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MORAL APPROPRIATENESS, CAPITAL PUNISHMENT, AND THE *LOCKETT* DOCTRINE

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I. INTRODUCTION

A flourishing enterprise since the early 1970s, United States Supreme Court exposition of capital punishment law under the eighth amendment recently has fallen into a recession.

Legal forecasters saw the downturn coming as early as 1983. In that year, as the Supreme Court approached its annual summer recess, the justices handed down four decisions strongly portending a cutback in the relatively rigorous federal oversight of capital punishment to which the nation had become accustomed.[1] As we enter the 1990s, the substantial contraction of federal scrutiny of capital punishment foreshadowed by the 1983 decisions is very much upon us. In just over twelve months' time during the late 1980s and early 1990s, the Supreme Court, despite stinging dissents, stripped the lower federal courts of much of their power to give relief to death row inmates except in the most egregious cases of constitutional er-

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[1] The decisions were Zant v. Stephens, 462 U.S. 862 (1983) (affirming death sentence despite use of unconstitutional aggravating circumstance); Barefoot v. Estelle, 463 U.S. 880 (1983) (approving expedited federal review of capital cases and upholding use of speculative psychiatric testimony offered to support imposition of death sentence); Barclay v. Florida, 463 U.S. 939 (1983) (affirming death sentence despite use of aggravating circumstance in violation of state law); and California v. Ramos, 463 U.S. 992 (1983) (affirming death sentence where sentencing jury permitted to take into account possibility of gubernatorial clemency in the event that defendant is sentenced to life without parole). For what is probably the leading account of capital punishment law in the Supreme Court, circa 1983, and a prescient estimation of the significance of the 1983 decisions, see Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

ror.[2] As if on a mission, the Court also used its certiorari power liberally during the 1988 and 1989 Terms to clear the landscape of most of the major unresolved eighth amendment capital punishment questions that had been percolating in the lower courts. The Court ruled against the defendant on almost every key point, again over bitter dissents.[3] No one should be predicting significant expansions in eighth amendment capital punishment jurisprudence anytime soon.

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[2] The majority accomplished this contraction of lower federal court power by revamping the rules governing the retroactive application of the Court's decisions in habeas corpus. Under Teague v. Lane, 489 U.S. 288 (1989), and its rapidly increasing progeny — including Sawyer v. Smith, 110 S. Ct. 2822 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); and Saffle v. Parks, 110 S. Ct. 1257 (1990) — habeas corpus relief is generally unavailable to defendants who seek to establish a deprivation of their constitutional rights by relying upon a new rule of constitutional law that was not firmly settled when their cases became final (that is, upon the conclusion of the direct appeal process, including the passing of the time limit for filing a petition for writ of certiorari in the United States Supreme Court, *see* Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986)). Because the phrase "new rule" is defined so broadly under the *Teague* line of cases, habeas relief is for all intents and purposes available only when the state's denial of the petitioner's claim of constitutional right was rationally indefensible. Indeed, "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 110 S. Ct. at 1217.

[3] Foremost among the eighth amendment rulings from the 1988 and 1989 Terms that went against the capital defendant are the following: Lewis v. Jeffers, 110 S. Ct. 3092 (1990) (affirming lenient standard for review of constitutional adequacy of aggravating circumstances); Walton v. Arizona, 110 S. Ct. 3047 (1990) (affirming placement upon the defendant of the burden to establish mitigating circumstances sufficient to call for a life sentence); Clemons v. Mississippi, 110 S. Ct. 1441 (1990) (holding for defendant, but affirming propriety of appellate reweighing of aggravating and mitigating circumstances as means of curing trial-level error relating to capital sentencing); Saffle v. Parks, 110 S. Ct. 1257 (1990) (holding that Constitution as construed to date does not dictate that sentencer must be free to base its sentencing decision on the sympathy it feels for the defendant after hearing mitigating evidence should it desire to do so); Boyde v. California, 110 S. Ct. 1190 (1990) (upholding scheme that requires imposition of death sentence where mitigating circumstances are outweighed by aggravating circumstances); Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990) (upholding scheme that mandates imposition of death sentence where aggravating circumstance but no mitigating circumstance exists); Penry v. Lynaugh, 492 U.S. 302 (1989) (refusing to hold the death penalty per se unconstitutional for the mentally retarded offender); and Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to hold the death penalty per se unconstitutional for the juvenile offender). Capital defendants did manage to secure a few victories, however, during the 1988 and 1989 Terms. *See, e.g.*, McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (holding unconstitutional a requirement of juror unanimity before jury may consider mitigating circumstance; reaffirming Mills v. Maryland, 486 U.S. 367 (1988)); Gathers v. South Carolina, 490 U.S. 805 (1989) (states cannot allow factors "wholly unrelated to the blameworthiness of a particular defendant" to be placed before the sentencer in support of a death sentence; reaffirming Booth v. Maryland, 482 U.S. 496 (1987)). *But see* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (overruling *Booth* and *Gathers* to the extent that those decisions held inadmissible evidence and argument relating to victim and impact of victim's death on victim's family).

With doctrines regulating capital punishment in retreat or desuetude almost everywhere one turns in the eighth amendment area, one capital punishment doctrine nonetheless has stood firm. This doctrine originates in the landmark 1976 ruling in *Woodson v. North Carolina*,[4] but is more familiarly associated with *Lockett v. Ohio*,[5] which explicated *Woodson*'s principles two years later. *Lockett* and its progeny address a core requirement of capital sentencing procedure by holding that a capital sentencing scheme must provide for an "individualized assessment of the appropriateness of the death penalty."[6] This individualized assessment is achieved only by allowing the sentencer "to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."[7] Although the sovereigns in our federal system who choose to employ the ultimate criminal sanction retain considerable latitude regarding the shape and complexion of their capital sentencing regimes, "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."[8]

The *Lockett* doctrine has demonstrated impressive staying power in the Supreme Court. In each of the Court's past six Terms, at least one condemned inmate has secured relief for a violation of one of the doctrine's constituent precepts.[9] The Court held fast to the *Lockett* doctrine in these cases despite the virtually certain knowl-

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4 428 U.S. 280 (1976).

5 438 U.S. 586 (1978).

6 Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

7 *Id.* at 327 (finding requirement of individualized sentencing violated where sentencing jury was not provided a vehicle in its sentencing issues and instructions to consider and give mitigating effect to evidence of defendant's mental illness by imposing or recommending a life sentence). The capital sentencer cannot be impeded "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." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis omitted and supplied). Several Supreme Court decisions recognize that the Constitution requires individualized sentencing in capital cases, and that individualized sentencing requires that the capital sentencer be permitted to consider and give effect to all relevant mitigating evidence. *See, e.g.*, Boyde v. California, 110 S. Ct. 1190, 1196 (1990) (stating the requirement and finding it met where sentencing jury is allowed to consider all relevant mitigating evidence); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990) (same).

8 Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted).

9 *See* Parker v. Dugger, 111 S. Ct. 731 (1991); McKoy v. North Carolina, 492 U.S. 302 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

edge that the lower courts would have to overturn many other death sentences as a consequence.[10] In a time when solicitude for eighth amendment claims in capital cases is not readily discernible — indeed, in a time when almost any public display of affection for a criminal defendant's constitutional claims is deemed the height of bad taste — the Supreme Court's continued allegiance to *Lockett* is no mean testament to the doctrine's strength.

What is it about the *Lockett* doctrine that has allowed it to survive, and some might even say thrive, in a climate so inhospitable to many other rules bestowing constitutional rights upon criminal offenders? The doctrine endures, I believe, for two principal reasons. First, it serves the most fundamentally humane of purposes. Execution, the harshest punishment acceptable to our society, is legitimate only when it can be said with confidence that it is not only a permissible *legal response* but also the *morally appropriate response* to the particular crime and the particular offender. The *Lockett* doctrine is the primary legal tool for ensuring that each decision to employ the death penalty is well grounded in morality. The doctrine achieves this goal by setting out a series of requirements designed to guarantee that the capital sentencer will be able and willing to make a reliable moral decision.

The fact that it contributes to a sound constitutional objective is not all that commends the *Lockett* doctrine. The second principal reason why *Lockett* endures is that it performs its constitutional mission with admirable precision. Its requirements are carefully drawn for maximum clarity and maximum ease in application by trial and reviewing courts alike. This clarity minimizes frictions between federal and state authorities and limits intrusions upon state interests by the federal judiciary. The *Lockett* doctrine brings the Constitution's grand principles to life in real cases while providing judges and juries with predictable, workable and efficient rules.

This article's examination of the *Lockett* doctrine proceeds in five stages. The constitutional principles that underlie the doctrine are identified and elaborated in Part Two. Three central propositions emerge in that discussion: first, that it has made sense for the Supreme Court to interpret the eighth amendment to forbid the imposition of a morally inappropriate death sentence; second, that it has made sense for the Court to hold that any system of capital punishment is unconstitutional unless the sentencing authority is able

[10] In McKoy v. North Carolina, 110 S. Ct. 1227 (1990), Penry v. Lynaugh, 492 U.S. 302 (1989), Mills v. Maryland, 486 U.S. 367 (1988), and Hitchcock v. Dugger, 481 U.S. 393 (1987), the *Lockett* violations were systemic, and thus are likely to have occurred in many cases within the jurisdictions in question.

and willing under that system to make a reliable determination of the morally appropriate sentence in a given case; and third, that it has made sense for the justices to conclude that discretion in the hands of the sentencer is an indispensable feature of any valid capital sentencing scheme.

In Part Three, the requirement that a capital sentencer be vested with discretion is reconciled with the principle that capital punishment also must be subject to the rule of law. The eighth amendment requires rationality and orderliness in capital sentencing. This requirement, however, does not contradict, qualify, or impinge upon the amendment's coequal demand that a capital sentencing system remain discretionary enough to ensure a reliable determination of the death penalty's moral appropriateness in every case.

After establishing the *Lockett* doctrine's constitutional basis, the article's analysis turns to the doctrine's structure. While the journals include insightful treatments of the doctrine when it was nascent,[11] a steady stream of Supreme Court capital litigation has run its course since that time. The *Lockett* doctrine is now fit for evaluation as a mature body of law. In Part Four, that evaluation begins with a critical examination of the doctrine's various provisions. Particular attention is directed to how the doctrine successfully serves eighth amendment principles while fairly and thoughtfully accommodating federalism concerns. The analysis of the *Lockett* doctrine continues in Part Five, where special focus is devoted to the doctrine's operation and its function as a rule of structural and systemic value to the legal system. Through the *Lockett* doctrine, reviewing courts can distance themselves from the hard substantive moral choices that must be made in any death penalty case by leaving those choices to the sentencer. The doctrine's requirements establish the minimum conditions which must be met before the sentencer can confidently be entrusted with those moral choices. A logical consequence of this proposition is that any *Lockett* violation requires reversal of a death sentence and a new sentencing determination by a qualified and reliable sentencer.

Lockett's central role in the Supreme Court's eighth amendment

11 *See, e.g.*, Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 22-38, 60 (1980); Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981); Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U.L. REV. 369 (1983); Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 DUQ. L. REV. 103 (1982); Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 766-77 (1978); Weisberg, *supra* note 1.

capital punishment jurisprudence and its endurance in trying times are not the only reasons it is worthy of examination at this time. While few important constitutional doctrines escape criticism altogether, *Lockett* recently has received a particularly scathing attack from Justice Scalia. In *Walton v. Arizona*, decided at the end of the 1989 Term, Justice Scalia broke from the rest of the Court to disavow the *Lockett* doctrine and the constitutional principles upon which it is based and to call for *Lockett*'s overruling.[12] Of course, it remains to be seen whether Justice Scalia's challenge to *Lockett* and its progeny will have any effect on the Court's eighth amendment jurisprudence. But the conclusion reached in the sixth and final part of this article is that Justice Scalia's attack on the *Lockett* doctrine is more revealing of the justice's individual jurisprudential bent than it is of any particular flaw in the *Lockett* doctrine or its constitutional foundation.

The *Lockett* doctrine has endured because it deserves to endure.

II. Moral Appropriateness, Reliable Decisions, and the Need for Discretion in Capital Sentencing

The fundamental constitutional propositions with which this article deals, and which will be developed in this section, can be stated succinctly: The Constitution permits only morally appropriate impositions of the death penalty; it requires in every case that the capital sentencer reliably determine that death is indeed the morally appropriate penalty; and it therefore requires that the capital sentencing determination be discretionary.

Identifying and articulating the wide array of moral concerns that should shape life's many choices — a sort of "moral calculus" — and applying those concerns in diverse situations is a mind-boggling task. It is especially confounding when the choice is as momentous as the choice between life and death. This difficulty no doubt presents constitutional complexities, which will be taken up soon enough. But for the moment, set aside the important question of how moral appropriateness is determined and focus upon the more basic proposition which must be established first: American society should not execute a human being, in lieu of sentencing that person to long-term or life imprisonment, unless it can be said confidently that the death penalty is morally appropriate for the offense and the offender at hand.

This proposition's constitutional credentials are not dependent

[12] 110 S. Ct. 3047, 3067-68 (1990) (Scalia, J., concurrring in part and concurring in judgment),

upon a belief that the proposition makes good philosophy or good policy. People conceivably might differ with such a belief, as well as with the suggestion that good philosophy or good policy necessarily makes good constitutional principle. Rather, the Supreme Court has found this proposition to be of constitutional dimension for a much less controvertible reason. As the Court has concluded, the proposition is an accurate statement of a long- and deeply-held belief which American society has manifested through its choices regarding the administration of the death penalty.

Consider — as the Supreme Court did in *McGautha v. California*[13] and *Woodson v. North Carolina*[14] — why it is that by the mid-20th century every state wishing to employ the death penalty had turned away from the traditional *mandatory* death penalty for first degree murder (or its locally defined equivalent) and instead had given its juries ungoverned and unreviewable *discretion* either to impose the death penalty or to dispense mercy.[15] The states did not turn *en masse* to discretionary capital sentencing schemes for aesthetic reasons. And only a cynic would think that all of the states left the life or death decision to a sentencer's complete discretion so that racial, cultural and economic prejudices might have more room to maneuver[16] — although that surely proved to be a most regrettable side-effect.[17]

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[13] 402 U.S. 183 (1971). In *McGautha*, the Court held that due process principles are not offended when a jury is given complete and unreviewable discretion, unguided by prescribed standards of any kind, to sentence a murderer to death or life imprisonment. For further discussion of *McGautha*, see *infra* note 156.

[14] 428 U.S. 280 (1976). In *Woodson*, the Court declared unconstitutional a mandatory death sentence for first degree murder. A plurality consisting of Justices Stewart, Powell and Stevens concluded that the eighth amendment requires individualized consideration of the character and record of the offender and the circumstances of the particular offense "as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (plurality opinion). Justices Brennan and Marshall, believing the death penalty to be in all instances cruel and unusual punishment, filed separate opinions concurring in the judgment. *Id.* at 305 (Brennan, J., concurring in judgment); *id.* at 306 (Marshall, J., concurring in judgment).

[15] The movement to jury discretion in capital sentencing began in 1838, when Tennessee abandoned its mandatory death penalty. By 1900, the federal government and 22 other states had followed Tennessee's lead, and by 1963 mandatory death sentences had been rejected in favor of generalized discretionary sentencing in every state that authorized capital punishment. Some statutes calling for mandatory death sentences for particularly esoteric crimes, such as treason against state government, perjury in a capital case, and murder committed by an inmate serving a life sentence, managed to remain on the books, but they almost never were enforced. *See Woodson*, 428 U.S. at 291-92 n.25 (plurality opinion); *McGautha*, 402 U.S. at 199-202.

[16] There is, however, evidence suggesting that some of the southern states may well have adopted discretionary capital sentencing in part to further discriminatory objectives. *See* H. BEDAU, THE DEATH PENALTY IN AMERICA 11 (3d ed. 1982).

[17] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249-57 (1972) (Douglas, J., concurring);

Legislatures gave their sentencers broad discretion, the Court fairly inferred, because of the nation's growing understanding about the enormity and complexity of capital sentencing. The "fundamental weakness" of traditional mandatory death penalty schemes was their inability to reliably determine that death was the morally appropriate sentence.[18] Of course, these mandatory schemes did not completely disregard moral concerns; anyone passingly acquainted with the traditions of the criminal law would agree that the elements of the capital offense and the defenses available to it were designed to give expression to at least some moral concerns regarding punishment. But all mandatory schemes by their nature circumscribe the range of moral considerations that are taken into account in an individual case to those which happen to be reflected in the substantive criminal law's doctrinal provisions. In addition to limiting the range of relevant moral considerations, mandatory schemes also limit the manner by which those considerations can be applied in a case. Moral considerations can be dealt with only indirectly — to the extent that they are otherwise manifested through the doctrinal forms of the substantive criminal law. In short, a mandatory death penalty scheme subordinates moral considerations to legal form. Whenever such subordination occurs the moral correctness of any rendered decision is jeopardized.

The risk that a morally inappropriate death penalty might be imposed under a mandatory scheme was not just an abstract shortcoming, bothersome only to theoreticians. Jurors, people from all walks of life, voiced their objections. When the law demanded the imposition of the death sentence in a particular case despite moral considerations arguing against it, juries were quick to nullify the law and go instead with morality. They acquitted defendants in convincing first degree murder cases rather than lend their hands to the imposition of death sentences that were, in their judgment, morally inappropriate. These jurors were not flagburning subversives intent on defying the law. If we could ask them today to explain their actions, they likely would answer with something along the following lines: "We believe strongly in capital punishment, we believe strongly in obeying the law, and we also believe strongly in obeying the law even when we are convinced that it reaches morally inappropriate results. *Except here.* Not when life or death is literally the is-

id. at 362-66 (Marshall, J., concurring). Concerns about the discriminatory use of discretion in capital sentencing persist today. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 320-45 (1987) (Brennan, J., dissenting); Turner v. Murray, 476 U.S. 28, 35-36 (1986).

[18] *Woodson*, 428 U.S. at 291 (plurality opinion).

sue. Death is *different*."[19] With real defendants and real lives at stake, American sentencers refused to subordinate morality to legal form.

Significantly, the legislatures did not respond to the widespread phenomenon of jury nullification by elaborating upon the elements of capital murder or the defenses to it. Doing so might have made the law responsive to a broader range of moral concerns, but it would have been at best a partial solution to the problem. More law could never have fully solved the problem revealed by jury nullification because legal form, with its inherent limitations, was very much part of the problem. Hard as they may try, human beings are fundamentally unable fully to express morality through the forms of law. Just as an expression loses meaning when translated to another language, moral considerations cannot survive intact the conversion into legal form.

Equally significantly, the legislatures did not address jury nullification by replacing mandatory capital sentencing schemes with checklists of moral considerations which juries or judges would be expected to employ in the course of rendering discretionary sentencing decisions. This approach also would have proved unavailing because of humankind's inability to articulate in advance a moral calculus which can satisfactorily determine which murderers should die and which should be spared. There is simply no objective, articulable, and complete catalogue of the morally appropriate and the morally inappropriate in capital sentencing. The second Justice Harlan summed up the teachings to be gleaned from the shift from mandatory to discretionary capital sentencing in a now-familiar passage from *McGautha v. California*:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history . . .. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.[20]

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[19] Jury nullification of the mandatory death penalty laws is documented and discussed in Woodson v. North Carolina, 428 U.S. 280, 290-91 (1976) (plurality opinion), and McGautha v. California, 402 U.S. 183, 199 (1971). *See also* BEDAU, *supra* note 16, at 27-28.

[20] 402 U.S. at 204 (1971). "[A] judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision." Weisberg, *supra* note 1, at 308. *See also* Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 332-33 (1976) (plurality opinion).

The failure of mandatory capital sentencing schemes does not mean that it is impossible to determine reliably the moral appropriateness of a death sentence. It does indicate, however, that whoever is charged with making the determination must be free to engage in an open and flexible moral inquiry that attends to the nuances that can distinguish seemingly similar cases. Legislators across the nation heeded this proposition when they overwhelmingly adopted discretionary capital sentencing schemes that gave the sentencer freedom to respond to an unlimited and unspecified array of moral considerations. "The . . . subjective juror responses which resulted in juror nullification under the old system were legitimized."[21]

In light of the above history, it is not difficult to see why the imposition of a morally inappropriate death sentence is unconstitutional even under a narrow construction of the eighth amendment. With the possible exception of Justice Souter, who has yet to vote in a case directly presenting the question, no one on the Court today disputes that the eighth amendment's cruel and unusual punishments clause derives at least some of its content from the "evolving standards of decency that mark the progress of a maturing society."[22] The justices also appear to agree that legislative enactments and jury verdicts are objective indicators of those evolving standards.[23] As the Court recognized in *Woodson v. North Carolina*,[24]

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[21] *Woodson*, 428 U.S. at 312 (Rehnquist, J., dissenting). *See supra* note 15.

[22] Stanford v. Kentucky, 492 U.S. 361, 368-69 (1989) (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); *id.* at 381-82 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 382 (Brennan, J., dissenting).

[23] *See Stanford*, 492 U.S. at 371, 374 (plurality opinion); *id.* at 380 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 381 (Brennan, J., dissenting).

The current members of the Court disagree, however, regarding whether, and to what extent, the eighth amendment gives the justices a mission over and above enforcing the amendment's original intent and society's subsequently evolved standards of decency. For many years, various members of the Court have believed that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion), and that the amendment's fundamental respect for human dignity imposes both substantive and procedural limitations on the state's power to punish. These justices submit that it is the judiciary's duty to articulate and enforce these limitations as vigorously as it enforces other standards of decency embraced by the amendment. This view was held by a majority of the Court upon the retirement of Justice Brennan. *See Stanford*, 492 U.S. at 390-92 (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 380-82 (O'Connor, J., concurring in part and concurring in judgment); Penry v. Lynaugh, 492 U.S. 302, 335-36 (1989) (plurality opinion of O'Connor, J.); *id.* at 343-34 (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.); *id.* at 349-50 (Stevens, J., concurring in part and dissenting in part, joined by Blackmun, J.); Thompson v. Oklahoma, 487 U.S. 815, 833 (1988) (plurality opinion of Stevens, J., joined by Brennan, Marshall and Blackmun, JJ.); *id.* at 853 (O'Connor, J., concurring in judgment); Sumner v. Shuman, 483 U.S. 66, 85 (1987) (opinion of the Court per Blackmun, J., joined by Brennan, Marshall, Powell, Stevens, and O'Connor, JJ.); Enmund v. Florida, 458 U.S. 782, 797 (1982)

in which it first struck down a mandatory capital punishment statute, the legislative shift from mandatory to discretionary capital sentencing schemes reveals society's firm belief that morally inappropriate death sentences are indecent and fundamentally illegitimate. It does an injustice to both the American public and the eighth amendment to interpret society's documented aversion to mandatory death sentences as a meager objection to excessive formality in the imposition of capital punishment. It is more realistic to interpret the legislative shift, as the *Woodson* plurality did, as an expression of a deeper, substantive societal value: Where the death penalty is concerned, "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[25] The belief no longer prevails because adherence to it produces morally unacceptable consequences — death sentences that are "unduly harsh"[26] because they fail to appreciate that "individual culpability is not always measured by the category of the crime committed."[27] Thus, the notion that the moral appropriateness of a capital sentence must be reliably determined was "not drawn from a hat" by the Court.[28] It is

(opinion of the Court per White, J., joined by Brennan, Marshall, Blackmun, and Stevens, JJ.). *See also* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion of Burger C.J., joined by Stewart, Powell, and Stevens, JJ.); Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion of White, J., joined by Stewart, Blackmun and Stevens, JJ.); Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Liebman & Shepard, *supra* note 11, at 766-77.

Four members of the Court apparently have retreated from this position, at least insofar as it authorizes the Court to review the substantive wisdom of a legislatively authorized sentence for a class of offender or offense. *See Stanford*, 492 U.S. at 377-78 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White and Kennedy, JJ.); *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting, joined by Rehnquist, C.J. and White, J.). *See also* Walton v. Arizona, 110 S. Ct. 3047, 3066-67 (1990) (Scalia, J., concurring in part and concurring in judgment).

24 428 U.S. 280 (1976).

25 *Id.* at 296-97 (plurality opinion) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

26 *Id.* at 293 (plurality opinion).

27 *Id.* at 298 (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)). *See also* Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion) ("the 19th century movement away from mandatory death sentences was rooted in [this] recognition").

A majority of the justices recently voiced the same reading of history, observing that society has "long held [the belief] that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

28 *Woodson*'s "prohibition of automatic death sentences for certain crimes [was] not

one of society's evolved standards of decency, and is therefore embraced by the eighth amendment.[29]

The foregoing also explains why the Court has concluded that "discretion in a capital punishment system is necessary to satisfy the Constitution."[30] The goal of imposing only morally appropriate death sentences is impossible to meet unless and until someone gives the concept of moral appropriateness substantive content. As *Woodson* acknowledged, society's rejection of mandatory death penalty statutes manifests an unwillingness to entrust the legislatures with the task of formulating a definitive and close-ended moral calculus for choosing between life and death.[31] Capital sentencing schemes that legislatively pre-set this moral calculus, or that subordinate moral considerations to legal form, do not reliably measure the moral appropriateness of any particular death sentence. The range of moral considerations that reasonable, civilized people might find relevant to the appropriateness of a particular death sentence is inestimably broad and impossible to articulate completely in advance.[32] The risk that a legislatively pre-set moral calculus will produce a death sentence of questionable moral appropriateness is one that society declared itself unwilling to tolerate when it moved to discretionary capital sentencing schemes. Evolved standards of decency demand that the capital sentencer have the discretion to attend and respond to any considerations that might make the death penalty morally inappropriate in a particular case.[33] Only then can society have confidence in the decision that death is the morally appropriate punishment.[34]

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drawn from a hat, but [was] thought to be (once again) what a national consensus required." Thompson v. Oklahoma, 487 U.S. 815, 875 (1988) (Scalia, J., dissenting) (citation omitted).

29 The eighth amendment embraces "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

30 McCleskey v. Kemp, 481 U.S. 279, 314 n.37 (1987).

31 American society's rejection of mandatory death penalty legislation reflected the recognition of "[t]he inadequacy of distinguishing between murderers solely on the basis of legislative criteria." Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (plurality opinion).

32 Any effort to fully articulate the many moral considerations that might be relevant to the question of punishment or to specify which ones alone ought to mitigate in favor of a life sentence "would [be to] assume some objective criterion of what is mitigating, which is precisely what [the Constitution] forbid[s]." Walton v. Arizona, 110 S. Ct. 3047, 3062 (1990) (Scalia, J., concurring in part and concurring in judgment).

33 "[F]lexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty." Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (plurality opinion).

34 The fact that a number of the states were willing to enact mandatory death penalty statutes following Furman v. Georgia, 408 U.S. 238 (1972), which invalidated all death

The plurality opinion in *Woodson* did not rely exclusively on an analysis of evolved standards of decency in condemning the mandatory death penalty for murder. The plurality also believed that "*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."[35] A majority of the Court has affirmed this proposition squarely and repeatedly since *Woodson*.[36] There is, however, no need to rely upon the eighth amendment's respect for human dignity to conclude that the Constitution requires discretion in capital sentencing so that the moral appropriateness of the penalty can be reliably determined. Evolved standards of decency, properly understood, dictate the same result.

III. THE RULE OF LAW AND *FURMAN V. GEORGIA*

Although discretion in capital sentencing is constitutionally required, it does not follow that legal form must be avoided whenever the death penalty is at issue. Society long has favored adherence to the rule of law in order to legitimize the exercise of governmental power. Undeniably, killing criminal offenders is among the rawest and most provocative uses of governmental power known to this or any other nation. Capital punishment probably will remain inalterably illegitimate to a significant segment of the American public. But even supporters of the death penalty concede that capital punishment must be administered in a fundamentally legitimate manner — that is, fairly, even-handedly and with thought and care.

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penalty schemes that granted sentencers unbridled discretion, does not alter this conclusion. Not every legislative enactment represents a thoughtful and considered expression of contemporary social ideals, particularly legislation which appears to dramatically reestimate a fundamental standard of decency. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 857 (1988) (O'Connor, J., concurring in judgment). Legislation is particularly likely to be unrepresentative of contemporary social ideals when legislators believe that they must take action, yet perceive that the Supreme Court has left them with sharply limited and uncertain options. Legislation passed in such a climate frequently is so laced with assumptions about what the justices believe and will permit that it is weak and unreliable evidence of society's own standards. The post-*Furman* reenactment of mandatory death penalty schemes is a classic illustration of this phenomenon. *See* Woodson v. North Carolina, 428 U.S. 280, 298-300 & n.35 (1976) (plurality opinion). See also the discussion of *Furman* in Part Three of this article.

[35] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted) (emphasis supplied).

[36] *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Sumner v. Shuman, 483 U.S. 66, 85 (1987); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982). *See also* McCleskey v. Kemp, 481 U.S. 279, 315 n.37 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

By that measure, the death penalty's legitimacy was in grave doubt when the nation began to examine capital punishment closely in the 1960s. As well-intentioned as the unbridled discretion schemes seem to have been, their results were deeply disturbing. At best, the pattern of sentencing decisions (if a set of capricious results can be called a "pattern") lacked rhyme or reason to explain it. At worst, the results could be considered powerful evidence of invidious discrimination.[37] Capital punishment was an ailing institution and the nation imposed a moratorium on executions in the late 1960s to study the matter more thoroughly.[38] To some prognosticators, the patient was terminally ill and the only humane alternative was to put it out of its misery swiftly and painlessly.[39] But a majority of the justices believed that the Court lacked the constitutional wherewithal to abolish capital punishment — a position which may have been reached by the Court privately as early as in 1967,[40] was

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[37] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249-57 (1972) (Douglas, J., concurring); *id.* at 362-66 (Marshall, J., concurring).

[38] The racially discriminatory effects of capital punishment as applied in the United States provoked the NAACP Legal Defense and Education Fund, Inc., to lead a sustained nationwide series of legal challenges. *See* M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); Note, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985). By 1967, executions had ceased while the constitutional claims were adjudicated. MELTSNER, *supra*, at 183.

Undoubtedly, the tenor of the times helped the death row lawyers. Public support for the death penalty had declined steadily into the mid-1960s. *See, e.g.*, Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290 (1970). Furthermore, inside the Supreme Court, at least one justice was working to place capital punishment on the Court's agenda. In 1963, Justice Arthur Goldberg circulated a lengthy memorandum discussing capital punishment's constitutional status and proposing that the Court take up the issue in one or more of six capital cases for which certiorari petitions were pending. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 314-15 (1986); Goldberg, *Death and the Supreme Court*, 15 HASTINGS CONST. L.Q. 1, 1-3 (1987); Goldberg, *Memorandum to the Conference Re: Capital Punishment*, 27 S. TEX. L. REV. 493 (1986) (reproducing Goldberg memorandum verbatim). When Justice Goldberg's memorandum failed to convince the Court to take any of the pending cases, he drafted a dissent from the denial of certiorari in one of the cases, Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from the denial of certiorari), that was joined by Justices Douglas and Brennan. The viability of the capital punishment issue thus was flagged for the public generally, and for the constitutional bar and lower courts in particular.

[39] *See, e.g.*, Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201; Black, *The Crisis in Capital Punishment*, 31 MD. L. REV. 289 (1971); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

[40] In Boykin v. Alabama, 395 U.S. 238 (1969), the Court granted certiorari to consider directly for the first time the death penalty's per se constitutionality. The case was resolved on grounds unrelated to that eighth amendment question, but one source suggests that the justices voted privately on the question in the course of conferencing and marked their conclusion in favor of constitutionality. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 206-07 (1979).

strongly forecasted publicly by 1971,[41] and was explicitly announced in *Gregg v. Georgia* in 1976.[42]

Instead of abolishing capital punishment, the Court chose to regulate it, taking perhaps not the first step[43] but certainly the first true leap of faith in its landmark 1972 decision of *Furman v. Geor-*

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41 *See* McGautha v. California, 402 U.S. 183 (1971). To Justice Brennan at least, *McGautha* signalled "the end of any hope that the Court would hold capital punishment to be unconstitutional." Brennan, *supra* note 38, at 321.

42 428 U.S. 153 (1976). In *Gregg*, Justices Stewart, Powell and Stevens joined in a plurality opinion which reasoned that capital punishment would constitute cruel and unusual punishment if it were substantially out of step with "the evolving standards of decency that mark the progress of a maturing society," *id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)), or if it failed to accord with "the dignity of man" underlying the eighth amendment by inflicting unnecessary and wanton pain or by being grossly disproportionate to the severity of the crime, *id.* at 173. In the plurality's judgment, capital punishment withstands challenge under both tests because it neither offends contemporary societal standards of decency, *id.* at 182, nor is unjustifiably or unconstitutionally severe, *id.* at 186-87.

Justice White, joined by Chief Justice Burger and then-Justice Rehnquist, concurred in the judgment based on the views expressed in Justice White's dissenting opinion filed the same day in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 350-56 (1976). These justices adopted substantially the same eighth amendment analysis as the plurality in concluding that the death penalty is not per se unconstitutional. The decisions of Congress and 35 states to reenact the death penalty after *Furman*, they reasoned, precluded a finding that capital punishment "is offensive to the prevailing attitudes and moral presuppositions in the United States." *Id.* at 353. Nor could these justices find fault with the judgments of these same legislatures that the death penalty appropriately serves legitimate punishment goals. *Id.* at 354-55.

Justice Blackmun also concurred in the *Gregg* judgment, filing a one-sentence opinion in which he cited his own dissent four years earlier in Furman v. Georgia, 408 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting), as well as the dissenting opinions in that same case of Chief Justice Burger, *id.* at 375 (Burger, C.J., dissenting), and then-Justice Rehnquist, *id.* at 465 (Rehnquist, J., dissenting). 428 U.S. at 227 (Blackmun, J., concurring in judgment). Although he found the death penalty personally distressing, Justice Blackmun was unprepared to hold the death penalty unconstitutional in light of considerable legislative support for its use. *Furman*, 408 U.S. at 405-13 (Blackmun, J., dissenting).

Only Justices Brennan and Marshall adopted the position in *Gregg* that the death penalty is per se unconstitutional. *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting). In so concluding, each reiterated the views he had espoused earlier in *Furman*. *See* 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). In Justice Brennan's view, the death penalty fails under the eighth amendment because it denies human dignity; it constitutes the arbitrary imposition of an unusually severe punishment which society does not consider acceptable and which serves no penal purpose more effectively than significantly less drastic punishments. *Furman*, 408 U.S. at 305 (Brennan, J., concurring). For Justice Marshall, the death penalty is unconstitutional because it is excessive in relation to the purposes that might be asserted to justify it, and is morally unacceptable to a citizenry informed about its actual application and consequences. *Id.* at 342-59, 360-69 (Marshall, J., concurring).

43 *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding unconstitutional a death sentence imposed by a jury from which all prospective jurors who had expressed conscientious scruples against capital punishment had been excused for cause without any attempt to determine whether they could nevertheless return a verdict of death).

gia.[44] In a famously fractured decision — each of the nine justices wrote separately — the Court invalidated capital punishment statutes which gave juries unbridled sentencing discretion as violative of the eighth amendment ban against cruel and unusual punishments. As the Court later explained, *Furman* found unbridled sentencing discretion unconstitutional because it "created a substantial risk that [the death sentence] would be inflicted in an arbitrary and capricious manner."[45] To comply with the eighth amendment, a state is required to bring capital punishment closer to the rule of law by making it more rational and more orderly; "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."[46]

Occasionally, it is argued that *Furman*'s call for rational orderliness impinges upon or otherwise qualifies the constitutional imperative of discretion in capital sentencing recognized in *Woodson*, *Lockett*, and their progeny.[47] If *Furman* does threaten the principle of *Woodson* and *Lockett*, then it is dead wrong as a matter of constitutional law. As noted above, the discretion which allows a capital sentencer to reach a morally appropriate determination is inextricably bound up in and mandated by society's evolved standards of decency. Society alone can cause those evolved standards of decency to change.[48] No matter how broad the Supreme Court's latitude under the Constitution might be, the justices have no license to compromise society's standards of decency to incur even the slight-

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44 408 U.S. 238 (1972).

45 Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

46 Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion).

47 *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3067-68 (1990) (Scalia, J., concurring in part and concurring in judgment). There has even been an intimation in at least one Supreme Court majority opinion to this effect. *See* Boyde v. California, 110 S. Ct. 1190, 1196 (1990) ("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.' ") (citation omitted).

48 *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 (1989) ("In determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole"); Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) ("Of course the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views. To avoid this danger we have . . . looked for objective signs of how today's society views a particular punishment") (citing Furman v. Georgia, 408 U.S. 238, 277-79 (1972)(Brennan, J. concurring)). For present purposes, it may be assumed that the eighth amendment's recognition that standards of decency evolve connotes no substantive value judgments about what it means to "evolve." Under this assumption, even a reversion to earlier understandings might qualify as an evolution in contemporary conceptions of decency — although there are difficulties associated with assessing the significance of an abrupt change in course. *See supra* note 34.

est concession of morality to the rule of law. Even if the eighth amendment did give the justices permission to impose new standards of decency upon society, rather than confining the Court to the less subjective task of discerning society's already-evolved standards of decency (a proposition with which some of the justices doubtless would disagree), *Furman* nevertheless would not threaten the principle of *Woodson* and *Lockett*. No currently accepted norm of constitutional adjudication could legitimize a ruling that would require society to tolerate morally questionable death sentences, despite any potential gains in systemic rationality or orderliness. Indeed, it is not clear that a legal system that produced morally inappropriate death sentences could ever be called rational or orderly.[49]

If *Furman* cannot alter the constitutional impermissibility of risking a morally erroneous death sentence by subordinating morality to law, what then is *Furman*'s effect on death penalty jurisprudence? There are basically two schools of thought on this point. One view sees in *Furman* a mandate that arbitrariness, capriciousness and irrationality be rooted out of capital sentencing patterns almost entirely. If this mandate cannot be achieved while maintaining the discretion necessary to guard against morally inappropriate sentences, then capital punishment simply cannot be administered at all.[50] The other view, which apparently commands a majority of the justices, does not allow *Furman* to imperil capital punishment's very existence. For the majority of justices, *de facto* or *de jure* judicial abolition of the death penalty is constitutionally unsupportable, and *Furman* therefore must be interpreted to demand at most the practically attainable.[51] Neither interpretation of *Furman*, however, ren-

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[49] Since Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), the Court has recognized that "a consistency [in capital sentencing] produced by ignoring individual differences is a false consistency." *See also* Boyde v. California, 110 S. Ct. 1190, 1201 (1990) (Marshall, J., dissenting) ("The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution"); McKoy v. North Carolina, 110 S. Ct. 1127 (1990) (jury discretion to consider moral appropriateness of death sentence unduly limited, posing unacceptable risk of arbitrary death sentences); Mills v. Maryland, 486 U.S. 367 (1988) (same).

[50] *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3069 n.1 (1990) (Brennan, J., dissenting) ("Our cases have applied these principles [that capital punishment not be meted out arbitrarily or irrationally, and that the punishment must also accord with human dignity] together to 'insis[t] that capital punishment be imposed fairly, *and* with reasonable consistency, or not at all.' ") (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)) (emphasis supplied in *Walton*).

[51] Whatever rational orderliness *Furman* might demand from capital punishment, it "does not 'plac[e] totally unrealistic conditions on its use.' " McCleskey v. Kemp, 481 U.S. 279, 315 n.37 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976)

ders it logically irreconcilable with *Woodson* and *Lockett*. *Woodson* and *Lockett* mandate that a sentencer be given a limited discretion that is not arbitrary, capricious or standardless — *the discretion to give a life sentence because of moral considerations that arise directly from the mitigating circumstances of the offense and the offender.*

IV. Making Moral Appropriateness Possible: The Doctrine of *Lockett v. Ohio* and Its Progeny

Having identified some of the principles that have emerged as fundamental under the eighth amendment — that only morally appropriate death penalties are permissible, that a reliable determination must be made that death is indeed the morally appropriate decision in a given case, and that a capital sentencing procedure accordingly must be sufficiently discretionary to make reliable determinations possible — we are ready to confont much the same question that the Court faced after its 1976 *Woodson* ruling. How may the Court assure adherence to these constitutional principles while minimizing needless frictions and keeping true to the judicial craft? The Court's answer to this question may constitute the single most important doctrine governing capital punishment today — the doctrine equated with *Lockett v. Ohio*[52] and its progeny.

Generally speaking, *Lockett* and the cases following it hold that a capital sentencing scheme must provide for an "individualized asssessment of the appropriateness of the death penalty,"[53] an assessment which cannot be made if the sentencer is impeded "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."[54]

(plurality opinion)). The *McCleskey* decision fairly can be read to have turned on this precise point. Condemned to die in Georgia, Warren McCleskey contended — with impressive supporting data — that the state's capital sentencing scheme was arbitrary and capricious in its application because its results ultimately were explicable only as the products of impermissible racial considerations. According to Justice Powell, the author of the majority opinion rejecting McCleskey's challenge, Georgia could make its scheme more rational only at the expense of either discretion (which cannot be compromised) or the system's basic workability. In the final analysis, then, McCleskey lost because his "call for greater rationality [was] no less than a claim that a capital punishment system cannot be administered in accord with the Constitution." 481 U.S. at 315 n.37.

52 438 U.S. 586 (1978).

53 Penry v. Lynaugh, 492 U.S. 302, 319 (1989). *See also* Boyde v. California, 110 S. Ct. 1190, 1196 (1990) (same).

54 *Lockett*, 438 U.S. at 604 (plurality opinion) (emphasis omitted and supplied). *See also* McCleskey v. Kemp, 481 U.S. 279, 314-15 n.37 (1987) ("We have held that discretion in a capital punishment system is necessary to satisfy the Constitution. . . . [T]he Constitution requires that juries be allowed to consider 'any relevant mitigating factor,' even if it is not included in a statutory list. . . . If capital defendants are to be treated as

When the sentencer is unable to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation [there is a] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."[55]

It is worthwhile to explore the *Lockett* doctrine in some detail, for *Lockett* and its progeny accomplish a great deal of constitutional work with remarkable efficiency. By way of preface, first note the simplicity of the doctrine's overall strategy: A class of evidence, called "mitigating evidence," is defined, and a series of requirements is imposed concerning the treatment of that evidence in any capital sentencing process. Those requirements guarantee that mitigating evidence will be considered in the capital sentencer's decision. When the *Lockett* doctrine's requirements are obeyed, the capital sentencing process becomes open and flexible, thus enhancing the likelihood that the sentencer's moral decision will be reliable.

A. THE DEFINITION OF MITIGATING EVIDENCE

Consider first *Lockett*'s definition of "mitigating evidence," that class of evidence entitled to particular consideration under the eighth amendment. Mitigating evidence, the cases provide, is any "fact[] about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death."[56] By several measures, the definition deserves high marks. First, it contains no reference to any particular moral theory or theories. This "moral neutrality" is a considerable achievement

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'uniquely individual human beings,' . . . then discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed is essential.") (citations omitted).

55 *Lockett*, 438 U.S. at 605 (plurality opinion). *Accord* Sumner v. Shuman, 483 U.S. 66, 82, 85 (1987) (mandatory death sentence for murder committed by life-term inmate unconstitutional because it precludes consideration of mitigating evidence and therefore creates risk that death sentence will be imposed in spite of factors which might call for a less severe penalty; "[h]aving reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate"); Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring) ("failure to consider all mitigating evidence risks erroneous imposition of the death sentence").

56 Franklin v. Lynaugh, 487 U.S. 164, 188 (1988) (O'Connor, J. concurring) (citing California v. Brown, 479 U.S. 538, 541 (1987)). *See also* Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (mitigating evidence is "*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") (emphasis supplied).

in light of the alternative. Were the justices to define mitigating evidence with reference to some particular moral theory, they could be accused of legislating their own morals, to the exclusion of other reasonably held and equally legitimate moral precepts, under cover of the eighth amendment. Nothing in the Constitution permits the Court to give credence to only some of the moral considerations which rational people might deem germane to the appropriateness of the death penalty in a particular case. As Justice Scalia has stated succinctly, the eighth amendment discloses no "objective criterion of what is mitigating."[57] The *Lockett* doctrine avoids this subjective quagmire. It defines mitigating evidence by reference to the facts of the individual case and the possibility that, under some moral theory, some of those facts could conceivably give rise to an argument against imposition of the death penalty. If evidence bears on "any aspect" of the defendant's character, record or crime,[58] and if it could support a reasonable argument for a sentence less than death,[59] then it is by definition mitigating evidence.

Second, *Lockett*'s definition extends constitutional protection to the kind of evidence that must be taken into account at sentencing to produce a morally appropriate sentence. Any evidence about the offender or the offense that might support a conceivable moral argument against the death sentence in a particular case is protected under *Lockett*'s definition. Mitigating evidence might include, for instance, evidence that a death sentence would be unjust because the defendant's personal responsibility for the offense is lessened by youth,[60] stunted intellectual and emotional growth,[61] mental retar-

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57 Walton v. Arizona, 110 S. Ct. 3047, 3062 (1990) (Scalia, J., concurring in part and concurring in judgment).

Justice Powell not long ago proposed that the Court limit the range of moral considerations deserving of constitutional protection in the capital sentencing process to "those factors that are central to the fundamental justice of execution." Skipper v. South Carolina, 476 U.S. 1, 13 (1986) (Powell, J., concurring in judgment). Such an open-ended formulation cannot provide meaningful guidance until it is given more definitive substantive content. That substantive content can be provided only through highly subjective (and hence constitutionally suspect) value judgments. Who is to say, for instance, what the fundamental justice of execution is and what matters are "central" to it? By what criteria can such matters be determined?

58 Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978) (plurality opinion).

59 *See* McKoy v. North Carolina, 110 S. Ct. 1227, 1232 (1990) ("if the sentencer could reasonably find that it warrants a sentence less than death"); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) ("inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' ") (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)).

60 *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 375 (1989) (plurality opinion); Thompson v. Oklahoma, 487 U.S. 815, 833-38 (1988); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982); ALA. CODE § 13A-5-51(7) (1975 & Supp. 1990); ARIZ. REV. STAT. ANN. § 13-703G.5 (1982 & Supp. 1989); ARK. STAT. ANN. § 5-4-605(4) (1987); CAL. PENAL

dation or impaired capacity,[62] mental or emotional disturbance,[63] provocation by others,[64] insanity,[65] the influence of alcohol or drugs at the time of the offense,[66] or shared or limited participation in the

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CODE § 190.3(i) (West 1988); COLO. REV. STAT. § 16-11-103(5)(a) (1986); CONN. GEN. STAT. ANN. § 53a-46a(g)(1) (West 1985); FLA. STAT. ANN. § 921.141(6)(g) (West 1985); IND. CODE ANN. § 35-50-2-9(c)(7) (West 1986 & Supp. 1990); LA. REV. STAT. ANN. § 905.5(f) (West 1981 & Supp. 1991); MD. CRIM. LAW CODE § 413(g)(5) (1988); MISS. CODE ANN. § 99-19-101(6)(g) (1972 & Supp. 1990); MO. ANN. STAT. § 565.012.3(7) (Vernon 1979); MONT. CODE ANN. § 46-18-304(7) (1989); NEB. REV. STAT. § 29-2523(2)(d) (1989); N.H. REV. STAT. ANN. § 630:5II(b)(5) (1986 & Supp. 1990); N.J. REV. STAT. § 2C:11-3c(5)(c) (1982 & Supp. 1990); N.M. STAT. ANN. § 31-20A-6.I (1978); N.C. GEN. STAT. § 15A-2000(f)(7) (1988); OHIO REV. CODE ANN. § 2929.04(B)(4) (Baldwin 1986); 42 PA. CONS. STAT. § 9711(e)(4) (Pardon 1982); S.C. CODE §§ 16-3-20(C)(b)(7), (9) (1985 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(e) (1990); VA. CODE ANN. § 19.2-264.4.B(v) (1990); WASH. REV. CODE § 10.95.070(7) (1990); WYO. STAT. § 6-2-102(i)(vii) (1988 & Supp. 1990).

61 *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 789 n.7 (1987).

62 *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 340 (1989); ALA. CODE §§ 13A-5-51(5), (6) (1975 & Supp. 1990); ARIZ. REV. STAT. ANN. § 13-703G.1 (1982 & Supp. 1989); ARK. STAT. ANN. § 5-4-605(3) (1987); CAL. PENAL CODE § 190.3(h) (West 1988); COLO. REV. STAT. § 16-11-103(5)(b) (1986); CONN. GEN. STAT. ANN. § 53a-46a(g)(2) (West 1985); FLA. STAT. ANN. § 921.141(6)(f) (West 1985); IND. CODE ANN. § 35-50-2-9(c)(6) (West 1986 & Supp 1990); LA. REV. STAT. ANN. § 905.5(e) (West 1986 & Supp. 1991); MD. CRIM. LAW CODE § 413(g)(4) (1988); MISS. CODE ANN. § 99-19-101(6)(f) (1972 & Supp. 1990); MO. ANN. STAT. § 565.032.3(6) (Vernon 1979); MONT. CODE ANN. § 46-18-304(4) (1989); NEB. REV. STAT. § 29-2523(2)(g) (1989); N.H. REV. STAT. ANN. § 630:5II(b)(4) (1982 & Supp. 1990); N.J. REV. STAT. § 2C:11-3c(5)(d) (1982 & Supp. 1990); N.M. STAT. ANN. § 31-20A-6.C (1978); N.C. GEN. STAT. § 15A-2000(f)(6) (1988); OHIO REV. CODE ANN. § 2929.04(B)(3) (Baldwin 1986); 42 PA. CONS. STAT. § 9711(e)(3) (1982); S.C. CODE § 16-3-20(C)(b)(6) (1985 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(d) (1990); VA. CODE ANN. § 19.2-264.4.B(iv) (1990); WASH. REV. CODE § 10.95.070(6) (1990); WYO. STAT. § 6-2-102(i)(vi) (1988 & Supp. 1990).

63 *See, e.g.*, ALA. CODE § 13A-5-51(2) (1975 & Supp. 1990); ARK. STAT. ANN. § 5-4-605(1) (1987); CAL. PENAL CODE § 190.3(d) (West 1988); COLO. REV. STAT. § 16-11-103(5)(f) (1986); FLA. STAT. ANN. § 921.141(6)(b) (West 1985); ILL. REV. STAT. ch. 38, ¶ 9-1(c)(2) (1979 & Supp. 1990); IND. CODE ANN. § 35-50-2-9(c)(2) (West 1986 & Supp. 1990); LA. REV. STAT. ANN. § 905.5(b) (West 1981 & Supp. 1991); MISS. CODE ANN. § 99-19-101(6)(b) (1972 & Supp. 1990); MO. ANN. STAT. § 565.032.3(2) (Vernon 1979); MONT. CODE ANN. § 46-18-304(2) (1989); NEB. REV. STAT. § 29-2523(2)(c) (1989); N.H. REV. STAT. ANN. § 630:5II(b)(2) (1982 & Supp. 1990); N.J. REV. STAT. § 2C:11-3c(5)(a) (1982 & Supp. 1990); N.M. STAT. ANN. § 31-20A-6.D (1978); N.C. GEN. STAT. § 15A-2000(f)(2) (1988); 42 PA. CONS. STAT. § 9711(e)(2) (1982); S.C. CODE § 16-3-20(C)(b)(2) (1985 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(b) (1990); VA. CODE ANN. § 19.2-264.4.B(ii) (1990); WASH. REV. CODE § 10.95.070(2) (1990); WYO. STAT. § 6-2-102(i)(ii) (1988 & Supp. 1990).

64 *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582, 621 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); MD. CRIM. LAW CODE § 413(g)(3) (1988); OHIO REV. CODE ANN. § 2929.04(B)(2) (Baldwin 1986); S.C. CODE. ANN. § 16-3-20(C)(b)(8) (1985 & Supp. 1990).

65 *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 414 (1986).

66 *See, e.g.*, Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987); ARK. STAT. ANN. § 5-4-605(3) (1987); CAL. PENAL CODE § 190.3(h) (West 1988); COLO. REV. STAT. § 16-11-103(5)(i) (1986); IND. CODE ANN. § 35-50-2-9(c)(6) (West 1986 & Supp. 1990); LA. REV. STAT. ANN. § 905.5(e) (West 1981 & Supp. 1991); NEB. REV. STAT. § 29-2523(2)(g)

actual crime.[67] *Lockett*'s definition of mitigating evidence also would embrace evidence in support of a claim that the defendant suffered tragic or horrible circumstances in his or her formative years, such as abuse,[68] neglect,[69] poverty,[70] or domestic turbulence,[71] that might explain the defendant's failure to develop into a fully normal and law-abiding citizen. Evidence tending to show that a death sentence would be too harsh because the defendant in the past has succeeded in making a well-behaved and peaceful adjustment to prison life,[72] is prone only to isolated incidents of violent behavior that can be controlled or minimized in prison,[73] has been willing to confess or cooperate with authorities in some way,[74] or otherwise has good prospects for rehabilitation[75] would find protection in *Lockett*'s definition. So, too, would evidence of some of the defendant's positive

(1989); N.J. REV. STAT. § 2C:11-3c(5)(d) (1982 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(d) (1990).

67 *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 828 (1982) (O'Connor, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (plurality opinion); Chaney v. Brown, 730 F.2d 1334, 1352-55 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984); State v. Gerald, 113 N.J. 40, 104-05, 549 A.2d 792, 825-26 (1988); ALA. CODE § 13A-5-51(4) (1975 & Supp. 1990); ARIZ. REV. STAT. ANN. § 13-703G.3 (1982 & Supp. 1989); ARK. STAT. ANN. § 5-4-605(5) (1987); CAL. PENAL CODE § 190.3(j) (West 1988); COLO. REV. STAT. § 16-11-103(5)(d) (1986); CONN. GEN. STAT. ANN. § 53a-46a(g)(4) (West 1985); FLA. STAT. ANN. § 921.141(6)(d) (West 1985); IND. CODE ANN. § 35-50-2-9(c)(4) (West 1986 & Supp. 1990); LA. REV. STAT. ANN. § 905.5(g) (West 1981 & Supp. 1991); MISS. CODE ANN. § 99-19-101(6)(d) (1972 & Supp. 1990); MO. ANN. STAT. § 565.032.3(4) (Vernon 1979); MONT. CODE ANN. § 46-18-304(6) (1989); NEB. REV. STAT. § 29-2523(2)(e) (1989); N.C. GEN. STAT. § 15A-2000(f)(4) (1988); OHIO REV. CODE ANN. § 2929.04(B)(6) (Baldwin 1986); 42 PA. CONS. STAT. § 9711(e)(7) (1982); S.C. CODE § 16-3-20(C)(b)(4) (1985 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(f) (1990); WASH. REV. CODE § 10.95.070(4) (1990); WYO. STAT. § 6-2-102(i)(iv) (1988 & Supp. 1990).

68 *See, e.g.*, Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987); Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir.), *cert. denied*, 480 U.S. 951 (1986); Pickens v. Lockhart, 714 F.2d 1455, 1466 (8th Cir. 1983).

69 *See, e.g.*, Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987); Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir.), *cert. denied*, 480 U.S. 951 (1986).

70 *See, e.g.*, Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir.), *cert. denied*, 480 U.S. 951 (1986); Goodwin v. Balkcom, 684 F.2d 794, 800 n.4 (11th Cir), *cert. denied*, 460 U.S. 1098 (1982).

71 *See, e.g.*, Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987); Thompson v. Wainwright, 787 F.2d 1447, 1453 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987); Pickens v. Lockhart, 714 F.2d 1455, 1466 (8th Cir. 1983).

72 *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1, 7 (1986).

73 *See, e.g.*, Sumner v. Shuman, 483 U.S. 66, 82 (1987).

74 *See, e.g.*, Foster v. Strickland, 707 F.2d 1339, 1347 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984); COLO. REV. STAT. § 16-11-103(5)(h) (1986); N.J. REV. STAT. § 2C:11-3c(5)(g) (1982 & Supp. 1990); N.M. STAT. ANN. § 31-20A-6.H (1978); N.C. GEN. STAT. § 15A-2000(f)(8) (1988).

75 *See, e.g.*, Miller v. Wainwright, 798 F.2d 426, 430-31 (11th Cir. 1986); State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984); N.M. STAT. ANN. § 31-20A-6.G (1978).

traits — such as remorse,[76] general good character,[77] hardworking nature,[78] success in overcoming considerable hardships,[79] service to the community[80] or the military,[81] or relatively minor criminal record[82] — that distinguish the defendant from truly incorrigible murderers and commend restraint in imposing the harshest sentence.

The breadth of *Lockett*'s definition of mitigating evidence is justified. All of the foregoing considerations speak directly to the moral appropriateness of the death sentence in a particular case and thus are precisely the type of moral concerns to which a capital sentencing system must be fully open and responsive. Indeed, a capital sentencing scheme which discounted these considerations would be infected with the risk of moral error, the very risk which society found so intolerable as to require rejection of mandatory capital sentencing. *Lockett*'s definition might be considered *underinclusive* for its failure to embrace everything that should be taken into account to ensure a reliable moral choice between life imprisonment and the

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76 *See, e.g.*, Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987); Evans v. Cabana, 821 F.2d 1065, 1071 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987).

77 *See, e.g.*, Coleman v. Risley, 839 F.2d 434, 453 n.7 (9th Cir. 1988), *rev'd on other grounds sub nom.* Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 349 (1989).

78 *See, e.g.*, Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985).

79 *See, e.g.*, Johnson v. Wainwright, 806 F.2d 1479, 1483-84 (11th Cir. 1986), *cert. denied*, 484 U.S. 872 (1987).

80 *See, e.g.*, Coleman v. Risley, 839 F.2d 434, 453 n.7 (9th Cir. 1988), *rev'd on other grounds sub nom.* Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 349 (1989).

81 *See, e.g.*, Coleman v. Risley, 839 F.2d 434, 453 n.7 (9th Cir. 1988), *rev'd on other grounds sub nom.* Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 349 (1989); Laws v. Armontrout, 863 F.2d 1377, 1389-90 (8th Cir. 1988), *cert. denied*, 490 U.S. 1040 (1989).

82 *See, e.g.*, Coleman v. Risley, 839 F.2d 434, 453 n.7 (9th Cir. 1988), *rev'd on other grounds sub nom.* Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 349 (1989); Magill v. Dugger, 824 F.2d 879, 889 (11th Cir.), *cert. denied*, 483 U.S. 1035 (1987); ALA. CODE § 13A-5-51(2) (1975 & Supp. 1990); ARK. STAT. ANN. § 5-4-605(6) (1987); CAL. PENAL CODE §§ 190.3(b), (c) (West 1988); COLO. REV. STAT. § 16-11-103(5)(g) (1988); FLA. STAT. ANN. § 921.141(6)(a) (West 1985); ILL. REV. STAT. ch. 38, ¶ 9-1(c)(1) (1979 & Supp. 1990); IND. CODE ANN. § 35-50-2-9(c)(1) (West 1986 & Supp. 1990); LA. REV. STAT. ANN. § 905.5(a) (West 1981 & Supp. 1990); MD. CRIM. LAW CODE § 413(g)(1) (1988); MISS. CODE ANN. § 99-19-101(6)(a) (1972 & Supp. 1990); MO. ANN. STAT. § 565.012.3(1) (Vernon 1979); MONT. CODE ANN. § 46-18-304(1) (1989); NEB. REV. STAT. § 29-2523(2)(a) (1989); N.H. REV. STAT. ANN. § 630:5II(b)(1) (1986 & Supp. 1990); N.J. REV. STAT. § 2C:11-3c(5)(f) (1982 & Supp. 1990); N.M. STAT. ANN. § 31-20A-6.A (1988); N.C. GEN. STAT. § 15A-2000(f)(1) (1988); OHIO REV. CODE ANN. § 2929.04(B)(5) (Baldwin 1986); 42 PA. CONS. STAT. § 9711(e)(1) (1982); S.C. CODE § 16-3-20(C)(b)(1) (1985 & Supp. 1990); UTAH CODE ANN. § 76-3-207(2)(a) (1990); VA. CODE ANN. § 19.2-264.4.B(i) (1990); WASH. REV. CODE § 10.95.070(1) (1990); WYO. STAT. § 6-2-102(i)(i) (1988 & Supp. 1990).

death penalty.[83] Attempts to alleviate any perceived *overinclusiveness* in the definition, however, could only make matters positively worse. Any alternative narrower definition would probably be even more underinclusive, or would reflect impermissibly subjective value judgments regarding what is and is not mitigating.

Third, *Lockett*'s definition of mitigating evidence is drawn narrowly enough to exclude matters that do not enhance the reliability of the sentencer's moral decision in any particular case. While there is some force to the argument that *any and all* moral considerations arguing against capital punishment should be open for a capital sentencer's consideration, acceptance of so broad a proposition is not constitutionally compelled. To achieve confidence in the moral appropriateness of a death sentence for a particular offender and offense, it is not necessary to conduct a mini-referendum on the death penalty's moral appropriateness *as a categorical matter*, replete with litigation over general moral objections to the death penalty unrelated to the unique circumstances of the case at hand. The views of philosophers or the clergy that capital punishment is morally offensive,[84] evidence that the death penalty in fact does not deter,[85] and evidence regarding the gruesomeness of an execution[86] exemplify the kind of generalized objections to capital punishment that fall outside *Lockett*'s definition of mitigating evidence. A state constitutionally may exclude these objections from the sentencer's consideration because they do not suggest a moral basis for a sentence less than death in one particular case as opposed to any other.[87]

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[83] *See infra* note 91.

[84] *See, e.g.*, State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009 (1985); State v. Watson, 449 So. 2d 1321 (La. 1984), *cert. denied*, 469 U.S. 1181 (1985); People v. Yates, 98 Ill. 2d 502, 456 N.E.2d 1369 (1983), *cert. denied*, 466 U.S. 981 (1984); Hill v. State, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982); State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213 (1983).

[85] *See, e.g.*, State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), *cert. denied*, 472 U.S. 1032 (1985); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

[86] *See, e.g.*, Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030 (1985); Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), *cert. denied*, 459 U.S. 1188 (1983); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

[87] The history of capital punishment might support limiting the evidence in a capital case to facts relating to the case at hand. Even during the days when juries had unbridled sentencing discretion, defendants did not enjoy a corresponding right to litigate capital punishment's general morality in unbridled fashion. Judges were forbidden from suggesting a framework for the jury's deliberations on whether to grant or withhold mercy, *see, e.g.*, State v. McMillan, 233 N.C. 630, 633, 65 S.E.2d 212, 213 (1951), but they generally were accorded the authority "to exclude, as irrelevant, evidence not bearing

The practical significance of generalized evidence about the morality or advisability of capital punishment seems to lie in its capacity to make the sentencer more or less susceptible to particularized arguments about the moral appropriateness of the death penalty in the case at hand. Unquestionably, a sentencer's freedom from predispositions that will skew its moral determination is of great constitutional importance. There are, however, means other than an evidentiary free-for-all for guaranteeing fair-minded sentencers. Where the jury makes the sentencing decision, for instance, jury selection procedures address this concern,[88] as well as measures to ensure that the jury is instructed on its obligations[89] and "recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' "[90] Thus, the need for a reliable determination of the death penalty's moral appropriateness in a particular case does not require the capital sen-

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on the defendant's character, prior record, or circumstances of his offense." Lockett v. Ohio, 438 U.S. 586, 605 n.12 (1978) (plurality opinion). Moreover, the practice of "death qualification" of capital juries was well accepted in the days of unbridled discretion. Jurors who harbored general scruples against the death penalty were not unfit to serve, but those who made it unmistakably clear that their moral or religious opposition to capital punishment would prevent them from ever voting to impose a death sentence could be excused for cause. Witherspoon v. Illinois, 391 U.S. 510 (1968). *See also* Lockhart v. McCree, 476 U.S. 162 (1986) (affirming constitutionality of the universally followed practice of "death qualification"); Wainwright v. Witt, 469 U.S. 810 (1984) (holding that correct standard under *Witherspoon* is that excusals for cause are permissible whenever a juror's scruples against capital punishment would prevent or substantially impair the juror's performance of his or her duties as a juror in accordance with the instructions and the oath); Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977, 982 & n.20 (1984). Thus, society's traditional commitment to discretionary capital sentencing does not argue in favor of making the morality of capital punishment per se a litigable question in individual cases.

88 *See, e.g.*, Ross v. Oklahoma, 487 U.S. 81 (1988) (sixth and fourteenth amendment right to have prospective juror excused for cause when the juror's favorable views toward death penalty would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath, at least when defense lacks peremptory challenge to excuse the juror); Turner v. Murray, 476 U.S. 28 (1986) (sixth and fourteenth amendment right to voir dire prospective capital jurors on question of racial bias where case involves interracial crime); Dayan, Mahler & Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOY. L.A.L. REV. 151 (1989).

89 *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."); Boyde v. California, 110 S. Ct. 1190, 1198 (1990) (Constitution is violated where there is a reasonable likelihood that the jury interpreted an ambiguous instruction in a way that prevents full consideration of evidence that might provide moral basis for a sentence less than death); Penry v. Lynaugh, 492 U.S. 302, 323 (1989) (sentencing instructions inadequate to ensure that jury would feel free to consider and give effect to evidence that might provide moral basis for a sentence less than death).

90 Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) (plurality opinion). *See also* Sawyer v. Smith, 110 S. Ct. 2822, 2832 (1990) (explaining rule of *Caldwell*).

tencing hearing to serve as a forum for examining the morality of capital punishment as an institution. Such general policy decisions should be made in political forums. *Lockett* therefore permits the states to confine their capital trials to facts and issues related to the individual offender and offense at hand.[91]

Fourth, *Lockett*'s definition of mitigating evidence should please those who value precision and predictability in constitutional rules. Its clear and fairly objective terms make it a workable tool for trial

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91 The eighth amendment may obligate the states, however, to permit sentencers to consider matters outside the *Lockett* definition of mitigating evidence. Consider, for example, the argument eloquently advanced by Justice Blackmun in favor of permitting the capital sentencer to dispense mercy without regard to the moral arguments for or against the death sentence on the facts of the case:

> While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's sympathy or mercy, human qualities that are undeniably emotional in nature. . . . 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. . . . [W]e see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.

California v. Brown, 479 U.S. 538, 561-63 (1987) (Blackmun, J., dissenting). *See also* Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 395-98 (1989). Were the Court to accept Justice Blackmun's position, it apparently would not be to prevent the imposition of morally inappropriate death sentences. *See* Saffle v. Parks, 110 S. Ct. 1257 (1990) (to require that capital sentencer be free to base decision upon sympathy for defendant would necessitate the development of a "new rule" of constitutional law). Strong arguments also can be made that the eighth amendment requires admission of information about the parole eligibility rules that would apply to the defendant if he were sentenced to life rather than death. Admission may be required even if, as some courts have held, this information does not fall within *Lockett*'s definition because it is not a fact about the offender or the offense. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 231-38, 244-49 (1987); *see also* Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989).

The extent to which a state may expand the scope of its capital sentencing hearing beyond matters relating to the individual offender or offense is a question largely unexplored, although some things have been said in the cases. As a substantive matter, the Court on two occasions advanced the proposition that the states cannot allow factors "wholly unrelated to the blameworthiness of a particular defendant" to be placed before the sentencer in support of a death sentence. *See* South Carolina v. Gathers, 490 U.S. 805, 810-11 (1989) (sentencer's consideration of victim impact evidence that is unrelated to defendant's personal culpability is barred by the eighth amendment); Booth v. Maryland, 482 U.S. 496, 504 (1987) (same). This proposition is in some doubt given the Court's recent decision in Payne v. Tennessee, 111 S. Ct. 2597 (1991). In *Payne*, the Court overruled *Booth* and *Gathers* insofar as they held inadmissible evidence of the specific harm done by the defendant offered in the form of victim impact evidence. The Court reasoned that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness," it should have such evidence before it. *Payne*, 111 S. Ct. at 2608. As a procedural matter, due process dictates that the defense must be allowed to review and deny or explain any factor which the sentencer is permitted to take into account in the sentencing decision. Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); *id.* at 10-11 (Powell, J., concurring in judgment); Gardner v. Florida, 430 U.S. 349 (1977).

and reviewing courts alike. Whether a fact is about an individual's character or record or offense is as straightforward a question as a judge will face. Whether the fact might suggest a conceivable moral argument against imposing the death penalty involves a bit more judgment, but jurists mindful of the wide range of moral views should not experience much difficulty administering *Lockett*'s broadly inclusive standard.

B. THE REQUIREMENTS RELATING TO THE TREATMENT OF MITIGATING EVIDENCE

Lockett and its progeny impose four requirements regarding the treatment of mitigating evidence in capital sentencing. The first two work in tandem toward a single objective: *empowering the sentencer to make a reliable moral decision.* They are well framed to ensure that regardless of how a state structures its capital sentencing procedure, the sentencer (whether jury, judge or perhaps even appellate court[92]) retains the discretion to reject the death penalty when it is morally inappropriate for the particular offender or offense.

First, the *Lockett* doctrine mandates that the sentencer must be free to "consider" any and all mitigating evidence — that is, to think upon and weigh the evidence, and to determine in light of the evidence whether death is the "reasoned *moral* response to the defendant's background, character, and crime."[93] Consequently, virtually anything that is reasonably likely to impede the sentencer's consideration of mitigating evidence, as defined by *Lockett*, violates the eighth amendment.[94]

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92 *See* Walton v. Arizona, 110 S. Ct. 3047 (1990) (jury sentencing not constitutionally required in capital cases); Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990) (constitutionally permissible for appellate courts to reweigh aggravating and mitigating circumstances and thus serve as second sentencer, although they may face "certain difficulties in determining sentencing questions in the first instance").

93 Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)).

94 *See, e.g.*, McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (unconstitutional to prevent individual jurors from considering, in ultimate sentencing decision, evidence which all twelve jurors do not agree has mitigating value); Mills v. Maryland, 486 U.S. 367 (1988) (same); Hitchcock v. Dugger, 481 U.S. 393 (1987) (where jury is to recommend sentence subject to potential override by trial judge, it is unconstitutional for judge to instruct jury not to consider certain mitigating evidence in ultimate sentencing decision and for judge himself to refuse to consider that mitigating evidence); Eddings v. Oklahoma, 494 U.S. 104 (1982) (unconstitutional for sentencing judge to refuse to consider mitigating evidence on theory that state law prohibited its consideration). *See also* Boyde v. California, 110 S. Ct. 1190, 1198 (1990) (eighth amendment is violated where there is a reasonable likelihood that sentencing jury applied an instruction in a way that prevented the consideration of mitigating evidence).

The only recognized exception to the requirement that there be no barrier to the

Second, the doctrine mandates that the sentencer must be able to "give effect" to mitigating evidence, for " 'the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration' in imposing sentence."[95] Thus, the sentencer must be "provided with a vehicle for expressing its 'reasoned moral response' to [mitigating] evidence in rendering its sentencing decision."[96] There is a straightforward test for determining whether the sentencer was able to "give effect" to mitigating evidence in a particular case. The reviewing court should draw from each item of mitigating evidence presented a list of all reasons that might argue against the moral appropriateness of the death sentence for that particular offender or offense. For each reason on the list, the court should then ask whether a reasonable sentencer would have believed itself legally authorized, based upon the laws meant to govern its decision and its obligation to obey those laws,[97] to return a life sentence for that reason alone if satisfied that the reason rendered the death sentence inappropriate. If the answer for even one reason on the list is "no," the sentencer did not have a vehicle for expressing its reasoned moral responses to mitigating evidence, and the eighth amendment accordingly was violated.[98]

Of course, dependable moral determinations will not necessarily be achieved simply by empowering the sentencer to consider and give effect to all the mitigating evidence in the case. Thus, while the first two *Lockett* requirements seek to *empower* the sentencer to make a reliable moral decision, the third and fourth *Lockett* requirements serve a different but related purpose: *enhancing the likelihood that the*

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sentencer's consideration of mitigating evidence is that a state may insist that only evidence which has been shown to be more likely than not true be taken into account. Walton v. Arizona, 110 S. Ct. 3047 (1990).

95 Penry v. Lynaugh, 492 U.S. 302, 321 (1989) (quoting Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in judgment)). *See also* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (sentencer must be free to give mitigating evidence "independent mitigating weight").

96 *Penry*, 492 U.S. at 329.

97 Where the sentencer is a jury, the governing law of course will be found in the court's instructions. *See, e.g.*, *Penry*, 492 U.S. 302 (instructions to jury unconstitutional for failing to provide a vehicle for consideration of certain mitigating evidence). Where a judge or a group of judges is performing the sentencing function, the governing law will be found in the substantive law of the jurisdiction as revealed in statutes, rules, and judicial decisions. *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990) (where sentencing is done by judges, they are "presumed to know the law, and to apply it in making their decisions").

98 The leading case illustrating this process is Penry v. Lynaugh, 492 U.S. 302 (1989). *See also* Oregon v. Wagner, 309 Or. 5, 786 P.2d 93 (1982), *cert. denied*, 111 S. Ct. 212 (1990) (finding constitutional error under *Penry*).

sentencer in fact will make a reliable moral decision. As a corollary to the requirement that the sentencer not be barred from considering any mitigating evidence, the *Lockett* doctrine's third requirement mandates that the sentencer itself may not refuse to consider any mitigating evidence presented in a case.[99] Although the sentencer is free to decide that mitigating evidence does not warrant a sentence less than death — were this not so, there would be no reason to have a sentencer — the sentencer cannot refuse to take mitigating evidence into account. In practice, this means that a death sentence cannot stand when the record reveals a reasonable likelihood that the sentencer refused to consider all the mitigating evidence.[100] *Lockett*'s insistence that the sentencer attend to its moral mission is scarcely objectionable. An unconstitutional risk of moral error in capital sentencing arises whenever the sentencer fails to consider all the mitigating evidence; this risk is no less real or pernicious when the fault lies with an able but unwilling sentencer.[101]

The fourth *Lockett* requirement mandates that the defense can-

99 Skipper v. South Carolina, 476 U.S. 1, 4 (1986) ("Equally clear is the corollary rule that the sentencer may not refuse to consider . . . 'any relevant mitigating evidence.' ") (citation omitted).

100 Eddings v. Oklahoma, 455 U.S. 104 (1982), provides the choicest example of such a case. In the majority's estimation of the record, the sentencing judge as well as the state appellate court had operated on the premise that certain mitigating evidence could not be considered as a matter of law, and not merely on the grounds that the evidence was unworthy of belief or of insubstantial weight. *Lockett* principles, the Court accordingly held, had been violated. *Id.* at 112-14. Justice O'Connor, concurring, took the view that even if the record were ambiguous as to whether the sentencing judge and appellate court had refused to consider mitigating evidence on erroneous grounds, constitutional error nonetheless was established because "*Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." *Id.* at 119 (O'Connor, J., concurring).

Although the Court in *Eddings* did not articulate a clear standard for dealing with allegations that a sentencer has refused to consider mitigating evidence in violation of *Lockett*, later developments suggest that the justices would find the Constitution violated where there is a "reasonable likelihood" that the sentencer has disregarded mitigating evidence categorically. In Boyde v. California, 110 S. Ct. 1190, 1198 (1990), the Court concluded that a jury instruction is unconstitutional when there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence." Because *Boyde* rests upon the uncontroversial proposition that the Constitution forbids a death sentence where there is a reasonable likelihood that mitigating evidence has gone unconsidered, it follows that the Constitution also is violated where the record reveals a reasonable likelihood that the capital sentencer refused to consider all the mitigating evidence.

101 "Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' " Mills v. Maryland, 486 U.S. 367, 375 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring)). *Accord* McKoy v. North Carolina, 110 S. Ct. 1227, 1233 (1990).

not be prevented from introducing any mitigating evidence.[102] Apparently implicit in this requirement, although the Court has not squarely decided the point, is a mandate that the defense cannot be denied an opportunity to argue before the sentencer the asserted significance and desired effect of the mitigating evidence presented.[103] Given the typical capital defendant's strong incentive to avoid the death penalty, this requirement helps ensure that a wide range of mitigating evidence will be developed before the sentencer. The result is an increased likelihood that the sentencer will possess and appreciate the information necessary to make a moral decision deserving of society's confidence.

Admittedly, compliance with *Lockett*'s requirements will not fully secure the constitutional objective of ensuring that all death sentences imposed are morally appropriate. The confidence that society places in a decision to impose the death penalty depends upon many other factors, including particularly the quality of the defendant's attorney and the resources available to help that attorney.[104] Empowering the capital sentencer to respond favorably to the defendant's mitigating pleas nonetheless is a necessary and substantial step toward the goal. The *Lockett* doctrine enhances capital punishment's moral reliability.

In addition, the *Lockett* requirements are commendable for their administrative ease. To determine whether each requirement is met in a particular case, one need only answer four discrete questions. Was anything reasonably likely to have impeded the sentencer's consideration of mitigating evidence? Did the sentencer have a vehicle for giving effect to each item of mitigating evidence? Is there a reasonable likelihood that the sentencer refused to consider any mitigating evidence? Was the defense prevented from presenting any mitigating evidence? While these questions do not foreclose the possibility of legitimate differences of opinion in a given case

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102 *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1 (1986) (unconstitutional for trial judge to prevent defendant from placing mitigating evidence before sentencing jury). *See also* Green v. Georgia, 442 U.S. 95 (1979) (unconstitutional to employ hearsay rule to exclude reliable mitigating evidence).

103 *See* Boyde v. California, 110 S. Ct. 1190, 1199-1200 (1990) (while finding no constitutional violation, Court notes that the "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence," and stresses that defendant "had an opportunity . . . to argue" the significance of his background and character).

104 There is serious doubt that the legal assistance that capital defendants receive is adequate to produce the reliable sentencing determinations envisioned under the eighth amendment. *See, e.g.*, Bright, *Death by Lottery — Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990).

(what legal questions, let alone legal questions of constitutional dimension, ever do?), the questions aspire toward objectivity. *Lockett* provides state judges who conduct capital trials or review them on direct appeal with standards that are neither vague nor ambiguous. In addition, *Lockett*'s clarity and precision allow federal jurists to apply *Lockett* on certiorari or in habeas corpus without worrying that granting relief to a condemned inmate for a *Lockett* violation will offend some legitimate concept of federalism.

The most impressive proof of the *Lockett* doctrine's theoretical soundness, clarity, and workability might well be the Supreme Court's consistent application of the doctrine. As noted earlier, in every Supreme Court Term from 1986 to 1990 a condemned inmate has obtained relief for a *Lockett* violation.[105] The Court enforced *Lockett* principles in each of these cases even though a ruling favorable to the defendant was likely to require the reversal of many other death sentences.[106] While the Court's adherence to *Lockett* might be attributable to nothing more than respect for *stare decisis*, extreme deference to precedent is not the current Court's style. More likely, the Court continues to believe that *Lockett* makes good constitutional sense.

V. THE CAPITAL SENTENCING FRAMEWORK STRUCTURED BY *LOCKETT*: THE LIMITED ROLE OF THE REVIEWING COURT AND THE INAPPROPRIATENESS OF CONVENTIONAL HARMLESS ERROR ANALYSIS

The *Lockett* doctrine's value in the capital sentencing process is structural and systemic rather than substantive. As noted above, the doctrine is virtually devoid of substantive content; it does not purport to define the circumstances in which the death sentence is morally appropriate. Instead, *Lockett* establishes the structural framework within which capital sentencing decisions are to be made. It lays out the minimum procedural conditions which must be met before a decision to impose the death penalty constitutionally can be relied upon.

The fact that *Lockett* performs this structuring role in capital sentencing has significant implications for the way the doctrine operates within the criminal justice system. First, the capital sentencing framework which *Lockett* establishes defines and demarcates the respective roles of the capital sentencer and the reviewing courts. The capital sentencer is charged with assessing the substantive *mor-*

105 *See* cases cited *supra* note 9.
106 *See supra* note 10.

ality of the death sentence in a particular case. Reviewing courts, on the other hand, generally assess only the *legality* of any death sentence imposed by ensuring that the sentencer met *Lockett*'s constitutionally mandated procedural requirements. Second, the *Lockett* doctrine's role as an arbiter and enforcer of minimum procedural requirements for capital sentencers, coupled with the heightened confidence which society must have in any decision to impose the death penalty, dictates that *Lockett* violations must require automatic reversal. Thus, when a *Lockett* error occurs, there is no need to engage in conventional harmless error analysis.

A. THE LIMITED ROLE OF THE REVIEWING COURT

The goal of imposing only morally appropriate death sentences is impossible to meet until someone provides substantive content to the concept of moral appropriateness. *Lockett* assigns this task to the capital sentencer alone. Through *Lockett*, reviewing courts in capital cases can push the hard moral choices upon a sentencer whose substantive moral determination will receive unimpeachable respect in all but the rarest cases.[107] Needless to say, the awesome power to make unreviewable determinations of this gravity cannot be placed in the hands of just anybody who happens to claim the title of capital sentencer. *Lockett* consequently charges reviewing courts with the task of ensuring that the capital sentencer meets the minimum constitutional qualifications for the job. No special moral expertise is required of the sentencer; indeed, it is doubtful we would recognize such expertise if ever we were confronted with it. A capital sentencer is not permitted to make unreviewable moral determinations, however, unless and until it has been shown that the sentencer was able and willing to "consider[] . . . 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."[108] Thus, under *Lockett*, the sentencer and the reviewing courts are consigned to what each can do better. The sentencer attends to the substantive morality of each death sentence imposed, while the reviewing courts police the sentencer to ensure

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107 The rare exceptions are cases in which the defendant is deemed constitutionally immune from the death penalty because the offense was not sufficiently severe, *see, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (death penalty unconstitutionally disproportionate for rape of adult victim), or because the offender was not sufficiently culpable, *see, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988) (juvenile offender held immune from capital punishment in absence of specific legislative determination that juveniles should be eligible for death penalty).

108 Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted).

its compliance with fundamental procedural requirements.[109] Judges undoubtedly take comfort in the distance that *Lockett* puts between them and the substantive morality of individual death sentences. In several leading cases in the *Lockett* line, a defendant asked the justices to hold the death penalty morally inappropriate for a particular category of offender and therefore forbidden as a matter of law. In *Lockett*, for example, the defendant urged that the death penalty was so manifestly excessive for a felony murderer who neither performed the killing nor intended that it occur as to be per se unconstitutional.[110] In *Eddings v. Oklahoma*, the justices were asked to find the death penalty inappropriate for any juvenile offender.[111] And in *Penry v. Lynaugh*, the defendant contended that capital punishment is fundamentally inappropriate for a mentally retarded offender.[112] The Court rejected each of these categorical claims. The justices avoided making substantive moral decisions in these cases by expressing confidence that capital sentencers can take full account of all possible moral considerations when rendering decisions in particular cases.[113]

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109 Under certain circumstances, a state may allow an appellate court to act as both a reviewing court and a capital sentencer in cases where the sentence imposed by the trial-level sentencer is found to be constitutionally infirm. Even in these cases, however, the appellate court does not perform appellate review of the *morality* of the trial-level sentencer's decision. Instead, after determining (as a traditional reviewing court) that the sentence imposed by the trial-level sentencer is unconstitutional and cannot be affirmed, the appellate court (now acting as a capital sentencer) makes its own assessment of the morally appropriate punishment by "reweighing" the facts of the case. See the discussion of *Clemons v. Mississippi infra* at text accompanying notes 136-140.

110 438 U.S. 586, 624 (1978) (White, J., concurring in part, dissenting in part, and concurring in judgment).

111 455 U.S. 104, 110 n.5 (1982).

112 492 U.S. 302, 336-40 (1989).

113 *See, e.g., Lockett*, 438 U.S. at 615-16 (Blackmun, J., concurring in part and concurring in judgment) (rather than rule categorically that nontriggerman felony murderer is ineligible for death penalty, "[t]he more manageable alternative, in my view, is to follow a proceduralist tack, and require . . . that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea"); *Eddings*, 455 U.S. at 113-14 n.9 (Court views defendant's more sweeping challenge — the claim that the death penalty is constitutionally excessive when imposed upon a juvenile — as "compris[ing]" the narrower contention "that the sentencer erred in refusing to consider relevant mitigating circumstances"); *Penry*, 492 U.S. at 335-36 (opinion of O'Connor, J.) (while Court cannot categorically prohibit the imposition of the death penalty upon a mentally retarded defendant because "it cannot be said on the record before us that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty," the sentencer nonetheless must be free to consider mental retardation as a mitigating circumstance). *See also* Stanford v. Kentucky, 492 U.S. 361, 373-75 (1989) (plurality opinion) (suggesting that society is satisfied to deal with moral objections against the death penalty for a juvenile offender by allowing the sentencer to take them

B. THE INAPPROPRIATENESS OF CONVENTIONAL HARMLESS ERROR ANALYSIS

Given the way *Lockett* demarcates the roles of the capital sentencer and the reviewing courts, any *Lockett* violation necessarily constitutes reversible error. A *Lockett* violation therefore need not be further analyzed under the standard of *Chapman v. California*[114] to determine whether the error was harmless in the sense that the sentencer would have reached the same result had the error not occurred. Although the Supreme Court has not explicitly confirmed this proposition,[115] the doctrine's structure dictates such a conclu-

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up on a case-by-case basis when giving individualized consideration to a particular defendant's youthful age).

114 386 U.S. 18 (1967). Under *Chapman*, the "beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. It is unclear how much latitude *Chapman's* outcome-oriented standard gives an appellate court to independently evaluate the weight of the evidence in assessing the probable effect of a constitutional error. *See* Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 127-31 (1988). Some courts, reading the *Chapman* standard expansively, find constitutional error harmless when convinced that the decision reached by a jury was nonetheless the "correct result." This approach is criticized because it displaces the jury's independent judgment. *Id.* at 127-28. Courts which take a narrower view of the appellate court's role "ask the empirical question of whether the constitutional error affected the jury that actually convicted the defendant." *Id.* at 128.

115 To date, the Supreme Court has not faced the question squarely. In every case in which a *Lockett* violation has been established, the Court has reversed the death sentence. The Court has never held a violation of the *Lockett* doctrine to be harmless, and it has never held that relief for *Lockett* error depends upon an assessment of case-specific prejudice to the defendant.

Until 1986 there was not even a hint in the Court's opinions that a *Lockett* error could be anything other than automatic reversible error. In that year, Justice White's opinion for the Court in Skipper v. South Carolina, 476 U.S. 1 (1986), addressed the State's suggestion that exclusion of the defendant's proffered mitigating evidence of good behavior in jail after his arrest was not erroneous or in any event was harmless because it was "merely cumulative." The State's position was dismissed because "it appear[ed] reasonably likely that the exclusion of the evidence . . . may have affected the jury's decision to impose the death sentence [and] [t]hus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." *Id.* at 8.

Since *Skipper*, a few matters of particular note on the subject have appeared in the Court's opinions. In Hitchcock v. Dugger, 481 U.S. 393 (1987), Justice Scalia's opinion for a unanimous Court contained dictum in which he construed the Court's precedents as leaving open the possibility that *Lockett* error might be excused as harmless. 481 U.S. at 399 ("Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.").

In McNeil v. North Carolina, 110 S. Ct. 1516 (1990), Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, dissented from an order vacating the death sentence and remanding the case for further consideration in light of McKoy v. North Carolina, 110 S. Ct. 1227 (1990). *McKoy* struck down a state sentencing requirement that jurors consider only that mitigating evidence which they unanimously

sion. When a *Lockett* error occurs, the institutional figure charged with the responsibility for making a substantive moral judgment regarding the death penalty's moral appropriateness — the sentencer — is proved to have been insufficiently empowered or insufficiently likely to return a death sentence deserving of constitutional respect. By definition, the defendant who establishes a *Lockett* violation demonstrates a potential for error in the sentencer's moral judgment that fatally undermines confidence in that judgment and therefore mandates reversal. Justice O'Connor made precisely this point for a majority of the Court in *Penry v. Lynaugh*:

> Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." . . . "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."[116]

The concept of a rule of constitutional criminal procedure which is structured so that any violation of the rule necessarily cre-

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agree exists. In his dissent, Justice Kennedy raised the possibility that reversal might not be required "where a unanimity requirement may have been harmless due to failure to present mitigating evidence." *McNeil*, 110 S. Ct. at 1516 (Kennedy, J., dissenting with respect to granting of certiorari and vacating and remanding of case).

Despite Justice Kennedy's use of the word "harmless," it is doubtful that he intended to endorse the groundbreaking proposition that a *Lockett* violation can be excused if the sentencer would have reached the same conclusion had the violation not occurred. Justice Kennedy more likely meant only that errors under *McKoy* might not necessitate reversals where it can be said beyond a reasonable doubt that no mitigating evidence actually was precluded — a much narrower and not altogether unfamiliar proposition. If no evidence actually was precluded, the sentence can be affirmed because it can be said confidently that the sentencer was able and willing to take account of all mitigating evidence. Affirming a sentence in such a situation is markedly different from affirming a sentence in a case where mitigating evidence in fact was precluded but the reviewing court feels that the sentencer would have decided the case the same way even without the constitutional error. *Compare* Penry v. Lynaugh, 492 U.S. 302 (1989) (reversal of death sentence required because Texas three-question sentencing scheme failed to provide vehicle for jury to give effect to all aspects of the mitigating evidence actually in the case), *with* Franklin v. Lynaugh, 487 U.S. 164 (1988) (reversal of death sentence not required although very same Texas scheme used because, unlike *Penry*, all aspects of the mitigating evidence in Franklin's case could be given effect by the jury), *and* Jurek v. Texas, 428 U.S. 262 (1976) (Texas scheme not unconstitutional on its face because capable of interpretation to comply fully with *Lockett* principles as enunciated in Woodson v. North Carolina, 428 U.S. 280 (1976)).

116 492 U.S. 302, 328 (1988) (citations omitted). *Accord* McKoy v. North Carolina, 110 S. Ct. 1227, 1233 (1990) (because violation of *Lockett* doctrine "risks erroneous imposition of the death sentence, . . . it is our duty to remand this case for resentencing;" no harmless error analysis undertaken); Mills v. Maryland, 486 U.S. 367, 375 (1988) (same). *See also* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (upon finding *Lockett* error, remand is required because "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances. We do not weigh the evidence for them.").

ates an unacceptable risk of an adversely affected outcome, thus requiring automatic reversal, is not novel. There are rules of constitutional criminal procedure for which a violation of the rule, by definition, embodies a finding of potential prejudice to the defendant sufficient to undermine confidence in the case's outcome. A violation of the sixth amendment right to effective assistance of counsel, for example, by formulation embodies a finding of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[117] Similarly, a due process violation based upon the government's failure to disclose exculpatory evidence to the defense by formulation requires proof of a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[118] These constitutional errors are not subject to "harmlessness" analysis under *Chapman* to determine whether a different result might have been reached in the absence of constitutional error. Because establishment of one of these errors necessarily establishes a "reasonable probability" that the case's outcome was affected, and because this "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome,"[119] reversal is required upon the showing of error.

Unlike the automatically reversible errors discussed above, a *Lockett* violation does not *explicitly* embody a finding of a probability of adverse effect upon the judgment that is "sufficient to undermine confidence in the outcome." But establishment of a *Lockett* violation does *implicitly* embody such a finding. Where *Lockett* is violated, the reviewing court has found the capital sentencer to have been unable or unwilling to reach a reliable moral judgment. Since only the capital sentencer is authorized to assess the moral appropriateness of the death penalty, and since its judgment cannot be trusted because of *Lockett* error, the reviewing court has no choice but to order that a new sentencing determination be made by a constitutionally adequate capital sentencer. Reversal and resentencing are required.

The eighth amendment requires a uniquely high degree of confidence in the moral appropriateness of any death sentence imposed, for the death sentence — unlike any other judgment rendered in our criminal or civil courts — calls for an incomparably severe and uniquely irrevocable action.[120] Thus, while our legal sys-

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117 Strickland v. Washington, 466 U.S. 668, 694 (1984).

118 United States v. Bagley, 473 U.S. 667, 682 (1985).

119 *Strickland*, 466 U.S. at 694. *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.6, at 67 (Supp. 1989).

120 The "qualitative difference between death and other penalties calls for a greater

tem customarily demands assurances that a constitutional error has not adversely affected the outcome of a case and thereby produced an unwarranted conviction or incarceration, it demands even stronger assurances that no defect in the sentencing process has led to a morally unwarranted decision to kill a human being in the name of punishment. It follows that a correspondingly lesser degree of potential adverse affect upon the judgment suffices to undermine confidence in a decision to impose a death sentence than is required for any other type of judgment. The risk that a *Lockett* error may have resulted in the imposition of a morally inappropriate death sentence need not even amount to a "reasonable probability." Given the singular gravity of capital punishment, the mere possibility that the unconstitutional handicaps imposed upon the sentencer adversely affected its moral judgment is troubling. This possibility of moral error, inherent whenever a *Lockett* violation is established, is constitutionally unacceptable because there is virtually no substantive federal review of a sentencer's moral determination and thus no other safeguard against an actual error in moral judgment by the sentencer.

Further reason to believe that *Lockett* violations must constitute automatically reversible error can be found in the Supreme Court's recent treatment of the law under *Caldwell v. Mississippi*,[121] an analogous eighth amendment capital punishment doctrine. *Caldwell* holds that a death sentence cannot stand where the sentencing jury has been given misleading information about its role in the sentencing process that allows it to devalue its responsibility for the sentencing decision.[122] In *Caldwell*, for example, the prosecutor and the trial judge incorrectly suggested to the sentencing jurors that a decision to impose the death sentence would be subject to plenary appellate review. Such misinformation creates a decided yet immeasurable risk — "an intolerable danger" — that the jurors will minimize the importance of their decision[123] and return a death sentence that

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degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). *Accord* Murray v. Giarratano, 492 U.S. 1, 9-10 (1989); California v. Ramos, 463 U.S. 992, 998-99 (1983).

121 472 U.S. 320 (1985).

122 *Id.* at 328-30; *id.* at 343 (O'Connor, J., concurring in part and concurring in judgment). *See also* Dugger v. Adams, 489 U.S. 401, 407-08 (1989); Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986).

123 *Caldwell*, 472 U.S. at 333. The jurors might have erroneously believed that "the authoritative determination of whether death was appropriate" would be made by the appellate court and not by the jury. *Id.* at 343 (O'Connor, J., concurring in part and concurring in judgment). *See also* Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. REV. 283 (1989).

does not represent a considered individualized assessment of the morally appropriate punishment.[124] Thus, both *Caldwell* and *Lockett* are designed to satisfy the need for heightened confidence in the capital sentencer's moral decision. Each identifies and proscribes circumstances which create unresolvable doubts about the sentencer's ability or willingness to make a reliable moral determination. In light of the functional and structural similarities between *Caldwell* and *Lockett*, it is reasonable to conclude that if a violation of one of these rules constitutes automatic reversible error, a violation of the other should be automatically reversible as well.

Statements made toward the close of the 1989 Term indicate that if faced with the issue, the justices would find *Caldwell* violations to be automatic reversible error. In *Sawyer v. Smith*,[125] a case nominally concerned with the issue of *Caldwell*'s retroactive application, four members of the Court expressed their belief that *Caldwell* violations are automatically reversible.[126] The remaining justices, forming the majority in *Sawyer*, stopped short of making so explicit a declaration; it would have been unnecessary to the *Sawyer* holding. The majority opinion contains language, however, which logically compels the conclusion that *Caldwell* errors are automatically reversible.

Justice Kennedy's opinion for the *Sawyer* majority observed:

> *Caldwell* . . . must be read as providing an *additional measure of protection against error*, beyond that afforded by [the due process clause's protection against fundamentally unfair proceedings], in the special context of capital sentencing. The *Caldwell* rule was designed as an enhancement of the accuracy of capital sentencing, a protection of *systemic value* for state and federal courts charged with reviewing capital proceedings.[127]

This eloquent testimonial precludes any contention that a *Caldwell* violation may be excused for want of actual prejudice to the case's outcome. A rule which requires a reviewing court to find some actual prejudice before remedying a violation provides no

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[124] Misinformation of the sort prohibited by *Caldwell* " 'present[s] an intolerable danger that the jury will in fact choose to minimize the importance of its role,' a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case." Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986) (quoting *Caldwell*, 472 U.S. at 333).

[125] 110 S. Ct. 2822 (1990).

[126] *Id.* at 2837 (Marshall, J., dissenting, joined by Brennan, Blackmun and Stevens, JJ.) ("*Caldwell* denies . . . that 'focused, unambiguous, and strong . . .' prosecutorial arguments that mislead a jury about its sentencing role in the capital context can ever be deemed harmless").

[127] *Id.* at 2832 (citation omitted) (emphases supplied).

"additional measure of protection against error" and has no "systemic value" for reviewing courts over and above the protections already afforded by principles of due process. The due process clause already safeguards a defendant from improper conduct that is shown to have actually prejudiced the trial.[128] *Caldwell* can provide "additional . . . protection" against sentencing error and have "systemic value" for reviewing courts only if it conclusively presumes prejudice and thereby relieves reviewing courts of case-specific prejudice inquiries, including harmless error analysis.

The *Sawyer* opinion emphasizes that what makes *Caldwell* special is its lack of concern with demonstrable prejudice to the defendant. "Rather than focusing on the prejudice to the defendant, . . . [the] concern in *Caldwell* [is] with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence."[129] What sets *Caldwell* apart from other criminal procedure rules and compels the conclusion that it is a doctrine of automatic reversal is also true of *Lockett*. Like *Caldwell*, *Lockett* is not concerned with any demonstrable case-specific prejudice to the defendant. Instead, *Lockett* is concerned with the "unacceptable risk" that the sentencer's inability or refusal to consider and give effect to mitigating evidence might have affected the reliability of its moral judgment.[130]

The Supreme Court has never held that a *Lockett* violation can be dismissed for want of sufficient impact upon a case's actual outcome.[131] Furthermore, the death penalty cases in which the Court has applied *Chapman*'s harmless error analysis are readily distinguishable, for none involved the violation of rules designed to en-

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128 *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 180, 183 n.15 (1986) ("undoubtedly . . . improper" prosecutorial arguments did not violate due process because they did not render trial unfair "in the context of the facts and cirucmstances of this case"); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (challenged prosecutorial remarks, after "examination of the entire proceedings in this case," not shown to have resulted in denial of a fair trial).

129 *Sawyer*, 110 S. Ct. at 2832.

130 Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

131 A distinguishable situation exists in cases like Franklin v. Lynaugh, 487 U.S. 164 (1988), where reversal is not required because a procedural device with the capacity to violate *Lockett* is shown to have had no such effect in fact; the procedural device as applied in the actual case did not preclude the sentencer's ability to consider or give effect to any mitigating evidence. In such cases, the sentencer actually considered all mitigating evidence, and its determination thus can be relied upon. *Cf.* Carella v. California, 491 U.S. 263, 269 (1989) (Scalia, J., concurring in judgment) (where jury given instruction that unconstitutionally alleviates the prosecution's burden of proof, no need to reverse conviction if the instruction can be shown to have had no effect in the narrow sense that the jury in fact would not have relied upon the instruction; distinguishing, and finding inappropriate, analysis for harmless error on theory of overwhelming evidence). *See supra* note 115.

sure the sentencer's ability and willingness to render a reliable moral decision.[132] Still, the current Supreme Court majority has tended to favor actual prejudice inquiries as a way to minimize federal constitutional interference with the primarily state business of bringing criminals to justice,[133] and has exhibited a desire to curtail federal court reversals of capital cases.[134] Some of the justices may therefore consider recrafting *Lockett* to make it less than a rule of automatic reversal.[135]

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132 In Clemons v. Mississippi, 110 S. Ct. 1441 (1990), and Zant v. Stephens, 462 U.S. 862 (1983), for instance, the error was the use of an unconstitutionally vague aggravating circumstance in violation of the eighth amendment's mandate that the class of murderers eligible for the death penalty be narrowed in advance. *See* Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). In Satterwhite v. Texas, 486 U.S. 249 (1988), the error was the introduction of evidence obtained in violation of the defendant's sixth amendment right to counsel under Estelle v. Smith, 451 U.S. 454 (1981). While such errors can, depending upon the context, have an impact upon the sentencer's choice of sentence, they do not signal, as do violations of *Lockett* or *Caldwell*, a risk that the sentencer's capacity to render a reliable moral decision has been impaired.

133 Of the harmless error doctrine, the Court has said the following:

> As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. . . . The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). *See also* Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) (opinion of the Court per Rehnquist, C.J., on applicability of harmless error analysis to erroneous admission of involuntary confession); Satterwhite v. Texas, 486 U.S. 249, 256 (1988); Rose v. Clark, 478 U.S. 570, 577 (1986).

Similar observations have been made concerning the "reasonable probability of a different outcome" standard that the Court has made part of the prima facie showing needed to establish various constitutional violations. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985); Strickland v. Washington, 466 U.S. 668, 695 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982).

134 *See supra* notes 2-3 and accompanying text. *See also* McCleskey v. Zant, 111 S. Ct. 1454 (1991) (generally limiting capital defendants to one round of federal habeas corpus review by presuming that successive habeas petition is abuse of the writ and establishing stringent "cause and prejudice" standard for rebutting the presumption of abuse).

135 Some lower courts, without serious analysis, have held that *Lockett* error can be excused as harmless if the mitigating evidence precluded was unimpressive or if the evidence weighing against the defendant was overwhelming. *See* Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1834 (1990); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1834 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), *cert. denied*, 485 U.S. 482 (1988); Smith v. Dugger, 529 So.2d 679 (Fla. 1988); Booker v. Dugger, 520 So.2d 246 (Fla.), *cert. denied*, 486 U.S. 1061 (1988). The North Carolina Supreme Court has expressed the opinion that *Lockett* error may be harmless, but only if no mitigating evidence in fact was precluded. *See* State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 111 S. Ct. 1403 (1991); *see also* State v. Laws, 328 N.C. 550, 402 S.E.2d 573 (1991) (finding harmless error in such circumstances); State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991) (same). As observed earlier, *see supra* note 131, this approach is not the broad "harmless error" analysis which

The Court would be well advised, however, to resist the temptation to remodel *Lockett*. Any modification of the *Lockett* doctrine aimed at making its protections turn upon a case-specific actual prejudice inquiry — whether by redefining "mitigating evidence" to exclude items not thought to be very persuasive, or by holding *Lockett* violations subject to *Chapman*'s harmless error analysis — would mean that some risks of moral error now deemed unacceptable under *Lockett* would become acceptable. The certain result would be that more lives would be taken in moral error. None of the institutional interests which might be asserted to justify changing *Lockett*, such as limiting friction between state and federal courts, or enhancing the law's clarity and predictability, is strong enough to warrant increasing the number of immoral executions. In addition, *Lockett* is carefully structured to minimize judicial differences of opinion in its application. Tinkering with *Lockett* inevitably will dim its bright lines, thereby increasing opportunities for confusion and disagreement between state and federal reviewing judges.

The argument that treating *Lockett* errors as automatically reversible will unduly burden the states by requiring a full-fledged resentencing hearing whenever a death sentence is found to be tainted by constitutional error is unpersuasive. The Supreme Court, in *Clemons v. Mississippi*,[136] recently announced general approval of an alternative procedure for remedying constitutional violations in capital sentencing. *Clemons* allows state lawmakers to empower their appellate courts not only to review the legality of a death sentence, but also to serve as the *resentencer* in cases where the original death sentence imposed at trial by a sentencing judge or jury is found to be constitutionally infirm. Rather than remanding the case for a new hearing before a trial-level sentencer, the appellate court may itself perform the requisite resentencing by "reweighing" the facts and determining the morally appropriate sentence. The *Clemons* Court found appellate "reweighing" constitutionally permissible because appellate judges, despite their distance from live testimony, are not inherently incapable of providing the reliable individualized sentencing determinations mandated by the eighth amendment.[137]

courts often undertake pursuant to *Chapman*; it involves no judicial inquiry concerning how the jury would have decided the case had it been permitted to consider a different mix of mitigating evidence than it actually did.

136 110 S. Ct. 1441 (1990).

137 *Id.* at 1448-49. In *Clemons*, the constitutional error involved the failure to adequately limit the jury's discretion to find the aggravating factor that the crime was "especially heinous, atrocious, or cruel." Had the error not occurred, it is possible that the jury might have decided the case differently. The jury had been instructed to balance the aggravating and mitigating factors to determine the appropriate punishment; its de-

Thus, each state may make its own decision regarding whether to allow appellate-level resentencing. A state's decision in favor of appellate resentencing will be respected by the federal courts.[138]

Of course, appellate court resentencing is subject to significant qualifications both explicit and implicit. When a state appellate court undertakes to "reweigh" the facts of a case and make a moral appropriateness determination, its sentencing decision — no less than the decision of any other capital sentencer — must inspire the heightened degree of confidence required by the evolving standards of decency that inform the eighth amendment. The state appellate court, when acting as capital sentencer, must therefore comply with all the rules designed to ensure an individualized and reliable sentencing decision. These rules include the *Lockett* requirement that the sentencer be willing and able to consider and give effect to all mitigating evidence.[139]

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termination thus may have been affected by the presence of the unconstitutional aggravating factor. Indeed, the prosecutor in final argument had urged the jury to weigh the unconstitutional factor heavily.

As Justice Blackmun's opinion for the dissenting justices recognizes, it is child's play to extend the majority's reasoning in *Clemons* to a wide range of constitutional errors that might taint a jury's or trial judge's sentencing decision. Indeed, *Clemons'* reasoning supports the idea that an appellate court could be the one and only capital sentencer. "The logical implication of the majority's approach is that no trial-level sentencing procedure need be conducted at all" — save to the extent necessary to develop an evidentiary record for the appellate court to use as the basis for its sentencing decision. *Id.* at 1457 (Blackmun, J., concurring in part and dissenting in part). Barring some unforeseeable change in the Court's course, it appears that *Lockett* violations will not be categorically exempt from being remedied through appellate "reweighing." *But see infra* text accompanying notes 139-40.

138 The Supreme Court's general approval of appellate resentencing or "reweighing" in *Clemons* should not be interpreted as an endorsement of the wisdom of the procedure as a legislative policy. *See Clemons*, 110 S. Ct. at 1451 ("Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing . . . when errors have occurred in a capital sentencing proceeding.").

In addition, for the benefit of federal reviewing courts, states must be unambiguous about the role their appellate courts play when they find a trial-level sentencing decision to be unconstitutional. State appellate courts must make clear whether they are merely reviewing the legality of a capital sentence, or making an independent assessment of the morally appropriate sentence in a given case. All doubts are resolved in the defendant's favor. *Id.* at 1450-51 (since unclear whether state court performed appellate "reweighing" or instead performed harmless error analysis, a showing that the state court erroneously performed either is sufficient to warrant reversal and remand for further proceedings). *See also* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (when there is "any legitimate basis" for finding ambiguity concerning whether sentencer complied with eighth amendment, death sentence may not be affirmed).

139 *Clemons*, 110 S. Ct. at 1450 (reversal and remand required since, assuming the state appellate court was "reweighing," the Supreme Court "cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a

In addition, *Clemons*' logic dictates that appellate "reweighing" alone may not be used to remedy constitutional errors which can only be corrected through further resort to trial-level evidentiary processes. For example, a *Lockett* error occurs if a capital defendant is prevented from presenting mitigating evidence at trial. This error cannot be remedied by appellate "reweighing" alone, however, because the error has adversely affected the trial record. The appellate court, like the trial-level sentencer, is unable to consider all mitigating evidence, and therefore is equally unable to render a morally reliable sentencing decision. The error can only be cured by giving the defendant an opportunity to introduce and develop the excluded mitigating evidence and argue its significance to the sentencer. In contrast, consider a case in which the trial judge instructed the sentencing jury to disregard mitigating evidence that was presented and stressed in defense counsel's final argument. This *Lockett* error did not adversely affect the trial record. An appellate court, under *Clemons*, could remedy this error by performing appellate "reweighing," provided the court fully considered and was free to give effect to the mitigating evidence that the jury was instructed to disregard.

Although the Court found no need to address the point in *Clemons*, a strong argument can be made that the eighth and fourteenth amendments impose a final qualification on appellate resentencing by prohibiting such resentencing unless the defendant receives fair notice before trial that appellate resentencing is the state's policy. Due process, as well as the need for heightened reliability in capital sentencing, counsel that government reveal the identity of the institution that will serve as the ultimate sentencer and the form of the record that the sentencer will consider before a defendant is asked to present his or her case in defense or in mitigation.[140]

Given *Lockett*'s clarity and ease of application, and given the considerable latitude that states now enjoy under *Clemons* to remedy

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defendant's mitigating evidence"). *See also* Parker v. Dugger, 111 S. Ct. 731, 739-40 (1991) (for appellate court to "reweigh" in accordance with *Clemons*, it cannot disregard mitigating circumstances found by the trial-level sentencer unless it "come[s] to its own independent factual conclusion" after conducting its own "independent review" of the evidence in compliance with *Lockett*).

In *Clemons*, the Supreme Court intimated that certain aspects of the appellate process that distinguish it from the trial process might pose challenges to an appellate court seeking to comply with *Lockett*. However, the justices left the exploration of those intricacies for another day. *See* 110 S. Ct. at 1451.

[140] *See* Coleman v. McCormick, 874 F.2d 1280, 1288 (9th Cir.) (en banc), *cert. denied*, 110 S. Ct. 349 (1989) ("defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing").

Lockett violations, there is simply no need to tamper with *Lockett*. To be sure, even after *Clemons* federal judges may well still find themselves in the unenviable position of having to enforce doctrines like *Lockett* against a less than fully willing sovereign power. But the blame will belong with the constitutional violators and not the constitution as it has been interpreted.

VI. Dual Principles and the Wages of Interpreting and Enforcing a Constitution

For a while, the Supreme Court's endorsement of the *Lockett* doctrine appeared unanimous. In 1987, the justices delivered a 9-0 opinion — a rare sighting for Court watchers these days — that vacated a death sentence for failure to comply with *Lockett* principles.[141] Since then, however, differences of opinion have materialized in every case directly or indirectly raising a *Lockett* question. Until most recently, the disagreements concerned the extent of the doctrine's reach rather than the doctrine's essential integrity.[142] Not anymore. In a concurring opinion in *Walton v. Arizona*,[143] Justice Scalia brought the 1989 Term to a close by announcing that he favored overruling not only *Lockett*, but also one of the foundational constitutional principles accepted by the Court since the 1976 *Woodson* decision. "I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted," Justice Scalia declared.[144]

Justice Scalia's quarrel with the *Lockett* doctrine, and with discretionary capital sentencing in general, is not that they fail to accomplish their goal — helping to ensure reliable moral determinations in capital sentencing. Scalia makes no claim that under *Woodson* and *Lockett* morally inappropriate death sentences are being imposed, or that morally appropriate death sentences are being withheld improperly. To judge from Justice Scalia's concurrence in *Walton*, there is no problem with *Woodson* and *Lockett* in the judicial forums plainly regarded by the Court as mattering the most — the trial courts where the life and death decisions must be made in the first

141 Hitchcock v. Dugger, 481 U.S. 393 (1987).

142 *See* Walton v. Arizona, 110 S. Ct. 3047 (1990); Clemons v. Mississippi, 110 S. Ct. 1441 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); McKoy v. North Carolina, 110 S. Ct. 1227 (1990); Boyde v. California, 110 S. Ct. 1190 (1990); Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Franklin v. Lynaugh, 487 U.S. 164 (1988); Mills v. Maryland, 486 U.S. 367 (1988); Sumner v. Shuman, 483 U.S. 66 (1987).

143 110 S. Ct. 3047 (1990).

144 *Id.* at 3068 (Scalia, J., concurring in part and concurring in judgment).

instance.[145]

What, then, is Justice Scalia's concern? Scalia's challenge to *Woodson* and *Lockett* rests upon the following proposition: The principle of *Woodson* and *Lockett*, that there must be discretion in capital sentencing, is fundamentally irreconcilable with the principle of *Furman* and its progeny that there must be rationality and orderliness in capital sentencing. In Scalia's mind, these two principles are locked in mortal combat:

> To acknowledge that "there perhaps is an inherent tension" between th[e] line of cases [represented by *Woodson* and *Lockett*] 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. And to refer to the two lines as pursuing "twin objectives," . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled.[146]

There is not enough room in one legal world for both of these principles, Justice Scalia contends, because "[t]he simultaneous pursuit of contradictory objectives necessarily produces confusion" in the state and federal appellate courts that review the procedural propriety of death sentences.[147]

Justice Scalia's criticism stands upon a faulty premise that reveals either a genuine misappreciation of the principles at issue or a critic's exercise of rhetorical overstatement. The eighth amendment is not at war with itself. The principle promoted by *Woodson* and *Lockett* mandates that the sentencer must have discretion in order to correctly determine the death penalty's moral appropriateness in a particular case. The principle advanced by *Furman* and its progeny requires that the potential for arbitrary or capricious results in capital sentencing must be minimized — but not at the expense of the discretion necessary to ensure a morally appropriate sentence. As explained in Part Three of this article, nothing in the formulation or application of these principles renders them logically irreconcilable. As any trial judge can attest, both law and logic recognize that discretion may be required at the same time that demands are made to minimize the risks associated with abuses of that discretion. The trial bench works with and applies this dynamic

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145 *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 90 (1977) ("[T]he trial of a criminal case in state court [should be perceived] as a decisive and portentous event. . . . To the greatest extent possible all issues which bear on this charge should be determined in this proceeding.").

146 *Walton*, 110 S. Ct. at 3063 (Scalia, J., concurring in part and concurring in judgment) (quoting first McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting), and then Spaziano v. Florida, 468 U.S. 447, 459 (1984)).

147 *Id.* at 3064 (Scalia, J., concurring in part and concurring in judgment).

every day.[148] Justice Scalia's implicit and incorrect assumption is that the discretion which *Woodson* and *Lockett* protect is an unfettered, standardless discretion. Such unfettered discretion would be at odds with *Furman*. The sentencer's discretion under *Woodson* and *Lockett*, however, is the limited and structured discretion to give a life sentence because of moral considerations arising from mitigating evidence, not the discretion "to make the sentencing decision according to . . . whims or caprice."[149]

Justice Scalia is quite right to think that simultaneously satisfying the eighth amendment's two central principles requires vigilance on the part of states which employ capital punishment. The "unwary" state, Justice Scalia complains, may find itself in constitutional default because the overindulgence of one of these principles easily can result in a constitutionally insufficient regard for the other principle.[150] This observation standing alone, however, does not indict the Court's capital punishment jurisprudence under *Furman*, *Woodson* and *Lockett*. Nowhere is it written that a state has a right to be unwary of the Constitution's demands, particularly when the state seeks to take the life of one of its citizens. If it could be demonstrated that even vigilant states are unable to design capital sentencing schemes that accommodate both principles — a showing, in short, that the Supreme Court has failed to articulate the eighth amendment's dual principles clearly and workably — then there might be cause to believe that something is constitutionally amiss. Justice Scalia levels the necessary accusation, asserting that the states lack guidance in applying capital punishment. "For state lawmakers," he contends, "the lesson has been that a [capital punishment] decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it to-

148 *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990) (trial judges retain discretion to tailor appropriate sanctions under Rule 11, but that discretion is necessarily abused if judge operates under misapprehension of law or clearly erroneous assessment of facts); Batson v. Kentucky, 476 U.S. 79 (1986) (prosecutors retain broad discretion to use peremptory challenges, but procedures must exist to guard against abuse of discretion in form of racial discrimination). Even where discretion is virtually unfettered (which, I suggest, is not true of a capital sentencer's discretion to respond to mitigating evidence), "[a]n official's discretion means not that he is free to decide without recourse to standards of sense and fairness." R. DWORKIN, TAKING RIGHTS SERIOUSLY 33 (1978).

149 Saffle v. Parks, 110 S. Ct. 1257, 1263 (1990). *See also* California v. Brown, 479 U.S. 538, 543 (1987).

150 *Walton*, 110 S. Ct. at 3068 (Scalia, J., concurring in part and concurring in judgment) ("[T]he *Woodson-Lockett* principle . . . contradict[s] 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 ending or even diminishing.").

morrow."[151] But even allowing for hyperbole, the facts do not substantiate Justice Scalia's charge. As the discussion in Part Four of this article demonstrates, the *Lockett* doctrine is unclear only to those who want it that way.[152]

Perhaps Justice Scalia's failure of proof explains why no other justice joined him in his *Walton* concurrence. There may be a more rudimentary reason, though, for his solitary position in *Walton*. Justice Scalia's strong distaste for uncertainty and indeterminacy in constitutional law is becoming increasingly apparent as his tenure on the Court advances, and it is a matter of judicial style and tem-

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151 *Id.* at 3065 (Scalia, J., concurring in part and concurring in judgment).

152 It bears noting that Justice Scalia's vision of innocent, well-meaning states being victimized by erratic Supreme Court jurisprudence is not established by the three illustrations he employs in *Walton* — the alleged about-faces represented by Hitchcock v. Dugger, 481 U.S. 393 (1987), McKoy v. North Carolina, 110 S. Ct. 1227 (1990), and Penry v. Lynaugh, 492 U.S. 302 (1989). *See Walton*, 110 S. Ct. at 3065 (Scalia, J., concurring in part and concurring in judgment).

Florida officials may not have been happy with the *Hitchcock* decision, in which the Court concluded that the sentencing judge had operated under the unconstitutional belief that he could consider at sentencing only those mitigating factors specified by statute. But the officials could not have been surprised by *Hitchcock*. The Court's unanimous opinion (authored by Justice Scalia) convincingly shows that it "could not be clearer" that the case was controlled by Lockett v. Ohio, 438 U.S. 586 (1978) — a precedent on the books well before the Florida Supreme Court affirmed Hitchcock's sentence in 1982. *See Hitchcock*, 481 U.S. at 398-99. Moreover, the Florida Supreme Court already had acknowledged *Lockett's* controlling influence on cases like *Hitchcock* before the Supreme Court announced its *Hitchcock* decision. *See* Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing ?*, 15 STETSON L. REV. 263, 281-84 (1986).

Similarly, North Carolina officials dare not claim surprise in the *McKoy* decision, which held unconstitutional a rule requiring every juror to disregard mitigating evidence unless all twelve jurors unanimously agreed that the evidence constituted a mitigating factor. Seven years before *McKoy* was decided, the North Carolina attorney general conceded to the state supreme court that the rule in question contravened *Lockett* and urged the state court to so hold. *See* State v. McKoy, 323 N.C. 1, 50, 372 S.E.2d 12, 42 (1988) (Exum, C.J., dissenting), *rev'd*, 110 S. Ct. 1227 (1990).

Of Justice Scalia's cited examples, only Penry v. Lynaugh, 492 U.S. 302 (1989), arguably supports his point. The support is not very strong, however, as the majority opinion in *Penry* demonstrates. In *Penry*, a divided Court held that the Texas sentencing scheme found facially constitutional in Jurek v. Texas, 428 U.S. 262 (1976), was applied unconstitutionally when it operated to preclude full consideration of certain mitigating evidence proffered by the defendant. It should take a lot more than one debatably bad apple to convince us that the whole bunch is spoiled.

Even if Justice Scalia were factually correct in suggesting that the states running afoul of *Lockett* almost always do so in good-faith reliance upon other Supreme Court decisions, it does not follow necessarily that the Court has erred in interpreting the Constitution. A state's interest in the finality of death sentences imposed in good faith before the announcement of a new capital punishment ruling is adequately protected by a general bar on the retroactive application of the new ruling in habeas corpus. *See supra* note 2. Respect for the finality of judgments can be had without freezing the substantive constitutional law in perpetuity.

perament that sets him apart from the rest of the Court.[153] It is not surprising to find Justice Scalia expressing discontent with perceived uncertainties and indeterminacies that most of the justices accept as necessary incidents of responsible constitutional adjudication.

Those who are familiar with constitutional adjudication can appreciate the Court's interpretive difficulties in dealing with clauses as spacious as the eighth amendment. To the eternal frustration of those who seek determinate rules of decision, the Constitution is a grand and intensely political document which sometimes communicates only at the level of broad and sweeping principle and is frequently less than crystal clear about the contours of the principles it evokes. The fourth amendment's command that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," for instance, speaks with a generality that defies immediate rule-like application, and with an expansiveness that supports a number of potentially competing principles and interests.[154] Given the limits of human knowledge and the national importance of reaching the best possible results, it is no wonder that the Supreme Court occasionally places a premium upon its ability to remain flexible and responsive. The Court's familiar "balancing" approach to most fourth amendment issues is a vivid doctrinal manifestation of this desire for flexibility.[155]

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153 Justice Scalia's penchant for imparting determinate meaning to fundamentally indeterminate text, insisting all along that the meaning he has divined is in no sense personally supplied, is thoughtfully explored in Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). *See also* Gelfand & Werhan, *Federalism and Separation of Powers on a Conservative Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1460-63 (1990). For some representative opinions that evidence the point, see Maryland v. Craig, 110 S. Ct. 3157, 3176 (1990) (Scalia, J., dissenting) (sixth amendment's confrontation clause so interpreted), Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (per Scalia, J.) (same), Walton v. Arizona, 110 S. Ct. 3047, 3066-67 (1990) (Scalia, J., concurring in part and concurring in judgment) ("cruel and unusual" language of eighth amendment so interpreted), and Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989) (plurality opinion of Scalia, J.) (same).

154 *See generally* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742 (1982). There is no shortage of recent scholarship exploring the fundamentally indeterminate nature of the Constitution's provisions relating to individual rights. *See, e.g.*, D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U.L. REV. 250 (1990); Carter, *Constitutional Adjudication and Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

155 The fourth amendment makes a fine example because it stumps the very best who deny the Constitution's indeterminate nature. Even Justice Scalia has to shrug when he reads the fourth amendment. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("While there are some absolutes in Fourth

Does a balancing approach concede the existence of a profound textual indeterminacy? Surely. Does it produce a considerable measure of doctrinal uncertainty? Most definitely. Is it disruptive of American constitutional order? Of course not. Clear rules from the Supreme Court doubtless have their virtues. As the justices draw brighter and brighter lines, the judicial and law enforcement systems theoretically should operate more smoothly. In addition, accepting the reasonable but hard-to-prove assumption that constitutional grey areas impede legislators, administrators and jurists, politics and federalism theoretically should flourish when the Court makes definitive rulings. The Court's own apparent legitimacy may also be enhanced when it speaks in an assertive, rule-like tongue. But these virtues have limitations. Prudence, if not humility, sometimes demands tolerance of doctrinal uncertainty in constitutional law in order to achieve full benefit from the Constitution. It is not always better that the law be settled today than that it be settled correctly in the end.

Since at least 1972, the majority of the Court has adopted a slow, relatively patient approach to constitutional exposition in the capital punishment context. A perspective that tolerates some indeterminacy and uncertainty and candidly views constitutional interpretation as an evolutionary process has prevailed.[156] Rather than

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Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been 'reasonable,' the answer depends largely upon the social necessity that prompts the search."). *See also* Kannar, *supra* note 153, at 1339.

156 The Court's acceptance of this perspective helps explain the celebrated *volte-face* made by the Court from McGautha v. California, 402 U.S. 183 (1971), to Furman v. Georgia, 408 U.S. 238 (1972).

In *McGautha*, the Court found no due process violation in giving a jury unbridled discretion to sentence a murderer to death, even as it acknowledged "the undeniable surface appeal of the proposition" that such unbridled discretion is "fundamentally lawless." 402 U.S. at 196. The way to address the formal lawlessness of unbridled discretion, Justice Harlan reasoned for the majority, would be to articulate and apply identifiable standards. Any standards that could truly regularize capital sentencing, however, would have to embody fairly discrete and narrow norms; such narrow standards inevitably would be morally unsatisfactory. Requiring such standards as a matter of federal constitutional mandate, Justice Harlan thus concluded for the majority, would not be worth the candle. *Id.* at 207.

Less than fourteen months later, the Court in *Furman* struck down the very same unbridled discretion schemes under the eighth amendment. Neither the brief passage of time, nor a change in the Court's personnel, nor the use of a different constitutional provision persuasively explains the change in course from *McGautha* to *Furman*. The Court's center (Justices Stewart and White being the swing votes) apparently revised its estimate of the feasibility of an evolutionary approach to constitutional death penalty adjudication. I doubt that Justice Stewart and Justice White underwent tumultuous philosophical sea-changes in just over a year. But it seems fair to conclude that they and the rest of the *Furman* majority became persuaded that forcing the states back to the drawing board was a responsible and profitable thing to do. Perhaps they recognized that un-

attempting to "solve" capital punishment's constitutional status for all time by forcing clean and definitive answers out of broad constitutional language, the justices instead have engaged in continuing self-education about the institution of capital punishment and about the Constitution's impact on society's use of this ultimate penal sanction. Justice Brennan portrayed the Court's eighth amendment capital punishment odyssey so:

> The process of trying to resolve such a momentous constitutional issue is often a dynamic one, with positions of the justices changing as arguments are made, theories advanced, and authorities marshaled. The path . . . weaves and winds as one might expect, given the overriding importance of the issues and the apparent elusiveness of standards with which to decide them.[157]

Now is no time to abandon either the tradition of patience that has marked the Court's eighth amendment capital punishment jurisprudence or any of the doctrines which that tradition has nurtured. With every day, the path weaves and winds less.

VII. CONCLUSION

The lament that eighth amendment capital punishment jurisprudence is complex, confused and marred by deep division among the justices is not an unfamiliar one.[158] But the doctrine of *Lockett v. Ohio* is clear, workable, and firmly grounded upon a coherent vision of what the decision to sentence a human being to death must entail. *Lockett* and its progeny affirm that we as a society do not kill in the name of punishment unless we are sincerely confident that our action is moral. We owe that fundamental measure of decency not only to those we condemn to death, but to ourselves. "[T]he way in which we choose those who will die reveals the depth of moral com-

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leashing the states' creative energies could result in fresh blueprints for bringing rational orderliness and the rule of law to death penalty jurisprudence without sacrificing the respect and concern for morality that formed the basis of Justice Harlan's *McGautha* opinion. They also might have foreseen a more subtle benefit that would accrue from the instigation of institutional reform. By asking the states to revisit the issue of capital punishment through their political and judicial processes, the Court created a dynamic that provided timely (although potentially ambiguous, *see supra* note 34) information about the evolving standards of decency that give content to the eighth amendment. *See* Tao, *Beyond* Furman v. Georgia*: The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 722, 725 (1976). To be sure, the Court had to track the uncertain twists and turns of institutional reform and periodically assess its marginal costs and benefits. Such tasks, however, are not beyond the capacity of the Court and the judicial method.

157 Brennan, *supra* note 38, at 316.

158 *See, e.g.*, Acker & Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 Vand. L. Rev. 1299, 1341 & n.201 (1989); Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1781-82 (1987).

mitment among the living."[159]

159 McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).