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# The *Lockett* Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing

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# THE *LOCKETT* PARADOX: RECONCILING GUIDED DISCRETION AND UNGUIDED MITIGATION IN CAPITAL SENTENCING

Scott E. Sundby\*

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## INTRODUCTION

The United States Supreme Court has based its eighth amendment jurisprudence governing the death penalty on two fundamental commandments. The first commandment of "guided discretion" requires that the sentencer's discretion be narrowly guided as to which circumstances subject a defendant to the imposition of the death penalty. The second commandment of "individualized consideration" mandates that the sentencer be allowed to consider all evidence concerning the offender and the offense that might argue for a sentence less than death. These principles of guided discretion and individualized consideration comprise almost the entire foundation upon which the Court has built its framework of constitutional rules regulating the death penalty. With only a touch of hyperbole, *Furman v. Georgia*<sup>1</sup> and *Gregg v. Georgia*,<sup>2</sup> which established the principle of guided discretion, and *Woodson v. North Carolina*<sup>3</sup> and *Lockett v. Ohio*,<sup>4</sup> which developed the doctrine of individualized consideration, might be described as the Court's Holy Text for the eighth amendment, and its later holdings might be described primarily as attempts to apply the Text's teachings to different situations.

Within the Court, however, eighth amendment principles that previously had been considered sacrosanct are being challenged. Justice Scalia, in particular, has proclaimed that he no longer will abide by the teachings of *Woodson-Lockett* and their underlying principle of individualized consideration.<sup>5</sup> Indeed, Justice Scalia has declared that after examining the principles of guided discretion and individualized consideration, he has found them to hopelessly conflict with each other. The two principles which have existed for over a decade as the yin and yang of the eighth amendment now are being starkly contrasted by one of the High Priests as " 'twin objectives' . . . like . . . the twin objectives of good and evil. They cannot be reconciled."<sup>6</sup>

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1. 408 U.S. 238 (1972).

2. 428 U.S. 153 (1976).

3. 428 U.S. 280 (1976).

4. 438 U.S. 586 (1978).

5. *Walton v. Arizona*, 110 S. Ct. 3047, 3068 (1990) (Scalia, J., concurring).

6. *Id.* at 3063 (citation omitted). Justice Scalia's discontent with the Court's current eighth amendment jurisprudence does not stop with *Woodson* and *Lockett*, the subjects of this Article. He also has advocated overruling the Court's cases prohibiting

Although Justice Scalia's call for abandoning *Woodson* and *Lockett* has yet to command majority support, the Court has been moving into a new phase of eighth amendment jurisprudence concerning the death penalty. The immediate post-*Furman* era was marked by an active development of principles that generated rules and procedures for the states to follow. In contrast, the contemporary view of the eighth amendment increasingly is of an amendment that merely marks out general constitutional boundaries within which the states are free to operate.<sup>7</sup> In a corresponding fashion, although *Furman-Gregg* and *Woodson-Lockett* still stand at the center of the Court's eighth amendment jurisprudence, their preeminence as sources for new constitutional limits on death penalty practices has begun to dim. The Court appears to be adopting a position that more closely resembles its usual constitutional approach to substantive criminal law issues; an approach generally characterized by great reluctance and misgiving.<sup>8</sup>

This Article will examine some of the changes taking place in the Court's eighth amendment jurisprudence by focusing on the

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the use of evidence concerning victim attributes at capital sentencing hearings, see *South Carolina v. Gathers*, 109 S. Ct. 2207, 2217-18 (1989) (Scalia, J., dissenting), and has argued for a much more restrictive analysis of whether the death penalty is disproportional to certain crimes and offenders, see *Stanford v. Kentucky*, 492 U.S. 361, 371-72 (1989) (plurality opinion). Indeed, Justice Scalia's questioning of existing doctrine in almost all areas of the law has turned Scalia opinions into a cottage industry for the academic community. See generally *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. (forthcoming 1991); Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783 (1990); Note, *Mother of Mercy—Is this the End of RICO—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern"*, 65 NOTRE DAME L. REV. 1106 (1990).

7. See generally Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. L. REV. 737 (1985); Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. The trend has been exacerbated by the Court's recent rulings curtailing the availability of federal habeas relief to state prisoners and making it more difficult to raise new challenges based on the federal constitution. See generally *Teague v. Lane*, 109 S. Ct. 1060 (1989) (federal habeas relief may not be granted for claims based on "new" constitutional rules); Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183, 210-17 (noting need to modify *Teague* to vindicate federal constitutional rights).

8. The Court's reticence in addressing substantive criminal law issues primarily reflects concerns with intruding on states' rights and legislative prerogatives. Consequently, the definition of crimes and the level of punishment have remained almost exclusively the province of state legislatures. See generally Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1580-81 (1981) (noting the Court's reluctance to impose substantive limitations on the definition and punishment of crimes); Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HAST. L.J. 457, 475-87 (1989) (examining the Court's general reluctance to develop substantive limitations in the criminal law area).

Court's recent interpretations of *Lockett v. Ohio*'s requirement that the sentencer must be allowed to consider all mitigating evidence calling for a sentence less than death. Part One provides a basis for understanding *Lockett*'s holding and its place within the Court's development of eighth amendment law by briefly tracing the evolution of the Court's decisions leading to *Lockett*. Part Two addresses Justice Scalia's argument in *Walton v. Arizona* for overruling *Lockett* and his declaration that he will no longer abide by its holding. Justice Scalia's opinion provides an excellent opportunity to reexamine *Lockett*'s underpinnings and to ask whether the holding has a proper place in the Court's eighth amendment jurisprudence.

Finally, Part Three looks at the Court's recent cases involving *Lockett* issues and its development of a substance-procedure distinction for assessing whether a state's rule affecting the sentencer's consideration of mitigating evidence violates *Lockett*. The substance-procedure distinction raises difficult questions regarding the interaction between the objectives of *Furman* and *Lockett* and has important implications for the Court's general approach to capital punishment. Perhaps most importantly, the distinction ultimately may provide an indirect means to accomplish much of Justice Scalia's goal of removing *Lockett*'s restrictions on state death penalty procedures. The picture that emerges in the end is one of a constitutional doctrine that has enjoyed a period of vigorous growth but now is in danger of slowly being whittled away, perhaps to the point of extinction.

## I. THE CREATION STORY

### A. *Furman and Gregg: The Federalization of Who is "Death Eligible"*

The United States Supreme Court often hands down landmark decisions that throw an area of the law into a state of flux, but rarely does the Court simply wipe the constitutional slate clean and declare that it is starting over.<sup>9</sup> Such was the effect, however, when the Court in *Furman v. Georgia*<sup>10</sup> struck down Georgia's death penalty scheme because the unbridled discretion given the sentencer in

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9. Such a rare example is *Brown v. Board of Education*, 347 U.S. 483 (1954), when the Court abandoned the "separate but equal" doctrine to find that school segregation violated the Equal Protection Clause of the fourteenth amendment. See generally Powell, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 284-85 (1990) (Justice Powell discussing infrequency of the overruling of major decisions in both the Warren and Burger Courts).

10. 408 U.S. 238 (1972).

imposing the death penalty led to "arbitrary and capricious" results.<sup>11</sup> The Court's decision was by a narrow five-to-four margin, with each of the nine Justices writing a separate opinion.<sup>12</sup>

The fragmented nature of the Court's decision created great uncertainty over the constitutional future of capital punishment. The holding was not so much a consensus of opinion as a coalition of differing views. Language combed from the various opinions yielded support for positions ranging from a conclusion that the death penalty was always unconstitutional to an argument that the only constitutional form of capital punishment was a mandatory death penalty.<sup>13</sup>

*Furman* was significant not only because it condemned the Georgia statute for failing to guide the capital sentencer, but also because the Court found that the eighth amendment allowed it to make such a determination in the first place. The five justices invalidating the statute won a closely fought battle over the threshold question of whether the eighth amendment even permitted the Court to pass judgment on the constitutionality of a state's procedures for imposing the death penalty.<sup>14</sup> The Court was but one vote shy of finding that the eighth amendment's ban on "cruel and unusual punishment" primarily was limited to forms and modes of punishment. Further inquiries would have been beyond the Court's power to implement the amendment's command.<sup>15</sup>

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11. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (Marshall, J., concurring). Three justices, Justices White, Stewart and Douglas, voted to invalidate on the basis of the unguided discretion given the sentencer, while two justices, Justices Brennan and Marshall, maintained that the death penalty was a *per se* violation of the eighth amendment.

12. In fact, there was not even a plurality opinion, as none of the concurring justices joined any of the other opinions.

13. Compare, e.g., the opinions of Justices Brennan and Marshall, 408 U.S. at 269-306, 360-71 (the death penalty always violates the eighth amendment), with Chief Justice Burger's dissent, *id.* at 401 (expressing concern that *Furman* may be interpreted as allowing only mandatory death penalties).

14. Although the four dissenters each wrote separate opinions, they were united on the contention that the majority had overstepped proper judicial bounds. Justice Powell, for example, argued that the majority violated "root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers." *Id.* at 417. Both Justice Rehnquist's and Justice Powell's dissents, which stressed the argument that the majority had exceeded the Court's power, were joined by the other three dissenters.

15. The dissenter's basic position on the proper scope of the Court's role under the eighth amendment perhaps was best summarized by Justice Harlan in a case decided the previous term:

It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifur-

If a majority in *Furman* had arrived at such a conclusion, the change in outcome would have had a dramatic effect. In contrast to the post-*Furman* development of detailed constitutional rules controlling when and how the death penalty is imposed, the Court's eighth amendment jurisprudence would have more closely resembled its reticent treatment of other criminal law issues.<sup>16</sup> Most likely, the Court would have engaged in infrequent constitutional excursions without any significant development of overreaching constitutional principles.<sup>17</sup> Thus by finding that the eighth amendment reached the process for determining who received the death penalty, *Furman* firmly placed the Court in the role of constitutional overseer of how the death penalty would be implemented in the future.

If *Furman* was the legal equivalent of the Big Bang for capital punishment, it was the states who were given the initial task of bringing order to the chaos, and a large number tried.<sup>18</sup> Like shamans studying a talisman, legislatures examined *Furman* and tried to divine the constitutional fate of the death penalty. Some states read the Court's concern over "arbitrary and capricious" death sentences as a mandate to eliminate sentencer discretion altogether and therefore implemented mandatory death penalties for specified

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cated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

*McGautha v. California*, 402 U.S. 183, 221 (1971) (citation omitted). Indeed, part of the dissents' complaint that the majority was ignoring *stare decisis* was premised on the Court's rejection in *McGautha* just the term before of a due process challenge to the death penalty based on the sentencer's unguided discretion. *Furman*, 408 U.S. at 400 (Burger, C. J., dissenting) ("[I]t would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication.").

16. See *supra* note 8.

17. This largely was the judiciary's approach to the death penalty prior to *Furman*. See generally Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 146-58 (1986).

18. From the time that *Furman* was decided in 1972 until the Court upheld the first post-*Furman* death penalty statute in 1976, thirty-five states and Congress had enacted new death penalty statutes. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

crimes.<sup>19</sup> Other legislatures responded by attempting to provide greater guidance to the sentencer as to when to impose the death penalty.<sup>20</sup> The procedures for guidance varied in form, but the substantive factors making the penalty applicable were relatively uniform.<sup>21</sup> The various responses to *Furman* were then presented to the Supreme Court to receive their constitutional grades.

The Court's response in *Gregg v. Georgia* and its companion cases is now a familiar story. Mandatory death penalties failed because they completely precluded individualized consideration of the defendant and the offense.<sup>22</sup> Guided discretion schemes, in contrast, satisfied *Furman*'s concerns by limiting the class of defendants who were, as they are euphemistically called, "death eligible."<sup>23</sup> *Gregg* and its companion cases thus laid out the basic eighth amendment parameters for capital punishment: the sentencer's discretion must be controlled as to when the death penalty can be imposed, but sufficient discretion must remain so that the death penalty is not imposed without an opportunity to consider the specific circumstances of the defendant and the crime.

*Furman* and *Gregg* were crucial steps in the federalization of the death penalty. Although its promise largely has gone unfulfilled, by making the question of whether discretion was adequately

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19. Twenty-two states responded to *Furman* by enacting mandatory death penalty schemes. Poulos, *supra* note 17, at 200.

20. See Poulos, *supra* note 17, at 199 n.461 & Table 1.

21. Procedures vary, for example, over whether the jury or judge imposes the death penalty, compare FLA. STAT. ANN. § 921.141(3) (West 1985) (trial judge imposes penalty) with GA. CODE ANN. § 26-3102 (1983) (jury is sentencing body), and as to how the decision is posed to the sentencer, compare TEX. CODE CRIM. PROC. ANN. art. 37.071(4) (Vernon 1981) (sentencer required to answer three specific questions) with GA. CODE ANN. § 26-3102 (1983) (jury given discretion to weigh evidence in deciding to impose death penalty). Despite the variance in procedures, however, the aggravating factors making the defendant eligible for the death penalty are quite uniform. See *infra* note 26 and accompanying text.

22. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (citation omitted)); *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (sentencer must be given "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." (footnote omitted)). For further discussion of mandatory death penalties, see *infra* notes 74-92 and accompanying text.

23. *Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976) (plurality opinion) (approving Georgia's death penalty scheme because jury discretion controlled by objective standards). In addition to Georgia's statute, the Court also approved the guided discretion statutes enacted by Florida, *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion) and Texas, *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).



controlled an eighth amendment issue, the Court was in a position to significantly standardize determinations of who became eligible for the death penalty. The eighth amendment now required review of a state's use of aggravating factors both to ensure that the factors sufficiently narrowed who was death eligible<sup>24</sup> and to ascertain whether the aggravating factors could support the weight of the death penalty in terms of severity and penological justification.<sup>25</sup> The aggravating circumstances used in death penalty statutes became quite uniform among the states adopting capital punishment schemes.<sup>26</sup>

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24. *Gregg*, 428 U.S. at 200-02 (reviewing several of Georgia's aggravating circumstances for vagueness); see also *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) ("especially heinous, atrocious, or cruel" aggravating circumstance not adequately narrowed by judicial interpretation); *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980) ("outrageously or wantonly vile, horrible or inhuman" aggravating circumstance inadequately channels sentencer discretion).

25. *Gregg*, 428 U.S. at 173, 182-87 (eighth amendment requires Court to decide whether death penalty is disproportionate to severity of crime); see, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate for non-triggerman convicted of felony-murder who did not intend to kill); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (death penalty disproportionate for rape). For further discussion, see *infra* notes 85-89 and accompanying text.

26. Several reasons may explain the uniformity. The states may have been simply asking the question, "which aggravating factors adequately support the death penalty and distinguish who is eligible?" and arrived at similar answer, or they may have been cautious out of a fear of unconstitutionality, or they may have lacked imagination. Certainly the similarity in aggravating circumstances is due in part to the Model Penal Code, which provided a guided discretion model statute for the states to use after *Furman* was decided. See generally Poulos, *supra* note 17, at 192-200 (describing Code's effect on capital sentencing statutes). Even the Texas statute which appears to depart significantly from the Code's model by basically limiting the sentencer to questions of the defendant's intent and future dangerousness, incorporates many of the Code's aggravating factors through its definition of what constitutes capital murder. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981). The eight MPC aggravating circumstances thus are used by most death penalty jurisdictions in some form:

*Aggravating Circumstances*

- a. The murder was committed by a convict under sentence of imprisonment.
- b. The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- c. At the time the murder was committed the defendant also committed another murder.
- d. The defendant knowingly created a great risk of death to many persons.
- e. The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
- f. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

Less certain after *Gregg* were the constitutional rules governing the mitigating side of the ledger, namely the controls that a state placed on the sentencer's consideration of evidence arguing against a sentence of death. Many states had responded to the Court's command of 'some discretion but not too much,' by specifying which mitigating factors the sentencer was allowed to use.<sup>27</sup> Such a scheme had a certain symmetrical appeal: just as the state controlled sentencer discretion over which defendants were death eligible through an eighth amendment approved list of aggravating factors, so too it limited the sentencer's discretion as to who was removed from the death penalty pool by specifying mitigating factors. Apparently the Ohio Legislature had reasoned in such a manner when it passed the capital punishment statute under which Sandra Lockett was sentenced to death,<sup>28</sup> limiting the sentencer's

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- g. The murder was committed for pecuniary gain.
  - h. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

MODEL PENAL CODE § 210.6(3) (Proposed Official Draft 1962). Studies indicate that the vast majority of defendants become death eligible because of the felony-murder (circumstance (e)) and vile murder (circumstance (h)) circumstances. See Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138-39 (1986).

27. As with aggravating circumstances, see *supra* note 26, the MPC provided a sample list of mitigating circumstances that was widely used:

*Mitigating Circumstances*

- a. The defendant has no significant history of prior criminal activity.
- b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- f. The defendant acted under duress or under the domination of another person.
- g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- h. The youth of the defendant at the time of the crime.

MODEL PENAL CODE § 210.6(4) (Proposed Official Draft 1962). The Model Penal Code, however, did not limit the sentencer to the list of mitigating circumstances, but allowed consideration of "any other facts that it deems relevant." *Id.* at § 210.6(2).

28. According to the statutory history described in *Lockett*, prior to *Furman* the Ohio House of Representatives had passed a bill setting up a guided discretion system that did not limit the mitigating circumstances which the sentencer could consider. *Furman* was decided while the House bill was before the Ohio Senate, and the Senate,

consideration to three mitigating factors (provocation, duress and mental deficiency).<sup>29</sup>

B. *Lockett v. Ohio: The Federalization of Mitigating Circumstances*

If the Court was looking to establish the proposition that limiting consideration of mitigating evidence might lead to an unwarranted imposition of the death penalty, *Lockett*'s facts provided a favorable setting. The record raised a distinct possibility that Lockett had been only a minor participant in the robbery leading to the victim's death and that the jury had convicted her of capital murder on an aiding and abetting theory rather than specifically finding that she intended or contemplated that a killing would occur.<sup>30</sup> Moreover, Lockett had no significant prior record and was making progress in overcoming drug addiction. Psychological examinations had shown her to be mentally normal with a favorable prognosis for rehabilitation.<sup>31</sup> The *coup de grace* was that these very factors that made her rehabilitation prognosis favorable actually deprived her of a chance to qualify for the only statutory mitigating factor available under the case's facts, that the offense was "primarily the product of

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apparently in reaction to *Furman*, eliminated the sentencer's discretion to consider mitigating circumstances. See *Lockett v. Ohio*, 438 U.S. 586, 599-600 n.7 (1978).

29. The Ohio Statute provided that:

Regardless of whether one or more of the aggravating circumstances . . . [is] proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a [preponderance] of the evidence:

1. The victim of the offense induced or facilitated it.
2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REV. CODE ANN. § 2929.04(B) (Baldwin 1975), *quoted in Lockett*, 438 U.S. at 609 app.

Although the Ohio statute strictly limited what constituted a valid mitigating factor, it did provide that once the factor was found, the sentencer could not impose the death penalty. In contrast, schemes based upon the MPC, such as Georgia's, required the sentencer to weigh the mitigating evidence against the aggravating circumstances. See *Gregg*, 428 U.S. at 197-98.

30. *Lockett*, 438 U.S. at 589-93. There was some evidence that Lockett had not even stayed with the getaway car during the robbery, but had gone to get something to eat. *Id.* at 594 n.2 (summarizing presentence report).

31. *Id.* at 594.

psychosis or mental deficiency.”<sup>32</sup> Nor was Lockett’s appeal hurt that the sentencing judge apparently felt unduly restrained by the statute’s limited mitigating factors when he stated that he found “no alternative, whether [he] like[d] the law or not” to imposing the death penalty.<sup>33</sup>

Chief Justice Burger’s plurality opinion<sup>34</sup> is best characterized as an evidentiary ruling on what mitigating evidence is constitutionally relevant for the sentencer to consider when deciding whether to impose the death penalty.<sup>35</sup> The Chief Justice began his opinion by drawing two lessons from the Court’s previous holdings: first, imposition of the death penalty requires greater reliability than other penalties, and, second, the Court’s decisions striking down mandatory death penalties had established that at least some aspects of the “individual offender or the circumstances of the particular offense” were constitutionally relevant.<sup>36</sup> The Court’s task in

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32. *Id.*

33. *Id.*

34. Although the Chief Justice’s opinion commanded only four votes, Justice Marshall clearly agreed with the plurality’s objection that the Ohio Statute did not allow individualized consideration. *Id.* at 620–21 (Marshall, J., concurring in judgment). He refused to formally concur in the plurality opinion, however, because he could not share the plurality’s “assumption” that the death penalty could ever be applied fairly. *Id.* at 621. *Cf.* *Franklin v. Lynaugh*, 487 U.S. 164, 191 n.1 (1988) (Stevens, J., dissenting) (*Lockett* has precedential value of majority opinion because concurrence was on broader grounds).

Calling a Supreme Court opinion in the death penalty area a plurality or majority opinion is often a tricky proposition. Justices Marshall and Brennan (Justice Brennan did not participate in *Lockett*) have stood steadfastly by their position in *Gregg* that the death penalty is always unconstitutional, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), and consequently often concur in a judgment reversing a death penalty but not in the opinion. For example, in *Coker v. Georgia*, 433 U.S. 584, 600 (1977), Justices Brennan and Marshall concurred in the judgment finding that the death penalty was disproportionate for a rapist, but on the grounds that the death penalty was always unconstitutional. Presumably they agreed with the plurality opinion that the death penalty was in fact disproportionate for rape, but because they concurred only in the judgment, Justice White’s opinion was rendered a “plurality” opinion. Justice Marshall’s *Lockett* concurrence had the same effect of making Chief Justice Burger’s reasoning only a plurality opinion.

35. Although *Lockett* is an eighth amendment case, its premise that the defendant must be allowed to present certain types of mitigating evidence because it is reliable and relevant has strong parallels to the Court’s due process ruling that “an essential component of procedural fairness is an opportunity to be heard.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (state must allow defendant to present “competent, reliable evidence bearing on credibility of a confession when such evidence is central to the defendant’s claim of innocence.”). *Lockett* differs, of course, in that the evidence essential to the defendant being heard goes to the claim that the death penalty is not justified rather than to a claim of innocence.

36. *Lockett*, 438 U.S. at 602–04 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

*Lockett*, according to the Chief Justice, was to take the next step beyond these holdings and answer the questions of exactly "which facets of an offender or his offense [are] deemed 'relevant' in capital sentencing [and] what degree of consideration of 'relevant facets' [is] require[d]." <sup>37</sup> His answer was a broad one: "the sentencer, in all but the rarest kind of capital case, [can]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." <sup>38</sup> By limiting the sentencer's consideration of mitigating circumstances, the Chief Justice concluded, statutes like Ohio's "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." <sup>39</sup>

Although the *Lockett* Court certainly was correct that its decision was rooted in the principle of individualized punishment that had led the Court to find mandatory death penalties unconstitutional, *Lockett* broadened the principle. In declaring the mandatory death penalty unconstitutional, the Court simply had said that the state could not preclude consideration of all mitigating evidence. <sup>40</sup> *Lockett*, on the other hand, declared off-limits any effort to limit the evidence a defendant could present as a defense to the death penalty so long as the evidence touched upon the defendant's character or the nature of the offense. After all, Ohio had not prevented the defendant from presenting a case against the imposition of death penalty, but had only tried to limit the defendant's arguments to factors *the state* viewed as relevant. <sup>41</sup> *Lockett* made clear that such relevancy determinations were a matter of federal

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37. *Id.* at 604.

38. *Id.*

39. *Id.* at 605.

40. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty violates eighth amendment); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same).

41. It is instructive, for instance, to see how the Ohio Supreme Court had reconciled Ohio's statute with *Woodson* and *Roberts*:

The General Assembly might properly have included other mitigating circumstances, or declined to list specific mitigating circumstances, but we conclude that those which are listed do direct inquiry both to the circumstances of the crime and to the individual culpability of the defendant, and so adequately guide the decision of the sentencing authority. It is a delicate legislative task to provide standards which are not arbitrary, yet which allow meaningful consideration of the defendant and his crime, and it is an essential judicial task to assure that those standards be strictly construed in favor of the defendant, to allow the broadest consideration of mitigating circumstances consistent with their language.

*State v. Bayless*, 48 Ohio St. 2d 73, 86, 357 N.E.2d 1035, 1045-46 (1976).

constitutional law and that the eighth amendment principle of individualized consideration barred the state from determining for the sentencer which aspects of the offender or the offense justified consideration as mitigating factors.

The Court did have an alternative, advocated in part by Justice Blackmun in a concurring opinion, to *Lockett*'s wholesale removal of mitigating circumstances from state control. The opinion could have narrowly held that the eighth amendment required that the defendant's degree of participation and *mens rea* be included on the state's list of mitigating factors.<sup>42</sup> Under this approach, the Court presumably would have developed, on a case-by-case basis, a list of constitutionally required mitigating factors and then left the state free to augment the core list as they saw fit. This approach, had it prevailed, essentially would have mirrored the Court's treatment of aggravating factors by developing a list of Court approved mitigating factors for the states to use. In theory, this approach still could have led to *Lockett*'s broad definition of what constitutes relevant mitigating circumstances if the Court kept finding each challenged factor to be "relevant," but it would have done so on a case-by-case basis.

The plurality opinion did not expressly explain why it eschewed such a factor-by-factor approach. However, good reasons existed for its rejection once a majority agreed that "relevant" mitigating circumstances should include all aspects of the defendant and the offense arguing for a sentence less than death. To have prolonged reaching *Lockett*'s ultimate conclusion through step-by-step holdings would have sewn further confusion in an already confused area of the law. Indeed, one of the Court's explicit goals in deciding *Lockett* was to clarify the eighth amendment principles governing capital punishment: "The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views [from prior cases] in order to provide that guidance."<sup>43</sup> In *Gregg*, the Court had attempted to articulate its views on the need to narrow eligibility for the death

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42. Cf. *Lockett*, 438 U.S. at 613, 615-16 (Blackmun, J., concurring) (advocating "more limited" rule which would "merely require[] that the sentencing authority be permitted to weigh any available evidence . . . concerning the defendant's degree of participation . . . and the nature of his *mens rea* in regard to the commission of the homicidal act.").

43. *Id.* at 602.

penalty, and it clearly hoped that through *Lockett*'s holding it was completing the mitigating half of the circle.

*Lockett* quickly became a mainstay of the Court's death penalty jurisprudence, and it required the rewriting or judicial modification of state statutes which had limited the mitigating circumstances that could be raised. The Court applied *Lockett* to different contexts in a manner that continually stressed that state efforts to limit full consideration of mitigating evidence ran afoul of the eighth amendment. Among its post-*Lockett* rulings, the Court invalidated judicial barriers to consideration of mitigating evidence,<sup>44</sup> statutory barriers to consideration of all mitigating evidence,<sup>45</sup> procedural hurdles such as jury unanimity requirements,<sup>46</sup> and evidentiary restrictions such as temporal limits on whether the defendant's behavior was relevant mitigating evidence.<sup>47</sup> The Court also reaffirmed its condemnation of mandatory death penalties, even in the very specific context of an inmate serving a life sentence who commits a murder.<sup>48</sup> The Court's hope that *Lockett* would stand as a bedrock eighth amendment principle providing coherence to its death penalty rulings was evident in these cases.

*Lockett* and its progeny thus came to stand as a rather formidable barrier to any state efforts to regulate what mitigating evidence a defendant could rely upon in trying to argue for a sentence less than death. In fact, based on the cases following *Lockett*, a persuasive argument could have been made that the mitigating side of the death penalty balance had been preempted as a matter solely for federal constitutional law and was completely off-limits to the states. Such an argument would have proven to be in error, however, for within *Lockett*'s holding was an underlying tension with

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44. *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.10 (1982) (reversing death penalty because sentencing judge apparently believed defendant's youthfulness and mental disturbance were not permissible mitigating circumstances to consider under state law—"We note that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances' . . . [but] *Lockett* requires the sentencer to listen.").

45. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (Texas scheme of posing special questions to sentencer invalid to the extent it precludes sentencer from considering defendant's mental retardation).

46. *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988).

47. *Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of defendant's good behavior *after* arrest must be admitted as relevant mitigating evidence).

48. *Sumner v. Shuman*, 483 U.S. 66 (1987). This was a situation expressly left an open issue in *Lockett*. See *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978).

*Furman* and *Gregg* that provided a foothold for restraining *Lockett* and, perhaps eventually, the means of its own demise.

II. THE TENSION BETWEEN "INDIVIDUALIZED  
CONSIDERATION" AND "GUIDED DISCRETION":  
CAN THEY BE RECONCILED?

A. *The Two Stages of the Death Penalty Decision*

Even the most ardent supporter of *Lockett*'s holding can muster some sympathy for the Ohio legislature. Reading *Furman*'s condemnation of unbridled discretion, it identified specific aggravating circumstances on one side of the ledger and specific mitigating factors on the other side for the sentencer to consider, thinking it was fulfilling the Court's commands.<sup>49</sup> At least on the surface, *Lockett*'s immunization of mitigating circumstances against state regulation appears to conflict with *Furman* and *Gregg*'s most fundamental premise that a sentencer must not be given unbridled discretion over whether to impose the death penalty. Yet, after *Lockett*, one of the surest routes to reversible error would be to guide the sentencer by listing mitigating factors that could be considered without also making clear that the sentencer could consider any unlisted mitigating evidence bearing on the offender's culpability.<sup>50</sup>

In *Lockett*, it was Justice White who most forcibly made the argument that allowing consideration of all mitigating evidence that bears on the appropriateness of the death penalty conflicts with *Furman*. Justice White complained that "[t]he Court has now completed its about-face since *Furman v. Georgia*," and expressed the great[ ] fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that "its imposition would then be

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49. See *supra* note 28. Justice Rehnquist lamented in his *Lockett* dissent that: "[T]he Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed." 438 U.S. at 629 (Rehnquist, J., concurring in part and dissenting in part).

50. *Boyde v. California*, 110 S. Ct. 1190 (1990), is not to the contrary. In *Boyde*, the defendant challenged a jury instruction on the grounds that it did not adequately convey to the jury that it was allowed to consider non-statutory mitigating circumstances. Although a majority upheld the instruction, it did so because it found the instruction adequately conveyed to the jury that it could consider unlisted mitigating factors, not because such an instruction was unnecessary. *Id.* at 1197-1201.



pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes."<sup>51</sup>

Justice White's opinion must be qualified by two considerations. First, he had voted to uphold mandatory death penalties, and he made clear in *Lockett* that he continued to reject the principle of individualized consideration as an eighth amendment value.<sup>52</sup> Second, his fear of a reversion back to a pre-*Furman* state of affairs appeared to stem from a concern that sentencers might respond to the mitigating evidence by "refus[ing] to impose the death penalty no matter what the circumstances of the crime,"<sup>53</sup> rather than from a disagreement that such evidence was relevant *if* one accepted the principle of individualized consideration. It was unclear, therefore, whether Justice White would continue to object if his fear proved to be unfounded that sentencers would use *Lockett* to arbitrarily impose the death penalty only on "those very few for whom society has least consideration."<sup>54</sup>

The Court took a number of years before it began to acknowledge and address that a "tension . . . has long existed between the two central principles [of guided discretion and individualized sentencing] of our Eighth Amendment jurisprudence."<sup>55</sup> The *Lockett* plurality itself had not directly responded to Justice White's concerns over arbitrariness, although its justification for a broad definition of relevance—that it *enhanced* the reliability of the sentencer's decision—stood in direct contradiction to his concerns. Consequently, it is only in the more recent cases involving *Lockett* issues that the Court has begun to address the tension directly.

The Court's basic response has been to conceptualize the death penalty decision as consisting of two stages. The first stage involves the decision of whether the defendant is eligible for the death penalty and the second stage focuses on the decision not to impose the

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51. *Lockett*, 438 U.S. at 622–23 (White, J., dissenting in part) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (citations omitted)).

52. *Id.* (reaffirming adherence to his dissent in *Roberts v. Louisiana*, 428 U.S. 325, 337 (1976)).

53. *Id.*

54. *Id.* Justice Rehnquist dissented in part out of the same concern that "the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it." *Id.* at 631 (Rehnquist, J., concurring in part and dissenting in part).

55. *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring); see also *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) ("arguably these two lines of cases . . . are somewhat in 'tension' with each other."); *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, J. dissenting) (observing "there perhaps is an inherent tension").

death penalty.<sup>56</sup> For the first stage, the eighth amendment focus will be on whether the state has sufficiently narrowed the class of defendants who are "death eligible" and whether the sentencer has been guided adequately in its identification of such defendants. The second stage says *once* the narrowing process has taken place, the sentencer must decide whether or not the defendant should fall out of the death penalty pool. After *Lockett*, the sentencer's decision must be made only after it has considered all mitigating evidence bearing on the offender and the offense.<sup>57</sup>

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56. See, e.g., *Penry v. Lynaugh*, 109 S. Ct. 2934, 2951 (1989); *McCleskey*, 481 U.S. at 304 ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence.") (emphasis in original); *Zant v. Stephens*, 462 U.S. 862, 878-79 (1983). The two-phase approach actually has its roots in Justice White's *Gregg* concurrence in which he rejected the defendant's argument that the Georgia Statute violated *Furman* by investing too much discretion in the sentencer:

The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

*Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring) (emphasis in original); see also Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 374-76 (1981).

57. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court approvingly quoted the Georgia Supreme Court's conceptualization of the process as a pyramid divided into three planes:

The first plane of division above the base separates from all homicide cases those which fall into the category of murder . . . .

The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances . . . .

The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder.

*Id.* at 870-72 (quoting *Zant v. Stephens*, 250 Ga. 97, 99-100, 297 S.E.2d 1, 3-4 (1982) (citations omitted)).

Splitting the decision-making process into two distinct stages allows the Court to justify treating aggravating and mitigating factors differently by maintaining that they address distinct aspects of the sentencer's decision. *Furman*'s concern with unbridled discretion is satisfied through the specification of aggravating circumstances that operate to identify the pool of defendants upon whom the penalty can be imposed.<sup>58</sup> Once the pool is identified and the sentencer is faced with the decision of whether "to decline to impose the death sentence,"<sup>59</sup> then full consideration of mitigating evidence must be allowed. This stage enhances reliability by ensuring that the sentencer has considered all relevant factors pertaining to the individual's culpability and character before making its "reasoned moral response."<sup>60</sup> Thus, by dividing the decision process into two stages, the Court has been able to find that the sentencing process accommodates the "twin objectives" of guided discretion and individualized consideration.<sup>61</sup>

#### B. Justice Scalia's Call for Overruling *Lockett v. Ohio*

Does this explanation resolve the "inherent tension" between *Furman* and *Lockett*? Justice Scalia emphatically has declared that it does not. He believes that it is impossible to reconcile the notions of guided discretion and individualized consideration: "To acknowledge that 'there perhaps is an inherent tension,' between [the *Lockett*] line of cases and the line stemming from *Furman* . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."<sup>62</sup> Nor does he believe that the death penalty decision itself can be split into two dimensions, arguing that, "[t]he decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is

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58. *Penry*, 109 S. Ct. at 2951; see also *Franklin v. Lynaugh*, 487 U.S. 164, 198-99 (1988) (Stevens, J., dissenting) (*Gregg* and *Lockett* both "guide" by focusing attention on offender and the offense).

59. *McCleskey*, 481 U.S. at 304 (emphasis in original).

60. *Penry*, 109 S. Ct. at 2951 (O'Connor, J., concurring).

61. *Spaziano v. Florida*, 468 U.S. 447, 459-60 (1984); see also *Franklin*, 487 U.S. at 182.

62. *Walton v. Arizona*, 110 S. Ct. 3047, 3063 (1990) (quoting *McCleskey*, 481 U.S. at 363 (Blackmun, J., dissenting)). Like Justice Scalia, legal commentators also have argued that *Furman* and *Lockett* are in conflict, but usually for the very different purpose of illustrating the failure of the Court's entire death penalty jurisprudence, including that built upon *Gregg*. See generally Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1153 (1980); Weisberg, *supra* note 7.

unguided discretion to impose as well.”<sup>63</sup> Consequently, for Justice Scalia, if the sentencer is given unbridled discretion *at any point* in the decision-making process, *Furman*’s command of providing a “governing standard” to the sentencer is violated.<sup>64</sup> Because he believes that *Lockett* and *Furman* are irreconcilable, Justice Scalia declared in his concurring opinion in *Walton v. Arizona* that he “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.”<sup>65</sup>

As with Justice White’s dissent in *Lockett*, Justice Scalia’s objection to *Lockett* did not stem solely from the discretion given the sentencer through *Lockett*’s broad definition of relevant mitigating evidence. His objection also extended to the very principle of individualized consideration established in *Woodson v. North Carolina*<sup>66</sup> and *Roberts v. Louisiana*,<sup>67</sup> the cases finding mandatory death penalties unconstitutional. Justice Scalia reiterated in abbreviated form the dissenters’ position in *Woodson* and *Roberts* that the eighth amendment provided no textual support for rejection of mandatory death penalties:

[t]he mandatory imposition of death—without sentencing discretion—for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment, because it will not be ‘cruel’ (neither absolutely nor for the particular crime) and it will not be ‘unusual’ (neither in the sense of being a

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63. *Penry*, 109 S. Ct. at 2968 (Scalia, J., concurring in part and dissenting in part). It was in his *Penry* concurrence that Justice Scalia first noted his dissatisfaction with the interaction of *Furman* and *Lockett*. *Id.* at 2968–69.

64. *Walton*, 110 S. Ct. at 3063. Justice Scalia elaborated:

Pursuant to *Furman*, and in order “to achieve a more rational and equitable administration of the death penalty,” we require that States “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance.’” In the next breath, however, we say that “the State *cannot* channel the sentencer’s discretion . . . to consider any relevant [mitigating] information offered by the defendant,” that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not “deserve to be sentenced to death.” The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.

*Id.* (citations omitted).

65. *Id.* at 3068. If the temptation arises to condemn Justice Scalia for refusing to abide by the majority’s rule, fairness requires that one remember that Justices Brennan and Marshall have steadfastly adhered in every post-*Gregg* case to their dissenting position in *Gregg* that the death penalty is *per se* unconstitutional. See *supra* note 34.

66. 428 U.S. 280 (1976).

67. 428 U.S. 325 (1976).

type of penalty that is not traditional nor in the sense of being rarely or 'freakishly' imposed).<sup>68</sup>

In advocating this narrower interpretation of "cruel and unusual,"<sup>69</sup> Justice Scalia also discounted as "quite immaterial" the plurality's reliance in *Woodson* and *Roberts* on the historical and legislative trend against mandatory death penalties<sup>70</sup> and their use of evidence that juries faced with mandatory death penalties frequently disregard their instructions and refuse to return a guilty verdict for the capital offense.<sup>71</sup> As he had with *Lockett*, Justice Scalia declared that he no longer would follow *Woodson*'s principle of individualized consideration, "a principle so lacking in support in constitutional text and so plainly unworthy of respect under *stare decisis*."<sup>72</sup>

In assessing Justice Scalia's call for overruling *Woodson* and *Lockett*, it is important to recognize that, as with Justice White's

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68. *Walton*, 110 S. Ct. at 3067 (Scalia, J., concurring). It was only with reluctance that Justice Scalia found himself even willing to adhere to *Furman*. In *Walton*, he expressed the opinion that *Furman*'s interpretation of the eighth amendment "is probably not what was meant by an 'unusual punishment' in the Eighth Amendment," but concluded that the Eighth Amendment would "bear" *Furman*'s interpretation. *Id.* at 3066.

69. Justice Scalia's precise interpretation of the eighth amendment remains to be developed, as he did not view *Walton* as the proper occasion to fully explore the issue. *Id.* at 3066. His brief analysis suggests that to the extent he accepts *Furman*'s conclusion that "unusualness" includes rarely imposed penalties as well as non-traditional punishments, his main disagreement with the *Woodson* Court's interpretation of the eighth amendment was its willingness to include "contemporary community values" and "human dignity" as legitimate eighth amendment inquiries. *Id.* at 3067 (dismissing such factors as "immaterial" and irrelevant); see also *id.* at 3090 n.7 (Stevens, J., dissenting) (contending that Justice Scalia overlooks these factors).

70. *Id.* at 3067.

71. *Id.* This appears to be the only part of *Woodson*'s analysis that Justice Scalia thought even arguably proper under the eighth amendment, because it would fall within *Furman*'s definition of "unusualness" as including the arbitrary imposition of the penalty, see *supra* note 69. Justice Scalia dismissed the argument, however, because he believed it "conjecture (found nowhere else in the law) that juries systematically disregard their oaths." *Id.* at 3067. He also contended that if jury nullification does occur, it undermines *Furman* itself, because if juries would not obey instructions under a mandatory death penalty scheme, there is no reason to believe they would follow the standards required by *Furman* in a guided discretionary scheme. Justice White had made a similar argument in his *Roberts* dissent. *Roberts v. Louisiana*, 428 U.S. 325, 360 (1976) (White, J., dissenting).

The argument, however, fails to recognize that juries were disregarding their oaths under mandatory schemes because they had no other means of avoiding impositions of the death penalty for a particular defendant whom the jury did not believe deserved to die. *Woodson* and *Lockett* provide the jury a *legal* means to channel their individualized consideration, making it much more likely that they will follow the standards given to them. See also *infra* notes 90-92 and accompanying text.

72. *Walton*, 110 S. Ct. at 3068.

dissent in *Lockett*, two different arguments are being forwarded: one that individualized consideration is not required by the eighth amendment and one that it conflicts with *Furman*. If the first basis for overruling *Lockett* is correct, that *Woodson* erroneously found that the eighth amendment requires individualized consideration, then *Lockett* also falls because its holding that the sentencer must be allowed to consider all relevant mitigating evidence is premised on the existence of such a constitutional right. In this sense, *Woodson* and *Lockett* are inextricably bound together as constitutional rulings, and Justice Scalia's packaging of them throughout his opinion as "*Woodson-Lockett*" is accurate. It is a very different argument, however, to contend that *Woodson* and *Lockett* are unsupportable not because they lack constitutional underpinnings, but rather because they conflict with a different eighth amendment command, *Furman*'s condemnation of unbridled discretion. Now the question becomes whether the eighth amendment principle of individualized consideration can be implemented without violating *Furman*'s ban on unbridled discretion. Justice Scalia appeared to acknowledge the distinction between the argument that *Woodson* and *Lockett* lack a valid constitutional basis and the contention that *Woodson* and *Lockett* cannot be constitutionally implemented:

My initial and my fundamental problem . . . is *not* that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply . . . both them and *Furman*—if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett* . . . . *Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.<sup>73</sup>

Under this argument *Woodson* and *Lockett* do not necessarily fall together. One could still find that *Lockett*'s broad treatment of mitigating circumstances violates *Furman*, but uphold *Woodson*'s more limited ruling that mandatory death penalties are unconstitutional because *no* mitigating evidence may be considered. Because the constitutional consequences vary depending upon which argument is used to overrule *Lockett*—that it lacks a constitutional basis or that it conflicts with *Furman*—each argument needs to be addressed separately.

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73. *Id.* at 3067–68.

### 1. The Eighth Amendment and the Principle of Individualized Consideration

The debate over whether the principle of individualized consideration is part of the eighth amendment's ban on "cruel and unusual punishment" need not be revisited in detail. The plurality and dissenting opinions in *Woodson* and *Roberts* admirably developed the competing viewpoints over whether the eighth amendment recognizes such a principle, and the textual and historical evidence underlying those opinions has not changed.<sup>74</sup> Any overruling of *Woodson*, therefore, could not be justified on the basis that the intervening fifteen years has yielded new evidence for the debate, but must rest solely on the current Court adopting a different interpretation of the same evidence and policy considerations.<sup>75</sup> If "the fundamental respect for humanity underlying the Eighth Amendment"

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74. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts*, 428 U.S. 325. The *Woodson* plurality based its decision on three factors. First, the plurality found that mandatory death penalties violated contemporary standards of decency. As evidence of this, Justice Stewart pointed to the legislative trend rejecting mandatory schemes and the not infrequent refusal of juries to convict defendants of capital crimes where death was the automatic penalty. The dissent, on the other hand, argued that the legislative movement towards discretionary schemes and the "actions of some maverick juries or jurors" were far too ambiguous to serve as evidence that society had rejected mandatory death penalties as violating standards of decency. *Woodson*, 428 U.S. at 309-13 (Rehnquist, J. dissenting). The dissent also argued that the large number of states adopting mandatory death penalties after *Furman* showed continued acceptance of the principle. *Id.* at 313. The plurality had dismissed those statutes as being enacted because of a belief that mandatory schemes were the only way to satisfy *Furman*. *Id.* at 289-300.

The plurality's second argument was that given the problem of jury nullification in mandatory schemes, "a mandatory scheme may well exacerbate the problem [of arbitrary and capricious death penalties] identified in *Furman*, by resting the penalty determination on the particular jury's willingness to act lawlessly." *Id.* at 303. The dissent's response primarily was to argue that if jury discretion was unobjectionable in statutes like the ones approved in *Gregg* and *Proffitt*, exercise of jury discretion through nullification would be no more objectionable. *Id.* at 314-16 (Rehnquist, J., dissenting). Nor did the dissent agree with the plurality's argument that a formalized discretionary system would make death penalty decisions more readily reviewable on appeal, because juries still did not have to specify the mitigating factors upon which they relied. *Id.* at 317-19 (Rehnquist, J., dissenting).

The plurality's final reason was its more direct and independent determination that given the unique nature of the death penalty, "the fundamental respect for humanity underlying the Eighth Amendment" required individualized consideration. *Id.* at 303-05. The dissent objected that the plurality was "surrender[ing] to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution." *Roberts*, 428 U.S. at 363 (White, J., dissenting).

75. The *Woodson* plurality's finding was that societal standards had "evolved" to reject mandatory penalties. 428 U.S. at 288-301. Thus, any new evidence would have to show society has "devolved" in its standards. One can only imagine how the Court

and the historical experience with mandatory death penalties required individualized consideration for capital cases in 1976,<sup>76</sup> the only reason that the amendment does not also require it in 1991 or later is that a majority of Supreme Court justices now hold a different view of what constitutes human dignity under the eighth amendment.

How far the Court can go in interpreting provisions of the Bill of Rights such as the ban on cruel and unusual punishment is, of course, at the center of the ongoing and heated debate over the Court's proper role in interpreting the Constitution and Bill of Rights.<sup>77</sup> Justice Scalia very well might embrace an explanation that the Court's view of human dignity under the eighth amendment has changed, in the sense that the Court no longer is willing to read into the phrase "cruel and unusual" its own views of human dignity.<sup>78</sup> The important point for this discussion is that if *Woodson* and its principle of individualized consideration are overruled, the Court's action would not be based on changes in contemporary values or jury behavior, factors relied upon in *Woodson*, but rather would reflect a change in the Court's sentiment towards a principle that has been a central tenet of the eighth amendment for fifteen years.

In arguing for overruling *Woodson* and *Lockett*, Justice Scalia was not completely insensitive to the issue of *stare decisis*. He maintained, however, that the cases had "frustrated [*stare decisis*]" very purpose [of introducing certainty and stability into the law] from the outset—contradicting the basic thrust of much of our death penalty jurisprudence, laying traps for unwary States, and generating a fundamental uncertainty in the law that shows no signs of

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would phrase such a determination: "Because society's standards of decency have now lessened to a sufficient degree . . ."

76. *Woodson*, 428 U.S. at 304.

77. Although *Furman* itself involved a closely fought battle over the Court's role in interpreting the eighth amendment, see *supra* notes 14–17 and accompanying text, Justice White saw the Court's role in *Woodson* and *Roberts* as distinguishable. In *Furman*, Justice White was on the "activist" side of the debate, finding the Court could use the eighth amendment to prevent the states from imposing the death penalty so infrequently and randomly that it no longer served legitimate penological purposes. *Furman v. Georgia*, 408 U.S. 238, 312–14 (1972) (White J., concurring). But in *Woodson* and *Roberts*, he argued that the Court no longer was simply assessing whether the state procedures produced arbitrary results, but was actively dictating procedures to be followed. *Roberts*, 428 U.S. at 356–58 (White, J., dissenting).

78. See generally R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 219–21 (1990) (criticizing Justice Brennan's argument that the eighth amendment protects "human dignity").



ending or even diminishing."<sup>79</sup> Consequently, Justice Scalia cleverly argued that overruling the cases would in fact promote certainty in the law and further the values of *stare decisis* rather than undermine them.

Justice Scalia may be correct about the future uncertainty over *Woodson-Lockett* issues,<sup>80</sup> but eliminating the principle of individualized consideration may not create any greater certainty. Although *Woodson-Lockett* issues would be foreclosed,<sup>81</sup> overruling the cases would create a constitutional acceptance of mandatory death penalties and schemes severely restricting mitigating factors, which are likely to create a whole new set of constitutional headaches if states enact them.<sup>82</sup>

The history of the mandatory death penalty is that of the sentencer seeking a means to evade the law's mandate. By definition, a mandatory death penalty requires that the state be able to define in advance a set of circumstances that *always* will justify imposition of the death penalty. Although in the abstract it may seem possible to factually describe circumstances where the death penalty is always

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79. *Walton v. Arizona*, 110 S. Ct. 3047, 3068 (1990) (Scalia, J., concurring). Justice Scalia has expressed an unwillingness to be bound too greatly by *stare decisis*, especially where the decision is of recent vintage. See *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting); Powell, *supra* note 9, at 287-88 (discussing recent challenges to the doctrine of *stare decisis*). The intensity of Justice Scalia's attack on *Woodson* and *Lockett* may in part be explained by the fact that those cases have become sufficiently embedded so that "state and federal laws and practices have been adjusted to embody [them]." *Gathers*, 109 S. Ct. at 2218. Justice Scalia's criticism of *Woodson* and *Lockett* for creating legal uncertainty is consistent with his stated concern that the law be predictable. See Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989).

80. In the 1989-90 term the Court attempted to resolve a number of *Lockett* issues regarding state procedures for instructing juries on how to use mitigating evidence. Whether these rulings will decrease the uncertainty is a questionable proposition: See *infra* notes 175-196 and accompanying text.

81. However, if the Court overrules the cases on the ground that unguided mitigation violates *Furman*, then the Court may be faced with new 'reverse *Lockett*' issues of whether sentencer consideration of mitigating evidence is adequately controlled, see *infra* notes 134-143 and accompanying text.

82. If the Court overrules *Woodson* and *Lockett* not solely on the grounds that they do not properly interpret the eighth amendment, but also on the basis that they produce arbitrary results, then the only constitutional death penalty may be a mandatory one, see *infra* notes 99-100 and accompanying text. Assuming the Court simply finds that mandatory death penalties are permissible and not required, how many states in fact enact mandatory death penalties would help shed light on the disagreement in *Woodson* over whether the states passing mandatory schemes after *Furman* did so because they believed such schemes were the only way to satisfy *Furman* or because they voluntarily chose the mandatory death penalty, see *supra* note 74.

justified, historically this task has proven impossible.<sup>83</sup> Whether through the development of legal escape routes, like the benefit of clergy in England,<sup>84</sup> or through the refusal of the sentencer to follow the law, discretion has inevitably crept into mandatory death penalty schemes and created fissures of uncertainty within the legal framework.

Two fissures of uncertainty in particular are likely to appear in a post-*Furman* mandatory death penalty scheme. The greatest constitutional stress point would be the Court's eighth amendment disproportionality analysis, which requires the Court to determine whether the death penalty is proportional and penologically justified when applied to the defendant and his offense.<sup>85</sup> The Court already has confronted a number of difficult disproportionality challenges involving the death penalty for rapists, juveniles, mentally retarded individuals and non-triggermen convicted of felony-murder.<sup>86</sup> When the Court has rejected a disproportionality challenge, it often has relied on the fact that the challenged factor can be considered in mitigation by the sentencer. For example, Justice Scalia in upholding the death penalty for sixteen and seventeen year-old offenders relied on the fact that the jury could take the offender's

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83. See generally *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976) (tracing history of mandatory death penalty in United States and concluding, "[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid."); Poulous, *supra* note 17, at 146-58.

84. The benefit of clergy is a wonderful case study of how cracks of discretion inevitably open up within supposedly mandatory schemes. The benefit originally was used in medieval England as a means of ensuring that clergy accused of crimes were tried by the ecclesiastical rather than secular courts. Ecclesiastical courts, unlike secular courts, could not render a "judgment of blood," that is, impose the death penalty. The availability of the benefit of clergy gradually was expanded from the clergy to anyone who could pass a simple literacy test. Because the test always used the same bible verse, the 51st Psalm, the benefit was often extended on the basis of memorization rather than literacy. Much of the history of the death penalty in England is a tug-of-war over the scope of the benefit of clergy. See generally G. DALZELL, *BENEFIT OF CLERGY IN AMERICA & RELATED MATTERS* 20 (1955); L. GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* 7 (1969); 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 461 (1883).

85. *Gregg v. Georgia*, 428 U.S. 153, 173, 182-87 (1976) (plurality opinion).

86. See *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989) (death penalty not disproportionate for 16 and 17 year olds); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (death penalty not *per se* disproportionate for mentally retarded defendants); *Tison v. Arizona*, 481 U.S. 137 (1987) (death penalty not disproportionate for non-triggerman who is major participant and shows reckless indifference to human life); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate for non-triggerman who does not intend to kill); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate for rape).

youth into consideration, because, as he quoted *Lockett*, "individualized consideration [is] a constitutional requirement."<sup>87</sup> Would the Court still find the death penalty for juveniles or mentally retarded individuals to be proportional if the sentencer were legally barred from taking such factors into account? Or would the Court be forced to develop two lines of disproportionality analysis, one for discretionary statutes and another for mandatory schemes?

One can only speculate (which, in part, is the point) how the Court would alter its disproportionality analysis to accommodate the pressures created by a mandatory death penalty. The Court's reliance on sentencer discretion to justify its current disproportionality analysis does suggest, however, that even with a mandatory death penalty the principle of individualized consideration eventually would surface in one form or other.

Moreover, such problems would not be confined to mandatory death penalties, but could apply to any scheme where the disputed factor is not recognized by the state as a valid mitigating circumstance. It is highly instructive that of the three Justices in *Lockett* who rejected the plurality's principle of individualized consideration, two—Justices White and Blackmun—still would have found Ohio's death penalty statute with its limited mitigating factors unconstitutional as applied to *Lockett*. Justice White would have reversed because he believed the death penalty for a non-triggerperson who did not intend to kill was so disproportionate that it violated the eighth amendment.<sup>88</sup> Justice Blackmun, on the other hand, rejected Justice White's disproportionality approach as too likely to create constitutional confusion,<sup>89</sup> and advocated reversal through

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87. *Stanford*, 109 S. Ct. at 2978. Justice Scalia was even more direct in *Thompson v. Oklahoma*, arguing that *Lockett* changed his disproportionality analysis when applied to death sentences for 15 year-old offenders:

If the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment. We have already decided as much, and more, in *Lockett v. Ohio*.

*Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting); see also *Penry*, 109 S. Ct. at 2958 ("[s]o long as sentencers can consider and give effect to mitigating evidence of mental retardation . . . an individualized determination of whether 'death is the appropriate punishment' can be made in each particular case.").

88. *Lockett v. Ohio*, 438 U.S. 586, 624-28 (1978) (White, J., dissenting).

89. *Id.* at 613-16 & n.2 (Blackmun, J., concurring).

"[t]he more manageable alternative" of what amounted to a very limited *Lockett* rule. The inability of Justices White and Blackmun to agree on an alternative theory to individualized consideration for reversal, despite their shared finding of unconstitutionality, leaves one less than sanguine that overruling *Woodson* and *Lockett* would bring harmony to the eighth amendment.

The second likely fissure of uncertainty that would be created by capital sentencing schemes eliminating or severely limiting sentencer consideration of mitigating evidence stems from the historical lesson that sentencers faced with such schemes will refuse to follow the law.<sup>90</sup> *Woodson*'s detractors have suggested that jury nullification is but one form of sentencer discretion and, therefore, if discretion is permissible under *Gregg* no basis for objection to jury nullification exists.<sup>91</sup> That argument, however, completely fails to distinguish between discretion exercised through lawful channels and renegade discretion.

*Woodson* and *Lockett* directly acknowledge the need for discretion and incorporate it into the internal decision-making process of the sentencer, allowing the sentencer to directly address the relevant evidence. Sentencer nullification, in contrast, requires the sentencer to exercise discretion within the larger context of deciding whether to disobey the law—renegade discretion. Forcing the sentencer to exercise discretion by deciding whether or not to operate within the confines of the law adds a wild card aspect to the sentencer's decision that is much more likely to produce arbitrary and capricious results. Like-situated defendants may be treated differently not because the sentencers differ over whether the evidence justifies death, but because the sentencers differ over whether they can depart from the legal standards.

If history repeats itself and sentencer nullification surfaces, such an occurrence would present serious constitutional problems

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90. Although Justice Scalia dismissed the problem of jury nullification as "conjecture," *Walton v. Arizona*, 110 S. Ct. 3047, 3067 (1990), almost every study of mandatory death penalty schemes has arrived at the conclusion that jury nullification was a significant problem. See *Woodson v. North Carolina*, 428 U.S. at 280, 294 n.29 (reviewing literature and studies documenting problem of jury nullification in capital cases). See generally THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 27 (H. Bedau 1st ed. 1964); T. SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE 13 (1959), cited in *Woodson*, 428 U.S. at 294 n.29; Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974). But cf. Poulos, *supra* note 17 at 148–51 (concluding jury nullification explanation for movement to unfettered discretion schemes "overly simplistic").

91. *Woodson*, 428 U.S. at 314–16 (Rehnquist, J., dissenting).

under *Furman*. Forcing the sentencer to make the renegade decision not to obey its legal instructions is not really any different in kind from the standardless discretion condemned in *Furman*. In both cases the sentencer operates without legal standards in deciding whether to impose the death penalty. The situation is arguably even more arbitrary, however, when the lack of standards arises because the sentencer is forced to defy the law, because now part of the sentencer's decision involves deciding whether to defy the legal standards themselves.

Nor, as has been argued,<sup>92</sup> does sentencer nullification under mandatory schemes mean sentencers are just as likely to disobey the channelled discretion of statutes like those approved in *Gregg* and its companion cases. The essence of such statutes is to narrow who is factually eligible for the death penalty while still providing a legal avenue for the sentencer to give voice to the principle of individualized consideration. Consequently, sentencers will be much less inclined to feel compelled to step outside the procedures that are provided. Thus, while one of Justice Scalia's goals in overruling *Woodson* and *Lockett* may be to bring stability to the law, allowing the elimination or severe curtailment of sentencer discretion would simply be to chase the principle of individualized consideration down one hole and watch it later come up another.

## 2. *Woodson-Lockett* and the Ban on Unbridled Discretion

The second way to argue for overruling *Woodson* and *Lockett* is to maintain that their requirement of individualized consideration conflicts with *Furman*'s constitutional command against unbridled discretion that produces an arbitrary and capricious imposition of the death penalty. This is a high stakes argument for both sides of the death penalty debate because of the possible consequences if the Court should find that the two principles are at total odds with each other.

For death penalty advocates, the difficulty is that if the two principles are of equal constitutional magnitude and truly cannot be reconciled, then the death penalty itself must be unconstitutional. The death penalty would be invalid not because it is *per se* cruel and unusual, but because it cannot be procedurally implemented in a constitutional fashion. For if *Woodson-Lockett*'s principle of individualized consideration requires broad discretion, but its effect is to

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92. *Walton*, 110 S. Ct. at 3067 (Scalia, J., concurring); *Roberts v. Louisiana*, 428 U.S. 325, 360 (1976) (White, J., dissenting).

give the sentencer unbridled discretion in violation of *Furman*, the death penalty becomes checkmated by the two competing constitutional principles.<sup>93</sup>

On the other hand, death penalty opponents run the risk that by arguing that the current system's discretion still produces arbitrary and capricious results, the Court's response will not be an invalidation of the death penalty but a reversal of *Woodson* and *Lockett*. Such a course of action would produce the rather unseemly appearance of the Court overruling a constitutional doctrine of fifteen years because its ultimate price—invalidation of capital punishment—is too high.<sup>94</sup> Yet, the Court conceivably could hold that *Woodson* and *Lockett* are either of lesser constitutional magnitude than *Furman* or of no constitutional stature at all.<sup>95</sup> Casting *Furman* and *Woodson-Lockett* as being in total conflict thus poses the danger that either side advocating such a conclusion may win the battle but lose the war.

Before addressing whether *Furman-Gregg* and *Woodson-Lockett* are intolerably in conflict, two initial observations must be made. First, if the two lines of cases are irreconcilable, it is not because their goals are in conflict, but rather because they cannot coherently be implemented together. The *Lockett* dissidents paint a picture of discord by stressing that *Furman* states that the key to the eighth amendment is adequately controlling discretion and yet *Lockett* takes away the states' ability to guide the sentencer on which mitigating factors to weigh. This facile contrasting of "controlled" and "open-ended" discretion, however, fails to appreciate that both lines

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93. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 314–19 (1987) (acceptance of petitioner's claim that sentencer discretion is being used in racially discriminatory fashion might mean that no constitutional death penalty scheme could exist); *Gregg v. Georgia*, 428 U.S. 153, 225–26 (1976) (White, J., concurring) (dismissing defendant's argument that too much discretion remains in Georgia system as really an argument that a constitutional death penalty statute cannot be passed). See generally Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. LAW 1, 53–54 (1987/1988) (arguing their finding that jurors do not follow statutory guidelines for imposing death penalty means *Furman* is not being satisfied and yet *Woodson* precludes alternative of mandatory death penalty).

94. Given the petitioner's strong statistical showing in *McCleskey v. Kemp* of racial discrimination based on the race of the victim, a persuasive case can be made that it was precisely because of the consequences—possible invalidation of all capital punishment schemes—that the Court refused to find that the defendant had proven that racial discrimination infected the death penalty decision. See *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting) ("The Court's decision appears to be based on a fear that the acceptance of *McCleskey*'s claim would sound the death knell for capital punishment in Georgia.").

95. See *supra* notes 74–79 and accompanying text.

of cases are aimed at the same narrowing objective of identifying, as precisely as possible, who is within the state's power to execute. *Furman* and *Gregg* pare the pool from one direction by using the egregiousness of the offense to limit the types of offenses a state may use to qualify the defendant for the death penalty, while *Woodson* and *Lockett* further narrow the pool by constraining the state's ability to keep the sentencer from considering the defendant's individual culpability for the offense. In this sense, *Furman*, *Gregg*, *Woodson* and *Lockett* actually are complementary cases working towards the same end of identifying the group of defendants most deserving of death such that its imposition is not cruel and unusual punishment.<sup>96</sup>

It is important to note the common purpose of *Furman-Gregg* and *Woodson-Lockett* at the outset, because it is easy to lose sight of their shared goal once the focus is turned on the sentencer's role. It is not until the implementation stage that the two lines of cases begin to part: *Furman-Gregg* narrow by restricting sentencer discretion, while *Woodson-Lockett* refine by expanding the sentencer's evidence base. Of course, whether the two principles can be consistently implemented is a legitimate and crucial inquiry. However, when the inquiry is undertaken, it should be done with the understanding that the cases are aimed at the same goal. This understanding is easily lost if one focuses only on Justice Scalia's powerful rhetorical portrayal of the two lines of cases as irreconcilable.<sup>97</sup>

The second observation to bear in mind is that *Furman*'s quarrel was not with all sentencer discretion, but only with discretion that yielded arbitrary and capricious death penalties.<sup>98</sup> To simply point out that a particular case or principle requires broad sentencer discretion does not by itself invoke *Furman*'s condemnation. The critical question, therefore, is whether the discretion *Woodson* and

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96. See *Franklin v. Lynaugh*, 487 U.S. 164, 198-99 (1988) (Stevens, J., dissenting) (consideration of all mitigating evidence furthers *Gregg*'s goal of guiding discretion by focusing sentencer on the offender and the offense).

97. A similar glossing over may occur if we simply stop at Justice Scalia's statement that the "individualized determination is a unitary one . . . does the defendant deserve death for this crime?" *Walton v. Arizona*, 110 S. Ct. 3047, 3064 (1990) (Scalia, J., concurring). Just because the ultimate question requires a yes or no decision does not mean that the determination itself does not have several dimensions. *Furman-Gregg* and *Woodson-Lockett* are intended to ensure the sentencer has an opportunity to consider all facets of the decision.

98. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

*Lockett* require to further individualized consideration results in the freakish imposition of the death penalty.

With these two observations in mind, the examination of whether and to what degree, the *Furman-Gregg* and *Woodson-Lockett* lines of cases are in conflict can proceed. It is easiest to start with the 'total conflict' view and ask whether the *Lockett* dissidents truly believe that sentencer discretion to consider the individual circumstances of the defendant is totally irreconcilable with *Furman*'s commands. One way to test the total conflict position is to ask what would be a valid death penalty scheme if the proposition is adopted. If giving the sentencer discretion to consider the particular offender and the circumstances of the offense by itself truly undermines *Furman*'s command, then the answer must be that the *only* valid death penalty would be a mandatory death penalty that takes all discretion from the sentencer.<sup>99</sup> Such a conclusion not only would mean that *Woodson* and *Lockett* were wrong in *requiring* individualized consideration, but that *Gregg* also was wrong in *allowing* any discretion to be given the sentencer.

Neither Justice Scalia nor the *Lockett* dissenters appear to advocate the extreme position that only mandatory death penalties are constitutional, but rather object to a constitutional requirement "that the sentencer must enjoy *unconstrained discretion* to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not 'deserve to be sentenced to death.'"<sup>100</sup> The difference in objection is extremely important, because it is a concession that individualized consideration does not always conflict with *Furman*; otherwise, the only constitutional death penalty would be a mandatory one. As a result, the problem no longer is a choice between the different sides of a dichotomy—no discretion versus individualized consideration—but an issue of where on a continuum the principles come into conflict. To that extent, this issue is not a "*Woodson-Lockett*" one, but solely a *Lockett* issue, because the real complaint is not that all individualized consideration conflicts with *Furman*, but that *Lockett* extended the principle so far that now a conflict arises.

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99. Such was the understanding of a majority of the states passing death penalty statutes after *Furman*. See Poulous, *supra* note 17 at 180–92.

100. *Walton*, 110 S. Ct. at 3063 (Scalia, J., concurring) (emphasis added) (quoting *Penry v. Lynaugh*, 109 S. Ct. 2934, 2950 (1989)). Justices White and Rehnquist, while dissenting in *Lockett*, both concurred in *Gregg*'s upholding of Georgia's discretionary statute.



Once the issue is recognized as a question of degree rather than an all-or-nothing choice, the inquiry can be refined to whether *Lockett*'s broad definition of relevance does inevitably result, as Justice Scalia claims, in "random mitigation" and a reversion to freakish results.<sup>101</sup> As a starting point, it is helpful to distinguish between two potential types of arbitrary and capricious results. The first type occurs where the sentencer bases its decision on truly random factors not rationally bearing on whether the defendant deserves death; for example, if the sentencer decides not to impose the death penalty because of the race of the victim, the defendant's societal status, a flip of the coin, or whether the sky is blue, then *Furman* undeniably is violated.

To the extent such results occur,<sup>102</sup> however, the blame cannot be placed directly on *Lockett*'s definition of relevant mitigating evidence. Although broad, the definition is not in and of itself arbitrary and capricious, but is directly tied to the ultimate issue of whether the defendant deserves the death penalty.<sup>103</sup> Certainly, no reasonable person would argue that invidious factors like race or poverty, let alone truly random factors like coin flips or the weather, properly bear on whether the defendant deserves death.

A reply might be made that although *Lockett*'s definition is not arbitrary, the breadth of its standard invites decisions to be made on such factors in a way that a more limited definition of mitigation would not.<sup>104</sup> Empirically proving or disproving such a proposition obviously is difficult if not impossible. Still, one suspects that if sentencers do rely on invidious or random criteria, such factors will enter into the decision if the sentencer is given any discretion. At some point the sentencer will have to weigh competing factors and come to a judgment and, if the sentencer is inclined to

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101. *Id.* at 3064.

102. *Cf. McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting petitioner's statistics as not adequately proving sentencer's decision influenced by race of victim).

103. *See Gillers, Deciding Who Dies*, 129 U. PA. L. REV. 1, 29-30 (1980) (decision based on "relevant" mitigating factor under *Lockett* is by definition not arbitrary because factor will supply rational basis for not imposing death penalty).

104. *See Radin, supra* note 62, at 1153 ("[b]y requiring more individualization in capital murder cases after *Lockett* the Court has necessarily increased the area of possible arbitrariness"); Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1160-63 (1984) [hereinafter Special Project] (noting possibility that sentencer might disguise "racial motivations" by pointing to defendant's mitigating factors).

discriminate or act randomly, the opportunity will exist.<sup>105</sup> Short of banning all sentencer discretion, which may lead to its own randomness through jury nullification, curtailing *Lockett*'s scope would not cure any truly random or invidious use of mitigating factors. Indeed, arguably the most effective remedy would be not to limit the sentencer's consideration of mitigating evidence, but to require the state to define more narrowly who becomes death eligible.<sup>106</sup>

A second type of arbitrariness, and the strongest basis for claiming that *Lockett* itself produces arbitrary and capricious results, occurs if the standard is so loose that sentencers will not consistently agree on what factors justify a sentence of death. Here, the argument is that *Furman* is violated not because juries are acting irrationally, but because they are reaching inconsistent results. For example, some juries might find that the defendant's troubled childhood mitigates his responsibility, while others would dismiss it as an extenuating factor. In other words, so many factors exist over which people could disagree on whether they call for a sentence less than death—age, upbringing, drug addiction, intelligence, and so on—that the results will be arbitrary and capricious.<sup>107</sup> In contrast, the argument would proceed, if states were empowered to specify which mitigating factors are relevant, then all sentencers, at least

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105. See *McCleskey*, 481 U.S. at 317–18 & nn.40–44 (citing studies suggesting that juries in criminal cases may be influenced by factors such as victim and defendant's attractiveness).

106. *Id.* at 367 (Stevens, J., dissenting) (limiting death penalty to "extremely serious crimes" would significantly decrease discriminatory imposition of death penalty). But see *id.* at 318 n.45 (majority opinion) (arguing impracticability of adequately identifying such categories of cases).

107. Justice Scalia sardonically described the problem as follows:

It would misdescribe the sweep of this principle to say that "all mitigating evidence" must be considered by the sentencer. That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden. Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother. *Whatever* evidence bearing on the crime or the criminal the defense wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer.

*Walton v. Arizona*, 110 S. Ct. 3047, 3062 (1990) (Scalia, J., concurring).

within that state, would be using the same standards for the individualized sentencing.<sup>108</sup>

In the abstract, significant disagreement probably does exist as to whether any particular factor mitigates and to what extent.<sup>109</sup> The inquiry cannot end there, however, because sentencers are not asked to evaluate the mitigating factors abstractly, but are required by *Lockett* to apply the mitigating factors to the specific facts and decide whether the proffered mitigating factors call for a sentence less than death. The crucial inquiry, therefore, is whether sentencers diverge so greatly in making their *total* assessment of whether a defendant deserves to die that the results are freakish and arbitrary. Again, it is important to remember that *Furman* did not condemn discretion in and of itself, but discretion that produced arbitrary and capricious results.

The difficulty with determining whether the sentencer can be trusted to weigh the mitigating evidence in a rational and consistent fashion is that finding and weighing mitigating factors is generally unlike other responsibilities we entrust to the trier of fact. Normally, the criminal law tries to define its substance in terms of historical fact: did the defendant do the act? did he intend its consequences? Even the aggravating factors used to determine who is "death eligible" are usually cast as historical fact determinations, such as whether the death occurred in the course of a felony-murder.<sup>110</sup>

Mitigating factors, on the other hand, even "historical facts" like the defendant's youth, ultimately require the sentencer to provide them substance by determining their qualitative importance. This part of the decision-making process is the "moral" aspect to which Justice O'Connor referred when she described the death penalty decision as a "reasoned *moral*" decision.<sup>111</sup> The elusiveness of

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108. *Cf. id.* at 3064 ("The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard.").

109. The disagreement also illustrates, however, the difficulty of compiling a list of mitigating factors that adequately anticipates in advance the variety of factual settings that will arise.

110. Not surprisingly, the aggravating factor that has given the Court the most trouble is the "especially heinous" factor. Like mitigating evidence, the factor has the potential to be understood differently by different sentencers. *See generally* Maynard v. Cartwright, 486 U.S. 356, 358–59 (1988) (Oklahoma "especially heinous" factor not adequately defined).

111. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For further discussion, see *infra* notes 169–174 and accompanying text.

such factors in terms of traditional legal definition also helps explain why the *Lockett* Court opted for a definition of relevance that drew its meaning directly from the ultimate issue to be decided by the sentencer—whether or not to impose death—rather than attempting to identify in advance which specific factors were relevant to the decision.

Can sentencers make such a “reasoned moral” judgment without yielding arbitrary and capricious results? Justice Scalia has rejected the argument outright:

The Court today demands . . . a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant’s background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he ‘lacked the moral culpability to be sentenced to death, did not deserve to be sentenced to death, or was not sufficiently culpable to deserve the death penalty.’ The Court seeks to dignify this by calling it a process that calls for a ‘reasoned moral response,’—but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional ‘moral response’ that the Court demands to be allowed—an outpouring of personal reaction to all the circumstances of a defendant’s life and personality, an unfocused sympathy.<sup>112</sup>

Justice Scalia concluded that “‘[f]reakishly’ and ‘wantonly’ have been rebaptized ‘reasoned moral response’.”<sup>113</sup>

Despite Justice Scalia’s strong language, the question remains why one should accept his conclusion rather than the *Lockett* plurality’s opposite conclusion that expanding mitigating evidence

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112. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2968 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted). Despite Justice Scalia’s characterization, the Court has stopped far short of embracing a view of *Lockett* that allows “emotional” or “compassionate” responses by the sentencer to be considered. See *infra* notes 169–174 and accompanying text (discussing Court’s approval of anti-sympathy instructions to jury at capital sentencing hearing).

113. *Penry*, 109 S. Ct. at 2969 (Scalia, J., dissenting) (citation omitted); see also Justice Rehnquist’s prediction in his *Lockett* dissent:

If a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive of no basis upon which the jury might take it into account in imposing a sentence, the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a ‘mitigating circumstance,’ it will not guide sentencing discretion but will totally unleash it.

*Lockett v. Ohio*, 438 U.S. 586, 631 (1978).

would enhance reliability. In trying to overturn a settled constitutional principle on the grounds that it fosters arbitrariness, some evidence ought to exist that sentencers are in fact applying *Lockett* evidence in a random and inconsistent fashion. Indeed, if the Court in *McCleskey* required the defendant to produce "exceptionally clear proof before [it] would infer that the discretion has been abused" in a discriminatory fashion,<sup>114</sup> no reason exists why a similarly high standard should not apply to those challenging the sentencer's use of discretion under *Lockett*.

Empirical analysis of the proposition is an admittedly difficult task.<sup>115</sup> Substantial evidence exists that the death penalty is not being applied evenhandedly, but the inconsistency appears to be entering through a variety of portals, such as the exercise of prosecutorial discretion, inadequately defined aggravating circumstances, vague sentencing instructions, the lack of meaningful appellate proportionality review, sentencers' racial attitudes and the quality of defense representation.<sup>116</sup> The combined inconsistency emanating from these sources ultimately may require invalidation of the death penalty as arbitrary, but the crux of the issue here is why single out *Lockett* as the culprit and simply assume that it is an

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114. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

115. For an excellent general discussion of the Court's use of empirical findings in constitutional decisionmaking, see Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991). One method for determining what mitigating factors influence sentencers would be to interview sentencers who declined to impose a death sentence. Cf. Geimer & Amsterdam, *supra* note 93, at 27-39. A study funded by the National Science Foundation currently is being undertaken to interview jurors who have served on capital juries to determine what influenced their decision of whether or not to impose the death penalty. The author is the director of the California segment of the study.

Some comparative data regarding the frequency of death sentences under *Lockett* and non-*Lockett* schemes would also be informative and might be obtained from a comparison of the various death penalty schemes in operation for the six year period between *Furman* and when the Court struck down limitations on mitigating evidence in *Lockett*. A more recent case study might focus on the Texas death penalty scheme and whether the Court's ruling in *Penry*, 109 S. Ct. 2934, which required a broader consideration of mitigating evidence than previously allowed, has resulted in a significant change in death penalty rates.

116. See generally, R. HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 98-113 (1989) (surveying studies which look at the consistency of how the American death penalty is being applied); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466-68 (1981) (focusing on prosecutorial discretion as the source of racial bias); Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980) (arguing the need for more rigorous appellate proportionality review to guard against arbitrariness).

inability to process mitigating evidence which is the source of *Furman* violations.

Granted, *Lockett* expanded the scope of mitigating evidence that may be presented, but *Lockett*'s standard of relevance—evidence calling for a sentence less than death—standing alone is not irrational, and no proof exists to justify a conclusion that sentencers are reacting to “bizarre” evidence and reaching wildly divergent conclusions. Justice Scalia may be able to list mitigating factors that do not sound persuasive or consistent standing alone,<sup>117</sup> but that does not account for how the factors fit into the entire package of evidence presented to the jury, let alone whether the jury was persuaded. Moreover, trial strategy would argue against risking alienation of the sentencer by presenting “bizarre” evidence on the off-hand chance that the sentencer may act irrationally. In his *Lockett* dissent, Justice Rehnquist went so far as to express the belief that *Lockett* would not significantly alter existing practices:

[a]s a practical matter, I doubt that today's opinion will make a great deal of difference in the manner in which trials in capital cases are conducted, since I would suspect that it has been the practice of most trial judges to permit a defendant to offer virtually any sort of evidence in his own defense as he wished.<sup>118</sup>

In fact, what empirical evidence does exist suggests that to the extent sentencers are acting inconsistently as a result of inadequately guided discretion, the blame more properly is placed on a failure to adequately narrow aggravating factors rather than on aberrational use of mitigating evidence.<sup>119</sup> Yet, when evaluating vague aggravating factors, the Court has increasingly exhibited a willingness to find that the sentencer was adequately guided. In *Walton* itself, the Court approved the use of an aggravating factor that required the murder be “especially heinous, cruel or depraved,” even though the Court conceded that, “the proper degree of definition of an aggravating factor of this nature is not susceptible of mathemati-

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117. See, e.g., Justice Scalia's listing of mitigating factors that have been argued, *supra* note 107.

118. *Lockett v. Ohio* 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting).

119. See generally Geimer & Amsterdam, *supra* note 93, at 23–53. The authors indicate that if any *Lockett* problems exist, they center on the danger that the sentencer will limit too severely its consideration of mitigating evidence, *id.* at 23–39, not that they are basing their decisions on “bizarre” mitigating factors; see also F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 87–91 (1986) (studies demonstrate that sentencers are not being guided by statutory aggravating factors).

cal precision.”<sup>120</sup> Given the Court’s express deference to state court findings that a defendant properly was found to be death eligible under an aggravating factor that all concede is facially vague,<sup>121</sup> it would be especially troubling if the Court imposed stricter limits on the defendant’s ability to present mitigating circumstances that establish why he should not be sentenced to death on the rationale that the sentencer’s discretion was not adequately guided. And, as a majority of the Court has consistently recognized since *Woodson* and *Gregg*, strong reasons exist why less control should be placed on the sentencer’s consideration of mitigating evidence than on its use of aggravating factors.<sup>122</sup>

Finally, *Furman*’s concern with the arbitrary and capricious implementation of the death penalty is not satisfied by consistency alone. Identical punishment of unlike defendants may itself be arbitrary and capricious if what distinguishes the individuals would convince the sentencer that different punishments are warranted. The *Lockett* Court gave life to this principle when it found that sentencer reliability would be enhanced by providing the defendant the opportunity to tell the sentencer why, although death eligible, she did not deserve to die.<sup>123</sup> Unless one is prepared to maintain that the state can guarantee in advance that no mitigating factors exist beyond those listed in a particular statute which would justify a sentence less than death, the exclusion of such factors from sentencing consideration is itself arbitrary and capricious.<sup>124</sup>

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120. *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990). The Arizona Supreme Court had purported to give a limiting construction to the factor, which the majority relied upon to find sentencer discretion was adequately guided. *Id.* After a thorough review of the Arizona Supreme Court’s precedent, however, the dissent concluded that the heinous, cruel or depraved factor covered practically all first-degree murders. *Id.* at 3076–82 (Blackmun, J., dissenting).

121. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102–03 (1990) (adopting “rational factfinders” standard to determine if application of aggravating circumstance too vague).

122. See *supra* notes 56–61 and accompanying text.

123. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981) (“the rule in *Lockett* recognized that a consistency produced by ignoring individual differences is a false consistency.”).

124. The tension between the desire to have certainty and uniformity in the application of rules and the desire to adapt the rules for particular individuals runs throughout the law. See generally *Compassion and Judging*, 22 ARIZ. ST. L.J. 13 (1990) (panel discussion of a judge’s proper role in applying general rules to individual cases). Perhaps the most vivid and famous portrayal of the conflicting values is found not in the law books but in Portia’s response to Shylock after he has demanded the pound of flesh he is entitled to under the law: “The quality of mercy is not strained. It droppeth as the gentle rain from heaven [u]pon the place beneath. . . . It is an attribute to God himself; [a]nd earthly power doth then show likest God’s [w]hen mercy seasons justice.” W.

The above arguments are not meant to suggest that concerns over whether the sentencer is properly able to evaluate mitigating evidence are unfounded. No one can seriously contend that cases do not exist where different sentencers would have come to divergent conclusions over whether the same evidence justified the death penalty, just as cases have occurred where different triers of fact would disagree over whether the government has proven that the defendant committed the crime beyond a reasonable doubt.<sup>125</sup> If the death penalty decision is to be an individualized one, then some risk of misuse of discretion will attach.<sup>126</sup>

Given the empirical stand-off, the issue largely becomes one of choosing between competing risks: the danger that a defendant may receive a life rather than death sentence because the sentencer relied on an arbitrary factor and the risk that an undeserving defendant may receive the death penalty because the jury did not hear all mitigating factors calling for a sentence less than death. Where the argument is that the risk of arbitrariness justifies dispensing with the principle of individualized consideration—a constitutional rule expressly intended to enhance sentencer reliability and minimize the risk of erroneous sentences of death—the burden of proof should be placed on those challenging the constitutional rule to show that the risk has materialized.<sup>127</sup> The *Lockett* dissidents have yet to show

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SHAKESPEARE, *THE MERCHANT OF VENICE* 72–73 (D. Bevington ed. 1988). The translation of such notions from iambic pentameter into constitutional doctrine is an admittedly difficult proposition. Cf. Schroeder, *Compassion on Appeal*, 22 ARIZ. ST. L.J. at 45.

125. The appellate standard for reviewing jury verdicts of guilt is specifically designed to acknowledge that rational jurors may vary in viewing the evidence, by asking whether “any rational trier of fact could have found [guilt] beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Court has adopted essentially the same standard for federal courts reviewing whether an aggravating factor was properly found by the State Courts. *Lewis*, 110 S. Ct. at 3102–03.

126. Cf. *Walton v. Arizona*, 110 S. Ct. 3047, 3092 (1990) (Stevens, J., dissenting) (acknowledging mandatory death penalty may yield greater certainty, but arguing *Woodson-Lockett* is “not only wiser, but far more just.”).

127. Cf. Hertz & Weisberg, *supra* note 56, at 376 (“An erroneous decision to extinguish the defendant’s life is far more opprobrious than an erroneous decision to spare the defendant and sentence him to life imprisonment.”); Special Project, *supra* note 104, at 1162 (*Lockett* “probably correct” despite dangers associated with increased sentencer discretion).

To some degree, it is more difficult to speak of erroneous death sentences in the same sense one speaks of erroneous convictions. Because the death penalty decision involves a moral or evaluative component, it may seem incongruous to say such a decision was in error. See Weisberg, *supra* note 7, at 326, 342–43 (noting difficulty of calling a death penalty decision erroneous). Yet to the extent it is agreed that certain types of mitigating evidence will materially affect how a defendant’s culpability is assessed, excluding such evidence does increase the risk that the defendant will receive a death



that *Lockett* has resulted in the irrational scenarios that they have prophesized.

C. *The Consequences of Overruling Lockett*

Given Justice Scalia's express goal of bringing greater coherence and stability to the eighth amendment, it is important to examine the consequences if Justice Scalia should prevail in convincing the Court to overturn *Lockett* on the ground that its definition of relevance yields arbitrary and capricious results. Whether Justice Scalia's goal would be achieved is questionable, because overruling *Lockett* on arbitrariness grounds would create its own significant constitutional side effects.<sup>128</sup>

First, by removing *Lockett* discretion from the sentencer, the Court will disrupt its eighth amendment disproportionality review.<sup>129</sup> When deciding whether the death penalty is disproportionate to a particular offense or offender, and therefore in discord with "contemporary standards of decency," the Court has relied on two primary indicators: how many legislatures authorize the death penalty in the defendant's case and whether sentencers are actually sentencing defendants to death in similar circumstances.<sup>130</sup> For example, the infrequency with which sentencers actually imposed the death penalty on rapists was an important factor in the Court's decision that the death penalty was disproportionate for the crime of rape.<sup>131</sup>

If sentencer discretion is removed or severely limited, this important indicia of whether a particular use of the death penalty is in accord with "contemporary values" is lost, because sentencers will be unable to refuse to impose the death penalty on the broad

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penalty that the sentencer otherwise would believe unjustified. Evaluative judgments may still be in "error" if the judgment would have been made differently except that the evaluator was unaware or not allowed to consider material facts. Cf. Radin, *supra* note 62, at 1179-80 (analyzing risk of "moral error" present in death penalty decisionmaking process).

128. The likelihood that mandatory death penalties will produce their own constitutional problems has already been addressed. See *supra* notes 80-92 and accompanying text.

129. The need for the Court to change its current disproportionality analysis if *Woodson* is overruled and mandatory death penalties are allowed is discussed, *supra* notes 85-89 and accompanying text.

130. See *Gregg v. Georgia*, 428 U.S. 153, 181-82 (1976) (plurality opinion).

131. See *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (plurality opinion) (relying in part on fact that Georgia juries sentence rapists to death in only one out of ten cases to find death penalty disproportional); see also *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982) (relying in part on juries' rejection of death penalty for non-triggermen convicted of felony-murder to find death penalty disproportional).

grounds that it is inappropriate.<sup>132</sup> The Court primarily will be left to counting the number of states authorizing the particular use. However, authorization does not mean sentencers are in fact finding the death penalty to be justified under the authorized circumstances; only sentencer behavior can show whether community values actually support a particular use of the death penalty.<sup>133</sup> The Court might try to rely on sentencer nullification as a gauge, but it would be extremely difficult to judge whether sentencers imposing the death penalty for a particular crime were doing so because they agreed it was justified under the circumstances, or because they felt compelled to follow the law even though they believed the death penalty was not warranted. In other words, relying on jury nullification runs a high risk of "false positives" because sentencers may be sentencing particular defendants to death only because they believe they must follow the law.

The second and most disruptive ramification of overruling *Lockett* will be the necessity of redefining the proper role of mitigating factors under the eighth amendment and modifying existing death penalty statutes accordingly. If Justice Scalia truly is correct that *Lockett* is producing results in violation of *Furman*, then it is difficult to see how the Court would not be forced to overrule *Gregg*'s approval of a provision in Georgia's statute that allowed the sentencer to consider all mitigating factors and to exercise "mercy" by declining to impose the death penalty even if no mitigating factors existed.<sup>134</sup> The only way to continue to uphold the statute approved in *Gregg* after concluding that *Lockett*'s holding "destroys . . . rationality and predictability"<sup>135</sup> would be to argue that a state may choose to have an open-ended mitigation scheme but cannot constitutionally be required to do so. Justice Scalia hinted at this distinction when he stated, "It is difficult enough to

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132. The problem is especially great now that the court has held that the state need not let the jury evaluate the severity of the aggravating circumstance in a particular case. See *Blystone v. Pennsylvania*, 110 S. Ct. 1078, 1083–84 (upholding statute requiring death penalty if sentencer finds one or more aggravating circumstances and no mitigating factors, because aggravating factors are only for "limiting the class of death-eligible defendants, [and need not] be further refined or weighed by a jury."). *Blystone*, however, may have been premised in part on the notion that the severity of the aggravating factors—or, more precisely, lack of severity—could itself be considered as mitigating evidence. Cf. *id.* at 1083–84 & n.5. If *Lockett* is overruled, then the sentencer's ability to compensate for a lack of severity of an aggravating factor on the mitigating side of the equation would be removed.

133. *Gregg*, 428 U.S. at 182.

134. *Id.* at 203 (plurality opinion); *id.* at 221–22 (White, J., concurring).

135. *Walton v. Arizona*, 110 S. Ct. 3047, 3063 (1990) (Scalia, J., concurring).

justify the *Furman* requirement so long as the states are *permitted* to allow random mitigation; but to impose it while simultaneously *requiring* random mitigation is absurd.”<sup>136</sup>

Such a distinction not only is difficult, it is nonsensical. If an open-ended mitigation scheme undermines *Furman* by allowing unbridled sentencer discretion, the effect exists whether the state adopts the scheme by choice or by constitutional coercion. Therefore, invalidating *Lockett* because its broad definition of relevant mitigating evidence contradicts *Furman* also requires overturning *Gregg*’s approval of Georgia’s statute. Distinguishing between “requiring” and “permitting” states to utilize such schemes makes sense if the argument simply is that *Lockett* is not constitutionally based,<sup>137</sup> but does not work where the claim is that *the effect* of a *Lockett*-type scheme results in unacceptable arbitrariness.

Recognizing that overruling *Lockett* also requires invalidating the Georgia statute approved in *Gregg* makes clear that abandoning *Lockett* does not necessarily remove the Court from constitutional review of mitigating factors. Justice Scalia’s argument that to *not* limit mitigating evidence violates *Furman*’s ban on unbridled discretion means the states would be constitutionally obligated to specify relevant mitigating circumstances. Just as a state would violate the eighth amendment by failing to adequately narrow the death-eligible pool by specifying aggravating circumstances, so presumably would a state that failed to adequately guide the death penalty decision by specifying mitigating circumstances. The question currently asked under *Lockett*—whether the state unconstitutionally limits the sentencer’s consideration of mitigating evidence—would be turned upside down to ask whether the state adequately limits the sentencer’s consideration of mitigating evidence. The Court still would be looking over the state’s shoulder, except now it would be to ensure that the state was sufficiently limiting mitigating circumstances to satisfy the eighth amendment.

This continuing duty would occur whether or not the Court also overrules *Woodson* as not properly interpreting the eighth amendment. If the Court rules that *Woodson*’s requirement of some individualized consideration remains valid but that *Lockett* went too far down the continuum,<sup>138</sup> the Court then will have to decide which mitigating factors adequately protect the principle of individualized consideration without slipping over the line of giving

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136. *Id.* at 3064 (emphasis in original).

137. *See supra* notes 72–73 and accompanying text.

138. *See supra* notes 66–73 and accompanying text.

the sentencer too much discretion. Trying to find such a balance, and deciding mitigating factor by mitigating factor whether the factor is constitutionally required, surely would not yield the predictability sought by Justice Scalia. Indeed, the need to provide certainty and guidance was one of the reasons the *Lockett* plurality opted for a broad-based rule rather than attempting to resolve the issue on a case-by-case basis.<sup>139</sup>

Even if *Woodson* were overruled along with *Lockett* so that no constitutional principle of individualized consideration would apply, the Court would not be free of overseeing mitigating factors. If *Lockett*'s mitigation scheme violates *Furman*, the immediate effect, of course, would be to invalidate all existing death penalty schemes, since they have been legislatively or judicially modified to meet *Lockett*'s requirements. Once the states modified their statutes in response to the initial fall out, the Court would now be faced with reverse *Lockett* issues: Does the scheme give too much discretion to the sentencer to consider mitigating factors? Are the mitigating factors sufficiently limited and narrowly defined? Is the sentencer sufficiently guided on how to use the mitigating evidence?<sup>140</sup> Only mandatory death penalty schemes would be free of such questions, but they raise other constitutional problems.<sup>141</sup>

Theoretically, therefore, reversal of *Lockett* on the rationale that it produces arbitrary death penalties would require continued constitutional supervision over how the states used or did not use mitigating factors. In practice, though, given the evident motivations for overruling *Lockett*, the wise legal handicapper would wager that actual judicial supervision of state limitations on mitigating circumstances would be deferential.<sup>142</sup> Justice Scalia has made it evident that although he has cast his argument against *Lockett* in terms of *Furman* arbitrariness, one of his fundamental reasons for wanting to reverse *Lockett* is the desire to cede control back to the

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139. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

140. Because a defendant sentenced to life is not going to challenge a statute for providing too much mitigation, any such challenge would have to come, as in *Furman* and *Gregg*, from a defendant who has been sentenced to death.

141. See *supra* notes 82-92 and accompanying text.

142. Justice White, for example, did not find it inconsistent to uphold Georgia's open-ended mitigation scheme as constitutional in *Gregg* and yet argue in *Lockett* that an open-ended mitigation requirement would result in a reversion to a pre-*Furman* state of affairs. *Lockett*, 438 U.S. at 623 (White, J., concurring in part and dissenting in part). Still, if history is bound to repeat itself, then past experience suggests that when the Court embraces a new principle in the capital punishment area—like the view that open-ended consideration of mitigating evidence violates *Furman*—confusion is likely to follow.

states and minimize federal overview: "The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not."<sup>143</sup> But if the Court were to take a hands-off approach to state uses of mitigating factors, it would suggest that much of the ado over *Lockett*'s inconsistency with *Furman* was really a decoy argument to justify making the relevance of mitigating factors a matter for the states rather than the eighth amendment. If this is the true reason driving the move to overrule *Lockett*, it would be better to do so directly by finding that *Lockett*'s federalizing of mitigating factors was not properly based in the eighth amendment, rather than acting as if *Lockett*'s demise was brought about by its own shortcomings.

### III. THE ATTACK ON *LOCKETT*'S REARGUARD: CONTROLLING THE SUBSTANCE THROUGH THE PROCEDURE

#### A. *The Rise of the Substance-Procedure Distinction*

Justice Scalia's frontal assault on *Lockett* was aimed at returning to the states substantive control over the mitigating factors that a sentencer can use in deciding to impose the death penalty. Despite Justice Scalia's failure in *Walton* to directly remove *Lockett*'s control over the substance of mitigating evidence, the Court arguably has accomplished much of Justice Scalia's goal through a rearguard action that gives the states significant control over the procedures that the sentencer may use in processing the mitigating evidence it receives under *Lockett*. As part of an emerging trend, the Court has taken a recognized eighth amendment principle that places substantive limits on the states' power to impose capital punishment and diluted its strength by deferring to the state's chosen method of implementing the principle.<sup>144</sup>

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143. *Walton v. Arizona*, 110 S. Ct. at 3047, 3064 (1990) (Scalia, J., concurring).

144. A similar pattern of creating the substantive right but deferring to state implementation—can be seen in the Court's rulings concerning exclusion of jurors with scruples against the death penalty, *compare Witherspoon v. Illinois*, 391 U.S. 510 (1968) (may exclude juror for cause only if "unmistakably clear" that juror would "automatically" vote against death penalty) *with Wainwright v. Witt*, 469 U.S. 412 (1985) (standard is whether juror's attitude would "substantially impair" performance of duties and state court's determination is presumed correct); in the Court's rulings on the need to find sufficient culpability by the defendant, *compare Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate for non-triggerman who does not intend to kill) *with Cabana v. Bullock*, 474 U.S. 376 (1986) (determination of whether non-triggerman sufficiently culpable can be made by appellate court rather than fact-finder); and in its determinations on whether aggravating circumstances adequately narrow the death penalty pool, *compare Godfrey v. Georgia*, 446 U.S. 420 (1980) (aggravating circumstance invalid because not adequately limited by state court) *with Lewis v. Jeffers*, 110 S.

By drawing a distinction between the substance of mitigating evidence and the procedure for considering such evidence, a majority of the Court for the first time has begun to limit *Lockett*'s reach:

*Lockett* and *Eddings* do not speak directly, if at all, to the issue presented here . . . . [The petitioner] asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision.<sup>145</sup>

While the substance-procedure distinction has gained currency among a majority of the Court, its full implications for returning power to the states remains to be seen. The cases suggest, however, that the distinction holds potential for giving states significant control over the use of mitigating evidence.

The *Lockett* Court arguably opened the door to the procedure-substance distinction when it observed that "[t]here is no perfect procedure for deciding in which cases governmental authority should be used to impose death."<sup>146</sup> The distinction, however, remained dormant in the immediate post-*Lockett* era. It was not until later that the distinction began to appear in concurrences and dissents as an argument for upholding state procedures even though the procedures clearly affected evidence within *Lockett*'s definition.

In *Skipper v. South Carolina*,<sup>147</sup> for example, the majority had found that the trial court's exclusion of evidence that the defendant had behaved well in jail after his arrest violated *Lockett* because favorable inferences from it "would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'"<sup>148</sup> In a special concurrence, however, Justice Powell argued that even if the evidence was within *Lockett*'s definition,<sup>149</sup> the question of whether

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Ct. 3092 (1990) (in determining whether state adequately narrows aggravating factor, must defer to state finding unless "wholly arbitrary").

145. *Saffle v. Parks*, 110 S. Ct. 1257, 1261 (1990). In *Parks*, the Court found that *Lockett* did not preclude telling the jury not to be influenced by sympathy. The Court reasoned that an anti-sympathy instruction did not tell the jury they could not consider the defendant's mitigating evidence, but only *how* they were to consider it. See also *infra* note 170.

146. *Lockett*, 438 U.S. at 605 (plurality opinion).

147. 476 U.S. 1 (1986).

148. *Id.* at 4-5 (quoting *Lockett*, 438 U.S. at 604).

149. Justice Powell first argued that good behavior *after* the crime did not bear on the defendant's culpability or character and, therefore, did not fall within *Lockett*'s protection. *Id.* at 11-14.

such evidence was sufficiently probative of the factor to be admissible was an evidentiary issue to be resolved by state law:

The Court's [refusal to defer to the state court's decision on probity] apparently rests on the notion that the States have little or no authority to decide that certain types of evidence may have insufficient probative value to justify their admission. . . . This Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer. . . . It makes little sense, then, to substitute our judgment of relevance for that of state courts and legislatures. Nor is such intrusive review necessary in this context to guard against fundamentally unjust executions.<sup>150</sup>

Justice Powell concluded that the *Lockett* opinion had specifically left such decisions to the states when it said, "Nothing in this opinion limits the traditional authority of a court to exclude as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."<sup>151</sup>

Although the majority did not directly respond to Justice Powell's argument, the difference in conclusions can be explained based on whether the South Carolina courts' exclusion of the evidence is viewed as a "what" or "how" issue. The majority viewed the state court actions as invading the federal constitutional province of *what* constitutes relevant mitigating evidence because the state had excluded the evidence of good prison behavior after arrest as irrelevant under *Lockett*. The majority expressly disagreed with that conclusion, finding the evidence to be relevant as to whether the defendant should receive a life rather than death sentence. Therefore, *Lockett's* caveat that its holding did not preempt the states' "traditional authority" to determine relevance would not be applicable, because that authority only extends to evidence *outside* of *Lockett's* protected zone, "evidence not bearing on the defendant's character, prior record, or the circumstances of the offense."<sup>152</sup>

Justice Powell, on the other hand, maintained that even if constitutionally relevant, the exclusion of the evidence could be justified based on reliability and probity concerns, which are state law matters independent of "what" is a mitigating factor under *Lockett*. This early effort to characterize a state rule as bearing on "how" *Lockett* evidence was to be treated rather than as telling the sen-

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150. *Id.* at 15.

151. *Lockett*, 438 U.S. at 604 n.12, quoted in *Skipper*, 476 U.S. at 15 (Powell, J., concurring).

152. *Lockett*, 438 U.S. at 604 n.12. The *Skipper* majority made clear, for example, that the states could exclude evidence of a defendant's good hygiene practices as irrelevant under *Lockett*. See *Skipper*, 476 U.S. at 7 n.2.

tencer "what" mitigating evidence they could consider was doomed for several reasons. First, the state courts primarily had cast their rationale for exclusion on relevancy grounds, creating at least the appearance that they had decided admissibility directly based on *Lockett*.<sup>153</sup> Moreover, the state evidentiary grounds relied upon (probative value) operated to keep the evidence entirely from the sentencer. The Court consistently has viewed state procedures that completely preclude sentencer consideration of mitigating evidence as taboo efforts to tell the sentencer what mitigating evidence to consider.<sup>154</sup> In contrast, if the sentencer is allowed to consider the evidence, even if just to apply the evidentiary rules or procedures and determine that the evidence cannot properly be used, the procedures are much more likely to be seen as "how" issues.<sup>155</sup>

A similar analysis explains the Court's decision in *Sumner v. Shuman*,<sup>156</sup> where it struck down Nevada's mandatory death penalty for a prisoner who commits a murder while serving a life sentence without parole. The *Lockett* Court expressly had left the question open.<sup>157</sup> Most notable was Justice Blackmun's strong argument that even in such an extreme case important mitigating factors might exist which would lead the sentencer to find that the death penalty was not appropriate for all defendants in that situation. For example, important differences might exist between defendants' backgrounds, the severity of the crime for which they were serving the life sentence, or the particular circumstances of the capital murder itself.<sup>158</sup> Only through the principle of "individualized sentencing" and the opportunity to hear mitigating circumstances would the sentencer be able to respond to these factors and decide if a particular defendant deserved to die. Nor was the Court persuaded that special needs of deterrence and retribution existed which required a mandatory death penalty, because "any legitimate

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153. *Skipper*, 476 U.S. at 6-7 (summarizing state court opinions). The State later attempted to advance other evidentiary grounds besides relevance for excluding the evidence, but the majority rejected them as inapplicable to the facts. *Id.* at 5-8.

154. *See, e.g., Green v. Georgia*, 442 U.S. 95 (1979) (Georgia's hearsay rule could not be used to exclude mitigating evidence at penalty trial).

155. *See infra* notes 161-167, 183-188 and accompanying text (discussing weighing instructions and burden of proof requirements as "how" issues).

156. 483 U.S. 66 (1987).

157. *Lockett v. Ohio* 438 U.S. 586, 604 n.11 (1978) (plurality opinion). The Court also had held the question open in its original mandatory death penalty cases. *Roberts v. Louisiana*, 428 U.S. 325, 334 n.9 (1976) (plurality opinion).

158. *Sumner*, 483 U.S. at 78-82.



state interests can be satisfied fully through the use of a guided-discretion statute."<sup>159</sup>

The Court's opinion in *Sumner* made evident that any departures from *Lockett*'s fundamental principle that the state cannot preclude the sentencer from hearing all constitutionally relevant evidence would need to meet an extremely high burden of justification. Again, the state's efforts to control *what* mitigating factors the sentencer could consider were seen as stepping into the off-limits area staked out by *Lockett*. This point was made clear by the dissent's lament that, "Until today, the Court has never held that the constitution prohibits a State from identifying an especially aggravated and exceedingly narrow category of first-degree murder, . . . and determining as a matter of law and social policy that no combination of mitigating factors . . . could ever warrant reduction of a sentence of death."<sup>160</sup>

In contrast to the cases in which the states have attempted to control what mitigating evidence can be considered, the Court recently has upheld state statutes which direct the sentencer how to weigh the aggravating and mitigating evidence. In *Blystone v. Pennsylvania*,<sup>161</sup> the majority upheld a statute which required the sentencer to impose death "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances."<sup>162</sup> The defendant had argued that the statute in effect operated as a mandatory death penalty by requiring the jury to return a sentence of death once it found aggravating circumstances outweighed the mitigating circumstances.

Without expressly invoking the "what-how" dichotomy, Chief Justice Rehnquist responded by finding that *Lockett*'s mandate was fulfilled because the jury had been allowed "to consider all relevant mitigating evidence" and any guidance to the jury beyond that threshold requirement was within the "traditional latitude [enjoyed by the States] to prescribe the method by which those who commit

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159. *Id.* at 85. The state had argued that because the defendant already was serving a life sentence, only a mandatory death penalty could adequately deter and serve retribution interests. *Id.* at 83.

160. *Id.* at 87 (White, J., dissenting).

161. 110 S. Ct. 1078 (1990).

162. *Id.* at 1081 (quoting 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (Purdon 1982)).

murder shall be punished.”<sup>163</sup> The Chief Justice thus viewed *Lockett* as a threshold requirement which prevented the state from keeping constitutionally relevant mitigating evidence from being considered by the sentencer, but did not extend to precluding the state, at least within reasonable bounds, from telling the sentencer how to use the evidence.<sup>164</sup>

In *Boyde v. California*<sup>165</sup> the Court reaffirmed that it was permissible for the state to direct the sentencer how to weigh aggravating and mitigating circumstances. The Court upheld a jury instruction that told the jury, “If you conclude that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death.” The Chief Justice rejected the argument that *Lockett*’s principle of individualized sentencing required that a sentencer have the freedom not to impose the death penalty even where aggravating circumstances outweighed mitigating circumstances: “[T]here is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence ‘in an effort to achieve a more rational and equitable administration of the death penalty.’”<sup>166</sup> Indeed, the Chief Justice gave an indirect blessing to state measures controlling consideration of mitigating evidence when he characterized the defendant’s argument as a call for “unfettered sentencing discretion.”<sup>167</sup>

The substance-procedure dichotomy, or what-how distinction, has an undeniable appeal. As an initial matter, it strikes the underlying chord of compromise inherent in federalism: core constitutional values are kept safely within the federal safehouse while the states are given substantial leeway in shaping how the values will be translated into practice. Thus in the area of mitigating circumstances, the substance of what is protected by *Lockett*’s mandate of individualized sentencing remains off-limits to the states, while the procedure for its implementation is left to the best judgment of the states.

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163. *Id.* at 1083–84 & n.5 (distinguishing *Sumner v. Shuman* because in that case the sentencer had no opportunity to consider mitigating evidence).

164. *Id.* at 1083–84.

165. 110 S. Ct. 1190 (1990). In *Walton v. Arizona*, 110 S. Ct. 3047, 3056 (1990), the Court summarily upheld mandatory “shall” language in the Arizona statute by simply recounting its holdings in *Boyde* and *Blystone*.

166. *Boyde*, 110 S. Ct. at 1196 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)).

167. *Id.*

Moreover, by allowing the states to structure how mitigating evidence is to be used, some of the tension between *Furman*'s call for guided discretion and *Lockett*'s requirement of unrestricted presentation of relevant mitigating evidence is relieved.<sup>168</sup> Fears that sentencers will use mitigating evidence in an irrational manner can be calmed by pointing to state procedures telling sentencers how to use the evidence. As a bonus, the Court accomplishes such a reconciliation without having to get into the business of dictating proper procedures. The Court simply sits as a hands-off overseer to ensure state procedures are "rational."

B. *Telling the Sentencer How to Decide: What is the Nature of the Death Penalty Decision?*

Despite its inherent appeal, the substance-procedure distinction has several important implications that need to be acknowledged and addressed. Most fundamentally, it endorses a view that the sentencer's decision to impose or not impose the death penalty is a logical, almost mathematical, evaluation of the aggravating and mitigating evidence. The paradigm invoked is that of the scales of justice: the sentencer places the aggravating factors on one side and mitigating factors on the other and decides which "outweighs" the other. Additionally, this paradigm assumes that even before the mitigating evidence is put on the scales, the evidence, for example evidence of a troubled childhood, can be pre-screened by evidentiary devices such as burdens of proof.

This view of the death penalty as a calculated decision helps explain the majority's view in *California v. Brown*,<sup>169</sup> in which the Court upheld an instruction to the jury that it should not base its decision on "mere sympathy." The majority reasoned in part that such an instruction helps enhance the reliability of the jury's decision by ensuring emotional responses will not enter into the equation.<sup>170</sup> As Justice O'Connor wrote in her concurrence:

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168. See *supra* notes 49-61 and accompanying text.

169. 479 U.S. 538 (1987).

170. *Brown*, 479 U.S. at 543 ("[T]o the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence . . . it fosters the Eighth Amendment's 'need for reliability' ") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). As with many death penalty decisions, see *supra* note 34, it is not entirely clear whether Chief Justice Rehnquist's opinion is a majority or plurality opinion. Although four other justices joined the opinion, one of them, Justice O'Connor, wrote a concurrence setting out her own reasoning.

It appeared that *Brown* might contain an interesting difference in viewpoint between Chief Justice Rehnquist and Justice O'Connor's opinions over the role of emotion in the sentencer's decision. Justice O'Connor appeared to argue that any emotion or

[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion. . . . [T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.<sup>171</sup>

If one views the death penalty decision as a calculated weighing and processing of information free from emotion, then state procedures fostering "more rational" decisions will not only be constitutionally permissible, but desirable.

On the other hand, if the death penalty decision is regarded as based in part on emotional, or at least not on "rational" factors as traditionally conceived, then such procedures frustrate the "individualized" decisionmaking process of *Lockett*. This is the perspective reflected in Justice Blackmun's dissent in *Brown*, where he argued that the anti-sympathy instruction may have dissuaded the jury from taking "mercy" on the defendant:

The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. . . . In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of 'contemporary values,' . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value. . . . [When] a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be "swayed" by sympathy well may arrest or restrain this humane response, with truly fatal consequences for the defendant. This possibility I cannot accept, in light of the special role of mercy in capital sentencing and the stark finality of the death sentence.<sup>172</sup>

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sympathy was improper, because the decision was to be a "reasoned" one. The Chief Justice's opinion, on the other hand, could be read as saying that emotion based on proper mitigating evidence was acceptable, and it was only "extraneous" emotion not based on the evidence that the sentencer could be told to ignore. See, e.g., *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988) (defendant has right to have jury consider sympathy and emotion based on mitigating evidence). The majority opinion in *Saffie v. Parks*, 110 S. Ct. 1257 (1990) appeared to resolve any potential conflict in favor of Justice O'Connor's view that emotion and sympathy could properly be excluded from sentencer considerations even if based upon properly admitted mitigating evidence. *Id.* at 1262-63 (emotion and sympathy undermine need for decision to impose death penalty to be non-arbitrary and reliable).

171. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring); see also *supra* notes 112-113 and accompanying text (Justice Scalia's critique of the concepts articulated by Justice O'Connor).

172. *Id.* at 562-63 (Blackmun, J., dissenting) (citations omitted).

The need to accommodate the "humane response" of "compassion" also forms the basis for the argument why a statute that requires the sentencer to impose the death penalty if it finds one or more aggravating circumstances but no mitigating circumstances violates *Lockett*: the mandatory aspect of the provision takes away the sentencer's ability to exercise compassion based on an overall assessment of the defendant and his crime.<sup>173</sup> One might still use Justice O'Connor's phrase "reasoned moral response" to describe the sentencer's decision to not impose the death penalty despite the lack of a formal finding of mitigating factors, but the "moral" judgement would include the possibility of a "human response" not based strictly on a state-guided weighing of the circumstances. The pans on the scales of justice would have to accommodate not only "facts" sifted through the burden of proof sieve, but also intangibles based on human responses outside the traditional realm of logic and reason.<sup>174</sup>

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173. *Cf. Blystone v. Pennsylvania*, 110 S. Ct. 1078, 1092 (1990) (Brennan, J., dissenting) (arguing that Pennsylvania statute requiring jury to impose death penalty if it finds an aggravating circumstance but no mitigating factors is unconstitutional because, "[f]inding an aggravating circumstance does not entail any moral judgment about the nature of the act or the actor, and therefore it does not give the jury an opportunity to decide whether it believes the defendant's particular offense warrants the death penalty.").

174. The California Supreme Court, for example, has held that a jury instruction telling the jury that "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," is impermissible unless it is also communicated that the sentencer ultimately must decide what is the appropriate penalty. *People v. Brown*, (Brown I), 40 Cal. 3d 512, 538-44, 726 P.2d 516, 532-34, 220 Cal. Rptr. 637, 653-55 (1985), *rev'd on other grounds*, 479 U.S. 538 (1987). As Justice Grodin explained,

In [the death penalty] context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider . . . Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

*Id.* at 541, 726 P.2d at 532, 220 Cal. Rptr. at 653. The California Supreme Court has reaffirmed its adherence to the view that the statute's weighing language must not lead the jury to believe that it does not have sole discretion to determine whether the death penalty is appropriate. *See People v. Milner*, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); *People v. Brown* (Brown II), 45 Cal. 3d 1247, 1258-59, 756 P.2d 204, 211, 248 Cal. Rptr. 817, 824 (1988). It remains to be seen whether the California Supreme Court will continue to adhere to this viewpoint as a matter of state law given the United States Supreme Court's approval of the "shall" language in *Boyde v. California*, 110 S. Ct. 1190, 1195-96 (1990).

That a majority of the Court would reject such a vision of the death penalty decision is not surprising. The view strongly clashes with the archetype of legal thought in which justice is based on calculation and logic, not "human response," and, if fully applied to the death penalty, would heighten the tension already present between *Furman*'s condemnation of unbridled discretion and *Lockett*'s definition of mitigating evidence. If *Lockett* was extended to require constitutionally that a trump card of mercy be given the sentencer, the cases would become even more difficult to reconcile. *Lockett* no longer would be justified by the rationale of producing more reliable decisions by ensuring that all relevant evidence is heard by the sentencer; instead, the sentencer would have an affirmative grant of power to act even where no evidence falls within *Lockett*'s definition of relevant evidence. This use of *Lockett* would require the Court to expressly accept the idea that the nature of the death penalty decision is so unique that, once an aggravating factor is found, complete discretion must be vested in the sentencer. This view obviously has proven too much for a majority of the current Court to accept.

C. *Telling the "What" from the "How"*

Beyond its more general implications for how the Court conceptualizes the death penalty decision, the substance-procedure distinction holds the potential of significantly restricting *Lockett*'s role in capital sentencing. The potential primarily stems from the inherent difficulty of determining whether a rule goes to the substantive or procedural aspect of the mitigating evidence, creating the possibility that the procedural "exception" will swallow *Lockett*'s substantive rule. This problem should not be a great surprise to anyone who has struggled with the procedure-substance distinctions governing "*Erie* questions" of whether the Federal Rules of Civil Procedure or state law applies to diversity claims brought in federal court.<sup>175</sup> In the relatively short time that a majority of the Court has used the distinction in the death penalty context, the Court already has severely divided on six occasions over whether an issue

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175. See generally E. CHEMERINSKY, *FEDERAL JURISDICTION* 266 (1989) ("a simple principle emerges after *Erie*: federal courts are to apply state substantive law and federal procedural law. The problem is that distinctions between substance and procedure are inherently ephemeral and thus difficult to draw. . . . Ever since *Erie*, the Court has struggled to provide criteria to determine when federal law may be used in diversity cases."); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). *Erie* questions, like *Lockett* issues, also involve delicate questions of power allocation between the federal and state spheres of sovereignty.

was a 'core' *Lockett* violation or involved only a procedural technique for governing the processing of mitigating factors.<sup>176</sup>

In *McKoy v. North Carolina*,<sup>177</sup> for example, a majority of the Court struck down North Carolina's requirement that a mitigating circumstance be found unanimously by the jury before it could be weighed against aggravating circumstances. According to the majority, the scheme's infirmity was that one holdout juror could prevent the other jurors from individually giving effect to the defendant's mitigating evidence. Indeed, the possibility existed that all twelve jurors would believe valid mitigating evidence was present, but because they could not unanimously agree on any one mitigating factor, the defendant could not benefit from any of the constitutionally relevant mitigating factors.<sup>178</sup> The majority also specifically rejected the State's argument that a factor became "irrelevant" under state law if not unanimously found, making clear that the relevance of mitigating evidence is a federal constitutional question not dependent upon a state's "mere declaration that evidence is 'legally irrelevant.'"<sup>179</sup> The Court concluded that the relevance of mitigating evidence under *Lockett* did not depend upon whether the sentencer in fact accepted or rejected the evidence, but rather on whether the evidence reasonably could have led the sentencer to find that a sentence less than death was warranted.<sup>180</sup> Consequently, a majority saw the unanimity requirement as an impermissible attempt by the state to determine for the sentencer what was relevant mitigating evidence, rather than as a procedure aimed at guiding the sentencer's use of relevant mitigating evidence.

Three justices, on the other hand, viewed the unanimity requirement "not [as] a limitation upon *what* the sentencer was allowed to give effect to, but rather [as] a limitation upon the *manner*

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176. See *Walton v. Arizona*, 110 S. Ct. 3047 (1990); *Saffle v. Parks*, 110 S. Ct. 1257 (1990); *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988).

177. 110 S. Ct. 1227 (1990). The decision reflected the Court's earlier holding in *Mills v. Maryland*, 486 U.S. 367 (1988), which had struck down Maryland's requirement that the jury be unanimous in finding mitigating circumstances. The North Carolina Supreme Court had tried to distinguish *Mills* in part on the basis that the North Carolina law, unlike Maryland's, allowed the jury to return a life sentence even if no mitigating evidence was found. See *McKoy*, 110 S. Ct. at 1231. The Court still found the possibility, however, that a single holdout juror could essentially require imposition of the death penalty by preventing consideration of mitigating evidence the other eleven jurors would otherwise use. *Id.*; see also *id.* at 1239 (Kennedy, J., concurring).

178. See *id.* at 1231-32.

179. See *id.* at 1232.

180. See *id.*

in which it was allowed to do so—viz., only unanimously.”<sup>181</sup> Writing for the dissenters, Justice Scalia argued that the whole jury was in fact the sentencer, so that requiring the whole jury to agree on specific mitigating factors did not preclude the jury from giving effect to mitigating factors. Rather, the requirement served merely a procedural device for guiding the jury’s consideration. Justice Scalia concluded:

In short, *Lockett* and *Eddings* are quite simply irrelevant to the question before us, and cannot be pressed into service by describing them as establishing that “a sentencer [by which the reader is invited to understand an individual member of the jury] may not be precluded from giving effect to all mitigating evidence.”<sup>182</sup>

The dispute in *McKoy* over whether jury unanimity fell within the “what” or “how” category is best explained as a dispute over who is the sentencer under the death penalty scheme. If each juror is a separate sentencer and the jury verdict is simply a tabulation of individual votes, then the unanimity requirement’s effect is to preclude the sentencer, i.e. individual jurors, from being able to give weight to relevant mitigating evidence as they find appropriate. If Justice Scalia is correct, however, that the sentencer is in fact the whole jury making a consensus judgment, then the claim that the requirement is really a procedural device to guide the jury’s use of mitigating evidence is more colorable. More colorable, that is, if threshold requirements for consideration of mitigating factors are in fact “guiding” rather than “precluding” devices.

The elusiveness of the distinction between “guiding” and “precluding” also can be seen in the Court’s ruling in *Walton v. Arizona*.<sup>183</sup> In *Walton*, the Court considered Arizona’s requirement that the sentencer, under Arizona’s scheme the trial judge, find that the defendant had proven by a preponderance of the evidence mitigating circumstances “sufficiently substantial to call for leniency.”<sup>184</sup> The defendant had argued that such a requirement

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181. *Id.* at 1245 (Scalia, J., dissenting).

182. *Id.* at 1245–46 (*Eddings v. Oklahoma*, 455 U.S. 869 (1982) strongly reaffirmed *Lockett*’s requirement that state law not preclude the sentencer from considering all mitigating evidence). Justice Kennedy’s concurrence appears more in sympathy with the dissent’s view that the unanimity requirement is a “how” (procedural) rather than “what” (substantive) issue, but he believed that the requirement as used in North Carolina was an arbitrary procedural control. See *id.* at 1239–40 (Kennedy, J., concurring); see also *infra* notes 191–192 and accompanying text (arguing *McKoy* better seen as a “how” case).

183. 110 S. Ct. 3047 (1990).

184. ARIZ. REV. STAT. ANN. § 13-703(E) (1989). The requirement that the defendant prove mitigating circumstances by a preponderance of the evidence is based on the



violated *Lockett* because it effectively excluded relevant evidence that the sentencer must constitutionally be allowed to consider. Therefore, just as a jury unanimity requirement might preclude a sentencer from being able to consider relevant mitigating circumstances, Walton argued that the Arizona scheme might prevent the sentencer from giving effect to relevant mitigating factors, albeit factors not proven by a preponderance of the evidence.

A divided Court upheld the evidentiary requirement with little explanation. The plurality simply found that such a restriction was not within *Lockett*'s scope because, "Walton is not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence; and it does not follow from *Lockett* and its progeny that a State is precluded from specifying how mitigating circumstances are to be proved."<sup>185</sup> Justice White also analogized to the Court's non-capital cases that allowed the state at the guilt-innocence phase to place the burden of proof for affirmative defenses on the defendant.<sup>186</sup>

The plurality's cursory dismissal of Walton's claim is troubling because Walton's argument *was* that Arizona's statute precluded consideration of a "particular type of mitigating evidence," specifi-

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Arizona Supreme Court's construction of statutory section 13-703(c) (1989), which places the burden of proof on the defendant. *See State v. Gretzler*, 135 Ariz. 42, 659 P.2d. 1 (1983).

185. *Walton*, 110 S. Ct. at 3055. The plurality also noted that *Lockett* expressly had reserved the issue of whether the defendant could bear the burden of non-persuasion on mitigating evidence. *Id.*; *see Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978).

186. *Walton*, 110 S. Ct. at 3055. Justice White's reliance on the affirmative defense cases is intriguing, given that the *McKoy* Court earlier in the term had expressly rejected the cases as inapposite. The *McKoy* majority persuasively had pointed out that the affirmative defense cases, *Martin v. Ohio*, 480 U.S. 228 (1987) (state may place burden of persuasion on defendant for self-defense) and *Patterson v. New York*, 432 U.S. 197 (1977), (state may place burden of persuasion on defendant for heat-of-pasion), were premised in part on the idea that the State was free to choose whether or not even to create the affirmative defense. *Lockett*, in contrast, constitutionally mandates that the relevant mitigating evidence be considered. *See McKoy*, 110 S. Ct. at 1233. Thus *Martin* and *Patterson*'s justification for placing the burden on the defendant, that the greater power to decide whether to even recognize the defense includes the lesser power to dictate which party proves the issue, does not apply to mitigating circumstances where the state is constitutionally required to allow their consideration.

Moreover, the fact-finder's decision concerning the use of mitigating evidence is different in nature from its decision regarding affirmative defenses. With affirmative defenses, the trier must decide "yes" or "no" as to its existence. The use of mitigating evidence, on the other hand, is a qualitative judgment that may be based on the cumulative effect of evidence. Thus, although no one piece of mitigating evidence may persuade the sentencer that a sentence less than death is warranted, together they might lead the sentencer to such a conclusion. *See Walton*, 110 S. Ct. at 3073-74 (Blackmun, J., dissenting).

cally evidence arguing for a sentence less than death but not proven by a preponderance of the evidence. The state was not contending that Walton's mitigating evidence—substance abuse and youthfulness—were not relevant under *Lockett*, nor that they were without any persuasive value. Consequently, as the dissent noted, the evidentiary standard operated to “define[] a wide range of relevant mitigating evidence—evidence with some degree of persuasiveness which has not been proved by a preponderance—that *cannot* be given effect by the capital sentencer.”<sup>187</sup>

If the plurality had attempted to explain why the burden of proof requirement was a “how” issue, its most likely reasoning would have been that the sentencer was precluded from giving effect to the evidence not because of its substance, but for nonsubstantive concerns such as reliability. From this perspective, *Lockett* allows the state to tell the sentencer what is sufficiently reliable mitigating evidence to rely upon. Once the evidence is found reliable, however, the state may not preclude the sentencer from giving effect to the evidence. For example, a scheme not allowing mental retardation to be weighed as a mitigating factor because mental retardation is not considered by the state to be relevant still would be invalid,<sup>188</sup> but a statute requiring the mental retardation to be proven by a preponderance of the evidence would pass constitutional muster.

The acceptance of burden of proof requirements as permissible state controls over “how” the sentencer considers evidence, however, creates a conflict with the cases striking down jury unanimity requirements. The *Walton* plurality summarily distinguished the cases on the basis that Arizona did not use the jury as the sentencer and that the *Mills* and *McKoy* cases had not disapproved of instructions in those cases which had imposed a preponderance of the evidence standard.<sup>189</sup> Although descriptively true, the differences fail to explain why a unanimity requirement, which attempts to establish reliability through consensus, invalidly tells the sentencer “what” they can consider as mitigating evidence, while an evidentiary burden, which might preclude the jury from giving effect to the very same evidence because of reliability concerns, is permissible.<sup>190</sup>

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187. *Walton*, 110 S. Ct. at 3074.

188. See *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (Texas death penalty statute invalidly precluded sentencer from considering defendant's mental retardation).

189. See *Walton*, 110 S. Ct. at 3055–56.

190. Justice Blackmun's dissent even posited a scenario for burden of proof requirements that paralleled the “hold-out” juror scenario in *Mills* and *McKoy*:

Perhaps an abstract distinction can be posited as to why burden of proof reliability is a procedural concern while consensus reliability goes to substance, but ultimately one is led to conclude that *Mills* and *McKoy* are better characterized not as "what" cases, but as illegitimate state attempts to control the procedure of how mitigating evidence is considered. If this understanding of the cases is correct, then they become examples of instances in which a state's procedural guidelines are invalid not because they preclude consideration of mitigating evidence based on substance, but because they do not legitimately enhance reliability. This understanding is implicit in Justice Kennedy's *McKoy* concurrence: "The extreme control given to one juror in the North Carolina scheme in effect can allow that juror alone to impose a capital sentence. It is that fact, and not a novel application of *Lockett* to requirements intended to enhance the reliability of the jury's findings, that is dispositive."<sup>191</sup> The moral of *Mills* and *McKoy* from this perspective is that states are allowed to enhance the reliability and rationality of the process, but the procedures still must meet certain minimal constitutional standards.<sup>192</sup>

The Justices' disagreements in *McKoy* and *Walton* over what is procedural and what is substantive suggests that the distinction has significant elasticity. Since the advent of the "what-how" distinction, the Court has considered four procedures which operate on some level to preclude jury consideration of certain mitigating evidence: a scheme that requires the sentencer to answer specific questions, jury unanimity requirements, burdens of proof, and anti-sympathy instructions. In those cases, two were invalidated as efforts by the state to control what mitigating evidence the sentencer

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The problems with the preponderance standard are compounded when the defendant presents several possible mitigating factors. A trial judge might be 49% convinced as to each of 10 mitigating circumstances; yet he would be forced to conclude, as a matter of law, that there was no mitigation to weigh against the aggravating factors.

*Id.* at 3073-74. The Ninth Circuit, in one of the first post-*Walton* cases, concluded that in an analogous setting *Lockett* and not *Walton* controlled and required the sentencer to consider all the mitigating evidence together before deciding if it meets the burden of proof. *Smith v. McCormick*, 914 F.2d 1153, 1168-69 (9th Cir. 1990). The court argued that to reject specific mitigating factors without weighing them all together in effect precluded the sentencer from "giving effect" to all mitigating evidence and thus amounted to telling the sentencer "what" they could consider as mitigating evidence. *Id.*

191. *McKoy v. North Carolina*, 110 S. Ct. 1227, 1240 (Kennedy, J., concurring).

192. Justice Kennedy, for example, agreed with the characterization in *Mills* that the "'one juror veto' system . . . [is] 'the height of arbitrariness.'" *McKoy*, 110 S. Ct. at 1240 (quoting *Mills v. Maryland*, 486 U.S. 367, 374 (1988)).

could consider (special questions and unanimity requirements)<sup>193</sup> and two were upheld as valid procedural controls (burdens of proof and anti-sympathy instructions).<sup>194</sup> In *all* of the cases, however, there was disagreement over whether the challenged state requirement was in effect “guiding” (procedural) or “precluding” (substantive) the sentencer’s consideration of the mitigating evidence, making it evident that one Justice’s procedure is another’s substance. Moreover, one cannot be confident that even those requirements that the Court has ruled upon are now settled law, as at least one lower court already has found that a requirement the Supreme Court has ruled is procedural—burdens of proof for weighing mitigating evidence—may still be invalid as a substantive control if used to prevent the sentencer from weighing all mitigating evidence together.<sup>195</sup>

The inability to identify where substance stops and procedure begins not only creates uncertainty within the law, it poses a distinct danger to *Lockett* itself. After *Walton*, the door has been opened for a state to attach requirements to the sentencer’s use of mitigating evidence so long as it has first allowed the sentencer to hear the evidence. What remains to be seen is whether the Court will uphold procedures that allow the states to accomplish indirectly what *Lockett* forbids directly: determining for the sentencer what mitigating evidence may be used in deciding if the death penalty is appropriate. For example, after *Walton*, may a state that believes a mandatory death penalty is appropriate for a certain crime effectuate that result by requiring the sentencer to find that any mitigating evidence presented by the defendant can justify a sentence less than death only if it “overwhelmingly calls for a sen-

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193. *McKoy*, 110 S. Ct. 1227 and *Mills*, 486 U.S. 367 (jury unanimity); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (special questions). In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), a majority of the Court agreed that the use of special questions was constitutional for the particular mitigating evidence at issue (prior prison disciplinary record and residual doubt), but left open the possibility that the scheme may be unconstitutional under different facts. In *Penry*, the Court found such an occasion had arisen.

194. See *Walton v. Arizona*, 110 S. Ct. 3047 (1990) (burden of proof); *Saffle v. Parks*, 110 S. Ct. 1257, 1261 (1990) (arguing, *inter alia*, that challenge to anti-sympathy instruction goes to telling jury “how” to consider mitigating evidence and is outside *Lockett*’s scope).

195. See *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990). The court concluded that if specific mitigating factors were never considered together because standing alone they failed to meet the requisite burden of proof, the burden of proof standard now operated to preclude the sentencer from giving effect to valid mitigating evidence, i.e. mitigating evidence which weighed *together* would call for a sentence less than death. *Id.* at 1168–69.

tence less than death"?<sup>196</sup> Does such a provision "guide" or "preclude" the sentencer's use of the mitigating evidence?

The cases striking down jury unanimity requirements provide some reason to believe that even if such a measure is viewed as a procedural device, its extremely high threshold of proof might be seen as arbitrary. The almost inescapable conclusion, however, is that the Court is now intent on giving the states significant control over evidence which is substantively within *Lockett*'s protection. Moreover, *Lockett* is placed in a no-win situation, because to the extent the Court does strike down state requirements (either because it decides the controls are substantive rather than procedural, or, if procedural, arbitrary) it gives greater force to Justice Scalia's claim that the whole area is so confusing and unpredictable that *Lockett* should be abandoned. Indeed, the only prediction that can be made with any certainty is that the debate over *Lockett*'s role and its proper scope will not be resolved for the foreseeable future.

#### CONCLUSION

With his usual powerful rhetoric, Justice Scalia has painted a picture of two constitutional doctrines—controlled discretion and individualized consideration—on a collision course. The Court is portrayed on the one hand as riding herd over the states to drive unbridled discretion out of the death penalty and then schizophrenically turning around and demanding that open-ended discretion be allowed back into the death penalty decision. A reader of Justice Scalia's *Walton* concurrence quite likely could walk away shaking her head at how the United States Supreme Court could have tolerated, let alone created, a framework of principles so at odds with itself.

This Article's purpose has not been to deny that a tension between *Furman* and *Lockett* exists, but to address the question of whether the tension amounts to an irreconcilable conflict. For while the cases necessitate different approaches to sentencer discretion, *Furman* narrowing it and *Lockett* expanding it, they share the goal of identifying which defendants are within the state's power to execute under the eighth amendment. The crucial question, therefore, is whether the means of implementing their principles invariably are drawn into conflict.

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196. Cf. *Walton*, 110 S. Ct. at 3076 (Blackmun, J., dissenting) ("[T]he right to present mitigating evidence is rendered all but meaningless if the rules that guide the sentencer's deliberations virtually ensure that the mitigating evidence will not change the outcome.").

As a starting point, it must be recognized that the question is not an all-or-nothing one between discretion or no discretion. *Furman* did not condemn all discretion, but only discretion that yielded arbitrary and capricious results. Furthermore, because even *Lockett*'s opponents do not appear to maintain that the only constitutional death penalty is a mandatory one, the issue can be further refined to asking where on a continuum does discretion for individualized consideration become too great. More specifically, is *Lockett*'s definition of relevant mitigating evidence too far down the continuum?

Justice Scalia contends that *Lockett* does produce "freakish" results, citing a host of potential mitigating factors that a sentencer must be allowed to consider under *Lockett*. His assumption, however, is that the sentencer will be unable to apply those factors in a rational and consistent fashion. If evidence should materialize someday that sentencers are applying mitigating evidence in an arbitrary fashion, a showdown will occur between *Furman* and *Lockett*. As of now, however, Justice Scalia is offering only one particular view of whether sentencers are capable of making the "reasoned moral judgment" called for by *Lockett*. His viewpoint stands in contrast to that of the *Lockett* plurality, which crafted its inclusive definition of mitigating evidence precisely because it believed that *more reliable* death penalty decisions would result.

It is particularly important to examine carefully the underlying assumptions for overruling *Lockett* to ensure that the rationale for such an action is clear. If *Woodson* and *Lockett* truly do produce the arbitrary and capricious results condemned by *Furman*, then the Court needs to make such specific findings and resolve the conflict. The danger, however, is that the Court will overrule or severely limit *Woodson-Lockett* on the basis that it violates *Furman*, when the Court's real objection is that the principle of individualized consideration removes too much power from the states. Certainly reversing *Woodson* and *Lockett*'s interpretation of the eighth amendment is within the Court's power, but it should address the question directly rather than suggesting that its hand is being forced because of an irreconcilable conflict between *Furman* and *Lockett*.

Although *Lockett* has withstood Justice Scalia's salvo, at least for the moment, the future role of mitigating evidence is still very much in jeopardy. In *Walton v. Arizona*, the Court for the first time allowed a state to place mitigating circumstances within *Lockett*'s definition of relevance, evidence arguing for a sentence less than death, beyond the sentencer's consideration. Under *Walton*, the

state's reason for preventing consideration of evidence apparently must be procedural and aimed at enhancing reliability. However, so long as the state can structure its scheme such that any relevant mitigating evidence is presented and considered by the sentencer, even if the consideration involves rejecting the factor based on a state-imposed evidentiary standard, the Court will review such standards under an analysis that appears to resemble a rational basis test. *Lockett*'s core barrier against state definition of what is a relevant mitigating factor remains, but the barrier has shrunk considerably as the Court has granted to the states control over procedures to ensure reliability.

Most fundamentally, the Court's approval of evidentiary burdens makes clear that a majority embraces the view that the death penalty can be implemented as a calculated decision based upon objective fact-finding and "reasoned moral" judgment. In contrast to its immediate post-*Furman* decisions, the Court increasingly has viewed the death penalty decision as a subset, albeit a somewhat unique one, of traditional factual and evidentiary issues. As a result, the Court has exhibited greater comfort with states exercising their traditional power to control the sentencer's decision-making process. This state of affairs would not have been possible if the Court viewed the death penalty decision as including elements of compassion and mercy and had constitutionally required that the sentencer be permitted to give those factors effect.