note 2, at 36. In the latest death penalty survey by the Pew Research Center, seventy-eight percent of respondents said that "[t]here is some risk that an innocent person will be put to death," and twenty-one percent responded "[t]here are adequate safeguards to ensure that no innocent person will be put to death." *Id*.

6. The Supreme Court's refusal to intervene in the midst of rushed litigation in late-stage capital cases has been the subject of much criticism. *See, e.g.*, Ngozi Ndulue, *Symposium: The Shadow Docket Is Shaping the Future of Death Penalty Litigation*, SCOTUSBLOG (Oct. 26, 2020, 10:42 AM), https://www.scotusblog.com/2020/10/symposium-the-shadow-docket-is-shaping-the-future-of-death-penalty-litigation/ [https://perma.cc/3HWU-MZGH] ("The Supreme Court's rulings on federal executions show the power and the danger of its shadow docket. The injunctions issued the week of the executions involved important issues of constitutional law, statutory interpretation and administrative law."). A minority of Supreme Court justices have, in recent years, decried the Court's refusal to stay executions even as legitimate and complex legal questions remain unresolved. *See, e.g.*, Barr v. Purkey, 140 S. Ct. 2594, 2595 (2020) (Breyer, J., dissenting); *see id.* at 2597 (Sotomayor, J., dissenting); United States v. Higgs, 141 S. Ct. 645, 648 (2021) (Sotomayor, J., dissenting); *see id.* at 645 (Breyer, J., dissenting). In his dissent in *Higgs*, Justice Breyer laid out a litany of legal questions still unresolved in the case and wrote: "None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up'?" *Id*. at 646 (Breyer, J., dissenting).

7. For an analysis of the lack of meaningful standards in setting up execution schedules, *see generally* Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163 (2019).

8. According to then-Attorney General William Barr, "Under Administrations of both parties, the Department of Justice has sought the death penalty against the worst criminals, including these five murderers, each of whom was convicted by a jury of his peers after a full and fair proceeding." Press Release, U.S. Dep't of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [https://perma.cc/F5C5-KQNJ].

9. *See* Response in Opposition to Emergency Application for Stay of Execution at 1–2, Mitchell v. United States, 140 S. Ct. 2624 (2020) (No. 20A32) ("The district court and the court of appeals accorded him extensive

Court permitted every one of the federal government's thirteen executions to go forward.[10]

The Supreme Court's confidence in the proceedings in lower courts is not new. In 2007, Justice Scalia wrote in a concurrence:

> The dissent's suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle.[11]

Over the years, the death penalty has maintained its legitimacy through the idea that the processes that lead to execution are procedurally rigorous and that the courts are cautious.[12] This perception arises in part from the Supreme Court's

review on direct appeal, collateral review under 28 U.S.C. 2255, and on his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6)). This Court has twice denied petitions for writs of certiorari in those proceedings, and applicant's certiorari petition (and stay application) in the Rule 60(b) proceeding are pending before this Court (Nos. 20-5398, 20A30); Brief for Respondent at 2–3, United States v. Mitchell, 141 S. Ct. 216 (2020) (No. 20A30) ("The district court and the court of appeals accorded him extensive review on direct appeal, collateral review under 28 U.S.C. 2255, and on his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). This Court has twice denied petitions for writs of certiorari in those proceedings, and applicant's certiorari petition (and stay application) in the Rule 60(b) proceeding are pending before this Court (Nos. 20-5398, 20A30).").

10. *See* DPIC FEDERAL EXECUTION UPDATES, *supra* note 4. In a case challenging lethal injection processes, the dissent characterized the preceding very differently. Barr v. Lee, 140 S. Ct. 2590, 2593 (2020) (Sotomayor, J., dissenting) ("The Government is poised to carry out the first federal executions in nearly two decades. Yet because of the Court's rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring to the way in which the Government plans to execute them.").

11. Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring).

12. For a comprehensive analysis of the constitutional regulation of the death penalty and the appearance of procedural regularity, see generally CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016). *See also* David Niven & Aliza Plener Cover, *The Arbiters of Decency: A Study of Legislators' Eighth Amendment Role*, 93 Wash. L. Rev. 1397, 1418–19 (2018) (analyzing legislative debates about death penalty abolition, and noting that, "[i]n the speeches of several legislators rejecting the possibility that death sentences could be imposed arbitrarily or based upon insufficient evidence, the Fifth Amendment's guarantee of due process is referred to as 'super due process,' 'super process,' or 'maximum due process.'"); Carol Steiker & Jordan Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 2020 ANN. REV. CRIMINOLOGY 299, 310 (2020) ("[T]he post-*Furman* choice to regulate rather than abolish the death penalty was premised in large part on the potential of regulation to cure some of the manifest pathologies of the practice (including arbitrariness, discrimination, and error."). The increasing limits on opportunities to review capital convictions caused Justice Blackmun in 1992 to question the continued legitimacy of the death penalty:

> As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg v. Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the

mandate that, under the Eighth Amendment, death penalty cases require a heightened standard of reliability.[13] To the extent that there are in place additional resources and safeguards to make the administration of the death penalty more reliable than in noncapital cases, we might assume that the Supreme Court's requirement of heightened reliability is responsible.

A closer examination of the way that courts are applying the Court's requirement of heightened standards suggests otherwise. A review of courts' treatment of procedural issues under the Eighth Amendment in capital cases reveals that, in the cases that explicitly address the requirement of heightened reliability standards, courts are regularly reverting to the same procedural standards as in noncapital cases even while claiming to abide by the higher standards.[14] In a large number of cases, courts simply invoke the rule of heightened standards before applying whatever test is applicable in noncapital cases.[15]

Even more problematic, some courts are using the Eighth Amendment's requirement of heightened standards to justify denying certain procedural protections for capital defendants.[16] These courts invoke heightened reliability standards to justify giving the *government* more leeway on procedures like evidentiary rules, appellate procedures, and jury instructions.[17] At state and federal levels, in other words, the requirement of heightened reliability often not only adds little or no meaningful process but can actually undermine certain specific rights of capital defendants.[18]

In short, the heightened procedural standards, described by many as a kind of "super due process,"[19] have not played out in the lower courts as designed. Courts have done little work to make the Eighth Amendment's requirement of heightened standards enforceable and reviewable. The repeated use of the language in death penalty decisions creates a veneer of legitimacy and procedural caution that does not match the substantive analyses the courts are undertaking. At its best, the requirement of heightened standards is simply unenforced on the

adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case.

Sawyer v. Whitley, 505 U.S. 333, 359–60 (1992) (Blackmun, J., concurring) (citation omitted).

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Part IV.

15. *See* discussion *infra* Section IV.A.

16. *See* discussion *infra* Section IV.B.

17. *See* discussion *infra* Section IV.A. (discussion of Dustin Honken); *See* discussion *infra* Subsection IV.B.1 (discussions of Lezmond Mitchell and Daniel Lee). These rights are "procedural" in the sense that they are distinct from the Eighth Amendment categorical bans on the death penalty for certain classes of defendants or crimes. *See* Miller v. Alabama, 567 U.S. 460, 470, 482 (2012) (discussing the "two strands" of precedent under the Eighth Amendment that distinguish the Eighth Amendment ban on punishments that do not match the culpability of a class of people from the cases that address the necessary processes for determining who will be sentenced to death).

18. In three of the federal cases that ended in executions in 2020–2021, courts had invoked the Eighth Amendment to give the government wider latitude in the sentencing hearing, *see* discussion *infra* Section IV.B (Lezmond Mitchell), rejected another court's determination that heightened standards required relief, *see* discussion *infra* Section IV.B. (Daniel Lee), and invoked heightened standards while applying the conventional noncapital tests, *see* discussion *infra* Section IV.A (Dustin Honken).

19. *See* discussion *infra* Section III.C.

lower courts. At its worst, the language is contributing to a false confidence in the procedural rigor of capital prosecutions.[20]

This Article argues that under-enforcement of the Eighth Amendment's heightened standards stems from the complexity of criminal due process, the challenges of adding heightened standards to the vast majority of due process trial rights, and the courts' failure to undertake the serious work of creating meaningfully higher standards. The Article describes the origin and theory of the Eighth Amendment's role in adding heightened standards to capital prosecutions and analyzes state and federal cases to show how the courts have failed to implement a meaningful "super due process."

Part II describes how capital prosecutions are depicted as exceptionally rigorous and how this depiction is undermined by evidence that the process is unreliable in determining who is guilty and who is most deserving of severe sentences. Part III describes how the Eighth Amendment's procedural protections fit within a larger constitutional scheme and why, given the architecture of criminal due process and the Eighth Amendment, the project of imposing heightened standards was likely to fail. Part IV describes the ways in which state and federal courts have invoked the Eighth Amendment's requirement of heightened reliability. Specifically, this Part explores how the language of "heightened reliability" is used by courts that then apply the same standard that exists in noncapital cases and how some courts have invoked heightened reliability in a manner that works to the defendant's detriment. Part V discusses the implications of this structural failure for the continued legitimacy of the death penalty, particularly in light of a changing Supreme Court and its treatment of capital cases.

II. THE PERCEPTION OF PROCEDURAL RIGOR IN CAPITAL CASES

Proponents of the death penalty point to a few aspects of capital prosecutions to suggest that the courts appear to be exercising caution in capital cases. Non-binding ABA guidelines set baseline qualifications for capital counsel, mitigation specialists, and investigators;[21] capital defendants often have two or more lawyers;[22] funding for defense counsel in capital cases may be more generous in some jurisdictions;[23] lawyers are appointed through post-conviction and up to

20. To be clear, this Article does not argue the courts' treatment of the Eighth Amendment has, on balance, put capital defendants in a worse place than noncapital defendants in most instances. While a number of courts have so distorted the meaning of "heightened standards" that it can be deployed against capital defendants, *see* Section IV.B, the larger point is that the courts' invocation of "heightened standards" most often adds no meaningful process.

21. *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952 (2003), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf [https://perma.cc/E3QN-9YWN] (hereinafter ABA GUIDELINES) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.").

22. *See id*.

23. *See* James W. Douglas & Helen King Stockstill, *Starving the Death Penalty: Do Financial Constraints Limit Its Use?*, 29 JUST. SYS. J. 326, 334–35 (2008) (discussing funding variability among jurisdictions). *But see* Eli Hager, *Where the Poor Face the Death Penalty Without a Lawyer*, MARSHALL PROJECT (Nov. 28, 2017, 10:00

the point of execution;[24] the cases themselves go through many courts with several rounds of review; and the litigation carries on for decades.[25] At the end of the process, the thinking goes, clemency offers a final catchall for errors that may have escaped unnoticed to that point.[26]

Proponents rely on these features of death penalty litigation to suggest that the risk of error must be low.[27] The reality, however, looks quite different. Capital lawyers are often poorly paid,[28] poorly trained,[29] and either under political pressure not to mount a strong defense or not innately oriented toward presenting one.[30] State and federal post-conviction doctrine affords more deferential review than it ever has,[31] with many litigants unable even to get a court to review new evidence if some is discovered on appeal or post-conviction.[32] While some point to the fact that post-conviction processes take years or decades to complete, the length of time it takes to move through these procedural minefields is a poor proxy for procedural rigor.[33]

Moreover, research has generally borne out the hypothesis that capital proceedings carry real—not just theoretical—risk of error.[34] In other words, the public's concern in surveys about the reliability of the death penalty[35] matches what appears to be happening in these cases. Error rates are high.[36] In addition, to the extent that the legitimacy of the death penalty rests on the notion that procedures are in place to ensure that only the most morally culpable are selected for the

PM), https://www.themarshallproject.org/2017/11/28/where-the-poor-face-the-death-penalty-without-a-lawyer [https://perma.cc/2UPW-6VSG] (reporting on Louisiana's failure to fund capital counsel).

24. *See* ABA GUIDELINES, *supra* note 21, at 1076–87 (§§ 10.14.C and 10.15.1).

25. *See* Glossip v. Gross, 576 U.S. 863, 935–38 (2015) (Breyer, J., dissenting).

26. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411 (1993) (rejecting capital defendant's claim of innocence but noting: "This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency."); s*ee* Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1125 (2013).

27. *See* Niven & Plener Cover, *supra* note 12, at 1428–29.

28. Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the* Strickland *Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM 261, 265 (2019); s*ee* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L. J. 1835, 1844 (1994).

29. *See* Perlin et al., *supra* note 28, at 265–66.

30. *See* Kathryn A. Sabbeth, *Capital Defenders as Outsider Lawyers*, 89 CHI.-KENT L. REV. 569, 582 (2014).

31. *See, e.g.*, Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 446 (2017) ("Left to develop on its own, however, State PCR fails to perform the enforcement function adequately, so searing criticism of State PCR is easy to find."). The Supreme Court sharply curtailed postconviction rights in the 2021 term, with decisions like *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) and *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022).

32. *See Ramirez*, 142 S. Ct. at 1734.

33. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411 (1993); Glossip v. Gross, 576 U.S. 863, 909–15; 935–38 (2015) (Breyer, J., dissenting) (discussing both the lengthy delays and the risk of error).

34. *See* Samuel R. Gross, Barbara O'Brien, Chen Hu, & Edward Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROCS. NAT'L ACAD. SCIS. U.S. AM. 7230, 7231 (2014).

35. DPIC YEAR-END REPORT, *supra* note 2, at 36.

36. Gross et al., *supra* note 34, at 7231.

death penalty,[37] the research shows that those who are sentenced to death have suffered serious abuse, trauma, and mental illness at high rates.[38] Far from a system that accurately sorts the guilty and innocent,[39] it is entirely inadequate to the task of sorting those who may, assuming such a system could even exist,[40] be morally deserving of execution.[41] The risk of error on many fronts, therefore, is significant.[42]

But while the assumptions about the robustness of procedural protections might not match reality, they do say something about how heightened standards should operate in capital cases. The legal system naturally perceives, and the public embraces, an idea that procedural rigor should match the severity of the punishment.[43] In other words, the perception of a procedurally robust

37. *See* Robert Smith, Sophie Cull & Zoe Robinson, *The Failure of Mitigation?*, 65 HASTINGS L. J. 1221, 1226 (2014).

38. *Id.* at 1224; Alex Hannaford, *Letters from Death Row: The Biology of Trauma*, TEX. OBSERVER (June 22, 2015, 1:35 PM), https://www.texasobserver.org/letters-from-death-row-childhood-trauma/ [https://perma.cc/3JAP-Q5AV] (discussing high rates of childhood trauma and poverty on Texas's death row).

39. *See Saved from the Executioner: The Unlikely Exoneration of Henry McCollum*, CTR. FOR DEATH PENALTY LITIG., (Aug. 31, 2017), https://www.cdpl.org/wp-content/uploads/2017/06/SAVED-FROM-EXECUTION-web-final1.pdf [https://perma.cc/W4RS-M5UE] (detailing the degree to which an exoneration came about almost entirely by luck).

40. *See* Stephen B. Bright, *The Future of the Death Penalty in Kentucky and America*, 102 KY. L.J. 739, 753 (2014) ("How much uncertainty is tolerable with regard to executing people of low intelligence and people who are profoundly mentally ill? Are juries able to measure precisely the degree of disability and culpability of an intellectually disabled person? Are they able to distinguish between people so intellectually disabled that they are exempt from the death penalty, and those not quite intellectually disabled enough so that it is acceptable to execute them? How should profoundly mentally ill people be sentenced? Do their disorders and impairments reduce their culpability so that they should be spared the death penalty or make them a danger to society so that they should be executed? Different people on different juries make those decisions, but it is impossible for them to make them consistently. Intellectual disability cannot be precisely measured. Psychiatrists and psychologist do not fully understand mental illness and certainly do not agree with regard to it. How can juries in capital cases, which are so often influenced by the passions of the moment, make these immensely difficult decisions?").

41. Smith et al., *supra* note 37, at 1225.

42. *See* Glossip v. Gross, 576 U.S. 863, 910 (2015) (Breyer, J. dissenting) ("For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed."); James Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* 1 (Colum. L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 15, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712 [https://perma.cc/6EYS-48BS]. ("[This study] asks whether the mistakes and miscarriages of justice known to have been made in individual capital cases are isolated, or common? The answer provided by our study of 5,760 capital sentences and 4,578 appeals is that serious error—error substantially undermining the reliability of capital verdicts—has reached epidemic proportions throughout our death penalty system. More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed."); Gross et al., *supra* note 34, at 7235. For an analysis of the contradiction between American tolerance of the death penalty and its patent flaws, see Jenny Brooke-Condon, *Denialism and the Death Penalty*, 97 WASH. U. L. REV. 1397, 1412 (2020).

43. *See, e.g.*, Richard Lippke, *Fundamental Values of Criminal Procedure*, *in* OXFORD HANDBOOK OF CRIM. PROCESS 25, 35 (2019):

> [T]he case for rigorously testing the government's evidence is grounded in an account of what taking the basic rights of persons seriously requires of state officials before they impose legal punishment on them. Such an account holds that as the state increasingly intrudes upon the rights of persons during the investigatory and adjudicatory processes, it should have to surmount successively stronger evidentiary barriers designed to shield those rights from official depredation. At the limit, before it can curtail basic rights in

administration of death penalty cases reflects a general intuition that courts should and do proceed with greater caution in capital cases because of the high stakes. The idea of a "sliding scale" of procedural rigor is at the heart of Eighth Amendment capital jurisprudence.[44]

As an initial matter, the Supreme Court has offered no consistent definition of reliability, and so there are multiple ways to understand what heightened reliability might mean in the capital context. A reliable death penalty would be one that accurately selects only guilty defendants.[45] Among those who are factually guilty, a reliable death penalty would accurately select the most culpable of these individuals during a sentencing proceeding and impose death only for the most culpable.[46] Under a different frame, a reliable death penalty would ensure that the criminal procedural rules imposed in all prosecutions would be scrupulously observed in the capital context such that, for example, an incompetent capital defendant would not be subjected to trial,[47] the government would abide by its discovery obligations,[48] etc.

profound and often enduring ways through the infliction of legal punishment, the state should have to provide powerful proof of the criminal misconduct of persons. (footnote omitted).

See generally William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON L. REV. 259, 262 (2015) (advocating for a sliding scale model of due process for serious, noncapital cases).

44. Berry, *supra* note 43, at 280.

45. While most of the Court's capital cases calling for heightened procedural standards apply to the penalty phase determinations, the Supreme Court has made clear that culpability-phase determinations are subject to heightened standards as well. Beck v. Alabama, 447 U.S. 625, 638 (1980).

46. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) ("The Court has explained that the Amendment imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'"); Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) ("In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'").

47. *See generally* J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 461–62 (2012) (proposing a higher standard for competency in capital cases).

48. *See generally* Sanjay K. Chhablani, *Beyond* Brady*: An Eighth Amendment Right to Discovery in Capital Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 423, 424 (2014) (proposing stricter discovery obligations in capital cases).

Each of these reliability metrics fails in the capital context. Extensive research has shown that factors such as race,[49] geography,[50] and the quality of the lawyer[51] are driving death sentences. In a disturbing number of cases, those selected for execution,[52] nearly executed,[53] or actually executed[54] were not even guilty.[55] In terms of procedural reliability, the courts have not systematically defined what a heightened standard might look like if applied to all of the individual decisions made by courts in capital prosecutions.[56] In other words, the Eighth

49. *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (rejecting claim that large-scale study showing significance of race in capital sentencing determinations demonstrated violation of Equal Protection Clause); Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 679–85 (2015); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES (1998) (detailing empirical studies showing that there are higher rates of death sentences for black defendants and that the key decisionmakers in capital cases are overwhelmingly white men); NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 28–32 (Robert Dunham ed., 2020) (explaining historically racialized use of death penalty and lynching and recent data on the racialized concentration of death sentences in counties with high rates of death sentences, racial disparities in death sentences nationwide, salience of race of the victim, and size of a state's African American population and the chance of a reversal for constitutional error in a capital case); *see also* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 983 (2020).

50. Frank R. Baumgartner, Janet M. Box-Steffensmeier & Benjamin W. Campbell, *A Few Counties Are Responsible for the Vast Majority of Executions. This Explains Why.*, WASH. POST (Feb. 1, 2018, 6:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/01/a-handful-of-counties-are-responsible-for-the-vast-majority-of-executions-this-explains-why/ [https://perma.cc/UB43-4F76]; FRANK R. BAUMGARTNER, MARTY DAVIDSON, KANEESHA R. JOHNSON, ARVIND KRISHNAMURTHY & COLIN P. WILSON, DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 117–37 (2018).

51. Bright, *supra* note 28, at 1835; Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 720 (2017) (describing sharp declines in death sentences in jurisdictions adopting structured, statewide defender support systems).

52. *Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence-database (last visited May 31, 2023) [https://perma.cc/W8QV-UGMC].

53. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 80 (2011) (Ginsburg, J., dissenting) ("But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps."); CTR. FOR DEATH PENALTY LITIG., *supra* note 39, at 3.

54. *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent (last visited May 31, 2023) [https://perma.cc/U8T5-RVAF]; *see also* JAMES S. LIEBMAN ET AL., THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION 2 (2014) (compiling evidence of probable innocence for Carlos DeLuna, executed in 1989).

55. *Innocence Database*, *supra* note 52. One scholar noted, in an in-depth examination of a capital case rife with *Brady* violations, "[f]or [Debra] Milke, *Brady's* due process doctrine provided no protection from the risk of wrongful conviction." Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*, 38 N.Y.U. REV. L. & SOC. CHANGE 437, 439 (2014).

56. Capital cases in which courts applied noncapital standards on procedural issues can produce disturbing results. Using, again, the examples of the due process competency right and the due process discovery right: One capital defendant, having been found competent to stand trial, Rector v. Lockhart, 727 F. Supp. 1285, 1286 (E.D. Ark. 1990), *aff'd sub nom.* Rector v. Clark, 923 F.2d 570 (8th Cir. 1991), was so impaired that he set aside his dessert at his final meal to save for later. Marshall Frady, *Death in Arkansas*, NEW YORKER 105, 115 (Feb. 22, 1993). Another capital defendant, having requested exculpatory information multiple times, was within days of his execution when his legal team accidentally came into possession of a lab report that later led to his exoneration. *Connick*, 563 U.S. at 55.

Amendment—supposedly the source of super due process—is applied by lower courts in a disturbingly limited fashion.[57]

Why does a system that looks like it has so many robust features fail to deliver reliable results?[58] The way in which the Supreme Court has chosen to frame the constitutional analysis of death penalty cases offers one set of answers.

The procedural legitimation of the death penalty can be traced back at least as far as the Supreme Court's decision to halt the death penalty in *Furman v. Georgia*[59] and its reinstatement four years later with a set of cases that outlined a new procedural regime for the death penalty and ushered in the modern death penalty era.[60] Under this new constitutional scheme, the Eighth Amendment was supposed to provide added procedural rigor that was unavailable under the Due Process Clause.[61] This combined Eighth Amendment/Due Process analysis created a super due process[62] that the courts appeared to embrace at first.[63] But over the years, the requirement of heightened procedures fell short of what it had seemed to promise.[64]

According to Carole Steiker and Jordan Steiker, whose body of work has shaped this field, a "recurring feature of constitutional regulation is the way in which the Supreme Court's intervention in an area of law can serve to legitimate

57. "Although the Court has carved out a series of protections applicable only to capital trials, it has done so in an entirely ad hoc fashion and left untouched a substantial body of doctrine that relegates capital defendants to the same level of protection as noncapital defendants." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397 (1995).

58. *See* Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 147 (2017) ("Procedural justice concerns now dominate the Court's jurisprudence, but the Court has failed to identify any evidence suggesting the procedures developed by legislatures to promote consistency and accuracy in capital charging and sentencing are capable of satisfying the requisite constitutional standards."). A recent book by sociologist Sarah Beth Kaufman also explored this disconnect with respect to sentencing processes at trial. In a systematic study of several capital trials, she wrote:

> If there is any venue in the contemporary US criminal justice system where individuated sentencing and careful consideration of process have the potential to disrupt this norm [in which the super due process accorded to capital sentencing negates the dehumanizing impulse inherent in criminal sentencing], it is in the capital sentencing trial. The stakes are high, the players handpicked, and review assured. Yet, . . . the legally sanctioned elements of capital sentencing remain anchored in the necropolitics of the era in which they developed.

SARAH BETH KAUFMAN, AMERICAN ROULETTE: THE SOCIAL LOGIC OF DEATH PENALTY SENTENCING TRIALS 90–91 (2020).

59. 408 U.S. 238 (1972).

60. After the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), effectively struck down existing death penalty statutes in 1972, the Supreme Court once again authorized the death penalty with a set of five decisions, all issued on the same day in 1976. Gregg v. Georgia, 428 U.S. 153, 207 (1976); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976). The crux of these decisions was that the Eighth Amendment could supply the requisite procedural rigor necessary for the imposition of the death penalty.

61. *See infra* Section III.C.

62. The phrase "super due process" was introduced by Margaret Jane Radin in 1980, in support of the idea that, as a moral matter, the degree of procedural rigor increases with the severity of punishment. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 55 S. CAL. L. REV. 1143, 1143 (1980).

63. Steiker & Steiker, *supra* note 57, at 360.

64. *Id.*

practices that were previously contested, by inducing false or exaggerated faith that the actors being regulated are following rules that will prevent abuses and ensure fairness."[65] After decades of judicial tinkering with the death penalty,[66] there is widespread recognition from researchers, lawyers, and judges that the Eighth Amendment project to enforce procedural rigor has been a failure.[67]

III. THE EIGHTH AMENDMENT AND SUPER DUE PROCESS

Understanding how the courts have failed to use the Eighth Amendment and the Due Process Clause to work together in the service of a set of super due process procedural regulations requires understanding (1) the criminal due process rights and how they have developed in the modern era, and (2) the evolution of the idea of super due process and the mandate for heightened procedural protections in capital cases under the Eighth Amendment.

A. The Criminal Due Process Right

It seems intuitive that a higher degree of caution, and greater enforcement of trial rights, should apply in cases carrying long sentences and graver consequences.[68] Although this sliding scale of procedural rigor applies in civil cases under the Due Process Clause, the criminal due process right does not actually account for what is at stake for a defendant.[69] The history and scope of criminal due process rights are important in understanding how courts have failed to adopt a meaningful heightened standard of reliability in capital cases.

The Supreme Court's exploration of criminal due process began in the late nineteenth century with *Hurtado v. California*.[70] In *Hurtado*, the Court held that the requirement of due process does not prohibit a state from proceeding with a prosecution by information rather than indictment.[71] More significant than the actual holding is the fact that the case marked the Supreme Court's first important exploration of the content of "due process" in criminal cases.[72] The case

65. STEIKER & STEIKER, *supra* note 12, at 230.

66. This language comes from Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins*, announcing that he had reversed his position on the death penalty, no longer believed it to be constitutional, and would never again "tinker with the machinery of death." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

67. STEIKER & STEIKER, *supra* note 12, at 3; *see also* Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake; Speaking Out in Favor of the ABA's Position*, 13 CRIM. JUST. MAG., Summer 1999, at 29; Steiker & Steiker, *supra* note 57, at 357 ("Virtually no one thinks that the constitutional regulation of capital punishment has been a success.").

68. *See supra* note 44 and accompanying text.

69. *See id.*

70. 110 U.S. 516, 538 (1884) (holding that a state criminal procedure allowing for prosecution by information rather than indictment does not violate the Fourteenth Amendment's due process provision).

71. *Id.*

72. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 306 (2001) ("Although decided in 1884, over a century after the adoption of the Bill of Rights, *Hurtado* was the first major Supreme Court ruling on what due process requires of the criminal process.").

established that the due process provisions of the Fifth and Fourteenth Amendment were identical in their content,[73] and that due process "refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized."[74] That language—centering the concept of due process around that which is "fundamental"—still drives courts' analyses of criminal due process.[75]

Before the modern death penalty era, due process required greater protections in capital cases. In the infamous case of the Scottsboro Boys,[76] the Supreme Court found that due process required the appointment of counsel for capital defendants.[77] The Court's ruling was fact-specific and depended on a number of circumstances in the case, but the fact most central to its decision was the penalty:

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.[78]

Beginning in the latter half of the twentieth century, the analysis of criminal due process proceeded along two tracks. The first was the gradual process of incorporation of the federal constitutional rights enumerated in the Bill of Rights.[79] Over time, the enumerated rights were nearly all incorporated under the Due Process Clause of the Fourteenth Amendment (with the grand jury right as the only exception).[80] The second due process track concerned the

73. *See Hurtado*, 110 U.S. at 534–35. This directive would later be modified by the process of selective incorporation, which lent to the Fourteenth Amendment's due process provision the content of each of the enumerated rights under the Bill of Rights.

74. *Id.* at 536.

75. Medina v. California, 505 U.S. 437, 445 (1992) (a criminal process does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.").

76. Powell v. Alabama, 287 U.S. 45, 50 (1932) (sentencing nine Black youths to death for allegations that they raped two white women).

77. *Id*. at 71.

78. *Id.*

79. *See* Israel, *supra* note 72, at 304.

80. Donald A. Dripps, *Due Process: A Unified Understanding*, *in* CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 45, 65–66 (Karen Orren & John W. Compton eds., 2018); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating exclusionary rule of the Fourth Amendment); Aguilar v. Texas, 378 U.S. 108, 110 (1964) (incorporating warrant requirement); Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating protection against double jeopardy); Griffin v. California, 380 U.S. 609, 615 (1965) (incorporating privilege against self-incrimination); Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967) (incorporating right to speedy trial); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating right to jury trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating right to confront witnesses); Washington v. Texas, 388 U.S. 14, 19 (1967) (incorporating defendant's right to present own witnesses); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (incorporating right to counsel); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating protection against excessive fines); Robinson v. California, 370 U.S. 660, 666 (1962) (incorporating protection against cruel and unusual punishment).

constitutionality of the procedures that did not fall within any of the specific enumerated rights in the Bill of Rights.[81] This set of trial rights has come to be known loosely as "free-standing criminal due process."[82]

The Supreme Court decisions in this second category apply a due process framework for testing the constitutionality of at least fifty criminal trial procedures.[83] While the Supreme Court has described the right as having "limited operation,"[84] in fact it applies to a broad set of procedural rights in the criminal context.[85] Given the infinite variety of the forms that criminal trials take—the variety of facts, procedural rules, courtroom practices, unforeseen circumstances, prosecutorial acts, and judicial rulings—it is not surprising that this free-standing criminal due process right has been invoked to deal with a large number of issues that come up in criminal trials. The free-standing due process cases address the various procedural trial rights that have now been recognized by the courts as fundamental to due process: for example, the right to favorable, material information in the hands of the prosecution,[86] the right to an impartial tribunal,[87] the right to specific procedural protections in juvenile cases,[88] the right not to be tried while incompetent,[89] and many more.[90]

Throughout the 1950s, 60s, 70s, and 80s, as the Supreme Court developed the caselaw around these various trial procedures under the free-standing due process right, it did not differentiate between the analyses applicable to criminal

81. *See generally* Israel, *supra* note 72.

82. *Id.* at 421.

83. *Id.* at 389–95. As Israel explained, the criminal processes and issues that are governed by due process tests established by the Supreme Court include: identification procedures, "outrageous" police investigatory conduct, confessions, destruction and preservation of evidence, defense access to witnesses, prosecutors' delay in bringing charges, prosecutors' vindictiveness in bringing charges, litigation of suppression motions, reciprocal discovery obligations, access to defense experts, disclosure of exculpatory material by prosecutors, disclosure of exculpatory material held by other government actors, filing of defense motions, biased judges, juries' exposure to pretrial publicity, defendants' physical presence at trial and exclusion for misconduct, prejudicial aspects of the courtroom, defendant's right to testify, right to be competent to stand trial, procedures for determining competency, televising of trials, standard of proof beyond a reasonable doubt, the presumption of innocence, the shifting of the burden of proof, means of proving mental state for a crime, jury instructions on the standard of proof, prosecutors' presentation of false testimony, disclosure of evidence that undermines the credibility of prosecution witnesses, inferences from defendants' invocation of *Miranda* rights, improper closing arguments, admissibility of defense evidence, judicial interference with defense witnesses, overall atmosphere of the courtroom, information provided to defendants before they plead guilty, the necessary factual basis for the plea, pressures on defendants to plead guilty, withdrawal of a guilty plea, breach of plea agreements by judges and prosecutors, range of evidence that can be considered by judges at sentencing, defendants' access to information on which a sentence is based, accuracy of information considered by a judge, defendants' opportunity to be heard and offer evidence at sentencing, burden of proof for sentencing enhancements, extension of sentences, right to counsel on appeal, standards for withdrawal of counsel on appeal, retaliation against defendants who exercise the right to appeal, right to counsel in probation revocation proceedings, procedures for probation revocation, and procedures for parole revocation.

84. Medina v. California, 505 U.S. 437, 443 (1992) (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

85. *See* Israel, *supra* note 72, at 394.

86. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

87. Tumey v. Ohio, 273 U.S. 510, 535 (1927).

88. *In re* Gault, 387 U.S. 1, 56 (1967).

89. Dusky v. United States, 362 U.S. 402 (1960).

90. *See* Israel, *supra* note 72, at 394.

and civil due process issues.[91] When the Supreme Court decided *Mathews v. Eldridge* in 1976,[92] a civil case involving the termination of disability payments, the case's civil due process analysis was at least in theory applicable to the criminal due process analysis.[93] In *Mathews*, the Court had to decide whether George Eldridge was entitled to more exacting administrative procedures before losing his social security disability benefits.[94] That case announced the now-well-known three-factor test for determining whether deprivation of an interest by the government was attended by sufficiently fair process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[95]

In *Mathews*, and in the cases that have followed and applied this three-factor test, a great deal turns on the severity of the stakes for the rights claimant. In fact, it was a deciding factor for the *Mathews* Court: "[T]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[96] Having just decided a few years earlier that welfare recipients had a right to a hearing before even a temporary deprivation of welfare benefits,[97] the Court now distinguished the private interest at stake in *Mathews*.[98] Disability benefits, the Court found, were not means-tested and so, unlike in the context of welfare benefits, the initial termination, if erroneous, would not necessarily thrust the recipient into poverty.[99] The Court rejected Mathews's claim that his substantive rights were insufficiently protected by the procedures in place.[100] The Court's analysis of the gravity of the consequences for Eldridge was, therefore, determinative of the procedural right.[101]

In support of its framework, the *Mathews* Court cited[102] an influential article by Judge Henry Friendly, *Some Kind of Hearing*,[103] which is credited with establishing the idea of a due process matrix in which the amount of process due

91. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 14–15 (2006).
92. 424 U.S. 319 (1976).
93. *Kuckes*, supra note 91 at 14–15.
94. *Mathews*, 424 U.S. at 323–26.
95. *Id.* at 335.
96. Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168)).
97. *Id.* at 263–64.
98. *Mathews*, 424 U.S. at 340–41.
99. *Id*.
100. *Id.* at 339–40.
101. *Id.* at 341.
102. *See id.* at 343.
103. *See generally* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975).

is tied to the seriousness of the consequences.[104] Judge Friendly suggested a general taxonomy:

> The fields are so diverse that it is impossible to apply any universal scale of seriousness. However, gradations appear within each field. Thus a welfare termination is more serious than a reduction; suspension of a payment that is the claimant's only hope for income is more serious than a suspension that permits resort to other sources of income, even to the welfare system; expulsion from public housing is more serious than transfer to a smaller apartment; expulsion from a school is more serious than suspension or loss of credit; severance from government service is graver than suspension pending a further hearing; dismissal on a ground carrying a moral stigma is more serious than on one that does not; some types of prison discipline are more onerous than others.[105]

The Court's subsequent procedural due process cases in the civil context have reinforced that the degree of process that is required is inextricably tied to the severity of the consequences for the rights claimant.[106] In fact, this question of consequences is often a primary driving force in the outcome,[107] and as a result, the procedures required in a school suspension[108] look very different from those that precede civil commitment.[109]

Shortly after its decision in *Mathews*, the Court addressed another procedural due process case, but this time in the context of a criminal prosecution. In *Patterson v. New York*, the Court analyzed whether due process permitted the state to place the burden of proving an affirmative defense on the defendant and, in describing the applicable test, made no mention of *Mathews*.[110] Instead, the Court found that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out,'" and the procedure in place in a criminal case does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[111]

104. A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 15 (1999).

105. Friendly, *supra* note 103, at 1298.

106. *See id.* There is no doubt now that the *Mathews* test for civil due process incorporates a sliding scale of procedural rigor such that more procedural caution is required where the stakes are serious. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

107. Dripps, *supra* note 80, at 67 ("The benefits and costs of procedural safeguards as calculated by the judiciary have varied across cases less than the weight of the individual interests at stake."); *see* Kuckes, *supra* note 91, at 12 ("Civil precedents reflect a continuum in which procedural due process protections come into play whenever governmental action threatens a cognizable deprivation of private interests, but the extent of those protections varies with the severity of the deprivation and the importance of the government's interest.").

108. Goss v. Lopez, 419 U.S. 565, 579 (1975).

109. Addington v. Texas, 441 U.S. 418, 427 (1979); *see* Dripps, *supra* note 80, at 67 ("So while procedures for terminating Social Security benefits are reviewed in the interest of accuracy, the procedures for imposing criminal punishment are reviewed for consistency with the historical practices enshrined in the Bill of Rights.").

110. Patterson v. New York, 432 U.S. 197, 200 (1977).

111. *Id*. at 201–02 (holding that placing the burden of proving an affirmative defense on the defendant did not offend due process).

During this time period, caselaw was also continuing to develop for a multitude of criminal due process rights, many of which were first established as part of a wave of due process cases under the Warren Court. For the most part, none of these criminal due process cases invoked the *Mathews* test.[112] For example, in the post-*Mathews* era, the Supreme Court decided a number of cases analyzing the defendant's due process right to favorable, material evidence pursuant to *Brady v. Maryland*.[113] In none of these *Brady* cases did the Supreme Court invoke *Mathews* or even come close to suggesting that the *Mathews* framework, or any framework that considered the severity of the penalty, should apply. Instead, the Court analyzed, refined, and expounded on the original *Brady* test—that a defendant is entitled to information that is favorable, material, and in the possession of the government—with no mention of whether or how the seriousness of the penalty might factor into a court's ruling.[114]

But in two other criminal cases involving the free-standing criminal due process right, the Supreme Court did in fact apply the *Mathews* test. In *Ake v. Oklahoma*, the Court was called on to decide whether due process required that a defendant raising an insanity defense had a right to a state-funded psychiatric evaluation.[115] In applying the private-interest prong of the *Mathews* test, the Court found:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.[116]

The Court similarly invoked the *Mathews* test in *United States v. Raddatz*, which held that due process permitted a district court not to re-hear a suppression hearing that had been held by a magistrate.[117]

112. The two notable exceptions are *United States v. Raddatz*, 447 U.S. 667, 677 (1980) and *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

113. *See* Giles v. Maryland, 386 U.S. 66, 73 (1967); Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Agurs, 427 U.S. 97, 99 (1976); Weatherford v. Bursey, 429 U.S. 545, 550 (1977); United States v. Bagley, 473 U.S. 667, 668 (1985).

114. *See Giles*, 386 U.S. 66; *Giglio*, 405 U.S. 150; *Agurs*, 427 U.S. 97; *Weatherford*, 429 U.S. 545; *Bagley*, 473 U.S. 667.

115. Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

116. *Id*. at 78. The Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74–75.

117. United States v. Raddatz, 447 U.S. 667, 683 (1980). The majority in that case did not specifically point to the severity of the loss of liberty as the private interest at stake but did emphasize the different criminal-justice-related objectives of a suppression hearing in support of the rejection of the claim. Justice Powell in a concurrence, however, referred to the private interests at stake in a suppression hearing as "substantial." *Id.* at 686–87 (Powell, J., concurring). Justice Marshall in his dissent asserted:

> The private interests at stake here are hardly insignificant. The suppression hearing was conducted to determine whether the agents had violated respondent's privilege against self-incrimination, an interest that the Constitution singles out for special protection and that our cases recognize as fundamentally important.

The open question about whether *Mathews* applied in criminal cases was answered in *Medina v. California*,[118] a capital case addressing the defendant's competency to stand trial. There, the Court refused to import the *Mathews* test into criminal due process cases and found that placing the burden of proving competence on the defendant did not violate due process.[119] Rather than weigh the interest of the government, the risk of error, and what is at stake for the rights claimant, the Court returned to some of the principles that animated the *Hurtado* opinion over a hundred years earlier:

> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.[120]

Noting that the Court had previously invoked *Mathews* in two criminal due process cases, the Court determined that it was not clear that reliance on *Mathews* was "essential to the results reached in those cases" and dismissed the significance of those citations.[121] The Court found, as it had in *Patterson*, that a criminal procedure violates due process only if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[122]

By emphasizing the Bill of Rights as a primary source of constitutional procedural protections, the Court minimized the role of free-standing due process. But the enumerated rights touch on only a small number of discrete issues that arise during a criminal prosecution, and the *Medina* Court appeared to ignore the fact that the free-standing due process right necessarily has to govern all of the limits, rules, and constraints on the rest of the criminal processes if courts want to avoid a constitutional free-for-all.[123] Contrary to the Court's characterization of the right as a narrow one with "limited operation," the criminal due process right is comprehensive and complex.[124] "The enormously wide-ranging

> Moreover, respondent's liberty was wholly dependent on whether the trier of fact believed his account of his confession rather than that of the agents.

Id. at 700 (Marshall, J., dissenting) (citation omitted).

118. 505 U.S. 437, 442–43 (1992).

119. In a concurring opinion, Justice O'Connor indicated that the Mathews test remained "a useful guide." *Id*. at 453 (O'Connor, J., concurring).

120. *Id*.

121. *Id.* at 444.

122. *Id.* at 445.

123. *See id.* at 443–44.

124. *Id.* at 443; Carol S. Steiker, *Solving Some Due Process Puzzles: A Response to Jerold Israel*, 45 ST. LOUIS U. L.J. 445, 445–46 (2001).

influence of the due process clause over the entire area of constitutional criminal procedure . . . resists any simple, over-arching normative framework."[125]

The complexity of a due process right that covers at least fifty trial procedures, each of which has its own line of case doctrine and often individual tests, presents a formidable challenge for anyone who tries to identify the core features or structure of the right. Despite the admirable work done in the field to account for this set of rights,[126] many agree that the free-standing due process right is a complicated morass.[127]

Under these circumstances, and with such an unwieldy set of constitutional trial rights, formulating a criminal due process right that accounts for the severity of the charge is no easy task. A single constitutional right, like equal protection, can be adjusted to require more or less government scrutiny or caution.[128] But courts overseeing capital prosecutions have no clear roadmap as to how the vast array of criminal due process protections might be adjusted to account for the grave consequences of being wrong.

B. The Eighth Amendment as an Additional Source of Procedural Rigor

Death penalty trials before the Supreme Court's decision in *Furman v. Georgia*[129] were abysmally unregulated.[130] In *McGautha v. California*, the Court considered a challenge to the death penalty on due process grounds alone.[131] But the Court found no due process problem with the fact that trials were not bifurcated into culpability and sentencing determinations and that a sentencing jury had no guidance as to how to use its discretion in deciding whether a defendant should live or die.[132]

The Eighth Amendment offered a way of strengthening the procedures that might traditionally be governed by due process, and just a year after *McGautha*, the Court addressed the same procedural complaints, but this time under the Eighth Amendment.[133] This time, the argument prevailed and the death penalty, as it existed across the country in 1972, was struck down.[134]

125. *See* Steiker, *supra* note 124, at 445–46.

126. *See* Israel, *supra* note 72, at 305–06; Dripps, *supra* note 80, at 65–66.

127. Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 490 (2001) (footnotes omitted).

128. *See* Steiker, *supra* note 124, at 453.

129. *See generally* 408 U.S. 238 (1972).

130. *See* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 675–77 (2015) ("The state death penalty before *Furman v. Georgia* in 1972 is arguably one of the darkest and more disgraceful chapters in American history. . . . [T]here was often little difference between lynchings carried out by the mob and 'legal lynchings' that took place in courtrooms.").

131. McGautha v. California, 402 U.S. 183, 221 (1971) ("The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair.").

132. *Id*.

133. *See Furman*, 408 U.S. at 239–40.

134. *Id*.

Specifically, *Furman* took up the basic question of whether, in the two cases presented, "the imposition and carrying out of the death penalty . . . constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[135] While *Furman* was a famously fractured decision, producing separate opinions from each of the nine justices, one of the threads that ran consistently through the opinions of the five justices who struck down the death penalty was that the concerns about the death penalty were distinctly procedural.[136] Even Justices Marshall and Brennan, who took the absolutist position that no application of the death penalty could be constitutional under the Eighth Amendment, addressed the procedural inadequacies of the system for its implementation.[137]

Justice Douglas focused on the application of an arbitrary and discriminatory process whose result was the disproportionate imposition of the death penalty on Black defendants, as well as the absence of any safeguards to reduce the risk of race and class discrimination.[138] Justice White focused on the infrequency of death sentences in order to show that the traditional justifications for punishment had lost their force with the rarely imposed sentence of death, and he homed in specifically on the lack of procedural guidance in sentencing:

> . . . [B]ased on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty . . . the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.[139]

Brennan addressed the origins and evolution of the notion of what may be proscribed under the Eighth Amendment, but like Douglas, noted the

135. *Id.*

136. Carole Steiker and Jordan Steiker have catalogued the concerns of the Justices in *Furman* and the 1976 cases around four themes: "desert (the problem of overinclusion), fairness (the problem of underinclusion), individualization, and heightened procedural reliability." Steiker & Steiker, *supra* note 57, at 364. But the view that *Furman* is about the procedural Eighth Amendment is open to debate. One scholar argues that, before the 1976 cases were decided, one might have reasonably understood *Furman* to impose a substantive ban in that the "Eighth Amendment prohibits the arbitrary imposition of the death penalty." Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 776–77 (2005).

137. *See Furman*, 408 U.S. at 274–77 (1972) (Brennan, J., concurring); *id.* at 366–67 (Marshall, J., concurring).

138. Douglas wrote: "The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions." *Id. at* 242 (Douglas, J., concurring). "There 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 and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Id.* Quoting from recent congressional testimony, Douglas continued, "Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted." *Id.* at 247–48. "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." *Id.* at 249. Douglas also focused on the disproportionate racial impacts of the death penalty as a consequence of the arbitrary and discriminatory application. *Id.* at 249–57.

139. *Id*. at 313 (White, J., concurring).

"arbitrariness" as a feature of the prohibition of cruel and unusual punishment.[140] According to Brennan, there are four interrelated principles that animate the Cruel and Unusual Clause of the Eighth Amendment, and they must be evaluated in combination:

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause . . . .[141]

With respect to arbitrariness, as one of these four principles, Brennan wrote:

> When the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. . . . [O]ur procedures in death cases, rather than resulting in the selection of 'extreme' cases for this punishment actually sanction an arbitrary election. . . . In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.[142]

The most influential among the opinions was that of Justice Stewart.[143] Noting that the constitutionality of the death penalty in all cases was not before the Court, he focused on the procedures that led to the sentence of death in the cases at hand. "[T]he death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments . . . ."[144] Acknowledging the specter of race in the application of the death penalty, Stewart added, "But racial discrimination has not been proved, and I put it to one side. 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."[145]

Finally, the opinion of Justice Marshall, despite its grounding in the position that the death penalty in all applications was unconstitutional, addressed more expansively than the other opinions the procedural inadequacies of the existing system. While the other four opinions focused on the arbitrary application generally or the inadequate procedural protections in sentencing specifically, Marshall addressed the unreliability of the guilt determination as well.[146] He noted that the "beyond a reasonable doubt" standard is not infallible and that innocent people are sentenced to death.[147] Morever, Marshall reasoned that the

140. *Id*. at 274–77 (Brennan, J., concurring).
141. *Id*. at 282.
142. *Id*. at 293–95.
143. *See id*. at 306–10 (Stewart, J., concurring).
144. *Id*. at 309 (Stewart, J., concurring).
145. *Id*. at 310. (Stewart, J., concurring).
146. *Id*. at 366–67 (Marshall, J., concurring).
147. *Id*. at 367.

nature of trials is such that proving innocence after conviction "is almost impossible," courts rarely disturb jury findings, and prosecutors are hardly incentivized to assist.[148] "No matter how careful courts are," Marshall wrote, "the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real."[149] In other words, the standard procedures in place at the time for determing factual guilt were simply not rigorous enough given the consequences at stake.

Four years later, the Court reinstated the death penalty by handing down decisions in five cases that assessed the constitutionality of five different state death penalty schemes (the "1976 cases").[150] These decisions confirmed that, at least in the view of the 1976 Supreme Court, the deficiencies of the scheme struck down in *Furman* were procedural in nature. The Court's decisions in the 1976 cases gave a broad picture of which procedures might make a death penalty scheme constitutional (bifurcated proceedings that separate the guilt determination from the sentencing determination, guidance to juries about the use of their sentencing discretion, specific jury findings about the crime or character of the defendant, and an appellate process that reviews the proportionality of the sentence given the circumstances)[151] and what procedures were proscribed by the Eighth Amendment (mandatory death sentences for certain categories of crimes).[152]

The Court was careful to note that the procedures in place in the capital schemes in *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida* were not the only procedures that could lend sufficient rigor under the Eighth Amendment: "We do not intend to suggest," the Court wrote, "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*."[153] Each individual system of administering the death penalty, the Court emphasized, "must be examined on an individual basis."[154] The overall point the Court made in affirming some of the capital punishment schemes was that, at least as far as procedures go, a constitutional system of administering the death penalty is possible.[155]

In *Furman* and the 1976 cases, the Court made clear that the source of these additional procedural protections in capital cases was the Eighth Amendment and not the Due Process Clause.[156] The Court later reiterated in *Lockett v. Ohio* that

148. *Id*.

149. *Id.*

150. Gregg v. Georgia, 428 U.S. 153, 207 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 259–260 (1976).

151. *Gregg*, 428 U.S. at 189–95; *Proffitt*, 428 U.S. at 247–52; *Jurek*, 428 U.S. at 269–75.

152. *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 305.

153. *Gregg*, 428 U.S. at 197.

154. *Id*.

155. *Id*.

156. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

it was the Eighth Amendment and not the Due Process Clause that added procedural protections in capital cases.[157] In this case, the Court was clear about the increased procedural rigor required: The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[158] The Court explained that "what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman*."[159]

The Eighth Amendment might have seemed like an odd choice for the enhancement of procedural protections. Carol Steiker wrote in response to Jerold Israel's exhaustive accounting of criminal due process:

> What I and my students always find baffling here is the fact that the Court chose to invalidate standardless capital sentencing under the cruel and unusual punishments clause rather than the due process clause, when the argument sounds so—well, procedural. Indeed, the whole "death is different" theme that runs through *Furman* and much of the rest of the Court's capital jurisprudence seems like a natural argument for the sliding scale of due process—the more significant the individual interest, the greater the process that is due.[160]

Nevertheless, the choice to use the Eighth Amendment rather than the Due Process Clause to infuse procedural rigor for serious cases proved necessary given the Court's later decision to abandon the sliding scale of due process in *Medina*.[161] After *Medina*, if the courts were going to infuse heightened standards for capital cases, the content of that extra layer of procedural protection would have to emanate from the Eighth Amendment.[162]

In the years that followed the 1976 cases, the Court repeatedly reaffirmed that the Eighth Amendment adds procedural protections that the Due Process Clause alone does not supply and that these added procedural protections are in place because of the severity of the penalty of death.[163] In 1977, for example, the Supreme Court vacated a death sentence where the sentencing judge had considered confidential information not available to the defense when he handed down the death sentence.[164] The next year, in *Lockett v. Ohio*, the Court struck down a death penalty statute that precluded the sentencer from considering certain

157. Lockett v. Ohio, 438 U.S. 586, 599 (1978).

158. *Id*. at 604.

159. *Id*.

160. Steiker, *supra* note 124, at 449.

161. Medina v. California, 505 U.S. 437, 446 (1992).

162. Kuckes, *supra* note 91 at 14–15.

163. Gardner v. Florida, 430 U.S. 349, 357–58 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); Beck v. Alabama, 447 U.S. 625, 638 (1980); Ford v. Wainwright, 477 U.S. 399, 411 (1986).

164. *Gardner*, 430 U.S. at 357, 362 (conceding that the Court had upheld a death sentence in a similar case decided decades earlier, but noting that since that earlier decision, the Court "has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society.").

mitigating evidence.[165] In addition to focusing on the dignity concern behind a requirement of individualized sentencing, the Court noted that "'the penalty of death is qualitatively different' from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[166]

In subsequent decisions, the Court added more procedural requirements for capital cases while invoking the Eighth Amendment's "heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'"[167] In doing so, the Court made clear that the requirement of heightened procedural protections for capital cases applies to both the guilt determination and the sentencing determination.[168]

In the wake of these early cases, there was no question then that the Eighth Amendment was supposed to add something to other constitutional procedural protections in capital cases to infuse some additional procedural rigor.[169] The

165. *Lockett*, 438 U.S. at 608.

166. *Id.* at 604 (citation omitted).

167. Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (citation omitted) ("That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives."). *See also* Mills v. Maryland, 486 U.S. 367, 383–84 (1988), *holding modified by Boyde v. California*, 494 U.S. 370 (1990) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."); *Ford*, 477 U.S. at 411 ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."); Sumner v. Shuman, 483 U.S. 66, 71–72 (1987) ("The Court's opinions in 1976 addressing the constitutionality of five post-*Furman* state statutes did much to clarify what standards must be met to render a capital-punishment statute facially constitutional. . . . [T]he Court relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case."); Monge v. California, 524 U.S. 721, 732 (1998) ("[W]e cited the heightened interest in accuracy in the *Bullington* decision itself. We noted that in a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (quoting Addington v. Texas, 441 U.S. 418, 423–24 (1979))); Bradshaw v. Stumpf, 545 U.S. 175, 189 (2005) (Souter, J., concurring) (noting Justice Stevens's comment ten years prior that "'serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens,' and that '[t]he heightened need for reliability in capital cases only underscores the gravity of those questions . . . .'" (quoting Jacobs v. Scott, 513 U.S. 1067, 1070 (1995))); *Ford*, 477 U.S. at 411 ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.").

168. "To insure [sic] that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." Beck v. Alabama, 447 U.S. 625, 638 (1980) (footnote omitted) (holding that juries must be provided the option to convict capital defendants of lesser, noncapital crimes where such charges were available).

169. *See* Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 416–17 (2014) ("Although scholars have described *Woodson* and *Lockett* as requiring 'super due process' in the capital context, the cases invoke the Eighth Amendment rather than procedural due process analysis as the basis for the holdings.") (footnotes omitted).

primary open questions then and now are what are the limits of this super due process and what are its actual impacts?

C. Super Due Process and the Modern Death Penalty

At the outset of the modern death penalty era, the application of the Eighth Amendment to add procedural rigor to capital cases seemed, on its face, an appropriate response to the particular constitutional concerns that were raised in *Furman*.[170] In 1980, Margaret Radin introduced the term and concept of "super due process" to reflect this compounded set of rights.[171] She explored "the procedural due process strain in eighth amendment analysis" and its "underlying notion that a process may be considered cruel[ ]" in order to argue that "the same respect for persons that gives form to the retributivist substantive limitation on punishment also engenders a super due process procedural limitation."[172]

Radin set the stage for a scheme of procedural rigor that considered the severity of the punishment. She first explained the connection between increased procedural protections and the risk of error:

> Because it attaches substantive significance to risk of error, the super due process analysis is part of the broader normative evaluation of risk of error that pervades our system of criminal adjudication and our system of adjudication generally. It is similar in form to a set of developed moral/legal rules regarding allocation of risk of error. The moral question to which these risk allocation rules address themselves is, in a given case or with respect to a given issue, at the given level of uncertainty, whether the Court should risk error in favor of one side or the other? Risk of error principles accord moral significance to the appreciation that judicial decisions are always made under uncertainty, in a nonideal world.[173]

Radin argued that even super due process is insufficient to resolve the risk of moral error—the risk that execution is disproportionate for a particular defendant or class of defendants—because of arguably conflicting mandates of "super due process" imposed by the Supreme Court.[174] But even without this conflict within the Eighth Amendment doctrine, under Radin's understanding of super due process, the tolerable risk of moral, legal, and factual errors[175] should be *de minimis* in a capital case.

170. The Model Penal Code had adopted a set of model death penalty procedures in 1962, and these procedural recommendations were largely adopted in the 1976 cases via the Eighth Amendment. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 191–194 (1976).

171. Radin, *supra* note 62, at 1163.

172. *Id*. at 1144.

173. *Id*. at 1155–56 (footnotes omitted).

174. The conflict lies in the fact that one line of cases mandates that sentencing must be both individualized (thus increasing the chance of arbitrariness) and consistent (that is, decreasing the chance of arbitrariness). *See id*. at 1180. There is significant debate, however, about whether such a conflict exists. *See* Walton v. Arizona, 497 U.S. 639, 714–17 (Stevens, J., dissenting).

175. Radin divides the universe of error into these three components, with legal error relating to the risk that a legally incorrect decision has been made (such as an erroneous ruling on a Fourth Amendment suppression issue); factual error relating to the risk that a factually innocent person who did not commit the crime is being

The concept of super due process held great promise for those who felt that the punishment was ultimately tolerable if the courts were appropriately cautious.[176] The term "super due process" is used less by the courts[177] but is grounded in the general, well-established expectation that heightened standards should be applicable in capital cases.[178]

The rhetoric around super due process and heightened standards of procedural protections bolstered the appearance of legitimacy for the death penalty as an institution but did little to correct the procedural failings that led to the Court's decision in *Furman*.[179] In theory, the added layer of protections for capital cases should have offered a kind of fix to the Due Process Clause's failure to account for the severity of penalty across a wide expanse of trial procedures. But it resulted in only a small number of specific mandates in Supreme Court cases and a general instruction that courts should apply heightened standards of reliability.[180] The Supreme Court offered no blueprint for how lower courts should apply heightened standards or how appellate courts should determine whether heightened standards had, in fact, been applied. Moreover, despite this general requirement of heightened standards, in practice, the lower courts have been applying due process principles in the same manner in capital and noncapital cases alike, with no apparent adjustment based on the severity of the stakes.[181] So for the vast majority of issues that arise in a criminal case, the constitutional test is the same for capital and noncapital proceedings alike.

Because the free-standing due process right covers a wide swath of criminal procedural protections, this lack of enforcement has left the vast majority of

executed; and moral error relating to the risk that, though guilty, an individual not deserving of the ultimate punishment is being put to death. *See* Radin, *supra* note 62, at 1156–57.

176. *See id.* at 1144.

177. *See, e.g.*, State v. Spaulding, 89 N.E.3d 554, 593 (Ohio 2016) (O'Neill, J., dissenting) ("In this matter, a jury was asked to take the life of a fellow citizen. Its focus must be laser clear, and the court's protection of the process must be the equivalent of 'super due process.'"); Branch v. State, 882 So.2d 36, 65 (Miss. 2004) (rejecting a "super due process" test for effective assistance of counsel that would eliminate a required showing of prejudice for capital defendants); Matter of Harris, 111 Wash. 2d 691, 709 (Wash. 1988) (Utter, J., dissenting) ("If today's death penalty statutes escape constitutional invalidation, it is because they adhere to the 'super due process' required by the United States Supreme Court cases which reshaped the use of this penalty in the 1970's. In order to comport with these due process requirements, we must take all possible measures to ensure that constitutionally defective information does not inform the sentencing process.") (citations omitted); People v. Morgan, 682 N.Y.S.2d 516, 519 (Co. Ct. 1998) (describing the various labels that have been applied to the more stringent capital procedures); People v. Arthur, 673 N.Y.S.2d 486, 499 (N.Y. Sup. Ct. 1997) (describing the "federal constitutional commands of heightened scrutiny under the US Constitution Eighth Amendment's cruel and unusual punishment clause" as "super due process"); U.S. v. Sauer, 15 M.J. 113, 118 (C.M.A. 1983) (Fletcher, J., dissenting) (arguing that super due process was applicable only to due process protections and not other aspects of the Fifth Amendment).

178. Radin, *supra* note 62, at 1163.

179. *See* STEIKER & STEIKER, COURTING DEATH, *supra* note 12, at 230–36.; Steiker & Steiker, *supra* note 57, at 360 ("[T]he Court's current approach to regulating the death penalty has the effect of legitimating the use of capital punishment as a penal sanction in the eyes of actors within the criminal justice system and the public at large.").

180. Steiker & Steiker, *supra* note 57, at 360.

181. *See, e.g.*, Ambrose v. State, 254 So.3d 77, 98 (Miss. 2018) (citing *Keller v. State*, 138 So.3d 817, 835 (¶ 15) (Miss. 2014)).

criminal trial procedures untouched by the increased procedural protections of the Eighth Amendment in capital cases. In other words, one of the barriers to combining the Due Process Clause and the Eighth Amendment to create a "super due process" lies in the complex nature of the free-standing criminal due process right: If the right encompasses no fewer than fifty separate procedural protections recognized by the Supreme Court, and each of these has its own doctrine and test, not to mention the infinite factual variations of all of these issues as they might arise in a given case, how are courts supposed to apply enforceable enhancements across the board in capital cases?

After the Supreme Court first introduced the idea of heightened procedural protections in capital cases, debates about the effectiveness of supposedly heightened standards emerged. One early article referred to super due process as "a level of procedural reliability that would virtually eliminate erroneous executions."[182] Others expressed skepticism about the effectiveness of putting into place a set of factors to guide juries' discretion.[183] Still, others highlighted the lack of guidance from the appellate courts, despite the mandate.[184] Robert Weisberg wrote in 1983 that "the Court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance."[185] Within a few years of Radin's coinage of the term "super due process," some were calling it a failure at best, and counterproductive at worst.[186] As Robert Cover wrote after the end of the *de facto* death penalty moratorium, "The Court continued to say that death was permissible if you get it right. And almost all the individual cases continued to confirm that the state could *not* get it right."[187]

Early caselaw also bore out these concerns, as the Court declined to impose significant procedural protections beyond a handful of cases addressing specific

182. Derick P. Berlage, *Pleas of the Condemned: Should Certiorari Petitions from Death Row Receive Enhanced Access to the Supreme Court?*, 59 N.Y. UNIV. L. REV. 1120, 1121–22 (1984).

183. *See, e.g.*, Catherine Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 TUL. L. REV. 828, 873 (1979) ("The use of the calibration approach to the death penalty is only likely to heighten the doubt about the propriety of imposing death sentences.").

184. *See, e.g.*, W. Ward Morrison, Jr., *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 WASH. L. REV. 111, 111–12 (1989) ("The United States Supreme Court requires that states afford 'super due process' before imposing the death penalty. . . . [W]hile the Supreme Court has required procedural safeguards, it has sent the states unclear signals as to what safeguards to impose."); Steiker & Steiker, *supra* note 57, at 359 (1995) ("How and why did the Court create a body of law at once so messy and so meaningless? . . . We demonstrate that almost all of the complexity that the Court has injected into death penalty law concerns relatively few aspects of state death penalty practices; important aspects of those practices remain essentially unregulated.").

185. *See, e.g.*, Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 (1983).

186. "[D]espite its putative commitment to special procedures that address the need for heightened reliability in capital sentencing, the Court has never truly insisted on what Margaret Radin has aptly termed 'super due process for death.'" Steiker & Steiker, supra note 57, at 360; Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 96 (1990) ("Contrary to earlier predictions, the application of due process analysis in the death penalty context has not resulted in the creation of a 'super due process' standard. Instead, the Court has afforded capital defendants less procedural fairness precisely, and solely, because they are under a sentence of death.").

187. Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 830 (1986).

procedures. In *Williams v. Florida*, the Supreme Court denied certiorari in a capital case in which the trial court had rejected a request for a continuance of two weeks so that defense counsel, unprepared for sentencing after a guilty verdict, could muster up a mitigation case in order to argue that the jury spare his client's life.[188] Justice Marshall dissented, arguing that the denial of the continuance "makes a mockery of federal constitutional standards that have been designed to ensure heightened sensitivity to fairness and accuracy where imposition of the death penalty is at issue."[189] Neither the prosecution nor the state supreme court, Justice Marshall continued, had "offered any explanation why, in this *capital* case, commitment to scheduling was of such pressing concern as to justify the denial of even a brief continuance."[190]

In the early years after the 1976 cases, the Court could have charted a different path by giving lower courts guidance as to how they should apply heightened standards. Specifically, the Court could have granted certiorari in *Williams v. Florida*, laid out some procedural enforcement of the idea that a trial court considering a capital defendant's continuance request should exercise more than the regular amount of caution, and embarked on a path to define what procedural rigor should actually look like in capital cases. But doing so would have forced questions about how to analyze trial court denials of motions of all types that fall under the free-standing due process right.[191] The Court also could have engaged in a case-by-case determination of individual procedures to determine which of the procedures that traditionally are governed by due process would be supplemented by added protections for capital defendants and how. Doing so would have pulled the Eighth Amendment into the variable complexity of due process in a way that would have required more sustained attention from the Court than it appeared willing to give.

188. Williams v. Florida, 465 U.S. 1109, 1110–11 (1984).

189. *Id.*

190. *Id.*

191. While Jerold Israel has identified fifty criminal due process protections, these reflect only the rights affirmatively approved by the Supreme Court and not the myriad of novel trial issues that might separately arise in cases to come. Israel, *supra* note 72, at 389–95.

IV. COURTS' APPLICATIONS OF THE EIGHTH AMENDMENT REQUIREMENT OF HEIGHTENED PROCEDURAL STANDARDS

Although courts at all levels, including the Supreme Court,[192] have frequently invoked the requirement of "heightened standards" in capital cases under the Eighth Amendment, they have not shown a willingness to give much meaning or definition to this requirement. The Supreme Court precedent continues to require heightened standards in capital cases, but there is still little guidance for lower courts about what this means.[193] Members of the Supreme Court have repeatedly invoked the language of heightened reliability[194] or "death-is-different"[195] to underscore the point that, at least in theory, the general requirement of

192. *See* United States v. Tsarnaev, 142 S. Ct. 1024, 1037 n.2 (2022) (noting the continued viability of the Court's earlier cases, *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). The Court in *Lockett* specifically noted that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. at 604. *See infra* Section IV.B for a more detailed discussion of *Tsarnaev* and its impact.

193. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 106 (2008) (Thomas, J., concurring) ("We have neither the authority nor the expertise to micromanage the States' administration of the death penalty.").

194. *See, e.g.*, Barr v. Purkey, 140 S. Ct. 2594, 2596 (2020) (Breyer, J., dissenting from denial of cert.) (highlighting how the question at issue in the case around the ability to raise constitutional ineffective assistance of counsel in a successive habeas petition relating to federal conviction reflects "heightened need for reliability" in death penalty cases); Glossip v. Gross, 576 U.S. 863, 909–10 (2015) (Breyer, J., dissenting) ("This Court has specified that the finality of death creates a 'qualitative difference' between the death penalty and other punishments (including life in prison). That 'qualitative difference' creates 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'") (citation omitted); Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) ("The Court has explained that the Amendment imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'"); Sawyer v. Smith, 497 U.S. 227, 245 (1990) (Marshall, J., dissenting) ("The prosecutor's effort to minimize the jury's sense of responsibility is precisely the type of misleading argument that we condemned in *Caldwell v. Mississippi*, and is therefore 'fundamentally incompatible with the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment.'") (citation omitted); Clemons v. Mississippi, 494 U.S. 738, 769 (1990) (Blackmun, J., concurring) ("[G]iven the heightened concern for reliability when a sentence of death is imposed, I find inexplicable the majority's willingness in a capital case to countenance the resolution of disputed factual issues by means of a procedure that this Court has deemed insufficiently reliable even for the adjudication of a civil lawsuit."); Satterwhite v. Texas, 486 U.S. 249, 263 (1988) (Marshall, J., concurring) ("Because of this heightened concern for reliability, '[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.'"); Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."); Darden v. Wainwright, 477 U.S. 168, 188–89 (1986) (Blackmun, J., dissenting) ("[T]his Court has stressed repeatedly . . . that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life."); Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) ("In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'").

195. *Baze*, 553 U.S. at 84 (Stevens, J., concurring) ("Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman*, of arbitrary application identified by Justice Stewart, and of excessiveness identified by Justices Brennan and Marshall. In subsequent years a number of our decisions relied on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases. Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.") (citations omitted); Abdul-Kabir v. Quarterman, 550 U.S. 233, 284 (2007) (Scalia, J., dissenting) ("Whether one regards improvised death-is-different jurisprudence with disdain or with approval, no one can be at ease with the stark

heightened standards continues to have force.[196] But it is a requirement that has been largely unenforced on the lower courts, and the vague standard of heightened standards is practically unreviewable.[197]

An examination of federal and state, appellate and trial-level court decisions makes clear how impotent the procedural Eighth Amendment has been in practice. The way that courts apply the Supreme Court's guidance on "super due process," "heightened" standards, or the notion that "death is different," shows why. Courts regularly invoke the language of the Supreme Court to demonstrate that they understand that they are required to impose heightened procedural protections but seldom appear to do anything different in their analyses than they would do under a noncapital due process analysis.[198] In other words, cases in which the courts acknowledge the requirement and actually show that they are applying it to a specific procedure[199] are in short supply.

A. Courts Invoke Heightened Reliability but Apply Noncapital Standards

Courts that invoke heightened standards frequently do so while clearly applying the exact same legal test that would apply in noncapital cases.

For example, the Supreme Court of Mississippi routinely states at the outset of its death penalty decisions that it applies "heightened scrutiny to capital murder convictions where a sentence of death has been imposed."[200] It emphasizes that "what may be harmless error in a case with less at stake may become reversible error when the penalty is death."[201] But this acknowledgment, in

reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row."); Kansas v. Marsh, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) ("We are thus in a period of new empirical argument about how 'death is different.'"); Schriro v. Summerlin, 542 U.S. 348, 362 (2004) (Breyer, J., concurring) ("This Court has made clear that in a capital case 'the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case.' Hence, the risk of error that the law can tolerate is correspondingly diminished. At the same time, the 'qualitative difference of death from all other punishments'—namely, its severity and irrevocability—'requires a correspondingly greater degree of scrutiny of the capital sentencing determination' than of other criminal judgments." (citation omitted)); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

196. *See infra* Section III.C.

197. There is a rich body of scholarship on the Supreme Court's constitutional regulation of the death penalty over the last half century, a great deal of it laid out in the work of Carole Steiker and Jordan Steiker. *See generally* STEIKER & STEIKER, *supra* note 12; Carol S. Steiker & Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, *supra* note 12, at 310; Steiker & Steiker, *supra* note 57, at 359.

198. *See e.g.*, Ambrose v. State, 254 So.3d 77, 98 (Miss. 2018) (citing *Keller v. State*, 138 So.3d 817, 835 (¶ 15) (Miss. 2014)).

199. *See, e.g.*, State v. Coleman, 188 So.3d 174, 229 (La. 2016) (finding that the heightened standard was not met where "[t]he state's presentation of inconsistent evidence and theories of the . . . homicide and the state's failure to give defendant proper notice of this change in evidence and testimony incurably tainted the sentencing process"), *overruled on other grounds by* State v. Brown, 347 So.3d 745, 826 (La. 2022).

200. Ambrose v. State, 254 So.3d at 98.

201. *Id.*

practice, amounts to little more than a nod to the concept while the court simply applies the noncapital precedent. In *State v. Ambrose*, the court cited the higher standard, recognized that the harmless error standard of review can provide too little protection in capital cases, and then did exactly what it suggested it would not do—it applied the harmless error standard.[202] The dissent offered a more fulsome description of what "heightened scrutiny" should mean in a capital appeal, finding that six errors warranted reversal.[203]

The Mississippi Supreme Court has been transparent about its superficial application of its so-called "heightened scrutiny" on appeal. In *Hansen v. State*, the court laid out a few examples of how it purported to apply "heightened scrutiny" to capital cases when assessing appellate claims.[204] In capital cases, the court noted, it had raised the standard of review on appeal by assessing "trial errors for the cumulative impact," rather than simply examining each individual error on its own;[205] it had applied the "plain error rule with less stringency";[206] it had relaxed the rule requiring a "contemporaneous objection" at trial in order for an issue to be reviewed by the appellate court;[207] and, finally, the court noted, it had "resolve[d] serious doubts in favor of the accused."[208] These types of additional protections, the court suggested, amounted to heightened scrutiny.

But in the very next paragraph the court made a confusing about-face:

> What is important for today is that we understand none of this means the rules themselves change as the penalty of death is sought. Neither the contemporaneous objection rule nor any other rule of procedure or substance becomes metamorphosed into something more favorable to the capital defendant. Any contrary thought may be safely branded error.[209]

It is unclear what the court could have meant by this other than that the additional protections of the Eighth Amendment were ultimately about form over substance, and the appearance of process rather than a truly heightened standard.

The so-called "heightened scrutiny" cited by the *Hansen* court has little, if any, impact today. The *Hansen* court had cited case examples of how it supposedly uses "heightened scrutiny," but none of these cases support the notion that the Mississippi courts do anything different in capital cases. Three of the cases long pre-dated the modern death penalty era (1908,[210] 1939,[211] and 1947[212]) and have not been cited by a majority opinion from the court in a death penalty appeal

202. *Id*. at 105–06 (stating that heightened scrutiny required it to find that the lower court erred in improperly excluding evidence, but after weighing all the evidence, announced: "Thus, we conclude that the error excluding evidence of Lee's criminal past was harmless beyond a reasonable doubt.").

203. *Id*. at 153–63 (Kitchens, J., dissenting).

204. 592 So.2d 114, 142 (Miss. 1991).

205. *Id*.

206. *Id*.

207. *Id*.

208. *Id*.

209. *Id*.

210. Gambrell v. State, 46 So. 138, 138 (Miss. 1908).

211. Russell v. State, 189 So. 90, 91 (Miss. 1939).

212. Augustine v. State, 29 So. 2d 454 (Miss. 1947).

since 1996.[213] The fourth case—relaxing the contemporaneous objection rule for capital defendants, as suggested by *Culberson v. State*,[214] also appears to have been forgotten by the court. In 2010, a federal court in a habeas case noted that the Mississippi Supreme Court "routinely" enforces the contemporaneous objection rule against defendants in capital cases.[215] Despite what the *Hansen* court suggested, therefore, there seemed to be no difference in the way the Mississippi Supreme Court treats capital and noncapital cases on appeal.

Mississippi is not alone. Other state appellate courts eagerly invoke the principle of heightened standards and then in the next breath reject whatever procedural protection has been requested by the defendant.[216] Courts reason that the defendants' proposed heightened protections should not apply because such procedures have not yet been established as an essential feature of the Eighth Amendment.[217]

In *State v. Kleypas*,[218] for example, the Kansas Supreme Court wrote at length about the higher standard of procedural rigor and reliability in capital cases but then immediately concluded that the obligation to apply heightened standards did not require it to impose a higher standard of review on any *particular* issue. "Rather," the court stated, "the decisions simply lead to the conclusion that the already applicable standard should be applied and heightened reliability in both the guilt-phase and penalty-phase proceedings must be ensured."[219] Before it ended the death penalty, the Washington Supreme Court likewise reframed the heightened reliability standard as simply a heightened *scrutiny*, and admitted that it imposed no different procedural standards than those applicable in noncapital cases:

> However, heightened scrutiny means just that: a closer, more careful review of the record. Heightened scrutiny does not raise the standard of review. For example, in reviewing a challenge to an evidentiary ruling by the trial court, we still employ the abuse of discretion standard in the penalty phase. We will, however, more carefully review the factual basis upon which the trial court relied to ensure that the ruling complies with that standard.[220]

213. Brown v. State, 682 So. 2d 340, 356 (Miss. 1996).

214. Culberson v. State, 379 So.2d 499, 506 (Miss.1979).

215. Jordan v. Epps, 740 F. Supp. 2d 802, 847 (S.D. Miss. 2010).

216. *See, e.g.*, State v. Hidalgo, 390 P.3d 783, 788 (Ariz. 2017) ("Although Hidalgo correctly notes that capital defendants are accorded heightened procedural safeguards, he has not identified any opinions holding that a capital defendant is entitled to an evidentiary hearing on a pretrial motion even if the court's ruling does not turn on disputed facts.") (citation omitted).

217. *See, e.g.*, *id*. *See also*, Hall v. State, 663 S.W.3d 15, 36–37 (Tex. Crim. App. 2021) (rejecting the claim that introduction of a Comedy Central video showing petitioner in jail interacting with comedian violated Eighth Amendment where petitioner did not cite "any precedent to support his assertion that admitting the video frustrated the Eighth Amendment's heightened reliability requirement").

218. State v. Kleypas, 382 P.3d 373 (2016) (citing Brown v. State, 890 So.2d 901, 907 (Miss. 2004) and State v. Lord, 888, 822 P.2d 177 (1991)).

219. *Id*. at 413.

220. State v. Lord, 822 P.2d 177, 211 (1991) (*abrogated on other grounds by* State v. Schierman, 438 P.3d 1063 (Wash. 2018)). Elsewhere in the opinion, the *Lord* court claimed that it applied a more liberal preservation-of-error rule in capital cases, *id*. at 849, but the court's analysis shows that it applied the exact same procedural

In short, the heightened standard appeared to be nothing more than a vague requirement of a careful review by the appellate courts. Assuming that appellate courts are careful in every case, capital and noncapital alike, it is not clear what this "closer, more careful review of the record" could possibly mean.

In fact, nowhere do these state courts clarify what a more "careful" approach might look like. The rhetoric is especially mystifying when the content of review is the same for capital and noncapital cases, the procedural standards are the same, the appellate processes appear to be the same, and the outcomes appear to be the same.[221] The courts surely did not intend to imply that their review in noncapital appeals is less than careful. But the simple insistence that they are in fact being more careful is unsatisfying and opaque. These cases show that, at least as far as appellate review is concerned, there appears to be, in fact, no heightened standard for capital cases.[222]

In other state cases, appellate courts have expressly rejected claims that heightened capital standards require particular protections proffered by capital defendants.[223] For example, Indiana's, California's, and Oklahoma's highest courts have all described a heightened standard that essentially goes no further than the noncapital procedures for prosecution when a capital defendant waives counsel or waives the presentation of mitigating evidence:

> While the United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case . . . , the high court has never suggested that this heightened requirement for reliability requires or justifies forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case. . . . Rather, the required reliability is

rule as in non-capital cases and declined to review issues not raised before the trial court. *Id.* at 880, 895. *See also* People v. Landry, 385 P.3d 327, 351, 360 (Cal. 2016) (refraining from applying any higher standard for severance determinations or right to duress defense in capital cases).

221. *See supra* Part IV.

222. Other examples abound. *See* State v. Reynolds, 836 A.2d 224, 291 (Conn. 2003) ("However, even with the heightened appellate scrutiny appropriate for a death penalty case, the defendant's challenge to the sufficiency of the evidence of aggravating circumstances must be reviewed, in the final analysis, by considering the evidence presented at the defendant's penalty hearing in the light most favorable to sustaining the facts impliedly found by the jury. . . .") (internal quotation marks and brackets omitted); *Reynolds*, 836 A.2d at 299–300 (acknowledging the "heightened concern" in capital cases but applying a noncapital standard to the admissibility of arguably prejudicial material).

223. *See* People v. Letner & Tobin, 235 P.3d 62, 110–11 (Cal. 2010) (rejecting more cautious appellate standard for capital defendants while acknowledging that heightened standards apply); People v. Peoples, 365 P.3d 230, 260 (Cal. 2016) (rejecting argument that heightened standards bar retrial after penalty phase deadlock); People v. Eubanks, 266 P.3d 301, 323–24 (Cal. 2011) (rejecting argument that a higher standard should have applied to admissibility of scientific evidence and finding that traditional rules of evidence were sufficient to meet Eighth Amendment requirements); People v. Lucas, 333 P.3d 587, 679–80 (Cal. 2014) (rejecting rule that heightened capital standards apply to claims that lost or destroyed evidence impairs the defense); Hall v. State, 663 S.W.3d 15, 36–37 (Tex. Crim. App. 2021) (rejecting rule that heightened capital standards require a special jury instruction for weighing the credibility of jailhouse informants); Bell v. Commonwealth, 563 S.E.2d 695, 716 (Vir. 2002) (rejecting rule that heightened standards should bar use of unadjudicated criminal conduct in penalty phase); Gardner v. State, 306 S.W.3d 274, 303 (Tex. Crim. App. 2009) (rejecting rule that heightened standards require presumption in favor of life sentence).

> attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.[224]

In other words, the courts appear to be concluding that the prosecution meets the heightened standard so long as it meets the regular requirements of a noncapital criminal prosecution and does not conflict with death penalty statutes upheld by the Supreme Court in 1976.

Similarly, the California Supreme Court rejected a claim that erroneous admission of a hearsay statement violated the heightened standards in capital cases. Acknowledging that "high court decisions state as a general proposition that the Eighth and Fourteenth Amendments to the United States Constitution prescribe heightened reliability for proceedings in capital cases,"[225] the court first addressed the state law claim that the evidence violated the rule against hearsay.[226] The court found that even if it did, the error was not prejudicial as a matter of state law.[227] The court then addressed the Eighth Amendment aspect of the issue and found that there could be no Eighth Amendment violation where there was no state law prejudicial error.[228] In other words, the court applied the Eighth Amendment to mean whatever the state rules were in any case, with no greater protection for the capital defendant.

Federal courts are also invoking heightened standards without appearing to apply them. For example, in *Honken v. United States*,[229] the court devoted substantial space to the discussion of heightened review:

> It is axiomatic that the death penalty is profoundly different from all other penalties and such difference is largely owed to its severity and total irrevocability. Consequently, there is a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" To achieve reliability in a capital case, the court must "search for constitutional error with painstaking care."[230]

The Court then evaluated the twenty-one grounds of relief proffered by the defendant and rejected each with no discussion under each analysis of how

224. Wallace v. State, 893 P.2d 504, 511 (Okla. Ct. Crim. App. 1995) (quoting People v. Bloom, 774 P.2d 698, 718–19 (1989)); Smith v. State, 686 N.E.2d 1264, 1275 (Ind. 1997) (quoting same language while affirming death sentence for individual who waived counsel and negotiated a plea and acceptance of a death verdict for himself).

225. People v. Seumanu, 355 P.3d 384, 398 (Cal. 2015) (quoting People v. Martinez, 213 P.3d 77, 95 (Cal. 2009)).

226. *Id.*

227. *Id.* at 401.

228. *Id.* at 399–400.

229. Honken v. United States, 42 F. Supp. 3d 937 (N.D. Iowa 2013).

230. *Id.* at 984–85 (citations omitted).

exactly heightened standards were applied.[231] On each count, the court appears to have simply applied the ordinary, noncapital tests for each ground.[232] The court proceeded with its analysis and rejection of each claim, one by one, without discussion of how any particular claim might be understood differently under a heightened standard.[233] But the court then concluded, "In sum, the movant's convictions and sentences of death withstand scrutiny *even in light of the heightened standards* that are applied in capital cases.[234] In other words, the court analyzed the individual legal claims in the same manner as in a noncapital case and simply stated in summary fashion, without evidence, that it applied a higher standard. Without showing how it did anything differently in this capital case, the court simply offered its assurance that it was careful. Neither the public nor the appellate courts could have any sense of how the court enhanced its scrutiny of the procedures. Dustin Honken was executed by the federal government in 2020.[235]

Honken is a representative example of other federal cases that appear to invoke the language of heightened standards without actually applying any.[236] In one federal capital case, the court acknowledged the duty to apply heightened standards but in rejecting a claim based on the rate of error in capital cases, the court simply accepted that the federal death penalty, "like the state death penalty statutes, will inevitably result in the execution of innocent people."[237]

At its best, the language of heightened standards features prominently in dissenting opinions that assert that the majority has failed to apply enhanced protections for capital defendants. In these opinions, the dissenters emphasize that a more cautious approach would warrant relief.[238] For example, in one case

231. *See generally id.*

232. *See generally id.*

233. *See generally id.*

234. *Id.* at 1196 (emphasis added).

235. Hailey Fuchs, *For Third Time This Week, the Federal Government Carries Out an Execution*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/us/dustin-honken-federal-execution.html [https://perma.cc/MMJ5-YUY8].

236. *See, e.g.*, United States v. Hammer, No. 4:96-CR-0239, 2014 WL 2451487, at *3 (M.D. Pa. May 29, 2014) (granting government's motion to reconsider exclusion of evidence of defendant's prior bad acts); United States v. Con-ui, No. 3:13-CR-123, 2017 WL 783437, at *16 (M.D. Pa. Mar. 1, 2017) (admitting evidence of prior bad act of defendant); Koehler v. Wetzel, No. 3:12-CV-00291, 2015 WL 2344932, at *83 (M.D. Pa. May 14, 2015) (but rejecting claim that prosecutor's comments were prejudicial); Ramey v. Davis, 314 F. Supp. 3d 785, 829 (S.D. Tex. 2018), *cert. of appealability granted in part and denied in part*, 942 F.3d 241 (5th Cir. 2019) (upholding Texas Court of Criminal Appeals determination that admission of expert testimony "did not violate the heightened reliability requirement of the Eighth Amendment"); Higgs v. United States, 711 F. Supp. 2d 479, 554 (D. Md. 2010); United States v. Rivera, 363 F. Supp. 2d 814, 820–24 (E.D. Va. 2005) (invoking heightened standards to the question of severance of defendants, then conducting the noncapital test, then determining the severance was not required in either the culpability *or* penalty phases of the trial). *See also* Basso v. Stephens, 555 F. App'x 335, 342 (5th Cir. 2014) ("In the present case, therefore, precedent bound the district court to decline Petitioner's request to apply a heightened standard of factual scrutiny.").

237. *See* United States v. Sampson, No. CR 01-10384-MLW, 2015 WL 7962394, at *17–20 (D. Mass. Dec. 2, 2015) ("The Court has recognized that the capital punishment system may result in errors, but has held that it is nevertheless constitutional.").

238. *See, e.g.*, State v. Neveaux, 285 So. 3d 1089, 1090 (La. 2019) (Johnson, C.J., dissenting).

denying a claim that a capital defendant's confession was involuntary because it came two days after a severe beating by law enforcement, the dissenting judge wrote:

> The State is seeking the death penalty for Mr. Neveaux, a young African American man on trial for killing a white sheriff's deputy. The law requires courts to employ every presumption against voluntariness in an ordinary case where the State seeks to use an incriminating statement given by the defendant. And, because death is different, the Supreme Court requires us to apply heightened care to protecting the rights of the defendant in capital prosecutions. In this case, the trial court did neither. Mr. Neveaux suffered severe physical injuries, requiring his hospitalization, at the hands of Jefferson Parish Sheriff's Office deputies and he gave a statement two days later while still in the custody of the Jefferson Parish Sheriff's Office and still in fear of harm. Its admission into evidence in this capital case violates Due Process.[239]

In another case, a partial concurrence was particularly pointed in exposing the false front of heightened standards:

> In death-penalty cases, like this one, this Court, through its precedent, claims that our standard of review "'is one of ***'heightened scrutiny'*** under which ***all bona fide doubts are resolved in favor of the accused.***" In truth, in many cases, the State appears to receive the benefit of every doubt, and the Court appears to value procedural nicety over constitutionally protected rights. This case is just such a case.[240]

B. Courts Invoke Heightened Reliability Against Capital Defendants

Even more troubling than the cases described above are the opinions in which courts have concluded that the requirement of heightened standards works to the defendant's disadvantage. These cases fall into two categories: (1) cases in which courts find that "heightened reliability" confers certain rights on the government, and (2) cases in which the concept of heightened scrutiny or heightened reliability means that the capital defendant should be denied a right they would have in a noncapital case.

1. Courts Invoke Heightened Standards to Justify Additional Rights for the Government

State and federal courts have used the Supreme Court's language of "heightened reliability" to justify relaxed standards for admitting the prosecution's penalty-phase evidence. The Kansas Supreme Court calls the rule the "all relevant evidence doctrine" and describes it as "a doctrine that encourages jurors to have all possible relevant information about the individual defendant because

239. *Id.* at 1089–90 (citations omitted).

240. Crawford v. State, 218 So. 3d 1142, 1168 (Miss. 2016) (Dickinson, J., concurring).

heightened reliability in sentencing is achieved by including more evidence on the presence or absence of aggravating and mitigating factors."[241]

With similar logic, the Second Circuit Court of Appeals rejected a challenge to the admissibility of the government's evidence in the penalty phase on the grounds that it violated the standards set by the Federal Rules of Evidence.[242] In doing so, the court reasoned that "in order to achieve such 'heightened reliability,' *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors."[243] In other words, courts are allowing the government a more flexible evidentiary standard under the rationale that more information assists the factfinder and therefore leads to a more reliable result—as though the Eighth Amendment procedural rights belonged to the prosecution and not to the defendant facing execution.[244] In these cases, a "reliable" death penalty procedure means that more people may be executed, not fewer.

Reasonable people may debate whether relaxing evidentiary standards to admit more evidence promotes reliability or undermines it.[245] After all, on the defense side, the Supreme Court has made clear that heightened reliability requires 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,"[246] and this rule is understood to create a broad constitutional right to

241. State v. Carr, 502 P.3d 511, 591 (Kan. 2022).

242. United States v. Fell, 360 F.3d 135, 143 (2d Cir. 2004). Other federal courts have followed suit: United States v. Montgomery, 10 F. Supp. 3d 801, 813–14 (W.D. Tenn. 2014); United States v. Minerd, 176 F. Supp. 2d 424, 435–36 (W.D. Pa. 2001) ("We agree that heightened reliability is essential to the capital process. . . . It is 'essential . . . that the jury have before it all possible relevant information about the individual whose fate it must determine.'") (quoting Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion)); United States v. Jones, 132 F.3d 232, 241–42 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999) ("The Federal Death Penalty Act provides for a relaxed evidentiary standard during the sentencing hearing in order to give the jury an opportunity to hear all relevant and reliable information, unrestrained by the Federal Rules of Evidence. . . . Consequently, the relaxed evidentiary standard does not impair the reliability or relevance of information at capital sentencing hearings, but helps to accomplish the individualized sentencing required by the constitution"); United States v. Chanthadara, 928 F. Supp. 1055, 1059 (D. Kan. 1996); United States v. Nguyen, 928 F. Supp. 1525, 1546–47 (D. Kan. 1996); United States v. Rivera, 405 F. Supp. 2d 662, 668 (E.D. Va. 2005); United States v. Mikos, No. 02 CR 137-1, 2003 WL 22110948, at *9 (N.D. Ill. Sept. 11, 2003) ("We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such hearings and to approve open and far-ranging argument.").

243. *Fell*, 360 F.3d at 143.

244. *See, e.g.*, United States v. Basciano, 763 F. Supp. 2d 303, 355–56 (E.D.N.Y. 2011), *aff'd*, 634 F. App'x 832 (2d Cir. 2015). In *Basciano*, the defendant challenged the Federal Death Penalty Act, which permitted the government to introduce unadjudicated allegations of criminal conduct in the sentencing phase, even though such evidence is ordinarily inadmissible under the rules of evidence. The court justified this loosening of the evidentiary rules on the grounds that the requirement of heightened reliability stood for the proposition that

> more evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors. . . . The FDPA evidentiary standard "permits the jury to have before it all possible relevant information about the individual defendant whose fate it must determine. As a result, the FDPA does not undermine 'heightened reliability,' it promotes it."

Id. (quoting United States v. Fell, 360 F.3d 135, 144 (2d Cir. 2004)).

245. For one critique of the way that evidentiary rules fail in preventing wrongful convictions, see generally Jeffrey Bellin, *The Evidence Rules That Convict the Innocent*, 106 CORNELL L. REV. 305, 306 (2021).

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

introduce mitigation evidence.[247] But the core problem with the way courts have justified the "all-relevant-evidence" doctrine is not that there has been a legislative determination to even a playing field that was arguably made lopsided by the Supreme Court, but rather that the Eighth Amendment's requirement of heightened reliability is deployed in justifying it.[248] To the extent the heightened standards create a sense of assurance that an individual selected for execution is truly deserving of the death penalty, these cases show that the language is being used for very different purposes.[249]

In the cases of two individuals executed by the federal government in its 2020–2021 wave of executions, courts had rejected claims that the relaxed evidentiary standards at the penalty phase violated the requirement of heightened standards.

Lezmond Mitchell was executed on August 27, 2020. He was abandoned by his parents as a child and grew up in his grandparents' violently abusive household.[250] He was suicidal as a high schooler.[251] According to a high school teacher who came forward to testify in his penalty phase, Mitchell's attorneys conducted no real witness preparation and instead simply showed him gruesome photos of the murder he allegedly committed.[252] The appellate record reflected a dismally minimal investigation by Mitchell's lawyers, and his attorneys failed to introduce significant history of trauma and abuse at sentencing.[253] Mitchell had no history of violent behavior before his arrest, and evidence showed that his co-defendant was likely the instigator of the crime.[254]

On appeal, Mitchell argued that the Federal Death Penalty Act was unconstitutional because it included lax evidentiary standards for the penalty phase.[255] Specifically, these standards allowed prosecutors to introduce aggravating evidence that would not have passed muster under the evidentiary rules normally

247. *See* STEIKER & STEIKER, *supra* note 12, at 165 (describing a tension in death penalty law after *Lockett*, in "its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live"); Russell Stetler, *Lockett v. Ohio and the Rise of Mitigation Specialists*, 10 CONLAWNOW 51, 59 (2018) ("Lockett put capital defense lawyers throughout the country on notice that they could offer expansive mitigation about the character and record of their clients, and the circumstances of their crimes.").

248. *See, e.g.*, United States v. Tsarnaev, 142 S. Ct. 1024, 1048 (2022) (Breyer, J., dissenting).

249. In any event, the all-relevant-evidence rule for the federal death penalty was not enacted as a response to the Supreme Court. Before the current federal procedure was enacted, the law specifically provided that, in a penalty phase, the government would be bound by the Federal Rules of Evidence but the defense would not. *See* PL 93–366 (S 39), PL 93–366, AUGUST 5, 1974, 88 Stat 409, 411 (1974 precursor to 1994 death penalty sentencing procedures); *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 372–92 (1999) (describing the historical progression of federal death penalty statutes from 1974 to the most recently passed provision in 1994). The idea that there are good reasons for establishing asymmetrical rules for the government and the defense in a death penalty sentencing, therefore, is neither new nor particularly radical.

250. Liliana Segura, *Over the Objections of the Navajo Nation, Trump Prepares to Execute Lezmond Mitchell*, INTERCEPT (Aug. 25, 2020 9:35 AM), https://theintercept.com/2020/08/25/lezmond-mitchell-execution-navajo-nation/ [https://perma.cc/7LWD-SLRX]

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.*

applicable in criminal trials.[256] The Ninth Circuit rejected this claim, finding that "the Supreme Court has . . . made clear that in order to achieve 'such heightened reliability,' *more* evidence, not less, should be admitted on the presence of aggravating and mitigating factors."[257]

But an Eighth Amendment right to heightened reliability cannot confer a set of rights to the prosecution in its pursuit of a death verdict.[258] The rules of evidence act as basic guardrails in a criminal trial, and lowering the standards can have significant effects. In Lezmond Mitchell's case, prosecutors were permitted to suggest in the penalty phase that his status as a Navajo was a reason to impose a death sentence because the murder of other Navajo members represented a betrayal of his religious and cultural traditions.[259] This argument was permitted despite the fact that prosecutors knew that Navajo leaders opposed a death verdict for Mitchell.[260]

When the federal government sought a death verdict for Daniel Lee, the court allowed the government to pursue a wide-ranging cross-examination of a defense expert about whether he thought Lee was prone to violence in the future.[261] The defense witness, a psychologist, had not testified about future dangerousness, had not conducted any assessment of the defendant's future dangerousness, and the government had agreed that it would not present such evidence so long as the defense did not.[262] The government then, without notice, questioned the expert extensively on matters well outside of what the defense expert had addressed, including the question of whether the defendant was a "psychopath."[263] The government then introduced its own witness to discuss future dangerousness—again, despite assurances that it would not do so.[264] In the cross-examination of the defense expert and the presentation of its own rebuttal expert, the government elicited testimony about a variety of allegations of bad behavior in the defendant's past, despite not having provided the required notice for

256. *See* Stetler, *supra* note 247, at 59 ("Lockett put capital defense lawyers throughout the country on notice that they could offer expansive mitigation about the character and record of their clients, and the circumstances of their crimes.").

257. United States v. Mitchell, 502 F.3d 931, 980 (9th Cir. 2007) (citing Gregg v. Georgia, 428 U.S. 153, 203–04 (1976), which rejected a claim that the Georgia courts provided insufficient standards for the introduction of penalty phase evidence).

258. It is axiomatic that the protections contained in the Bill of Rights belong to individuals and not to governments. *See* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 12 THE PAPERS OF THOMAS JEFFERSON 440 (Julian P. Boyd, Mina R. Bryan & Fredrick Aandahl eds. 1955).

259. Appellant's Replacement Opening Br., United States v. Mitchell, 2006 WL 2951933 at *47 (9th Cir. Aug. 7, 2006); *Mitchell*, 502 F.3d at 994–95.

260. Appellant's Replacement Opening Br., United States v. Mitchell, 2006 WL 2951933 at *93–94 (9th Cir. Aug. 7, 2006).

261. United States v. Lee, 89 F. Supp. 2d 1017, 1022–29 (E.D. Ark. 2000), *rev'd*, 274 F.3d 485 (8th Cir. 2001).

262. *Id.*

263. *Id.* at 1026.

264. *Id.* at 1019.

introducing such evidence [265] and despite the fact that there was no independent evidence introduced to support the claims.[266]

In light of the government's conduct, Lee filed a motion for a new penalty phase.[267] The reviewing court found the errors so significant that it granted the motion. [268] The court discussed the requirement of heightened reliability extensively[269] and found that the trial court "erred in failing to restrain the Government in these respects despite Defendant Lee's insistence that the questioning was improper. As a result," the court found, "Defendant Lee's rights were irreversibly compromised."[270]

The appellate court reversed.[271] Without even mentioning the Eighth Amendment, the requirement of heightened reliability, or the lower court's serious reliance on the mandate for procedural caution in capital cases, the appellate court simply found that the Federal Death Penalty Act "erects very low barriers to the admission of evidence at capital sentencing hearings," and that the government's conduct fell within the very loose bounds of the statute.[272] Daniel Lee was executed by the federal government on July 13, 2020.[273]

The danger of relaxing the evidentiary rules for the government in a penalty phase is that it removes the clear, concrete guardrails of the rules of evidence in favor of a truly amorphous standard of admissibility that can be used unevenly to favor the government. Under the Federal Death Penalty Act, "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[274] The subjective nature

265. *Id*. at 1022 (citing 18 U.S.C. § 3593(c), which allows the government to present adverse evidence in support of a mitigating factor "for which notice has been provided").

266. *Id*.

267. *Id*. at 1020.

268. *Id*. at 1042.

269. Specifically, the court explained:

> As a forethought, the Court acknowledges that Defendant Lee's arguments are worthy of extremely careful scrutiny because this is a death penalty case and, as such, Defendant Lee's life is at stake. The court in United States v. Pena–Gonzalez appropriately described decisions in death penalty cases as follows:
>
> > [This decision] entails the unique gravity appropriate for capital cases. Capital punishment is qualitatively different from any other form of criminal penalty we may impose. With it, we deny the convict any possibility of rehabilitation and order instead his execution, the most irrevocable of sanctions. Its severity demands a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. We must be, therefore, particularly sensitive to insure that unique safeguards are in place that comport with the constitutional requirements of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.
>
> Furthermore, it has been said that, "[i]n capital proceedings generally, th[e] [Supreme] Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."

Id. at 1021 (first quoting United States v. Pena–Gonzalez, 62 F.Supp.2d 358, 360 (D.P.R. 1999); then quoting Ford v. Wainwright, 477 U.S. 399, 411 (1986)) (citations omitted).

270. *Id*. at 1028–29 (footnote omitted).

271. United States v. Lee, 274 F.3d 485, 488 (8th Cir. 2001).

272. *Id*. at 494.

273. Hailey Fuchs, *Government Carries Out First Execution in 17 Years*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/us/politics/daniel-lewis-lee-execution-crime.html [https://perma.cc/34F2-MXU7].

274. 18 U.S.C. § 3593(c).

of what is "probative" on the question of a person's moral deservedness of death invites the court to make a subjective assessment of the quality of the evidence in place of the jury's.

The Supreme Court's recent ruling in the death penalty case of Dzhokhar Tsarnaev illustrates this problem. In *United States v. Tsarnaev*,[275] the trial court excluded mitigation evidence that the defense claimed was critical to its theory that the defendant's crime was the product of his older brother's violent, coercive influence.[276] That evidence—that the older brother previously committed a gruesome triple murder that the younger Tsarnaev knew about—was information that the federal government found reliable enough to use as a basis for seeking a search warrant.[277] The trial court nevertheless barred it on grounds that the evidence was "without any probative value" and "would be confusing to the jury and a waste of time."[278]

The appellate court reversed, invoking what sounds like the all-relevant-evidence doctrine, but this time in favor of the defendant:

> Because it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision," the Supreme Court has for years said that if "the evidence introduced and the arguments made . . . do not prejudice a defendant, it is preferable not to impose restrictions."[279]

The appellate court undertook an exhaustive analysis of the facts of the older brother's homicidal acts, the manner in which the defense would have marshalled these facts to support the defense theory, and how these facts would have exposed the fallacy of the government's benign characterization of the older brother.[280] The appellate court granted relief, reasoning that the excluded evidence "was also highly probative of [the older brother's] ability to influence Dzhokhar."[281] According to the reviewing court, the excluded evidence "strengthen[ed] two of Dzhokhar's mitigating factors—his susceptibility to [his brother's] influence, and his having acted under [his brother's] influence."[282]

The Supreme Court, however, reinstated the death sentence.[283] Specifically, the Court declined the opportunity to apply a heightened standard to its review of evidentiary decisions by the lower courts in capital cases: "None of the dissent's cases," the Court wrote, "supports applying heightened scrutiny to evidentiary decisions in death-penalty cases. . . . All told, not one of these cases addressed, let alone altered, the abuse-of-discretion standard traditionally applicable to a district court's evidentiary decisions."[284]

275. United States v. Tsarnaev, 142 S. Ct. 1024 (2022).
276. *Id.* at 1037.
277. *Id.*
278. *Id.* at 1033.
279. United States v. Tsarnaev, 968 F.3d 24, 68 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1683 (2021), *and rev'd*, 142 S. Ct. 1024 (2022).
280. *Id.* at 63–75.
281. *Id.* at 69.
282. *Id.* at 70.
283. United States v. Tsarnaev, 142 S. Ct. 1024, 1030 (2022).
284. *Id.* at 1040 n.3.

The dissent's characterization of the excluded evidence was stark: "Dzhokhar argued that Tamerlan was a highly violent man, that Tamerlan radicalized him, and that Dzhokhar participated in the bombings because of Tamerlan's violent influence and leadership. In support of this argument, Dzhokhar sought to introduce evidence that Tamerlan previously committed three brutal, ideologically inspired murders in Waltham, Massachusetts."[285]
In other words, the all-relevant-evidence doctrine that relies on the "heightened reliability" mandate in capital cases can easily apply to allow government evidence to be admitted, but will not apply with similar leniency to the defense evidence. The dissent was quick to highlight the contradiction: "The evidentiary showing Dzhokhar attempted to make here was not, as the majority asserts, any more complex or confusing than the evidentiary showing the Government makes in these situations."[286] For the government, the Eighth Amendment's heightened standard of reliability has a sweeping and inclusive effect in the penalty phase, but for defendants, it offers no greater protection than the federal statute, which is restrictively applied.

2. Courts Invoke "Heightened Standards" to Deny Capital Defendants a Protection They Would Have in a Noncapital Case

In a few cases, state supreme courts have distorted the requirement of heightened standards to justify lower procedural standards for capital defendants than noncapital defendants.[287] The Nevada Supreme Court relied on the requirement of "heightened review" and "heightened scrutiny" in order to support its authority to consider *sua sponte* an argument that the prosecution did not make in its appellate brief. [288] In that case, the prosecution had failed to argue on appeal that the introduction of certain inadmissible evidence was a harmless error.[289] Although the established rule up to that point had been to find that the prosecution conceded that an error was harmful if it failed to argue otherwise, the Nevada Supreme Court found that that rule did not apply in capital cases.[290] Although the court clearly would not have considered an argument that the prosecution never made in a noncapital case, it justified doing so—and ruling against the capital defendant—because of its "heightened" duty to examine the record. After all, the court reasoned, if it was required to conduct a more searching and thorough review on appeal under the Eighth Amendment, then there was not much more effort involved in doing its own examination of the record for arguments not made by the prosecution.[291] The court affirmed the defendant's conviction

285. *Id.* at 1043 (Breyer, J. dissenting).
286. *Id.* at 1049–50.
287. *See* State v. Cheever, 402 P.3d 1126, 1161 (Kan. 2017) (Johnson, J., dissenting); Winkler v. State, 795 S.E.2d 686, 703 (S.C. 2016) (Pleicones, J., dissenting); State v. Robinson, 363 P.3d 875, 981 (Kan. 2015).
288. Belcher v. State, 464 P.3d 1013, 1024 (Nev. 2020).
289. *Id.* at 1025.
290. *Id.* at 1024.
291. *Id.* at 1031.

and death sentence.[292] In such cases, a noncapital defendant enjoys greater procedural protections than a capital defendant.

In Connecticut, before the state abolished the death penalty, the Connecticut Supreme Court also invoked heightened reliability to justify lesser protections for capital defendants. In *State v. Peeler*,[293] the court relied on the heightened reliability rule to find that an issue of jury unanimity was of such critical importance in capital cases that the state should have been allowed to pursue an appeal even though it would not have been able to do so in a noncapital case.[294] In the same opinion, the court then again invoked heightened reliability to find that the state could seek a new penalty phase and a death verdict after a jury deadlocked on whether to impose life or death.[295] After exploring, for several paragraphs, the Supreme Court's calls for heightened capital standards, the court found that the instruction given to the jurors, informing them that a life verdict would be imposed if the jurors could not agree, violated "the *state's* right to fair and thorough deliberations."[296]

This invocation of the heightened standards to benefit the government seems a far cry from what the Supreme Court envisioned when it found that a constitutional death penalty was possible. The idea that "death, in its finality" requires a corresponding heightened "need for reliability" confers the protection on defendants,[297] and shifting those protections to the government upends the Eighth Amendment project. To be clear, there are capital protections outside of the Eighth Amendment that add procedural rigor for death penalty defendants in different ways.[298] But when these protections emanate almost exclusively from sources outside of the Eighth Amendment, the entire basis for reinstating the death penalty in 1976 comes into question. In short, the distortion of a defendant's Eighth Amendment right to create rights for the government at the defendant's expense is emblematic of the Eighth Amendment's overall failure to add the kind of super due process that capital punishment demands.

292. *Id*. at 1025.

293. State v. Peeler, 857 A.2d 808, 857–58 (2004).

294. *Id*.

295. *Id*. at 859–64.

296. *Id*. at 864 (emphasis added).

297. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

298. For example, state constitutions may provide greater protections, *see* Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J. F. 75, 86 (2022), and state statutes and regulations may create additional procedural protections, *see generally* Robin M. Maher, *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*, 42 HOFSTRA L. REV. 419 (2013). One study found that federal judges rule in favor of capital defendants in habeas proceedings more frequently than for noncapital defendants. Brett Parker, *Is Death Different to Federal Judges? An Empirical Comparison of Capital and Noncapital Guilt-Phase Determinations on Federal Habeas Review*, 72 STAN. L. REV. 1655, 1662 (2020). *But see* Michael Conklin, *Appellate Inequality Is Not A Virtue: A Response to Brett Parker's* Is Death Different to Federal Judges?, 11 HOUS. L. REV. 60, 61–63 (2021) (describing limitations of the study).

V. IMPLICATIONS OF THE COURTS' FAILURE TO APPLY THE STANDARD OF HEIGHTENED PROCEDURAL RELIABILITY

A. Enforcing Heightened Standards

The statements that "death is different" and that capital cases require "heightened" standards of reliability are familiar refrains by now.[299] But the call from the Supreme Court to impose heightened standards has been too generic to have a meaningful effect on the vast and complex array of traditional due process claims.

In other areas of constitutional law, courts have fused two constitutional rights in order to confer on certain claims a higher and more rigorous procedural standard.[300] In many of these cases, the higher standard carries a specific instruction as to how courts should analyze a constitutional claim,[301] particularly that heightened scrutiny requires more procedural rigor where the stakes are high.[302] For example, in the context of economic justice, criminal systems may not set up bail regimes that impose unaffordable high bail amounts absent other procedural protections.[303] In cases involving constitutional challenges to these systems, courts may debate whether heightened scrutiny applies, but once a court decides that it does, there is a clear direction on how to apply that scrutiny.[304] In other words, "heightened scrutiny" or "strict scrutiny" in this context has a specific meaning that applies when the Due Process Clause and Equal Protection Clause interact.[305] Such a standard is reviewable and enforceable.[306]

But where there is a general Supreme Court mandate to apply heightened standards of reliability in capital cases, lower courts are left with little direction.

299. *See supra* Section III.B–C.

300. There is a long history of the Supreme Court fusing constitutional rights in the manner suggested in this section; doing so in the capital context is therefore well-grounded in doctrine. *See generally* Brandon Garrett & Kerry Abrams, *Cumulative Constitutional Rights*, 97 BOS. U. L. REV. 1309 (2017). Under Garrett's and Abrams's taxonomy of cumulative constitutional rights, they identify one category of cumulated rights—intersectional rights—that describes the theoretical impulse behind the importation of Eighth Amendment procedural protections on top of other constitutional entitlements, in order to create "super due process." *Id.* at 1322–23. Garrett and Abrams describe such fused rights as those "involv[ing] multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm." *Id.* at 1330. And they offer as one example the fusion of the Eighth Amendment and due process in *Panetti v. Quarterman*, which addressed the failure of procedural protections in a hearing to determine competency to be executed and held that "both 'the Eighth and Fourteenth Amendments of the Constitution' entitled the inmate to those procedures." *Id.* at 1340 (quoting Panetti v. Quarterman, 551 U.S. 930, 948 (2007)).

301. *See, e.g.*, ODonnell v. Harris County, 892 F.3d 147, 162–63 (5th Cir. 2018) (finding that the county's bail scheme failed to satisfy the requirement of a compelling governmental interest and narrow tailoring in order to satisfy heightened scrutiny).

302. *Id.*

303. *Id.*

304. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L. J. F. 1098, 1106 (2019) (stating that the bail system in place must be "narrowly tailored to serve a compelling state interest").

305. *Id.*

306. In other words, appellate courts have a test to determine whether the government's practice survives heightened scrutiny and apply that test in line with precedent. *See, e.g.*, Odonnell v. Harris County, 892 F.3d at 162–63.

Unlike, for example, the context of an equal protection claim, the heightened review in capital cases applies not to a single action but to the enormous landscape of decisions and actions that make up a capital prosecution, with a substantial number of these decisions and actions falling under the free-standing criminal due process right.[307]

The Supreme Court was clear when it decided the 1976 cases that the procedural schemes the Court approved did not define the outer limits of the Eighth Amendment procedural protections, ruling only that the statutes approved in Georgia, Florida, and Texas provided enough criteria and guided discretion to the sentencing jury to pass constitutional muster.[308] But the scope of what the Eighth Amendment could do to ensure procedural rigor commensurate with the punishment had yet to be defined.

More than forty years later, capital defendants are still waiting for that meaningful, systematic definition. They have, instead, a series of ad hoc decisions that prohibit or require a few specific procedures, but no larger scheme of regulation, and no guidance on how to fill the gaps of procedural regulation not specifically addressed by the Supreme Court.[309] While the Eighth Amendment, as a doctrinal matter, adds a layer of procedural protection by requiring a heightened standard of reliability, the equipment it carries to give effect to the mandate is woefully inadequate to solve for the significant risk of error that the Due Process Clause alone allows.

At a minimum, courts should explicitly consider the high stakes of the case as a component of any due process analysis when death is a possible punishment.[310] Moreover, consideration of the life-and-death stakes must go further than the conclusory statement by courts that they are aware of the requirement of heightened procedural protections.[311] This approach—imposing a requirement that consideration of the death penalty be a factor in any due process analysis and making that requirement reviewable and enforceable—would mean compelling lower court decisions to provide a direct nexus between the courts' awareness of their obligations to apply a heightened standard and the specific measures

307. *See supra* Section III.A.

308. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (framing the issue as only whether the discretion afforded to the sentencing body in the Georgia statute was "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). In *Gregg*, the Court was clear that the procedures assessed in that case did not define the outer limits of what the procedural Eighth Amendment might require: "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. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns." *Id*. at 195.

309. Steiker & Steiker, *supra* note 57, at 426. The analogy drawn by Steiker and Steiker twenty-five years ago remains apt: "The current body of doctrine has grown like a house without a blueprint—with a new room here, a staircase there, but without the guidance of a master builder to ensure that the finished product is structurally sound." *Id*.

310. *See* Alec Buchanan, *Competency to Stand Trial and the Seriousness of the Charge*, 34 J. AM. ACAD. PSYCHIATRY & LAW 458, 459–63 (2006) (calling for forensic psychiatrists to consider the stakes in death penalty cases when making determinations about defendants' competency to stand trial).

311. *See id.*

that they are taking to raise the standard beyond the traditional due process threshold.

B. Challenges in a Shifting Landscape: Heightened Standards and the Current Supreme Court

Despite the growing public discomfort with the death penalty and a waning confidence in its reliability, the current Supreme Court is taking steps to sharply reduce the amount of scrutiny that capital prosecutions receive. Two trends are taking shape: (1) the Supreme Court is diminishing the role of federal habeas proceedings and restricting the ability of defendants to raise claims that their prosecutions were flawed or that the processes were unreliable;[312] (2) the Court is adjudicating death penalty claims on the shadow docket, in rushed proceedings, and issuing orders without the benefit of full briefing and without the thoughtful deliberation that the gravity of the cases call for.[313]

First, the Court's latest rulings in federal habeas cases make it far less likely that a federal court will be able to provide meaningful review of state court convictions and death sentences. In *Shinn v. Ramirez*,[314] for example, the Court acknowledged a 2012 ruling[315] that capital defendants could raise a claim that otherwise would be defaulted when previous ineffective lawyers were responsible for the default.[316] In *Shinn*, however, the Court found that the capital defendant in these circumstances could not actually present evidence of that claim in federal habeas proceedings.[317] Keeping this evidence out of court will inevitably shield deeply flawed capital prosecutions from judicial scrutiny.

In *Brown v. Davenport*,[318] the Court found that habeas petitioners must satisfy two separate tests relating to whether a trial court's error was prejudicial, rather than the one test that the lower court had applied.[319] More significant than the ruling itself was the long historical narrative in Justice Gorsuch's majority opinion, which suggested a very narrow reading of the scope of federal habeas.[320] Justice Sotomayor, in dissent, offered a very different history and hinted that the majority's motivation for writing the detailed historical account on a relatively small habeas issue was to set the stage for sharply curtailing habeas litigation in the future.[321]

312. *See, e.g.*, Brown v. Davenport, 142 S. Ct. 1510, 1538 (2022); Shinn v. Ramirez, 142 S. Ct. 1718, 1738 (2022).

313. *Supreme Court's "Shadow Docket" Shapes Death Penalty Litigation*, ABA (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/the-influence-of-the-shadow-docket-on-death-penalty-litigation/ [https://perma.cc/YY3X-6JU4].

314. 142 S. Ct. 1718 (2022)

315. Martinez v. Ryan, 556 U.S. 1 (2012).

316. *Shinn*, 142 S. Ct. at 1727–28.

317. *Id*.

318. 142 S. Ct. 1510 (2022).

319. *Id*. at 1517.

320. *Id*. at 1520–22.

321. *Id*. at 1517 n.5 (Sotomayor, J. dissenting).

Second, the Supreme Court's increasing use of the shadow docket in capital cases will also shield mistakes and flawed processes.[322] The federal executions under Trump provided the most stark examples of the Court's heavy reliance on the shadow docket to ensure that executions would go forward.[323] While the increasing use of the shadow docket in several areas has been noted,[324] the use of the shadow docket for the federal executions was even more unusual. The Court "dissolved lower-court stays at an unprecedented rate and did so *without* contemporaneous merits disposition."[325] Some individuals still had claims pending when they were executed.[326]

In the case of the final execution of the Trump administration, Justice Sotomayor wrote a dissent in response to a middle-of-the-night[327] order from the court, four sentences long, which: ruled before giving the Court of Appeals a chance to weigh in, granted the government's writ, reversed the district court, remanded the case, and vacated the stay so that the execution could proceed. Sotomayor wrote:

> The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale.
>
> This is not justice.[328]

Justice Sotomayor called the move "justice on the fly."[329]

Both of these trends are complex, rapidly evolving, and beyond the scope of this Article to explore in-depth, and other scholars are diligently unpacking their long-term significance for capital defendants.[330] I mention these trends for three reasons: first, if the heightened standards requirement is an empty one in practice, then reducing transparency and judicial review further insulates these already suspect rulings; second, cutting off a significant avenue of relief like federal habeas should force courts to revisit procedural rights at the pretrial, trial, and appellate stages (for example, if defendants can no longer expect to litigate

322. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–2 (2015) (coining the term "shadow docket" to refer to "a range of orders and summary decisions that defy its normal procedural regularity").

323. Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 623 (2022).

324. Linda Greenhouse, "*Justice on the Brink" and the Rule of Law*, 47 U. DAYTON L. REV. 1, 15 (2022).

325. Kovarsky, *supra* note 323, at 660.

326. *Id*.

327. The ruling came at about 11:00 pm. James Romoser, *Over Sharp Dissents, Court Intervenes to Allow Federal Government to Execute 13th Person in Six Months*, SCOTUS BLOG (Jan. 16, 2021, 2:44 AM), https://www.scotusblog.com/2021/01/over-sharp-dissents-court-intervenes-to-allow-federal-government-to-execute-13th-person-in-six-months/ [https://perma.cc/U9LA-ZMX6].

328. United States v. Higgs, 141 S. Ct. 645, 647 (2021) (Sotomayor, J., dissenting).

329. *Id.* at 652.

330. *See, e.g.*, Kovarsky, *supra* note 323, at 623; Greenhouse, *supra* note 324, at 12.

certain claims fully in federal habeas, shouldn't these issues receive greater attention, stricter enforcement, and closer scrutiny earlier in the process?); and third, if the legitimacy of the death penalty is tied to the degree of procedural rigor, these patent efforts to lower the bar should prompt new debates about the continued viability of the death penalty.

VI. CONCLUSION

History has shown that, at least as of the present, the courts have not been up to the task of applying a system of meaningful super due process in capital cases. But what is clear is that if courts and legislators insist on maintaining a death penalty scheme, then the current moment calls for an acknowledgment of the failures up to this point to apply meaningful heightened standards for the procedures used in capital prosecutions and an investment in setting standards that are apparent, reviewable, and enforceable.

Judges and scholars have described and critiqued efforts to "tinker with the machinery of death," and many have abandoned the project entirely in favor of outright abolition.[331] A proposal to undertake the serious project of infusing meaningful additional procedural protections to traditional due process claims may result in nothing more than further judicial tinkering. To be clear, the job of making the mandate for heightened procedural protections meaningful would be tedious. But if the constitutional framework of the death penalty and the institutions that create it are not equipped to add meaningfully heightened standards, then the remaining option is to abolish it.

331. Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'"); Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (renouncing the use of the death penalty by claiming, "From this day forward, I no longer shall tinker with the machinery of death."); Glossip v. Gross, 576 U.S. 863, 910 (2015) (Sotomayor, J., dissenting); Robert Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1207 (2015) (arguing that scholars and litigators should abandon the largely procedural project to reduce arbitrariness in the implementation of the death penalty and focus on the substantive aspects of the Eighth Amendment that exempt certain categories of individuals from the death penalty because of insufficient culpability); James Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 129 COLUM. L. REV. 1, 130 (2007) ("Under current circumstances, the Court's only alternative to thus imperfectly arming itself is to admit its own inability to do what long experience has shown it must: to acknowledge that it cannot interpret the Constitution convincingly enough to justify for itself, the public, and the executioner the crude violence administered every day by courts the Supreme Court oversees.").