

**JUSTICE VS. MERCY IN THE LAW OF HOMICIDE:
THE CONTEST BETWEEN RULE-OF-LAW
VALUES AND DISCRETIONARY LENIENCY FROM
COMMON LAW TO CODIFICATION TO
CONSTITUTION**

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The contest between justice and mercy in the law of homicide is most visible when we contrast the extremes. Consider first the wide discretion delegated to fact finders in homicide cases under the Penal Code of Sweden.¹ Murder is defined as the taking of the life of another and may be punished by ten years to life imprisonment.² If, however, “in view of the circumstances that led to the act or for other reasons,” the murder is considered to be “less grave,” it is deemed manslaughter and punished by at least six and at most ten years of imprisonment.³ Swedish law makes no attempt to define either the circumstances that might mitigate a murder down to manslaughter or the other reasons that fact finders might consider in the mitigation determination.⁴ Consequently, in Sweden, the legislature has delegated essentially unrestricted discretion to fact finders in individual cases to grant merciful dispensation from harsher punishment for homicides that the fact finders deem less grave for any reason.⁵

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1. See BROTTSBALKEN [BrB] [Criminal Code] 3:1, 2, 7 (Swed.) (1999) (unofficial translation published by the Ministry of Justice), reprinted in SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 426–27 (9th ed. 2012).

2. *Id.* § 1, at 426.

3. *Id.* § 2.

4. *See id.*

5. *See id.* § 7, at 427. A similar dichotomy between more serious and less grave offenses exists in Swedish homicide law for the rough equivalent of involuntary manslaughter in Anglo-American law. *See id.* An offender who “through carelessness causes the death of another” is subject to a maximum sentence of two years imprisonment, but will get a fine “if the crime is less grave,” or a sentence from six months to four years “[i]f the crime is gross.” *Id.*

In contrast, consider the law of the State of New York prior to revision of its criminal code and after promulgation of the American Law Institute's Model Penal Code (MPC). New York, like many other states, had over time enacted special statutes dealing with highly specific forms of homicide, each with its own sentencing provision.⁶ For example, New York had special statutory provisions dealing with homicides resulting from the following: "duels outside the state, negligent use of machinery, leaving mischievous animals at large, overloading passenger vessels, bursting of steamboat vessels, bursting of steam boilers, acts of physicians while intoxicated, making or keeping explosives contrary to law, and criminal negligence while operating a motor vehicle."⁷ New York was not alone in this endeavor as other states had specific statutes dealing with homicides committed by the following means:

[B]owie knives, poison, wood alcohol sold as a beverage, spring guns, strangling, and secret medicines, or resulting from negligent operation of a boat, operation of a motor vehicle while intoxicated, shooting at railway or street railway cars, obstructing railways or streetcars, lynching, carelessly shooting while hunting, operating an airplane or train or street railway car while intoxicated, forcibly taking a mine, killing a prison guard, killing a prohibition officer, poisoning a well, false testimony, abandonment of a person sick with smallpox, and sabotage.⁸

This approach, in contrast to that of Sweden, required the legislature to anticipate the entire range of homicidal human behavior and to pre-designate the punishment (or range of punishment) appropriate in each instance.⁹

The Anglo-American common law, as well as the MPC, and modern English and American penal codes together represent a third approach that steers between these two extremes. The Anglo-American project has been an attempt to guide fact-finder discretion by defining a few large categories of homicide with significantly different sentencing consequences. The common-law categories of murder, voluntary manslaughter, and involuntary manslaughter (or rough statutory equivalents with different appellations) cover most homicides, while modern Anglo-American legislatures today maintain separate statutory treatment for only a few special categories of homicide such as vehicular homicide and euthanasia.¹⁰ The category of murder itself is often legislatively subdivided into two or more "degrees" to recognize significant differences in seriousness of offense. Moreover, American jurisdictions that maintain the death penalty have adopted special statutory provisions designating death eligibility and structuring the capital sentencing process in

6. See MODEL PENAL CODE & COMMENTARIES § 210.1 cmt. 2, at 6 (1980) [hereinafter MODEL PENAL CODE AND COMMENTARIES].

7. *Id.* at 7.

8. *Id.*

9. See *supra* text accompanying notes 1–3.

10. See *infra* Part I.

response to intervention by the U.S. Supreme Court.¹¹ The Anglo-American approach seeks to balance legislative responsibility for defining homicide offenses with delegation of some necessary discretion to fact finders to make the factual and normative assessments that the general legislative categories require.¹²

The middle ground sought by the Anglo-American approach has entailed a delicate and shifting balance over time between the competing demands of what might be called “justice” and “mercy.” What I mean by justice in this context is not its most general sense of achieving just results according to some normative theory of just punishment. Thus, I do not use the term justice to mean compliance with the demands of just deserts in the retributive tradition, nor do I use it to mean compliance with the demands of an all-things-considered calculus of utility or social welfare. Rather, I use the term justice to stand for the complex set of values central to the rule of law—that is, the values of clarity, predictability, consistency, and equality, which help to ensure that like cases will be treated alike.¹³ As for mercy, I obviously am not using it in its theological sense of God’s mercy or grace, but rather in its secular sense of a public official’s untrammelled discretion to be lenient in affixing blame and punishment. Sweden’s homicide law clearly privileges what I call mercy in its delegation of comprehensive discretion to fact finders to be lenient in homicide cases, while the old New York penal law leaned much more toward what I call justice in its attempt to define and delimit punishment for each specific species of homicide.¹⁴ The Anglo-American middle-ground approach, however, has struggled to maintain a balance between these two values over time.

I chronicle the contest between justice and mercy in Anglo-American homicide law by giving examples from three contexts—one from the common-law development of the law of homicide, one from the codification of homicide law by legislatures, and one from the constitutionalization of part of homicide law under the Eighth Amendment of the U.S. Constitution.¹⁵ I demonstrate that in each context, the balance has shifted over time toward mercy rather than justice. In the tug-of-war between these competing values, the promotion of merciful discretion has repeatedly triumphed over the promotion of predictability and consistency in the law of homicide. I conclude by considering possible reasons for this persistent trend toward discretionary leniency in homicide cases.¹⁶

11. *See infra* Part II.

12. *See infra* Part II.

13. *See generally* BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* (2004) (exploring the history and normative content of the rule of law).

14. *See supra* notes 1–7 and accompanying text.

15. *See infra* Parts I–III.

16. *See infra* Part IV.

I. COMMON LAW: MITIGATION OF MURDER TO MANSLAUGHTER

In the Anglo-American common law, the doctrine of manslaughter developed to remove from the ambit of capital punishment homicides that occurred when the actor killed in the heat of passion, in response to provocation from the victim, or when the actor caused death through an act that was reckless or otherwise unlawful rather than intentional.¹⁷ In both forms of manslaughter (provoked manslaughter came to be known as voluntary manslaughter, and reckless manslaughter came to be known as involuntary manslaughter), the formulation of the central elements of the offense changed over time to invite greater discretion by the fact finder in the determination of which cases should be afforded leniency.¹⁸

First, consider the doctrine of provocation in the offense of voluntary manslaughter. When the doctrine first developed in the English common law, it restricted leniency to cases involving a finite list of types of adequate provocation.¹⁹ English criminal law expert Jeremy Horder describes the “gradual emergence of four distinct kinds or categories of provocation—and four alone—thought sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing.”²⁰ The four categories of adequate provocation were:

- (1) being the victim of a grossly insulting assault;
- (2) witnessing an attack on a family member or close friend;
- (3) witnessing an Englishman unlawfully deprived of his liberty; and
- (4) witnessing a man in the act of adultery with one’s wife.²¹

In this restrictive, rule-like version of the provocation doctrine, which continues to exist in many modern Anglo-American jurisdictions, judges act as gatekeepers who restrain the exercise of jury discretion.²² In this gatekeeping role, judges restrict invocation of the partial defense of provocation to those cases that fall within one of the approved categories, thus precluding evidence, argument, and instruction to the jury on the defense of provocation in cases outside of those categories.²³

Over time, however, the restrictive, rule-like version of provocation was partially eroded by more liberal, discretionary versions of the defense. Within the common-law tradition, some courts developed a more liberalized provocation law that dispensed with the judicial gatekeeping function and left the determination of the adequacy of the claimed provocation in the hands of

17. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 717–23 (1937).

18. See *id.*

19. JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 24 (1992).

20. *Id.*

21. See *id.*

22. See, e.g., *Girouard v. State*, 583 A.2d 718, 721 (Md. 1991) (reflecting the early common-law position that only a few specific circumstances can serve as legally adequate provocation).

23. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN 26 (2003).

the jury, without the guidance of a finite, common-law list.²⁴ As one liberal common-law court explained, the “true general rule” of provocation is that “reason should, at the time of the act, be disturbed or obscured by passion to an extent which *might render* ordinary men, of fair average disposition, *liable* to act rashly or without due deliberation or reflection, and from passion, rather than judgment.”²⁵ The court concluded that this determination “is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case.”²⁶ The same court admonished judges to send the question of the adequacy of provocation to the jury “if the alleged provocation be such as to admit of any reasonable doubt.”²⁷ The court reasoned:

[J]urors . . . coming from the various classes and occupations of society, and conversant with the practical affairs of life, are . . . much better qualified to judge of the sufficiency and tendency of a given provocation, and . . . to fix . . . the standard of what constitutes the average of ordinary human nature, than the judge²⁸

Under this less-constrained version of common-law provocation, the fact finder is accorded much broader discretion to determine whether the individual circumstances of any particular case suggest that the provocation at issue is of a kind that would induce a sufficient loss of self-control in “ordinary men” so as to call for leniency.²⁹

The MPC pushed the common-law liberalization of provocation to a further extreme, eliminating the requirement that there be any provoking act from the victim at all, and instead focusing solely on the defendant’s mental state.³⁰ Moreover, under the MPC, the relevant mental state is not merely hot-blooded passion, but a much wider array of possible disorder or distress.³¹ In the MPC’s language, criminal homicide constitutes manslaughter when “a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”³² The MPC also individualizes consideration of the reasonableness of the explanation or excuse for the defendant’s extreme mental or emotional disturbance, stating that “[t]he reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”³³ The drafters of the MPC explained that their

24. See *infra* text accompanying notes 25–27.

25. *Maher v. People*, 10 Mich. 212, 220 (1862) (emphasis in original).

26. *Id.* at 221.

27. *Id.* at 222.

28. *Id.*

29. *Id.* at 220.

30. See MODEL PENAL CODE § 210.3(1)(b) (1962).

31. See *id.*

32. *Id.*

33. *Id.*

formulation “sweeps away the rigid rules that limited provocation to certain defined circumstances” in order to delegate to the jury the power “to decide, in light of all the circumstances of the case, whether there exists a reasonable explanation or excuse for the actor’s mental condition.”³⁴ The MPC’s substantial expansion of fact-finder discretion to mitigate murder to manslaughter has been influential with a substantial minority of states; approximately twenty states now employ some version of the “extreme mental or emotional disturbance” test,³⁵ although not all of them have done away with the requirement of a provoking act or adopted the “actor’s situation” standard for the reasonableness assessment.³⁶ From early common law, to more recent common law, to the MPC and its influence on statutory revisions, the trend has clearly been in the direction of the liberalization of the law of voluntary manslaughter, resulting in a much more robust power of discretionary leniency or mercy on the part of fact finders in homicide cases.

A similar trend is evident in the common-law development of the offense of reckless or involuntary manslaughter through liberalization of the factors to be considered in applying the central concept of the “reasonable person.” At common law, the reasonable person was described as an embodied, actual person—a reasonable *man*, and indeed, a reasonable man of the solid working or middle classes.³⁷ In English common law, the reasonable man was sometimes described as “the man in the Clapham omnibus”³⁸—on the bus presumably on his way to work in London from what was “a commuter suburb for the working classes from around 1900 onwards” until its recent gentrification.³⁹ In an alternative formulation, the reasonable man was sometimes described as “the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves”—thus, presumably a proud homeowner with a lawn and a certain level of education.⁴⁰ Under such embodied formulations, fact finders in homicide cases were charged to consider whether a defendant’s risk-creating activity was enough of a departure from the behavior of a reasonable man—with middle-class education and values—so as to constitute recklessness.⁴¹

34. MODEL PENAL CODE & COMMENTARIES, *supra* note 6, § 210.3 cmt. 4(a).

35. See Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 604 (2004) (quoting MODEL PENAL CODE § 210.3(1)(b) (1962)).

36. See KADISH ET AL., *supra* note 1, at 456.

37. See *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 (C.A.) at 224 (Eng.).

38. See *id.*

39. Cat Byers, *Moving to Clapham London? Not Until You’ve Read This!*, MOVE BUBBLE (Apr. 5, 2014, 14:31), <http://blog.movebubble.com/2014/04/moving-to-clapham-london-not-until-youve-read-this/>.

40. See *Hall*, 1 K.B. at 224 (internal quotation marks omitted) (crediting an anonymous American author with this alternative formulation of “the man in the Clapham omnibus”).

41. See *id.*

In the criminal law (and beyond), the trend has been toward liberalization through individualization of the reasonable person standard.⁴² The inadequacy of the reasonable man standard in criminal law was most apparent in cases involving determinations of reasonableness in the context of self-defense and provocation.⁴³ Because women were often smaller and less physically powerful than their, usually male, attackers, women who resorted to deadly force in self-defense sought with some success to have the reasonableness of their fear determined from an explicitly female, rather than male, perspective.⁴⁴ In accepting the need for a “reasonable woman” standard in self-defense cases, one court explained “[u]ntil such time as the effects of that history [of sex discrimination] are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination.”⁴⁵ In the provocation context, the violent reaction of a teenaged male defendant in response to sexual assault and taunting by an older man led an English court to accept the need for individualization of the reasonableness standard, at least with regard to the age and sex of the offender.⁴⁶ The court noted that “to require old heads upon young shoulders is inconsistent with the law’s compassion to human infirmity.”⁴⁷

The MPC, as in the provocation context, took an even more extreme approach to liberalizing and individualizing the reasonable person standard. Just as it invoked the actor’s situation to consider the reasonableness of a defendant’s extreme mental or emotional disturbance, the MPC defined the universe of risk creation—the mental states of recklessness and negligence—with regard to the behavior of a law-abiding or reasonable person “in the actor’s situation.”⁴⁸ The drafters of the MPC explained that the word situation is

42. See Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 23–29 (2012) (describing the history of the liberalization of the reasonable man standard in the civil law of negligence and sexual harassment under Title VII).

43. See *infra* notes 44–45 and accompanying text.

44. See, e.g., *State v. Wanrow*, 559 P.2d 548, 559 (Wash. 1977) (en banc) (describing how a woman’s self-defense instruction should take into account her physical handicaps instead of applying the reasonable male standard).

45. *Id.*

46. See *Dir. of Pub. Prosecution v. Camplin*, [1978] 2 W.L.R. 679 (Eng.).

47. *Id.*

48. See MODEL PENAL CODE § 2.02(2)(c) (1962). “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe *in the actor’s situation.*” *Id.* (emphasis added); *id.* § 2.02(2)(d). “A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe *in the actor’s situation.*” *Id.* (emphasis added).

designedly ambiguous⁴⁹ and that it leaves “room for interpretation”⁵⁰—which is “precisely the flexibility desired.”⁵¹ The MPC thus represents the most extreme delegation of what it calls flexibility—or the power of mercy—to the fact finder when deciding whether homicides are murder or manslaughter (voluntary or involuntary) a view that both prompted and supported a similar trend of liberalization through individualization in both English and American common law.⁵²

II. CODIFICATION: FIRST-DEGREE MURDER

The first significant legislative innovation in the law of homicide in the United States happened when the Pennsylvania Legislature divided the common-law crime of murder into degrees in 1794.⁵³ The Pennsylvania Legislature created a new category of “first-degree” murder to designate those murders for which capital punishment could be imposed; all other murders would constitute “second-degree” murder and could be punished only by imprisonment.⁵⁴ The Pennsylvania Legislature defined first-degree murder as killing “by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing,” a definition that remains the law today in Pennsylvania.⁵⁵ The division of murder into degrees, and Pennsylvania’s specific conception of deliberate and premeditated murder, became widely adopted throughout the United States; by the mid-twentieth century, two-thirds of the states had murder statutes modeled on or closely resembling the Pennsylvania statute.⁵⁶

It might seem odd to use Pennsylvania’s creation of first-degree murder as an example of the trend toward discretionary mercy in the criminal law. It is highly doubtful that the Pennsylvania Legislature, which first enacted the law, intended to delegate greater discretion to fact finders to dispense all-things-considered leniency. Rather, the statute identified a certain especially culpable mental state with three adjectives—“willful, deliberate and premeditated.”⁵⁷ Moreover, the statute provided examples of killings that exemplified that mental state: “[k]illing by means of poison, or by lying in wait.”⁵⁸ Thus, the statutory canon of construction known as *ejusdem generis*

49. MODEL PENAL CODE & COMMENTARIES, *supra* note 6, § 210.3 cmt. 4(a), at 62 (internal quotation marks omitted).

50. *Id.* at 63.

51. *Id.*

52. *See id.* § 210.3 cmt. 1, at 44; § 210.3 cmt. 5(a), at 62–64.

53. *Id.* § 210.2 cmt. 2, at 16.

54. *See* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 98 (2002).

55. 18 PA. CONS. STAT. § 2502(d) (1998); MODEL PENAL CODE & COMMENTARIES, *supra* note 6, § 210.2 cmt. 2, at 16.

56. *See* Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 380 (1994).

57. 18 PA. CONS. STAT. § 2502(d).

58. *Id.*

(“of the same kind, class, or nature”⁵⁹) would suggest that any first-degree murder must exhibit the same kind of willfulness, deliberation, and premeditation as a killing by poisoning or lying in wait—in other words, cold calculation, planning, and the passage of time sufficient to allow for calm and careful thought.⁶⁰ The Pennsylvania statutory language thus seems to evince the desire to guide the identification of those murders appropriate for capital punishment rather than the desire to delegate the question to the discretion of the fact finder in light of all possibly relevant considerations.⁶¹

Over time, however, judicial constructions of the Pennsylvania formulation, both within Pennsylvania and in many other states, undercut the guidance offered by the statutory language by equating willful, deliberate, and premeditated killing with simply intentional killing.⁶² As the Chief Justice of the Pennsylvania Supreme Court explained, “Whether the intention to kill and the killing, that is, the premeditation and the fatal act, were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate and premeditated.”⁶³ Indeed, it was frequently noted in Pennsylvania case law that “[n]o time is too short for a wicked man to frame in his mind his scheme of murder.”⁶⁴ The Pennsylvania Supreme Court eventually clarified this view:

[T]he requirement of premeditation and deliberation is met *whenever there is a conscious purpose to bring about death*. . . . We can find no reason where there is a conscious intent to bring about death to differentiate between the degree of culpability on the basis of the elaborateness of the design to kill.⁶⁵

Although not every court that adopted the Pennsylvania formulation of first-degree murder broadened it in this way, many state courts followed the Pennsylvania Supreme Court’s lead in equating premeditation and deliberation with purposeful killing and using the “no time is too short” principle.⁶⁶

The Pennsylvania courts likely were motivated in their statutory construction by normative dissatisfaction with the use of a temporal notion of premeditation to designate the “worst” murderers.⁶⁷ The broadening of the concept of premeditation to include all purposeful killings, however, vastly widened the pool of potentially death-eligible killers and in effect granted fact finders greater discretion to select—or exempt—murderers from the ambit of the death penalty under the cloak of the first-degree premeditation and

59. 23 AM. JUR. 2D *Deeds* § 207 (2014).

60. 18 PA. CONS. STAT. § 2502.

61. *See id.*

62. *See infra* notes 63–66 and accompanying text.

63. *Commonwealth v. Earnest*, 21 A.2d 38, 40 (Pa. 1941).

64. *Commonwealth v. Carroll*, 194 A.2d 911, 916 (Pa. 1963) (quoting *Commonwealth v. Drum*, 58 Pa. 9, 16 (1868) (internal question marks omitted)).

65. *Commonwealth v. O’Searo*, 352 A.2d 30, 37–38 (Pa. 1976) (emphasis added).

66. *See KADISH ET AL.*, *supra* note 1, at 431.

67. *See Givelber*, *supra* note 56, at 381.

deliberation determination.⁶⁸ The great Benjamin Cardozo criticized the expansive judicial interpretations of the first-degree murder formulation not because they granted fact finders the greater power of merciful discretion—Cardozo approved of that—but because they failed to grant such power clearly and unambiguously.⁶⁹ In Cardozo’s own words:

What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.⁷⁰

Herbert Wechsler, the helmsman of the MPC project, shared Cardozo’s dissatisfaction with the broad judicial interpretations of the first-degree murder formulation, but for a different reason.⁷¹ Wechsler lamented the failure of the Pennsylvania statute to deliver on its promise of legislative guidance on the crucial question of death eligibility.⁷² As both Cardozo and Wechsler recognized, the elimination of the requirements that the decision to kill be reached “(1) calmly and (2) some appreciable time prior to the homicide” left “*nothing precise as the crucial state of mind but intention to kill.*”⁷³ In Wechsler’s view, this lack of precision represented not a welcome delegation of merciful power, but rather a failure of necessary guidance to fact finders: “The statutory scheme was apparently intended to limit administrative discretion in the selection of capital cases. As so frequently occurs, the discretion which the legislature threw out the door was let in through the window by the courts.”⁷⁴ Wechsler’s proposed solution then was not—as Cardozo would have it—to indicate more clearly to fact finders their freedom to dispense leniency, but rather to offer a more rigorous form of guidance for the selection of death-eligible murderers.⁷⁵

Wechsler proposed, through the death-penalty provisions of the MPC, to eliminate the category of first-degree murder altogether.⁷⁶ Instead of using the single metric of premeditation and deliberation to determine who among murderers should be eligible for the death penalty, the MPC proposed a list of aggravating factors and required that the fact finder find at least one such factor in a separate, post-verdict proceeding for a convicted murderer to become death

68. *See id.*

69. Benjamin Cardozo, *What Medicine Can Do for Law*, 7 BULL. N.Y. ACAD. MED. 581, 596–97 (1929).

70. *Id.* at 597.

71. *See* Wechsler & Michael, *supra* note 17, at 708–09.

72. *See id.* at 707–08.

73. *Id.* (emphasis added).

74. *Id.* at 709.

75. *See id.* at 717.

76. *See* MODEL PENAL CODE § 210.6 (1962) (withdrawn 2009).

eligible.⁷⁷ These factors included such diverse circumstances as the defendant's prior conviction of "another murder or of a felony involving the use or threat of violence"; that "[t]he defendant knowingly created a great risk of death to many persons"; that "[t]he murder was committed for pecuniary gain"; and that "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."⁷⁸ The MPC also proposed a list of mitigating factors, which included, among other things, evidence that "[t]he defendant was under the influence of extreme mental or emotional disturbance," the defendant was an accomplice whose "participation in the homicidal act was relatively minor," and "[t]he defendant acted under duress or under the domination of another person."⁷⁹ After the finding of a single aggravating factor, the fact finder was to consider all relevant evidence, including things beyond the listed aggravating and mitigating factors, and to impose the death penalty only if it found that "there [were] no mitigating circumstances sufficiently substantial to call for leniency."⁸⁰

Wechsler frankly acknowledged the difficulty of offering guidance in the capital sentencing context and explained that the MPC proposal tried to avoid wholesale discretion in the death-eligibility determination by recognizing the need for a multi-factored approach:

This plan reflects the imposing difficulty felt by every agency that has reviewed the law of homicide in formulating a workable rule to differentiate the cases where capital punishment should and should not be employed. The solution to the difficulty, insofar as it can be solved, inheres in acknowledging the multiplicity of factors that bear on the issue.⁸¹

The MPC's innovation, promulgated with the rest of the MPC in 1962, was completely ignored by state legislatures—at least initially, until the Supreme Court's constitutional intervention in capital punishment in the 1970s gave it new life.⁸² The MPC's attempt to promote the legislative guidance that Wechsler correctly saw as abdicated by the law of first-degree murder, however, demonstrates that the trend over time in this area moved away from guidance and rule-of-law values and toward greater discretionary mercy.

III. CONSTITUTION: GUIDED DISCRETION VS. OPEN-ENDED MITIGATION

In the 1960s and 1970s, a group of civil-rights lawyers and death-penalty abolitionists mounted a concerted litigation campaign to try to end the use of

77. *Id.* § 210.6(3).

78. *Id.*

79. *Id.* § 210.6(4).

80. *Id.* § 210.6(2).

81. MODEL PENAL CODE & COMMENTARIES, *supra* note 6, § 210.1 cmt 3, at 9 (footnotes omitted).

82. *See* Wechsler & Michael, *supra* note 17, at 715–17.

capital punishment in the United States.⁸³ They raised a host of constitutional arguments against the death penalty in courts across the country and managed to bring about a moratorium on executions for the five years leading up to the 1972 landmark case of *Furman v. Georgia*, which constitutionally abolished the death penalty as it was then practiced across the country (albeit temporarily, as it turned out).⁸⁴ The argument that persuaded the two key swing Justices—Potter Stewart and Byron White—to concur in the judgment of *Furman* targeted the failure of state legislatures to offer any guidance to capital sentencers in making the ultimate determination of life or death.⁸⁵ The typical pre-*Furman* instruction to capital sentencing juries—juries were and remain the most common sentencers in capital cases—simply instructed the jurors to follow their conscience, without any attempt to identify which death-eligible murderers should actually be sentenced to die.⁸⁶ Justices Stewart and White agreed that the standardless discretion accorded capital sentencing jurors violated the Eighth Amendment; in Justice Stewart’s memorable words, being sentenced to death pursuant to such a random process was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁸⁷

In response to the Supreme Court’s decision in *Furman*, a substantial majority of the states redrafted their capital statutes to provide sufficient sentencing guidance so as to meet the constitutional concerns raised by the Court.⁸⁸ Four years after *Furman*, the Court reauthorized the practice of capital punishment by upholding three new state statutes that guided capital sentencing discretion.⁸⁹ Two of the new schemes (and the majority of post-*Furman* capital statutes) used the MPC template of identifying aggravating and mitigating factors to be weighed against one another in a separate capital sentencing proceeding.⁹⁰ From 1976 to the present, the Supreme Court has continued to monitor the constitutionality of the administration of capital punishment, granting review on cases virtually every year to refine its Eighth Amendment jurisprudence.⁹¹

83. See generally MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (detailing the litigation campaign that led to *Furman* and exploring the significance of the decision).

84. *Id.* See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (temporarily abolishing the death penalty as it was practiced at the time).

85. See *Furman*, 408 U.S. at 310–14 (White, J., concurring).

86. See *id.* at 387–88 (Berger, C.J., dissenting).

87. See *id.* at 309 (Stewart, J., concurring).

88. See MELTSNER, *supra* note 83, at 307–09.

89. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253, 259–60 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

90. See *Gregg*, 428 U.S. at 193–94 (noting that Georgia’s death-penalty statutes were modeled after the MPC); *Proffitt*, 428 U.S. at 247–48 (noting that the Florida legislature modeled the state’s death-penalty statute after the MPC).

91. See Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 237 (2012).

For our purposes, the most striking aspect of the Court's ongoing constitutional regulation of capital punishment is that, although the impetus for the Court's original intervention was the need to impose rule-of-law values on the capital sentencing process, the effect of the Court's constitutional doctrine over time has been to enhance opportunities for individualized discretion, with only a formal veneer of procedural regularity. Here, too, the trend has clearly been to privilege mercy over justice.

In the early years of its regulatory project, the Court did monitor the new generation of state capital statutes to ensure that the aggravating factors that were meant to structure the sentencing process offered sufficiently precise guidance. For example, in *Godfrey v. Georgia*, the Court struck down Georgia's catch-all aggravator, which asked whether "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."⁹² The Court explained: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"⁹³ For similar reasons, the Court struck down Oklahoma's catch-all aggravator—similar to the one proposed by the MPC⁹⁴—that asked whether the murder was "especially heinous, atrocious, or cruel."⁹⁵

Over time, however, the Court seemed to lose enthusiasm for monitoring the clarity and focus of aggravating factors. In *Arave v. Creech*, the Court upheld Idaho's statutory aggravator, which asked whether the defendant "exhibited utter disregard for human life"⁹⁶—a description that surely "could fairly characterize almost every murder" every bit as much as the Georgia aggravator struck down by the Court in *Godfrey*.⁹⁷ In upholding Idaho's aggravator, the Court relied on a "limiting construction" provided by the Idaho Supreme Court, which construed the "utter disregard" language to mean that the defendant was a "cold-blooded, pitiless slayer"—a description of barely more descriptive content than the language it purported to limit.⁹⁸ The U.S. Supreme Court nonetheless found that this limiting construction was sufficiently clear and narrow because it "refer[red] to a killer who kills without feeling or sympathy."⁹⁹ The holding in *Arave*, which permits the use of an aggravating factor of even less specificity than those the Court previously

92. *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980) (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978) (current version at GA. CODE ANN. § 17-10-30 (West 2012))) (internal quotation marks omitted).

93. *Id.* at 428–29.

94. See MODEL PENAL CODE § 210.6(3)(h) (1962) (withdrawn 2009).

95. See *Maynard v. Cartwright*, 486 U.S. 356, 359 (1988) (quoting OKLA. STAT. tit. 21, § 701.12(4) (1981), *invalidated by Maynard*, 486 U.S. 356) (internal quotation marks omitted).

96. *Arave v. Creech*, 507 U.S. 463, 467 (1993).

97. See *Godfrey*, 446 U.S. at 428–29.

98. See *Arave*, 507 U.S. at 471.

99. *Id.* at 472.

rejected, represents more of an abdication than an application of the Court's commitment to justice, in terms of rule-of-law guidance, in the capital sentencing process.

Moreover, the Court failed to limit the breadth of aggravating factors in a different way: by failing to limit their proliferating number, as well as their broad or vague scope. In the new generation of capital statutes with lists of aggravating factors, state legislatures have tended to add to the lists over time.¹⁰⁰ In particular, it has become a form of distinction for individuals to belong to a group or class of citizens whose murder is deemed a potentially capital offense.¹⁰¹ As a result, aggravating factors collectively cover the vast majority of those convicted of capital murder.¹⁰² For example, one study of the Georgia statute—upheld in *Gregg v. Georgia* in 1976—as a model of guided discretion—found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of the statute were death-eligible under that scheme,¹⁰³ and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.¹⁰⁴ Thus, the Court's constitutional regulation has failed to ensure that aggravating factors fulfill their promise to narrow the class of the death-eligible and to guide discretion in the sentencing process.

In contrast to its anemic enforcement of rule-of-law values in the capital sentencing process, the Court has been far more active in requiring that capital sentencing statutes allow for adequate individualization and mercy. In 1976, the year that it reauthorized the new guided-discretion statutes, the Court also struck down two mandatory capital statutes, holding that a sentence of death could not constitutionally be imposed without consideration of the individual characteristics of the defendant.¹⁰⁵ The Court noted that there had been a long historical movement away from mandatory capital statutes in the United States in favor of discretionary mercy by sentencing juries—a movement indicative of “evolving standards of decency” under the Eighth Amendment.¹⁰⁶ The Court also poetically invoked the normative underpinnings of discretionary mercy:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of

100. See Jonathan Simon & Christina Spaulding, “Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties,” in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81, 82 (Austin Sarat ed., 1999).

101. See *id.* To illustrate this phenomenon, a student in January 2014 sent me a cell phone snapshot of a notice posted in the back of a taxicab in New Orleans indicating that Louisiana law made it a capital offense to murder a taxi driver.

102. See Simon & Spaulding, *supra* note 100, at 82–83.

103. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 268–69 n.31 (1990).

104. See *id.* at 102.

105. See *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 335–36 (1976).

106. *Woodson*, 428 U.S. at 293.

death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹⁰⁷

The Court vigorously developed this new requirement of individualized sentencing in a line of cases rejecting state statutory schemes that limited capital sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,¹⁰⁸ or by excluding full consideration of some potentially relevant mitigating evidence.¹⁰⁹ Moreover, the Court has never limited the universe of what might be considered potentially mitigating evidence. Indeed, the Court has raised the bar for defense counsel both by requiring adequate investigation of mitigation,¹¹⁰ and by finding prejudice to capital defendants, requiring reversal of their death sentences when such evidence is not presented.¹¹¹

It soon became apparent, however, that the Court's robust commitment to individualization in capital sentencing was undercutting the rule-of-law values that had motivated the Court's constitutionalization of capital punishment in the first place. Even as early as the year prior to *Furman*, the lawyers litigating the constitutional challenges to the death penalty recognized that unregulated mercy was essentially equivalent to unregulated selection: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."¹¹² In the post-*Furman* era, Justice Scalia has become the most vehement critic of discretionary mercy among those who have recognized the tension between the twin demands for mercy and justice in the Court's Eighth Amendment jurisprudence:

To acknowledge that "there perhaps is an inherent tension" between [the individualized sentencing line of cases and the guided discretion line of cases] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines

107. *Id.* at 304.

108. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 606 (1978).

109. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

110. *Compare* *Burger v. Kemp*, 483 U.S. 776, 789–95 (1987) (upholding a death sentence despite the failure of defense counsel to present any mitigating evidence), *with Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (reversing a death sentence for inadequate mitigation presentation despite some substantial efforts by the defendants' two well-respected lawyers).

111. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (finding the state court's determination that the capital defendant was not prejudiced by his counsel's inadequate presentation of mitigating evidence unreasonable even under a deferential standard of review on habeas corpus).

112. Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (Nos. 203, 204), 1970 WL 122025.

as pursuing “twin objectives,” is rather like referring to the twin objectives of good and evil. They cannot be reconciled.¹¹³

Because Justice Scalia concluded that *Furman*’s mandate of guided discretion was more plausibly rooted in the Eighth Amendment than the requirement of individualized sentencing, he announced that he would vote only to enforce the former constitutional command and not the latter one: “Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”¹¹⁴

Although the tension between justice and mercy is most evident in the context of capital punishment, because the Supreme Court has required heightened attention to both values in its evolving Eighth Amendment jurisprudence, the same tension clearly exists within the Anglo-American criminal law more generally, as it attempts to steer between formal rule-like advance directives and post hoc all-things-considered discretion. Despite Justice Scalia’s disgruntled choice of justice over mercy in the capital context, it is clear that the majority of the Supreme Court has chosen a different path. The constitutional regulation of capital punishment—like the common law of manslaughter and the statutory creation of first-degree murder—over time has come to privilege mercy over justice.

IV. REASONS FOR THE TRIUMPH OF MERCY

The consistent triumph of discretionary mercy over rule-of-law values in many different contexts across centuries of Anglo-American homicide law represents something of a puzzle. Yes, Shakespeare gave Portia a moving courtroom speech about the value of discretionary mercy falling “as the gentle rain from heaven,”¹¹⁵ but it is also hard to deny the competing attractions of clarity, predictability, consistency, and equality in the application of the criminal law, especially in the high-stakes context of homicide.¹¹⁶ Indeed, it was the absence of these very qualities that led progressive civil rights lawyers to launch the constitutional challenge to capital punishment in the 1960s.¹¹⁷ One might expect a certain amount of seesawing back and forth between discretionary mercy and rule-of-law justice over time, as the legal system calibrates and balances the two competing values. But the consistency and magnitude of mercy’s triumph call for some attempt at explanation.

First, one possibility is that the tendency toward expanding discretion in the administration of the law of homicide does not reflect a normative

113. *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (citations omitted), *overruled by* *Ring v. Arizona*, 536 U.S. 584 (2002).

114. *Id.* at 673.

115. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

116. *See generally* TAMANAHA, *supra* note 13 (exploring the history and normative content of the rule of law).

117. *See supra* note 83 and accompanying text.

preference for mercy over justice; perhaps the trend toward discretion reflects instead the difficulty of achieving the promise of the rule of law in the homicide context. As Justice Harlan famously wrote in rejecting a constitutional challenge to standardless capital sentencing discretion under the Due Process Clause (just one year before the same claim prevailed under the Eighth Amendment in *Furman*): “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are *beyond present human ability*.”¹¹⁸ Even the optimistic reformers of the MPC project expressed caution about what could be hoped for in the reform of capital punishment—after acknowledging the “imposing difficulty” or formulating a workable rule for identifying those homicides that should receive the death penalty, the MPC drafters suggested that “[t]he solution to the difficulty, *insofar as it can be solved*, inheres in acknowledging the multiplicity of factors that bear on the issue.”¹¹⁹ The difficulty of identifying capital homicides with any rule-like precision is reproduced all the way down the stepladder of homicides. The commitment of Anglo-American law to the project of creating a few general categories of homicide with meaningful differences in terms of seriousness and punishment makes the formulation of the categories not only tremendously important, but also impossible without building in some significant discretion for the fact finder.

Second, the tendency toward mercy in the substantive law of homicide may reflect a preference between two types of error. Rule-like formulations are best at achieving predictability and consistency, but they also tend to be both over and under inclusive. In the homicide context, to be over inclusive is to convict and punish an offender at a higher level of culpability than he or she deserves; to be under inclusive is to convict and punish an offender at a lower level of culpability than he or she deserves (i.e., to fail to include an offender who should be included at the higher level). In its procedural law, the Anglo-American criminal justice system reflects a strong preference for errors of under inclusion rather than over inclusion by imposing a burden of proof beyond a reasonable doubt.¹²⁰ The promotion of discretionary leniency as part of the substantive law of homicide serves much the same purpose, allowing the fact finder to correct errors of over inclusion through the loose weave of the substantive standard, as well as through procedural law.

Finally, it may be that the tendency toward mercy in the law of homicide paradoxically aims to promote, rather than oppose, rule-of-law values. When the substantive criminal law is too rigid, criminal juries will tend to nullify by

118. *McGautha v. California*, 402 U.S. 183, 204 (1971) (emphasis added).

119. MODEL PENAL CODE & COMMENTARIES, *supra* note 6, § 210.1 cmt. 3, at 9 (emphasis added).

120. *See In re Winship*, 397 U.S. 358, 363 (1970) (holding that the requirement of proof beyond a reasonable doubt is constitutionally required and serves as “a prime instrument for reducing the risk of convictions resting on factual error”).

acquitting defendants despite the strength of the evidence.¹²¹ Indeed, this tendency toward jury nullification helped to drive the abandonment of mandatory capital statutes and the introduction of capital sentencing discretion in the United States.¹²² The longstanding recognition of the legality of jury nullification in the Anglo-American tradition, however, has always been in tension with the rule of law. As one scholar of nullification notes, “Even among supporters [of jury nullification], . . . nullification is justified by acknowledging the limits of the rule of law, in which the application of general rules to specific cases sometimes yields unsatisfactory results. To achieve one of law’s ends—justice—we must sometimes abandon law’s means, such as rule application.”¹²³ Allowing fact finders greater discretion in the application of substantive standards, the law prevents the highly public repudiation of the rule of law that acts of jury nullification represent, especially in high-profile, high-stakes cases such as homicide prosecutions.¹²⁴ In this way, mercy that is hidden within the criminal justice system—baked into the substantive standards themselves—replaces mercy that acts in opposition to the enforcement of those standards (e.g., nullification). The former kind of mercy thus promotes the rule of law by preventing the latter kind that would openly subvert it.

Justice is often represented as a blindfolded woman holding a scale and a sword, while mercy is often depicted as an angel staying the sword-wielding hand of justice. But justice is usually presented as the central figure, with mercy reaching from behind in an imploring or supplicating manner. In contrast to these visual depictions, the opportunities for discretionary leniency within the substantive law of homicide have tended, over time, to displace the blind application of rule-like norms. Recognition and exploration of this pattern, as I have attempted here, can help us consider whether this consistent trend toward mercy represents a mistaken abdication of rule-of-law commitments or an appropriate response to “the diverse frailties of humankind.”¹²⁵

121. See Steiker & Steiker, *supra* note 91, at 217 (“The introduction of discretion [into the capital sentencing process] was in part motivated by . . . the fear that jurors would nullify to avoid imposition of the death penalty in particularly undeserving cases.”).

122. *Id.*

123. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1153 (1997) (footnote omitted).

124. *Id.*

125. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).