Review Essay

Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing

Crossed Over: A Murder, A Memoir. By Beverly Lowry.* New York: Alfred A. Knopf, 1992. Pp. 245. \$22.00.

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"Kill Them All. Let God Sort Them Out."¹

I. INTRODUCTION

The crime of homicide arouses at least two powerful desires: to avenge and to understand. Vengeance demands that the perpetrator suffer for the harm wrought on the community, to repair the social fabric torn by the heinous act.

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1. T-shirt belonging to Karla Faye Tucker. BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* 31, 208 (1992) [hereinafter cited by page number only].

Understanding seeks to reconcile the inhumanity of the crime with the fact that a member of the community, a human being, committed it. What could have caused the killer to depart from our most basic norms? These two desires may pull us in opposite directions. If we seek vengeance to demonstrate our collective hatred of the murderous act, we have less interest in uncovering the inevitably complicated and ambiguous root causes of the crime. And if, in our effort to understand, we locate some causes external to the killer, our desire to avenge may be diminished, or at least diffused.

Beverly Lowry's *Crossed Over: A Murder, A Memoir* is a compelling exploration of these conflicting desires. Lowry, a novelist, lost her eighteen-year-old son Peter in an unsolved hit-and-run incident. Because of this loss, Lowry identifies herself as a victim and feels the pain and anger of one irreparably harmed by the acts of another. The death of her son, says Lowry, "felt as if somebody had plugged me like a watermelon, right about at my middle, where the reddest, tenderest meat is."² But Peter himself had been in trouble with the law and, at the time of his death, was facing possible indictment on a stolen gun charge. Through the protective lens of parenthood, Lowry seeks explanations for her son's behavior, resisting the possibility that he was simply "born bad"—"He's not a bad boy, I kept saying to myself at the time."³ Lowry's sense of tragedy is compounded by her perception that Peter's death came just as he was at the threshold of maturity and, possibly, redemption. After dropping out of school and living on his own, Peter had, shortly before his death, moved back into his parents' home and "was starting on what he swore was his last chance to finish high school."⁴

It is this dual experience of having raised a troubled child, perhaps a criminal, and losing him to violent death, perhaps murder, that draws Lowry to the subject of her book, Karla Faye Tucker. Tucker is on Texas' Death Row for her participation at the age of twenty-three in a brutal double murder. Tucker and her boyfriend, Daniel Ryan Garrett, went to the home of Jerry Lynn Dean, an enemy and rival of them both, ostensibly to steal motorcycle parts or at least to case the apartment for a future theft. Their plan, if it could be called that, followed three days of "shooting crystal and drinking tequila . . . and eating pills"⁵ without sleeping. They were, in Tucker's words, "wired" and "looking for something to do."⁶ On finding Dean at home, they ended up killing him and his one-night companion, Deborah Ruth Thornton, using, among other things, a pickax. After the murder, both Tucker and Garrett bragged about their crime,

2. Pp. 4-5.

3. P. 19.

4. P. 76.

5. P. 41.

6. P. 42.

with Tucker proudly announcing that she “got a nut”⁷—had an orgasm—with each stroke of the pickax.

Lowry becomes intrigued by Tucker’s crime after reading a newspaper story accompanied by a striking photograph of Tucker. By the time Lowry meets her, Tucker has been on death row for five years and has seemingly undergone a conversion marked by contrition, service to others, and religious devotion. Lowry describes Tucker as deeply remorseful, remarking that Tucker accepts full responsibility for her crime and always “give[s] that act its full measure of significance and horror.”⁸ In addition, Lowry describes how Tucker reaches out beyond herself to touch the lives of her fellow prisoners, as well as corrections officers, young drug addicts (with whom she corresponds), and even Lowry herself. Her activities range from knitting clothing for friends and family to counseling a fellow inmate away from suicide. Tucker is, according to Lowry, “maybe the most loving person I have ever met.”⁹

In the course of a series of conversations, Lowry uncovers Tucker’s poignant childhood and adolescence. We learn of Tucker’s drug abuse beginning at age eight, her early exposure to sex (age eleven or twelve) and later prostitution, her mother’s own drug abuse, prostitution, and early death, and Tucker’s discovery that she, alone among her siblings, was not the biological offspring of her mother’s husband, the man she believed to be her “real” father.

Accepting her Death-Row conversion as sincere, some of Tucker’s former pursuers—prosecutors and police officers—now argue against Tucker’s death sentence on the ground that “[t]he person who is Karla Tucker today . . . is not the same person who was Karla Tucker at that time.”¹⁰ Tucker’s attorney, too, thought at the time of her trial that “there’s another girl inside there [who is] just now starting to come out.”¹¹ Lowry resists this tendency to identify two Karla Faye Tuckers by describing positive qualities in Tucker, such as loyalty, bravery, and generosity, that manifested themselves throughout Tucker’s life. Even as she abused drugs and descended into a period of rage and violence, Tucker protected her sister and friends from abusive men, lovingly cared for her dying mother, and virtually adopted an abandoned child for several years.

Crossed Over is a record of Lowry’s struggle to assess the significance of the various potentially mitigating aspects of Tucker’s life. For Lowry, one central question is what caused Tucker to kill, and, by extension, what caused her own son Peter to invite trouble so persistently in his life. She wonders whether some people are just “born bad,” but she implicitly rejects such determinism when she scours the lives of Tucker and her son for turning points and explanations. Nonetheless, she is reluctantly skeptical of our ability to ascertain cause and

7. P. 65.

8. P. 242.

9. P. 197.

10. P. 14.

11. P. 159.

effect with any degree of precision. In Lowry's view, attempting to explain *exactly* why Tucker became a murderer "is about like searching for one particular glob of tar in the whole Gulf of Mexico."¹² In addition to acknowledging the problem of precision, Lowry remains ambivalent about the idea that people cannot help what they do. Despite her obvious sympathy for Tucker, and her appalled reaction to Tucker's childhood, Lowry stops short of insisting that Tucker did not in some meaningful sense "choose" to kill. She relates with obvious irony Tucker's own unwillingness to abandon the possibility of choice: when Lowry reports to Tucker the emotional explanation offered by Danny Garrett (Tucker's boyfriend) for why he couldn't help revealing to Tucker his sexual infidelity to her, Tucker responds without blinking, "I think he could have found a way."¹³

Lowry also ponders whether Tucker's attempt at redemption through faith and good works should alter our reaction to Tucker or her crime. Although Lowry is clearly moved by Tucker's unflinching acceptance of responsibility and by her construction of a truly meaningful and socially valuable life in prison, she cannot say that we must "forgive" Tucker or show her "mercy."¹⁴ It is Tucker who brings this realization to Lowry by asking her how she would feel "if they found the driver of the truck that killed Peter and there was a trial and they brought the driver up and said, 'Oh, but he's changed, he's a new person now. See how good he is?'"¹⁵ In response, Lowry is forced to acknowledge frankly that her desire to respond nobly with forgiveness or mercy might be at war with her human capacity: "I'd like to think that I'd be kind. But . . . I have to tell you, I don't know."¹⁶

Lowry's book is not about law; it never directly addresses how our justice system should take account of Karla Faye Tucker's background, character, and experiences in determining whether she lives or dies. But the questions Lowry wrestles with in a personal way are the same questions that the law must confront systematically. Just as Lowry struggles with the question of how the story of Tucker's life can and should affect one's reaction to her crime and her fate, so must the legal system confront the question of the legal relevance of a troubled life—or an exemplary one—to the imposition of the ultimate penalty of death. In our current system, in which decisions regarding the imposition of the death penalty are "constitutionalized" because of the nature of the punishment,¹⁷ the question can be framed as one of constitutional boundaries:

12. P. 32.

13. P. 218.

14. *See* pp. 232-33.

15. P. 232.

16. P. 233.

17. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("Because of that qualitative difference [between capital and noncapital sentences], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). *See generally* Daniel R. Harris, Note, *Capital Sentencing After Walton*

are the quite different kinds of mitigating evidence presented in Lowry's portrait of Tucker's life constitutionally significant to a capital sentencing decision? Do some mitigating circumstances constitutionally preclude the imposition of the death penalty? Must a state permit any or all of this evidence to be considered by the sentencer? May a state do so?

Current Supreme Court doctrine provides relatively uncomplicated answers to these questions. The presence of a particular mitigating circumstance (such as youth, mental retardation, or lack of sufficient intent to bring about death) precludes the imposition of the death penalty only in situations of overwhelming societal consensus,¹⁸ the existence of which the Court has been reluctant to find.¹⁹ At the same time, the Court has identified a firm consensus against *procedures* that focus solely on the offense apart from the circumstances and characteristics of the offender.²⁰ This Eighth Amendment right to "individualized" sentencing²¹ requires that states permit capital sentencers to consider, as a mitigating factor, *any* aspect of the defendant's background, character, or crime.²²

Our argument in this Review Essay addresses the structure of the capital decisionmaking process; we attempt to give greater and more defensible content to the Court's requirement of "individualized" sentencing. We reject the Court's apparent conclusion that individualized sentencing necessarily entails uncircumscribed consideration of mitigation evidence. Rather, for the individualization requirement to have any force as a constitutional principle, it must rest on a substantive theory that specifies which aspects of the individual are constitutionally relevant. Applying the Court's Eighth Amendment methodology, which focuses on consensus as a means of identifying evolving standards of

v. Arizona: *A Retreat From the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389 (1991) (discussing the distinctiveness of substantive and procedural protections in capital sentencing).

18. The Court employs "proportionality" analysis to determine whether, in light of the nature of the crime or the characteristics of the defendant, the imposition of the death penalty would constitute "cruel and unusual punishment" under the Eighth Amendment. The Court attempts to discern "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), focusing on "objective evidence" of society's views, *see, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion) (imposition of death penalty for rape violates societal consensus). A similar analysis can be employed to determine which evidence is constitutionally relevant to the capital sentencing decision, even where such evidence does not categorically preclude imposition of the death penalty. *See infra* text accompanying notes 60-109 for a discussion of societal consensus regarding consideration of mitigation evidence.

19. *See, e.g.*, *Stanford v. Kentucky*, 492 U.S. 361 (1989) (imposition of capital punishment for a crime committed when defendant was sixteen or seventeen years old does not conflict with a national consensus and hence does not constitute cruel and unusual punishment under the Eighth Amendment); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (there is insufficient national consensus against execution of the mentally retarded to render it unconstitutional); *Tison v. Arizona*, 481 U.S. 137 (1987) (Eighth Amendment does not prohibit the death penalty as disproportionate in the case of defendant who lacks specific intent to kill so long as defendant's participation in a felony that results in murder is major and defendant's mental state is one of reckless indifference).

20. *Woodson*, 428 U.S. at 301.

21. *Id.* at 304.

22. *Penry*, 492 U.S. at 319; *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

decency,²³ we conclude that the individualization requirement mandates consideration only of evidence regarding individual culpability. We discern a firm societal consensus, based on current statutes and common law tradition, that evidence of reduced culpability—and only such evidence—is an indispensable part of capital sentencing. This refined conception of individualized sentencing, though it limits a defendant's right to present some kinds of mitigating evidence, at the same time more securely grounds the individualization requirement in the Constitution, and therefore protects a defendant's right to present any mitigating evidence at all.²⁴

That the Eighth Amendment *requires* states to permit consideration of mitigation evidence regarding reduced culpability does not, in our view, *preclude* states from adopting a broader mitigation inquiry, including consideration, for example, of evidence demonstrating lack of future dangerousness or general good character. Although states must provide for consideration of evidence of reduced culpability, states may, but need not, “channel” consideration of mitigation evidence by limiting consideration of such evidence to this constitutional “core.” Our position that channeling consideration of mitigation evidence is permitted but not required by the Constitution may seem odd given the Eighth Amendment's separate requirement, identified in *Furman v. Georgia*²⁵ and subsequent cases,²⁶ that states channel consideration of aggravation evidence to reduce arbitrariness. *Furman* suggested that the absence of statutory guidelines in the capital sentencing process invites arbitrary, even invidious, discrimination in the selection of those who live and die. If the failure to channel the sentencer's consideration of aggravating evidence leads to unconstitutional arbitrariness in the imposition of capital punishment, how can it be that the Constitution does not require consideration of mitigation evidence to be similarly confined? Our answer is that *forcing* states to channel consideration of mitigation evidence would create a distinct Eighth Amendment problem—by permitting the imposition of the death penalty contrary to internal community consensus—that is not implicated by forcing states to channel consideration of aggravation evidence. Accordingly, we argue, the Supreme Court cannot force states to channel consideration of mitigation evidence in an attempt to reconcile

23. See *supra* note 18.

24. Justice Scalia has recently argued that the individualization requirement should be abandoned altogether. *Walton v. Arizona*, 110 S. Ct. 3047, 3066-68 (1990) (concurring opinion). For a discussion of Justice Scalia's attack, see *infra* text accompanying notes 122-127.

25. 408 U.S. 238 (1972).

26. See, e.g., *Stringer v. Black*, 112 S. Ct. 1130, 1140 (1992) (“Use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.”); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (“Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”) (citing, *inter alia*, *Gregg v. Georgia*, 428 U.S. 153, 189, 205-07 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980).

the requirement of individualized sentencing with *Furman*'s anti-arbitrariness principle.

At the same time, we acknowledge that failure to channel consideration of mitigation evidence creates some of the same kind of arbitrariness created by failure to channel aggravation evidence. If this arbitrariness cannot be squared with *Furman*, and yet cannot be eliminated by Court decree, then two possibilities remain. *Furman*'s anti-arbitrariness principle may be too stringent because it is unattainable, and thus may not be constitutionally compelled. Or *Furman*'s anti-arbitrariness principle may be both constitutionally indispensable and irreconcilable with permitting states to broaden the mitigation inquiry, thus rendering the death penalty unconstitutional.

II. CURRENT DOCTRINE AS APPLIED TO KARLA FAYE TUCKER

Although Tucker has been on Death Row for almost a decade, the Texas courts are still reviewing certain aspects of her conviction, including the claim that a prosecution witness lied to the jury about the promises he received from the government in exchange for his testimony. If Tucker's sentence or conviction were overturned, opening the way for a retrial, she would undoubtedly want to present at the sentencing phase a portrait similar to the one Lowry draws in *Crossed Over*, including evidence of her troubled background, her drug use at the time of the crime, her current reform, and her positive character traits.²⁷ At the time of Tucker's trial, the sentencing jury's consideration of her mitigation evidence was confined to discrete questions about the "deliberateness" of the crime and Tucker's "future dangerousness."²⁸ Current Texas law, however,

27. Robin West has argued powerfully that such "narrative" should play a greater role in appellate review of capital sentencing (and by implication, the entire capital decisionmaking process):

We need to learn from the liberal dissents [in death penalty cases] not just that criminal defendants have a right to a jury that has heard their life story, we need to hear the life story. We need to understand what happened and why. We need to hear about the event that caused the arrest, about the life circumstances that caused and arguably mitigate the criminality of the event, and the social realities that engendered, facilitated, or permitted the life circumstances. We need to learn once again to recognize these people as human, as "like us." We need that gap of empathic understanding closed. We need to be given a stake in their lives, and in the communities from which they come. We need to be made responsible.

Robin West, *Narrative, Responsibility, and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 175-76 (1990).

28. The former Texas statute submitted the following special issues to the jury after the presentation of all sentencing-phase evidence:

- (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.

TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b) (West 1990).

At Tucker's trial, her attorneys submitted, and the trial court adopted, an instruction that allowed consideration of Tucker's drug use and difficult background only to the extent that it established her

establishes a more openended inquiry, and would allow a new jury to reject the death penalty based on any aspect of Tucker's mitigating case.²⁹

Texas revised its sentencing scheme to comply with a series of Supreme Court cases explicitly rejecting the state's limited sentencing inquiry as incompatible with "individualized" sentencing. The Texas "special issues" scheme had survived a facial constitutional challenge in *Jurek v. Texas*³⁰ as part of the Court's first comprehensive review of the "guided discretion" capital sentencing schemes enacted in response to *Furman v. Georgia*.³¹ But a little more than a decade later, Justice O'Connor's pivotal concurring opinion in *Franklin v. Lynaugh*³² intimated that the Texas scheme might be too narrow to permit constitutionally adequate consideration of relevant mitigation evidence in a given case.³³ Then, in *Penry v. Lynaugh*,³⁴ the Court held that the Texas scheme unconstitutionally precluded Penry's jury from giving mitigating effect to his evidence of mental retardation.³⁵ The Supreme Court cases that led Texas to broaden its capital sentencing inquiry reflect the Court's emerging theory of individualized sentencing. Under this theory, no part of Karla Faye Tucker's life may be excluded from her jury's consideration, because, to the Court, individualized consideration encompasses consideration of every distinguishing feature of the individual.

The Court first announced the individualization requirement in *Woodson v. North Carolina*,³⁶ decided, ironically, the same day as *Jurek v. Texas*. As announced in *Woodson*, the individualization requirement invalidated, at least, capital sentencing schemes like North Carolina's, which established a mandatory death penalty upon conviction of any first-degree murder.³⁷ Subsequent cases

"temporary insanity" at the time of the crime.

29. The current Texas scheme, as revised in 1991, requires the jury to decide:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (West Supp. 1992).

30. 428 U.S. 262 (1976).

31. 408 U.S. 238 (1972).

32. 487 U.S. 164, 183 (1988) (O'Connor, J., concurring).

33. *Id.* at 185-86 (agreeing that Texas' special issue regarding future dangerousness permitted adequate consideration of the defendant's lack of disciplinary problems in prison, but suggesting that the Texas scheme might not permit adequate consideration of other constitutionally relevant mitigating evidence).

34. 492 U.S. 302 (1989).

35. On the basis of these cases, Tucker has sought post-conviction relief, arguing, like Penry, that her jury was unconstitutionally precluded from giving effect to her mitigating evidence. She has also alleged that her attorneys' failure to insist on proper sentencing instructions constituted ineffective assistance of counsel. To date, the Texas Court of Criminal Appeals has rejected both of these claims. The United States Supreme Court is still adjudicating whether the now-repealed Texas scheme permitted adequate consideration of mitigation evidence other than evidence of mental retardation. In *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992), the Fifth Circuit held that the special issues scheme permitted adequate consideration of the defendant's evidence of youth and good character. The Supreme Court granted review, 112 S. Ct. 2937 (1992), and recently heard arguments regarding Graham's claim.

36. 428 U.S. 280 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

37. *Id.* at 303-05. The Court later expanded its holding in *Woodson* to forbid a mandatory death penalty

examined capital sentencing schemes that, although nonmandatory, limited jurors' consideration of particular kinds of mitigation evidence, such as minor participation in the crime,³⁸ turbulent family history and consequent emotional disturbance,³⁹ lack of dangerousness,⁴⁰ and mental retardation.⁴¹ In these cases, the Court's conclusion that individualized sentencing requires consideration of "any relevant mitigating evidence"⁴² was never accompanied by a substantive theory of relevance. Instead, the Court focused solely on whether the proffered evidence concerned the individual, revealing its assumption that the individualization requirement makes constitutionally relevant any and all traits or experiences that distinguish one individual from another.⁴³

The inclusiveness of the Court's concept of individualization has caused the Court to notice, and will ultimately force it to address, factual scenarios that appear to call for some more limited definition of "relevant mitigating evidence."

for even narrowly defined crimes, such as murder committed while serving a life sentence. See *Sumner v. Shuman*, 483 U.S. 66 (1987). *Sumner* makes clear that *no* mandatory death penalty can survive constitutional scrutiny.

38. In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality of the Court held that Ohio's capital sentencing scheme, which specified an exclusive list of mitigating circumstances, could not be applied constitutionally to Lockett. The Court concluded that the failure of the Ohio scheme to permit full consideration of Lockett's mitigating evidence regarding "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime" rendered her sentence unconstitutional. *Id.* at 597.

39. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), despite the broad language of the Oklahoma statute permitting consideration of "any mitigating circumstances," OKLA. STAT. tit. 21, § 701.10 (1980), the judge-sentencer refused to consider the defendant's turbulent family history and emotional disturbance, as well as his youth, as mitigating factors. The Court reversed his sentence of death, holding that, despite the breadth of the statute and the fact that the mitigating evidence was placed before the judge, "*Lockett* requires the sentencer to listen" to all mitigating evidence. 455 U.S. at 115 n.10.

40. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the defendant sought to present evidence of his good behavior in prison while awaiting trial. The trial judge excluded the evidence on the ground that, as a matter of South Carolina law, post-crime behavior in prison does not bear on the defendant's character, prior record, or circumstances of his offense. See *id.* at 3 (citing *State v. Koon*, 298 S.E.2d 769 (S.C. 1982)). The Court held that evidence of adaptability to prison was constitutionally relevant at sentencing and that the exclusion of such evidence tainted Skipper's death sentence.

41. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court held that Texas' "special issues" scheme unconstitutionally precluded Penry's jury from giving full mitigating weight to evidence that he was mentally retarded.

42. See *Skipper*, 476 U.S. at 4; *Eddings*, 455 U.S. at 114.

43. The Court's sole rejection of evidence proffered as mitigating concerned a defendant's request that the jury be permitted to consider at sentencing any "residual" doubt jurors entertained regarding the defendant's guilt. See *Franklin v. Lynaugh*, 487 U.S. 164, 172-75 (1988) (plurality opinion); *id.* at 187 (O'Connor, J., concurring). The Court's rejection of Franklin's claim rested on its view that individualized sentencing does not require a jury to reexamine its "residual doubt" concerning the defendant's guilt. *Id.* at 174. The inevitable possibility of factual error, notwithstanding the standard of proof beyond a reasonable doubt, is a policy argument against the imposition of an irrevocable penalty in every case, and does not call attention to any particular attribute of the defendant.

The Court has also upheld jury instructions that limit the manner in which juries may consider concededly relevant evidence. See *California v. Brown*, 479 U.S. 538 (1987) (instruction to jury to disregard, among other things, "mere sentiment, conjecture, sympathy . . ." in capital sentencing does not violate constitutional requirement of individualized sentencing); see also *Saffle v. Parks*, 494 U.S. 484 (1990) (suggesting but not announcing that instruction to jury to "avoid any influence of sympathy" would also be consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). The Court in *Brown* and *Parks* viewed the states as permissibly, perhaps even properly, limiting the jury to reasoned, rather than emotional or irrational, responses to all evidence presented. The decisions do not purport to rest on a theory delineating which aspects of the individual are constitutionally relevant.

In *Boyde v. California*,⁴⁴ for example, Chief Justice Rehnquist, writing for the majority, appeared to be distinctly underwhelmed by the significance of Boyde's receipt of a prize for his dance choreography while in prison. Although the Chief Justice did not decide whether the evidence was constitutionally relevant, he implied that consideration of artistic ability, as such, was not an indispensable aspect of individualized sentencing.⁴⁵ Similarly, in *Skipper v. North Carolina*,⁴⁶ the Court suggested in dictum and with some exasperation that there must be some limit to what the Constitution requires in terms of individualized consideration, noting that it had "no quarrel" with the proposition that "how often [the defendant] will take a shower" may be deemed irrelevant to the sentencing determination.⁴⁷ But despite the Court's apparent intuition that its sweeping concept of individualization must be refined, the Court has not yet developed a refining principle.

III. A REFINING PRINCIPLE: WHAT MUST CAPITAL SENTENCERS CONSIDER?

A. *The Supreme Court's Individualization Requirement*

While we embrace the Court's conclusion that the Eighth Amendment's prohibition of cruel and unusual punishment requires "individualized" sentencing in capital cases, we believe that the Court is mistaken to the extent that it regards consideration of *all* aspects of an individual as constitutionally indispensable. The Court grounds the individualization requirement in a discernible consensus⁴⁸ that the wholesale elimination of sentencer discretion in capital cases is intolerable. But the doctrinal conclusions the Court draws extend far beyond any consensus it has identified. In the cases developing the individualization requirement, the Court has described the existence of only one societal consensus—our aversion to mandatory sentencing.⁴⁹ But an aversion to mandatory sentencing tells us only that we cannot consider the offense alone,

44. 494 U.S. 370 (1990).

45. *Id.* at 382 n.5. The opinion distinguished artistic ability as it bears on the question of the defendant's future dangerousness, and such ability as it reveals the defendant's intrinsic worth. The Chief Justice appeared to conclude that evidence of the former was constitutionally relevant, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), whereas evidence of the latter may have no constitutional relevance whatsoever.

46. 476 U.S. 1 (1986).

47. *Id.* at 7 n.2 (quoting *State v. Plath*, 313 S.E.2d 619, 627 (S.C.), *cert. denied*, 467 U.S. 1265 (1984)).

48. See *Woodson v. North Carolina*, 428 U.S. 280, 295-96 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (Eighth Amendment proscription against mandatory capital sentencing schemes derives from "contemporary standards of decency"); see also *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion) (Eighth Amendment inquiry is guided by "evolving standards of decency that mark the progress of a maturing society") (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *id.* at 849 (O'Connor, J., concurring) (Eighth Amendment inquiry looks for "signs of a society-wide consensus").

49. See, e.g., *McGautha v. California*, 402 U.S. 183, 197-203 (1971) (discussing historical movement toward discretionary sentencing in capital cases); *Woodson*, 428 U.S. at 302 (opinion of Stewart, Powell, and Stevens, JJ.) (arguing that the "long and consistent American experience with the death penalty in first-degree murder cases" reveals a rejection of mandatory statutes).

apart from the offender, in imposing a sentence of death. It does not tell us which aspects of the offender we must consider. And it certainly does not necessarily entail its opposite; a consensus against mandatory sentencing does not lead us inexorably to unconstrained consideration of all individualizing circumstances.

The Court's expansive yet increasingly ambivalent approach to consideration of mitigating evidence reveals the need for a theory of individualization. Such a theory must explain both the Court's conviction that many kinds of mitigating evidence are indispensable to capital sentencing and the Court's reluctance to go too far—its emerging intuition that some differentiating positive attributes, such as talent or hygiene (and perhaps other admirable qualities, like bravery, leadership, or charisma), may not be indispensable. If the Court lacks a theory that explains why certain individual attributes fall *outside* of the individualization requirement, then the Court will be unable to defend its perception that certain attributes clearly fall *within* it, except on an "I know it when I see it" basis. If one cannot explain why consideration of artistic talent is inessential, one cannot adequately justify at the level of theory an intuition, however deeply felt, that consideration of youth or mental retardation is essential to individualized sentencing. After all, each of these qualities are attributes of the "individual."

The Court's individualization requirement rests on an "equality" principle; it is premised on the recognition that not all first-degree murderers are similarly situated and on the principle that like defendants should be treated alike and different defendants treated differently.⁵⁰ The problem with this principle is that it cannot be called a "theory" because it does not tell us when we are faced with "like" defendants, given the infinite variety of human character and experience.⁵¹ The principle must be supplemented with some further substantive account explaining which likenesses matter.⁵²

50. See *Woodson*, 428 U.S. at 304-05. One might be able to derive an alternative conception of "individualization" from the Eighth Amendment—a conception that looks not to the defendant's right to equal treatment, but rather to the right of both the defendant and the sentencer to have the humanity of the defendant squarely confronted in the capital sentencing process. This alternative conception would require the sentencer to consider individualizing information in order to appreciate the humanity of the defendant and to recognize thereby the gravity of the decision to impose the death penalty in a particular case. Confronted with details about an individual defendant a sentencer may be moved—in an inarticulate and nonstandardized way—to impose a sentence less than death. The Supreme Court hinted at this conception when it spoke of "the fundamental respect for humanity underlying the Eighth Amendment," *id.* at 304. But the Court clearly grounds its "individualization" requirement on the principle that like cases must be treated alike in order to enhance the "reliability" of the imposition of the death penalty, *id.* at 305. We do not explore here the ramifications of this alternative conception of "individualization" because it is not the conception embraced by the Court; but it seems clear that such an alternative conception would pose the same question that we address *infra* in Parts IV and V: can any notion of individualized sentencing peacefully coexist with a prohibition against arbitrary sentencing?

51. *Lockett's* broad articulation of *Woodson's* individualization principle "does not exclude very much. . . . *Lockett* seems inherently to subvert any pretenses of doctrine-making." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 324-25.

52. Cf. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) ("So there it is: equality is entirely '[c]ircular.' It tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should be treated alike.' Equality is an empty vessel with no substantive

We think that this further substantive account, like the individualization requirement itself, should be rooted in an identifiable societal consensus regarding capital sentencing practices. We do not necessarily endorse societal consensus as the sole or even the best gauge of "cruel and unusual punishments" for Eighth Amendment purposes and we recognize the hazards of defining constitutional protections by reference to popular preferences.⁵³ Nonetheless we frame our argument in accordance with the Court's methodology for the sake of coherence: if individualization is constitutionally required because of societal consensus, the substance of the individualization principle should likewise be rooted in such consensus.⁵⁴ The question, then, is whether we can identify a consensus more specific than the one identified in *Woodson* rejecting mandatory capital sentencing—a consensus regarding which individual attributes and experiences must be considered in capital cases. We believe that such a consensus exists, and that it requires capital sentencers to consider evidence relating to a defendant's reduced culpability for his or her crime.

B. The Types of Mitigating Evidence: Reduced Culpability, Good Character, and Lack of Future Dangerousness

We define evidence of reduced culpability as evidence that suggests any impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences. Such evidence fairly includes, among other things, evidence of limited cognitive or emotional abilities, evidence of impairment resulting from drug or alcohol use, evidence of a troubled background or abuse, and evidence of imperfect or incomplete justification or excuse. Karla Faye Tucker's evidence that she was "wired" at the time of the crime after a three-day orgy of multiple-drug use, that she was in some sense emotionally crippled by a childhood lacking in ordinary parental

moral content of its own.") (citations omitted).

53. Several scholars have questioned the usefulness and propriety of examining societal consensus in order to construe the safeguards of the Eighth Amendment. See, e.g., Guido Calabresi, *The Supreme Court 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 144 (1991) (stating that the consensus approach to determining whether a punishment is cruel and unusual is of "questionable validity"); Richard Fallon, *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1543 n.60 (1989) (arguing that evidence of societal consensus is "not necessarily dispositive of debates about how the morality of the society and the constitutional order are best understood"); Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1057-59 (1978) (discussing difficulties with positivist approach to Eighth Amendment meaning); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187, 205 (1991) ("[W]hen politics selects the constitutional norms meant to confine the death penalty, the Eighth Amendment is drained of its integrity as a constitutional principle.").

54. We acknowledge that the concept of individualized sentencing could be derived apart from current social practices, and that such an account might offer a more persuasive grounding for the Eighth Amendment right. But given the Court's adherence to an Eighth Amendment methodology that privileges "objective evidence" of societal consensus, see *supra* note 18, our effort is aimed at exploring the consequences of the Court's own approach.

guidance and concern, that she was dominated in her adult life by a number of rough and lawless men, and that she sought out Jerry Lynn Dean in part because of his threats to her and her friends, constitutes evidence of reduced culpability. Of course, some types of "mitigating" evidence, if established to a certain substantive threshold, would reduce the charge of first-degree murder to something less,⁵⁵ or absolve a defendant of criminal liability altogether.⁵⁶ But in cases in which the evidence does not reach the thresholds required for such partial or complete defenses, the distinctive nature of capital punishment⁵⁷ should allow the sentencer to address circumstances and characteristics that may nonetheless call for a sentence less than death.

We regard all other potentially mitigating evidence as falling within two categories, "good character" evidence and evidence of lack of future dangerousness. Good character evidence is offered for one of two purposes, depending on the underlying penological theory. First, consideration of good character evidence can be forward-looking and consequentialist. Evidence of a defendant's special talents or close family ties may suggest the defendant's capacity to make continuing contributions to society. And evidence of a defendant's religious devotion and remorse for the crime may reflect a defendant's commitment to observe legal norms in the future. A jurisdiction guided by utilitarian considerations would undoubtedly regard these types of good character evidence as indispensable components of individualized sentencing. Second, consideration of good character evidence can be retrospective and nonutilitarian. Evidence of positive character traits and past good works may reveal a defendant's "general desert" and contribute to a moral assessment of the defendant's entire life that includes, but is not limited to, the defendant's culpability for the crime.⁵⁸ A jurisdiction might regard such a general assessment as particularly appropriate where the sentencing decision could result in execution.

The other category of mitigating evidence concerns a defendant's lack of future dangerousness. Of course, certain kinds of good character evidence may suggest that a defendant does not pose a threat to the community. But a jurisdiction might also require consideration of evidence unrelated to good

55. See, e.g., *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (discussing doctrine of "diminished capacity" which permits evidence of impaired mental condition to negate specific intent and thus to reduce first-degree murder to a lesser degree of homicide); *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (discussing New York's adoption of Model Penal Code's doctrine of "extreme emotional distress" which reduces murder to manslaughter); *Payne v. State*, 668 S.W.2d 495 (Tex. Crim. App. 1984) (discussing Texas and common law's doctrine of "sudden passion arising from adequate cause" which reduces murder to manslaughter).

56. See, e.g., *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (discussing defense of self-defense); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966) (discussing defense of insanity); *State v. Toscano*, 378 A.2d 755 (N.J. 1977) (discussing defense of duress).

57. See *supra* note 17.

58. See Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 351-52 (1992) (suggesting that *Lockett* implies that the sentencing inquiry must extend to an evaluation of general desert).

character that reflects a defendant's lack of future dangerousness, such as physical incapacity.⁵⁹ Such a jurisdiction might impose the death penalty only on those criminals whom the community believes could not be effectively restrained. In our view, neither consideration of evidence of good character nor consideration of lack of future dangerousness is sufficiently rooted in societal consensus to command constitutionalization.

C. Statutory Consensus Regarding Evidence of Reduced Culpability

Although members of the Court agree that the Eighth Amendment's prohibition of cruel and unusual punishment must be understood in light of "evolving standards of decency that mark the progress of a maturing society,"⁶⁰ there is less agreement about how to detect the existence of such standards.⁶¹ Whatever else may be relevant, the Justices agree that legislative enactments are a strong, if not the strongest,⁶² reflection of prevailing community standards.⁶³

Prior to *Furman*, most states left capital sentencing entirely unstructured, authorizing the sentencer to impose either death or life imprisonment as a matter of "absolute discretion."⁶⁴ Responding to both *Furman* and *Woodson*, current state sentencing schemes generally offer two vehicles for the consideration of mitigation evidence: a list of enumerated mitigating circumstances and a "catch-all" phrase or its functional equivalent permitting the sentencer to consider all other potentially mitigating factors.⁶⁵ A vast majority of the enumerated

59. For example, a jurisdiction could conclude that the death penalty would be inappropriate for a defendant paralyzed by a police bullet during his or her apprehension because the defendant posed no future danger to the community. In such a circumstance, the defendant's lack of future dangerousness reveals nothing about his or her character.

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

61. Compare *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (citing, as relevant to proof of societal consensus, views of "respected professional organizations" and "other nations that share our Anglo-American heritage"), and *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (stating that international opinion is relevant to proportionality inquiry), with *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting) (arguing that reliance on civilized standards of decency in other countries is "totally inappropriate as a means of establishing the fundamental beliefs of this Nation").

62. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."); *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) ("The most reliable objective signs consist of the legislation that the society has enacted.").

63. Of course, there is an apparent circularity if an absolute legislative consensus were required to establish an "evolving standard of decency." The fact that any given legislature has pursued a particular course cannot establish as a constitutional matter the validity of that action. Cf. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2713 (1991) (White, J., dissenting) ("[T]hat a punishment has been legislatively mandated does not automatically render it 'legal' or 'usual' in the constitutional sense.").

64. See, e.g., *Baugus v. State* 141 So. 2d 264, 266 (Fla. 1962) (capital punishment decision is "determined purely by the dictates of the consciences of the individual jurors"); *People v. Bernette*, 197 N.E.2d 436, 443 (Ill. 1964) (capital punishment is "an optional form of punishment which [the jury] . . . [is] free to select or reject as it [sees] fit"); *State v. Mount*, 152 A.2d 343, 351 (N.J. 1959) (decision to impose death is at the "absolute discretion of the jury upon its consideration of all the evidence").

65. Some states provide a catch-all, see CAL. PENAL CODE § 190.3(k) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(l) (West Supp. 1992); MD. ANN. CODE art. 27, § 413(g)(8) (Supp. 1992); NEV. REV.

mitigating circumstances are primarily, often exclusively, relevant to a defendant's culpability. Thirty-six states currently have death penalty statutes, and thirty of these states enumerate mitigating circumstances.⁶⁶ All thirty of the states that enumerate mitigating circumstances ask in some way whether the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was impaired. Twenty-seven states ask this question directly.⁶⁷ States also get to this issue by focusing on the presence of mental disease or defect,⁶⁸ intoxication or drug abuse,⁶⁹ duress or domination,⁷⁰ extreme mental or emotional disturbance,⁷¹

STAT. ANN. § 200.035.7 (Michie 1992); N.J. STAT. ANN. § 2C:11-3.c(5)(h) (West Supp. 1992), but most states, before their enumeration of mitigating circumstances, make clear that the enumerated list is not intended to be exhaustive. *See, e.g.,* ALA. CODE § 13A-5-51 (1982) ("Mitigating circumstances shall include, but not be limited to, the following . . ."); ARK. CODE ANN. § 5-4-605 (Michie 1987) (same); ILL. ANN. STAT. ch. 38, para. 9-1(c) (Smith-Hurd Supp. 1992).

66. The six states that do not enumerate mitigating circumstances are Delaware, Georgia, Idaho, Oklahoma, South Dakota, and Texas. DEL. CODE ANN. tit. 11, § 4209(c)(1) (1987); GA. CODE ANN. § 17-10-30 (1990); IDAHO CODE § 19-2515(c) (1987); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1992); TX. CODE CRIM. PROC. ANN. art. 37.071(e) (West Supp. 1992).

67. ALA. CODE § 13A-5-51(6) (1982); ARIZ. REV. STAT. ANN. § 13-703.G.1 (1989); ARK. CODE ANN. § 5-4-605(3) (Michie 1987); CAL. PENAL CODE § 190.3(h) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(b) (West Supp. 1992); CONN. GEN. STAT. § 53a-46a(g)(2) (1991); FLA. STAT. ANN. ch. 921.141(6)(f) (Harrison Supp. 1991); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West 1984); MD. ANN. CODE art. 27, § 413(g)(4) (Supp. 1992); MISS. CODE ANN. § 99-19-101(6)(f) (Supp. 1991); MO. ANN. STAT. § 565.032.3(6) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(4) (1991); NEB. REV. STAT. § 29-2523(2)(g) (1989); N.H. REV. STAT. ANN. § 630:5.VI(a) (Supp. 1991); N.J. STAT. ANN. § 2C:11-3.c(5)(d) (West Supp. 1992); N.M. STAT. ANN. § 31-20A-6.C (Michie 1990); N.C. GEN. STAT. § 15A-2000(f)(6) (1991); OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 1987); 42 PA. CONS. STAT. ANN. § 9711(e)(3) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(6) (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 39-13-204(j)(8) (1991); UTAH CODE ANN. § 76-3-207(3)(d) (Supp. 1992); VA. CODE ANN. § 19.2-264.4.B(iv) (Michie 1990); WASH. REV. CODE ANN. § 10.95.070(6) (West 1990); WYO. STAT. ANN. § 6-2-102(j)(vi) (Michie Supp. 1992).

68. ARK. CODE ANN. § 5-4-605(3) (Michie 1987); CAL. PENAL CODE § 190.3(h) (West 1988); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West 1984); MD. ANN. CODE art. 27, § 413(g)(4) (Supp. 1992); NEB. REV. STAT. § 29-2523(2)(g) (1989); N.J. STAT. ANN. § 2C:11-3.c(5)(d) (West Supp. 1992); N.M. STAT. ANN. § 31-20A-2.1.B (Michie Supp. 1992) ("The penalty of death shall not be imposed on any person who is mentally retarded."); OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 1987); TENN. CODE ANN. § 39-13-204(j)(8) (1991); UTAH CODE ANN. § 76-3-207(3)(d) (Supp. 1992); VA. CODE ANN. § 19.2-264.4.B(vi) (Michie 1990); WASH. REV. CODE ANN. § 10.95.070(6) (West 1990).

69. ARK. CODE ANN. § 5-4-605(3) (Michie 1987); CAL. PENAL CODE § 190.3(h) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(i) (West Supp. 1992); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West 1984); NEB. REV. STAT. § 29-2523(2)(g) (1989); N.J. STAT. ANN. § 2C:11-3.c(5)(d) (West Supp. 1992); TENN. CODE ANN. § 39-13-204(j)(8) (1991); UTAH CODE ANN. § 76-3-207(3)(d) (Supp. 1992).

70. ALA. CODE § 13A-5-51(5) (1982); ARIZ. REV. STAT. ANN. § 13-703.G.2 (1989); ARK. CODE ANN. § 5-4-605(2) (Michie 1987); CAL. PENAL CODE § 190.3(g) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(c) (West Supp. 1992); CONN. GEN. STAT. § 53a-46a(g)(3) (1991); FLA. STAT. ANN. ch. 921.141(6)(e) (Harrison Supp. 1991); ILL. ANN. STAT. ch. 38, para. 9-1(c)(4) (Smith-Hurd Supp. 1992) ("compulsion of threat or menace of the imminent infliction of death or great bodily harm"); IND. CODE ANN. § 35-50-2-9(c)(5) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(6) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(c) (West 1984); MD. ANN. CODE art. 27, § 413(g)(3) (Supp. 1992) ("substantial duress, domination or provocation"); MISS. CODE ANN. § 99-19-101(6)(e) (Supp. 1991); MO. ANN. STAT. § 565.032.3(5) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(3) (1991); NEV. REV. STAT. ANN. §

or belief of moral justification (including provocation).⁷² Twenty-six states ask whether the defendant's participation in the offense was relatively minor.⁷³ The only arguably nonculpability oriented circumstances that appear with any frequency concern the defendant's lack of a prior record⁷⁴ and, much less often,

200.035.5 (Michie 1992); N.H. REV. STAT. ANN. § 630:5.VI(b) (Supp. 1991) ("unusual and substantial duress"); N.J. STAT. ANN. § 2C:11-3.c(5)(e) (West Supp. 1992); N.M. STAT. ANN. § 31-20A-6.B (Michie 1990); N.C. GEN. STAT. § 15A-2000(f)(5) (1991); OHIO REV. CODE ANN. § 2929.04(B)(2) (Anderson 1987) ("duress, coercion, or strong provocation"); 42 PA. CONS. STAT. ANN. § 9711(e)(5) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(5) (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 39-13-204(j)(6) (1991); UTAH CODE ANN. § 76-3-207(3)(c) (Supp. 1992); WASH. REV. CODE ANN. § 10.95.070(5) (West 1990); WYO. STAT. ANN. § 6-2-102(j)(v) (Michie Supp. 1992).

71. ALA. CODE § 13A-5-51(2) (1982); ARK. CODE ANN. § 5-4-605(1) (Michie 1987); CAL. PENAL CODE § 190.3(d) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(f) (West Supp. 1992) ("emotional state of the defendant at the time the crime was committed"); FLA. STAT. ANN. ch. 921.141(6)(b) (Harrison Supp. 1991); ILL. ANN. STAT. ch. 38, para. 9-1(c)(2) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 35-50-2-9(c)(2) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(2) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(b) (West 1984); MD. ANN. CODE art. 27, § 413(g)(4) (Supp. 1992) ("substantially impaired as a result of . . . emotional disturbance"); MISS. CODE ANN. § 99-19-101(6)(b) (Supp. 1991); MO. ANN. STAT. § 565.032.3(2) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(2) (1991); NEB. REV. STAT. § 29-2523(2)(c) (1989); NEV. REV. STAT. ANN. § 200.035.2 (Michie 1992); N.H. REV. STAT. ANN. § 630:5.VI(f) (Supp. 1991); N.J. STAT. ANN. § 2C:11-3.c(5)(a) (West Supp. 1992); N.M. STAT. ANN. § 31-20A-6.D (Michie 1990); N.C. GEN. STAT. § 15A-2000(f)(2) (1991); OR. REV. STAT. § 163.150(1)(c)(A) (1991) ("extent of the mental and emotional pressure under which the defendant was acting"); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(2) (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 39-13-204(j)(2) (1991); UTAH CODE ANN. § 76-3-207(3)(b) (Supp. 1992); WASH. REV. CODE ANN. § 10.95.070(2) (West 1990); WYO. STAT. ANN. § 6-2-102(j)(ii) (Michie Supp. 1992).

72. CAL. PENAL CODE § 190.3(f) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(j) (West Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(4) (Michie/Bobbs-Merrill 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(d) (West 1984); MD. ANN. CODE art. 27, § 413(g)(3) (Supp. 1992) ("substantial duress, domination or provocation"); N.M. STAT. ANN. § 31-20A-6.F (Michie 1990) ("acted under circumstances which tended to justify, excuse or reduce the crime"); OHIO REV. CODE ANN. § 2929.04(B)(2) (Anderson 1987) ("duress, coercion, or strong provocation"); OR. REV. STAT. § 163.150(1)(b)(C) (1991) (special issue provision asking whether "the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."); S.C. CODE ANN. § 16-3-20(C)(b)(8) (Law. Co-op. Supp. 1991) ("defendant was provoked by the victim"); TENN. CODE ANN. § 39-13-204(j)(4) (1991) ("under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct").

73. ALA. CODE § 13A-5-51(4) (1982); ARIZ. REV. STAT. ANN. § 13-703.G.3 (1989); ARK. CODE ANN. § 5-4-605(5) (Michie 1987); CAL. PENAL CODE § 190.3(j) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(d) (West Supp. 1992); CONN. GEN. STAT. § 53a-46a(g)(4) (1991); FLA. STAT. ANN. ch. 921.141(6)(d) (Harrison Supp. 1991); ILL. ANN. STAT. ch. 38, para. 9-1(c)(5) (Smith-Hurd Supp. 1992) ("not personally present during commission of the act or acts causing death"); IND. CODE ANN. § 35-50-2-9(c)(4) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(5) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(g) (West 1984); MD. ANN. CODE art. 27, § 413(g)(6) (Supp. 1992) ("The act of the defendant was not the sole proximate cause of the victim's death."); MISS. CODE ANN. § 99-19-101(6)(d) (Supp. 1991); MO. ANN. STAT. § 565.032.3(4) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(6) (1991); NEB. REV. STAT. § 29-2523(2)(e) (1989); NEV. REV. STAT. ANN. § 200.035.4 (Michie 1992); N.H. REV. STAT. ANN. § 630:5.VI(c) (Supp. 1991); N.C. GEN. STAT. § 15A-2000(f)(4) (1991); OHIO REV. CODE ANN. § 2929.04(B)(6) (Anderson 1987) ("the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim"); 42 PA. CONS. STAT. ANN. § 9711(e)(7) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(4) (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 39-13-204(j)(5) (1991); UTAH CODE ANN. § 76-3-207(3)(f) (Supp. 1992); WASH. REV. CODE ANN. § 10.95.070(4) (West 1990); WYO. STAT. ANN. § 6-2-102(j)(iv) (Michie Supp. 1992).

74. ALA. CODE § 13A-5-51(1) (1982); ARK. CODE ANN. § 5-4-605(6) (Michie 1987); CAL. PENAL CODE § 190.3(c) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(g) (West Supp. 1992); FLA. STAT. ANN. ch. 921.141(6)(a) (Harrison Supp. 1991); ILL. ANN. STAT. ch. 38, para. 9-1(c)(1) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 35-50-2-9(c)(1) (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025(2)(b)(1) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.5(a) (West 1984); MD. ANN. CODE art. 27, § 413(g)(1) (Supp. 1992) ("The defendant has not previously (i) been found guilty of a crime of

whether the defendant constitutes a continuing threat to society.⁷⁵ Close examination of the statutes reveals that states regard the absence of prior offenses as relevant primarily to the culpability of the offender.⁷⁶

The focus on culpability apparent in all states that enumerate mitigating factors reflects the centrality of culpability to states' conceptions of individualization. This legislative consensus is powerful evidence that consideration of reduced culpability is a constitutionally indispensable aspect of capital sentencing. One might object, however, that the enumeration schemes on which we rely often include "catch-all" provisions for openended consideration of other mitigating factors, thus, perhaps, encompassing factors

violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence."); MISS. CODE ANN. § 99-19-101(6)(a) (Supp. 1991); MO. ANN. STAT. § 565.032.3(1) (Vernon Supp. 1992); MONT. CODE ANN. § 46-18-304(1) (1991); NEB. REV. STAT. § 29-2523(2)(a) (1989); NEV. REV. STAT. ANN. § 200.035.1 (Michie 1992); N.H. REV. STAT. ANN. § 630:5.VI(e) (Supp. 1991); N.J. STAT. ANN. § 2C:11-3.c(5)(f) (West Supp. 1992); N.M. STAT. ANN. § 31-20A-6.A (Michie 1990); N.C. GEN. STAT. § 15A-2000(f)(1) (1991); OHIO REV. CODE ANN. § 2929.04(B)(5) (Anderson 1987); OR. REV. STAT. § 163.150(1)(c)(A) (1991); 42 PA. CONS. STAT. ANN. § 9711(e)(1) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(1) (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 39-13-204(j)(1) (1991); UTAH CODE ANN. § 76-3-207(3)(a) (Supp. 1992); VA. CODE ANN. § 19.2-264.4.B(i) (Michie 1990); WASH. REV. CODE ANN. § 10.95.070(1) (West 1990); WYO. STAT. ANN. § 6-2-102(j)(i) (Michie Supp. 1992).

75. Only four states include lack of future dangerousness in their enumerations of mitigating factors. COLO. REV. STAT. ANN. § 16-11-103(4)(k) (West Supp. 1992); MD. ANN. CODE art. 27, § 413(g)(7) (Supp. 1992); N.M. STAT. ANN. § 31-20A-6.G (Michie 1990) ("the defendant is likely to be rehabilitated"); WASH. REV. CODE ANN. § 10.95.070(8) (West 1990). Two states *require* a finding of future dangerousness to render a defendant death-eligible. OR. REV. STAT. ANN. § 163.150(1)(b)(B) (1991); TX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (West Supp. 1992); cf. VA. CODE ANN. § 19.2-264.4.C (Michie 1990) (requiring jury to find *either* that the defendant would pose a continuing serious threat to society *or* that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" in order to impose the death penalty).

76. Some scholars have suggested that a defendant's prior offenses may increase the defendant's culpability for a subsequent offense, *see, e.g.*, ANDREW VON HIRSCH, *DOING JUSTICE* 84-88 (1976) (arguing that such offenders are more culpable because in repeatedly rejecting community standards, they act in an especially voluntary way), while others have maintained that prior criminal conduct has no relevance to culpability, *see, e.g.*, GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 465 (1978) (societies should not attach moral weight to the "persistence" of the offender); Howe, *supra* note 58, at 352 (arguing that prior convictions do not increase culpability for later crimes); Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 606 (1981) (reversing position adopted in *DOING JUSTICE, supra*). The federal sentencing guidelines take the former approach, U.S. SENTENCING COMM'N, *FEDERAL SENTENCING GUIDELINES MANUAL*, § 4A intro. commentary (1992) ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."). Whatever the moral relevance of prior criminal conduct as an *aggravating* factor, the absence of prior criminal conduct increases the plausibility of a defendant's claim that the circumstances of the offense, rather than the defendant's willingness to flout societal standards, account for the defendant's commission of the crime.

All four states that list lack of future dangerousness as a mitigating factor separately enumerate the defendant's lack of a significant criminal history as a mitigating factor. *Compare* statutes cited *supra* note 74 with statutes cited *supra* note 75. If these states regarded the lack of prior criminal activity as indicative of lack of future dangerousness, the separate enumeration of prior criminal activity would be superfluous.

It is also unlikely that states regard the absence of past offenses as helpful in assessing a defendant's "general desert" as opposed to his or her culpability for the particular crime. If states were concerned with "general desert," they would likely invite consideration of evidence regarding the defendant's affirmatively good deeds, rather than simply asking about the absence of bad ones. Given that *no* state enumerates any mitigating circumstance regarding a defendant's good acts or positive qualities (apart from a defendant's cooperation in the prosecution of other offenses, *see, e.g.*, COLO. REV. STAT. ANN. § 16-11-103(4)(h) (West Supp. 1992); N.J. STAT. ANN. § 2C:11-3.c(5)(g) (West Supp. 1992); N.C. GEN. STAT. § 15A-2000(f)(8) (1991)), it is fair to conclude that the states do not regard "general desert" as a key issue in capital sentencing.

beyond the culpability core. Even granting for the sake of argument that these catch-all provisions reflect legislative judgments to permit consideration of mitigating evidence unrelated to culpability, the enumerations nonetheless privilege the issue of reduced culpability in the sentencer's deliberations. Moreover, given the detailed enumeration of culpability factors, it would be reasonable to conclude that the catch-all provisions do *not* extend beyond culpability, but are instead intended to permit consideration only of unenumerated circumstances of reduced culpability.⁷⁷

One also might argue that the consensus we identify from current statutory schemes is suspect because these schemes may reflect states' efforts to comply with the varying commands of *Furman*, *Woodson*, and *Lockett*, rather than states' genuine views regarding capital decisionmaking.⁷⁸ We acknowledge the obvious interplay between the Court's decisions and statutory reform. We contend, however, for the reasons stated below, that states' decisions to confine their enumeration of mitigating circumstances to factors involving reduced culpability were not the result of perceived constitutional constraints. Accordingly, we believe that the focus on culpability in current state schemes reliably indicates contemporary conceptions of individualization.

The focus on culpability in states' enumerations of mitigating circumstances is not attributable to *Furman*, which provided notoriously vague guidance as to how to construct a constitutional capital sentencing scheme. The terse per curiam opinion stated only that imposition of the death penalty pursuant to the challenged statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁷⁹ The five justices supporting the judgment wrote separate concurrences setting forth divergent and arguably inconsistent rationales for the decision.⁸⁰ Despite their diversity, each of the opinions

77. A court construing the meaning of such catch-alls would be driven to this conclusion by the common law interpretive principle of *ejusdem generis*—that a “catch-all” provision preceded by a list of particular items should be construed to include items of the same kind. *See, e.g.,* *Hughey v. United States*, 495 U.S. 411, 419 (1990) (citing *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 734 (1973) for the proposition that a “catchall provision” is “to be read as bringing within a statute categories similar in type to those specifically enumerated.”). *See generally* BLACK’S LAW DICTIONARY 517 (6th ed. 1990) (explaining principle of *ejusdem generis*).

78. The *Woodson* Court itself recognized the hazard of identifying any definitive consensus from post-*Furman* statutes, refusing to attribute the post-*Furman* revival of mandatory death penalty statutes to “a sudden reversal of societal values regarding the imposition of capital punishment.” *Woodson v. North Carolina*, 428 U.S. 280, 298 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

79. 408 U.S. 238, 239-40 (1972).

80. *See id.* at 255-57 (Douglas, J., concurring) (arguing that the challenged statutes left too much room for racial, religious, and class discrimination in sentencing); *id.* at 305 (Brennan, J., concurring) (maintaining that the death penalty “is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of life imprisonment”); *id.* at 309 (Stewart, J., concurring) (arguing that the challenged death sentences were “cruel and unusual in the same way that being struck by lightning is cruel and unusual”); *id.* at 313 (White, J., concurring) (contending that under the challenged schemes, “the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice”); *id.* at 359-60 (Marshall, J., concurring) (arguing that the death penalty was “excessive” because it does not serve as a

observed that none of the schemes before the Court provided a principled basis for distinguishing those who were sentenced to death from those who were not; because sentencers were free to base their decision on any information they chose, and because sentencers would obviously differ in their selection of criteria, there was no guarantee that all equally deserving defendants (under any given theory) would be sentenced to death, or that undeserving defendants would be spared.⁸¹ The concurrences agreed that such unbridled discretion in capital sentencing produced unconstitutionally arbitrary results, but they gave little indication of how arbitrariness could be limited, or whether curing arbitrariness would be enough to save the death penalty.

More importantly, the concurrences did not, either individually or collectively, endorse any substantive theory of appropriate sentencing considerations. They suggested only that states must focus sentencers' attention on *some* theory of punishment, and that the chosen theory must be consistently applied; they did not purport to counsel states as to *which* theories were preferred. Accordingly, the focus on culpability in the statutory enumerations of mitigating circumstances that followed *Furman* reflects the penological theories of the states and not the Court.

Nor is the focus on reduced culpability attributable to the Supreme Court decisions establishing the individualization requirement. As argued above,⁸² the *Woodson/Lockett* line of cases gave little guidance regarding the substantive requirements of individualization. Indeed, those cases suggested, and current doctrine seems to confirm, that there is no substantive limitation at all on a defendant's ability to present mitigating evidence. *Lockett*, for example, suggested that the sentencer's "possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant—if not essential—[to the] selection of an appropriate sentence."⁸³ *Woodson*, and a companion case, *Roberts v. Louisiana*,⁸⁴ suggested that the "character,"⁸⁵ "attributes,"⁸⁶ "propensities,"⁸⁷ and "record"⁸⁸ of the individual offender, as well as "the circumstances of the particular offense,"⁸⁹ are constitutionally relevant considerations in capital sentencing. Evidence of character, attributes, record, and propensities clearly could refer to a defendant's "general desert" or

more effective deterrent than life imprisonment and "is morally unacceptable to the people of the United States at this time in their history").

81. For a discussion of the separate problems presented by overinclusion and underinclusion in the administration of the death penalty, see *infra* text accompanying notes 135-144.

82. See *supra* text accompanying notes 36-47.

83. 438 U.S. 586, 603 (1978) (plurality opinion) (internal quotation marks and citations omitted).

84. 428 U.S. 325 (1976).

85. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

86. *Roberts*, 428 U.S. at 333-34 (opinion of Stewart, Powell, and Stevens, JJ.).

87. *Id.* at 333.

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

89. *Id.*

likelihood of future dangerousness, as well as to a defendant's culpability. That the states overwhelmingly enumerate mitigating circumstances concerning culpability (and omit from their enumerations factors unrelated to culpability) thus reflects *their* choices rather than those of the Court.

Many states include factors unrelated to culpability in their enumeration of *aggravating* circumstances. One might argue that the inclusion of such considerations on the aggravating side undermines our view that the state statutes reflect a consensus about the primacy of culpability in individualized sentencing. We agree that any consensus we identify must be based on states' sentencing schemes in their entirety, and not simply on states' identification of "mitigating" circumstances. Nonetheless, the fact that states enumerate aggravating factors unrelated to culpability does not undermine our position regarding states' conceptions of individualized sentencing.

The overwhelming majority of aggravating circumstances direct the sentencer's attention to the harm caused by the defendant⁹⁰ or to general deterrence concerns⁹¹ rather than to any aspect of the defendant's character or experience. In this respect, the purpose of the enumeration of most aggravating circumstances is to satisfy the Eighth Amendment's command that the death penalty be confined to the "worst" murders, such as murders occurring in the course of a felony,⁹² murders of police officers,⁹³ or murders committed while in prison.⁹⁴ These types of aggravating circumstances do not represent an attempt to individualize sentencing; they are focused on the nature of the offense rather than on any particular aspect of the offender that might differentiate him or her from another offender who has committed the same crime. Accordingly, most aggravating circumstances serve a proportionality function rather than an individualizing function; they connect punishment to harm and social cost, rather

90. See, e.g., FLA. STAT. ANN. ch. 921.141(5)(c) (Harrison Supp. 1991) ("[t]he defendant knowingly created a great risk of death to many persons"); S.C. CODE ANN. § 16-3-20(C)(a)(9) (Law. Co-op. Supp. 1991) ("[t]wo or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct"); *id.* § 16-3-20(C)(a)(3) ("[t]he offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person").

91. See, e.g., N.J. STAT. ANN. § 2C:11-3.c(4)(f) (West Supp. 1992) ("[t]he murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another"); *id.* § 2C:11-3.c(4)(g) ("[t]he offense was committed while the defendant was engaged in . . . flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping"); N.C. GEN. STAT. § 15A-2000(e)(4) (1991) ("[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody"); *id.* § 15A-2000(e)(7) ("[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws").

92. See, e.g., S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law. Co-op. Supp. 1991); WYO. STAT. ANN. § 6-2-102(h)(iv) (Michie Supp. 1992).

93. See, e.g., FLA. STAT. ANN. ch. 921.141(5)(j) (Harrison Supp. 1991); S.C. CODE ANN. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1991) ("[t]he murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties").

94. See, e.g., ALA. CODE § 13A-5-49(1) (1982); KY. REV. STAT. ANN. § 532.025(2)(a)(5) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art 905.4(f) (West 1984).

than distinguish among offenders. Although a few states list aggravating circumstances that differentiate among defendants based on their individual characteristics, such as future dangerousness⁹⁵ or bad character,⁹⁶ these inclusions are relatively rare and thus do not reflect a societal consensus that factors unrelated to culpability are relevant to capital sentencing. The fact that *all* mitigating circumstances enumerated by states relate to the defendant as an individual, while few aggravating circumstances do so, reflects the states' view that individualized sentencing will occur primarily through sentencer consideration of mitigating evidence.

Moreover, even if states' enumerations of aggravating circumstances did reflect an emerging consensus regarding the importance of certain individualizing aspects of capital defendants (which they currently do not), state statutory schemes generally do not make aggravating circumstances *indispensable* parts of the sentencing inquiry. The operation of most state schemes makes this clear: a defendant often becomes "death-eligible" because of the nature of the crime. Enumerated aggravating factors that relate to the defendant as an individual will not necessarily come into play, because very few states insist that any *particular* aggravating circumstance be established to sustain a death sentence. If the state chooses not to rely on an enumerated aggravating factor in seeking a death sentence, the defendant cannot argue that the failure of the state to prove that circumstance (e.g., the lack of future dangerousness) constitutes a basis for a sentence less than death. Thus, in most states the decision to label a sentencing factor "aggravating" or "mitigating" has a serious practical consequence; the decision to label a factor "mitigating" ordinarily reflects the state's view that the factor should *always* be available to the sentencer as a ground for rejecting the death penalty.⁹⁷ Accordingly, aggravating circumstances are not generally part of the "individualizing" process mandated by *Woodson*. In sum, then, we do not find anything in states' enumerations of aggravating circumstances that undermines our view that states uniformly regard reduced culpability as the essential focus of individualized sentencing.

95. Two states enumerate future dangerousness as an aggravating factor. IDAHO CODE § 19-2515(g)(8) (1987) ("The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."); OKLA. STAT. ANN. tit. 21, § 701.12.7 (West 1983) ("[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). Two states *require* a finding of future dangerousness to support a death sentence. OR. REV. STAT. § 163.150(1)(b)(B) (1991) (to impose the death penalty the jury must unanimously find that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); TX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (West Supp. 1992) (same); *cf.* VA. CODE ANN. § 19.2-264.4.C (Michie 1990) (requiring jury find *either* that the defendant would pose a continuing serious threat to society *or* that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" before imposing death penalty).

96. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-703.F.6 (1989) ("defendant committed the offense in an especially heinous, cruel or depraved manner");

97. A few states, such as Oregon, Texas, and Virginia, enumerate mandatory aggravating factors that *must* be found to support a death sentence. *See supra* note 75. In those jurisdictions, the aggravating factors could be regarded as "functional" mitigating factors in the sense that the defendant must be permitted to argue against death based on the absence of those circumstances.

D. *The Model Penal Code and Evidence of Reduced Culpability*

Several members of the Court regard the views of "respected professional organizations," in addition to state legislative enactments, as relevant to the identification of societal consensus.⁹⁸ The views of such organizations also point to culpability as the core of individualized sentencing. The movement toward "channeled" discretion in capital sentencing was driven in part by the efforts of the American Law Institute (ALI) to formulate more precise capital sentencing standards. A decade before *Furman*, the ALI drafted a Model Penal Code section that listed eight mitigating circumstances the sentencer should consider, in addition to "any other" relevant factors, in the course of its sentencing decision.⁹⁹ All of those factors, except perhaps lack of prior criminal history,¹⁰⁰ focus on individual culpability. They address the presence of extreme mental or emotional distress, the involvement of the victim in the criminal act, the defendant's belief that his or her actions were morally justified, the defendant's minor participation in the crime, the existence of mental disease or defect, and the defendant's youth at the time of the crime.¹⁰¹ This focus is consistent with the Model Penal Code's more general attempt to link punishment to culpability.¹⁰²

The Model Penal Code commentary explains that the Code's choice of mitigating factors reflects the current "widespread acceptance" of the idea that "diminished" or "partial" responsibility¹⁰³ should reduce first-degree to second-degree murder. This doctrinal development is based on the belief that defendants who kill while impaired by some emotional or mental disturbance are less blameworthy and thus less deserving of punishment; the law gives effect to this belief by holding that such defendants do not truly "deliberate" or "premeditate."¹⁰⁴ Thus, the diminished capacity doctrine "springs from the recognition that the 'premeditation and deliberation' formula used to define first-degree murder only makes sense if it is construed as an essentially subjective inquiry into degrees of blameworthiness or moral turpitude."¹⁰⁵ Even before the advent of the "premeditation and deliberation" formula for identifying first-degree (i.e., capital) murder,¹⁰⁶ the common law distinguished between capital and

98. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

99. The relevant section, 210.6, was presented to the Institute in 1959 and again in 1962. See Model Penal Code § 210.6 & commentary at 107, n.* (Proposed Official Draft 1962).

100. See *supra* note 76.

101. MODEL PENAL CODE § 210.6(4)(b)-(h) (Proposed Official Draft 1962).

102. See, e.g., *id.* §§ 2.01, 2.05 (eliminating strict liability for criminal offenses); § 210.2(1)(b) (limiting the common law felony murder rule to a rebuttable presumption as to culpable mental state); § 210.3 (expanding the common law doctrine of provocation to include "extreme emotional distress," and thus reducing more murders to manslaughter on grounds of reduced culpability).

103. *Id.*, § 210.6 commentary at pp. 138-40 (1980).

104. *Id.*, § 210.6 commentary at 139.

105. *Id.*, § 210.6 commentary at 140.

106. The "deliberation and premeditation" formula was an American attempt "to reduce the rigors of the law" by restricting capital punishment to cases of such heightened culpability. It was first enacted by

noncapital homicide based on degrees of culpability. The category of manslaughter, encompassing murders committed in the heat of passion or without intent to kill, was created to grant less culpable defendants the "benefit of clergy" (not available to other murderers) and thus to preclude their execution.¹⁰⁷ Thus, the Model Penal Code's focus on culpability in its enumeration of mitigating circumstances reflects both a modern and an historical consensus that the distinction between capital and noncapital murder should turn on the culpability of the defendant.

E. *Actual Sentencing Practices and Evidence of Reduced Culpability.*

The Court has also looked to actual sentencing practices to determine whether consensus exists for the purposes of the Eighth Amendment.¹⁰⁸ We doubt that a comprehensive examination of sentencing decisions would reveal much for the purposes of the present inquiry, because even when a record of the mitigating circumstances found by the sentencer is available (along with a record of the sentencer's ultimate decision),¹⁰⁹ we cannot draw reliable conclusions about the sentencer's attitude regarding the role of reduced culpability in capital sentencing. A sentencer's decision to impose death despite evidence in the record demonstrating reduced culpability may reflect the sentencer's assessment that evidence of reduced culpability does not generally call for a sentence less than death, but it might as easily reflect the sentencer's assessment of the *extent* of the defendant's reduced culpability in that case. Because "reduced" culpability is invariably a matter of degree (and we cannot confidently assess the extent of a defendant's reduced culpability from a record), we cannot discern sentencers' views regarding the significance of evidence of reduced culpability based on their lack of responsiveness to such evidence in their verdicts. Similarly, we cannot draw reliable conclusions from sentencers' apparent responsiveness to evidence of reduced culpability. Given that state enumerations of mitigating circumstances privilege evidence of reduced culpability, it would be hazardous to conclude that sentencers' reliance on such evidence reflects the sentencers' own views, as opposed to legislative choices.

Pennsylvania in 1794 and soon adopted by many other states. See *McGautha v. California*, 402 U.S. 183, 198 (1971).

107. Benefit of clergy was a device by which at first clerics, and later a much broader group of defendants, were exempted from capital punishment for their first-charged offense. See *id.* at 197-98.

108. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 335-36 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 852 (1988) (O'Connor, J., concurring in the judgment); *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977) (plurality opinion).

109. See, e.g., FLA. STAT. ANN. ch. 921.141(3) (Harrison Supp. 1991) (requiring that sentencing judges make written findings of fact detailing aggravating and mitigating circumstances); MISS. CODE ANN. § 99-19-101(3) (Supp. 1991) (same requirement for juries).

F. *A Refined Theory of Individualized Sentencing*

On the basis of the foregoing analysis, we believe that the individualization requirement of the Eighth Amendment is most sensibly understood to mandate consideration of evidence of reduced culpability in capital cases. We do not rule out the possibility that a further societal consensus may be found that requires consideration of evidence unrelated to reduced culpability. Indeed, we acknowledge that states' reluctance to set forth categorical exclusions to mitigating evidence may ultimately reflect their judgment that the capital sentencing decision should be unconstrained. But, following the Court's Eighth Amendment analysis,¹¹⁰ there is little "objective evidence"¹¹¹ that states' conceptions of individualization are so broad, and striking evidence that states regard culpability as the touchstone of individualized sentencing. The focus on culpability is apparent in current state statutory schemes and consonant with historical efforts, both common law and statutory, to separate capital murder from murders warranting a sentence less than death. Although various members of the Court have at times recognized the essential connection between culpability and individualized sentencing,¹¹² the Court has not attempted to clarify or cabin the individualization principle. The Court's failure to develop a theory of individualization has left it in the uncomfortable and untenable position of defending, against increasing attack,¹¹³ the proposition that the Eighth Amendment requires states to permit unbridled consideration of mitigating circumstances in capital sentencing. A more refined conception of individualization rooted in an identifiable Eighth Amendment consensus thus both limits and protects a defendant's right to individualized sentencing: it eliminates, as a constitutional requirement in most circumstances,¹¹⁴ a defendant's right to have the sentencer consider mitigating evidence unrelated to culpability,

110. See *supra* note 18.

111. *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

112. See, e.g., *Penry*, 492 U.S. at 327-28 ("[I]t 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."); *Skipper v. South Carolina*, 476 U.S. 1, 12 (1986) (Powell, J., concurring in the judgment) (arguing that *Lockett* and *Eddings* "clearly focus on evidence that lessens the defendant's culpability for the crime for which he was convicted"); *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting) (suggesting that discretion in capital sentencing flowed from the recognition that "individual culpability is not always measured by the category of the crime committed").

113. See, e.g., *Walton v. Arizona*, 110 S.Ct. 3047, 3061-68 (1990) (Scalia, J. concurring) (stating that *Woodson*, *Lockett*, and *Eddings* should be overruled). For a detailed discussion of Justice Scalia's attack on constitutionalizing the individualization principle, see *infra* text accompanying notes 122-127.

114. In some circumstances, a defendant's evidence of lack of future dangerousness or general good character may be relevant to rebut the states' proof of an aggravating circumstance. In such circumstances, the Due Process Clause may require states to permit consideration of the rebuttal evidence. See *Skipper*, 476 U.S. at 5 n.1 (where defendant was not allowed to introduce evidence of his adaptability to prison life to rebut prosecution's assertion that he would pose disciplinary problems if sentenced to prison, "elemental due process" requires that the "defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'" (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion))).

but it provides a defensible justification for recognizing the principle of individualization at all.

Our view that states *must* permit consideration of evidence of reduced culpability does not suggest that states *may not* permit consideration of mitigating evidence beyond this "core." In our federal structure, states retain the power to afford criminal defendants greater protections than those commanded by the Constitution.¹¹⁵ The Eighth Amendment's prohibition against imposition of cruel and unusual punishments marks a floor rather than a ceiling of protection. And states might very well regard lack of future dangerousness or general desert as crucial considerations in determining who should die.¹¹⁶ At the present time, most states have adopted a "catch-all" or its functional equivalent for consideration of mitigating evidence,¹¹⁷ partly in response to the Court's seeming insistence that all individualizing aspects of a defendant are constitutionally relevant as mitigating circumstances. If our view of individualization were adopted by the Court, some states might limit their "catch-all" to evidence reflecting reduced culpability, whereas others might retain their more encompassing inquiry. The possibility that states might choose the latter course (of voluntarily reproducing the current expansive inquiry into mitigation) prompts our next question: is a state's choice to adopt such a broad view of mitigation foreclosed by a separate Eighth Amendment concern, traceable to *Furman*, that capital sentencing discretion be circumscribed to avoid arbitrariness?

IV. FORCING STATES TO CHANNEL CONSIDERATION OF MITIGATING EVIDENCE: WHAT MAY CAPITAL SENTENCERS CONSIDER?

The Eighth Amendment requirement of individualized capital sentencing, limited, as we have argued, to a requirement that sentencers consider evidence of a defendant's reduced culpability, does not itself mandate that states confine consideration of mitigating evidence to this constitutionally required "core." However, a separate though related Eighth Amendment requirement—that capital sentencing discretion be "guided,"¹¹⁸ "channeled,"¹¹⁹ or "narrowed"¹²⁰ in

115. See, e.g., *People v. Bullock*, 485 N.W.2d 866, 440 Mich. 15 (1992) (holding that state constitution's prohibition of "cruel or unusual" punishment gave greater protection to defendant than federal constitution's prohibition of "cruel and unusual" punishment).

116. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2713 (1991) (plurality opinion) (stating that "the Eighth Amendment does not mandate adoption of any one penological theory" and that "marked divergences . . . in underlying theories of sentencing . . . are the inevitable, often beneficial, result of the federal structure").

117. See *supra* note 65 and accompanying text.

118. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.").

119. See, e.g., *Lewis v. Jeffers*, 110 S. Ct. 3092, 3099 (1990) (stating that the *Furman* principle "requires a State to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance") (internal quotations marks and citation omitted).

120. *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (to avoid the arbitrariness of *Furman*, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably

order to reduce arbitrariness in sentencing—arguably might entail such a restriction. The long-observed tension between *Furman*'s requirement that sentencing discretion be narrowed and *Lockett*'s requirement that individualized consideration be broadened¹²¹ compels us to answer the question why, if it is *permissible* to limit individualized consideration to a constitutional "core," is it not also *required* that states do so?

Forcing states to channel consideration of mitigating evidence is the logical but unacknowledged consequence of Justice Scalia's critique of the tension between *Furman* and *Lockett* in *Walton v. Arizona*.¹²² In *Walton*, Justice Scalia announced that he, as an individual Justice, would no longer adhere to *Lockett*'s requirement that all relevant mitigating evidence be considered—"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."¹²³ Justice Scalia reached this categorical stance after declaring his belief that the tension between *Furman* on the one hand, and *Woodson* and *Lockett* on the other, has become intolerable. In his view, to acknowledge an "inherent tension" between these two lines of cases "is rather like saying that there was perhaps an inherent tension between the Allied and the Axis Powers in World War II."¹²⁴ Given his determination that the *Furman* line of cases was "arguably supported"¹²⁵ by the text of the Constitution but that the *Woodson/Lockett* line bore "no relation whatever,"¹²⁶ Justice Scalia decided that the *Woodson/Lockett* cases must be jettisoned in order to give effect to *Furman*. Justice Scalia, however, failed to acknowledge the logical implications of his critique. If the problem with the *Woodson/Lockett* cases is not simply that they are not compelled by the text of the Constitution, but that they violate a separate principle that *is* compelled by the Constitution, then the individualized sentencing required by *Woodson* and *Lockett* must not only be deconstitutionalized; it must also be *banned*.¹²⁷

justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

121. See, e.g., 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, 1080 (1991) ("[T]he Court's dual sentencing objectives strongly resemble Siamese twins—locked at the hip but straining uncomfortably in opposite directions."); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1150 (1980) ("The achievable or imaginable level of individualization varies inversely with the achievable or imaginable level of consistency.") (emphasis omitted); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1161 (1991) ("At least on the surface, *Lockett*'s immunization of mitigating circumstances against state regulation appears to conflict with *Furman* and *Gregg*'s most fundamental premise that a sentencer must not be given unbridled discretion over whether to impose the death penalty."); Weisberg, *supra* note 51, at 325 ("Assuming that *Lockett* does grant some very broadly defined right to introduce mitigating circumstances, how can we fit it into the competing historical accounts of the Court's struggle to contain the death penalty?").

122. *Walton v. Arizona*, 110 S. Ct. 3047, 3058-68 (1990) (Scalia, J., concurring).

123. *Id.* at 3068.

124. *Id.* at 3063.

125. *Id.* at 3066.

126. *Id.* at 3067.

127. See Sundby, *supra* note 121, at 1189.

Under this view, states *must* “channel” sentencers’ consideration of mitigating evidence in the same way that they channel consideration of aggravating evidence, in order to give effect to *Furman*’s anti-arbitrariness principle.

The most common response to Justice Scalia’s arguments in *Walton* is to insist that broad consideration of mitigating evidence can peacefully coexist with *Furman*’s requirement of channeled capital sentencing discretion.¹²⁸ Justice Stevens elaborated this position in his dissent in *Walton*, which specifically addressed Justice Scalia’s argument. In Justice Stevens’ view, the problem of arbitrary, “lightning”-like¹²⁹ application of the death penalty identified in *Furman* was attributable to “the size of the class of convicted persons who are eligible for the death penalty.”¹³⁰ Thus, the proper remedy for such sentencing arbitrariness lies in sufficient “narrowing” of the class.¹³¹ Justice Stevens described “narrowing” as the process of dividing the apex of a pyramid (representing all cases of homicide of every category) from the base; the apex represents the small category of homicides eligible for the death penalty.¹³² Once this category is defined (for example by the use of aggravating factors), the sentencer may impose the death penalty, but also may decline to do so “without giving any reason.”¹³³ Justice Stevens concluded that permitting openended discretion to *exempt* defendants from the death penalty is not inconsistent with limiting discretion to select who is *eligible* for its imposition: “After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.”¹³⁴

Justice Stevens’ attempt to reconcile “narrowing” with broad discretion to show mercy can succeed only if one takes a particular, and particularly limited, view of *Furman*. Justice Stevens’ argument assumes that the problem with the openended, pre-*Furman* capital sentencing schemes lay only in the possibility that some people executed under such schemes might not have been chosen for execution had the state been required to articulate its theory of the “worst” crimes. This problem is one of “overinclusion”—when individual sentencers are given unguided power to announce life or death, there is no guarantee that each imposition of the death penalty reflects the state’s, and thus the

128. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 315 (1983); Harris, *supra* note 17, at 1424; 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, 374-76 (1981).

129. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

130. *Walton*, 110 S. Ct. at 3090 (Stevens, J., dissenting).

131. *Id.*

132. Justice Stevens used this metaphor previously in his opinion for the Court in *Zant v. Stephens*, 462 U.S. 862, 870-72 (1983), noting that the same image was invoked by the Georgia Supreme Court to explain the operation—and constitutionality—of its capital sentencing scheme. See *Zant v. Stephens*, 297 S.E.2d 1, 3-4 (Ga. 1982).

133. 110 S. Ct. at 3091.

134. *Id.* at 3092.

community's, consensus about who deserves to die. Indeed, one of the major arguments made to the *Furman* Court was that the infrequency of death verdicts by juries could not be squared with the breadth of the states' statutes authorizing capital punishment;¹³⁵ this infrequent imposition suggested that many of the statutes that remained on the books had fallen into desuetude and no longer reflected the actual views of the people of the state. *Furman* itself involved death sentences in two cases of rape and thus raised the possibility that the penalty was being applied when a community consensus was lacking.¹³⁶ This concern regarding "overinclusion" was reflected in Justice Stewart's concurrence in *Furman*, which suggested that mandatory capital sentencing schemes might solve the problem because they would impose the penalty only when "state legislatures have determined [it] to be necessary."¹³⁷ Justice Stewart intimated that forcing states to articulate a theory of the worst murders and thus to "narrow" the class of persons eligible for the death penalty might be sufficient to remedy the problem of arbitrariness. Under this view, Justice Stevens would be correct that permitting sentencers broad discretion to exempt defendants *out* of the narrowed class would not re-create *Furman*'s unconstitutional arbitrariness, because discretion to be merciful would never result in the imposition of the death penalty absent a state consensus that it was deserved.

The difficulty with Justice Stevens' reconciliation is that it ignores a second, crucial aspect of the *Furman* problem. Openended capital sentencing schemes are not troublesome merely because they might impose death when it is not "deserved" according to actual community consensus, but also because they might *fail* to impose the death penalty when it *is* "deserved." This is the "equal protection"¹³⁸ problem identified by Justice Douglas in his opinion in *Furman*—the concern that only some of those who "deserved" the death penalty were actually being sentenced to death, and the fear that these few were being

135. See, e.g., Brief for Petitioner at 11, *Furman v. Georgia*, 408 U.S. 328 (1972) (No. 69-5003) ("[T]he Eighth Amendment condemns a penalty which is so oppressive that it can command public acceptance only by sporadic, exceedingly rare and arbitrary imposition."); Brief for Petitioner at 39-40, *Aikens v. California*, 408 U.S. 813 (1972) (No. 68-5027) ("[S]ince 1958 . . . , executions in all regions of the United States for any crime have been rare. Since 1963 they have been freakishly rare. . . . The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does*. What it has done, in the years 1965-1970 inclusive, is to execute only ten people.") (citation omitted). *Aikens* was a companion case to *Furman*.

136. See *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (widespread consensus that death penalty is excessive for rape rendered death sentence unconstitutional in such cases).

137. 408 U.S. at 309 (Stewart, J., concurring).

138. *Furman*, 408 U.S. at 255 (Douglas, J., concurring) ("In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.") (citation omitted). Randall Kennedy has reframed this problem as the failure to afford black communities equal access to a "public good"—imposition of the death penalty when blacks are murdered. Randall H. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

identified by impermissible factors such as race and class.¹³⁹ Thus, the pre-*Furman* capital sentencing schemes were objectionable not simply because they resulted in *overinclusive* application of the death penalty, but also because they led to *underinclusion*.¹⁴⁰ Capital defendants singled out for the death penalty under such schemes could argue both that their executions might not be “deserved” and that, even if they clearly fell within any possible designation of the “worst” murderers, they were being treated differently from similarly situated defendants. Indeed, it is this latter concern that principally animated the assault on openended discretion in capital sentencing that began in the 1960’s and culminated in *Furman*.¹⁴¹

Recognition of the underinclusiveness problem inherent in openended capital sentencing schemes reveals the flaw in Justice Stevens’ argument in *Walton*. If we are worried that the failure to provide precise guidance to capital sentencers may lead them to use irrelevant characteristics (like physical attractiveness) or impermissible ones (like race or class) to determine who should live and who should die from among the equally eligible, this problem is not resolved merely by narrowing the range of persons among whom the sentencer can discriminate.¹⁴² Resolution of this problem requires not only that the state

139. See, e.g., 408 U.S. at 257 (Douglas, J., concurring); *id.* at 364 (Marshall, J., concurring).

140. Moreover, sometimes underinclusion is strong evidence of overinclusion: the fact that the state selects only a few out of many eligible to receive a benefit or to bear a burden often reveals that the state’s purported interest in the benefit or burden is illusory. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (state’s interest in environmental aesthetics offered to justify billboard ban was undermined by exceptions for on-site commercial billboards and political billboards); *Police Dep’t v. Mosley*, 408 U.S. 92 (1972) (state’s interest in preventing school disruption offered to justify ban on picketing was undermined by exception for labor picketing). Thus, the fact that only a few of many eligible defendants are selected to receive the death penalty (underinclusion) suggests that the state may not really value the death penalty at all (overinclusion). The resounding legislative endorsement of capital punishment that followed *Furman*, however, demonstrates that states *do* value the death penalty. Accordingly, the continuing underinclusive application of the death penalty—the disproportionate imposition of the death penalty on poor, black defendants who kill white victims—does not reflect disenchantment with the punishment, but rather an unwillingness to apply a valued penalty either to protect members of disfavored groups or to punish members of preferred groups.

141. The N.A.A.C.P. Legal Defense and Educational Fund took a leadership role in attacking this aspect of the death penalty. In its amicus brief in *McGautha v. California*, 402 U.S. 183 (1971), the Legal Defense Fund argued:

For it is, once again, the easy way out—too easy, we think, where the matter of killing human beings is involved—for a legislature to leave undisturbed upon the statute books a capital punishment law whose evenhanded and nondiscriminatory enforcement it could not rationally support, and its public would abhor—so long as both the legislature and the public are assured that it need not in fact be evenhandedly and nondiscriminatorily applied. If a few poor ugly wretches are the only ones who have to actually die, and upon grounds not susceptible of examination or application to anyone else, capital punishment obviously escapes the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. For the public can easily bear the rare and random imposition of a punishment which, if applied systematically and regularly, would make the common gorge rise.

Brief Amici Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent at 13-14, *McGautha v. California*, 402 U.S. 183 (1971) (No. 203) [hereinafter Brief Amici Curiae].

142. For example, within a “narrowed” class of defendants, sentencers could still choose to execute only the poor or the black defendants; the unfairness of such selection is not eliminated by the fact that it operates in a smaller sphere.

articulate a theory of the worst murders, but also that the state guide the decisionmaking process to ensure that its theory is implemented in a nondiscriminatory manner. Thus, Justice Stevens' analysis, that "narrowing" the class of the death-eligible is all that *Furman* requires, is incomplete; sentencer discretion must be "channeled" as well. And if this is so—if failure to channel sentencer discretion creates unacceptable underinclusiveness in the application of the death penalty—then openended discretion in the dispensation of mercy must be likewise unacceptable. Discrimination in the dispensation of mercy and discrimination in the imposition of death create exactly the same inequality problem in any given pool,¹⁴³ as the opponents of the pre-*Furman* sentencing schemes recognized: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean[] the same thing in any man's language."¹⁴⁴ Thus, Justice Stevens' attempted reconciliation of *Furman*'s anti-arbitrariness principle with the *Woodson/Lockett* command of openended discretion ultimately fails.

We nonetheless reject the view that states must be forced to limit consideration of mitigation evidence to its constitutional core. Our position, however, does not rest on Justice Stevens' premise that unbridled discretion in the consideration of mitigating evidence is less problematic than unbridled discretion in the consideration of aggravating evidence. Rather, we contend that *requiring* states to channel consideration of mitigating evidence when they might otherwise choose not to do so creates a separate constitutional problem not implicated by forced channeling on the aggravation side.

Forcing states to channel consideration of aggravating circumstances requires states to articulate a theory of the worst murders and to attempt to guide sentencers in the implementation of that theory. This significantly reduces the problems of over- and underinclusiveness identified above—that is, sentencers are prevented both from applying their own theories of the worst murders, which might sweep in more defendants than the state's theory, and from applying different theories to different cases in an arbitrary and possibly discriminatory way. Of course, sentencers might still misinterpret the state's theory, and thus might still produce over- and underinclusiveness, given the impossibility of reducing any viable penological theory to a simple formula. But there seems to be little question that both over- and underinclusiveness can be reduced by forcing states to channel sentencers' consideration of aggravating evidence.

Forcing states to limit consideration of mitigating evidence to the constitutional core of evidence of reduced culpability, however, would reduce underinclusiveness at the cost of *increasing* overinclusiveness. Forced channeling of

143. In fact, the constitutional requirement of openended discretion in the consideration of mitigating evidence may well be partly responsible for the staggering disparities in the imposition of the death penalty based on the race of the victim. These disparities are set forth in the famous study, DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990), the preliminary findings of which were addressed by the Court in *McCleskey v. Kemp*, 481 U.S. 279, 286-93 (1987).

144. Brief Amici Curiae, *supra* note 141, at 69.

consideration of mitigating evidence would undoubtedly reduce the problem of underinclusiveness in the same way that forced channeling of consideration of aggravating evidence would; both kinds of channeling prevent sentencers from treating similar cases differently for arbitrary or discriminatory reasons. But forcing states to restrict consideration of mitigating evidence to its constitutional core would create a new and serious problem of overinclusiveness. If a state were forced to eliminate sentencers' consideration of, for example, evidence of the defendant's rehabilitation or general good moral character, *despite* the state's own determination that such mitigating evidence would be relevant to the sentencing decision, then a subsequent sentence of death would be disconnected from the state's (and thus the community's) considered judgment regarding who deserves to die. Requiring a state to confine its theory of mitigation is analogous to requiring a state that does not embrace the death penalty to execute certain murderers. Such a requirement may well reduce a kind of arbitrariness by subjecting all murderers within the United States to the possibility of receiving the ultimate punishment. And such a requirement would not currently run afoul of a national consensus regarding permissible punishment. Yet the requirement would clearly fail Eighth Amendment scrutiny because the Eighth Amendment must also protect defendants against punishment not authorized by their local communities. In fact, this "internal" proportionality principle may be more fundamental than the current "external" proportionality standard: whatever the wisdom of keeping states within the boundaries of national consensus, it cannot be doubted that a state may not be pulled in the direction of extreme punishments simply because other states permit them. Such a disassociation of individual sentencing decisions from a state's internal consensus regarding just punishment would itself violate the Eighth Amendment.¹⁴⁵

If this problem looks familiar, it is because forced channeling of mitigation reproduces the same constitutional infirmity that Justice Stevens identified as the central concern of *Furman*: forced channeling allows, even *requires*, sentencers to impose the death penalty where the community might find it inappropriate. Moreover, the potential for overinclusiveness created by forced channeling of consideration of mitigating evidence is in some sense greater than the potential for overinclusiveness created by the pre-*Furman* schemes of unbridled discretion. In the forced channeling scenario, departure from community norms is a certainty inscribed in law rather than an anomaly attributable to an idiosyncratic sentencer. Thus, despite the fact that channeling consideration of mitigating evidence would help to reduce arbitrariness in capital

145. Moreover, the current proportionality principle relies on each state's freedom to be more protective of its citizens than other states might be of theirs. We can identify emerging standards of decency, such as nationwide rejection of a punishment (or acceptance of a principle of leniency), only if states are granted such latitude.

sentencing, states may not be forced to channel sentencers' consideration of mitigating evidence in order to effectuate this goal.

V. IMPLICATIONS

And so we return to where Justice Scalia began. We have recast the Eighth Amendment's "individualization" requirement as a capital defendant's right to have considered, as a mitigating factor, evidence related to his or her reduced culpability. Accordingly, in our view, states can constitutionally limit consideration of mitigating evidence to this core. But we have also argued that the Eighth Amendment forbids forcing states to so limit consideration of mitigating evidence. As a result, states may voluntarily reproduce the current *Woodson/Lockett* regime of unbridled discretion on the mitigating side. We thus must confront the question raised so vehemently by Justice Scalia in *Walton*: can the *Woodson/Lockett* regime coexist with *Furman*'s requirement that discretion in capital sentencing be limited? We have rejected Justice Stevens' attempt to reconcile these two apparently conflicting principles because he fails to accord *Furman*'s anti-arbitrariness principle its full scope. But we have also rejected Justice Scalia's proposed solution, that the *Woodson/Lockett* line of cases be abandoned, because in recasting and refining the scope of the individualization requirement we have more securely connected it to its constitutional moorings. But we cannot ignore his question.

Two possible answers remain. If, as we maintain, the *Woodson/Lockett* principle and the *Furman* principle are irreconcilable, and the *Woodson/Lockett* principle cannot be jettisoned in its entirety, then either *Furman* must be abandoned or the death penalty cannot constitutionally be imposed.

The most eloquent arguments against *Furman* were made by Justice Harlan in his opinion for the Court in *McGautha v. California*,¹⁴⁶ which upheld openended discretionary schemes against a Due Process challenge one year before *Furman* invalidated them under the Eighth Amendment. Justice Harlan argued that the effort to direct and control sentencer discretion is both impossible and unnecessary. It is impossible because legislatures cannot "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and . . . express these characteristics in language which can be fairly understood and applied by the sentencing authority . . ."¹⁴⁷ It is unnecessary because "[s]tates are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors . . ."¹⁴⁸

146. 402 U.S. 183 (1971).

147. *Id.* at 204.

148. *Id.* at 208.

Justice Harlan's first observation about the impossibility of channeling discretion has been borne out in the twenty years since *Furman*. States' efforts to provide comprehensive enumeration of those cases calling for the death penalty have largely reproduced the pre-*Furman* scheme: the number¹⁴⁹ and breadth¹⁵⁰ of aggravating circumstances give sentencers, in fact if not in theory, the same broad discretion condemned by *Furman*.¹⁵¹ Moreover, the *Furman* line of cases erroneously presumes that the problem of arbitrariness in the selection of defendants for the death penalty can be attributed solely to arbitrariness in the sentencing process. However, vast arbitrariness exists in the operation of the criminal justice system prior to sentencing—in the investigation of crime, the charging decision, the plea offer (if any), the decision to seek the death penalty, and the effectiveness of defendant's counsel. Justice Harlan might argue that *Furman*'s apparently insignificant contribution to consistency in the application of the death penalty is good evidence that the *Furman* principle is not constitutionally required.¹⁵²

But Justice Harlan's second observation—that states are entitled to trust capital sentencers to base their decisions on principled grounds—finds considerably less support in experience, undermining his conclusion that *Furman*'s attempt to combat arbitrariness is not constitutionally compelled. The suspicion that racial discrimination drives capital sentencing decisions, articulated in several of the *Furman* concurrences,¹⁵³ has been confirmed by statistical

149. See, e.g., ARIZ. REV. STAT. ANN. § 13-703.F (1989) (listing 10 aggravating circumstances); COLO. REV. STAT. ANN. § 16-11-103(55) (West Supp. 1992) (listing 11 aggravating circumstances); FLA. STAT. ANN. ch. 921.141(5) (Harrison Supp. 1991) (listing 11 aggravating circumstances). In addition, many states permit consideration of unenumerated aggravating circumstances. See, e.g., UTAH CODE ANN. § 76-3-207(2) (Supp. 1992) (permitting consideration of "any other facts in aggravation or mitigation of the penalty").

150. See, e.g., ARIZ. REV. STAT. ANN. § 13-703.F.6 (1989) (listing, as aggravating factor, that "defendant committed the offense in an especially heinous, cruel or depraved manner").

151. This problem is exacerbated by many states' expansive definition of "capital" murder. See, e.g., ALA. CODE § 13A-5-40(a) (1982) (enumerating 18 kinds of capital murder); UTAH CODE ANN. § 76-5-202(1) (Supp. 1992) (enumerating 17 kinds of capital murder).

152. However, *Furman* has influenced the administration of capital punishment beyond its requirement that sentencer discretion be channeled. Since *Furman*, the Court has insisted on greater procedural protections in capital cases than in noncapital cases. See, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980) (recognizing constitutional right to a lesser included offense instruction in capital cases); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion) (holding unconstitutional capital sentencing procedure which permitted a trial judge to impose the death sentence on the basis of confidential information which was not disclosed to the defendant or his counsel). Although the concept that "death is different" was not clearly articulated in *Furman*, the case undoubtedly is responsible for the insistence on heightened reliability in capital cases, because each newly-identified protection in capital proceedings to some extent forestalls the kind of global challenge to capital punishment developed in *Furman*. In addition, many states responded to *Furman* with procedural safeguards (such as mandatory appellate review and bifurcated guilt and sentencing proceedings) that attempt to increase the rationality and predictability of capital decisionmaking, even though the Court has not found such safeguards to be constitutionally compelled.

A middle position (between abandoning the death penalty and abandoning *Furman*) would hold that these manifold protections wrought by *Furman* are significant and worth preserving even if the *Furman* problem of underinclusiveness cannot be solved completely. Such a position might regard complete evenhandedness in the administration of capital punishment as neither possible nor constitutionally compelled, but nonetheless insist that capital punishment schemes include procedural mechanisms that foster evenhandedness as much as practically possible.

153. See *supra* notes 138-139 and accompanying text.

evidence: the race of the victim is highly correlated with the perpetrator's sentence; when coupled with the race of the defendant, the victim's race is an extraordinary predictor of the defendant's fate.¹⁵⁴ Being singled out for imposition of the death penalty is not like "being struck by lightning," as Justice Stewart supposed in *Furman*,¹⁵⁵ because lightning strikes indiscriminately whereas the death penalty does not. The intractability of the problem of arbitrariness in capital sentencing might thus lead one to conclude, as Justice Marshall did,¹⁵⁶ that the death penalty cannot constitutionally be imposed.¹⁵⁷

Ultimately, then, our insistence that there is an Eighth Amendment "individualization" requirement in capital sentencing, and that it cannot be squared with *Furman*'s prohibition against unbridled sentencing discretion, has driven us to revisit that aspect of *Furman*. Our reconsideration of *Furman*, in turn, pushes toward one of two extremes: either the inevitable arbitrariness of capital sentencing means that *Furman* must be jettisoned, or *Furman*'s failure to fulfill its promise of principled, nonarbitrary decisionmaking renders the death penalty unconstitutional. Ironically, acceptance of either of these choices severely undercuts if not wholly eliminates the need for an individualization principle. Should the Court overrule *Furman*, states would be free to return to the opened discretionary schemes in effect before *Furman* was decided; because such schemes permit sentencers to impose or withhold the death penalty on any ground whatsoever, we would have no reason to fear that evidence of reduced culpability would be unconstitutionally removed from sentencers' consideration. And if imposition of the death penalty were foreclosed because of its arbitrary administration, the individualization principle in capital sentencing would likewise retain no constitutional role. Recognition of our individualization principle, therefore, ends up swallowing the principle itself.

Finally, the choice between abandoning *Furman* and abandoning the death penalty turns inevitably on a judgment about the constitutional significance of racial disparities and other arbitrariness in capital sentencing. Such disparities and arbitrariness undoubtedly exist in noncapital sentencing, so the issue may ultimately be nothing more (or less) than "how different is death?" Our purpose here is not to suggest an answer to that question, but to insist, contrary to Justice Scalia, that it must be addressed, and that the doctrinal conflicts arising from *Furman* and *Woodson* cannot be smoothed over by dismissing the individualization principle as an unwarranted product of an unprincipled Eighth Amendment excursion.

154. See generally BALDUS, ET AL., *supra* note 143.

155. 408 U.S. at 309.

156. See *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring) ("[T]he effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.")

157. See Jack Greenberg, *Commentary: Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1679 (1986); cf. Kennedy, *supra* note 138, at 1429-40 (analyzing the possible remedial approaches to racially discriminatory capital sentencing).

VI. REFLECTIONS

We undertook our examination of the conflicts embedded in current death penalty law in order to assess what significance the legal system should attach to Beverly Lowry's intricate portrait of Karla Faye Tucker. We felt that the questions that Lowry asks of herself (and implicitly of her readers) bear a close resemblance to the questions that the legal system must address in the capital sentencing context: how does the story of Karla Faye Tucker's life affect our reaction to her crime? How does such a story help us decide whether a convicted murderer should live or die? We can address these questions to ourselves personally, as Lowry does, or we can address them to the criminal justice system, as we have tried to do above. But while the questions are similar, the human responses offered by Lowry differ markedly from the legal responses we have discussed.

For Lowry, the relevance of Tucker's life to her crime is a deeply unsettling issue. If the circumstances of Tucker's life call forth forgiveness and mercy, then must Lowry forgive the unknown killer of her son Peter? But if the circumstances of Tucker's life should not qualify our reaction to her crime, how can Lowry understand and justify her deep attachment to Tucker, and her even deeper attachment to her own troubled son? Lowry recognizes that these questions lie at the heart of her relationship with Tucker: "Forgiveness is at issue, mercy, the right of one human being to hold another accountable, and to judge."¹⁵⁸ Ultimately, Lowry does not answer these questions, choosing instead to forego the role of "sentencer": "It [judgment] doesn't happen, I think; we don't have the right to forgive *or* avenge. To one another, we offer aspirins. There's little else to give."¹⁵⁹ Lowry's unwillingness to judge stems in large part from her close connection and personal identification with Tucker. At different points in the book, Lowry wonders whether Tucker serves as an emotional substitute for her missing mother or son, her imaginary sister or daughter, or herself;¹⁶⁰ Lowry "get[s] lost" in the collage of photographs of Tucker on the wall above her writing desk.¹⁶¹

The legal system, however, can never abdicate judgment; if we are legitimately to have a death penalty, we must collectively decide when to impose it. Although the Eighth Amendment requires that such determinations be "individualized," it also demands consistency from case to case. The legal system cannot "get lost" in individualizing detail; it must apply the same standards to Karla Faye Tucker that it would apply to the unknown killer of Peter Lowry. So for the legal system, the question is not one of "forgiveness." It is only individuals, or maybe only God, who can forgive and show compassion. While

158. P. 244.

159. P. 244.

160. Pp. 82, 219.

161. P. 4.

there is room for individualization in capital sentencing (if individualization is defined as compassionate dispensation based on some articulable standard of desert), compassionate dispensation for any or no reason—"mercy" or "grace," if you will—may be beyond the power of law to grant. Our legal system strives instead for a "reasoned moral response" to capital crimes.¹⁶² Indeed, the history of death penalty jurisprudence has been a struggle over the components necessary for such a response. "Reasoned" implies reasons and standards, the treatment of like cases alike—hence the attraction of a mandatory death penalty for certain clearly defined crimes. "Moral," however, suggests individual desert—hence the requirement of individualized sentencing.

As Lowry's personal experience illustrates, however, these two components are deeply in tension; it is difficult to individualize without "getting lost." Lowry's book and Karla Faye Tucker's life thus illustrate in a profound way the tension between a constitutional principle of individualization and a constitutional principle of anti-arbitrariness. It is easy to be moved by Lowry's sensitive and multilayered account of Tucker's background, personality, and apparent redemption. Lowry makes us understand how a photograph of Tucker's vibrant face "hooked [her] heart."¹⁶³ At the same time, we must recognize that the more of Lowry's individualizing portrait of Tucker we permit a sentencer to consider, the greater the opportunity for arbitrariness and bias. Openended discretion in capital sentencing risks unprincipled dispensations of mercy. If we gave a jury of twelve people Lowry's whole book to read without attempting to guide the nature of their response, it is paradoxically more likely that they would decide Karla Faye Tucker's fate by focusing only on the front cover—on the same photo of an attractive white female that "hooked" Beverly Lowry.

162. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

163. P. 3.