A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty

By SUSAN RAEKER-JORDAN*

Table of Contents

I. Introduction 456
II. Doctrinal Underpinnings of Current Death Penalty Jurisprudence 458
  A. Substantive Limits on Capital Punishment 459
    1. "Evolving Standards of Decency" 459
    2. The Court's Excessiveness Inquiry 463
      a. Furtherance of Penological Goals 463
      b. Proportionality Analysis 466
  B. Procedural Requirements 467
III. Post-*Gregg* Applications of the Doctrine 473
  A. Substantive Challenges to the Death Penalty 473
  B. Procedural Challenges to Death Sentences 498
    1. Aggravating Circumstances and Vagueness 498
    2. Mitigating Circumstances and Unbridled Discretion 501
      a. General Principles 501
      b. The Texas Cases 506
IV. The Rigging of the "Evolving Standards" Test 513
  A. Jury Decisionmaking is Systematically Channeled to Return Death Sentences 513

---

* Assistant Professor of Law, Widener University School of Law. B.A. 1984, University of Maine; J.D. 1988, University of South Carolina School of Law. The author would like to thank Professors Robert C. Power and Robert L. Hayman, Jr. at Widener University School of Law, and Professor Linda E. Carter, David Raeker-Jordan, and Bruce A. Jordan for their helpful comments on earlier drafts of this Article. The author would also like to thank Darin J. McMullen and Caryn Green for their invaluable research assistance and Shannon Whitson for her patient clerical assistance in the preparation of this Article.

1. Antisympathy Instructions and Victim Impact Evidence Coalesce to Favor Death 514
2. Evisceration of the *Woodson* Line of Decisions Permits Circumscription of Mitigating Evidence and Thus Gives Deleterious Primacy to Aggravators 521
3. Sanctioning of Vague Definitions of Aggravators Gives Additional Breadth to Death Class 532
4. Death Qualification of Juries Further Stacks the Deck 537

B. Selective Evaluation of Legislative Enactments Ensures a Pro-Death Penalty Sampling 546

V. The Final Analysis 550

A. A Proposal 552

B. Conclusion 555

I. Introduction

In recent cases involving substantive challenges[1] to the death penalty, several members of the United States Supreme Court have favored jettisoning all benchmarks but the "evolving standards of decency" test for determining whether a death penalty is cruel and unusual in violation of the Eighth Amendment. Because of this trend, and because of the uncertainty of how newer members of the Court will view the doctrinal construct for determining constitutionality, it is necessary to assess the validity of the evolving standards test and to determine whether it should be employed as the sole determinant of what constitutes cruel and unusual punishment in the death penalty context. This Article therefore critiques the construction of the "evolving standards of decency" test for cruel and unusual punishments under the Eighth Amendment, specifically in the death penalty context.

This Article demonstrates that the consequence of the Supreme Court's current death penalty jurisprudence on the evolving standard

1. The phrase "substantive challenges" is used here to denote those challenges to death sentences for certain classes of offenders, while the phrase "procedural challenges" refers to those that protest the manner in which the penalty was imposed. A death sentence may be cruel and unusual either for the offender on whom it is imposed or for the offense for which it is imposed, *see generally infra* notes 64-208 and accompanying text, or because the procedures employed by the state to determine the appropriateness of death result in the intolerable arbitrary infliction of death. *See generally infra* notes 220-302 and accompanying text.

of decency is a pro-death,[2] self-fulfilling constitutional construct, and that the evidence gleaned from the "objective indicia" of jury sentencing behavior and legislative enactments can be and has been rigged to favor death. This rigging is accomplished through the creation of procedural rules that slant juror decisionmaking toward death sentences and the selective evaluation of legislative enactments. This Article concludes that because of the manipulability of the prongs of the test, there must be other checks on the death penalty.

Toward those ends, Part II of this Article sets forth the doctrinal underpinnings of the Supreme Court's death penalty jurisprudence. Part III then traces the application of that doctrine by examining the Court's assessment of both substantive and procedural challenges to death sentences since 1976. Examination of the substantive challenges will reveal the Court's basic Eighth Amendment analytical construct and the schism in the Court over the propriety of sole use of the evolving standards test, which looks to jury sentencing behavior and legislative enactments as objective gauges of contemporary community values. This section also discusses the doctrine governing death penalty procedure in order to place the more recent procedural decisions in context.

Part IV then sets forth the rigging of the evolving standards test by looking first at what jury sentencing behavior is likely to show about the evolving standard as a consequence of the Court's more recent rulings. Specifically, this Article surveys the various procedural rules that impact both the constitution of the jury and jury decisionmaking, thus affecting jury sentencing behavior. This Article examines the Court's jurisprudence concerning antisympathy instructions, victim impact evidence, mitigating circumstances evidence, vague aggravators, and death qualification of juries. Even if valid justifications exist for each of these lines of doctrine, this Article argues that the net effect of the decisions is to stack the sentencing deck in favor of death, which then results in a greater likelihood of jury decisions imposing death. When the Supreme Court takes up the question of the constitutionality of a death sentence and uses evidence of jury sentencing behavior to determine the "evolving standards of decency," the results are, to a great extent, predetermined: juries will have imposed death more often because of the effects of the procedural rules, the "objec-

2. Another commentator has scrutinized the pro-death nature of the Court's death penalty jurisprudence through an examination of the Court's habeas corpus decisions. Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. A.B.A. SEC. INDIVIDUAL RTS. & RESP. J. 14 (Winter 1987).

tive index" of societal standards of decency will show a favoring of death sentences, and the analysis will be steered toward the inevitable conclusion of constitutionality. The validity of using jury sentencing behavior as an "objective" gauge of the evolving standards of decency is thus put into question.

The rigging of the evolving standards test is further demonstrated through an examination of the Court's selective evaluation of legislative enactments to ascertain the evolving standards of decency. In cases challenging the imposition of death on a certain class of offenders, a majority of the Court has looked only to enactments in those states that authorize capital punishment and has not factored the legislative decisions of abolitionist states into the calculus. This selective examination itself skews the analysis of the evolving standards by excluding evidence of general, and thus necessarily specific, opposition to the death penalty. The resulting "standard" is therefore more death-inclined. The remainder of Part IV evaluates the propriety and effect of that selective sampling in relation to the rigging of the evolving standards test.

Finally, Part V proposes that to counteract the self-fulfilling nature of the constitutional construct as it has evolved over the last several terms, the Court must remain faithful to its original methods of assessing the constitutionality of the death penalty for classes of offenders or for certain crimes. The Article concludes that the Court should consider the international response to the death penalty and all legislative action regarding capital punishment, even in abolitionist states. The Court should also continue to conduct its own assessments of proportionality and penological justification as additional constitutional benchmarks to prevent the self-fulfilling nature of the constitutional construct from eliminating any real constraint on the penalty.

II. Doctrinal Underpinnings of Current Death Penalty Jurisprudence

Since the 1972 decision of *Furman v. Georgia*,[3] the United States Supreme Court has refined its Eighth Amendment death penalty jurisprudence in evaluating both substantive and procedural aspects of state death penalty statutes. Today, the Court examines statutes to determine not only whether the punishment itself is one that comports with the requirements of the Eighth Amendment, but also whether the manner of the sentencer's arrival at that punishment comports

3. 408 U.S. 238 (1972).

with the Amendment's requisites. Thus, under the current formula, a state death penalty statute must leap various substantive and procedural constitutional hurdles if it is to be upheld under an attack challenging it as cruel and unusual under the Eighth Amendment.

A. Substantive Limits on Capital Punishment

In *Gregg v. Georgia*,[4] the Court delineated the general contours of Eighth Amendment analysis, stating that the determination of whether a punishment is "cruel and unusual" under the Amendment requires an evaluation of the punishment under society's "evolving standards of decency."[5] The Court ascertains those evolving standards by looking to certain objective indicia.[6] Additionally, the Court has measured a punishment for excessiveness according to its furtherance of penological goals and its proportionality to the blameworthiness of the offender.[7] Hence, if a sentence of death in a particular case or for a particular class of offenders does not further any of the recognized penological goals, or is too extreme in relation to the offender's blameworthiness, then the sentence may be considered excessive or "cruel and unusual" punishment *in that case* or *for that class*. These tests will be examined in turn.

1. *"Evolving Standards of Decency"*

In the first decision since *Furman* to uphold a state death penalty statute against an Eighth Amendment challenge, the three-member

4. 428 U.S. 153 (1976) (plurality opinion). The judgment of the Court was set out in the plurality opinion of Justices Stewart, Powell, and Stevens. *Id.* at 158. Those three Justices also authored the opinions and announced the judgment of the Court in four other cases decided the same day as was *Gregg*: Proffitt v. Florida, 428 U.S. 242 (1976) (upholding a death penalty statute, similar to Georgia's scheme in *Gregg*, except that judge rather than jury imposed sentence); Jurek v. Texas, 428 U.S. 262 (1976) (upholding the constitutionality of Texas's death penalty scheme, which permitted the imposition of death when the jury answered in the affirmative to three statutorily-enumerated questions); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding North Carolina's mandatory death penalty scheme unconstitutional); Roberts v. Louisiana, 428 U.S. 325 (1976) (holding unconstitutional Louisiana's mandatory scheme). Justices Brennan and Marshall dissented in separate opinions to *Gregg*, *Jurek*, and *Proffitt*. *See Gregg*, 428 U.S. at 227 (Brennan, J., dissenting), 231 (Marshall, J., dissenting).

5. 428 U.S. at 169-77. *See infra* notes 14-19 and accompanying text. The death penalty as a general proposition has historically been considered "decent" under societal standards. *See infra* notes 10-13 and accompanying text.

6. *See infra* notes 17-23 and accompanying text.

7. *See infra* notes 25-37 and accompanying text. *But cf.* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074 (1964) (arguing that these questions are more appropriately considered as governed by substantive due process considerations, rather than by Eighth Amendment commands).

plurality in *Gregg v. Georgia*[8] established the general principles against which an Eighth Amendment "cruel and unusual punishment" claim is measured.[9] The opinion first noted that in the earliest Eighth Amendment cases, courts only examined the method or mode of execution and that "[t]he constitutionality of the sentence of death itself was not at issue."[10] The Justices pointed to the "long history of acceptance" of capital punishment in this country, illustrated by its imposition by many states under the common law, its existence at the time the Bill of Rights was ratified, and its continued use into the twentieth century.[11] The *Gregg* plurality found that acceptance of the death penalty as a punishment was also indicated by various provi-

---

8. 428 U.S. 153 (1976) (plurality opinion). The plurality opinion first addressed the more general question of whether the death penalty is always cruel and unusual punishment and held that it was not. *Id.* at 187. The opinion then examined the particular statute at issue and determined whether it violated the Eighth Amendment on procedural grounds. *Id.* at 196-207 and *see infra* notes 41-49.

9. For discussions of the history and meaning of the cruel and unusual punishments clause, see Furman v. Georgia, 408 U.S. 238, 314-28 (1972) (Marshall, J., concurring); RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 29-58 (1982); Hugo A. Bedau, *Thinking of the Death Penalty as a Cruel and Unusual Punishment*, 18 U.C. DAVIS L. REV. 873, 892-97 (1985); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969).

10. *Gregg*, 428 U.S. at 170. A method of punishing by death was struck down, however, if it was "barbarous" or more akin to "torture." *Id.* These early cases thus seemed to focus more on the "cruel" portion of the clause. *See generally id.* & n.17; *Furman*, 408 U.S. at 376-79 (Burger, C.J., dissenting); *Id.* at 378 (stating, as of 1972, that the cases decided under the Eighth Amendment "reveal[ ] an exclusive concern with extreme cruelty"). In Trop v. Dulles, 356 U.S. 86 (1958), a case not involving the death penalty, the Court nonetheless opined that:

> [w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.

Id. at 99. In attempting to demarcate some boundaries of the "cruel and unusual punishments" clause short of death, but recognizing that the precise contours had not been defined, the Court cautioned that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Id.*

11. 428 U.S at 176-77. The Justices stressed that, indeed, "[a]t the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State." *Id.* at 177.

sions of the Constitution itself.[12] Thus, "history and traditional usage"[13] evinced societal acceptance of the punishment.

The Court has not limited itself, however, to comparing today's punishments against those punishments available at the adoption of the Bill of Rights or under the common law.[14] Over time, the Court has interpreted the Eighth Amendment "'in a flexible and dynamic manner,'" endowing it with fuller, more contemporary "'meaning as public opinion becomes enlightened by a humane justice.'"[15] This additional mode of interpretation, beyond the "static" interpretation of original meaning, recognizes that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16] In ascertaining these "evolving stan-

---

12. *Id.* at 177 (finding that because the Fifth Amendment provided that "'[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ,'" (quoting U.S. CONST. amend. V), and was adopted along with the Eighth Amendment, the framers had contemplated that the penalty would remain in use); *see also id.* (reaching the same conclusion from similar due process language in the text of the Fourteenth Amendment). *But see* William J. Brennan, Jr., *Foreward: Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 5-6 (1994) (arguing that even if some parts of the Constitution, such as the Fifth Amendment, contemplate the use of the death penalty, "the language of [that Amendment] does not declare that the right of the state to punish by death shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards.").

13. Woodson v. North Carolina, 428 U.S 280, 288 (1976).

14. The Court has expressly recognized that the Amendment reaches beyond those indicators:

> There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, *at a minimum*, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted. . . .
>
> Moreover, the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789.

Ford v. Wainwright, 477 U.S. 399, 405-06 (1986) (holding that execution of insane defendants violates the Eighth Amendment) (emphasis added).

15. *Gregg*, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

16. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), *quoted in Gregg*, 428 U.S. at 173. *Trop* was one of the cases in which the Court went beyond the traditional examination of a punishment for its torturous or barbarous nature. A court-martial had convicted the defendant in *Trop* for wartime desertion and, along with other punishment, dishonorably discharged him. He was additionally stripped of his citizenship under a statute that provided that a dishonorably discharged wartime deserter would be stripped of United States citizenship. *Trop*, 356 U.S. at 87-90. The defendant then challenged the operation of the statute. After noting that the Amendment's commands are not static or precise, *id.* at 100-01, the Court held that "the Eighth Amendment forbids Congress to punish by taking away citizenship . . . ." *Id.* at 103. The Court quoted the dissent in the court of appeals for the reasoning that "'the American concept of man's dignity does not comport with making even those we would punish completely "stateless" . . . .'" *Id.* at 101

dards of decency," the Court looks to two primary indicia[17] of what contemporary American society regards as acceptable punishments: legislative enactments[18] and jury sentencing behavior.[19]

In *Gregg*, for example, the Court cited the death penalty laws of thirty-five states that were enacted in response to the *Furman* decision as illustrative of the desire for capital punishment among the people's elected representatives and, hence, among the people:[20] "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."[21] The Justices further opined that "[t]he jury also is a significant and reliable objective index

n.33 (quoting Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting)). It further reasoned that with denationalization:

> [t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . .
>
> . . . .
>
> The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.

Id. at 101-02. In part because the punishment here was "deplored in the international community of democracies," *id.* at 102 (footnote omitted), it was indecent by contemporary standards and so was cruel and unusual under the Eighth Amendment.

17. In Woodson v. North Carolina, 428 U.S. 280 (1976), decided the same day as *Gregg*, the Court described these indicia as "two *crucial* indicators of evolving standards of decency." *Id.* at 293 (emphasis added). The Court also considers these to be "*objective* indicia that reflect the public attitude toward a given sanction," *Gregg*, 428 U.S. at 173 (emphasis added), thus allowing courts to avoid imposing their own subjective judgments about the content of contemporary values. As this Article will argue, however, the Court's recent jurisprudence has eliminated any "objective" characteristics of these indicia and so rendered highly suspect their use in the analysis.

18. *Gregg*, 428 U.S at 174 n.19.

19. *Id.* at 181.

20. In general, "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency." *Woodson*, 428 U.S. at 294-95.

21. *Gregg*, 428 U.S. at 179. "[A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people." *Id.* at 180-81. The Justices had earlier cautioned, however, that "legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Id.* at 174 n.19; *see also* Harmelin v. Michigan, 501 U.S. 957, 1016-17 (1991) (White, J., dissenting) (noting "the fact that a punishment has been legislatively mandated does not automatically render it 'legal' or 'usual' in the constitutional sense. Indeed, . . . if this were the case, then the prohibition against cruel and unusual punishments would be devoid of any meaning."). To illustrate the point, the Justices in *Gregg* cited Robinson v. California, 370 U.S. 660 (1962), in which the Court found unconstitutional one of nine state statutes that criminalized the status of addiction: "[P]enal laws enacted by state legislatures may violate the Eighth Amendment because 'in the light of contemporary human knowledge' they 'would doubtless be universally thought to be an infliction of cruel and unusual punishment.'" 428 U.S. at 174 n.19 (quoting *Robinson*, 370 U.S. at 666).

of contemporary values because it is so directly involved."[22] In that regard, the *Gregg* court also emphasized that "'one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.'"[23] When legislatures enact laws providing for certain punishments and juries impose sentences according to those guidelines, the Court will consider these acts as reliable benchmarks of contemporary standards of decency and thus as touchstones of what constitutes "cruel and unusual" punishment. These benchmarks, however, are not conclusive as to the constitutionality of a particular sanction because the Court is the final arbiter of constitutionality and uses other aids in that determination.[24]

2. *The Court's Excessiveness Inquiry*

a. Furtherance of Penological Goals

The *Gregg* decision noted that the Eighth Amendment requires not only adherence to society's standards of decency in inflicting punishment, as evidenced by "objective indicia," but also fidelity to "the basic concept of human dignity."[25] This amorphous concept precludes

---

Thus, contemporary societal standards of decency may be violated by enactments of those very legislatures whose decisions are thought to reflect the relevant contemporary values employed as one of the touchstones of Eighth Amendment analysis. The difficulty with this reasoning is one of the components of the criticism this Article will explore in assessing the workability of the evolving standards test as it is currently formulated.

22. *Gregg*, 428 U.S. at 181.

23. *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)). Even though statistics presented to the Court in *Gregg* revealed an apparent reluctance on the part of juries to sentence defendants to death, *id.* at 181-82, and arguably a possible rejection of the death penalty, the Justices instead interpreted the figures as demonstrating "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Id.* at 182; *see also infra* note 160 and accompanying text. Based on the evidence that more than 460 persons were sentenced to death between the *Furman* decision and the time of argument in this case, the Justices found the actions of juries "fully compatible with the legislative judgments . . . as to the continued utility and necessity of capital punishment in appropriate cases." *Gregg*, 428 U.S. at 182.

24. *Id.* at 173. Significantly, the Court has subsequently stressed that "[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in a particular case. Enmund v. Florida, 458 U.S. 782, 797 (1982) (emphasis added); *see also* Thompson v. Oklahoma, 487 U.S. 815, 833 n.40 (1988) (plurality opinion) ("That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

25. 428 U.S. at 182. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment

a state from inflicting suffering gratuitously, or without the appropriate penological justification.[26] If there exists no penological justification, or if the penalty "serves no penal purpose more effectively than a less severe punishment,"[27] then it is excessive, contrary to human dignity, and therefore cruel and unusual.[28] In the death penalty context, the plurality recognized the two justifications of retribution and deterrence.[29]

Retribution, accomplished through the legal system, is necessary to prevent citizens from engaging in self-help to vindicate their outrage at the wrongs committed against them.[30] A death penalty inflicted for the purpose of retribution has been said to be consistent with the underlying concept of human dignity since the "grievous . . . affront to humanity" resulting from certain extreme crimes warrants the "expression of . . . moral outrage" reflected by the penalty of death.[31]

---

stands to assure that this power be exercised within the limits of civilized standards." Trop v. Dulles, 356 U.S. 86, 100 (1958).

26. *Gregg*, 428 U.S. at 183. "[T]he punishment must not involve the *unnecessary* and wanton infliction of pain." *Id.* at 173 (emphasis added). Thus, with the appropriate penological justification, the punishment and concomitant possible infliction of pain is viewed as being "necessary" or at least not "wanton." For discussions of these jurisprudential justifications for the death penalty, see *id.* at 236-41 (Marshall, J., dissenting); ALBERT CAMUS, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 175-234 (Justin O'Brien trans., 1st Am. ed. 1961); Bedau, *supra* note 9, at 910-16; Hugo Adam Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033 (1983); Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L.J. 1 (1992); Mary E. Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973 (1985); Stephen G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 102-20 (1992); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1796-97 (1970); David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 KAN. L. REV. 443 (1989); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) [hereinafter Radin, *Super Due Process*]; Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978) [hereinafter Radin, *Jurisprudence of Death*]; Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 964-71 (1985).

27. Furman v. Georgia, 408 U.S. 238, 280 (1972) (Brennan, J., concurring).

28. *Gregg*, 428 U.S. at 173, 183.

29. *Id.* at 183.

30. *Id.*

31. *Id.* at 183-84. Apparently, but seemingly contradictorily, the "affront to humanity" occasioned by a certain class of killing of a human being justifies society's retributive killing of a human being; in other words, the very act that we find such an affront, as it clearly is, warrants the commission of the same act in return against the perpetrator. It seems counterintuitive to find one act such an "affront to humanity" but find the same act per-

Deterrence of capital crimes is the second goal of the death penalty that the Court has recognized as legitimate. But, as noted in *Gregg*, use of the death penalty for that purpose has not been rooted in a firm foundation: the results of "[s]tatistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders . . . simply have been inconclusive."[32] For that reason, the *Gregg* Court left the ultimate calculation of the deterrent effect, and thus the value of capital punishment in those jurisdictions, to individual state legislatures.[33] Ultimately, the *Gregg* plurality found the death penalty sufficiently justified under these recognized penological goals.[34]

formed by the state consistent with "the basic concept of human dignity." This dichotomy may explain an inherent flaw in the "evolving standards of decency" standard itself; the standard employs legislators' and juries' views, necessarily implicating their desires for retribution, to ascertain what is "cruel and unusual." Legislators and jurors are likely only concerned with the "affront to humanity" occasioned by the murder of the victim and express the desire for retribution through sentencing statutes and sentences. If the Court looks only to the evolving standards test, which incorporates these retributive impulses, then it ignores the "dignity of man" protected by the Eighth Amendment. That Amendment protects the dignity of the defendant, not the victim, and so resort only to the objective indicators and what they say about retribution essentially excludes the core concept of the Amendment. The only institution that can enforce or safeguard the principles of dignity embodied in the Eighth Amendment is the Court, and to accomplish that task it must conduct its own inquiry. It must itself inquire, for example, whether the punishment serves retributive purposes that comport with the dignity of the defendant. Otherwise, resort to the evolving standards test alone will fail to save us from ourselves, as the Amendment seemingly was meant to do. *See infra* note 461 and accompanying text. This Article will therefore discuss the consequent need for other checks on the punishment. That need also arises because of the Court's ability to rig part of the evolving standards test by its subsequent, seemingly unrelated, decisions. The Article will therefore spend considerable time establishing that rigging.

32. 428 U.S. at 184-85.

33. *Id.* Without corroborative statistics, the Justices felt they could "nevertheless assume safely" that there were classes of murderers for whom the death penalty would be a significant deterrent, such as murderers for hire and others who coldly calculate their decisions to kill. *Id.* at 185-86, 186 n.33. Again without reference to supporting authority, the Justices stated that many of the recent statutes had attempted to define the classes of crimes and criminals "for which capital punishment is *most probably* an effective deterrent." *Id.* at 186 (emphasis added). On these bases, the Justices found the death penalty justified, or at least not "clearly wrong," on deterrence grounds. *Id.* at 186-87. A commentator has observed that "the Justices incorrectly rely on the common-sense conclusion that the death penalty will have some deterrent effect in some circumstances." Donnelly, *supra* note 26, at 29. Moreover, the plurality's reasoning on this point is circular in that the Justices purported to conduct their own inquiry and yet, in this case challenging the death penalty in general, ultimately relied on legislators' determinations regarding deterrent effect. By this approach to constitutional determination, the Court would fail to act as a final check on states' use of the death penalty. Justice O'Connor is a more current adherent to this approach. *See infra* notes 211-216 and accompanying text.

34. 428 U.S. at 187.

b. Proportionality Analysis

In addition to evolving standards of decency and the excessiveness inquiry into the penological justifications for the death penalty, the *Gregg* plurality articulated another factor in the assessment of the penalty's constitutionality or "cruel and unusual" or excessive nature: "whether the punishment of death is disproportionate in relation to the crime for which it is imposed."[35] A sentence that is not proportional to the crime is excessive and is therefore cruel and unusual.[36] Because the crime for which Georgia sought to impose the death penalty in *Gregg* was murder, Justices Stewart, Powell, and Stevens elaborated no further than to declare that they could not "say that the punishment [of death] is invariably disproportionate to th[at] crime."[37] The punishment therefore survived proportionality review and was not found unconstitutional on that ground.

---

35. *Id.* at 187. The Court determines whether the punishment is "grossly out of proportion to the severity of the crime." *Id.* at 173. According to Justice O'Connor, this concept of proportionality was first detailed in Weems v. United States, 217 U.S. 349, 371 (1910). Enmund v. Florida, 458 U.S. 782, 812 (1982) (O'Connor, J., dissenting). But the *Weems* Court had quoted Justice Field in dissent in O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892), in which he wrote,

> The inhibition [of cruel and unusual punishments in the Eighth Amendment] is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.

One commentator has noted some debate concerning the role of proportionality review in Eighth Amendment cases. *See* Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 338 n.65 (1992).

36. *Gregg*, 428 U.S. at 173.

37. *Id.* at 187. Later decisions have refined disproportionality analysis and, in death penalty cases, have mostly applied that type of "disproportionality" analysis that compares the punishment at issue with the culpability of the particular offender. *See, e.g., infra* notes 100-102, 113-115, 127-130 and accompanying text. Disproportionality may also arise, as indicated in *Gregg*, if the death penalty is too severe a sanction for the particular crime. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (holding disproportionate and unconstitutional the death penalty for rape of an adult woman); *see also infra* notes 67-68, 76-77 and accompanying text. The Court has held, however, that the Eighth Amendment does not require the kind of proportionality review that compares death penalties imposed on those similarly situated. Pulley v. Harris, 465 U.S. 37, 43-44, 50-51 (1984). For a critique of that opinion, see William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 776-78 (1985) (arguing that "[r]eal proportionality review threatens the existence of the death penalty," *id.* at 778, ostensibly because such a review would indicate the existence of arbitrariness). For a discussion of the differences between the two types of proportionality analysis, that which is done in capital cases and that which is not, see David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 665-68 (1983). Outside of the death penalty context, the Court

The *Gregg* plurality thus outlined the substantive restrictions that the Eighth Amendment places on a state's ability to execute. Even for punishments such as the death penalty that existed at common law or at the adoption of the Bill of Rights, the "evolving standards of decency that mark the progress of a maturing society"[38] must evince current societal acceptance of the death sentence at issue. The penalty must also further the penological goals of retribution and deterrence and be proportional either to the offender's blameworthiness or to the crime committed.

B. Procedural Requirements

Having upheld the death penalty as consistent with the evolving standards of decency, and finding that it served appropriate penological goals and was proportionate to the crime of murder, the *Gregg* plurality proceeded to evaluate the manner in which Georgia courts and juries arrived at the death sentence and imposed it in particular cases.[39] In so doing, it announced various standards for measuring death penalty procedures.[40] Generally, "[b]ecause of the uniqueness of the death penalty, *Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[41] The *Gregg* plurality also found that the *Furman* concurrences had recognized that if "'there [were] no meaningful basis for distinguishing the few cases in which [the death penalty was] imposed from the many cases in which it [was] not,'"[42] then the penalty was imposed in an arbitrary, capricious, and therefore unconstitutional manner. Follow-

has found that the Eighth Amendment "does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). For analysis of *Harmelin*, see John C. Rooker, Note, *Crime and Punishment: The Eighth Amendment's Proportionality Guarantee After* Harmelin v. Michigan, 7 B.Y.U. J. PUB. L. 149 (1992), and Olivia Outlaw Singletary, Comment, Harmelin v. Michigan: *The Most Recent Casualty in the Supreme Court's Struggle to Develop a Standard for Eighth Amendment Proportionality Review*, 54 OHIO. ST. L.J. 1205 (1993).

38. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

39. *Gregg*, 428 U.S. at 204-06.

40. *Id.* at 204.

41. *Id.* at 188.

42. *Id.* (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). The *Gregg* judgment here also quoted Justice Stewart's concurring opinion in *Furman* (stating that the *Furman* death sentences were "'cruel and unusual in the same way that being struck by lightning [was] cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.'"). *Id.* (quoting *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (second alteration in original); *Id.* at 188 n.36 (noting that

ing *Gregg*, the Court has required that the sentencer's discretion to impose the death penalty "be suitably directed and limited"[43] so as to avoid this arbitrariness. The *Gregg* plurality also concluded that the jury's decision must be informed generally by considerations of the "'circumstances of the offense together with the character and propensities of the offender.'"[44] In this way, the sentence is individualized to the offender.

This guidance of the jury and individualization in sentencing can be accomplished, as it was under the Georgia scheme in *Gregg*, by having the sentencer consider a statutory enumeration of aggravating factors, along with any mitigating circumstances that the defendant may present.[45] Typically the sentencer must find the existence of at

---

"[t]his view was expressed by other Members of the Court who concurred in the judgments").

43. *Id.* at 189.

44. *Id.* (quoting Pennsylvania *ex. rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

45. Many jurisdictions enumerate both aggravating and mitigating circumstances that the sentencer must consider. *See e.g.*, ALA. CODE §§ 13A-5-49, -51 (1994); ARIZ. REV. STAT. ANN. §§ 13-703(F), (G) (Supp. 1995); ARK. CODE ANN. §§ 5-4-603 to 605 (Michie 1993); CAL. PENAL CODE §§ 190.2, 190.3 (West 1988 & Supp. 1995); COLO. REV. STAT. §§ 16-11-103(4), (5) (Supp. 1995); CONN. GEN. STAT. ANN. §§ 53a-46a(g), (h) (West 1994 & Supp. 1995); FLA. STAT. ANN. §§ 921.141(5), (6) (West 1985 & Supp. 1995); ILL. ANN. STAT. ch. 720, para. 5/9-1(b), (c) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 35-50-2-9(b), (c) (West Supp. 1994); KY. REV. STAT. ANN. § 532.025(2)(a), (b) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.4-905.5 (West Supp. 1994 & West 1984); MD. ANN. CODE art. 27, §§ 413(d), (g) (Supp. 1994); MASS. GEN. L. ch. 279, § 69 (Supp. 1995); MISS. CODE ANN. §§ 99-19-101(5), (6) (1994); MO. ANN. STAT. §§ 565.032(2), (3) (Vernon Supp. 1995); MONT. CODE ANN. §§ 46-18-303, -304 (1994); NEB. REV. STAT. §§ 29-2523(1), (2) (1989); NEV. REV. STAT. ANN. §§ 200.033 (Michie Supp. 1993), 200.035 (Michie 1992); N.H. REV. STAT. ANN. §§ 630:5(VI), (VII) (Supp. 1994); N.J. STAT. ANN. § 2C:11-3(c)(4), (5) (West 1995); N.M. STAT. ANN. §§ 31-20A-5, -6 (Michie Supp. 1995 & Michie 1994); N.Y. CRIM. PROC. LAW §§ 400.27(3), (6)-(7), (9) (McKinney Supp. 1996); N.Y. PENAL LAW § 125.27(1)(a) (McKinney Supp. 1996); N.C. GEN. STAT. §§ 15A-2000(e), (f) (Supp. 1994); OR. REV. STAT. §§ 163.150(1)(b), (c) (Supp. 1994); 42 PA. CONS. STAT. ANN. §§ 9711(d), (e) (Supp. 1995 & 1982); S.C. CODE ANN. § 16-3-20(C)(a), (b) (Law. Co-op. Supp. 1994); TENN. CODE ANN. § 39-13-204(i), (j) (Supp. 1995); UTAH CODE ANN. §§ 76-5-202, 76-3-207(3) (1995); VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie 1990); WYO. STAT. § 6-2-102(h), (j) (Supp. 1995). The sentencer's consideration of mitigating factors, however, cannot be limited to those provided in the statute. *See infra* notes 244-263 and accompanying text.

Under the Georgia statute under consideration in *Gregg*, for example, the sentencer would determine the penalty in the second half of a bifurcated proceeding. (See *Gregg*, 428 U.S. at 162-69 for an explication of the statutory scheme that the Court examined and found constitutional.) The statute provided a list of ten statutory aggravating factors and directed that, after considering the ten aggravators enumerated in the statute and *any* non-statutory aggravating and mitigating factors, the sentencer could impose the death penalty as long as it found the existence of one statutory aggravating factor beyond a reasonable doubt. *Id.* at 164-66 (citing GA. CODE ANN. §§ 27-2534.1, 26-3102 (Supp. 1975)). The decision noted that through this procedure, the Georgia legislature limited the class of murder-

least one aggravating factor before it may impose the death penalty.[46] Because the sentencer could also look to any circumstance that the defendant presented in mitigation, however, it could tailor the punishment to the particular individual.[47] Such a scheme "provide[s] gui-

---

ers subject to the death penalty and thereby better assured that the decision to impose the penalty was not based on caprice; the sentencer was required to consider evidence about the crime and character of the defendant when it considered factors both in aggravation and in mitigation. *Id.* at 196-97. The Georgia scheme is essentially the same now, except one unconstitutionally vague aggravator has been removed. *See* GA. CODE ANN. § 17-10-30 (1990).

The Georgia legislature further reduced the risk of arbitrariness, in the judgment of the Court, by providing for a special expedited review process by which the Supreme Court of Georgia independently reviewed the sentence for arbitrariness, disproportionality, and sufficiency of support for the statutory aggravating factors found by the sentencer. *Id.* at 198 (citing GA. CODE ANN. 27-2537(c) (Supp. 1975)).

46. In some states, the sentencer can impose death after finding at least one aggravating circumstance. *See, e.g.*, ALA. CODE § 13A-5-45(f) (1994); GA. CODE ANN. § 17-10-31.1(a) (Supp. 1995); KY. REV. STAT. ANN. § 532.025(3) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1995); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1988); VA. CODE ANN. § 19.2-264.4(c) (Michie 1990). Most states, however, require the jury to weigh any aggravators it finds against any mitigating circumstances. *See, e.g.*, ARK. CODE ANN. § 5-4-603 (Michie 1993); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. § 16-11-103(2) (Supp. 1995); DEL. CODE ANN. tit. 11, § 4209 (c), (d) (Supp. 1994); FLA. STAT. ANN. § 921.141(2), (3) (West 1985); IND. CODE ANN. § 35-50-2-9(i) (West Supp. 1995); MD. ANN. CODE art. 27, § 413(h) (Supp. 1994); MASS. GEN. L. ch. 279, § 68 (Supp. 1995); MISS. CODE ANN. § 99-19-101(2) (1994); MO. ANN. STAT. § 565.030(4) (Vernon Supp. 1995); MONT. CODE ANN. § 46-18-305 (1995); NEB. REV. STAT. § 29-2522 (1989); NEV. REV. STAT. ANN. § 175.554(3) (Michie Supp. 1993); N.H. REV. STAT. ANN. § 630:5(IV) (Supp. 1994); N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1995); N.M. STAT. ANN. § 31-20A-2(B) (Michie Supp. 1995); N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 1996); N.C. GEN. STAT. § 15A-2000(b) (Supp. 1994); OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1996); 42 PA. CONS. STAT. ANN. § 9711(c) (1982); TENN. CODE ANN. § 39-13-204(f)(2), (g) (Supp. 1995). Other states do not expressly require weighing. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1995); CONN. GEN. STAT. ANN. § 53a-46a(f), (g), (h) (West 1994 & Supp. 1995)); IDAHO CODE § 19-2515(c) (Supp. 1995); ILL. ANN. STAT. ch. 720, para. 5/9-1(g) (Smith-Hurd Supp. 1995); MONT. CODE ANN. § 46-18-305 (1993); OR. REV. STAT. § 163.150 (Supp. 1994); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1995); UTAH CODE ANN. § 76-3-207(2) (1995); WASH. REV. CODE ANN. § 10.95.060(4) (West 1990); WYO. STAT. § 6-2-102(d) (Supp. 1995).

47. *Gregg*, 428 U.S. at 197 (citing GA. CODE ANN. § 27-2534.1(b) (Supp. 1975)). Even if the Georgia jury found the existence of an aggravating circumstance beyond a reasonable doubt, for example, it could still grant mercy to the defendant depending on the mitigating evidence she presented to explain why she should not receive the ultimate penalty; in fact, the jury could recommend mercy even without a finding of a mitigating circumstance. *Id.* (citing GA. CODE ANN. § 27-2302 (Supp. 1975)). In essence, the sentencer was guided in its *imposition* of the death penalty but had virtually unbridled discretion *not* to impose the penalty. In response to defendant Gregg's argument that portions of the statute still allowed for the impermissible exercise of discretion, specifically the section that permitted a grant of executive clemency, the Justices pointedly noted that "the decision to *impose* [the death penalty] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant"; however,

dance to the sentencing authority and thereby reduce[s] the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary."[48] Although cautioning that they were not prescribing a constitutional blueprint to which state statutes were required precisely to conform, the Justices nonetheless indicated that a bifurcated scheme involving the consideration of prescribed aggravating factors and any mitigating factors, such as that employed in Georgia, would be a good candidate for passing constitutional scrutiny.[49]

"[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* at 199 (emphasis added). This reality has become a source of conflict within the present Court and, as this Article posits, unbridled discretion to be merciful has been scaled back by recent decisions. *See infra* notes 339-374 and accompanying text.

48. *Gregg*, 428 U.S. at 194-95.

49. *Id.* at 195. In the context of capital crimes, when jury sentencing is particularly desirable in order that the punishment reflect the "evolving standards of decency" in the society, the plurality stated that bifurcated proceedings would best achieve the desired end of fairness in sentencing. *Id.* at 190-92, 195. A bifurcated proceeding is one in which the jury first determines guilt or innocence, relying on evidence relevant and admissible only on the issue of guilt or innocence, and later determines the appropriate sentence, relying on evidence relevant to sentencing, some of which is *only* introduced *at that stage*. *See* Sumner v. Shuman, 483 U.S. 66, 85 n.13 (1987) ("Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other."). *See generally Gregg*, 428 U.S. at 191 (quoting MODEL PENAL CODE § 201.6, cmt. 5, pp. 74-75 (Tentative Draft No. 9, 1959)). Additionally, "[a]s a general proposition the[ ] concerns [expressed in *Furman* regarding arbitrariness] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg*, 428 U.S at 195. Most states expressly provide for such a separate sentencing proceeding. *See, e.g.*, ALA. CODE § 13A-5-45 (1994); ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1994); ARK. CODE ANN. § 5-4-602(3) (Michie 1993); CAL. PENAL CODE § 190.1 (West 1988); COLO. REV. STAT. § 16-11-103(1) (Supp. 1994); CONN. GEN. STAT. ANN. § 53a-46a(b) (West 1994); DEL. CODE ANN. tit. 11, § 4209(b) (1987); FLA. STAT. ANN. § 921.141(1) (West 1985); IDAHO CODE § 19-2515 (Supp. 1995); ILL. ANN. STAT. ch. 720, para. 5/9-1(d) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 35-50-2-9(d) (West Supp. 1994); KY. REV. STAT. ANN. § 532.025(1)(a) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905 (West Supp. 1994); MD. ANN. CODE art. 27, § 413(a) (Supp. 1994); MASS. GEN. L. ch. 279, § 68 (Supp. 1995); MISS. CODE ANN. § 99-19-101(1) (1994); MO. ANN. STAT. § 565.030(3) (Vernon Supp. 1995); MONT. CODE ANN. § 46-18-301 (1993); NEB. REV. STAT. § 29-2520 (1989); NEV. REV. STAT. ANN. § 175.552 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1994); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1995); N.M. STAT. ANN. § 31-20A-1 (Michie Supp. 1995); N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1996); N.C. GEN. STAT. § 15A-2000(a) (Supp. 1994); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1995); OR. REV. STAT. § 163.150(1)(a) (Supp. 1994); 42 PA. CONS. STAT. ANN. § 9711(a) (1982); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (Supp. 1995); TENN. CODE ANN. § 39-13-204 (Supp. 1994); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1995); UTAH CODE ANN. § 76-3-207(1) (1995); VA. CODE ANN. § 19.2-264.4(A) (Michie 1990); WASH. REV. CODE ANN. § 10.95.050 (West 1990); WYO. STAT. § 6-2-102(a) (Supp. 1995).

On the same day that the Supreme Court decided *Gregg*, it also decided *Woodson v. North Carolina*,[50] another plurality opinion in which Justice Stewart announced the judgment of the Court and Justices Powell and Stevens joined.[51] In *Woodson*, the issue was whether a death penalty scheme that mandatorily imposed death once the jury found the defendant guilty of a certain homicide violated the Eighth Amendment's proscription against cruel and unusual punishment.[52] Before answering in the affirmative, the Court examined the statutory procedures under which North Carolina sentenced a defendant to death.[53]

50. 428 U.S. 280 (1976).

51. *Id.* at 282. Justices Brennan and Marshall concurred in the judgment on the grounds that the death penalty is always unconstitutional. *Id.* at 305-06 (Brennan, J., concurring in the judgment); *id.* at 306 (Marshall, J., concurring in the judgment). Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented. *Id.* (White, J., dissenting). Justices Blackmun and Rehnquist also dissented separately. *Id.* at 307 (Blackmun, J., dissenting), 308 (Rehnquist, J., dissenting).

52. *Id.* at 287, 305. The Court on that day also decided the constitutionality of Louisiana's mandatory death penalty scheme. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); *supra* note 4.

Another potential question in *Woodson* involved a substantive challenge to the death penalty: whether the imposition of the death penalty on a defendant charged with felony murder was disproportionate to the crime when the defendant lacked the intent to kill and had not killed. The plurality did not reach the question because it found the statutory scheme violated the procedural dictates set out in *Gregg* and required by the Constitution. *Woodson*, 428 U.S. at 305 n.40. The Court took up the issue later in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). For fuller discussions of *Enmund* and *Tison*, see *infra* notes 83-118 and accompanying text.

53. *Woodson*, 428 U.S. at 286-87. The plurality had first examined the objective indicators of the evolving standards of decency to conclude that mandatory imposition of the death penalty did not comport with society's current standards. *Id.* at 301. By 1972, according to the plurality, mandatory death sentences had been repudiated by juries and, consequently, also by legislatures. *Id.* at 292-93, 298. Reportedly, juries had refused to convict defendants for first-degree murder or other capital offenses because of the automatic imposition of the harshest possible sentence. *Id.* at 293. Legislatures also moved away from mandatory schemes and toward discretionary ones in order to insure conviction and some punishment, even if it were less than death. *Id.* at 293, 296-97. For these reasons, mandatory schemes could not be applied consistently with the evolving standards of decency and hence with Eighth Amendment dictates. *Id.* at 301.

The plurality noted that even under statutes providing for discretion in jury sentencing, "[v]arious studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty 'with any great frequency.'" *Id.* at 295 (quoting H. Kalven & H. Zeisel, The American Jury 436 (1966)). The source quoted by the plurality showed that less than 20% of those convicted of capital murder received the death penalty under discretionary schemes. *Id.* n.31. The Court viewed these figures only as evidence of juror reluctance to impose the death penalty automatically in every capital case, rather than as more general proof that jurors in most cases simply did not view the death penalty as an acceptable punishment.

The *Woodson* plurality noted the *Furman* Court's rejection of standardless juror decisionmaking and the subsequent response by the North Carolina legislature to remove all jury discretion by enacting a mandatory statute.[54] But because of the tendency of juries to avoid the automatic imposition of death by declining to convict, "a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly."[55] Because the scheme provided no guidance to the jury in deciding whether to impose the death sentence, it failed "to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences."[56]

A corollary to a state's dictate to provide standards to the jury in the jury's *imposition* of the ultimate penalty is the state's obligation to allow juries to consider the individuality of the particular defendant.[57] The mandatory scheme here, however, failed to provide for the individualized sentencing determination mandated by the Eighth Amendment: "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[58] The *Woodson* plurality reasoned that:

> [a] process [such as a mandatory scheme] that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[59]

The Constitution requires these procedures in capital sentencing because death is different and irrevocable.[60] Therefore, the state must provide mechanisms to ensure that the sentence is warranted in each

54. *Id.* at 286-87.
55. *Id.* at 303.
56. *Id.* at 302.
57. *See supra* notes 44-45 and 47 and accompanying text.
58. *Woodson*, 428 U.S. at 304 (citation omitted).
59. *Id.*
60. *Id.* at 322.

case.[61] Because the North Carolina mandatory scheme allowed for none of the requisite individualized assessment, the Court found that it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[62]

This elaboration of the underpinnings of Eighth Amendment jurisprudence demonstrates various key concepts: substantively, the Court will evaluate death sentences for their cruel and unusual nature by looking to the "evolving standard of decency" as reflected in legislative enactments and jury sentencing behavior, and by looking to see that the death sentence accords with the "dignity of man" by measuring the proportionality of the punishment and its furtherance of the penological goals of retribution and deterrence. The Court's assessment of the procedures of death penalty imposition will ensure that two basic requirements are met. First, sentencing juries must be guided in their decisions to impose death. Second, juries must also be allowed to individualize the sentence by considering "compassionate or mitigating factors stemming from the diverse frailties of humankind."[63] A survey of the evolution of these basic rules and their application is necessary to evaluate the current validity of the "evolving standards" test and the current Court's clear drift toward a pro-death and self-fulfilling constitutional test in death penalty cases.

III. Post-*Gregg* Applications of the Doctrine

A. Substantive Challenges to the Death Penalty

Since *Gregg v. Georgia*, many of the substantive challenges to the death penalty have involved classes of defendants and required the Court to evaluate the imposition of the penalty of death both by its acceptance at the common law or at the time of the adoption of the Bill of Rights and in terms of society's evolving standards of decency: whether contemporary society would approve, as evidenced by jury sentencing behavior and legislative enactments, of executing a member of a particular class of people. As indicated above, however, the Court would also assess the sentence for excessiveness, for example, for its furtherance of the penological goals of deterrence and retribution: whether this class of defendants would be deterred by the possibility of a death sentence and whether such a sentence would satisfy society's desire that these class members receive their just deserts. Fi-

61. *Id.* at 305.
62. *Id.*
63. *Id.* at 304.

nally, although the Court has said that as a general matter the punishment of death is proportional to the crime of murder,[64] the punishment may nonetheless be disproportionate and so unconstitutionally excessive for members of a particular class. The Court may thus appraise the propriety of a sentence according to its proportionality to the blameworthiness of the particular class of defendant.[65]

One of the earliest post-*Gregg* cases to come before the Court on a substantive challenge was *Coker v. Georgia*,[66] which involved the imposition of the death penalty for the rape of an adult woman. In setting forth the standards to be used in evaluating the claim of cruel and unusual punishment, the plurality stressed that the Court had "firmly embraced" the concept that the "Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed."[67] The plurality further explained that the punishment is unconstitutionally excessive if it fails the proportionality test or "makes no measurable contribution to acceptable goals of punishment."[68] The plurality here employed the objective factors of legislation and jury sentencing decisions not separately, as the Court's decision in *Gregg* had suggested, but as tools to inform the Court's judgment about excessiveness; those objective indicia would inform the excessiveness judgment "to the maximum possible extent."[69]

The objective evidence revealed that at the time this case was decided, Georgia was the only state that authorized death for the rape of an adult woman.[70] Remarking that the plurality in *Trop v. Dulles*[71] had "[taken] pains to note the climate of international opinion con-

64. *See Gregg*, 428 U.S. at 187; *supra* note 37 and accompanying text.

65. The Court has since stated that "[a] punishment might fail the test [of excessiveness] on either ground," Coker v. Georgia, 433 U.S. 584, 592 (1977), *i.e.*, for lack of proportionality or failure to further penological goals.

66. 433 U.S. 584 (1977) (plurality opinion). Comprising the plurality were Justices White, Stewart, Blackmun, and Stevens. *Id.* at 586. Justices Brennan and Marshall concurred in the judgment, but on the grounds that the death penalty is unconstitutional in all contexts. *Id.* at 600-01 (Brennan, J., concurring in the judgment); *id.* at 600-01 (Marshall, J., concurring in the judgment). Justice Powell concurred in the judgment in part and dissented in part. *Id.* at 601; *see also infra* text accompanying notes 80-81.

67. *Coker*, 433 U.S. at 592.

68. *Id.*

69. *Id.*

70. *Id.* at 595-96. Prior to the Court's decision in *Furman*, and at different points in time, 16 to 18 states and the federal government had authorized the death penalty for rape; however, upon re-enactment, most of the states chose not to include death as a punishment for rape of an adult woman. *Id.* at 593-94.

71. 356 U.S. 86 (1958) (plurality opinion).

cerning the acceptability of a particular punishment," the plurality here observed that only three of sixty major nations surveyed provided for death in these circumstances.[72] Juries in Georgia had also failed to sentence rapists to death in approximately nine out of ten cases.[73] The weight of objective authority was thus against death as an acceptable punishment in these cases.[74]

The plurality emphasized, however, that "[t]hese recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[75] Thus, addressing for itself the proportionality of the punishment to the type of crime here at issue, the plurality found that the punishment of death was excessive because rape did not involve the taking of a human life.[76] The plurality essentially focused on the blameworthiness or culpability of the rapist, comparing that culpability to the penalty and finding it wanting in comparison to that of the murderer.[77] In the end, the plurality's own assessment about the disproportionality of the punishment here[78] was only buttressed by conclusions reached from analysis of the objective indicia.[79]

Justice Powell concurred in the judgment but dissented concerning the conclusion that death was always disproportionate for these crimes.[80] He did agree, however, with the plurality's recognition that although the "objective indicators [of society's evolving standards of decency] are highly relevant, . . . the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment . . .

72. *Coker*, 433 U.S. at 596 n.10. The decision did not identify, however, which nations out of those 60 authorized the death penalty in general.

73. *Id.* at 597.

74. *Id.* at 596-97.

75. *Id.* at 597.

76. *Id.* at 597-98 ("We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." (citation omitted)).

77. The Court stated, "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder." *Id.* at 598.

78. *Id.* at 592. The plurality also indicated that the punishment could violate the Eighth Amendment on the grounds of disproportionality alone, even if it furthered some penological goals and so did not violate that component of the analysis. *Id.* & n.4; *see also supra* note 65.

79. *Coker*, 433 U.S. at 597 (stating that "the legislative rejection of capital punishment for rape strongly confirms *our own* judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman") (emphasis added).

80. *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

must be decided on the basis of our own judgment in light of the precedents of this Court."[81] Thus, a majority of the Court explicitly concurred in the rightness of employing its own measurements in addition to those objective indicia evincing only society's attitude toward a particular punishment.[82] The Court's own proportionality analysis and assessment of the punishment for its furtherance of certain penological goals remained firmly within the Court's Eighth Amendment construct.

Another early case was *Enmund v. Florida*,[83] in which the defendant had been convicted of felony murder[84] and sentenced to death. The evidence showed, however, that Enmund had only driven the getaway car in the course of a robbery and subsequent murder; he had not actually killed, and claimed that he possessed no intent to kill.[85] On a petition for certiorari, the defendant asserted that a death sentence violated the Eighth Amendment when imposed on someone who did not kill, did not attempt to kill, and had no intent to kill.[86]

In surveying the legislative enactments of various death penalty jurisdictions[87] to determine society's attitude toward the execution of those in defendant's class, and more specifically the attitude toward the excessiveness or disproportionality of the sentence,[88] the Court determined that only eight states allowed imposition of the death penalty "solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[89] Nine other states

81. *Id.* at 603-04 n.2.

82. Chief Justice Burger, however, joined by Justice Rehnquist, dissented. *Id.* at 604 (Burger, C.J., dissenting).

83. 458 U.S. 782 (1982). The majority in *Enmund* included Justices White, Brennan, Marshall, Blackmun, and Stevens. *Id.* at 783. Justice O'Connor, joined by Chief Justice Burger, and Justices Powell and Rehnquist, dissented but appeared to agree that a Court-conducted inquiry into proportionality was necessary, in addition to the evolving standards assessment. *Id.* at 802, 815-16, 823 (O'Connor, J., dissenting).

84. The jury could convict defendant of first-degree murder under Florida's felony murder statute as long as it found there was a killing committed during the course of a robbery or attempted robbery and that defendant was present and aiding and abetting that robbery or robbery attempt; the jury need not have found intent to kill on the part of defendant to convict him. *Id.* at 785. Once found guilty of first-degree murder, he was subject to the death penalty. *Id.* at 788. Defendant was sentenced, on the jury's recommendation, upon a finding of four statutory aggravating circumstances and no mitigating circumstances. *Id.* at 785.

85. *Id.* at 786 & n.2.

86. *Id.* at 787.

87. At the time of decision in this case, 36 jurisdictions provided for capital punishment. *Id.* at 789.

88. *Id.* at 788-89.

89. *Id.* at 792.

allowed a death sentence of such a person if sufficient aggravating circumstances were shown and outweighed mitigating circumstances.[90] Because a defendant such as Enmund could be sentenced to death in only a third of American jurisdictions that had the death penalty, and even though the judgment was not "'wholly unanimous among state legislatures,'"[91] the Court nonetheless found the evidence to "weigh[ ] on the side of rejecting capital punishment for the crime at issue."[92]

Regarding jury determinations, the Court looked to statistics gleaned from reported appellate court decisions and a survey of the country's death-row population to find that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's."[93] For example, during the time covered by the survey of appellate decisions, 339 of the 362 persons executed for homicide were the actual killers; nontriggerman felony murderers accounted for only six of the remaining executions.[94] Similarly, the survey of death-row prisoners sentenced to death for homicide revealed that 698 out of 739 had participated in the killing, and sixteen of those who did not participate also were not physically present when the murder occurred, including defendant in this case.[95] The Court thus agreed with the defendant that juries considered death a disproportionate sentence for someone in his class.[96]

Significantly, in assessing the validity of this punishment for this class, the Court deemed it necessary to consider other countries' treatment of the class.[97] The Court found it "worth noting that the doctrine of felony murder has been abolished in England and India, . . . and is unknown in continental Europe."[98] In its determination of the evolving standards, the Court has often consulted the standards of other nations and has not limited its deliberation to the statutes and jury determinations of this country.[99]

---

90. *Id.*

91. *Id.* at 793 (quoting Coker v. Georgia, 433 U.S. 584, 596 (1977)).

92. *Id.*

93. *Id.* at 794.

94. *Id.*

95. *Id.* at 795.

96. *Id.* at 796.

97. "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.'" *Id.* at 796 n.22 (quoting *Coker*, 433 U.S. at 596 n.10).

98. *Id.*

99. *Trop v. Dulles* contains an example of the Court's use of this kind of evidence, as the Court highlighted the dearth of nations that punished crime with denationalization. 356 U.S. 86, 102-03 (1958). One could argue that the situation in *Trop* is distinct from those involving purely state matters, to which comparison to other state statutes and prac-

Recognizing that it was for the Court "ultimately to judge" whether the Eighth Amendment was violated, the Court undertook its own excessiveness inquiry.[100] Again, the Court's disproportionality analysis focused on the defendant's culpability in comparison to the severe nature of the ultimate penalty.[101] As in *Coker*, the *Enmund* Court reasoned that because the defendant robber did not take a life, death for him was an excessive or disproportionate punishment.[102]

Finally, the *Enmund* Court found that the execution of those in defendant's class was excessive in that it did not further the goals of punishment because it would not deter someone who had no intent to kill in the first instance, and would not ensure that he received his just deserts by avenging murders he neither intended nor did commit.[103] Because legislative judgment and jury sentencing indicated that the punishment was excessive and so contrary to the evolving standards of decency, and because the Court's analysis also found that the punishment would not further recognized penological goals and was disproportionate for this class of offender, imposition of the death penalty on this class was in violation of the Eighth Amendment.[104]

---

tices is relevant, because the punishment of denationalization can only be imposed by a nation and hence comparison to practices of other nations is necessary. That argument could have some merit if not for the recognition and use by the Court of the same evidence in subsequent cases, such as *Enmund*. And since the *Trop* decision, the Court itself has noted the significance of the *Trop* Court's heeding of international opinion: according to the Court in *Coker*, 433 U.S. at 596 n.10 (plurality opinion), the *Trop* Court "took pains to note the climate of international opinion concerning the acceptability of a particular punishment." *See also* Thompson v. Oklahoma, 487 U.S. 815, 830 & n.31 (1988) (plurality opinion). This historical treatment of evidence of the international community's practices is important to a critique of the current Court's attitude toward this evidence in assessing the evolving standards of decency regarding the penalty of death. *See infra* note 454 and accompanying text.

100. *Enmund*, 458 U.S. at 797.

101. *Id.* at 797-98.

102. *Id.*

103. *Id.* at 798-801.

104. *Id.* at 801. In the next pertinent decision following *Enmund*, the Court tackled the problem of execution of the insane and ultimately held that such an execution was violative of the Eighth Amendment. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986). Execution of the insane was barred at the common law, *id.* at 406, 408, and, at the time of decision in *Ford*, "no State in the Union permit[ted] the execution of the insane." *Id.* at 408 & n.2 (observing that 41 states then had the death penalty). These facts evidenced that many shared the view that execution of the insane would offend humanity. *Id.* at 409. Because the Court also saw little retributive value in executing those who could not understand why they were being punished, *id.*, the executions were barred by the Eighth Amendment. For this portion of the opinion, the majority included Justices Marshall, Brennan, Blackmun, Powell, and Stevens. *Id.* at 401. Justice O'Connor was joined by Justice White as she concurred in the result in part and dissented in part, *id.* at 427, and Chief Justice Burger joined Justice Rehnquist in dissent. *Id.* at 431 (Rehnquist, J., dissenting).

In *Tison v. Arizona*,[105] however, the Court modified the *Enmund* rule to permit the execution of those felony murderers who, even though they did not kill or intend to kill, participated in the felony in a major way and exhibited "reckless indifference to human life" in the execution of the felony.[106] Justice O'Connor, as author of the Court's opinion,[107] conducted a two-step proportionality analysis to reach this result,[108] but did not expressly employ the evolving standards test or assess whether the penalty in this instance would further penological goals.[109]

The first step of the Court's proportionality analysis was informed by the various death penalty states' assessments of proportionality, as evidenced by their legislative enactments on the subject. That is, the Court again found "the state legislatures' judgment as to proportionality in these circumstances relevant to th[e] constitutional inquiry,"[110] but did not consider jury sentencing behavior for this purpose. Because twenty-one states authorized capital punishment for a felony murderer who was a major participant in the felony and only eleven states prohibited a death sentence where there was no intent to kill,[111] the Court saw a consensus approving capital punishment in these circumstances as not excessive or disproportionate.[112]

In the second step of its proportionality analysis, the Court conducted its own proportionality assessment and recognized that the mental state of a defendant has traditionally been a critical measure of his or her culpability.[113] In the death penalty context, a defendant can be sufficiently culpable to be deserving of the death penalty even absent the intent to kill: "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state" that can warrant

105. 481 U.S. 137 (1987).

106. *Id.* at 158.

107. *Id.* at 138. Joining Justice O'Connor in the majority were Chief Justice Rehnquist and Justices White, Powell, and Scalia. *Id.* In dissent were Justices Brennan, Marshall, Blackmun, and Stevens. *Id.* at 159.

108. *Id.* at 152-58.

109. *Id.* The same year that the Court decided *Tison* but failed to examine whether penological goals were furthered, a six to three majority of the Court in Sumner v. Shuman, 483 U.S. 66, 82-85 (1987), found a mandatory death sentence scheme for life-without-parole prisoners incompatible with the Eighth Amendment partly because it failed to further the penological goals of deterrence and retribution. The Justices in the *Sumner* majority were Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor. *Id.* at 66.

110. *Tison*, 481 U.S. at 152.

111. *Id.* at 152-54, 158.

112. *Id.* at 154.

113. *Id.* at 156.

the death penalty.[114] The culpability requirement for proportionality set out in *Enmund* was therefore satisfied in cases in which "major participation in the felony committed[ ] combined with reckless indifference to human life," and thus the death penalty in those cases was constitutional.[115]

The dissent argued, however, that the Court misleadingly stated that a "majority of American jurisdictions clearly authorize capital punishment" in these types of cases because the Court excluded from the analysis those states that had abolished capital punishment.[116] Inclusion of abolitionist states in the tally would have revealed that three-fifths of the jurisdictions opposed execution of felony murderers who possessed no intent to kill.[117] The dissent also criticized the majority for excluding from its analysis evidence of frequency of imposition of the penalty on these defendants, or jury sentencing behavior, and evidence of other nations' abolition of capital punishment or, more specifically, prohibition of execution of these murderers.[118]

One of the next significant substantive challenges to the death penalty concerned minors aged fifteen years or less at the time of the commission of their crimes. In *Thompson v. Oklahoma*, a plurality of the Court ruled that executing those who were fifteen years old at the time of their crimes offended the evolving standards of decency,[119] was not proportional to the culpability of these offenders as a class,[120] and served no penological goals.[121]

Legislative enactments in those states that had considered a minimum age limitation demonstrated that all would exempt fifteen-year-olds from the death penalty.[122] The Court again found it significant that:

---

114. *Id.* at 157-58.

115. *Id.* at 158.

116. *Id.* at 175 (Brennan, J., dissenting).

117. *Id.* at 175 n.13. According to the dissent, 13 states and the District of Columbia would not have allowed a death sentence under any circumstance and 11 disallowed it for felony murderers with no intent to kill. In addition, "[a]t least four other States . . . also restrict the imposition of capital punishment to those who actually commit and intend to commit murder, and two more States reject the death penalty for most felony murderers." *Id.*

118. *Id.* at 176-79.

119. 487 U.S. 815, 830 (1988) (plurality opinion). The plurality here consisted of Justices Stevens, Brennan, Marshall, and Blackmun. *Id.* at 818.

120. *Id.* at 835.

121. *Id.* at 835-36.

122. *Id.* at 829. Eighteen states established a minimum age of eligibility for the death penalty of 16 at the time of the offense; nineteen other states that allowed the death penalty had set no minimum age for eligibility. *Id.* at 826-27, 829. At the time of argument in

> [t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[123]

Thus, adding to the views expressed in *Trop, Coker,* and *Enmund,* the plurality reiterated the relevance of international opinion in its assessment of the cruel and unusual nature of a punishment.[124]

Statistics showing that only eighteen to twenty defendants were executed in the twentieth century for crimes they committed when they were below the age of sixteen, demonstrated to the plurality that imposition of the death penalty on fifteen-year-old offenders was now "generally abhorrent to the conscience of the community."[125] Statistics of jury sentencing behavior also showed that only five of the 1393 persons sentenced to death during the survey period were under the age of sixteen at the time of the crime.[126] The evolving standards thus revealed that death inflicted on fifteen-year-olds was cruel and unusual punishment in the eyes of society.

However, because the analysis must proceed beyond the objective "evolving standards" assessment,[127] the plurality went on to find the penalty violative of proportionality requirements, as well as lacking in penological justification. Juveniles as a class are inherently less

---

this case, 14 states did not authorize the death penalty. *Id.* at 826. Eight of the 14 jurisdictions cited by the plurality in *Thompson* as not authorizing the death penalty affirmatively acted to abolish the death penalty by statute; the remainder simply did not include the punishment among the options. *Id.* at 826-27 n.25. This is a distinction without a difference, however, since in either case, the state has affirmatively chosen not to impose the penalty under any circumstance, either by abolishing it formally or by excluding it from the available options.

In response to a dissent argument that the defendant *could* theoretically be executed in 19 states, the plurality countered by considering those states with, as well as those states without, capital punishment. A consideration of *all* states' enactments would show that half of those states exempted 15-year-olds from society's ultimate punishment: "the execution would be *impermissible* in 32 States." *Id.* at 829 n.29 (emphasis in original). Whether to consider those states that do not authorize the death penalty in the analysis of evolving standards of decency has been controversial within the recent Court. *See, e.g.,* text accompanying *infra* notes 433-444.

123. *Thompson*, 487 U.S. at 830 (footnote omitted). The plurality also took note of the views of professional organizations such as the American Bar Association and the American Law Institute in its conclusion that society's standards of decency were offended by the execution of juveniles. *Id.*

124. *Id.* at 830 n.31.

125. *Id.* at 832; see also *infra* note 158 for a discussion of the dissent's rather caustic rebuke of the plurality for reliance on these figures.

126. *Thompson*, 487 U.S. at 832-33.

127. *See supra* notes 24-36 and accompanying text.

culpable than adults because of their lack of experience, self-control, and education.[128] Thus, the penalty of death is disproportional in the sense that it does not relate directly to juveniles' lessened moral culpability. In addition, the goal of retribution is not served by executing these less culpable offenders,[129] because it would be inconsistent with our "respect for the dignity of men" to execute one with lessened culpability.[130] In essence, juvenile conduct is less morally reprehensible and thus not deserving of the ultimate penalty.

Similarly, the deterrence rationale is not served by execution of juveniles because they likely do not contemplate or weigh the possibility of execution when they make decisions to act.[131] Even if they did make such calculations, they would not be deterred when knowing that being executed for a crime committed as a juvenile is as uncommon as being struck by lightning.[132] Finally, removing juveniles from the class of persons eligible for the death penalty would not lessen the general deterrent effect because the number of those arrested for death-eligible crimes who are under sixteen years old is so low.[133] In other words, most of the potential killers will still be deterred because they could be executed even after the exemption of this class of offenders.

While not expressly looking to the objective indicators of the evolving standard of decency for what those indicators had to say about proportionality, retribution, or deterrence, the plurality seemed to recognize the linkage between the two when it stated, "these indicators of contemporary standards of decency *confirm our judgment* that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[134] The plurality nonetheless retained the emphasis that "'it is for [the Court] ultimately to judge whether the Eighth Amendment permits [this] imposition of the death penalty.'"[135]

With *Thompson*, several members of the current Court began to articulate more clearly their differences with the plurality over certain issues—differences that have continued to manifest themselves in

128. *Thompson*, 487 U.S. at 834-35.
129. *Id.* at 837.
130. *See id.* at 836-37.
131. *Id.* at 837.
132. *Id.* at 833, 838.
133. *Id.* at 837. Statistics revealed that only two percent of those arrested for willful homicide were 16 years of age or younger at the time of their crimes. *Id.*
134. *Id.* at 823 (emphasis added).
135. *Id.* at 833 (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)).

more recent decisions. Justice O'Connor, for instance, although concurring in the judgment,[136] disagreed with the plurality about the persuasiveness of the evidence purporting to show a societal consensus against executing those under the age of sixteen.[137] The nineteen states that set no minimum age for eligibility for the death penalty[138] either chose to make fifteen-year-olds eligible for death (because everyone was death-eligible) or simply did not consider the issue when they established their death penalty schemes. Justice O'Connor speculated that if these states in fact considered the issue and chose to make fifteen-year-olds eligible for the death penalty, then no clear consensus against juvenile execution would exist.[139] For this reason, Justice O'Connor found a dearth of evidence of societal acceptance of executions of members of this class, as expressed by legislative enactments. She therefore could only join in the judgment and could not state as a matter of constitutional law that there was societal opposition to these executions.[140] In reaching that conclusion, however, she did consider, in her analysis of those states opposed to the execution of fifteen-year-olds, those states that had abolished the death penalty altogether.[141]

Justice O'Connor also did not believe that statistical proof of jury sentencing behavior was adequate or accurate enough to inform the Court about jurors' inclinations toward imposing the death penalty on juveniles.[142] Acknowledging that "[i]n previous cases, we have examined execution statistics, as well as data about jury determinations"[143] to make these assessments, she nevertheless saw inadequate evidence of the number of times prosecutors sought the death penalty against these offenders or the number of times they exercised their discretion not to seek the penalty.[144] She admitted that the available statistics tended to establish the requisite consensus against death in these cases, but concluded that they simply were not reliable enough in the absence of the aforementioned data.[145]

---

136. *Id.* at 848 (O'Connor, J., concurring).

137. *Id.* at 848-49. Justice O'Connor believed a consensus did exist but was not prepared to state that, as a constitutional matter, the evidence was clear. *Id.*

138. *See supra* note 122.

139. *Thompson*, 487 U.S. at 852.

140. *Id.* at 849-52.

141. *Id.* at 849.

142. *Id.* at 853.

143. *Id.* at 852.

144. *Id.* at 853.

145. *Id.*; *see also* Enmund v. Florida, 458 U.S. 782, 818-19 (1982) (O'Connor, J., dissenting) (making a similar argument with regard to felony murder cases). Because some of this

Although Justice O'Connor agreed with the need to perform proportionality analysis to measure a defendant's blameworthiness in relation to his punishment, she disagreed that one could state definitively that *as a class*, fifteen-year-olds were less culpable than adults.[146] In her view, even if members of this class were generally less blameworthy, "it does not necessarily follow that *all* 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment."[147] In the end, she would leave the decision to state legislatures to draw the line at which juveniles could not be executed.[148]

Ultimately, Justice O'Connor would have reversed the defendant's death sentence on the more narrow ground that he could not constitutionally be executed pursuant to a statute that established no minimum age.[149] She saw enough evidence of national consensus against execution of a member of this class to make suspect a death sentence imposed under a statute silent as to this class member.[150]

Dissenting in *Thompson*, Justice Scalia,[151] joined by Chief Justice Rehnquist and Justice White, stated more absolutely his adherence to the evolving standards of decency as the sole determinant of a punishment's constitutionality, beyond the historical usage determination.[152] The dissent first concluded that because death for juveniles was accepted at common law and at the time the Bill of Rights was ratified, there was no basis under that benchmark for a finding of unconstitutionality.[153]

In addition, according to the dissent, because a full forty percent of the states at the time of the hearing on this case would have permitted the execution of a fifteen-year-old, there was no evolving standard of decency evinced by state legislative action against such an execution.[154] Justice Scalia went further to note his disagreement with the

---

evidence would seem nearly impossible to acquire, and even though the Court has analyzed this question without such evidence in the past, *see, e.g., supra* notes 93-96 and accompanying text, one could argue that Justice O'Connor is raising a nearly insurmountable burden for death penalty defendants who seek to challenge their sentences on the basis of the evolving standards of decency as evidenced in part by jury sentencing behavior.

146. *Thompson*, 487 U.S. at 852.

147. *Id.* (emphasis added).

148. *Id.* at 854.

149. *Id.* at 857-58.

150. *Id.* at 857.

151. *Id.* at 859 (Scalia, J., dissenting).

152. *Id.*

153. *Id.* at 864.

154. *Id.* at 868. Nineteen states set no minimum age for eligibility for the death penalty. *See supra* note 122. For a discussion of Justice Scalia's disagreement with Justice Brennan

plurality over the use of evidence of international opinion to determine the evolving standards of decency.[155] Without supporting authority, and despite that the Court has traditionally consulted such evidence,[156] Justice Scalia opined that the enactments of our nation's state legislatures were "determinative of the question . . . , even if that position contradicts the uniform view of the rest of the world."[157]

Finally, while noting that statistics of jury behavior revealed the rarity of execution[158] of those who committed their crimes under the age of sixteen, Justice Scalia stated nonetheless that there was "no basis . . . for attributing that phenomenon to a modern consensus that such an execution should never occur."[159] Rather, the statistics demonstrated, in Justice Scalia's view, that society agreed the punishment should be imposed on this class only rarely.[160]

---

regarding the proper grouping of states whose enactments are to be considered in determining the evolving standard, see text accompanying *infra* notes 433-444.

155. *Thompson*, 487 U.S. at 868 n.4.

156. *See supra* notes 72, 97-99, 123-124 and accompanying text.

157. *Thompson*, 487 U.S at 868 n.4.

158. Justice Scalia rebuked the plurality's interpretation of jury sentencing behavior, stating that it did not deliver an evaluation of that behavior, as it promised, but rather focused on actual executions of those who committed their crimes under the age of 16. *Id.* at 869. By using statistics of executions, he urged, the plurality used a number that was of course much lower, consisting of 18 or 20 during the entire twentieth century. *Id.* By contrast, he cited the "inconvenient fact" that between 1984 and 1986, "no fewer than five murderers who committed their crimes under the age of 16 were sentenced to death, in five different States . . . ." *Id.* Justice Scalia appeared to reject this figure as evidence of any jury consensus against death for these defendants, yet failed to supply comparative data regarding the entire population of those sentenced to death during that period, and thus left the picture incomplete.

Additionally, although he accurately stated that the plurality examined the frequency of executions of juveniles, he inaccurately implied that the plurality based its evaluation of sentencing behavior solely on those statistics. *See id.* In fact, the plurality also noted that of the 1393 murderers who were *sentenced* to death between 1982 and 1986, only five of them were under 16 years of age when they committed their crimes, *id.* at 832-33; the plurality opinion then concluded: "Statistics of this kind . . . do suggest that these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" *Id.* at 833 (quoting Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

159. *Thompson*, 487 U.S. at 870. Justice Scalia noted the "many reasons" that would explain the drop in juvenile executions, one of which was the general decline in support among the public, at the time, for the death penalty. *Id.* at 869-70. The individualized sentencing mandated by the Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), *see infra* text accompanying note 248, also contributed, in his view, to the overall decline in imposition of the penalty.

160. 487 U.S. at 870; *see also* Enmund v. Florida, 458 U.S. 782, 819 (1982) (O'Connor, J., dissenting) (making a similar argument regarding jury sentencing of felony murderers); Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion) ("[T]he reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.");

Just as significantly, Justice Scalia proffered his view concerning the role of proportionality review and penological justification as requisites to constitutionality,[161] or those portions of Eighth Amendment analysis that the Court has seen as necessary to its constitutional role.[162] In eschewing any test other than one resorting to public opinion as embodied in legislative enactments and jury sentencing behavior, Justice Scalia outlined his position:

> It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of "cruel and unusual," or because they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an "abiding conviction"—by a majority of the small and unrepresentative segment of our society that sits on this Court. On its face, the phrase "cruel *and unusual*[163] punishments" limits the evolving standards appropriate for our consideration to those entertained

---

Furman, 408 U.S. at 388 (Burger, C.J., dissenting) ("The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty."). One commentator has argued that this possible interpretation itself rendered suspect the use of jury sentencing behavior:

> unless the consensus on cruelty is so complete that no jury ever imposes a particular penalty, one cannot determine whether a low rate of imposition indicates that juries think the penalty is cruel or that juries reserve the penalty for those rare heinous crimes for which they think it is not cruel.

Radin, *Jurisprudence of Death, supra* note 26, at 1038.

One wonders whether Justice Scalia and the dissenters here would require that no member of the class have been sentenced or executed before they will find from jury sentencing behavior some societal consensus regarding the death penalty. Such a case would of course never make it to the Court and jury sentencing behavior as a guide to the evolving standards of decency would then be an empty, never-employed shell; a sentence then would only be considered constitutionally "unusual" if it were never imposed. As Justice Brennan has observed, "resort to the Cruel and Unusual Punishments Clause would not be necessary to test a sentence never imposed because categorically unacceptable to juries." Stanford v. Kentucky, 492 U.S. 361, 386 (1989) (Brennan, J., dissenting).

161. *Thompson*, 487 U.S. at 873.

162. *See supra* notes 26-36 and accompanying text.

163. In this and other opinions, Justice Scalia focuses on the conjunction "and" joining the words "cruel" and "unusual" to support his narrow reading of the clause, by parsing out the text of the Eighth Amendment as if it were a statute. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (Scalia, J.); *Stanford*, 492 U.S. at 378 (plurality opinion). Historically, however, the Court has not interpreted the clause in that manner, but instead has recognized that:

> [t]he exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. . . . The Court recognized in [Weems v. United States, 217

> U.S. 349 (1910)] that the words of the Amendment are not precise .... Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, *precise distinctions between cruelty and unusualness do not seem to have been drawn.*

Trop v. Dulles, 356 U.S. 86, 99-100 & n.32 (1958) (citations omitted) (emphasis added); *see also Furman*, 408 U.S. at 376 (Burger, C.J., dissenting) ("Although the Eighth Amendment literally reads as prohibiting only those punishments that are both 'cruel' and 'unusual,' history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed."); Bedau, *supra* note 9, at 880 ("For the Court 'and' in 'cruel and unusual punishment' is not regarded as a true conjunction."). *But see* van den Haag, *supra* note 26, at 958 n.6 ("Decisions that interpret the conjunctive 'and unusual', as disjunctive 'or unusual,' seem less than persuasive."). The plurality in *Thompson* itself noted that the Eighth Amendment's "broad, vague terms do not yield to a mechanical parsing ...." *Thompson*, 487 U.S. 815, 833 n.40 (1988). For a discussion of whether the term "unusual" should be treated separately from "cruel" and its concomitant moralistic implications, see Bedau, *supra* note 9, at 880-83.

In his emphasis of the phrase "*and* unusual," Justice Scalia has interpreted the phrase to allow a punishment that is rarely inflicted. *See* Walton v. Arizona, 497 U.S. 639, 670-71 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("[T]he text did not originally prohibit a traditional form of punishment that is rarely imposed ...."); *see also* Gey, *supra* note 26, at 93. Further, by requiring that, as with a statute, the punishment must meet both elements, Justice Scalia essentially reduces the constitutional command to a nullity. If a punishment, to be prohibited by the Constitution, must not only be cruel but also be unusual under his definition, then virtually any punishment would, under the right conditions, not be prohibited. *Cf.* Goldberg & Dershowitz, *supra* note 26, at 1782 (arguing that a requirement of "virtually unanimous condemnation" would result in the Eighth Amendment's "forbid[ding] only extremely aberrant penalties"). As long as it was approved by the requisite number of state legislatures, as long as some juries (even though rarely) imposed the punishment, and if it had been available at the common law, the punishment of drawing and quartering would be constitutional under Justice Scalia's reading of the Eighth Amendment; penological goals and proportionality would never factor into the calculus because those factors would ultimately only impose the Justices' personal predilections onto an otherwise clearly-written command of the Constitution. *See, e.g., Stanford*, 492 U.S. at 378 (stating that "our job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*"). In essence, the Constitution would then sanction a "de-evolving" standard of decency that might permit cruel punishments so long as they were not unusual. *Cf.* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 298 n.48 (1991) (assuming for purposes of the author's thesis that standards of decency do not necessarily "evolve" and that "even a reversion to earlier understandings might qualify as an evolution in contemporary conceptions of decency"). *But cf.* Packer, *supra* note 7, at 1076 ("There is nothing irrational about boiling people in oil; a slow and painful death may be thought more of a deterrent to crime than a quick and painless one. The constitutional objection that would surely prevail is based on decency."). Justice Scalia himself has stated: "If it is not [unusual], then the Eighth Amendment does not prohibit it, *no matter how cruel* a judge might think it to be." *Walton*, 497 U.S. at 670 (emphasis added).

As noted, however, the Eighth Amendment has historically not been interpreted in this manner. The Court has recognized that there are some punishments that are excessive and simply do not accord with the "dignity of man," which concept is at the heart of the Amendment. *See supra* note 25 and accompanying text. To deal with the amorphous quality of the Amendment's phrasing, the Court has formulated standards relating to penologi-

> by the society rather than those dictated by our personal consciences.[164]

In sum, because he could discern no evolving standard of decency against the execution of those under sixteen years of age, Justice Scalia would have upheld the death sentence in this case.

---

cal goals and proportionality to judge a punishment's conformance to standards of excessiveness comporting with the dignity of the person. *See supra* notes 26-36 and accompanying text. These standards should serve to ensure an evolving standard of decency, one that would comport with human dignity, which requires that punishments be proportional and further certain goals of penology; the alternative would not recognize a certain minimum standard of decency, but would sanction a movement backward into the arguably more brutal past. In fact, the full phrasing of the evolving standards test itself supports the former reading: the punishment should accord with the "evolving standards of decency that mark the *progress* of a *maturing* society." *Trop*, 356 U.S. at 101 (plurality opinion) (emphasis added).

164. *Thompson*, 487 U.S. at 873 (citations omitted) (internal footnote added). Justice Scalia, and the Chief Justice and Justice White, believed that considerations of proportionality and penological justification were simply irrelevant policy questions. *Id.* In his total rejection of the use of the other checks on unconstitutional state action in this context, Justice Scalia arguably abdicated his role as one of the final arbiters of what is cruel and unusual punishment under the Eighth Amendment. In fact, he stated, "It is not necessary . . . that 'we [be] persuaded' of the correctness of the people's views." *Id.* at 874 (quoting plurality opinion, *id.* at 838) (alteration in original). Admittedly, by this approach, public opinion rather than the Court determines what is cruel and unusual and, so, what is constitutional. But Justice Scalia may have retreated from even that position. *See* Scott E. Sunby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1166 (1991). Justice Scalia recently wrote:

> Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, *even if they represented the convictions of a majority of Americans*. . . . If the people conclude that . . . brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

Callins v. Collins, 114 S. Ct. 1127, 1128 (1994) (Scalia, J., concurring in denial of certiorari) (emphasis added); *see also Walton*, 497 U.S. at 671-72 (Scalia, J., concurring in part and concurring in the judgment) ("It is quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime . . . ; still less is it relevant that mandatory capital sentencing is (or is alleged to be) out of touch with '"contemporary community values"' regarding the administration of justice.") (citations omitted). He seemed to argue that even if a majority of Americans opposed capital punishment, it would still be constitutional. By so arguing, he appears to throw out even the settled "evolving standards" test, which assumes that the convictions of Americans are accurately gauged by jury sentencing behavior and legislative enactments. What remains is the assertion that mere vengeance will sustain a finding of constitutionality for the death penalty. *Cf.* Gey, *supra* note 26, at 125-30 (arguing that Justice Scalia's opinions in Booth v. Maryland, 482 U.S. 496 (1987) and Payne v. Tennessee, 501 U.S. 808 (1991) demonstrate his view that satisfaction of society's desire for revenge justifies the death penalty). If that is indeed his view, then his Eighth Amendment would essentially place no constraints on punishments.

For critiques of Justice Scalia's originalist position, see authorities cited *infra* note 188.

Justice Scalia wrote the majority opinion in the next case to address the question of the constitutionality of executing a certain class of defendants who were sixteen and seventeen years old. In *Stanford v. Kentucky*,[165] the Court held that the evolving standards of decency did not prohibit the execution of either class of defendants and thus their executions were not cruel and unusual.[166] Justice Scalia noted that the claims of the defendants boiled down to allegations that their executions violated the evolving standards of decency component of Eighth Amendment analysis.[167] As he had in his *Thompson* dissent,[168] Justice Scalia, whose view now commanded a majority of the Court,[169] stressed that the standards to which the Court should look are those of "modern American society as a whole,"[170] not those of other nations. He reiterated that "'Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.'"[171] In analyzing these objective factors of legislative enactments and jury sentencing behavior, Justice Scalia and the majority did not conflate evolving standards with proportionality analysis, as they had done in *Coker, Enmund*, and *Tison*, and appeared to do in *Thompson*.[172] In rejecting other tests of constitutionality,[173] however, Justice Scalia did note that "the two methodologies

165. 492 U.S 361 (1989). *Stanford*, involving a defendant who was seventeen years old at the time of his crime, was consolidated with *Wilkins v. Missouri*, in which the defendant was sixteen at the time of his offense.

166. *Id.* at 380. Justices O'Connor and Kennedy now joined Justice Scalia, Chief Justice Rehnquist, and Justice White, to form the majority. *Id.* at 363.

167. *Id.* at 369.

168. *See supra* note 157 and accompanying text.

169. *See supra* note 166.

170. *Stanford*, 492 U.S. at 369. "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and . . . *amici* (accepted by the dissent) that the sentencing practices of other countries are relevant." *Id.* n.1 (citations omitted).

171. *Id* at 369 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). Justice Scalia added that "[t]his approach is dictated both by the language of the Amendment—which proscribes only those punishments that are both 'cruel and *unusual*'—and by the 'deference we owe to the decisions of the state legislatures under our federal system.'" *Id.* at 369-70 (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976)). Here again, Justice Scalia emphasized the term "unusual" and seemingly gave it primacy over the "cruel" portion of the clause; this emphasis, although without warrant historically, would seem necessarily to mandate resort only to objective factors and to preclude reliance on any other indicia, such as those concerning penological goals and proportionality, and explains Justice Scalia's consequent narrow application of the clause. *See supra* note 163.

172. *See supra* notes 69, 88, 110, 134 and accompanying text.

173. *See infra* notes 185-188 and accompanying text.

blend into one another, since 'proportionality' analysis itself can only be conducted on the basis of the standards set by our own society."[174]

In this case, because only fifteen of thirty-seven death penalty states disallowed the execution of sixteen-year-olds, and only twelve of thirty-seven disallowed execution of seventeen-year-olds, the Court found no legislative consensus against the executions of members of these classes.[175] The majority would not consider in its tally those states that declined to impose capital punishment in all cases, stating that:

> while the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned.[176]

By contrast, the dissent, comprised of Justices Brennan, Marshall, Blackmun, and Stevens, argued that the Court should consider all the states that would preclude the execution of these two defendants: those that specifically prohibited execution of members of the concerned classes and those that authorized no capital punishment at all.[177] Under that scenario, a majority, or twenty-seven states, would refuse to execute seventeen-year-olds, and thirty would refuse to execute sixteen-year-olds. The nineteen states that have general statutes and have not faced the question, the dissent argued, were not accurate benchmarks of constitutionality.[178] Although acknowledging that the general nature of those nineteen states' death penalty statutes did not necessarily "cut *against* the constitutionality of the juvenile death penalty,"[179] Justice Brennan nonetheless argued that he "would not assume, . . . in considering how the States stand on the moral issue that underlies the constitutional question with which we are presented, that a legislature that has never specifically considered the issue has made a conscious moral choice to *permit* the execution of juveniles."[180]

174. *Stanford*, 492 U.S. at 380.

175. *Id.* at 370-71.

176. *Id.* at 370 n.2. Justice O'Connor joined this part of the opinion, *see id.* at 363, even though in her *Thompson* concurrence she had considered abolitionist states in the calculus. *See Thompson*, 487 U.S. at 849 (O'Connor, J., concurring).

177. *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

178. *Id.* at 384-85.

179. *Id.* at 385 (emphasis added).

180. *Id.* (emphasis added).

Concerning the behavior of sentencing juries, the *Stanford* Court noted that between 1982 and 1988, only fifteen of 2106 death sentences were imposed on defendants who were sixteen years old or younger at the times of their offenses, and only thirty were imposed on defendants who were seventeen or younger.[181] Consistent with Justice Scalia's dissenting opinion in *Thompson*,[182] the Court found these figures indicative only of jurors' feelings that death should rarely be imposed on these defendants, not that it should never be imposed.[183] Because neither legislative enactments nor jury sentencing patterns—the "objective factors"—demonstrated a societal consensus against executing these defendants, the imposition of capital punishment on them was not cruel and unusual under the Eighth Amendment.[184]

Significantly, Justice Scalia again took the opportunity to disavow reliance on proportionality and furtherance of penological goals as indicia of a punishment's constitutionality,[185] and this time he was joined by the Chief Justice and Justices White and Kennedy, making up a plurality.[186] Reliance on anything other than the text of the Constitution or "demonstrable current standards of our citizens" would be to "replace judges of the law with a committee of philosopher-kings";[187] the Justices' own judgments, specifically concerning proportionality and whether goals of punishment were furthered by the penalty, were not only irrelevant but also inappropriate to the determination.[188]

181. *Id.* at 373.

182. *See supra* note 172.

183. Stanford v. Kentucky, 492 U.S. 361, 373-74 (1989); *see also supra* notes 158-160 and accompanying text. Chief Justice Burger, in dissent in Furman v. Georgia, 408 U.S. 238, 375 (1972), had noted the irony in a finding that more grants of mercy, illustrated by infrequent imposition of death, indicated to the majority of Justices in *Furman* that death sentences were contrary to the evolving standard; grants of mercy then set back the evolving standard of decency. *Id.* at 398.

184. *Stanford*, 492 U.S. at 377, 380.

185. *Id.* at 377-80.

186. *Id.* at 363.

187. *Id.* at 379. Thus far, this view commands only a plurality of the Court. Because, however, this view would significantly alter Eighth Amendment jurisprudence and leave the evolving standards test as the sole determinant of what constitutes cruel and unusual punishment, the thrust of this Article is to critically evaluate recent developments in death penalty law and their impact on the evolving standards test.

188. *See id.* at 378-79. A commentator has noted 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 . . . ." Bilionis, *supra* note 163, at 330 n.153; *see also id.* at 329-30. Others have more generally discussed his textualist approach to constitutional adjudication. *See* M. David Gelfand & Keith Werhan, *Federal-*

Justice O'Connor did not join that part of the opinion that rejected the Court's use of proportionality and "furtherance of penological goals" analysis and stated her belief in the relevance and propriety of the application of proportionality analysis to Eighth Amendment challenges.[189] Similarly, dissenting Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, saw the need and the precedent for invoking other tools beyond the objective indicia for determining the cruel and unusual nature of a punishment.[190] Specifically, the dissent recognized the Court's historic role in judging the constitutionality of a punishment by looking also to its contribution to accepted goals of punishment and its proportionality to the blameworthiness of the offender.[191]

Noting Justice Scalia's circumscription of the constitutional analysis to only those modes evincing public opinion, Justice Brennan charged that the Court would:

> abandon[ ] its proven and proper role in our constitutional system when it [would] hand[ ] back to the very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question, after complete analysis.[192]

In this case, according to the dissent, Justice Scalia and other members of the plurality would allow political majorities to determine the constitutional boundaries of the Eighth Amendment.[193] Following this case, however, a majority of the Court continued to consider proportionality and penological goal analyses necessary to Eighth Amendment adjudication.

---

ism 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); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). For a scathing critique of Justice Scalia's death penalty jurisprudence generally, see Gey, *supra* note 26. For general critiques of the originalist approach in the Eighth Amendment context, see Bedau, *supra* note 9; William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 324-26 (1986).

189. Stanford v. Kentucky, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment). But see *infra* notes 211-214 and accompanying text regarding her deference to the legislature on the question of proportionality, raising questions about her commitment to this prong of the analysis.

190. *Stanford*, 492 U.S. at 391 (Brennan, J., dissenting).

191. *Id.* at 393.

192. *Id.* at 392.

193. *Id.* at 391; *see also supra* note 164.

Penry v. Lynaugh[194] is the latest case in which the Court was confronted, inter alia, with the issue of the possible exemption of an entire class of defendants from capital punishment. Because defendant Penry had been assessed as having an IQ of between fifty and sixty-three, his death sentence presented the question of the propriety of executing a mentally retarded individual.[195] The majority, which included Justice O'Connor, Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy,[196] held that execution of the mentally retarded offended neither the common law nor the evolving standards of decency.[197] A review of state legislative enactments showed that at that time only one state prohibited the execution of the mentally retarded;[198] hence, "the single state statute . . . , even when added to the 14 States that have rejected capital punishment completely, does not provide sufficient evidence at present of a national consensus."[199] Because the defendant presented no evidence of jury sentencing behavior or behavior of prosecutors in regard to execution of the mentally retarded, the standards of decency were judged according to legislative enactments alone.[200]

Justice O'Connor repeated her commitment to the penological goals and proportionality assessments, but stated that those assess-

---

194. 492 U.S. 302 (1989). *Penry* was decided on the same day as *Stanford*. Justice O'Connor wrote the *Penry* opinion, parts of which were joined by various members of the Court. Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part. *Id.* at 306. Justice Stevens, joined by Justice Blackmun, concurred in part and dissented in part. *Id.* Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, concurred in part and dissented in part. *Id.*

195. *Id.* at 307, 313. According to the evidence presented, Penry was considered mildly or moderately retarded. *Id.*

196. *Id.* at 306.

197. *Id.* at 333, 335.

198. *Id.* at 334 (citing GA. CODE ANN. § 17-7-131(j) (Supp. 1988)). Since *Penry* was decided, at least eight more states have prohibited execution of the mentally retarded. *See, e.g.*, COLO. REV. STAT. § 16-11-103 (Supp. 1995); IND. CODE ANN. § 35-50-2-9 (West Supp. 1994); KY. REV. STAT. ANN. § 532.140 (Michie/Bobbs-Merrill 1990); MD. CODE ANN., CRIM. LAW art. 27 § 412 (Supp. 1994); N.M. STAT. ANN. § 31-20A-2.1 (Michie Supp. 1995); N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 1996); TENN. CODE ANN. § 39-13-203 (Supp. 1994); WASH. REV. CODE ANN. § 10.95.030(2) (West Supp. 1995). *But see* N.Y. CRIM. PROC. LAW § 400.27(12)(d) (McKinney Supp. 1996) (allowing a death sentence when one found mentally retarded committed first-degree murder, inter alia, while in prison).

199. *Penry*, 492 U.S. at 334. The majority here was composed in part of the four who joined the majority in *Stanford* and disagreed that the abolitionist states' acts should be considered. Nonetheless, the majority considered those statutes in the tally, likely because the case was clearer that there was no settled consensus against death for the mentally retarded among the death penalty states.

200. *Id.* at 334-35.

ments "[r]ely[ ] largely on objective evidence such as the judgments of legislatures and juries."[201] Nonetheless, she appeared to conduct her own assessments and found no categorical violation of those prongs of analysis.[202] For this portion of the opinion, no other member of the Court joined Justice O'Connor.[203]

After noting that a majority in this case and in *Stanford* reaffirmed the necessity of assessing a penalty by its contribution to penological goals and its proportionality to the culpability of the offender,[204] Justice Brennan, joined in concurrence and dissent by Justice Marshall, reasoned that mentally retarded persons as a class were less culpable, and that therefore, the sentence of death was unconstitutionally disproportionate.[205] He further opined that execution of the mentally retarded would not further the penological goal of retribution, due to the lessened culpability of these offenders, and would not further the goal of deterrence, due to the inability of mentally retarded individuals to reason through various courses of behavior and their consequences.[206]

Again Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, stressed his rejection of the "nonobjective" factors of Eighth Amendment analysis.[207] He also again accented the "and unusual" portion of the Amendment, stating that "[i]f it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment

201. *Id.* at 335.

202. *Id.* at 336-40; *but see supra* note 189. As in *Thompson*, Justice O'Connor could not say that all mentally retarded persons could never act with the requisite degree of culpability that would subject them to a death sentence, or that imposition of the penalty on members of this class is always disproportionate to their levels of culpability. *Penry*, 492 U.S. at 338.

203. *Penry*, 492 U.S. at 306.

204. *Id.* at 342-43 (Brennan, J., concurring in part and dissenting in part). Justice Brennan made no mention of Justice O'Connor's purported reliance on objective indicia to make proportionality, retribution, and deterrence evaluations, perhaps because she did not in fact rely on those objective indicators but conducted her own evaluation.

205. *Id.* at 346.

206. *Id.* at 348-49. The removal of this class of persons from those who are eligible for the death penalty would also not affect any deterrent value of the death penalty in more general terms, as those who are not mentally retarded would still be subject to the death penalty. *Id.* at 348.

A plurality of the Court would have held the punishment unconstitutional, as Justice Stevens, joined by Justice Blackmun, wrote separately to state his opinion that execution of the mentally retarded was unconstitutional. Without detailing the bases for his view, he merely indicated that the arguments outlined in Justice O'Connor's opinion, which included that respecting proportionality and penological goals analyses, led him to a result opposite from hers. *Id.* at 349-50 (Stevens, J., concurring in part and dissenting in part).

207. *Id.* at 351 (Scalia, J., concurring in part and dissenting in part).

is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court."[208] Nonetheless, after *Penry*, a majority of the Court held firm to the appropriateness of the Court's employment of these other modes of analysis, beyond the historical acceptance assessment and the use of the basic objective indicia of evolving standards of decency.

A review of these cases illuminates an adherence by a plurality of the 1989 Court to the rough construct of a pro-death, self-fulfilling constitutional framework for analyzing death penalty appeals.[209] Under this construct, three members of the current Court[210]—Chief Justice Rehnquist and Justices Scalia and Kennedy—would first jettison any requirement that the Court measure a sentence of death against goals of penology or against proportionality standards, because these factors purportedly would inject the Justices' own moral inclinations into the analysis. Justice O'Connor may adhere to a somewhat tautologically stunted Eighth Amendment analysis concerning these additional checks. In one case she admitted the relevance of proportionality analysis to determine the constitutionality of a death sentence, and even agreed that defendant's blameworthiness should be compared to the severity of the punishment.[211] Yet she ultimately would have left the proportionality measurement to state legis-

208. *Id.; see also supra* notes 163-164, 171, 187-188 and accompanying text.

209. The plurality included Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. Justice White has since retired.

210. The group would be restored to a clear plurality if Justice Thomas assumed Justice White's position. That substitution seems a strong possibility, given that Justice Thomas elsewhere seems to share Justice Scalia's originalist approach to constitutional interpretation. *See, e.g.,* Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 984 (1987) (urging that the Constitution be interpreted according to the original intentions of the founders, as embodied in the Declaration of Independence, when determining "the policy of action towards Black Americans"). Another commentator has observed that Justice Thomas also shares Justice Scalia's "plain meaning" approach to statutory construction. *See* Bradley C. Karkkainen, Note, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994). Justice Scalia's originalist approach emphasizes the "plain meaning" of the conjunction "and unusual" in the Eighth Amendment language, as one would with a statute, and therefore looks only to objective indicators of societal standards to determine whether imposition of the death penalty is "unusual" in our society. *See supra* notes 163, 171. Hence, Justice Thomas's agreement with Justice Scalia's originalism and "plain meaning" approach to statutory construction should lead him to join in the rejection of the Court's assessment of proportionality and penological justification, because that assessment would have no bearing on the "unusualness" of society's employment of a punishment.

211. *See* Thompson v. Oklahoma, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring).

latures.[212] Under that approach, instead of being a separate check on a punishment's constitutionality, the Court's proportionality analysis would become a mere subset of the evolving standards test.[213] Because legislative decisions regarding proportionality would be given deference, the Court's own proportionality analysis would fall to the deference accorded legislative enactments.[214] In this way, legislative enactments would become one of the sole determinants of constitutionality while Justice O'Connor abdicated the Court's ultimate power of judicial review in the death penalty context.

In other cases, however, Justice O'Connor stressed the importance of the Court's retaining a check on constitutionality by conducting proportionality analysis itself.[215] In the most recent case, she appeared to remain faithful to both of those approaches.[216] If Justice O'Connor returns to that apparent deferential approach to legislative enactments, she will render the Court's role that of a mere headcounter. Thus, there may currently be four Justices that favor, even if de facto, the exclusive use of the so-called objective indicators.

Next, a clear plurality of the Chief Justice and Justices Scalia, Kennedy, and O'Connor would confine any evaluation of the legislative-enactment prong of the evolving standards test to a consideration

212. *See id.* at 854 (stating that "I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures").

213. If state legislatures found this class of defendants culpable enough to deserve death, and if this finding was all that the Court looked to, then the Court would rubberstamp the culpability determination, and hence the proportionality determination, rather than conducting its own constitutional inquiry. The Court would then heighten the probative value of the very instrument the constitutionality of which was at issue; state death penalty laws would then have had two decisive places in the constitutional analysis, under the evolving standards of decency test and under proportionality analysis. Rather than determining what was constitutional, the Court would be abdicating that assessment to the state legislatures. *Cf.* Radin, *Jurisprudence of Death*, *supra* note 26, at 1036 ("[C]onclusive reliance on [legislative enactments] either through substantive definition or extreme judicial deference is circular. Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit.").

214. *Cf.* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1058 n.402 (1994) (noting that, for Justice O'Connor, "a finding of disproportionality . . . appears highly unlikely without a finding that public attitudes are opposed to the death penalty in the relevant context").

215. *See* Tison v. Arizona, 481 U.S. 137, 152-54, 155-58 (1987) (Justice O'Connor authoring opinion for the majority in which legislative enactments were used to gauge proportionality, in addition to Court's own proportionality determination); Enmund v. Florida, 458 U.S. 782, 815, 824 (1982) (O'Connor, J., dissenting) (stressing that proportionality involves not only consideration of contemporary standards of decency but also the harm caused and the level of defendant's culpability).

216. *See supra* notes 201-202 and accompanying text.

of only those American states that currently authorize the death penalty, thus skewing the calculus away from legitimate evidence of anti-death penalty sentiment. Finally, and again pertaining to the evolving standards of decency computation, it is unclear exactly what evidence of jury sentencing behavior this plurality would require of a defendant; those Justices have viewed even very low numbers of sentences only as evidence that juries would impose death on those defendants in rare and essentially horrible circumstances. In effect, they view the statistics as positive evidence that the jury takes its job very seriously and only sentences death in those extreme cases when it is warranted. Before finding a death sentence contrary to the evolving standards, the plurality thus would potentially require a defendant to show, from jury sentencing behavior, a virtual impossibility: that *no* jury would sentence a defendant to death under these circumstances.[217]

It is clear that there is at least a three-member plurality[218] consisting of the Chief Justice and Justices Scalia and Kennedy that would eliminate the Court's own measurements and rely only on historical usage and the objective indicia of the evolving standards of decency. By examining only public opinion as evidenced by legislative enactments in pro-death penalty states, and accepting as further evidence of public opinion only those jury decisions that show virtually no one in defendant's position has been sentenced to death and thus essentially eliminating that index from the calculus, the plurality has structured a test that by itself would more likely lead to a conclusion of constitutionality in death penalty cases.

Because, however, these cases deal only with the substantive challenges concerning the constitutionality of executing certain classes of defendants, one can discern only the outlines of the pro-death construct. The possibility that new members of the Court[219] would join this plurality makes it imperative that the evolving standards test be further critically evaluated for its objectivity and reliability on the constitutional question. To that end, an examination of early procedural challenges to death sentences is necessary because other, later lines of cases addressing procedural issues have been decided in ways that further steer the constitutional analysis in cases involving substantive challenges toward the inevitable conclusion of constitutionality for

217. *See supra* note 160.

218. *But see supra* note 210.

219. Justices Souter, Thomas, Ginsburg, and Breyer have yet to take a position on this issue, but see *supra* note 210 for a prediction of Justice Thomas's approach. Justice Stevens adheres to the doctrine set out in *Gregg* and its progeny.

sentences of death, by combining as pro-death influences on jury decisionmaking.

B. Procedural Challenges to Death Sentences

Defendants have challenged death penalty schemes both for the failure of aggravating circumstances to guide the jury and for the inability or failure of the sentencer to consider relevant mitigating circumstances. Through these challenges, the Court has refined its jurisprudence to find the unequivocal requirements in the Eighth Amendment of both channeling the jury's discretion to impose death and individualizing sentencing. The latter contemplates that the jury not be precluded from hearing and considering evidence about the circumstances of the crime or character and record of the offender that might counsel for a sentence less than death. These doctrines influence jury sentencing patterns and are therefore relevant to a critical evaluation of the evolving standards test. This section will set the stage for later discussion in Part IV.A., which details some of the more recent and significant modifications to these basic doctrines and these modifications' contribution to the rigging of the evolving standards test.

1. Aggravating Circumstances and Vagueness

In keeping with the dictates of *Gregg v. Georgia*,[220] to avoid the arbitrary imposition of the death penalty on those who are not truly deserving, the Court has required that states develop schemes that narrow the class of murderers and to cull from that class only those most deserving of the ultimate punishment. The Court recognized that "[a] system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."[221] Based on these doctrinal outlines, challenges could be brought against the broad, nonlimiting nature of aggravating factors in state death penalty schemes.

220. 428 U.S. 153, 189, 204-06 (1976) (plurality opinion).

221. *Id.* at 195 n.46. More recently, the Court noted in *Zant v. Stephens* that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." 462 U.S. 862, 877 (1983); *see also* Richmond v. Lewis, 506 U.S. 40, 46 (1992) ("[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty.").

The Court began to refine its jurisprudence regarding the treatment accorded aggravating circumstances in *Godfrey v. Georgia*[222] and *Maynard v. Cartwright*.[223] The specific challenge in those cases was whether an aggravating factor supplied by the statute was unconstitutionally vague[224] in that it provided "'no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not.'"[225] In *Godfrey*, the plurality opinion reiterated the precept that vague aggravators, in their failure to channel the sentencer's discretion to impose the death penalty, were unconstitutional under the Eighth Amendment.[226]

The statutory aggravator challenged in *Godfrey* allowed the jury to sentence to death provided it found that the crime "'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.'"[227] The jury found only that the murder was "outrageously or wantonly vile, horrible and inhuman."[228] Because almost any murder could be characterized as "horrible," "vile," or "inhuman," the finding by itself failed to show that the sentencer's discretion to impose death had been narrowed by a restriction on the class of murders for which death was an appropriate punishment.[229] Although conceding that the state supreme court could provide a constitutional narrowing construction to an otherwise vague aggravator and thus save the provision, there was no evidence that the trial court had instructed with the narrowed construction.[230] The state supreme court on appeal of this case had also failed to apply a limiting construction.[231]

Similarly, in *Maynard*, the Court examined the alleged vagueness of the aggravator permitting the imposition of death if the murder was "'especially heinous, atrocious, or cruel.'"[232] Relying on *Godfrey*, the Court found this aggravating circumstance no more certain than the

222. 446 U.S. 420 (1980) (plurality opinion).

223. 486 U.S. 356 (1988); *see also* Shell v. Mississippi, 498 U.S. 1 (1990) (per curiam).

224. *See Godfrey*, 446 U.S. at 423; *Cartwright*, 486 U.S. at 360.

225. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

226. 446 U.S. at 428.

227. *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

228. *Id.* at 428.

229. *Id.* at 428-29.

230. *Id.* at 429.

231. *Id.* at 432. The Georgia Supreme Court had, in other cases, narrowed the aggravator to apply only to murders evidencing some torture to or an aggravated battery on the victim. *Id.* at 431.

232. Maynard v. Cartwright, 486 U.S. 356, 359 (1988) (quoting OKLA. STAT. tit. 21, § 701.12(4) (1981)).

Georgia provision: "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"[233] Additionally, the appellate court's finding that the verdict was supported by the horrible facts of the case was not sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment."[234] The aggravator, therefore, was unconstitutionally vague and the death sentence could not stand.[235]

In *Walton v. Arizona*,[236] the Court assessed the constitutionality of an aggravator nearly identical to that evaluated in *Maynard*.[237] The Court upheld[238] this aggravator because the Arizona Supreme Court had supplied a construction that guided the sentencer:[239] "especially cruel manner" was interpreted to mean "'when the perpetrator inflicts mental anguish or physical abuse before the victim's death,' and that '[m]ental anguish includes a victim's uncertainty as to his ultimate fate,'"[240] while "especially depraved manner" meant "when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing."[241] Because these interpretations "provide[d] *some* guidance to the sentencer,"[242] to separate those murders appropriate for a death sentence from those that were not, the aggravator was not unconstitutionally vague.

From these cases, then, it is evident that a statutory aggravator cannot, under the Eighth Amendment, be so vague as to sweep within its purview virtually any murder; to do so would be to revert to pre-*Furman* arbitrariness. The aggravator may, however, be vague on its

233. *Id.* at 363-64. For a persuasive argument that these types of aggravators are incapable of being narrowed even by judicial construction, that they thus fail to provide the guidance that *Gregg* required, and that they are therefore terminally and unconstitutionally vague, see Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941 (1986).

234. *Id.* at 364.

235. *Id.*

236. 497 U.S. 639 (1990). Comprising the majority for this portion of the opinion were Justice White, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. *Id.* at 641.

237. *See id.* at 643. The aggravator required the sentencer to determine whether the murder was committed in "an especially heinous, cruel, or depraved manner." *Id.*; *see also* Lewis v. Jeffers, 497 U.S. 764 (1990).

238. *Walton*, 497 U.S. at 655.

239. The sentencer in this case was the trial judge, so the Court presumed that the judge knew the limiting construction and applied it. *Id.* at 653.

240. *Id.* at 654 (quoting Walton v. State, 769 P.2d 1017, 1032 (Ariz. 1989) (alteration in original)).

241. *Id.* at 655 (quoting *Walton*, 769 P.2d at 1033).

242. *Id.* at 654 (emphasis added).

face and still pass constitutional muster if the state courts have articulated a sufficiently narrow definition that will serve to guide the sentencer in its determination whether death is the appropriate sentence. The subsequent judicial narrowing will suitably channel the sentencer's discretion to those cases deemed appropriate for society's ultimate punishment. The problem arises, for purposes of the thesis presented here, when even the Supreme Court upholds as constitutional a purportedly "narrowed" construction that is itself vague and hence useless in performing the guiding function. This phenomenon adds to the combined effects of the Supreme Court's rulings in other areas to rig the evolving standards test and will be addressed, in that regard, below.[243]

2. *Mitigating Circumstances and Unbridled Discretion*

a. General Principles

The early cases that addressed alleged deficiencies regarding mitigating evidence and refined this line of doctrine were *Lockett v. Ohio*,[244] and *Eddings v. Oklahoma*.[245] *Lockett* involved a death penalty scheme that required the imposition of the penalty, after the jury returned a certain verdict with a finding of specified aggravating factors, unless the sentencer found the existence of one of three mitigating factors.[246] In expanding on *Woodson*'s command that the character and record of the individual offender be considered in the

243. The fact of this phenomenon is what is significant for the thesis advanced here; a thorough critique of the propriety of the Court's decisions in this area is therefore beyond the scope of this Article. For other decisions upholding death sentences after application of arguably vague aggravating factors, see Arave v. Creech, 113 S. Ct. 1534 (1993); Lewis v. Jeffers, 497 U.S. 764 (1990); Zant v. Stephens, 462 U.S. 862 (1983). *But see* Stringer v. Black, 503 U.S. 222 (1992); Espinosa v. Florida, 505 U.S. 1079 (1992); Richmond v. Lewis, 506 U.S. 40 (1992).

244. 438 U.S. 586 (1978) (plurality opinion). In the plurality on this point were Chief Justice Burger and Justices Stewart, Powell, and Stevens. *Id.* at 589. Justice Brennan took no part, *id.* at 609, while Justice Marshall concurred in the judgment. *Id.* at 619. Justices White and Rehnquist dissented as to this portion of the opinion. *Id.* at 621 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court); *id.* at 628 (Rehnquist, J., concurring in part and dissenting in part). *See also* Bell v. Ohio, 438 U.S. 637 (1978) (decided with *Lockett*).

245. 455 U.S. 104 (1982).

246. Specifically, the trial judge could decline to impose the death penalty if, in considering defendant's "'history, character, and condition,'" he or she found that "(1) the victim had induced or facilitated the offense, (2) it was unlikely that [defendant] would have committed the offense but for the fact that she 'was under duress, coercion, or strong provocation,' or (3) the offense was 'primarily the product of [defendant's] psychosis or mental deficiency.'" *Lockett*, 438 U.S. at 593-94 (quoting OHIO REV. CODE §§ 2929.03-2929.04(B) (1975)).

determination of the appropriate sentence, a plurality of the Court reversed a sentence of death and struck down the portion of the statute that limited the sentencer's discretion to those three mitigating factors.[247]

Most significantly, the *Lockett* Court stated definitively that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[248] The rationale advanced by the Court was again that:

> the imposition of death by public authority is so profoundly different from all other penalties [that] we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . .
>
> There is no perfect procedure . . . [, b]ut a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the 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.[249]

Whereas the mandatory statute in *Woodson v. North Carolina*[250] had unconstitutionally precluded the consideration of *any* mitigating factors, the statute at issue in *Lockett* unconstitutionally limited the sentencer's discretion to only three narrow factors that did not permit consideration even of such mitigating factors as age or defendant's minor role in the crime.[251] The sentencer, therefore, could not accord

---

247. *Id.* at 608-09.

248. *Id.* at 604 (footnotes omitted).

249. *Id.* at 605.

250. 428 U.S. 280 (1976); *see also supra* notes 50-62 and accompanying text.

251. *Lockett*, 438 U.S. at 608. The Court contrasted this statutory scheme with those examined in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976). The statute in *Gregg* passed constitutional muster because it did not at all limit the sentencer's discretion regarding mitigating factors. *Lockett*, 438 U.S. at 606; *see also supra* note 45 and accompanying text. Although the Florida statute in *Proffitt* had enumerated mitigating factors to be considered by the sentencer, those factors were not necessarily the only ones that the sentencer could consider in mitigation; thus, the Court had not viewed the statute as unconstitutionally limiting discretion. *Lockett*, 438 U.S. at 606. Finally, the Texas statute in *Jurek* had not listed and restricted the sentencer to certain mitigating factors, but also did not on its face allow unbridled discretion as to those factors. The Court nonetheless found that the statute's provision of three special issue questions allowed a jury to consider a defendant's proffered mitigating evi-

the defendant the individualized consideration that she was due under the Eighth Amendment.[252]

The statute at issue in *Eddings v. Oklahoma*[253] directed the sentencer to consider both aggravating and mitigating factors in determining the appropriate sentence and so appeared to have complied with the constitutional dictate set forth in *Lockett*.[254] Although the statute directed the sentencer to consider "any mitigating factor," the only mitigating evidence the trial court considered was of defendant's youth;[255] the trial judge as sentencer declined to consider, and apparently thought he was precluded from considering, the mitigating evidence of defendant's violent upbringing and disadvantaged childhood.[256]

Noting that *Lockett v. Ohio* mandated that a sentencer cannot be precluded from considering any aspect of a defendant's background as a mitigating factor,[257] the *Eddings* Court traced the *Lockett* mandate to the Court's historical insistence on the consistent and fair imposition of capital punishment as evidenced by its decisions in *Gregg* and *Woodson*.[258] *Gregg* ensured the consistent application of the death penalty by its requirement that state statutes guide the sentencer's discretion, as by the enumeration of aggravating and mitigating circumstances to be weighed; the *Woodson* and *Lockett* cases required that

dence through those questions; the statute therefore survived scrutiny. *Id.* at 607; *see generally infra* notes 272-280 and accompanying text.

252. In fact, the sentencing judge in *Lockett* very nearly bemoaned this result when, in imposing the sentence of death, he stated "that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Lockett*, 438 U.S. at 594 (alterations in original).

253. 455 U.S. 104 (1982). Justice Powell authored the majority opinion, to which Justices Brennan and O'Connor filed concurrences. Chief Justice Burger dissented and was joined by Justices White, Blackmun, and Rehnquist.

254. The Oklahoma statute at the time provided, in pertinent part, that

> "evidence may be presented [in the sentencing hearing] as to *any mitigating circumstances* or as to any of the aggravating circumstances enumerated in this act."

Eddings, 455 U.S. at 106 (quoting OKLA. STAT. tit. 21, § 701.10 (1980)).

255. Defendant was 16 when, after having been pulled over on the highway, he shot a police officer. The trial judge found the existence of three aggravating factors: "that the crime was 'heinous, atrocious, and cruel,'... that the crime was 'committed for the purpose of avoiding or preventing a lawful arrest or prosecution,' ... [and] that Eddings posed a continuing threat of violence to society." *See Eddings*, 455 U.S. at 108 n.3. These three aggravating factors outweighed the only mitigating factor that the court considered, that of defendant's youth, and so the trial judge imposed the death penalty. *See id.* at 108-09.

256. *Id.* at 109. The Supreme Court noted: "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113.

257. *Id.* at 110 (citing *Lockett*, 438 U.S. 586, 604 (1978)).

258. *Id.* at 110-12.

the death penalty be imposed fairly, by according weight, through the consideration of any mitigating factor, to the character and record of each offender.[259]

Applying those principles to the facts in *Eddings*, the Court went one step further:

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But *they may not give it no weight by excluding such evidence from their consideration.*[260]

Although the Oklahoma death penalty statute permitted the presentation of evidence regarding "any mitigating circumstances," and so complied with *Lockett* in that regard, the Court further emphasized that "*Lockett* requires the sentencer to listen."[261] Because the trial judge did not believe he was allowed to consider evidence of defendant's turbulent childhood, there was a risk that the death penalty was imposed without full consideration of this defendant's character and record, thereby risking that the death penalty was imposed unfairly without regard to the uniqueness of this particular individual.[262]

Lockett and *Eddings* thus expanded the role of mitigating factors in death penalty cases.[263] Initially, the Court adhered to this line of

---

259. *Id.* at 111-12.

260. *Id.* at 113-15 (second emphasis added).

261. *Id.* at 115 n.10 (citing OKLA. STAT. tit. 21, § 701.10 (1980)).

262. The dissent believed that the majority was playing semantics by parsing the language of the trial judge's ruling. 455 U.S. at 124-26 (Burger, C.J., dissenting). Instead of finding that the Oklahoma courts did not consider the mitigating evidence, other than youth, presented by the defendant, the dissent would have found that the courts considered the evidence but found it "not a sufficiently mitigating factor to tip the scales, given the aggravating circumstances." *Id.* at 125. More generally, it was clear to the dissent that the Oklahoma courts believed "that 'evidence in mitigation' must rise to a certain level of persuasiveness before it can be said to constitute a 'mitigating circumstance.'" *Id.* at 126. The Chief Justice persuasively supported this position by noting that the trial judge took extensive testimony on that evidence, *id.* at 124, and that the Court of Criminal Appeals also summarized the evidence in its ruling. *Id.* at 125. The dissent believed the majority, by contrast, wrongly "require[d] that any potential mitigating evidence be described as a 'mitigating factor'—regardless of its weight." *Id.* at 126. This objection foreshadows the dispute over mitigating evidence that would emerge more forcefully in later cases. *See infra* notes 294-303, 339-374 and accompanying text.

263. For discussions of *Lockett* and its effect, see Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981); Howe, *supra* note 214; Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out?: Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 853 (1992); *see generally* Bilionis, *supra* note 163; Sunby, *supra* note 164; Radin, *Super Due Process*, *supra* note 26.

decisions,[264] but then began a piecemeal and eventually substantial retreat from it.[265] Discussion of a different type of death penalty scheme and the Court's evaluation of it, however, is necessary to illustrate generally the eventual constriction of the reach of *Woodson, Lockett*, and *Eddings*.[266] This constriction is yet another thread in a death penalty jurisprudence that channels the jury to decisions of death and thus helps predetermine the result from the evolving standards calculus.[267]

264. *See* McKoy v. North Carolina, 494 U.S. 433, 435 (1990) (holding that "[a statutory] requirement [that] prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find[ ] . . . violates the Constitution by preventing the sentencer from considering all mitigating evidence"); Franklin v. Lynaugh, 487 U.S. 164 (1988) (deciding that the Texas death penalty scheme allowed jury to give effect to defendant's mitigating evidence) (Justices O'Connor and Blackmun adhering in concurrence, and Justices Stevens, Brennan, and Marshall adhering in dissent); Mills v. Maryland, 486 U.S. 367, 384 (1988) (recognizing that "the sentencer must be permitted to consider all mitigating evidence" and so vacating death sentence arrived at when jury could have interpreted instructions as precluding their consideration of mitigating evidence unless jurors were unanimous about the existence of a particular mitigating circumstance); Sumner v. Shuman, 483 U.S. 66, 73-82, 85 (1987) (holding unconstitutional a Nevada statute imposing mandatory death sentence on prisoner serving life term with no possibility of parole because defendant did not receive individualized consideration); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (Justice Scalia authoring opinion for a unanimous Court and holding that state trial court's instruction to jury and own consideration of evidence violated dictates of *Lockett* and *Eddings* because the judge limited consideration of mitigating circumstances to only those enumerated in the pertinent statute); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (stating that "[t]hese rules [from *Lockett* and *Eddings*] are now well established . . . ," and require that the sentencer be allowed to consider, as mitigating evidence, testimony regarding defendant's good post-arrest behavior in jail and "probable future conduct if sentenced to life in prison").

265. *See* Johnson v. Texas, 113 S. Ct. 2658, 2672 (1993); Walton v. Arizona, 497 U.S. 639, 649 (1990); Boyde v. California, 494 U.S. 370, 377 (1990); Saffle v. Parks, 494 U.S. 484, 490 (1990); California v. Brown, 479 U.S. 538, 543 (1987); *infra* notes 339-374 and accompanying text.

266. As noted, it is the fact of this constriction that is important for the purposes of this Article. Complete analysis of the Court's changing treatment of mitigating evidence would itself merit a separate article and so is beyond the scope of this one. For some instances of that treatment, see decisions upholding certain mandatory death sentences, Blystone v. Pennsylvania, 494 U.S. 299 (1990); Boyde v. California, 494 U.S. 370 (1990); Walton v. Arizona, 497 U.S. 639 (1990); decisions allowing antisympathy instructions, Saffle v. Parks, 494 U.S. 484 (1990); California v. Brown, 479 U.S. 538 (1987); and decisions generally permitting states to guide the jury's use of mitigating evidence, *see supra* note 265. Discussion of certain cases in these last two groupings, however, will be used to illustrate how the Court's general refinement of the principles of *Woodson* and its progeny affects the evolving standards test. *See infra* section IV.A.2.

267. *See infra* section IV.A.2.

b. The Texas Cases

The principles of *Woodson* and its progeny, although etched out in cases dealing with statutes that follow the Georgia model detailed in *Gregg*, govern also those schemes that do not follow the Georgia model. The Texas statute, which the Court reviewed on a number of occasions,[268] differed from the Georgia model in various respects.

The statute did not specify aggravators that would guide a jury in its imposition of the penalty, but did restrict to five the types of murders for which death could be imposed.[269] In a subsequent hearing, a jury would hear evidence relevant to its determination of three special issues, and could impose death only if it answered "yes" to each of the three questions.[270] The statute otherwise contained no clear dictate that a jury weigh mitigating evidence vis-á-vis aggravating circumstances or consider mitigating evidence at all. It was unclear, therefore, whether the statute permitted a sentencer's consideration of mitigating evidence and whether it thus allowed the jury to individualize this defendant, as required initially by *Woodson*.[271]

The Court first had occasion to assess the constitutionality of the Texas statute[272] in *Jurek v. Texas*,[273] which was decided with *Gregg*

268. The Court determined the general constitutionality of the statute in Jurek v. Texas, 428 U.S. 262 (1976) at the same time it evaluated the Georgia, Florida, Louisiana, and North Carolina statutes in 1976. It later examined the statute in response to various other challenges in Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality opinion), Penry v. Lynaugh, 492 U.S. 302 (1989), Graham v. Collins, 113 S. Ct. 892 (1993), and Johnson v. Texas, 113 S. Ct. 2658 (1993).

269. *See Jurek*, 428 U.S. at 268 (citing TEX. PENAL CODE § 19.03 (1974)).

270. *Id.* at 269 (citing TEX. CODE CRIM. PROC. art. 37.071 (Supp. 1975-1976)). The questions the jury was required to answer were as follows:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Id. (quoting art. 37.071(b)).

271. *See Jurek*, 428 U.S. at 272 ("The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.").

272. The concern here is with the Texas statute in effect until 1991, enacted in response to the decision in Furman v. Georgia, 408 U.S. 238 (1972). The Court had struck down the previous Texas statute in Branch v. Texas, which was decided with *Furman*. The statute currently in force requires the sentencer to answer three special issue questions, but the

and *Woodson*. In *Jurek*, the same three-Justice plurality held that the statute's limiting of death as an available punishment to only five types of murders served much the same purpose as did aggravating factors, such as those set out in the Georgia statute.[274] Because the jury had to determine whether the defendant's crime fell within one of those categories before it even reached the special issues,[275] in the judgment of the Court, the jury was essentially required to find the existence of aggravating factors.[276] The jury's discretion to impose death was thus limited and guided by the statute in accordance with the dictates of *Gregg*.

Whether the statute met the commands of *Woodson*, however, proved to be a bit more problematic. The Texas statute did not explicitly mention mitigating factors; "[t]hus, the constitutionality of the Texas procedures turn[ed] on whether the [three] enumerated questions allow[ed] consideration of particularized mitigating factors."[277] The plurality opinion found that the Texas Court of Criminal Appeals would interpret the statute's second special issue, regarding future dangerousness, as allowing the sentencer's consideration of any mitigating evidence the defendant could bring forth:[278]

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than in-

questions are different and are submitted to the jury through a different process. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1995). The scheme also now specifies eight types of murder for which death may be imposed. *See* TEX. PENAL CODE ANN. § 19.03 (West 1994).

273. 428 U.S. 262 (1976) (plurality opinion). The plurality was comprised of Justices Stewart, Powell, and Stevens. Chief Justice Burger and Justices White, Rehnquist, and Blackmun concurred in the judgment. Justices Brennan and Marshall dissented in a separate opinion to the decisions in *Gregg*, *Jurek*, and *Proffitt*.

274. *Id.* at 269.

275. The Texas statute required this finding in the guilt stage, *id.* at 269, whereas the Georgia statute required a similar finding during the sentencing phase. Gregg v. Georgia, 428 U.S. 153, 163-66 (1976); *see also* text accompanying *supra* note 45.

276. *Jurek*, 428 U.S. at 269.

277. *Id.* at 272.

278. *Id.* A plurality of the Court also later stated that the defendant was not entitled to special jury instructions to the effect that the jury could give effect to the mitigating evidence by declining to sentence to death even if it answered "yes" to all special issue questions. Franklin v. Lynaugh, 487 U.S. 164, 180 (1988) (plurality opinion).

> sanity, but more than the emotions of the average man, however inflamed, could withstand."[279]

Because the statute permitted individualized consideration of the defendant under the second special issue and yet also guided the jury in its decision whether to impose death, the plurality held that the statute comported with the dictates set out in *Gregg* and *Woodson* and was constitutional.[280]

More recently, in *Penry v. Lynaugh*,[281] one issue was whether the three statutory questions permitted the sentencer to consider and give effect to evidence of defendant's mental retardation, which he had presented in mitigation.[282] Comprising the majority, Justices O'Connor, Brennan, Marshall, Blackmun, and Stevens,[283] again examining the Texas statute, reiterated that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. [For the statute to comply with the Eighth Amendment, t]he sentencer must also be able to *consider and give effect* to that evidence in imposing sentence."[284] The Court emphasized,

> [i]ndeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is

279. *Jurek*, 428 U.S. at 272-73 (quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975)).

280. *Id.* at 274, 276.

281. 492 U.S. 302 (1989).

282. *Id.* at 312-13. Penry had also challenged the trial court's failure to instruct the jury to consider all of his evidence in mitigation, and challenged generally the constitutionality of executing a mentally retarded defendant. *Id.* For a discussion of the latter issue, see *supra* notes 194-208 and accompanying text.

283. *Penry*, 492 U.S. at 306, 319-28.

284. *Id.* at 319 (emphasis added). Although neither the plurality opinion in Lockett v. Ohio, 438 U.S. 586 (1978) nor the majority opinion in Eddings v. Oklahoma, 455 U.S. 104 (1982) used precisely the words "give effect to" in their discussions of what the jury was to be allowed to do with mitigating evidence, the *Lockett* opinion did state: "a statute that prevents the sentencer in all capital cases from giving *independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605 (emphasis added). It would seem to follow logically that the only way to give weight to evidence would be to give it effect.

to give a "'reasoned *moral* response to the defendant's background, character, and crime.'"[285]

The majority opinion, analyzing the three questions separately, held that the jury could not adequately give effect to Penry's mitigating evidence through the special issues;[286] if the jury felt that Penry's moral culpability due to his mental retardation was such that he was undeserving of the death penalty, it had no way of expressing that belief under the Texas scheme. For example, the jury could find that Penry posed a future danger precisely because of his mental retardation and so answer "yes" to the second question even if it believed Penry was undeserving of the ultimate penalty because of his mental disability.[287] In that situation, the sentencer had no "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision."[288] The Court found that the jury should have been instructed that it could, upon consideration of the evidence presented by the defendant, refuse to impose the death penalty and thereby give effect to defendant's mitigating evidence.[289]

The State had argued that to instruct the jury that it could decline to impose death because of Penry's mitigating evidence—in essence, that it "could render a discretionary grant of mercy"—would introduce unconstitutional unguided discretion into the sentencing process.[290] Recognizing that the *Furman* decision had struck down state death penalty laws because they had allowed unbridled discretion and had not guided juries in their sentencing decisions, the Court here nonetheless stressed that the decision *not* to impose the death penalty is different:

> [A]s we made clear in *Gregg*, so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. . . . 'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's

285. *Penry*, 492 U.S. at 327-28 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

286. *Id.* at 328.

287. *Id.* at 323-24. "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324.

288. *Id.* at 328.

289. *Id.*

290. *Id.* at 326.

> discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.'[291]

Once the field of offenders is narrowed to those for whom death may be appropriate, then, the only way that the state can be assured that the penalty is a just one for this offender, with his or her level of culpability, is to allow the jury virtually unbridled discretion to grant mercy,[292] despite the existence of aggravators that ordinarily would counsel a finding for death.[293] In this case, a plurality of the current Court, led by Justice Scalia and including Chief Justice Rehnquist and Justices White and Kennedy,[294] stressed opposition to the development of the *Woodson, Lockett,* and *Eddings* tenets relating to mitigating evidence.

The dissent first attacked the majority's opinion as an evisceration of the holding in *Jurek*,[295] but then more generally denounced both the Court's holding on this issue and the place of this doctrine in the Court's death penalty jurisprudence. The dissent further explained that the Texas scheme did permit the jury's consideration of all mitigating evidence, but simply channeled that consideration. It noted,

> we have never held that "the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." . . . [N]either *Lockett* nor *Eddings* "establish[ed] the weight which must be given to any particular mitigating evi-

291. *Id.* at 327 (quoting McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in *McCleskey*)).

292. *Cf.* Radin, *Super Due Process, supra* note 26, at 1153 (stating that "the 'unfettered' discretion found impermissible in *Furman*, is [after *Lockett*] not merely permissible but constitutionally required"). *But see* Bilionis, *supra* note 163, at 328 (arguing that this discretion is not unfettered, because that would violate *Furman*; rather, "[t]he sentencer's discretion under *Woodson* and *Lockett* . . . is the limited and structured discretion to give a life sentence because of moral considerations arising from mitigating evidence . . .").

293. This line of doctrine has caused a rift in the current Court. *See infra* notes 294-303, 339-374 and accompanying text.

294. *Penry*, 492 U.S. at 350.

295. *Id.* at 353-56. The dissent argued that *Jurek* upheld the constitutionality of the Texas statute because it did allow for consideration of that mitigating evidence pertinent to answering the three questions and therefore relevant to the verdict. What *Jurek* did, in the dissent's view, was to ensure that the evidence could be considered and yet to allow the state to determine the "precise *effect* of [its] consideration," *id.* at 355; the state could channel the jury's use of that information as long as it allowed the jury to consider the information and give effect to it *in some manner*. The dissent conceded only this: "Of course there remains available, in an as-applied challenge to the Texas statute, the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions it poses, and hence could not be considered." *Id.* at 356. This case, however, was not such a case, because evidence of defendant's mental retardation was relevant to, for example, the first special question, whether defendant's conduct in killing the victim was "deliberate." *Id.*

> dence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all."[296]

Thus, the dissent would have allowed the state to "channel" discretion not to impose the death penalty by allowing consideration of mitigating circumstances only for certain specified purposes and would have taken a significantly different tack than had previous decisions.[297]

More generally, Justice Scalia introduced[298] his concern about the broad, essentially unbridled discretion in juries to decline to impose the death penalty and previewed his later, more broadscale assault on the Court's jurisprudence in this area.[299] According to Justice Scalia, the Court replaced a scheme of guided discretion with one that required "an unguided, emotional 'moral response,' . . . an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy. . . . [T]he line of cases following *Gregg* sought to eliminate precisely the unpredictability it pro-

296. *Id.* at 357 (quoting Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) (plurality opinion on that point) and Barclay v. Florida, 463 U.S. 939, 961 n.2 (Stevens, J., concurring in the judgment) (second alteration in *Penry*)).

297. Whereas the *Penry* majority read precedent as requiring unfettered discretion in the jury to decline to impose the death penalty by allowing unbridled consideration of mitigating circumstances, the dissent was instead led "to the conclusion that all mitigating factors must be able to be considered by the sentencer, but need not be able to be considered for all purposes." *Id.* at 358. In effect, the dissent believed that the Constitution did not require, as a part of individualized sentencing, that a jury be provided an outlet for a general grant of mercy.

By advocating for channeled discretion regarding consideration of mitigating factors in this and later cases, in which the view carried a majority of the Court, the dissent would eventually in effect accomplish an overruling of the *Woodson* line of cases and a consequent elimination of the individualized sentencing requirement. It would thus do through the back door what it could likely not have done outright. *See infra* notes 343-374 and accompanying text.

298. A plurality, led by Justice White and joined by the Chief Justice and Justices Scalia and Kennedy, had touched on this issue in the prior term in Franklin v. Lynaugh, 487 U.S. 164 (1988), another opinion analyzing the Texas procedure. The plurality stated: "this Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing . . . ." *Id.* at 181. Justice O'Connor, joined in concurrence by Justice Blackmun, espoused an opinion similar to the one she would advocate in *Penry*: that the scheme would pass constitutional muster if the special issue questions permitted the jury to give effect to defendant's mitigating evidence. *See id.* at 183-85; *Penry*, 492 U.S. at 316-17. The *Franklin* concurrences thus agreed with the *Franklin* dissenters on this point. *See supra* note 264; *Franklin*, 487 U.S. at 189-200.

299. *See* Callins v. Collins, 114 S. Ct. 1127, 1127-28 (1994) (Scalia, J., concurring in denial of certiorari); Walton v. Arizona, 497 U.S. 639, 656-73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

duces."[300] In Justice Scalia's view, such a "dump[ing]"[301] of unfocused evidence produced freakish and arbitrary results and thus was not required by the Constitution.[302]

Despite, however, the rather strong affirmance by the majority in *Penry* of the need to allow the jury latitude to grant mercy in an appropriate case, in the very next term the Court began to come more in line with the dissent in *Penry* and began to scale back the protections afforded defendants under this line of doctrine.[303] The retreat from *Woodson* and its progeny by a majority of the Court began in 1990 and was complete in 1993. Two cases, one from each of those years, illustrate the Court's employment of this distinction between the substance of mitigating evidence and the manner in which it is considered, a distinction enabling states to cripple defendants in their presentations and juries in their considerations of mitigating evidence. The skirting and arguably effective evisceration of the *Woodson-Lockett-Eddings* line of doctrine is significant standing alone, but is also significant in its effect on the application of the jury-sentencing prong leading to the rigging of the evolving standards of decency test.

Thus far, the discussion has shown that the Court has employed various yardsticks of constitutionality under the Eighth Amendment Cruel and Unusual Punishment Clause. To determine when a death penalty is substantively cruel and unusual or is "excessive," the Court has evaluated it with respect to its historical acceptance and has examined society's evolving standards of decency as evidenced by legislative enactments and jury sentencing behavior. A majority of the Court has also measured the severity of the crime and culpability of the offender against the severity of the death sentence to determine proportionality, and has assessed whether the punishment would further the valid penological goals of retribution and deterrence. In this way, the Court has conducted its own excessiveness inquiry.

In addition, to insure that death sentences are not cruel and unusual because of the manner in which they are imposed, the Court has required that the procedures for imposition guide the jury in the exercise of its discretion to impose the penalty and yet permit individuali-

300. *Penry*, 492 U.S. at 359. *But see* Hertz, *supra* note 263, at 373-76 (arguing that allowing unbridled discretion to afford mercy is not inconsistent with *Furman*'s guided discretion requirement because reliability of *death sentences* is at the root of *Furman*; "[a]n erroneous decision to extinguish the defendant's life is far more opprobrious than an erroneous decision to spare the defendant and sentence him to life imprisonment").

301. *Penry*, 492 U.S. at 359.

302. *Id.* at 359-60.

303. *See infra* notes 343-374 and accompanying text.

zation of the sentence to the particular defendant before the court. This seemingly settled doctrine has been altered, however, by decisions of a Court of more recent composition.

The central contention of this Article is that the evolving standards test, one of the main tests of constitutionality, must be re-evaluated because a plurality of the Court may favor employing it as the only test. In that re-evaluation, this Article must go beyond the cases involving substantive challenges to the death penalty to argue that the jury sentencing prong of the test can be and has been manipulated in such a way that the inevitable conclusion shows approval of the death penalty. Specifically, the recent modifications of the Court's procedural death penalty jurisprudence play a role by altering the doctrine in ways that have significant ramifications for jury sentencing behavior, and thus for the evolving standards test, since they tilt, rather than simply guide, the jury's discretion toward death. Additionally, and as noted earlier, the Court has also selectively analyzed pro-death penalty statutes in its computation of the evolving standards, demonstrating that this prong can be manipulated to a pro-death bias as well. The evolving standards test is thus rigged to favor death and should not be the sole determinant of constitutionality.

IV. The Rigging of the "Evolving Standards" Test

A. Jury Decisionmaking is Systematically Channeled to Return Death Sentences

Decisions of the Court involving antisympathy instructions, victim impact evidence, use of mitigating evidence, clarity and certainty of aggravating factors, and death qualification of juries, standing alone, appear as rather innocuous procedural rules that developed logically during the course of the development of death penalty jurisprudence. When these factors merge, however, they insidiously help to manipulate sentencing juries into death sentences and thus skew this indicator of the evolving standards of decency when the Court employs it to evaluate substantive challenges to the death penalty.[304]

304. Critiquing the Court's approach to cruel and unusual punishment determination, one writer opined that "jury behavior as an indicator of contemporary moral standards is not so obviously vulnerable to criticism [as are legislative enactments]. At least those who serve on juries have been solemnly charged to bring their best moral judgment to bear on the cases brought before them." Radin, *Jurisprudence of Death*, *supra* note 26, at 1037-38. Professor Radin was writing in 1978, however, prior to the bulk of the decisions relied upon herein. Even then, she did have some criticisms of this index of society's views. *See supra* note 160.

1. *Antisympathy Instructions and Victim Impact Evidence Coalesce to Favor Death*

Three cases decided by the Court work in tandem to allow a state to preclude the jury from acting on any emotion except that favoring a verdict of death: two decisions[305] permitted the states to instruct the jury that it cannot be swayed by sympathy for the defendant in reaching its sentencing decision, and one case[306] held that the prosecution could introduce evidence of the impact of the loss of the victim, thereby implicitly allowing the jury to be swayed by sympathy for the victim. Together, these cases allow a jury's emotions to be driven toward a death determination.

In *California v. Brown*,[307] the Court addressed a question concerning a jury's use of feelings of sympathy produced by defendant's mitigating evidence. The California trial court had instructed the jury that, in weighing the aggravating and mitigating circumstances, it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[308] Upholding the constitutionality of the instruction, the Court found that it did not violate any of the principles set out in *Woodson, Lockett*, and *Eddings*.[309]

Although the California Supreme Court had agreed with the defendant that the instruction would divert the jury from considering sympathetic factors in defendant's favor and so would unconstitutionally preclude the jury from acting on defendant's mitigating evidence,[310] the majority in *Brown* determined that a reasonable juror would not have understood the instruction as precluding him or her

305. California v. Brown, 479 U.S. 538 (1987); Saffle v. Parks, 494 U.S. 484 (1990).

306. Payne v. Tennessee, 501 U.S. 808 (1991).

307. 479 U.S. 538 (1987). Chief Justice Rehnquist wrote the majority opinion in which Justices White, Powell, O'Connor, and Scalia joined. *Id.* Justices Brennan, Marshall, Stevens, and Blackmun dissented. *Id.* at 547, 561.

308. *Id.* at 540 (quoting Appellate Record at 20).

309. *Id.* at 541-43. Justice O'Connor, concurring in the decision, agreed that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion," *id.* at 545 (O'Connor, J., concurring), and so concurred that the instruction did not by itself violate the Constitution. *Id.* Justice O'Connor did recognize, however, that "one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored." *Id.* at 545-46. She therefore wanted to ensure that on remand the California Supreme Court determined that in fact the jury was informed of its responsibility to consider all of defendant's mitigating evidence. *Id.* at 546. See also *infra* notes 343-376 and accompanying text for a discussion of the danger that these instructions will prevent the jury from considering and giving effect to mitigating evidence.

310. *Brown*, 479 U.S. at 540 (citing *People v. Brown*, 709 P.2d 440, 453 (Cal. 1985)).

from so acting. The majority emphasized that the instruction forbade acting on *mere* sympathy, which a juror would know meant that he or she was "to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."[311] In fact, the majority stated, "[e]ven a juror who insisted on focusing on this one phrase[, 'sympathy,'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase."[312] The instruction was constitutional because

311. *Id.* at 542. The majority employed interesting reasoning to reach its conclusion here. It argued that defendant's interpretation was "strained" because it concentrated on the word "sympathy" rather than reading the entire section, which was modified by the adjective "mere." *Id.* The admonition not to be influenced by "mere sympathy," in the majority's view, made it clear to the jury that it was to confine its "deliberations to considerations arising from the evidence presented, both aggravating and mitigating." *Id.* at 543. The majority argued in addition, however, that "it [was] highly unlikely that any reasonable juror would almost perversely single out the word 'sympathy' from the other nouns which accompany it in the instruction. . . ." *Id.* at 542. The Court found no contradiction with its reasoning that the jury would single out the word "mere" and apply it as a modifier to every noun in the instruction. *Id.*

312. *Id.* The Court would not concede the danger that the jury would conclude that it was not to base its decision on any sympathy at all, as the defendant had argued. But because a defendant's mitigating evidence would serve to evoke precisely that response, and because that evocation is arguably the sole purpose of mitigating evidence, even the risk that a jury would interpret the instruction in the way argued by the defendant would seem to veer too close to the constitutional line set by *Woodson, Lockett*, and *Eddings*. *Cf.* Sunby, *supra* note 164, at 1197 ("[I]f the death penalty decision is regarded as based in part on emotional, or at least not 'rational' factors as traditionally conceived, then such procedures [as antisympathy instructions, which purport to foster rational decisions,] frustrate the 'individualized' decisionmaking process of *Lockett*."). The instruction should have violated those procedural guarantees because a jury could have ignored the mitigating evidence in response to the instruction. *See infra* notes 343-361 and accompanying text.

Indeed, this was the very argument advanced by the dissents. Justice Brennan noted first that the California Supreme Court itself interpreted the instruction as precluding the jury from considering mitigating evidence concerning defendant's character or record, *Brown*, 479 U.S. at 547-48 (Brennan, J., dissenting), and that the Court was "strain[ing] to find a way to override the state court's construction of its own jury instruction." *Id.* at 561. According to the dissenters,

> [i]n forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered. As the plurality noted in *Woodson v. North Carolina*, such evidence is intended to induce consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind."

Id. at 548 (citations omitted) (quoting *Woodson*, 428 U.S. 280, 304 (1976)). The possibility that the jury would interpret it in the way argued by the defendant, therefore, created the unacceptable risk of their ignoring mitigating factors.

The inclusion of the adjective "mere" in the instruction did not serve to cure the defect, as the jury could just as easily have believed "mere" modified only the first noun in

it guided the jury's use of mitigating evidence[313] by disallowing a sympathetic response to anything but admissible mitigating evidence.

By this holding, the *Brown* Court seems to have implicitly endorsed the notion that a jury could base a decision on sympathy that *was* "rooted in the aggravating and mitigating evidence,"[314] and in that way give effect to that mitigating evidence as required by *Woodson* and its progeny. But the Court later removed even this merciful safety net; in *Saffle v. Parks*,[315] the Court[316] made clear that the implicit endorsement by *Brown* did not exist.[317]

In *Parks*, the trial judge had instructed the jury to "'avoid *any* influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.'"[318] The instruction thus differed from that in *Brown* in that it did not draw any distinctions between sympathy tethered to the mitigating evidence and sympathy untethered to any relevant sentencing factors. In upholding the constitutionality of the instruction, the Court stated that *Lockett* and *Eddings* only forbid the state from barring consideration of relevant mitigating evidence; those cases did not preclude the state from guid-

---

the string, so that all considerations of sympathy were forbidden, not merely those "untethered" to mitigating evidence. *Id.* at 549. Additionally, confronted with a long list of impermissible emotions, the jury more than likely believed that "*any* response rooted in emotion was inappropriate. . . . The vast majority of jurors thus can be expected to interpret 'sympathy' to mean 'sympathy,' not to engage in the torturous reasoning process necessary to construe it as 'untethered sympathy.'" *Id.* at 550-51.

Justice Blackmun, in a separate dissent, would have reversed based on the strongly held belief that "sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual . . . ." *Id.* at 562 (Blackmun, J., dissenting); *see also* Callins v. Collins, 114 S. Ct. 1127, 1133 (1994) (Blackmun, J., dissenting from denial of certiorari). He emphasized the special role that mercy plays in capital cases, and its link to "contemporary values," and stated that the mere possibility that this instruction could quash any humane response evoked in the juror by defendant's mitigating evidence was unacceptable in a capital case. *Brown*, 479 U.S. at 561-63.

313. Although the Court did not write specifically in terms of guiding the jury's discretion in regard to mitigating evidence, it did state that the instruction here at issue "serves the useful purpose of *confining* the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors . . . ." *Brown*, 479 U.S. at 543 (emphasis added). The Court thus in effect found acceptable a state's limiting the *manner* in which the jury used mitigating evidence, while not explicitly limiting the *kind* of evidence that it could consider. The Court later drew this distinction much more clearly. *See infra* notes 340-376 and accompanying text.

314. *Brown*, 479 U.S. at 542.

315. 494 U.S. 484 (1990).

316. Justice Kennedy authored the opinion for the majority, which included Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. *Id.* at 485.

317. *Id.* at 494.

318. *Id.* at 487 (quoting Appellate Record at 13) (emphasis added).

ing that consideration, such as by instructing the jury that it could not act on any sympathy evoked by the mitigating evidence.[319]

The decisions in *Brown* and *Parks* engender various odious effects,[320] but specifically relevant are two consequences of these holdings. First, the silencing of the jury's sense of compassion dilutes the accuracy of the jury's determination as a reflection of the evolving standard.[321] The Court has said that "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—*a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."*'"[322] A jury whose compassion is muzzled, however, will not deliver judgments that accurately reflect "community values" that include compassionate, sympathetic responses. The "link" is thus severed and the resultant jury decision is of questionable value as an "*objective* index of contemporary values."[323]

The second result compounds the first, not only because the link is severed, but also because positive reactions toward the defendant are squelched. The upshot of severing the jury's compassionate response from its decisionmaking is a stronger emotional case against the defendant. A jury that silences its compassion is much less likely to grant a defendant mercy and so more likely to sentence to death in response to the emotional horrors of the crime.[324] In this way, the Court's decisions in the antisympathy cases have helped to rig the result against defendants and in favor of death, and thus also to rig further the evolving standards test.

Moreover, the rule from those cases works with another procedural-evidentiary rule to further lead a sentencer to a conclusion that

319. *Id.* at 490.

320. *See also infra* notes 343-361 and accompanying text.

321. *Cf.* Howe, *supra* note 214, at 1070 ("[T]he Eighth Amendment rationale for an expansive individualization mandate could only stem from a notion that requiring a sentencing inquiry with broad boundaries helps to ensure an unfettered voice for a possible societal consensus about deserts.").

322. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))) (emphasis added).

323. *Id.* at 181 (emphasis added).

324. A related argument is that these instructions effectively preclude the sentencer from considering and giving effect to mitigating evidence, with the consequent failure to accord the defendant the individualization that has heretofore been constitutionally mandated. This argument is discussed in the text accompanying *infra* notes 343-361.

death is the appropriate punishment. In *Payne v. Tennessee*,[325] the Court held that in assessing whether the death penalty is appropriate, the jury can hear and consider evidence of the "harm" caused by defendant's crime in the form of evidence about the victim and statements detailing the impact of the crime on the victim's family.[326] The powerful impact of this evidence, in evoking sympathy for the victim, coupled with admonitions prohibiting jurors from allowing sympathy for the defendant to infect their deliberations, emotionally directs those jurors toward death decisions.[327]

The Court in *Payne* reasoned that "the assessment of the harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law . . . in determining the appropriate punishment."[328] In the death penalty context, the harm caused to the family and society is relevant to the defendant's blameworthiness, it is a legitimate factor for the jury to consider, and its consideration does not introduce arbitrariness into the sentencing process.[329]

325. 501 U.S. 808 (1991). Chief Justice Rehnquist wrote the majority opinion, in which Justices White, O'Connor, Scalia, Kennedy, and Souter joined. *Id.* at 810.

326. *Id.* at 825-27, 830. *Payne* overruled the holdings in South Carolina v. Gathers, 490 U.S. 805 (1989) and Booth v. Maryland, 482 U.S. 496 (1987) that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *Payne*, 501 U.S. at 830 n.2. The majority in those two cases had reasoned that because evidence of the impact of the crime often does not factor into defendant's personal culpability or moral guilt for the crime charged, that evidence was usually irrelevant to a death penalty determination; the focus of that determination is on blameworthiness, or the character and record of the defendant and the circumstances of the crime, whereas the victim impact evidence focuses on the victim's character and family. *Gathers*, 490 U.S. at 810-11; *Booth*, 482 U.S. at 502, 504-05. Allowance of victim impact evidence, according to the *Booth* Court, "create[d] an impermissible risk that the capital sentencing decision will be made in an arbitrary manner," 482 U.S. at 505, and thus not individualized to this defendant as required by prior rulings.

The decision in *Payne* has been the subject of commentary because of the manner in which the Court overruled the two cases. *See, e.g.*, Michael Vitiello, Payne v. Tennessee: *A "Stunning* Ipse Dixit," 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 179-208 (1994); Ranae Bartlett, Case Note, Payne v. Tennessee: *Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992); *see also Payne*, 501 U.S. at 844-45, 848-56 (Marshall, J., dissenting); Payne v. Tennessee, 498 U.S. 1076, 1076-77 (1991) (Stevens, J., dissenting from grant of certiorari); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

327. *See infra* notes 337-338.

328. *Payne*, 501 U.S. at 819.

329. *Id.* at 825. The Court stated only that "[w]e think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty." *Id.* Any evidence that might be unduly prejudicial, apparently in the sense of promoting arbitrariness, could be challenged under the Fourteenth Amendment Due Process Clause. *Id.* The opinion was otherwise devoid of any reasoning tending to persuade that the admission of victim impact evidence did not introduce arbitrariness.

Arguably, and contrary to the *Payne* Court's assertions, the admission of victim impact evidence permits the jury unconstitutionally to impose death on "whim and caprice."[330] The Court has required that the decision to *impose* death be channeled and directed,[331] so that the jury can distinguish those cases in which death is appropriate from those in which it is not. Generally, this "channeling" has been accomplished through an enumeration of aggravating factors that the jury must find before imposing death.[332] In *Payne*, however, the Court failed to indicate the relationship of victim impact evidence to those aggravators. For instance, it failed to indicate whether to be admissible the evidence must tend to prove the existence of one or more of the aggravating factors, or, conversely, whether the jury could consider the evidence in any manner it chose. Because it failed to so limit the admission of the evidence, one can only conclude that there is no such restriction;[333] the jury must be able to consider victim impact evidence as it sees fit and for any purposes and so sentence based on its "gut reaction" to the victim impact evidence, or on "whim and caprice." Such a result seems clearly inconsistent with the requirements of *Gregg* and its progeny that a sentencer be guided in its decision whether to *impose* the death penalty.[334]

---

330. Justice Stevens in dissent in *Payne* made this argument rather forcefully. *Payne*, 501 U.S. at 860-67 (Stevens, J., dissenting); *see also id.* at 845-46 (Marshall, J., dissenting).

331. *See* Gregg v. Georgia, 428 U.S. 153, 189, 199 (1976).

332. *See supra* notes 45-46 and accompanying text.

333. *Cf.* Gey, *supra* note 26, at 75 ("Except in exceptional circumstances, victim impact statements also do not relate to the specific aggravating factors in death penalty statutes . . . .") (footnote omitted).

334. *See, e.g., supra* note 47 and text accompanying notes 54-56, 291; *see also Payne*, 501 U.S. at 857-59, 861, 863-64 (Stevens, J., dissenting). The observation made here is merely one to further the general point of the Article and is not intended as a definitive appraisal of the propriety, impact, or consequences of the holding in *Payne.* Such an appraisal is beyond the scope of this Article, but has been undertaken by numerous other commentators. *See* Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); David R. Dow, *When Law Bows to Politics: Explaining* Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157 (1992); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); *see generally* Gey, *supra* note 26; Vitiello, *supra* note 326, at 223-36; *see also* Catherine Bendor, Recent Developments, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219 (1992); Matthew V. Brammer, Note, *Eighth Amendment No Longer Bars Victim Impact Statement Admission in Capital Sentencing Proceedings*: Payne v. Tennessee, 61 U. CIN. L. REV. 261 (1992); Christopher W. Ewing, Note, Payne v. Tennessee: *The Demise of* Booth v. Maryland, 23 PAC. L.J. 1389 (1992); Patrick M. Fahey, Note, Payne v. Tennessee: *An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205 (1992); Michael I. Oberlander, Note, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621 (1992); K. Elizabeth Whitehead, Note, *Mourning Becomes Electric:* Payne v. Tennessee*'s Allowance of Victim Impact Statements During Capital Sentencing Proceedings*, 45 ARK. L. REV. 531 (1992).

That result has the additional effect, however, of allowing the jury unfocused consideration of evidence that can only be described as that which would evoke sympathy for the victim.[335] The unbridled, and purely and powerfully visceral, reaction to the loss created by the defendant's crime would clearly favor the state's case.[336] In the penalty phase, such unchecked sympathy would doubtlessly pull the jury toward the conclusion of death[337] and thus pull the evolving standards test to a conclusion of constitutionality for the death penalty.

Antisympathy instructions and admission of victim impact evidence, both of which have been sanctioned by the Court, by themselves would incline the sentencer in favor of death, thus impugning the reliability of the jury's decision as an objective benchmark of the evolving standards. The distortion of the objectivity of the process is further exaggerated when the two rules unite; the lines of decision coalesce to favor death when, in the penalty phase, states can preclude jurors from acting on sympathy for the defendant while inundating the jury with victim impact evidence that arouses sympathy for the victim.[338] In this way, the Court's decisions inevitably permit a state to

335. Justice Stevens in dissent recognized this effect of the decision when he stated that the evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason. . . . Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible." *Payne,* 501 U.S. at 856-57 (Stevens, J., dissenting); *see also* Dubber, *supra* note 334, at 152 ("*Payne* opens the door for evidence that, at the very least, creates a substantial risk of evoking the jury's sympathy for the victim . . . ."); Bendor, *supra* note 334, at 236 ("The only clear role for this evidence is to serve as a direct appeal to the emotional sympathies of the jurors . . . ," a role the Court has previously found to be unacceptable.).

336. Professor Dubber has remarked, "*Payne* seeks to match the supposedly extravagant rights of the capital defendant by creating rights of the accuser, long after *Parks* has burnt this strawman of the hyper-protected defendant. *Payne*'s purported balancing act therefore creates a fundamental *imbalance in favor of the State.*" Dubber, *supra* note 334, at 152 (emphasis added).

337. Other commentators have recognized this danger. *See* Bendor, *supra* note 334, at 241 ("The practical result of this decision [in *Payne*] is that it will become easier for states to sentence criminal defendants to death."); Brammer, *supra* note 334, at 292 (footnotes omitted) ("The introduction of an emotionally charged [victim impact statement] may irrationally bias the sentencing authority toward a death sentence based solely on its irresistible emotional appeal."); *cf.* Whitehead, *supra* note 334, at 558 (noting that, after *Payne,* "the imposition of the death penalty stands to become an increasingly frequent occurrence"). Professor Dubber opined more categorically that victim impact evidence should be excluded altogether to ensure as much accuracy as possible in the decision to impose death. Dubber, *supra* note 334, at 116-17, 126-49.

338. The Court in *Payne* noted no contradiction between its decision here and its prior rulings in California v. Brown, 479 U.S. 538 (1987) and Saffle v. Parks, 494 U.S. 484 (1990); *see supra* notes 307-319 and accompanying text. In those cases, the Court was troubled by the jury's succumbing to *any* feelings of sympathy, not only that unfocused sympathy not

channel juror sympathies against the defendant and ineluctably drive the jury decisionmaking process toward death. Thus manipulated, resultant death sentences are invalid gauges of societal standards of decency and should be given little probative force in the constitutionality determination.

2. *Evisceration of the* Woodson *Line of Decisions Permits Circumscription of Mitigating Evidence and Thus Gives Deleterious Primacy to Aggravators*

Over a period of approximately five years, the Court saw grumblings of internal hostility[339] to the *Woodson-Lockett-Eddings*

---

rooted in the evidence, because the jury then would be unguided in its decision. The Court reached those decisions despite long-standing precedent that allowed jurors unbridled discretion *not* to sentence to death. In *Payne*, by contrast, the Court had no difficulty allowing jurors apparently free rein in responding to the sympathy evoked by the victim impact evidence, even though the Court has traditionally required strict guidance of the jury regarding its decision to *impose* death. For a persuasive explication of the combined effects of *Parks* and *Payne*, an explication similar to the one presented here, see Dubber, *supra* note 334, at 98-156. Professor Dubber states, for example, that "*Payne* illustrates the awesome combined impact of an antisympathy instruction that deprives the defendant of any opportunity to appeal to the jury's sense of mercy and a barrage of victim impact evidence that opens the floodgates of compassion for victims and their family." *Id.* at 129. Professor Dubber's conclusion is that *Payne* and *Parks* illustrate the desire of the Court for uniformity in the death penalty process, even at the expense of accuracy. *Id.* at 154-55. Because *Parks* permits the states to circumvent the individualization mandate, accuracy in sentencing is sacrificed. *Id.* at 91, 98-117. *Payne* then permits the state to stack the emotional evidence against the defendant, further ensuring that the defendant is dehumanized and that the sentence is not accurately individualized to him or his culpability. *Id.* at 123-45.

339. For a selection of statements recognizing a "tension" in the Court's jurisprudence between the line of cases that requires that a jury be allowed to consider any mitigating factor and that line that requires that the sentencer's discretion to impose death be guided, see Tuilaepa v. California, 114 S. Ct. 2630, 2635 (1994); Callins v. Collins, 114 S. Ct. 1127, 1127-28 (1994) (Scalia, J., concurring in denial of certiorari); *Callins*, 114 S. Ct. at 1133-35 (Blackmun, J., dissenting from denial of certiorari); Graham v. Collins, 113 S. Ct. 892, 903-04, 910-11 (1993) (Thomas, J., concurring); *Graham*, 113 S. Ct. at 923 n.9 (Souter, J., dissenting); Walton v. Arizona, 497 U.S. 639, 656-73 (1990) (Scalia, J., concurring in part and concurring in the judgment); Penry v. Lynaugh, 492 U.S. 302, 358-60 (1989) (Scalia, J., dissenting in part and concurring in part); Franklin v. Lynaugh, 487 U.S. 164, 182 (1988) (plurality opinion); McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting). For commentary discussing and/or attempting to resolve the purported conflict, see Vivian Berger, *Black Box Decisions on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1079-82 (1991); Bilionis, *supra* note 163, at 298-300, 326-32; Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 538-47 (1994); David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151 (1994); Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 26-38 (1980); Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1057-59 (1991); Howe, *supra* note 35, at 362-401; Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493 (1992); Randall K. Packer, *Struck By Lightning:*

line of doctrine ripen into majority opinions that essentially overruled, through the backdoor, those principles safeguarding unbridled discretion to decline to impose death.[340] The majority dislodged the settled

---

The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings, 20 N.Y.U. Rev. L. & Soc. Change 641, 647-49 (1993-94); Radin, *Super Due Process, supra* note 26, at 1149-55; Steiker & Steiker, *supra* note 263, at 859-68; Sunby, *supra* note 164, at 1161-90.

340. Although complete discussion of this phenomenon is beyond the scope of this Article, a chronology and skeletal explication of the doctrine's evolution may prove helpful. The grumblings seem to have begun in earnest in the 1988 case of Franklin v. Lynaugh, 487 U.S. 164, 179-82 (1988), in which a plurality led by Justice White argued that nothing in the Court's jurisprudence precluded a state's guiding of the jury's consideration of mitigating evidence. *See also supra* note 298 and accompanying text; Howe, *supra* note 35, at 394 (seeing "open conflict" begin in 1987 in California v. Brown, 479 U.S. 538 (1987)); Sunby, *supra* note 164, at 1191 (suggesting the grumblings may have begun in 1986 in Skipper v. South Carolina, 476 U.S. 1 (1986)). That plurality of Chief Justice Rehnquist and Justices White, Scalia, and Kennedy then formed the dissent in Penry v. Lynaugh, 492 U.S. 302 (1989), making the argument more strongly through the voice of Justice Scalia. *See id.* at 351-60 (Scalia, J., dissenting). The four continued the point in McKoy v. North Carolina, 494 U.S. 433 (1990), Justice Kennedy in concurrence, *see id.* at 456-57, and Justice Scalia, joined by the Chief Justice and Justice O'Connor, in dissent, *see id.* at 465-66, 469-71. In Boyde v. California, 494 U.S. 370, 372, 377 (1990), the majority, comprised of Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy, made only passing reference to a state's ability to "structure and shape consideration of mitigating evidence" and the absence of a constitutional requirement that the jury have unfettered discretion in sentencing. Regarding the *Boyde* majority's retreat from the requirement of unfettered discretion in the decision to decline to impose death, one commentator noted that "Justice O'Connor's defection from the old [*Penry*] majority on this issue cemented a new one," which leaned away from the *Woodson-Lockett-Eddings* principles. Berger, *supra* note 339, at 1078 n.67. The plurality in Walton v. Arizona, 497 U.S. 639, 649 (1990) (second emphasis added), consisting of Justice White, the Chief Justice, and Justices O'Connor and Kennedy, opined that "it does not follow from *Lockett* and its progeny that a State is precluded from specifying *how* mitigating circumstances are to be proved." The last two cases, one in 1990 and the last in 1993 and discussed in the text *infra*, found a majority of the Court clearly supporting and employing the distinction that allows states to structure the jury's consideration of mitigating evidence. *See* Saffle v. Parks, 494 U.S. 484 (1990); Johnson v. Texas, 113 S. Ct. 2658 (1993); *see also* Graham v. Collins, 113 S. Ct. 892, 898-903 (discussing the issue in deciding the case under Teague v. Lane, 489 U.S. 288 (1989)); *Graham*, 113 S. Ct. at 903-15 (1993) (Thomas, J., concurring) (arguing that "it is consistent with the Eighth Amendment for States to channel the sentencer's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner").

Justice Scalia has indicated openly, however, that he would overrule the *WoodsonLockett-Eddings* principles. Walton v. Arizona, 497 U.S. 639, 656-674 (1990) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 673 ("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."); *see also* Callins v. Collins, 114 S. Ct. 1127, 1128 (1994) (Scalia, J., concurring in denial of certiorari); Tuilaepa v. California, 114 S. Ct. 2630, 2639 (1994) (Scalia, J., concurring); Richmond v. Lewis, 506 U.S. 40, 53 (1992) (Scalia, J., dissenting); Espinosa v. Florida, 505 U.S. 1079, 1083 (1992) (Scalia, J., dissenting); Sochor v. Florida, 504 U.S. 527, 553 (1992) (Scalia, J., concurring in part and dissenting in part); Payne v. Tennessee, 501 U.S. 808, 833 (1991) (Scalia, J., concurring). For criticism of this

doctrine by distinguishing between the substance of mitigating evidence and the manner of its consideration.[341] The majority found no constitutional infirmity in a state's guiding the jury's use of mitigating evidence by instructing the jury *how* to consider the evidence, so long as the defendant was allowed to present the *substance* of the evidence to the sentencer. It is in this manner, however, that the Court successfully nullified the commands of *Woodson* and its progeny.[342] In so

position, see Gey, *supra* note 26, at 90-102; Howe, *supra* note 214, at 1047-48. Justice Thomas also implied his agreement with Justice Scalia when he advocated the overruling of *Penry, see Graham*, 113 S. Ct. at 913 n.10, and indicated he might overrule *Woodson. See id.* at 908 (stating that "we are not now confronted with a mandatory sentencing provision, and I have no occasion here to flesh out my disagreement with the Court's prohibition of such schemes").

Justice Stevens disagreed with Justice Scalia in *Walton*, arguing that the two doctrines requiring guidance and discretion were constitutionally prescribed and complementary. *Walton*, 497 U.S. at 714-19 (Stevens, J., dissenting). For a discussion of the Scalia-Stevens *Walton* debate, see Howe, *supra* note 35, at 402-18; Steiker & Steiker, *supra* note 263, at 860-64. Justice Blackmun similarly found the tension to be constitutionally required but for the same reason also found it unworkable; in his view, that unworkability rendered the death penalty as a whole unconstitutional. *See* Callins v. Collins, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting from denial of certiorari).

341. *See generally* Sunby, *supra* note 164, at 1190-1206 (discussing "The Attack on *Lockett*'s Rearguard: Controlling the Substance Through the Procedure"). This approach is hereinafter referred to as "the substance-procedure distinction." *Id.* at 1190.

342. *See* Howe, *supra* note 214, at 1048 (arguing that "[s]everal of the Court's decisions after *Penry* have opened the door to states to begin neutralizing the *Lockett* mandate," and citing, for example, Saffle v. Parks, 494 U.S. 484 (1990) and Johnson v. Texas, 113 S. Ct. 2658 (1993)); Sunby, *supra* note 164, at 1150 ("Perhaps most importantly, the distinction ultimately may provide an indirect means to accomplish much of Justice Scalia's goal of removing *Lockett*'s restrictions on state death penalty procedures.").

Another decision that permits state circumvention of the *Woodson-Lockett-Eddings* mandate is Walton v. Arizona, 497 U.S. 639 (1990). Although the decision does not fall within the cases employing the semantic distinction discussed in this section, it nonetheless further assists in the rigging of the evolving standards test and so is relevant to the overall thesis advanced throughout this Article. A plurality of the Court in *Walton* held that states could place the burden on defendants of proving by a preponderance of the evidence the existence of mitigating factors "sufficiently substantial to call for leniency." *Id.* at 649-51 (plurality opinion). Justice White was joined by the Chief Justice and Justices O'Connor and Kennedy.

First, the *Woodson-Lockett-Eddings* problem arises if a defendant cannot meet the proof burden. In that situation, some mitigating evidence will not be considered by the sentencer *even though* the *Lockett* decision had specified that "the [capital] sentencer . . . [can]not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). The *Walton* ruling seems to be in clear conflict with this principle of *Lockett. But see Walton*, 497 U.S. at 649.

Second, the significance of *Walton*'s burden of proof ruling on the evolving standards test is similar to that of those cases discussed here in the text. Specifically, if a state can successfully deprive the jury of consideration of some mitigating evidence relating to the defendant's background or to the circumstances of the crime, then it can increase the sig-

doing, the Court permits states to emphasize aggravating factors, possibly even to the exclusion of mitigating ones. Again, the result is a jurisprudence that, combined with other developments in death penalty law, permits the funneling of jurors' judgments inescapably toward death and renders jurors' judgments questionable as objective indicators of the evolving standard of decency.

The decision in *Saffle v. Parks*,[343] discussed earlier regarding the effects of antisympathy instructions on the evolving standards test,[344] works another noxious effect on the objective nature of that test and, in so doing, illustrates the application of the substance-procedure distinction. The *Parks* Court firmly embraced[345] the substance-procedure distinction it had merely alluded to in *California v. Brown*,[346] and would later employ in *Johnson v. Texas*:[347]

> [The defendant] asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision.[348]

In the *Parks* Court's view, a state's guiding of the jury's consideration of mitigating evidence did not prevent the jury from "considering, weighing, and giving effect to all of the mitigating evidence that [the

nificance of the aggravating evidence by that evidence's mere presence; the fewer items of mitigating evidence the sentencer considers, the fewer are the reasons for declining to impose death. Although the sentencer in *Walton* was the judge, *see Walton*, 497 U.S. at 643 (citing ARIZ. REV. STAT. ANN. § 13-703(B) (1989)), the effect of the burden on what the sentencer eventually considers is the same. The burden of proof requirement in this way alters the jury sentencing index by heightening the chance that a death sentence will result. This decision, too, therefore, affects not only the principles of *Woodson* and its progeny but also the reliability of the jury sentencing prong of the evolving standards test.

343. 494 U.S. 484 (1990). The majority here was comprised of Justice Kennedy, Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia. *Id.* at 485.

344. *See supra* notes 315-324, 338 and accompanying text.

345. *Parks* was before the Court on habeas corpus, or collateral review, and so was controlled by Teague v. Lane, 489 U.S. 288 (1989), which generally precludes the Court from announcing and applying a "new rule" when a case is before it in that posture. *See Parks*, 494 U.S. at 487. Although the Court in *Parks* held that a decision holding antisympathy instructions unconstitutional would constitute a "new rule" and so would not be announced, *id.* at 489, the Court nonetheless "firmly embraced" the substance-procedure distinction to reach even this result.

346. 479 U.S. 538 (1987); *see supra* note 313; *cf.* Sunby, *supra* note 164, at 1207 (finding the Court to have truly employed the distinction for the first time in Walton v. Arizona, 497 U.S. 639 (1990)).

347. 113 S. Ct. 2658 (1993); *see also infra* notes 362-376 and accompanying text.

348. *Parks*, 494 U.S. at 490.

defendant] put before them,"[349] as *Lockett* and *Eddings* commanded that the jury be allowed to do. Rather, in denying the jury the discretion to act on sympathy for the defendant, the state was simply requiring that the jury not sentence "according to its own whims or caprice."[350] At the heart of *Lockett* and *Eddings* was the requirement that the jury be supplied with the information necessary to make a "'reasoned *moral* response,' rather than an emotional one."[351] The state could, therefore, require that the jury use the evidence in that *manner*, to reach a moral result, and prohibit jurors from using the evidence in a way that would pacify their sympathetic feelings.

By drawing this substance-procedure distinction, recognizing that the state may not limit the substance of mitigating evidence[352] but may limit the process or manner of its use, the Court essentially obliterated the constitutional safeguards of *Woodson, Lockett*, and *Eddings*. In fact, the dissent in *Parks* astutely noted:

> [t]he majority struggles mightily to distinguish rules that govern a jury's ability to "consider," "weigh," and "give effect to" mitigating evidence from rules relating to the "*manner* in which [the] mitigating evidence can be considered." This distinction is meaningless for a rule that limits the *manner* in which the jury considers mitigating evidence is unconstitutional if it limits the jury's ability to consider and give effect to that evidence. But under the majority's approach, a law requiring the jury to discount the weight of all, or of certain, mitigating factors would be consistent with *Lockett* so long as the majority could describe the statute as relating to the "manner" in which the jury consid-

349. *Id.* at 491.

350. *Id.* at 493.

351. *Id.* (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The majority assumed, without discussing it, that sympathy has nothing at all to do with a "moral" response from the jurors. *But see* 494 U.S. at 513 (Brennan, J., dissenting) (stating that the "cases have not clearly defined the difference between a 'reasoned moral response' and an 'emotional' one"). The assumption raises interesting jurisprudential issues that, while significant, are beyond the scope of this Article. Other commentators have addressed the "blurred lines" between moral and emotional responses and the jurisprudential issues involved. *See, e.g.*, Dubber, *supra* note 334, at 104-17; Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

352. Because the *Parks* Court was only evaluating the issue in relation to *Teague v. Lane* and whether a ruling for defendant would constitute a "new rule," *see supra* note 294 and accompanying text, most of the opinion was dicta. In ruling, however, that precedent did not dictate a finding of unconstitutionality, the Court effectively ruled that antisympathy instructions would survive constitutional scrutiny and so arguably gave the states the power to preclude jurors' acting on sympathetic responses. *Parks*, 494 U.S. at 490-94; *see also* Dubber, *supra* note 334, at 89 n.19 (recognizing that even though the Court did not technically reach the merits of the issue, the substantive analysis that it employed nonetheless indicated that it would have ruled the same way on the merits).

> ers the evidence despite such a statute's obvious preclusive effect.[353]

This observation lays bare the perceived desire of the Court to temper if not nullify the precepts established in *Woodson* and its progeny. The nullification is in turn a component of the rigging of the evolving standards test, although the relevance of this line of decisions to the rigging is not at once apparent.

In *Parks*, the Court permitted a state to imprison the compassion of the jury, even though the *Woodson* Court had stressed the danger of excluding "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[354] If *Woodson*'s caution was not meant to ensure that the jury must be allowed to consider and give effect to the compassion evoked by defendant's mitigating evidence, then it accomplishes nothing at all. Rather, the statement must mean that the state must not only permit the jury to *hear* mitigating evidence, but must also allow the jury to *feel* whatever compassionate responses that "stem[ ] from the diverse frailties" of this defendant.[355] In this way, *Woodson* and its progeny help to en-

---

353. *Id.* at 504 (Brennan, J., dissenting) (alteration in original) (citations omitted).

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

355. Commentators have identified types of relevant mitigating evidence as including "the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983). Others have said that mitigating evidence includes:

> evidence that a death sentence would be unjust because the defendant's personal responsibility for the offense is lessened by youth, stunted intellectual and emotional growth, mental retardation or impaired capacity, mental or emotional disturbance, provocation by others, insanity, the influence of alcohol or drugs at the time of the offense, or shared or limited participation in the actual crime. . . . [Also included would be evidence] that the defendant suffered tragic or horrible circumstances in his or her formative years, such as abuse, neglect, poverty, or domestic turbulence . . . .

Bilionis, *supra* note 163, at 302-04 (footnotes omitted). Referring to evidence of this kind and advancing a standard for effective assistance of counsel, one commentator recognized the penalty phase determination as "the highly-charged moral *and emotional* issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live." Goodpaster, *supra*, at 334-35 (emphasis added). He added that counsel should present evidence that "may spark in the sentencer the perspective or compassion conducive to mercy . . . [or] *elicit a compassionate response* from the sentencer." *Id.* at 336 (emphasis added). There is thus support for the contention that one of the purposes of mitigating evidence, of the types identified above, is to reach the humanity, compassion, and emotions of jurors who will make the ultimate decision. *See also* Dubber, *supra* note 334, at 110-17 (arguing that individualization, accomplished through defendant's presentation of mitigating evidence, requires recognition and implementation of some appropriate emotional responses). Another commentator has suggested that "cruelty," as used in constitutional provisions forbidding it, results from an absence of mercy. Bruce Ledewitz, *Could the Death Penalty Be a Cruel Punishment?*, 3 WIDENER J. PUB. L. 121, 157 (1993). He

sure that jury sentences indeed reflect the societal evolving standard of decency regarding the death penalty.

The very purpose of mitigating evidence is to allow consideration of this defendant as an individual, with all the factors that went into producing this defendant and this crime. A necessary component of this individualization is the vision of the defendant as a human being, with all the frailties that come with that status. This portrayal and individualization, through the mitigating factors, must of necessity be bound up with any sympathetic reaction. It would be a rare sentencer who could personalize a defendant, judge his or her moral culpability, and yet be able completely to divorce any feelings of sympathy.[356] These feelings are generated by jurors' standards of decency and thus must find recognition in the sentence if the sentence is to be an accurate and reliable index of those standards.

Nonetheless, the *Parks* Court permitted the state to strip the facts of their essence, rendering them sterile and the defendant one dimensional.[357] This process fails to meet constitutional dictate of according the defendant his or her right to an individualized determination[358] and so in itself should render the antisympathy instruction violative of those principles embodied in *Woodson* and its progeny. The process

argues that even if a punishment is just, it still may be "cruel" if merciless: "justice unrelieved by mercy is cruel." *Id.* at 158. The first dictionary definition given for "mercy" is "compassion or forbearance shown to an offender or subject: clemency or kindness extended to someone instead of strictness or severity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1413 (3d. ed. 1986). In providing synonyms, the dictionary further explains: "Mercy, *a word of much emotional force* and hence one applicable to extreme situations, indicates a kindly refraining from inflicting punishment or pain, often a refraining brought about by *genuinely felt compassion and sympathy* . . . ." *Id.* (emphasis added). According to Webster's, then, dispensations of mercy *by definition* involve emotion and sympathy. If "justice unrelieved by mercy" is cruel, and if emotional or sympathetic responses are a *sine qua non* to the dispensation of mercy, then the Court's allowance of antisympathy instructions would render death sentences imposed pursuant to those instructions inherently "cruel."

356. *See generally* Dubber, *supra* note 334, at 110-17; *supra* note 351. A related argument is that any "reasoned moral response" of a sentencer must of necessity include the consideration of sympathetic factors generated by defendant's mitigating evidence. *See supra* note 355.

357. *See Parks*, 494 U.S. 484 (1989).

358. The language in *Woodson* would support this interpretation. The Court emphasized the danger that a death penalty procedure, rather than treating each defendant as an individual, could "treat all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson*, 428 U.S. at 304; *cf.* Dubber, *supra* note 334, at 111 ("The individualized sentencing requirement not only permits but requires that the sentencer consider the very individual significance of the defendant's past and future life.").

should also be identified as one distorting jury sentencing and thus contributing to the rigging of the evolving standards test.

Additionally, and perhaps more importantly, if a sentencer must be allowed to consider and *give effect* to mitigating evidence under *Woodson*, then the only way to give effect to that evidence would be to act, at least in some part, on the sympathy or compassion so produced. By indicating how the sentencer must use the evidence,[359] the state is essentially telling the sentencer what evidence it cannot consider;[360] if a sentencer cannot act on feelings of sympathy inevitably produced by the mitigating evidence, then it cannot give effect to and essentially cannot consider the mitigating evidence.[361] Such a result should clearly be a violation of the precepts of *Woodson, Lockett*, and *Eddings* and is a further distortion of the jury-sentencing prong of the evolving standards test. Removal of mitigating evidence from the sentencing determination can only result in the amplification of aggravating evidence and pitch the sentence toward death. Jury sentencing determinations so manipulated from the outset cannot be reliable, objective indicators of societal standards.

Employment of the substance-procedure distinction to avoid the dictates of *Woodson* has not been limited to the antisympathy cases, however, and so has more far-reaching effects on the evolving stan-

359. Arguably, in *Parks*, the state was not telling the sentencer how to use the evidence, but was only telling it how *not* to use the evidence. It would be a completely different case if the state told the jury not to be swayed by sympathy *but to use the mitigating evidence to give a reasoned moral response. See* 494 U.S. at 514 (Brennan, J., dissenting). Because this extra instruction is not given, however, there is an impermissible risk that the jury will disregard the mitigating evidence altogether, in violation of longstanding constitutional rules, because consideration of it is too intertwined with a sympathetic reaction.

360. *See* Sunby, *supra* note 164, at 1199, 1205 (seeing the "possibility that the procedural 'exception' will swallow *Lockett*'s substantive rule," and recognizing in 1991 that "[w]hat remains to be seen is whether the Court will uphold procedures that allow the states to accomplish indirectly what *Lockett* forbids directly: determining for the sentencer what mitigating evidence may be used in deciding if the death penalty is appropriate").

361. Defendant in *Parks* had argued precisely that:

> his jury could have *interpreted* the antisympathy instruction as barring consideration of mitigating evidence. More specifically, he claims that because much of the mitigating evidence relevant to his culpability also evoked sympathy, a juror who reacted sympathetically to the evidence would have believed that he was not entitled to consider that evidence *at all*—not even for its "moral" weight.

494 U.S. at 498-99 (Brennan, J., dissenting); *see also* Howe, *supra* note 214, at 1048 ("The Court has approved anti-sympathy instructions . . . through which states can suggest to sentencing jurors the irrelevance of a defendant's mitigating evidence."); Dubber, *supra* note 334, at 105. For an argument similar to the one presented here concerning the effect of *Parks* on the sentencer's ability to give effect to or consider mitigating evidence and the desirability of allowing some sympathetic emotions to play a role in the determination of sentence, see Dubber, *supra* note 334, at 98-117.

dards calculus. In *Johnson v. Texas*,[362] the Court used the device in deciding whether the Texas death penalty statute allowed adequate consideration of youth as a mitigating factor.[363]

The *Johnson* Court[364] found that the jury could still give effect to evidence of defendant's youth through the second special issue concerning future dangerousness.[365] The Court explained that the defendant in *Johnson* could have been found less culpable because of his age and that the jury could effectuate that finding by answering "no" to the second special issue on future dangerousness.[366] "As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied."[367] Emphasizing again that the sentencer's discretion regarding the use of mitigating evidence could be "structured" and guided, the Court upheld the Texas scheme under these circumstances.[368]

That the evidence could also become a two-edged sword when used as an aggravator in answering "yes" to the future dangerousness issue was irrelevant to the Eighth Amendment inquiry, according to the majority.[369] The Court distinguished *Penry*, where evidence of defendant's mental retardation could *only* be used as an aggravator; because Penry's mental abilities would never change, and thus arguably he would always be dangerous, the jury had no outlet for a decision that he was nonetheless less culpable.[370] By contrast, because the jury could have given effect to Johnson's evidence by finding him unlikely to be dangerous when he grew up, no violation of the *Woodson, Lockett*, and *Eddings* rules existed.

The concerns raised in *Penry*'s dissent about the virtually unbridled discretion in juries *not* to impose the death penalty, as com-

---

362. 113 S. Ct. 2658 (1993).

363. The Court had been presented with the same issue in Graham v. Collins, 113 S. Ct. 892 (1993), but denied relief to petitioner as a decision would have required application of a "new rule" that was impermissible under Teague v. Lane, 489 U.S. 288 (1989). The Court had also considered a similar challenge in Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality opinion), in which a plurality had found acceptable Texas's "guidance" of the jury's consideration of mitigating evidence. *See supra* note 298 and accompanying text.

364. Justice Kennedy wrote the majority opinion, in which Chief Justice Rehnquist and Justices White, Scalia, and Thomas joined. 113 S. Ct. at 2661. Justices Scalia and Thomas also filed concurring opinions. Justice O'Connor was joined in dissent by Justices Blackmun, Stevens, and Souter.

365. *Id.* at 2669.

366. *Id.* at 2670.

367. *Id.* at 2669 (quoting *Graham*, 113 S. Ct. at 901).

368. *Id.* at 2672.

369. *Id.*

370. *Id.* at 2669-70.

manded by *Woodson* and its progeny, reached their most damaging culmination in *Johnson*. Clearly now the majority ignored the spirit of *Woodson* and condoned a state's "guiding" of a jury's use of mitigating evidence to such an extent that the mitigating *effect* of that evidence could be completely eliminated.[371] By dictating *how* the jury used the evidence, the state could even transform mitigating evidence into aggravating evidence. In the majority's view, as long as the language of *Woodson* was followed and the state did not exclude pieces of evidence, then it mattered not that the spirit was violated.

Justice O'Connor, dissenting with Justices Blackmun, Stevens, and Souter,[372] excoriated the majority for its departure from "the proposition that the sentencer in a capital case must be able to give *full* effect to all mitigating evidence concerning the defendant's character and record and circumstances of the crime."[373] The four dissenters did not agree that the state could so channel the jury's consideration of evidence that the jury could not give that evidence *full mitigating effect*.[374]

In sum, the assault by the new majority[375] on mitigating evidence, and that assault's blatant hostility to defendants facing possible death sentences as illustrated in *Johnson*, is another development that assists

371. Professor Sunby had foreseen this eventuality in 1991 when he stated that "the [substance-procedure] distinction ultimately may provide an indirect means to accomplish much of Justice Scalia's goal of removing *Lockett*'s restrictions on state death penalty procedures." Sunby, *supra* note 164, at 1150. Professor Howe has more recently catalogued the effect of *Johnson* as "an even more frontal assault on the *Lockett* mandate." Howe, *supra* note 214, at 1049. Professor Howe argued that, under the Texas special issues statute, "the sentencer could not effectively consider the evidence regarding the offender's deserts," *id.* at 1050, and yet the Supreme Court upheld the Texas scheme because it allowed the sentencer "the *opportunity* to consider a defendant's evidence for *some* mitigating purpose." *Id.* (emphasis added) (footnote omitted). For another discussion of *Johnson*'s assault on the *Lockett* individualization and mitigating evidence principles, see J. Michael Brown, Note, *Eighth Amendment-Capital Sentencing Instructions*, 84 J. CRIM. L. & CRIMINOLOGY 854, 874-82 (1994).

372. Johnson v. Texas, 113 S. Ct. 2658, 2672 (1993) (O'Connor, J., dissenting).

373. *Id.* at 2675 (emphasis added).

374. Justice O'Connor quoted *McCleskey v. Kemp* to support her position: "'*the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.*'" *Id.* at 2676-77 (quoting McCleskey v. Kemp, 481 U.S. 279, 305 (1987)) (emphasis by Justice O'Connor). Justice O'Connor's opinion here may seem contradictory to her joining of the majority in *Parks*, in which the Court permitted the guidance of the jury in its use of sympathetic responses. She reconciled the two, however, by arguing that sympathy has nothing at all to do with the jury's "'reasoned *moral* response'"; this response is how the jury "gives effect" to defendant's mitigating evidence. *Id.* at 2680 (quoting Saffle v. Parks, 494 U.S. 484, 493 (1990)).

375. Justice Thomas was one of the new members of the Court. He now joined the four who had comprised the minority on this issue in *Penry* and *Franklin v. Lynaugh* to make up the majority in this case.

in the creation of a pro-death construct that warps the results of the evolving standards test. Under this line of doctrine, as long as a state has constitutionally "guided" the jury's consideration of mitigating evidence, there is no constitutional infirmity in the possibility that a jury would give aggravating effect to the evidence defendant presented in mitigation, as allowed under the Texas scheme. This consequence is acceptable to the Court even though the jury's prerogative to use the evidence instead as an aggravator in an appropriate case[376] would negate any cogency the mitigating evidence might have. The impact of this development on the evolving standards test is thus twofold: first, the negation of the evidence's effectiveness *as mitigating evidence* essentially removes the evidence from the sentencing scales and so increases the dominance of the aggravators in the balance. Second, the metamorphosis of mitigating evidence into aggravating evidence could literally increase the dominance of the aggravating evidence itself by adding yet another piece to it. Both of these contortions of the jury's consideration of mitigating evidence invidiously tilt the scales toward death and thus toward more jury determinations that death is an appropriate sentence. The Court's mitigating evidence jurisprudence thus skews the jury sentencing prong of the evolving standards test and renders it a nonobjective and unreliable index.

The rulings on antisympathy instructions only add to the pro-death effects created by the *Johnson* ruling. By precluding the jury's sympathetic response, those compassionate standards of decency are removed from the sentencing process. Cutting the link between the jury and the sentence again renders the sentence a questionable indicator of society's standards. A further effect is worked when compassionate impulses that can only favor life are wholly silenced; the inevitable consequence is that a defendant's chances for life are diminished while the odds for death are increased. The sentence, as a reflection of the evolving standard, is no longer reliable since it has been further artificially directed toward death.

In addition, the confusion among jurors that would seem inevitably to result from the antisympathy instructions could lead the jury to ignore mitigating evidence.[377] By blessing the use of antisympathy in-

376. *See Johnson*, 113 S.Ct. at 2672.

377. Two researchers have found that juror confusion over burdens of proof and other aspects of the capital sentencing process "works against the defendant because the jurors' strong initial inclination is to sentence to death." Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 2 (1993). They elaborated: "indecision tends to be resolved in favor of death. When jurors report predeliberation indecision about either guilt or sentence, the undecided jurors tend to vote

structions, the *Parks* decision allows the state somewhat surreptitiously to heighten the emphasis placed on aggravators and so helps to skew a sentencer's discretion toward a death decision that is again not reliable.

Finally, and as more generally argued by the *Parks* dissent,[378] under the guise of instructing the jury how to use the evidence rather than restricting what the jury can consider, any state could more affirmatively "guide" the jury's discretion regarding the use of mitigating factors in ways that subtly but purposely distract the jury from according the mitigating evidence any weight or completely prevent the jury from giving *mitigating* effect to the evidence. The inescapable consequence would again be greater emphasis on the aggravators; the vacuum created by the absence of mitigating factors would be filled by, and the penalty phase would thus be dominated by, evidence tending to prove the existence of the aggravators. The inexorable result is the tipping of the scales toward a death determination and a consequent impugning, at the outset, of jury sentencing behavior as a reliable index of society's views.

Thus, through a challenge to the Texas statute and its quirky manipulation of the jury's discretion to decline to impose death, together with an attack on evidence evocative of sympathy, the challengers to the *Woodson* line of cases were able successfully to unravel the net of mercy provided by the Court's longstanding jurisprudence with respect to mitigating circumstances. Again, the result is a jurisprudence that, combined with other developments in death penalty law, permits the funneling of jurors' judgments inescapably toward death. The perverting effects on the evolving standards test are undeniable.

3. *Sanctioning of Vague Definitions of Aggravators Gives Additional Breadth to Death Class*

Since *Gregg*, and more recently in *Zant v. Stephens*, the Court has emphasized that "an aggravating circumstance must genuinely narrow

for death," in part because confused jurors choose the default sentence, or death. *Id.* at 12. "[A] defendant with a confused jury may receive a death sentence by default, without having a chance to benefit from legal standards designed to give him a chance for life." *Id.* In this context, jurors confused over how they are to give effect to mitigating evidence, if not through some sympathetic impulse, then may, according to this study, choose death as the default sentence. *See also* Mann, *supra* note 339, at 535 ("[T]hese instructions pose a significant risk of confusing jurors regarding the nature of the evidence they should focus their attention on, thus causing the jurors to fail to exercise their judgment with respect to mitigating evidence that they might have found compelling.") (citing California v. Brown, 479 U.S. at 562-63 (Blackmun, J., dissenting)).

378. *See supra* text accompanying note 353.

the class of persons eligible for the death penalty."[379] Just as the Court has permitted the restriction of a jury's use of mitigating evidence, the Court has conversely and deftly allowed broader definition of aggravating factors, which, concomitantly, permits the states to expand subtly the class of those sentenced to death. This aspect of the Court's death penalty jurisprudence further seals the fate of the capital defendant and thus influences the calculation of the evolving standards test.

In *Arave v. Creech*, the Court gave states greater latitude to employ vague aggravating factors.[380] The statutory aggravating circumstance at issue in *Creech* was that "'[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.'"[381] The Idaho Supreme Court had provided the following for a narrowing construction: "'"the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."'"[382] Despite that a portion of the limiting construction duplicated the language of the aggravator itself, that part describing the "utmost . . . disregard for human life," the United States Supreme Court found this aggravator sufficiently channeled the sentencer's discretion to survive an Eighth Amendment challenge.[383]

379. Zant v. Stephens, 462 U.S. 862, 877 (1983); *see also* Gregg v. Georgia, 428 U.S. 153, 189, 199 (1976).

380. 113 S. Ct. 1534 (1993); *cf.* Cheri L. Bugajski, Recent Decisions, 32 DUQ. L. REV. 347, 359 (1994) ("[W]hen the United States Supreme Court announced its holding that the 'utter disregard' aggravating circumstance was constitutional, the Court took a step backwards and reinstated the very arbitrariness . . . it sought to avoid in *Furman v. Georgia*."); Daryl Kessler, Note, *Eighth Amendment—Sentencer Discretion in Capital Sentencing Schemes*, 84 J. CRIM. L. & CRIMINOLOGY 827, 853 (1994) ("[T]he Court has opened the door to the validation of capital sentencing schemes that might defy definition by all but the Justices of the Court," and by so doing has set a dangerous precedent.). The Court's decision in Payne v. Tennessee, 501 U.S. 808 (1991) also broadened the scope of permissible aggravating evidence when it sanctioned the state's use of victim impact evidence. *See supra* notes 328-334 and accompanying text. *Payne* thus works two effects on jury decision-making and hence on the evolving standards test: first, it colludes with decisions allowing antisympathy instructions to turn the jury's emotions toward death; second, it permits the state to pad its case at the sentencing phase with victim impact evidence, which apparently need not be relevant to specific enumerated aggravators, and so to expand the scope of aggravation.

381. 113 S. Ct. at 1538 (quoting IDAHO CODE § 19-2515(g)(6) (1987)) (alteration in original).

382. *Id.* at 1539 (quoting State v. Creech, 670 P.2d 463, 471 (Idaho 1983) (quoting State v. Osborn, 631 P.2d 187, 200-01 (Idaho 1981))).

383. *Id.* at 1542, 1543.

In reaching its decision, the Court[384] relied on dictionary definitions of the terms "cold-blooded" and "pitiless," which it distilled down to "kill[ing] without feeling or sympathy."[385] An aggravator that "[i]n ordinary usage" limited death sentences to those that involved "a killer who kills without feeling or sympathy," the Court reasoned, effectively performed the narrowing function required of aggravators under *Gregg* and its progeny.[386] The Court then dismissed charges that the term "cold-blooded" applied to whatever murder the auditory beholder thought it should: "[w]e are not faced with [subjective] pejorative adjectives such as 'especially heinous, atrocious, or cruel,'" but with a word that described the *fact* of a defendant's state of mind, which a jury could objectively ascertain from the circumstances of the crime.[387] Because the state provided a "narrowing" construction that was objective, admitted of no ambiguity, and narrowed the class of those to be sentenced to death, the aggravator withstood this vagueness challenge.

The Court's reasoning is problematic for a number of reasons. First, the Court provided a construction to the state court's construction of its seemingly vague aggravator and then found that twice-removed construction to be constitutional.[388] Hence, when it found the state's judicial construction of "cold-blooded" to be definite and not vague, it actually found *its own* construction, "acts without feeling or sympathy," to be nonvague.[389] Not only does the Court's very need to define "cold-blooded" demonstrate the vagueness of the term, but in conflating the state's judicial construction with its own, the Court also

384. Justice O'Connor authored the opinion. Others making up the majority included Chief Justice Rehnquist and Justices White, Scalia, Kennedy, Souter, and Thomas. *Id.* at 1537.

385. *Id.* at 1541; *see infra* note 399. The Court later described the terms to mean "acts without feeling or sympathy." *See Creech*, 113 S.Ct. at 1542.

386. *Creech*, 113 S.Ct. at 1541, 1542.

387. *Id.* at 1541-42.

388. The dissent strenuously objected to this twist, stating that "a 'facial' challenge of this nature . . . cannot be defeated merely by a demonstration that there exists a narrowing way to apply the contested language. The entire point of the challenge is that the language's susceptibility to a *variety* of interpretations is what makes it (facially) unconstitutional." *Id.* at 1546 (Blackmun, J., dissenting). One writer noted that "the Court merely substituted one admittedly vague and broad phrase ('utter disregard for human life') with another ('the utmost callous disregard for human life, i.e., the cold-blooded, pitiless slayer')." Bugajski, *supra* note 380, at 358; *see also infra* notes 391-392.

389. *See Creech*, 113 S. Ct. at 1542. For instance, in comparing this construction to that in *Walton*, the Court stated, "[w]hether a defendant 'relishes' or derives 'pleasure' from his crime arguably may be easier to determine than whether he *acts without feeling or sympathy* . . . ." *Id.* (emphasis added). The Court had also defined "cold-bloodedness" to mean "kills without feeling or sympathy." *Id.* at 1541.

demonstrated how far it will go in its proclivity to insulate death sentences from constitutional challenge.[390]

Moreover, as the dissent cogently argued, the majority erred in refusing to admit that the term "cold-blooded" can be applied to many cases that fit outside the definition constructed by the majority.[391] A jury will be applying the term "cold-blooded," not the Court's artful definition, and so it is the ambiguity of that term that must be assessed.[392] Because in everyday parlance people use the term to describe virtually any murder, despite the majority's contention to the contrary, the words chosen by the state to limit the sentencer's discretion to impose the death penalty fail to achieve that constitutional channeling to impose the penalty only on those who kill without feeling or sympathy.[393] "A person of ordinary sensibility could fairly characterize almost every murder as ['cold-blooded']."[394] The words could potentially sweep all first-degree murderers into the net and permit imposition of death in more cases than is warranted, in clear violation of the Eighth Amendment as construed in *Furman, Gregg*, and subsequent cases.[395]

The breadth of the terms "cold-blooded" and "pitiless" becomes clearer when contrasted with the terms used to narrow the Arizona statute in *Walton v. Arizona*. Although not the model of clarity them-

390. *Cf.* Kessler, *supra* note 380, at 850 ("[W]hen presented with an unconstitutional construction in [*Creech*], the Court went to great pains to derive a serviceable definition."); Diale Taliaferro, Casenote, 72 U. DET. MERCY L. REV. 229, 236 (1994) (arguing that the Court "established precedent for the practice of engaging upon its own construction of arguably vague state statutes in an effort to make that statute: (1) fall in line with constitutional requirements; and (2) fall in line with precedent").

391. *Creech*, 113 S. Ct. at 1547 (Blackmun, J., dissenting); *see also* Kessler, *supra* note 380, at 851 (stating that "[i]t is not at all apparent how one would objectively determine whether an individual is a 'cold-blooded pitiless slayer'"); Benjamin J. Lantz, Comment, Arave v. Creech: *A "Cold-Blooded, Pitiless" Disregard for Constitutional Standards*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 97, 116-17 (1995) (agreeing that the term "cold-blooded" is vague and could apply to many cases).

392. A commentator has observed that we have no way of knowing how the state courts themselves interpreted the terms "cold-blooded" and "pitiless slayer," so the result was that "the Court gave the terms meaning which: (1) the Idaho Supreme Court never did; and (2) were vague in themselves." Taliaferro, *supra* note 390, at 236, 237.

393. *Creech*, 113 S. Ct. at 1547; *see also* Bugajski, *supra* note 380, at 359; Kessler, *supra* note 380, at 850-51; Lantz, *supra* note 391, at 123.

394. Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980).

395. *Creech*, 113 S. Ct. at 1548; *cf.* Bugajski, *supra* note 380, at 359 (arguing that by sanctioning a vague but supposedly narrowing construction, the Court has once again allowed arbitrariness to enter the process); Kessler, *supra* note 380, at 351-52 (finding that the vague state court construction failed to narrow the class of those eligible for the death penalty); Taliaferro, *supra* note 390, at 237-39, 240 (agreeing with the dissent in *Creech* that the supposed narrowing construction failed at its purpose).

selves,[396] they nonetheless arguably provide some guidance to a sentencer faced with the sentencing task. Those terms restricted the sentencer to cases in which the offender inflicted mental anguish or physical abuse, relished the murder, or showed indifference to the victim's suffering and found pleasure in the killing.[397] Arguably, those terms in *Walton* admit of less ambiguity in the mind of the average person, precisely because they do describe a state of mind that can be determined from the circumstances, as opposed to the term "cold-blooded,"[398] on which the *Creech* majority substantially relied.[399] As stressed previously, the term "cold-blooded" *by itself* does not so clearly refer, "[i]n ordinary usage," only to killings without emotion. If it did, the majority would not have had to so define it in this case.

In yet another instance of the Court's disturbing inclinations toward rulings that work distortions on jury sentencing behavior, the Court in *Creech* endorsed vague statutory language by validating another ambiguous construction. Even more disturbing is the Court's

396. Arguably, the terms employed by Arizona courts are not so certain as, for example, a requirement that the murder have involved some form of torture, a limiting device apparently approved in Maynard v. Cartwright, 486 U.S. 356, 365 (1988). *See Walton*, 497 U.S. 639, 697-99 (1990) (Blackmun, J., dissenting). A commentator has voiced tepid approval, if indeed it could be called approval, of the *Walton* narrowed aggravator by describing it as "an abstractly adequate definition." Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643, 1654 (1993). But that narrowed construction may provide the jury with a way to sort out death-appropriate cases from others. *But see Walton*, 497 U.S. at 690-99 (Blackmun, J., dissenting).

397. *Walton*, 497 U.S. at 654-55.

398. The *Creech* Court itself even acknowledged that "the question is close." 113 S. Ct. at 1542.

399. The *Creech* Court stated,

> We acknowledge that . . . the word "pitiless," standing alone, might not narrow the class of defendants eligible for the death penalty. A sentencing judge might conclude that every first-degree murderer is "pitiless," because it is difficult to imagine how a person with any mercy or compassion could kill another human being without justification. Given the statutory scheme, however, we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded."

113 S. Ct. at 1543. Although the Court here essentially admitted the vagueness of the purported narrowing construction "pitiless," it nonetheless upheld the use of a term, "cold-blooded," to which it had attributed a definition nearly identical to that given to "pitiless": the Court defined "pitiless" to mean "devoid of, or unmoved by, mercy or compassion." *Id.* at 1541 (citing WEBSTER'S, *supra* note 355, at 1726). It had defined "cold-blooded" as "'marked by absence of warm feelings: without consideration, compunction, or clemency.'" *Id.* (quoting WEBSTER'S, *supra* note 355, at 442). It then acknowledged that these definitions "mirror" each other, *id.*, and summarized by indicating that "cold-blooded" meant "kill[ing] without feeling or sympathy." *Id.* Justice Blackmun criticized this inconsistency in dissent and argued that if one was unconstitutionally vague, the other was also. *Id.* at 1546 (Blackmun, J., dissenting); *see also* Lantz, *supra* note 391, at 117-21; Taliaferro, *supra* note 390, at 238.

willingness to provide the state with a construction that the Court *could* find constitutional. Neither of these developments bodes well for capital defendants or for the evolving standards test. By insulating from challenge a vague but supposedly "narrowing" construction, and by seemingly going out of its way to do it, the Court opens the door to more death sentences, imposed when more and more cases are able to fall within the ambit of the aggravating circumstances; "a vague aggravator creates the risk of an arbitrary thumb on death's side of the scale . . . ."[400] Again, more death sentences then factor into the element measuring jury sentencing behavior and evince an evolving standard of death. The Court's own jurisprudence in this additional way thus assists in predetermining the result of the constitutional analysis.

4. Death Qualification of Juries Further Stacks the Deck

Yet another strand of death penalty jurisprudence adds to the mix to demonstrate the rigging of the evolving standards test. Because the Court has found constitutional states' practices of "death qualifying" juries, sentences can be returned that fail to reflect the views of those members of society who oppose the death penalty. As a result and in this additional way, jury sentencing behavior, an integral component of the evolving standards test for cruel and unusual punishments, falls woefully short as an accurate index of society's views.

Before the *Furman* case held completely discretionary death penalty statutes unconstitutional,[401] the Supreme Court had held in *Witherspoon v. Illinois* that "a sentence of death cannot [constitutionally] be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[402] Unless the venireperson

400. Tuilaepa v. California, 114 S. Ct. 2630, 2642 (1994) (Blackmun, J., dissenting).

401. 408 U.S. 238 (1972). In subsequent decisions, however, the Court has indicated that, even though unguided discretion of the pre-*Furman* era no longer exists, the principles articulated in Witherspoon v. Illinois, 391 U.S. 510 (1968), still direct this area. *See, e.g.*, Morgan v. Illinois, 504 U.S. 719, 731 n.6 (1992); Adams v. Texas, 448 U.S. 38, 46 (1980).

402. 391 U.S. 510, 522 (1968). The Court relied on the Sixth Amendment and Fourteenth Amendment right to an impartial jury. *Id.* at 518; *see also* Wainwright v. Witt, 469 U.S. 412, 416 (1985).

The Court was unable to decide, on the evidence presented, whether the Constitution prohibited exclusion of these objectors from the guilt phase of a capital case. 391 U.S. at 517-18. It decided later, in Lockhart v. McCree, 476 U.S. 162, 171-73 (1986), that there still was not enough evidence of death-qualified jurors' predispositions toward guilt to announce a per se rule regarding the exclusion of these jurors from the guilt phase. *See also* Buchanan v. Kentucky, 483 U.S. 402, 414-15 (1987) (holding in *McCree* controlled claim of

stated unambiguously that he or she would never impose the penalty in any case, the juror could not be stricken for cause.[403] Those constitutionally stricken under this case came to be called "*Witherspoon*-excludables."[404]

The Court reasoned that people who opposed capital punishment could nonetheless make discretionary judgments about life and death and so fulfill their obligations as jurors.[405] If these people were excluded, however, the remaining jury would be unable to do what it was charged by law to do: "express the conscience of the community on the ultimate question of life or death."[406] Rather, the resulting jury would be one "uncommonly willing to condemn a man to die."[407] Recognizing the significance of jury decisionmaking in the computation of societal standards of decency, the Court elaborated:

> one of the most important functions any jury can perform in making . . . a selection [between life and death] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."[408]

The removal from the jury pool of some portions of society therefore can break the link between the penal system and societal standards of decency, skew the results of the sentencing process by producing greater numbers of death sentences, and hence affect the constitutional determination of what is decent and not cruel and unusual.

---

noncapital defendant in joint trial with capital defendant that death qualification prior to guilt phase violated noncapital defendant's Sixth and Fourteenth Amendment rights).

403. The Court elaborated in a footnote:

> Just as veniremen cannot be excluded for cause on the ground that they hold [conscientious or religious objections to the death penalty], so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. . . . The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

391 U.S. at 522 n.21. Opposition in principle to the death penalty, then, under *Witherspoon*, did not alone justify striking for cause. *Id.* at 520.

404. *See, e.g., Buchanan*, 483 U.S. at 407-08 n.6; *Lockhart*, 476 U.S. at 167 & n.1. For an analysis of *Witherspoon*, its impact, and the problems of application it created, see Eric Schnapper, *Taking* Witherspoon *Seriously: The Search for Death Qualified Jurors*, 62 TEX. L. REV. 977 (1984).

405. *Witherspoon*, 391 U.S. at 519.

406. *Id.*

407. *Id.* at 521.

408. *Id.* at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

Significantly, the *Witherspoon* Court indicated in a footnote that the striking for cause of venirepersons *would* be appropriate on the grounds that they "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."[409] The question nevertheless later arose whether a juror's qualms about the death penalty had to be so absolute in order for him or her to be excludable for cause, or whether the juror had to be unequivocal in his or her rejection of the death penalty in all cases before exclusion would be constitutional.[410]

Because of this perceived unresolved question, a pivotal decision in the evolution of this line of doctrine is *Adams v. Texas*,[411] which purported to apply the *Witherspoon* standard to Texas's bifurcated death penalty scheme.[412] The *Adams* Court had gleaned the following standard from precedent:

> [the line of cases since *Witherspoon*] establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.[413]

Despite the addition of the "substantially impair" language to the *Witherspoon* standard, it was nonetheless clear that the *Adams* Court focused on jurors' inability to "follow the law or obey their oaths."[414]

409. *Id.* at 522 n.21; *see also supra* note 403. This is the oft-cited "footnote 21." *See* Wainwright v. Witt, 469 U.S. 412, 418-19 (1985). *Witherspoon's* footnote nine is also relevant to this proposition:

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

391 U.S. at 515-16 n.9; *Wainwright*, 469 U.S. at 418-19. One commentator has dubbed the "requirement of unmistakable clarity . . . the linchpin of *Witherspoon*." Schnapper, *supra* note 404, at 990.

410. *See* text accompanying *infra* notes 418-421.

411. 448 U.S. 38 (1980).

412. *Id.* at 45; see *supra* notes 268-270 and accompanying text for a discussion of the Texas scheme. The Texas scheme differed from the one at issue in *Witherspoon* in that the former scheme was bifurcated, existed in post-*Furman* days when a jury's discretion to impose death was not unfettered, and did not require the jury directly to impose the penalty. *See* 448 U.S. at 45-46. Nonetheless, because Texas juries still exercised a range of discretion, albeit less of a range, the *Witherspoon* principles still applied. *Id.* at 46-47 & n.4.

413. *Adams*, 448 U.S. at 45 (citing Lockett v. Ohio, 438 U.S. 586, 595-96 (1978) and Boulden v. Holman, 394 U.S. 478, 483-84 (1969)).

414. *Adams*, 448 U.S. at 48; *see also* John C. Belt, Note, Morgan v. Illinois: *The Right to Balance Capital Sentencing Juries as to Their Views on the Death Sentence is Finally Granted to Defendants*, 24 N.M. L. REV. 145, 154 (1994) ("[M]ost courts that have followed *Adams* interpreted the 'substantial impairment' language to be a clear endorsement of the

The Court stated, "[w]e repeat that the State may bar from jury service those whose beliefs about capital punishment *would* lead them to ignore the law or violate their oaths."[415] The state could *not* exclude, however, those who "frankly concede that the prospects of the death penalty *may* affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt."[416] Clearly then, the *Adams* Court did not dilute the rule of *Witherspoon* that the juror make unmistakably clear, as a prerequisite to the state's striking for cause, his or her inability to follow the law or obey the oath because of opposition to the penalty.

The Court therefore recognized that constitutional guarantees of an impartial jury require that the defendant be sentenced by a jury from which are not excluded those whose convictions may merely "affect" their judgments; the very nature of the jury system is such that juries will inevitably be composed of people who will make judgments and assess facts based upon their own views and beliefs.[417] Excluding those who do not make clear their inability to perform their duties thus risks the exclusion of a discrete class and hence the seating of a partial jury. Fidelity to the strict *Witherspoon* requirement is essential to the production of a jury whose decisions truly represent the evolving standard of decency in society.

Witherspoon standard . . . ."); Valerie T. Rosenson, Note, Wainwright v. Witt: *The Court Casts a False Light Backward*, 66 B.U. L. REV. 311, 327 (1986) ("*Adams* interpreted the *Witherspoon* test as a general recognition of the state's legitimate interest in obtaining jurors who will follow their instructions and obey their oaths.").

415. *Adams*, 448 U.S. at 50 (emphasis added). Nowhere has the Court clearly explained why a juror's refusal to sentence to death, based on principle, constitutes a failure to "follow the law or obey the oath." *Id.* The Court's jurisprudence preserves the prerogative of the jury to grant mercy to a defendant, to accord mitigating weight to any aspect of the defendant's character and record and circumstances of the crime, and essentially to have discretion to *decline* to impose death. *See supra* notes 244-263 and accompanying text. *But cf.* notes 339-374 and accompanying text (indicating a trend in the Court to allow states to guide sentencers' discretion even regarding mitigating factors). Those with scruples against the ultimate penalty could arguably "follow the law" when they deemed each case worthy of mercy and exercised their discretion to decline to impose death. *Cf.* Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1078 (1985) ("There is no objective right answer. The discretionary sentencing decision—life or death—is entirely subjective. *Sentencing jurors obey their oaths simply by exercising their moral judgments* . . . .") (emphasis added). Because this Article is only examining the effect of these decisions on the application of the evolving standards test, however, whether the Court is correct in its disposition of *Witherspoon* or any of its progeny is a question beyond the scope of this Article.

416. *Adams*, 448 U.S. at 50 (emphasis added).

417. *Id.*

In professing an attempt to settle questions purportedly created by precedent such as *Adams*, the Court in *Wainwright v. Witt*[418] substantially relaxed[419] the standard set by the *Witherspoon* Court, thereby signalling the application of the pro-death approach to juror exclusion cases. Rather than seeing in *Adams*'s distillation of precedent the implicit inclusion of the *Witherspoon* "unmistakably clear" standard, the *Witt* Court saw exclusion: "the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof."[420]

Constricting the law, the Court sanctioned the *Adams* standard as the proper test, but absent "*Witherspoon*'s reference to 'automatic' decisionmaking[;] this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.'"[421] This jettisoning of the higher threshold of proof makes it much easier for the state to challenge a juror for cause if the juror exhibits at least some hesitancy

418. 469 U.S. 412 (1985). Justice Rehnquist wrote the majority opinion, in which Chief Justice Burger and Justices White, Blackmun, Powell, and O'Connor joined. *Id.* at 413. Justice Stevens concurred in the judgment only, protesting that much of the majority's opinion was "inconsistent with the standard announced in *Adams v. Texas*, which the entire Court continues to endorse today." *Id.* at 436 (citation omitted). Justice Marshall joined Justice Brennan in dissent. *Id.* at 439 (Brennan, J., dissenting).

419. As Justice Brennan noted in dissent, the majority in *Witt* viewed *Adams* as a retrenchment from the *Witherspoon* principles, when *Witt* actually provided the definitive curtailment of *Witherspoon*'s reach. *See Witt*, 469 U.S. at 450-53 (Brennan, J., dissenting); *see also* Belt, *supra* note 414, at 154 ("*Witt* was the first case to treat *Adams* as creating a new standard."). Another commentator has also noted that "[t]his most recent formulation [in *Witt*] of the standard for the exclusion of opponents of capital punishment from death penalty trial juries expands the range of prosecutorial challenges beyond that which had been thought permissible under [*Witherspoon*]." F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 IND. L.J. 295, 296 n.7 (1987); *see also* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); *id.* at 1785, 1786 (arguing that "*Witt* . . . posit[ed] a substantive standard that invited state trial judges to exclude more jurors than before . . . ," and that it "effectively dismantle[d] *Witherspoon*"); Geimer, *supra* note 37, at 775 n.184 (arguing that, in *Witt*, the Court "effectively abandoned serious review of trial court exclusion of jurors with reservations about the death penalty"); Belt, *supra* note 414, at 155 ("[T]he Supreme Court significantly reduced the standard of proof required in excluding capital sentencing jurors."); Rosenson, *supra* note 414, at 328-29 ("The *Witt* Court's dismissal of the unmistakable clarity standard results in an increased ability to exclude veniremembers who have feelings against the death penalty.").

420. *Witt*, 469 U.S. at 421.

421. *Id.* at 424; *see also id.* at 424 n.5 (stating "we simply modify the test stated in *Witherspoon*'s footnote twenty-one to hold that the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths"). One commentator even suggested that *Witt* effectively overruled *Witherspoon*. *See The Supreme Court, 1984 Term*, Leading Cases, 99 HARV. L. REV. 120, 127-28 (1985) [hereinafter *The Supreme Court*].

regarding his or her ability to impose the death penalty.[422] The danger then is that the jury not only may be "uncommonly willing to condemn a man to die,"[423] but also is unrepresentative of some segment of society that opposes capital punishment to some degree.

Even if the Court is correct that the Sixth and Fourteenth Amendments do not require the heightened *Witherspoon* standard, the consequences of all of these holdings for the evolving standards test should be obvious. In its quest to procure a jury that will enforce the death penalty, the prosecution can constitutionally exclude those segments of society who would not or who simply might not enforce it.[424] If opponents of the death penalty can be excluded without une-

422. *Cf. supra* note 419. In naming the "unmistakable clarity" aspect of *Witherspoon* the "linchpin" of its protections, a commentator articulated the reason for that clarity requirement. *See* Schnapper, *supra* note 404, at 990. He argued essentially that unmistakable clarity was required for "implementing the majority's fundamental premise that the disposition of challenges to scrupled jurors must be based on what those jurors actually say, not on what a judge assumes or infers that the jurors feel, mean, or might have said had they been asked." *Id.* The *Witherspoon* majority's premise was clearly not shared by the *Witt* Court, as is evident from the latter's annihilation of the requirement and consequent apparent approval of a judge's "assum[ption] or infer[ence] about what a juror might feel, mean, or might have said." *Id.*

Schnapper's research also indicated that "the attitude of individual veniremen toward the death penalty is often as uncertain, divided, and wavering as that of society itself." *Id.* at 1077. For that reason, the *Witt* decision is all the more damaging in its impact on the pro-death composition of the jury, because hesitancy in responding to questions about their "scruples" and ability to follow the law will much more easily lead to exclusion of those hesitant jurors.

Further protecting the exclusion of these jurors is the standard of review on appeal; the Court in *Witt* recognized that a judge's finding of juror bias was one of fact and so accorded a presumption of correctness, either on direct appeal or collateral review. 469 U.S. at 427-29. A commentator has argued that this standard of review, or lack of it, "insulat[es] any such [*Witt*] exclusion from federal constitutional review," Burt, *supra* note 419, at 1785, and that the "'presumption of correctness' is likely to be irrebuttable." *Id.* at 1786; *see also* Rosenson, *supra* note 414, at 337-38.

For other analyses of *Witherspoon, Adams*, and *Witt*, see Burt, *supra* note 419, at 1746-51, 1785-86; Gillers, *supra* note 415, at 1064-84; Belt, *supra* note 414; Rosenson, *supra* note 414; *The Supreme Court, supra* note 421.

423. *Witherspoon*, 391 U.S. at 521.

424. Justice Black had seen the *Witherspoon* decision as "making it impossible for States to get juries that will enforce the death penalty." *Witherspoon*, 391 U.S. at 532 (Black, J., dissenting). Thus, there is support for the proposition that exclusion of opponents assures that the death penalty will be enforced, that death sentences will be imposed, and that opponents will not subvert the process by preventing imposition of death sentences. The necessary by-product of that assurance, however, is a skewing of the evolving standard of decency.

One commentator has noted the possibility of subversion of the process by death penalty opponents, but has argued nonetheless that opponents' presence on the jury is required. To deal with the possibility of subversion, he has proposed that states be able to repeal a requirement of juror unanimity at sentencing. *See* Gillers, *supra* note 339, at 89-97.

quivocal proof that they can nonetheless serve faithfully as jurors, the remainder of the pool consists of those who are more ready, willing, and able to render a death sentence.[425] The jury may then in some fashion be more disposed to sentence to death.[426] In that event, jury-imposed death sentences are unreliable as an expression of the conscience of the community or society's standard of decency.[427] The rigging of the evolving standards test comes into sharper focus as it becomes clearer that the indicia used to determine the evolving standards are anything but objective.

Even assuming again, however, that jurors with scruples against the death penalty can ignore those convictions and serve on a jury, and even if the resultant jury is no more prone to sentence to death, the skewing effect on the evolving standards test remains. The Court in two subsequent cases reminded defendants that:

> not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases

425. Another commentator has argued that "[t]he state's ability to stack the jury against the accused through the death qualification process is even greater than the majority in [Lockhart v. McCree, 476 U.S. 162 (1986)] was willing to acknowledge." Schornhorst, *supra* note 419, at 322-23. He explained:

> The prosecutor will challenge peremptorily prospective jurors whose doubts about the death penalty are not sufficiently strong to justify exclusion by way of the *Witherspoon/Witt* criteria, thereby increasing the jury's tilt toward the state. Since the percentage of persons disfavoring capital punishment is decreasing, . . . the state will not only be able to exclude most of the "soft" jurors, but also to distort the representativeness of the jury. The defendant, on the other hand, is likely soon to run out of his or her equal number of peremptory challenges if the defendant exercises them to exclude people who favor the death penalty. The defendant will, in the end, be able to exclude only the most avid capital punishment devotees.

Id. at 323 (footnotes omitted).

426. Another commentator observed that "[t]he exclusion of *any* scrupled juror, whether protected by *Witherspoon* or not, benefits a prosecutor seeking the death penalty," Schnapper, *supra* note 404, at 992, ostensibly because that exclusion better ensures a jury that is more likely to return a death sentence. Studies have shown, too, that even the death-qualification process in itself produces a jury that is more likely to sentence a defendant to death. *See* Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 129 (1984) (finding that the process "led jurors to choose the death penalty as an appropriate punishment much more frequently than persons not exposed to it").

427. *Cf.* Stanford v. Kentucky, 492 U.S. 361, 387 n.3 (1989) (Brennan, J., dissenting) ("Capital sentences for juveniles would presumably be more unusual still were capital juries drawn from a cross section of our society, rather than excluding many who oppose capital punishment, . . . a fact that renders capital jury sentences a distinctly weighted measure of contemporary standards.") (citing Lockhart v. McCree, 476 U.S. 162 (1986)).

> so long as they state clearly that they are willing to temporarily *set aside their own beliefs in deference to the rule of law.*[428]

If those beliefs can truly be set aside, as posited by the Court, the beliefs would then find no expression in the verdict. Any principled dissent may very likely be obliterated from the evolving standards calculus in the name of enforcement of the death penalty scheme.[429]

The amalgamation of the Court's decisions in this area allows the prosecution to secure a jury from which is excluded people wholly opposed to or even possessing "conscientious scruples" against the death penalty and who purportedly *may* not follow the law and obey their oaths. Those prospective jurors with scruples against the death penalty can be seated, however, if they swear that they are able to set aside their beliefs and ignore them throughout the sentencing process. Whatever the trait that allows their dismissal from the jury venire or permits at least the exclusion of their views from the process, the Court's decisions lead ineluctably to the conclusion that there will never be a sentence that reflects opponents' beliefs against the death penalty.

It follows, then, that the evolving standards calculus will never include the standards of those members of society with scruples against the imposition of death. The result is an "evolving standard" that ignores the standards of relevant segments of society and is thus unreliable as a gauge of what is cruel and unusual. In this way, the Court's decisions have further "stacked the deck"[430] of jury decision-making to indicate a standard of societal decency more in favor of death than may in fact exist.[431]

428. *Lockhart*, 476 U.S. at 176 (emphasis added); *see also* Buchanan v. Kentucky, 483 U.S. 402, 416 (1987).

429. *See* Gillers, *supra* note 339, at 85-91 (arguing that death penalty opponents cannot constitutionally be excluded from juries because of the Eighth Amendment's reliability requirement and the need that the jury express the evolving standards of decency); Craig Haney, *Epilogue: Evolving Standards and the Capital Jury*, 8 LAW & HUM. BEHAV. 153, 157 (1984) ("[T]he capital jury serves as a gauge of the Eighth Amendment values. Yet, once we begin to systematically limit the range of community opinion and personal experience that is reflected on the jury, how can the gauge ever operate effectively?").

430. *Witherspoon*, 391 U.S. at 523.

431. This argument is not changed by the holding in Morgan v. Illinois, 504 U.S. 719 (1992). *Morgan* presented the "reverse-*Witherspoon*" or "life-qualifying" case. *Id.* at 724, 734 n.8. The Court held that the Fourteenth Amendment required that prospective jurors be asked whether they would vote *to impose* death in any case in which the defendant was found guilty of a capital offense, and that defendant be permitted to strike for cause those prospective jurors answering that question in the affirmative. *Id.* at 736, 729; *see also* Ross v. Oklahoma, 487 U.S. 81 (1988) (addressing the same issue in a case in which defendant had been denied removal of a prospective juror for cause and so exercised a peremptory strike to dismiss prospective juror). Exclusion of those who would always vote to execute

The preceding discussion has demonstrated the unreliability of jury sentencing behavior as an "objective" indicator of the evolution of society's standard of decency. Antisympathy instructions and victim impact evidence coalesce to favor death because together they permit the heaping onto the jury and the expression, in the form of a death sentence, of strong emotions for the loss of the victim, and yet prohibit the jury's venting of emotions that might favor the defendant. In the death penalty sentencing context, the jury's emotions are thus channeled toward a death decision and the index of jury sentencing behavior indicates approval for the death penalty. The Court's decisions regarding a state's ability to guide the sentencer's discretion with regard to mitigating evidence essentially permits circumscription of mitigating evidence and thus allows aggravating evidence to fill the void and tip the scales toward death; jury sentencing behavior is then more likely to evince approbation of death penalties. Additionally, in its recent lenient treatment of a vague aggravator, the Court has shown its willingness to sanction aggravators that fail to narrow the death class but instead give it more breadth; the result is an increase in death sentences and a consequent alteration in the index of jury sentencing. Finally, death qualification of juries further stacks the deck of jury sentencing because it excludes members of the community who are opposed to the death penalty and, even though it permits the seat-

---

does not balance out the removal of "*Witherspoon* excludables" and thus insure the reliability of jury decisions as reflections of the evolving standard; the jury that is eventually seated is still composed of people ready, willing, and able to sentence a defendant to death. *But see* Belt, *supra* note 414, at 165-67 (arguing that "life qualifying" of juries balances out, albeit imperfectly, "death qualifying" of juries).

The requirement that ardent proponents of the death penalty be excluded seems also compelled by the principle that the jurors be able to follow the law and obey their oaths. *See supra* notes 397-399 and accompanying text. Because the decision to impose the death penalty must be guided, jurors must make specific findings prior to the *imposition* of the penalty; this decision is not discretionary, as can be the one to *decline* to impose the penalty. Therefore, if a juror is predisposed, he or she will fail to follow instructions to determine the existence of aggravating factors and therefore should not be seated. The effect these jurors have on the sentencing process could be likened to the effect of a mandatory death penalty statute in that the jurors would automatically impose death upon conviction of a certain type of murder. That type of scheme has been held unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion) (finding North Carolina's mandatory death penalty statute unconstitutional in part because it "provide[d] no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die"); *cf. Morgan*, 504 U.S. at 736-39 (reasoning that these excludables cannot follow the law with regard to consideration of mitigating factors); Gillers, *supra* note 339, at 99 n.452 (suggesting that in 1980 these people might have been excludable because they would fail to accord the defendant the individualized consideration required by *Lockett*). This argument can be contrasted with that regarding *Witherspoon* excludables' ability to follow their oaths. *See* discussion *supra* note 415.

ing of jurors with some scruples against the penalty, requires that scrupled jurors bury their opposition in order to impose death in appropriate cases. In either situation, the sentence rendered by the jury may well be more likely to be a death sentence, but at the very least cannot accurately reflect anti-death penalty sentiment within the evolving standard. All of these rulings work together to systematically channel jury decisionmaking to return death sentences. Jury sentencing behavior can therefore be rigged and is thus not an "objective" indicator of societal standards of decency and should not be relied upon as a key test of constitutionality.

B. Selective Evaluation of Legislative Enactments Ensures a Pro-Death Penalty Sampling

In addition to employing evidence of jury sentencing behavior to determine the evolving standard, the Court has relied on legislative enactments of the various states to indicate the current societal consensus relating to the death penalty. Public opinion as borne out in decisions of legislators is considered another objective indicator of what is cruel and unusual.[432] The Court has split into factions over this prong of the standard as well,[433] with the latest majority's approach being the least effective at achieving an accurate, non-pro-death reflection of the evolving standards of decency. The best illustration of this split is found in *Stanford v. Kentucky*.[434]

432. *See supra* notes 16-18, 20-21 and accompanying text. Professor Radin has generally criticized reliance on legislative enactments as an indication of what is constitutional. Conceding that legislative enactments may be relevant to the determination to some degree, she nonetheless opined the following:

> conclusive reliance on these indicators either through substantive definition or extreme judicial deference is circular. Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit. To glean a list of permissible punishments from those enacted by legislatures either assumes that legislators never enact a punishment they think is, or may be, cruel or allows the legislature to define permissible punishments by its enactments. Such a view removes any role for a constitutional check.

Radin, *Jurisprudence of Death*, *supra* note 26, at 1036.

433. *See supra* notes 116-117, 122 and accompanying text.

434. 492 U.S. 361 (1989). In *Stanford*, there was a clean break on this issue between the majority, comprised of Justices Scalia, Chief Justice Rehnquist, and Justices White, O'Connor, and Kennedy, *see id.* at 364, 370 & n.2, and the dissent, comprised of Justices Brennan, Marshall, Blackmun, and Stevens. *See id.* at 382, 384-85. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the schism was not so clear, but the plurality addressed the interpretation difference in a footnote. *See id.* at 829 n.29; *see also supra* note 122 and accompanying text. In Penry v. Lynaugh, 492 U.S. 302 (1989), although the same majority as in *Stanford* found from legislative enactments no violation of the evolving standards, *see id.* at 306, 334-35, the count was such as to make less of a difference to the outcome so that the majority did consider abolitionist states in the calculation. *See id.* at 334 ("In our view,

The *Stanford* majority looked only at statutes from death penalty states to determine whether execution of sixteen- and seventeen-year-olds was contrary to the evolving standard. The dissent, which was comprised of the same Justices who constituted the plurality in *Thompson v. Oklahoma*, stressed that *all* state statutes must be considered if that prong of the test is to be truly representative of society's views. The *Stanford* dissent appears to have the better reasoned approach regarding the appropriate pool by which to compare a challenged death penalty statute. Employment of that approach would also result in a more objective sampling of standards regarding the death penalty and thus achieve a more accurate reflection of the evolving societal standards of decency.

The Justices had previewed their modes of interpretation and the schism in *Thompson*,[435] which involved execution of those who were fifteen or younger at the times of their offenses. The plurality in that case had initially confined its analysis to those states that had specifically considered the execution of this class of offender, but engaged the dispute by responding to a dissent criticism.[436] If the tally were also to include those death penalty statutes that specified no minimum age, as the *Thompson* dissenters contended, then it should also include states that had no death penalty at all; only that way would the focus be consistent, by looking generally to those state statutes that facially did or did not permit the execution of this class of offenders.[437] The ratio by that method would have been two-to-one against execution of members of this class.[438]

Justice Scalia in dissent, joined by the Chief Justice and Justice White, would not look to non-death penalty states; these three Justices chose to include in the computation of evolving standards only states that authorized the death.penalty and included those that had provided no minimum age prohibition on execution.[439] These statutes showed, in the dissent's view, that "a majority of the States for which

the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.").

435. 487 U.S. 815, 829 n.29 (1988) (plurality opinion); *id.* at 867-68 (Scalia, J., dissenting). Justice Kennedy did not participate in the consideration or decision of the case. *Id.* at 817.

436. *Id.* at 829, 829 n.29.

437. *Id.* at 829 n.29. Justice O'Connor in her concurrence also considered non-death penalty states but was less sure about the conclusion she would draw from the evidence. *See id.* at 849-52.

438. *Id.* at 829 n.29.

439. *Id.* at 867-68.

the issue exists (the rest do not have capital punishment) are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned."[440] Justice Scalia characterized these general death penalty provisions as proof of *affirmative determinations* to set no minimum age: "the larger number of States ([nineteen]) . . . have determined that no minimum age for capital punishment is appropriate . . . ."[441] In so doing, the dissent essentially read into a general allowance a more specific provision, that the states *considered* and *chose* to allow the execution of fifteen-year-olds. Using this analysis, the dissent argued that forty percent of the states would allow this penalty for this class.[442]

The majority in *Stanford* consisted of the *Thompson* dissenters, now joined by Justices O'Connor and Kennedy.[443] As three of the Justices had done in the dissent in *Thompson*, the majority here refused to accord the same interpretation to general *prohibitions* in abolitionist states as it accorded to general *authorizations* in death penalty states; it would not consider general prohibitions as encompassing specific prohibitions against execution of certain teenagers, but would consider general allowances as specific allowances to execute certain teenagers.[444] Logically, however, the general prohibition in abolitionist states could just as easily show that the states *considered* and *chose* to prohibit a narrow class of executions, those of fifteen-year-olds. In fact, it is more logical to conclude that the general *prohibition* encompasses the specific prohibition, as Justice Brennan and the other *Stanford* dissenters[445] did, than to conclude that the general *allowance* encompasses the specific allowance, as the majority did in *Stanford*; abolitionist states determined that the death penalty was suitable for no one and left no question regarding whether fifteen-year-olds could be executed under their schemes: they clearly could not.

By contrast, a general authorization for the death penalty evinces nothing definitive about the specific case of fifteen-year-olds; a general allowance does not preclude the legislature from later carving out specific prohibitions for classes of defendants that could nevertheless coexist with the general authorization. Moreover, a court in a death penalty state could similarly carve out a prohibition from the general

440. *Id.* at 868.
441. *Id.*
442. *Id.*
443. *Stanford*, 492 U.S. at 363.
444. *Id.* at 370-71 & nn.2-3.
445. Justice Brennan was joined in dissent by Justices Marshall, Blackmun, and Stevens. *Id.* at 382 (Brennan, J., dissenting).

authorization. In an abolitionist state, the converse is not true: a legislature that had affirmatively abolished the death penalty would not likely carve out a small death-eligible class like the one at issue here, and a court in that state could never carve out a specific authorization from the general prohibition against capital punishment. The *Stanford* dissent's approach is more doctrinally sound in this context. Therefore, if the current majority, led by Justice Scalia, continues to posit that general authorizations for the penalty of death show, without more, that the state considered and chose to impose the penalty on a discrete class of defendants, then, to be consistent, it must also count general prohibitions on the death penalty as showing a considered decision *not* to impose the penalty on a discrete class.

The more logically sound approach has, for purposes of this thesis, a more significant virtue in that it examines non-death penalty sentiment within the calculation of the evolving standards of decency. Such an approach would render a truer reflection of society's attitude toward the death penalty because it would then include opposition, general evidence of which is currently excluded by the majority.

As presently formulated, however, the legislative enactments prong of the evolving standards of decency test is not an objective index of society's views on the death penalty. The majority's method of compilation of the evidence is biased in favor of death because it *selectively* evaluates pro-death penalty enactments and excludes a significant number of enactments that evidence opposition to the death penalty. The resulting picture of the evolving standards of decency is not objective but is distorted toward death. Therefore, the test, in this regard as well, is not wholly reliable and should not be used exclusively to resolve substantive Eighth Amendment questions.[446]

446. For different reasons, Professor Radin has also proposed that the evolving standards analysis should not be the only one used to judge whether a punishment is cruel and unusual. *See* Radin, *Jurisprudence of Death, supra* note 26, at 1036-38. She proposed that "[t]he Court must search [also] for a deeper moral consensus on the meaning of cruelty in order to determine whether a specific punishment comports with current standards of decency." *Id.* at 992. She found tools for ascertaining that consensus essentially in what is termed here as the Court's excessiveness inquiry. *See id.* at 1030, 1042-62. Former Justice Goldberg and Professor Dershowitz also argued that the "objective criteria of the evolving standards of decency are properly viewed only as threshold, rather than determinative, inquiries under the [E]ighth [A]mendment." Goldberg & Dershowitz, *supra* note 26, at 1782. Opining that "[t]he final test must lie elsewhere," *id.*, the authors proceeded to outline a "[p]urposive [t]est of [c]onstitutionality," *id.* at 1784, that included evaluation for extreme severity and wantonness or excessive severity. *See id.* at 1785-97. In this Article, these evaluations are termed "proportionality review" and "assessment for furtherance of penological goals".

V. The Final Analysis

Because at least three members of the current Court have expressly indicated that, beyond the test of historical acceptance, they favor employing the evolving standards of decency test as the sole determinant of the constitutionality of death sentences under the Eighth Amendment, this Article undertook to evaluate whether that test was truly as "objective" as its supporters have claimed. This analysis reveals that the components of the test are not objective indicators of community values; one prong can be influenced by other decisions of the Court and statistics about the other prong can be selectively interpreted.

At least five separate areas of death penalty jurisprudence combine to render suspect the validity of jury decisionmaking as an accurate indicator of the evolving standard of decency in society. Two lines of case law, those dealing with antisympathy instructions and victim impact evidence, allow the force of the jury's emotions to be vented only in favor of the victim, and hence the state, but to be wholly squelched in the decision whether to grant the defendant mercy by declining to impose the death penalty. The result of the synthesis of these rulings is a jury that is told that the only valid emotions that it can heed are those that would lead to a sentence of death.

Another significant line of constitutional principles has undergone revision by the Court in a way that further impugns the employment of jury decisionmaking as a reflection of community values. Under the guise of reining in the jury's discretion with regard to mitigating evidence, the Court has essentially gutted a line of doctrine requiring that the jury be allowed to consider and give effect to any mitigating evidence that a defendant produces as a reason for a sentence less than death. States are now permitted to prescribe how a jury uses and gives effect to mitigating evidence, posing the danger that the evidence will not be considered or given effect at all and that the penalty phase will then be dominated by aggravating factor evidence. The jury will have far fewer reasons for imposing a sentence less than death.

Moreover, the Court has recently relaxed the requirement that statutory aggravating circumstances be sufficiently clear and understandable to channel the sentencer's discretion and ensure death sentences only for those truly deserving defendants. The consequence of this relaxation is to broaden the class of death-eligible defendants and thus to permit more death sentences.

Decisions of the Court concerning jury composition further stack the deck in favor of jury decisions that may not accurately reflect the societal standard of decency regarding the death penalty. Because the Court has held that states can exclude from the jury those members of society who oppose the death penalty in any context, and who would never impose the death penalty, juries are composed of people who are at least willing to sentence someone to die. The Court has also relaxed the standard by which veniremembers can be struck for cause, thereby potentially allowing the exclusion of those less certain about their positions on the penalty. Finally, because jurors can be urged to set aside their convictions in order to apply the law and sentence to death, any scruples against the death penalty are further obscured from the process. A jury decision will thus never reflect the standards of decency of that segment of society, no matter how large, with scruples against the death penalty; hence, the Court will never factor into its calculus of the evolving standard of decency those life sentences that were reached by juries composed, at least in part, of these objectors.

In these ways, "[t]he rules are stacked in favor of death" and "place the weights on the side of man's sadistic drive."[447] Because so much of death penalty law can be manipulated and can ultimately combine to influence a jury's decision in the direction of death, the outcome of that decisionmaking is not altogether reliable as an index of society's views and thus is not reliable as a determinant of "the evolving standards of decency that mark the progress of [this] maturing society."[448] This portion of the evolving standards test can and has been rigged in favor of the constitutionality of death sentences. Therefore, the test cannot stand alone, beyond that of historical usage, as the exclusive test of constitutionality in the death penalty context.

Finally, the selective evaluation of only death penalty states' legislative enactments skews the calculus away from objectivity and toward death as a constitutional punishment; death will not be deemed cruel and unusual, but rather will be constitutional because it comports with the evolving standard of decency in death penalty states. This prong of the evolving standards test fails the objectivity test as well and casts more doubt on the propriety of sole use of the evolving standards test to determine the constitutionality of the death penalty.

447. McGautha v. California, 402 U.S. 183, 247, 248 (1971) (Douglas, J., dissenting) (dissenting from decision upholding, against due process challenge, Ohio's unitary death penalty trial system).

448. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

A. A Proposal

Two fundamental reasons compel the conclusion that the Court should not look only to the "objective indicia" of evolving standards of decency to determine the constitutionality of the death penalty. One reason, developed throughout this Article, is that the indicia are not wholly reliable as objective indicators of society's values but can be manipulated and selectively analyzed. Jury sentencing behavior should not be employed at all as an index of society's views because the capital jury's composition does not mirror society and because its decisionmaking has been influenced toward death from the outset. If jury sentencing behavior is used as an index, it must be used with caution and an awareness that the process may not yield an objective result. Legislative judgments as an index of cruelty and unusualness could be somewhat more accurately reflective of society's standards of decency, however, if the Court considered all legislative judgments concerning the death penalty, not just those in states whose population and/or legislators support the punishment.[449]

The second reason that the "objective indicia" should not be used exclusively is that under the American system of justice, the Supreme Court is the final arbiter of what is constitutional[450] and therefore of what is cruel and unusual; the Court cannot abdicate that responsibility to legislatures and juries. For this reason, even if the Court were to attempt to cure the deficiencies in the evolving standards test, that test should not be the singular standard.

Because public opinion could clamor for just those punishments that should be considered cruel under ordinary definitions, which clamoring would find its way into jury decisions and legislative enactments, these forms of public opinion cannot be bootstrapped into usurping and, by that usurping, eliminating the restricting function of the constitutional provision. The Eighth Amendment *prohibits* cruel and unusual punishments; it does not *permit* whatever punishments the majority, through legislatures and juries, deems to be appropriate,

449. There may even be a strong argument that legislative enactments should not be employed at all as a measure of society's views. Researchers found in one study that "public support for capital punishment is an illusion that has become a self-perpetuating political myth." William J. Bowers, et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 142 (1994). To these researchers, "legislative support for capital punishment suggests that lawmakers are out of touch with the actual punishment preferences of their constituents . . . ." *Id.* at 132. In that event, legislative enactment of death penalties would not at all be an accurate reflection of society's evolving standards of decency.

450. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

just as the Fourteenth Amendment does not sanction whatever public opinion deems to be due process or equal protection.[451] Justice Brennan, concurring in *Furman v. Georgia*, articulated the idea precisely:

> this Court finally adopted the Framers' view of the [Cruel and Unusual Punishment] Clause as a "constitutional check" to ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." ... If the judicial conclusion that a punishment is "cruel and unusual" "depend[ed] upon virtually unanimous condemnation of the penalty at issue," then, "[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom." ... Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. ... [W]e must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights.[452]

Although the indicia of community values do indicate something about the cruel and unusual nature of punishments, they cannot serve with historical usage as the sole benchmarks of constitutionality. The Court must wade into the fray as it does under other clauses and judge for itself what is cruel and unusual.

In the death penalty context, the Court need only return to or continue its reliance on established principles and checks of constitutionality. For example, the Court has not in the past abdicated its role but has conducted its own excessiveness inquiry, by looking to proportionality principles and goals of punishment to ascertain whether the punishment comported with the "dignity of man"; these tools acted as

451. *See* Stanford v. Kentucky, 492 U.S. 361, 391-92 (1989) (Brennan, J., dissenting). Justice Scalia's likely retort to this argument would be that the Fourteenth Amendment does not contain language that would suggest a resort to some form of public opinion is necessary. He would argue that the Eighth Amendment, however, contains the phrase "and unusual," the meaning of which can only be ascertained by looking to what *the people* are doing. *See supra* note 163. "What *the people* are doing" and so what is not "unusual" can be evidenced by even rare provisions for and impositions of a punishment, under Justice Scalia's approach. *See supra* notes 158-160, 163-164 and accompanying text. Hence, if this counterargument had merit and if the clause meant what Justice Scalia argues it means, there would have been no need for a Cruel and Unusual Punishment Clause because what was being done would automatically pass muster. *See supra* note 164.

452. Furman v. Georgia, 408 U.S. 238, 268, 269 (1972) (Brennan, J., concurring) (quoting Goldberg & Dershowitz, *supra* note 26, at 1782); *see also* Bilionis, *supra* note 163, at 294-95 n.34 (positing that legislative enactments are not reliable indicators of standards of decency in the death penalty context because legislators so often respond according to perceived or presumed dictates of the Supreme Court); *see also supra* note 432.

further checks on state power by allowing for some measurement beyond mere public opinion as represented in the evolving standards test. Such punishments that could be imposed by the majority, but would fail to serve a deterrent or retributive function or would be too severe for the offender or crime involved, would not survive the scrutiny of the additional measurements.[453] The Court should continue its reliance on these other tools.

Furthermore, the Court should once again consider the practices of other nations in the constitutionality assessment. Currently, in its assessment of what society deems acceptable, a majority of the Court has refused to consider evidence of other nations' abolition of the death penalty, either in total or for certain classes of offenders. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White, O'Connor, and Kennedy, in *Stanford v. Kentucky* had "emphasize[d] that it is *American* conceptions of decency that are dispositive," and rejected the notion that other nations' stances on the death penalty were relevant.[454] This approach is not only without historical basis,[455]

453. Justice Brennan has similarly argued that proportionality analysis and assessment according to the evolving standards of decency are both necessary Eighth Amendment evaluations because penological goals alone cannot justify the imposition of certain punishments; those goals are not self-limiting. Tison v. Arizona, 481 U.S. 137, 179-82 (1987) (Brennan, J., dissenting).

454. 492 U.S. at 369 n.1. This interpretation may not be consistent with the approach of the Chief Justice and Justices Scalia, White, and Kennedy to employ only the evolving standards test and its "objective indicia." Other countries' sentencing practices, particularly those in western democracies, would arguably constitute "objective indicia" of standards of decency of maturing societies regarding the death penalty. Because such evidence would not require the justices to rely only on their "subjective views" of the rightness of the death penalty, it should have been acceptable to them. Their failure to include it results in the exclusion of anti-death penalty sentiment because most other western nations have abolished the death penalty. *See* Ved P. Nanda, *Recent Developments in the United States and Internationally Regarding Capital Punishment—An Appraisal*, 67 ST. JOHN'S L. REV. 523, 523 (1993). According to a report compiled at the request of the Economic and Social Council of the United Nations, *see* ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE vii (4th impression 1994), the following countries' laws "do not provide for the death penalty for any crime": Australia, Austria, Columbia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Haiti, Holy See, Honduras, Iceland, Lichtenstein, Luxembourg, Marshall Islands, Micronesia, Netherlands, Nicaragua, Norway, Panama, Portugal, Sweden, Uruguay, and Venezuela. *Id.* at 169. In the three and one-half years between the third and fourth reprints of the book, "ten more countries ha[d] abolished the death penalty for all crimes," including Angola, Croatia, Greece, Hong Kong, Hungary, and Switzerland. *Id.* at x. A commentator has observed, however, that, in addition to the United States, Japan is an exception to the other western industrial nations that have abolished capital punishment. Nanda, *supra*, at 523 n.4. Nonetheless, because strong evidence of western nations' abolition of the death penalty is excluded from the calculus by the majority, objective evidence of evolving standards against the death penalty is not factored in and the skewing persists.

455. *See, e.g., supra* notes 72, 97-99, 123-124 and accompanying text.

but is a crabbed approach to an otherwise fluid clause, whose meaning is derived from evolving standards.

Because of the foundations on which the Cruel and Unusual Punishment Clause rests, part of the fidelity to established principles should include returned resort to evidence of other nations' sentencing practices. The Court has emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of *man*";[456] it has not stated that the protections must accord with the dignity of Americans. The concepts of cruelty and decency are universal ones, not singularly American ones. These concepts are not limited by boundaries but are ascertained by reliance on the evolving standards that mark the progress of *a* maturing society. It would seem to mock the clause, or at the very least render it meaningless, to interpret it in a way that would allow for barbarous but common punishments within this country, while those punishments were abolished for their cruelty all over the world. Therefore, to remain faithful to the clause that was meant to safeguard the dignity of humankind and faithful to traditional doctrine, the Court should once more consider international opinion of the death penalty in its evolving standards assessment.

B. Conclusion

The Court must employ various tests to ascertain whether a death penalty comports with the Cruel and Unusual Punishment Clause of the Eighth Amendment. First, in its consideration of the evolving standards of decency, the Court must not only consider all states' positions on the death penalty but must also consider evidence of other countries' standards regarding the death penalty. The Court must also rely again on those tests that permitted the Justices to say what the law is in regard to the cruel, unusual, or excessive[457] nature of capital punishment: whether the punishment is proportional to the crime and blameworthiness of the offender and whether the punishment furthers goals that the Court has said can justify capital punishment in some

456. Trop v. Dulles, 356 U.S. 86, 100 (1958) (emphasis added); *see also* Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (plurality opinion); Sumner v. Shuman, 483 U.S. 66, 85 (1987); Ford v. Wainwright, 477 U.S. 399, 409 (1986); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

457. For an argument that due process requires excessiveness review in the death penalty context, see Note, *Excessiveness Review for Capital Defendants After* Honda Motor Co. v. Oberg, 108 HARV. L. REV. 1305 (1995).

circumstances.[458] Otherwise, if the evolving standards test is the sole standard for constitutionality, there will exist no real constraint on the death penalty under the Cruel and Unusual Punishment Clause[459] and the clause itself will degenerate into a tool to validate the whims of the masses. It could even be argued that the clause would be entirely written out of the Constitution.[460] Even from an originalist's perspective, surely the framers could not have intended the clause to generate a standard for cruelty and unusualness that could itself place its imprimatur on cruelty, as can the evolving standards test, but rather sought to protect us from ourselves and our baser instincts.[461] Employment of additional tests will ensure the continuing vitality of the Eighth Amendment and maintain its function as a bulwark against the vengeful and otherwise unrestrained impulses of the majority.

---

458. For a thoughtful discussion of the propriety of and jurisprudential bases for employing these additional checks, see Radin, *Jurisprudence of Death, supra* note 26, at 1030-62. Professor Radin more recently stated that she "would [now] be more inclined to stress the philosophical incompleteness of both [utilitarian, or deterrent, and Kantian, or retributivist,] modes of reasoning." Margaret J. Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1170 n.7 (1985).

459. *Cf.* Goldberg & Dershowitz, *supra* note 26, at 1782 ("If the [E]ighth [A]mendment is to retain independent moral force, these tests [of historical usage, legislative enactments, and public opinion] are not and cannot be the final arbiters of constitutionality."); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187, 205 (1991) ("To delegate [constitutional] norm selection to state legislatures . . . will inevitably jeopardize the Eighth Amendment's ability to act as a meaningful check on the majority's impulse, born of fear and frustration, to execute.").

460. *See* Furman v. Georgia, 408 U.S. 238, 383-84 (1972) (Burger, C.J., dissenting); Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment October Term*, 1963, 27 S. TEX. L. REV. 493, 500-01 (1986) ("If only punishments already overwhelmingly condemned by public opinion came within the cruel and unusual punishment proscription, the Eighth Amendment would be a dead letter . . . ."); Goldberg & Dershowitz, *supra* note 26, at 1782 ("Were wide acceptance—measured by statutory authorization or public opinion polls—enough to authorize a punishment, the clause would indeed be 'drained of any independent integrity as a governing normative principle.'"); Radin, *Jurisprudence of Death, supra* note 26, at 1035-36 ("The trouble with [relying only on objective indicators] is that it reads the clause out of the Constitution," in part because "the majority of the public favors few of the protections embodied in the Bill of Rights.").

461. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring) ("the Eighth Amendment is our insulation from our baser selves."); Goldberg, *supra* note 451, at 501 ("The Eighth Amendment, like the others in the Bill of Rights, was intended as a countermajoritarian limitation on governmental action . . . ."); Ledewitz, *supra* note 355, at 143 ("[D]efending us from ourselves . . . is obviously part of the reason a society has judicial review in the first place."). *But see* Woodson v. North Carolina, 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting) (implying that the Court was seeking to "save the people from themselves," rather than relying on the Eighth Amendment and trying to "ascertain the content of any 'evolving standard of decency'" through which the Amendment limited punishments).