

that such increased emphasis posed no constitutional problem, even assuming that it affected the sentencing outcome, and that it was a “merely a consequence of the statutory label ‘aggravating circumstance.’”⁷¹ But Justice Scalia’s reasoning is formalistic⁷²: The rule treats skewed outcomes as benign in states that incorporate omnibus factors at the penalty phase, but unconstitutional in states that restrict aggravating factors to an enumerated few and where, in Justice Scalia’s formulation, the “balancing of aggravators with mitigators” is “skewed.”⁷³ That distinction is not principled if merely stated as such, and must be supported by a more coherent theory. The idea of equality of randomness would provide such a theory. By reducing the constitutional significance of disparate outcomes to zero and introducing the constitutional significance of equalized weighing processes in each state, a theory of equality of randomness would render criticisms regarding emphasis and outcomes irrelevant.

Predictability and coherence as judicial values are especially important for a socially controversial issue like the death penalty. The new *Sanders* rule clarifies and provides predictability to the weighing-nonweighing distinction by jettisoning it in favor of a simplified rule. However, the majority and the dissents failed to provide a stabilizing theory that would allow the rule to escape the realm of mere formalism. The idea of intrastate equality of randomness would provide lawyers and judges with a theory to guide them through the Court’s capital sentencing jurisprudence — a theory that is not only predictable, but also coherent, logical, and acceptable.

2. *Eighth Amendment — Death Penalty — Weighing of Aggravating and Mitigating Factors.* — Described as “confused,”⁷¹ “anarchic,”⁷² “vast,”⁷³ and “a minefield through which . . . perplexed legislators tread at their peril,”⁷⁴ the Supreme Court’s death penalty jurisprudence demonstrates a notorious lack of clarity and frustrates state legislatures that seek to devise constitutionally valid capital punishment laws. While scholars argue that the Court should take steps to simplify this

⁷¹ *Id.* at 894 (majority opinion) (internal quotation marks omitted) (citing *Zant*, 462 U.S. at 888).

⁷² *Cf.* Schauer, *supra* note 49, at 516–17 (noting that a judge’s mere citing of a statute, without explaining his reasoning, precludes inspection of the decision and elicits accusations of formalism).

⁷³ *Sanders*, 126 S. Ct. at 890.

¹ Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1182 (2003).

² Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1781 (1987).

³ Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 440 (2004).

⁴ RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* 152 (1982).

doctrine,⁵ heedlessly clinging to the letter of the law without adhering to the spirit might engender more problems than it solves. Last Term, in *Kansas v. Marsh*,⁶ the Supreme Court maintained that its precedent imposes two simple requirements on any death penalty regime: the narrowing of the class of offenders and the admission of mitigating evidence. But in hewing close to the “minefield’s” dual guideposts alone for the sake of administrability, the Court lost its way. Although such a straightforward framework seems to leave states free to devise innovative capital punishment laws, *Marsh* contravenes the requirement of reasoned and individualized sentencing determination by ignoring the moral directive that like defendants should be treated alike.

Michael Lee Marsh II murdered Marry Ane Pusch and her nineteen-month-old daughter, M.P., after lying in wait in their Wichita home.⁷ Pusch was shot and stabbed; her body was subsequently covered with accelerant and set ablaze. Her daughter died in the resulting fire.⁸ A jury sentenced Marsh to death for the capital murder of M.P., and also found him guilty of the first-degree murder of Marry Ane, aggravated arson, and aggravated burglary.⁹

On direct appeal, the Kansas Supreme Court reversed and remanded Marsh’s capital murder and aggravated arson convictions. The court found that the State’s death penalty statute, which directs a jury to sentence a defendant to death if the jury decides that a defendant’s aggravating circumstances were not outweighed by mitigating circumstances,¹⁰ was unconstitutional because it mandated the death penalty “[i]n the event of equipoise, *i.e.*, the jury’s determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal[ly]”¹¹ Such a law, the court concluded, neither established a “unique standard to ensure that the penalty of death is justified” nor “allow[ed] the jury to express its ‘reasoned moral

⁵ See, e.g., Sigler, *supra* note 1, at 1193 (“There is ample room, and an urgent need, for the Court [both to] clarify the constitutional commitments that structure its capital sentencing jurisprudence and to honor these commitments in practice. Only in this way can the theoretical coherence of guided discretion be translated into a constitutionally defensible capital sentencing process.”).

⁶ 126 S. Ct. 2516 (2006).

⁷ *State v. Marsh*, 102 P.3d 445, 452 (Kan. 2004).

⁸ *Id.*

⁹ *Id.* at 453.

¹⁰ KAN. STAT. ANN. § 21-4624 (1995). The statute reads: “If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [Kansas Statute §] 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law.” *Id.*

¹¹ *Marsh*, 102 P.3d at 457.

response' to the mitigating circumstances."¹² Seeing "no way that the weighing equation . . . , which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments," the court held that the statute was unconstitutional on its face.¹³

The Supreme Court reversed and remanded. Writing for the Court, Justice Thomas¹⁴ first rejected Marsh's claim that the Court lacked jurisdiction under 28 U.S.C. § 1257¹⁵ to review the Kansas Supreme Court's decision.¹⁶ He then determined that *Walton v. Arizona*,¹⁷ which upheld a statute requiring a trial court to "impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency,"¹⁸ was controlling in Marsh's case.¹⁹ Although *Walton's* majority opinion did not use the word "equipose," Justice Thomas reasoned that the question "was necessarily included in Walton's argument that the Arizona system was unconstitutional"²⁰ and that the statutes at issue in *Walton* and *Marsh* were "sufficiently analogous."²¹ Focusing on the *Walton* dissent's recognition of the issue,²² Justice Thomas reasoned that *Walton* resolved *Marsh's* equipose issue without discussing it explicitly.²³

After concluding that "the question presented in the instant case was squarely before this Court in *Walton*,"²⁴ Justice Thomas nonetheless went on to demonstrate that the Court's death penalty jurisprudence did not prohibit the sentencing regime introduced in section 21-

¹² *Id.* at 458.

¹³ *Id.*

¹⁴ Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined Justice Thomas's opinion.

¹⁵ 28 U.S.C. § 1257(a) (2000). This statute grants the Supreme Court jurisdiction if "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." *Id.*

¹⁶ *Marsh*, 126 S. Ct. at 2521-22. Justice Thomas observed that although Marsh would be retried on certain criminal charges, the Kansas Supreme Court's holding on the constitutionality of the state's death penalty law was binding precedent for the state. *Id.* at 2521. Justice Thomas further noted that although the Kansas Supreme Court's opinion in *Marsh* was based on state precedent, namely its previous holding in *State v. Kleybas*, 40 P.3d 139 (Kan. 2001), this earlier holding itself interpreted the Eighth and Fourteenth Amendments and thus "rested on federal law." *Marsh*, 126 S. Ct. at 2522.

¹⁷ 497 U.S. 639 (1990), *overruled on other grounds* by *Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁸ *Id.* at 651 (citing ARIZ. REV. STAT. ANN. § 13-703 (1989)).

¹⁹ *Marsh*, 126 S. Ct. at 2522.

²⁰ *Id.* at 2523.

²¹ *Id.* at 2524.

²² *Walton*, 497 U.S. at 687 (Blackmun, J., dissenting).

²³ *Marsh*, 126 S. Ct. at 2523.

²⁴ *Id.*

4624.²⁵ Taking the opportunity to clarify Court precedent, he wrote that the Court's decisions in *Furman v. Georgia*²⁶ and *Gregg v. Georgia*²⁷ created two primary rules for capital sentencing regimes; as long as a state abided by these directives, its system was constitutionally sound. First, a death penalty system must "rationally narrow the class of death-eligible defendants"; second, it must allow "a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."²⁸ Stressing that states possess substantial discretion in fashioning death sentencing schemes,²⁹ the Court held that Kansas's statute met these two requirements by requiring the State to prove the existence of at least one statutorily enumerated aggravating factor in a separate sentencing hearing and by allowing sentencers to view any and all mitigating evidence a capital murder defendant might present.³⁰

Justice Thomas then rejected Marsh's contentions that the statute's mandatory language directing a death sentence in the case of equipoise created a "presumption in favor of the death penalty" or "a loophole" for ambivalent juries.³¹ Justice Thomas observed that under the Kansas statute the prosecution carries the burden of proving both a defendant's guilt and the existence of aggravators beyond a reasonable doubt; this requirement negates any presumption that death is the appropriate sentence for a capital crime.³² Moreover, the statute does not create a loophole for juries, because a jury's decision that mitigators and aggravators are in balance is different from a jury's inability to reach a unanimous decision at all. The latter, Justice Thomas noted, leads to only a life sentence.³³ Dismissing Justice Souter's discussion of the accuracy of the guilt determination phase in capital trials as "irrelevant," Justice Thomas stated that the Court's jurisprudence allows the imposition of the death penalty despite the possible existence of flaws in the criminal justice system.³⁴ Kansas's statutory system, therefore, passed constitutional muster.³⁵

Justice Scalia concurred with a scathing critique of Justice Souter's dissent. He faulted the dissent for rejecting Kansas's statute because

²⁵ *Id.* at 2524.

²⁶ 408 U.S. 238 (1972) (per curiam).

²⁷ 428 U.S. 153 (1976) (plurality opinion).

²⁸ *Marsh*, 126 S. Ct. at 2524–25.

²⁹ *Id.* at 2525 (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990)).

³⁰ *Id.* at 2526.

³¹ *Id.* at 2527–28.

³² *Id.* at 2527.

³³ *Id.* at 2528.

³⁴ *Id.* at 2528–29.

³⁵ *Id.* at 2529.

of the dissenters' "personal disapproval" of the death penalty, a disapproval at odds with the opinion of most Americans.³⁶ Moreover, he found the dissenters' emphasis on a concern for wrongly convicted defendants entirely misplaced, for "guilt or innocence is logically disconnected to the challenge in *this* case to *sentencing* standards."³⁷ After challenging the sources and statistics on exonerated defendants relied upon by the dissent, Justice Scalia further argued that evidence indicating the existence of wrongly executed defendants is slim.³⁸ Noting that the possibility of executing an innocent defendant "has been reduced to an insignificant minimum," Justice Scalia reasoned that this possibility should not interfere with the application of the death penalty.³⁹

Justice Stevens dissented. He argued that the Court's interest in reviewing Kansas's decision, essentially "[n]othing more than an interest in facilitating the imposition of the death penalty," was insufficient to disturb the state court ruling.⁴⁰ He concluded by encouraging the Court to show "restraint" when deciding whether to review state criminal cases that overturn lower state court rulings.⁴¹

Justice Souter also dissented.⁴² Acknowledging the freedom states enjoy in creating a death penalty system, Justice Souter argued that Kansas's "tie breaker" law is nonetheless improper, as the Eighth Amendment and the spirit of death penalty precedent demand "both a system for decision and one geared to produce morally justifiable results."⁴³ The latter requirement mandates that the death penalty "be reserved for 'the worst of the worst,'"⁴⁴ which the Kansas statute fails to do because it directs the death penalty for equipoise cases — close cases that do not involve the very worst crimes and criminals and that may involve evidence calling for a lesser punishment.⁴⁵ Finding Kansas's statute "morally absurd," he faulted the majority for approving such "irrationality" in its death penalty jurisprudence,⁴⁶ especially in light of the many recent exonerations of death row inmates.⁴⁷ Justice Souter then concluded that directing a jury in equipoise to condemn

³⁶ *Id.* at 2532 (Scalia, J., concurring).

³⁷ *Id.*

³⁸ *Id.* at 2533–35.

³⁹ *Id.* at 2539.

⁴⁰ *Id.* at 2540 (Stevens, J., dissenting).

⁴¹ *Id.* at 2541.

⁴² Justices Stevens, Ginsburg, and Breyer joined Justice Souter's dissent.

⁴³ *Marsh*, 126 S. Ct. at 2542–43 (Souter, J., dissenting).

⁴⁴ *Id.* at 2543 (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 2544.

⁴⁷ *Id.*

defendants to death does not constitute the reasoned morality required by the Eighth Amendment.⁴⁸

The *Marsh* Court created a semblance of clarity in capital punishment jurisprudence by interpreting precedent to require two straightforward elements in a capital sentencing regime. In so doing, the Court afforded the states wide leeway in creating individual death penalty laws, but opened the door to unintended, and truly “morally absurd,” results. A third rule, not required by *Marsh* — the directive to treat like offenders alike — is necessary to maintain states’ freedom in creating death penalty regimes while giving a structured meaning to the common instruction that a state put to death only its worst offenders.

In *Marsh*, the Court simplified its death penalty jurisprudence by distilling its decisions in *Furman*, *Gregg*, and their progeny to stand for two basic directives for states devising death penalty systems: to narrow rationally the class of death-eligible defendants⁴⁹ and to permit a jury to render a reasoned, individualized sentencing determination based on a capital defendant’s history.⁵⁰ Perhaps to make these rules as unrestrictive as possible, the majority stressed that the second directive requires only that all individualized information about a capital defendant be presented, leaving room for states both to determine how sentencers compare aggravating and mitigating information and to guide the sentencers’ comparisons of the information.⁵¹ This broad discretion, however, omits an important third element of the Court’s jurisprudence restricting the unprincipled imposition of the death penalty. Although many of the Court’s Eighth Amendment cases hone in on the presentation and consideration of evidence,⁵² many also empha-

⁴⁸ *Id.* at 2546.

⁴⁹ The term “death-eligible” refers to any defendant convicted of murder in a degree sufficient to qualify him or her for the weighing of aggravators and mitigators. The term “capital defendant” refers to a death-eligible defendant whose crime is accompanied by at least one statutorily defined aggravating factor, which must be weighed by a sentencer against any mitigating circumstances. “Capital convict,” on the other hand, defines the capital defendant who has committed an aggravating factor, has undergone any weighing of aggravators and mitigators the state permits, and has been subsequently sentenced to death. Though the commission of some types of capital murder automatically makes a defendant both a death-eligible defendant and a capital defendant — in Kansas, for example, murder for hire constitutes both an aggravating factor making the defendant death-eligible and a specified type of capital murder — other types of capital murder, such as murder during the commission of a kidnapping, require the commission of a separate aggravating factor to transform a death-eligible defendant into a capital defendant. *See* KAN. STAT. ANN. §§ 21-3439, -4625 (1995).

⁵⁰ *See Marsh*, 125 S. Ct. at 2525.

⁵¹ *See id.*

⁵² *See, e.g.,* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that capital juries must have access to all mitigating evidence related to a defendant); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (focusing on and disapproving of the lack of “particularized consideration” of a defendant’s record).

size the impropriety of the arbitrary and capricious imposition of capital punishment.⁵³ In these cases the Court instructs states to “provide a ‘meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.’”⁵⁴ The *Marsh* majority’s framework for death penalty schemes fails to capture fully this principle: it places no limits on the way states compare mitigating and aggravating circumstances, and does not require that a capital convict be considered more blameworthy than other death-eligible defendants. By not including this third rule in its framework, *Marsh* fails to guarantee a morally meaningful basis for selecting capital convicts out of the pool of capital defendants.

What makes such a selection basis morally meaningful is its connection to the blameworthiness of the defendant and, relatedly, to the severity of the crime.⁵⁵ In most death penalty systems, aggravating and mitigating factors can be conceived of as elements adding to or detracting from a defendant’s level of culpability: the more aggravating factors the prosecution can prove, the more severe the crime and the more appropriate the death penalty becomes.⁵⁶ Similarly, mitigating factors often involve evidence of past abuse the defendant suffered, prior good behavior, or mental deficiencies — elements that make a crime or criminal seem less evil or blameworthy.⁵⁷ Although aggravating and mitigating factors may seem disparate and incomparable, death penalty statutes often require a sentencer to assign a weight to these varied factors and make them commensurable.⁵⁸ Indeed, in an-

⁵³ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) (“There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death.”); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

⁵⁴ *Godfrey*, 446 U.S. at 427 (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

⁵⁵ This connection is predicated on capital punishment’s rationale being at least partly retributive. See *Atkins*, 536 U.S. at 319 (“With respect to retribution — the interest in seeing that the offender gets his ‘just deserts’ — the severity of the appropriate punishment necessarily depends on the culpability of the offender.”).

⁵⁶ Though certain members of the Court might prefer that capital punishment never be administered, see *Marsh*, 126 S. Ct. at 2532 (Scalia, J., concurring) (stating that the dissenters held personal views against the death penalty), they would doubtless find the punishment more appropriate as the severity of the crime increased.

⁵⁷ Anything that could possibly reduce a defendant’s culpability is usually allowed as a mitigating factor. For example, one court allowed evidence of a single instance of racial discrimination to be admitted as a mitigating factor because “childhood racial experiences mitigated [the defendant’s] moral culpability.” *United States v. Bernard*, 299 F.3d 467, 487 (5th Cir. 2002).

⁵⁸ The federal sentencing guidelines required such commensurability even more clearly. See Kay A. Knapp & Dennis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 685 (1992) (explaining that the United States Sentencing Commission constructed an approach that “assigns a point value to the barest elements of the offense that must be shown for a conviction,” after which “[p]oints are . . . either added to reflect aggravating factors or occasionally subtracted to reflect mitigating factors”). A similar system has been suggested for capital punishment laws. See Note, *The Rhetoric of Difference and the Legitimacy*

anticipating the possibility of complete equipoise, Kansas's statute expects a jury to weigh aggravators and mitigators with substantial precision.⁵⁹

Kansas's statute fails to comport with this additional third principle because it provides only a technical, unprincipled basis for winnowing the number of capital defendants to a smaller population of capital convicts with factors in equipoise. In Kansas, a defendant must commit at least one aggravating factor (along with capital murder) to be eligible for the death penalty, ostensibly because the death-eligible defendant without aggravating factors is not sufficiently blameworthy to execute. This aggravator is negated when sufficient mitigators detract from the defendant's culpability.⁶⁰ But if mitigating and aggravating factors are conceived of as paces along a continuum of culpability — aggravating evidence equals a step toward the death penalty, while mitigating circumstances equal a step backward — by directing death in equipoise cases, the Kansas statute mandates the death penalty in cases in which the defendant is at square one. The defendant is thus found to be just as culpable as the death-eligible defendant who has never taken any "paces" at all and who is not allowed, according to the Court's death-penalty jurisprudence, to be executed.⁶¹ Certainly there is a difference between an equipoise de-

of *Capital Punishment*, 114 HARV. L. REV. 1599, 1618 (2001) ("[A] death penalty statute could attach point values to aggravating factors (and negative values to mitigating factors) and require juries to impose the death penalty if a defendant's total point value exceeded a given number.").

⁵⁹ See KAN. STAT. ANN. § 21-4624 (1995). The *Marsh* majority chafed at the idea, elaborated in Justice Souter's dissent, that a precise comparison of aggravators and mitigators was unmanageable or unlikely to occur. See *Marsh*, 126 S. Ct. at 2528 (denying "Marsh's contention that an equipoise determination reflects juror confusion or inability to decide between life and death, or that a jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral decision" and maintaining that "far from the abdication of duty or the inability to select an appropriate sentence depicted by Marsh and Justice Souter, a jury's conclusion that aggravating evidence and mitigating evidence are in equipoise is a *decision for death* and is indicative of the type of measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant"). Of course, whether a weighing metaphor is truly apt and juries are able to undertake such painstaking comparison is another question. If they are not, and an equipoise situation is more clearly indicative of juror indecision, *Marsh* could also be faulted for contravening another requirement found in precedent: reliability of sentencing. See 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) (noting that the Court's capital punishment jurisprudence refers to "the need for heightened reliability in capital cases" (internal quotation marks omitted)).

⁶⁰ See James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1626 (2006) (arguing that *Woodson v. North Carolina* viewed mitigating factors as "neutralizers of aggravating factors" that "propel[]" a capital defendant away from an area of greater crime severity and toward an area of "mitigated" crime severity).

⁶¹ Equipoise cases do not necessarily involve a death-eligible defendant with culpability equal to that of a capital defendant free of aggravating factors. Many states, including Kansas, include mercy as a potential mitigating factor to consider. See, e.g., KAN. STAT. ANN. § 4626(a) (1995).

fendant's case and one involving no aggravators: the former has taken at least a few steps toward death, while the latter has taken none. In terms of moral culpability, however, both defendants are in the same place.⁶² Using its two-rule framework, the *Marsh* Court approved this statute, which allows defendants at the same legal culpability level to suffer different fates, even though the law offers no *meaningful* basis for distinguishing those condemned to death and contravenes Court precedent.⁶³

Moreover, *Marsh's* permissive framework, taken to its logical conclusion, does not clearly preclude weighing schemes in which defendants with considerable mitigating evidence — those with enough steps back to bring them *behind* the square one of the average death-eligible defendant — are sentenced to death for a single aggravating factor. If there are no limits to a state's freedom in crafting a mechanism for comparing aggravating and mitigating factors and in guiding the jury that weighs those factors, a state could, for example, dictate the death penalty whenever mitigating factors do not substantially outweigh aggravating factors. Perversely, such a system would allow the execution of a defendant with *more* mitigators than aggravators — someone found to be even less culpable than the death-eligible defendant with no aggravators at all.⁶⁴ Although the *Marsh* majority mentions that sentencing determinations must remain “individualized” and

Nevertheless, a facial challenge is still possible because the Kansas statute allows for such a potentiality.

⁶² This is not to say that there is no practical difference between the two types of defendants. Defendants in equipoise have aggravating circumstances, and therefore have usually imposed more harm on society either during their capital crime or through earlier crimes for which they were convicted. But in order to be in equipoise, the culpability for this added harm must be completely negated by an equal measure of mitigating circumstances. Therefore, while the defendant in equipoise probably caused and is responsible for creating more harm, the factfinder did not actually find him morally responsible for that added harm. Choosing to execute a defendant based on this distinction, a difference grounded in fact rather than culpability, is morally suspect.

⁶³ *Cf. Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (stressing that the Court's narrowing “jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes” and that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State,” one with less culpability “surely does not merit that form of retribution”). By that same logic, a defendant with culpability equal to the “average murderer” also does not deserve execution. See *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing a death sentence because the defendant's “crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder” and concluding that, therefore, there existed “no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not”).

⁶⁴ Because death-eligible defendants committing no aggravators are not capital defendants, their mitigating factors are not reviewed and their actual culpability levels remain somewhat indeterminate. However, a real possibility exists that a less culpable capital defendant with several mitigators will be executed over a more culpable capital defendant with neither aggravators nor mitigators in the scenario described above.

“reasoned,”⁶⁵ and might not actually sanction such a morally skewed scheme (or even find it compatible with precedent), it is hard to see how the *Marsh* framework alone precludes such a system when it also argues that this requirement is met by the mere allowance of mitigating evidence.

By refusing to cabin states’ broad discretion with an additional rule, the Court missed an opportunity to avoid such perverse results. States must remain internally consistent with regard to culpability when selecting capital defendants from the larger pool of death-eligible defendants. That is, the Court should impose a rule that treats equally offenders who are at the same culpability level, regardless of how many “steps” forward or backward they have taken. Such a rule would allow a large degree of state freedom in creating punishment laws,⁶⁶ while preventing the imposition of the death penalty in cases in which a defendant’s level of culpability does not rise above that of the conventional death-eligible defendant. Although Justice Souter’s dissent hinted at such a rule — he maintained that the death penalty cannot be “freakishly imposed” and must be reserved for “the worst of the worst” criminals⁶⁷ — it failed to forge a clear doctrinal element from precedent to support his preferred notion of the criminal justice system. If Justice Thomas clung too closely to the letter of the law, Justice Souter relied too heavily on the spirit.

What is perhaps most troubling about the *Marsh* decision is that in its attempt to clarify the constitutional parameters of death penalty legislation for the states, it left the guidelines in as ambiguous and puzzling a state as ever. With a textualist at its helm, the Court created a pair of straightforward guidelines that clearly left open the possibility of morally perverse legislation. But at the same time, the position of precedent — the belief that only “the worst” crimes and criminals should receive the ultimate punishment — creates doubt that the Court would actually tolerate such legislation. After all, though the spirit of the law may be amorphous, it is also readily palpable. What remains after the creation of these dual guideposts is a “doctrinal minefield” as difficult to traverse as, and even more morally questionable than, before.

⁶⁵ *Marsh*, 126 S. Ct. at 2524.

⁶⁶ For instance, this rule would not require that aggravators be proven beyond a reasonable doubt (as Kansas’s statute does). As Justice Scalia points out, if Kansas instituted this third requirement but relaxed the prosecution’s burden of proof on aggravators, the sum total of capital convicts may be higher than under the current system. *See id.* at 2532 n.2 (Scalia, J., concurring). States are also free to control the number and scope of their statutorily enumerated aggravating factors, and to either command or merely suggest a certain verdict in light of a specific weighing outcome.

⁶⁷ *Id.* at 2542–43 (Souter, J., dissenting).