IS THE SUPREME COURT'S COMMAND ON MITIGATING CIRCUMSTANCES A SPOONFUL OF SUGAR WITH A POISON PILL FOR THE DEATH PENALTY?

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> Achieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon.[1]

A major portion of the tale of the history of the death penalty in the United States features the ways that the death penalty system has shifted from a mandatory system to one with complete jury discretion and then eventually settling somewhere in between. A key part of this resolution came through the landmark U.S. Supreme Court case *Lockett v. Ohio*.[2]

Lockett was important in many ways, largely because it ensured a fairer death penalty by protecting the constitutional right of defendants to introduce mitigating factors in death penalty cases. But in creating a fairer death penalty, it may also have undermined the death penalty itself by making it more like the death penalty the Supreme Court had found unconstitutional in 1972.

Part One of this essay briefly discusses the history of the basic sentencing structure of the United States death penalty. Part Two briefly explains some of the historical significance of *Lockett v. Ohio*. Part Three addresses how *Lockett* made the death penalty fairer and indirectly saved the death penalty, while perhaps also planting the seeds for the demise of the U.S. death penalty.

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1. Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring).
2. *Id*.

I. THE EARLY AMERICAN DEATH PENALTY

By the time the Bill of Rights, which included the Eighth Amendment ban on cruel and unusual punishments, was ratified in 1791, every state in the United States followed England's common-law practice of using a mandatory death penalty sentencing system.[3] Under such a system, a capital defendant generally automatically received the death penalty upon conviction of a capital crime.[4]

Such a mandatory system, however, created problems. For example, when faced with a sympathetic but guilty defendant, jurors would acquit the defendant of the capital charges if they wished for the defendant to live.[5]

In the early 1800s, states began trying to temper the harshness of the system and to address the jury nullification problem by providing jurors with sentencing discretion.[6] Thus, once a jury found a defendant guilty of a capital offense, the jury had discretion of whether or not to impose a death sentence.[7]

Tennessee, Alabama, and Louisiana became the first states to use discretionary sentencing systems.[8] Between the Civil War and the beginning of the twentieth century, twenty additional U.S. jurisdictions adopted discretionary sentencing in capital cases.[9] In 1897, Congress also adopted a discretionary sentencing scheme for the federal death penalty.[10] And by 1963, the federal government and every state with a death penalty used the discretionary system.[11]

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3. Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (citing HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 5-6, 27-28 (rev. ed. 1967)).

4. In the 13th century, English common law made all criminal homicides "prima facie capital, but all were subject to the benefit of clergy, which after 1350 came to be available to almost any man who could read." McGautha v. California, 402 U.S. 183, 197 (1971). Subsequently, common law limited the types of homicides that made one eligible for capital punishment, but the punishment remained mandatory for those types of killings. *Woodson*, 428 U.S. at 289. "As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death." *Id*.

5. *Id*. at 290-91.

6. JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 58 (2015) (hereinafter IMPRISONED BY THE PAST).

7. "In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *McGautha*, 402 U.S. at 199 (citations omitted).

8. *Woodson*, 428 U.S. at 291.

9. *Id*.

10. *Id*. at 294.

11. *Id*. at 291-92.

This discretionary system created what appeared to be a fairer death penalty system, but there was another result that some legislators likely intended, at least in some jurisdictions. Giving jurors more discretion also allowed for improper considerations.[12] Thus, jurors were permitted to express racial prejudices in their disparate treatment of capital defendants based on the race of the defendants and the race of the victims.[13]

This discretionary system created other problems. When sentencers were given so much discretion, the results among different juries were inconsistent and arbitrary. And "these procedures left juries free to impose sentence based on whatever criteria they liked, without regard to their legitimacy or their relevance to the sentencing decision."[14]

Eventually, in *Furman v. Georgia*, the U.S. Supreme Court held that such discretionary systems violated the Eighth and Fourteenth Amendments.[15] While the Justices in the majority all wrote separate opinions and did not agree on a single reasoning, one theme that emerged from several of the opinions was a concern about the arbitrary and unpredictable results from such a system.[16] For example, Justice Douglas found the discretionary capital sentencing system "pregnant with discrimination."[17] And Justice Stewart noted that such a system allowed the death penalty to be imposed "wantonly" and "freakishly."[18]

Several years later, the Court held that a mandatory death sentencing system also violates the Constitution.[19] By contrast, at the same time, in *Gregg v. Georgia*, the Court upheld a sentencing system that tried to forge a middle ground between automatic death sentences and discretionary sentences.[20]

Although the exact procedures varied by state,[21] in general, this constitutional sentencing scheme provides sentencing jurors (or judges)

12. "From the 1930s until the 1967 moratorium, nearly 50 percent of the offenders executed for murder nationwide were black. In the South the figure exceeded 60 percent." DAVID C. BALDUS, GEORGE G. WOODWORTH, AND CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 9 (1990) [hereinafter EQUAL JUSTICE].

13. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE 100, 111 (Charles J. Ogletree Jr. and Austin Sarat ed., 2006).

14. EQUAL JUSTICE, *supra* note 12, at 9.

15. 408 U.S. 238, 239-40 (1972).

16. *See generally id*.

17. *Id*. at 257 (Douglas, J., concurring).

18. *Id*. at 310 (Stewart, J., concurring).

19. Woodson v. North Carolina, 428 U.S. 280, 301 (1976).

20. 428 U.S. 153, 207 (1976).

21. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 269 (1976) (discussing Texas's capital sentencing procedure that requires jurors to answer three questions).

with a list of guidelines, or aggravating factors, that make a defendant eligible for the death penalty.[22] Also, a defendant's attorney can introduce mitigating factors to argue for a sentence less than death. At the time of *Gregg*, it was unclear how far the constitutional command for mitigating factors reached, but the landmark decision of *Lockett v. Ohio* clarified that issue.

II. THE IMPACT OF *LOCKETT V. OHIO*

The Court's rejection of automatic death sentences in *Woodson v. North Carolina* and *Roberts v. Louisiana* created a constitutional command of individualized sentencing, where sentencers must be permitted in capital cases to determine the appropriate sentence for the individual, not just for the crime.[23] Jurors are able to consider aspects of an individual defendant through the introduction of mitigating circumstances.

Lockett v. Ohio clarified that constitutional individualized sentencing did not merely mean that a court had to allow jurors to consider some aspects of the defendant.[24] In *Lockett*, Ohio's death penalty statute was found unconstitutional because the statute limited the mitigating factors a capital jury could weigh.[25] The plurality broadly concluded that a sentencing jury should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[26]

Lockett's command created one of the most important constitutional principles in capital sentencing. In short, "*Lockett* entitles a capital defendant to present any mitigating evidence [the defendant] wishes, whether or not it falls within the scope of a specific statutory mitigating

22. "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg*, 428 U.S. at 195 (White, J., concurring in the judgment). Interestingly, prior to the decision in *Furman*, no state that had modified its death penalty law between 1959 and 1971 had decided to adopt the American Law Institute's 1959 Model Penal Code recommendation to provide statutory criteria for imposing the death penalty. *McGautha*, 402 U.S. at 202-03.

23. *Woodson*, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976). *See also* Proffitt v. Florida, 428 U.S. 242, 261 (1976); Jurek v. Texas, 428 U.S. 262, 277 (1976).

24. 438 U.S. 586, 604 (1978).

25. *Id*. at 608-09.

26. *Id*. at 604 (emphasis in original).

circumstance."[27] Subsequent Supreme Court cases such as *Eddings v. Oklahoma*[28] reinforced and expanded *Lockett's* conclusion that courts and legislatures may not prevent jurors from considering mitigating factors, as long as the evidence meets the Court's definition of mitigation.[29]

Lockett ensured that jurors would have significant information about a capital defendant before sentencing the defendant. The doctrine of mitigating circumstances revealed a range of relevant evidence, including details about facts that may help explain how a defendant came to commit a horrible crime. A social scientist examining decades of cases about evidence of mitigating factors would gain insight into the causes of crime and our understandings of human nature.

Without the holding of *Lockett*, the American death penalty would be harsher and more unfair. If jurors did not know the important details about a capital defendant, they would not be able to fully assess a defendant's culpability. And many people who might have otherwise been sentenced to death were saved by the commands of *Lockett*.[30]

Further, *Lockett* eventually laid the groundwork for some instances where the death penalty was categorically narrowed. In 2002, the Supreme Court held that defendants with an intellectual disability cannot be sentenced to death.[31] More than a decade earlier, the Court had approved of such executions.[32] But through years of developing law and science on

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27. Stephen P. Garvey, *As the Gentle Rain from Heaven: Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1000 (1996). *See also* Scott E. Sunby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1157 (1991) (discussing how Chief Justice Burger's plurality opinion defined what mitigating evidence is relevant under the constitution).

28. 455 U.S. 104, 112 (1982) (holding that sentence must be permitted to consider evidence of defendant's troubled youth as mitigating).

29. "In *Eddings v. Oklahoma*, the court took the next step and held that not only must the sentencer be permitted to consider all potentially mitigating evidence, but that the Eighth Amendment prohibited the sentencer from 'refus[ing] to consider, as a matter of law any relevant mitigating evidence.'" Sam Kamin and Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 1000 (2015) (quoting *Eddings*, 455 U.S. at 114-15)). *See also, e.g.*, Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (requiring sentencer to be able to consider defendant's adjustment to incarceration as a mitigating factor)). *See also* Hitchcock v. Dugger, 481 U.S. 393, 395 (1987) (concluding that trial judge's instruction that did not allow advisory jury to weigh non-statutory mitigating factors violated the constitution); Sumner v. Shuman, 483 U.S. 66, 76 (1987) (holding that even in a situation where a life-sentenced prisoner commits murder, mitigation still must be considered).

30. *See, e.g.*, Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 286 (1991-1992) (asserting that "[t]he *Lockett* doctrine is the primary legal tool for ensuring that each decision to employ the death penalty is well grounded in morality").

31. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

32. Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that execution of intellectually disabled individuals does not violate the constitution).

intellectual disability as a mitigating circumstance, such defendants were eventually completely excluded from the death penalty. Similarly, long before the Court held that juveniles cannot be sentenced to death in 2002, lawyers and experts litigated the role that age plays as a mitigating circumstance.[33] Thus, for its role in limiting the death penalty for individuals and for excluding classes of defendants, *Lockett* remains one of the most important Supreme Court decisions on the death penalty.

III. *LOCKETT* AS A POISON PILL FOR THE AMERICAN DEATH PENALTY

Yet, even as one may sing the praises of the Supreme Court's decision in *Lockett*, one may also consider the side-effects of the Court's main holding. Had the Court come to a different conclusion and allowed legislatures to limit mitigating factors, would we still have the death penalty? Assuming that states would have seized the opportunity to exclude some mitigating circumstances, society might have become more outraged about the harshness of capital punishment. In other words, if states had begun cutting back on allowing jurors to consider mitigating circumstances, we might have ended up with something nearer to the mandatory death penalty system that many in society had previously rejected. And if we were nearer to a mandatory death penalty, the Supreme Court in the 1980s or 1990s might have invalidated the death penalty again, perhaps for good.

But the Court did decide *Lockett* to ensure defendants may introduce a broad range of mitigating circumstances. So, a more useful exercise is to evaluate the death penalty that *Lockett* did create. The decision took us further away from the unconstitutional mandatory death penalty system from the country's early years. And that was a good result. But, on the other hand, it brought us nearer to the arbitrary death penalty of the discretionary system used in the 1900s until it was found unconstitutional in *Furman.*

Because *Lockett* allowed a defendant to introduce any mitigating evidence,[34] the American death penalty system began to look like the pre-

33. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it violates the constitution to execute defendants who were under eighteen at the time of the crime). Prior to *Roper*, defendants under eighteen could be executed. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (where the plurality of the Court held that it violated the constitution to execute an offender who was under the age of sixteen at the time of the crime); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over fifteen but under eighteen).

34. The Court has allowed some limits on how a sentencer considers mitigating evidence. In *Johnson v. Texas*, the Court considered whether or not special questions in Texas's capital sentencing statute permitted jurors to consider the defendant's young age as mitigating. *Johnson*, 509 U.S. at

Furman system where jurors considered a broad range of information to make their decision with little or no guidance. If that is the result from *Lockett*, one might surmise that the decision was a poison pill for the death penalty. Whether or not any of the Justices foresaw the effects, the arbitrariness built into a system that allows unlimited mitigation could make the death penalty violate the constitution under the commands of *Furman*.

Several commentators have embraced this theory that the modern death penalty is unconstitutionally arbitrary. For example, one writer has argued that "[w]here a jury can consider any mitigating factors, and assign them any weight it chooses, jury discretion is not guided or channeled," resulting in a jury exercising "unguided discretion."[35]

Justice Antonin Scalia eventually rejected the commands of *Lockett* for this same reason. In a 1990 concurring opinion, he concluded that *Lockett's* mitigation requirement "quite obviously destroys whatever rationality and predictability the [requirement of clear and objective standards to provide detailed guidance] was designed to achieve."[36] Similarly, Justice Harry Blackmun found *Lockett's* command of individualized sentencing inconsistent with the Constitution's other requirement from *Furman* of eliminating arbitrariness and discrimination in the capital punishment system.[37] Thus, he concluded that the inconsistency made the death penalty unconstitutional.[38]

But other commentators have argued that the post-*Lockett* death penalty differs from the pre-*Furman* discretionary death penalty in

354. The Court, however, held that *Lockett* only requires that a jury be permitted to weigh mitigating evidence and that the jury does not have to "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id*. at 372. Thus, the Court upheld the death sentence because the jury might consider the mitigating factor of youth for how it affected the question about defendant's future dangerousness. *Id*. at 371-72.

35. Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 68 (1995). "Thus, the *Lockett* Court moved from favoring weak discretion back to favoring strong discretion." *Id*. *See also* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 361-62 (1998) (noting how allowing a broad range of mitigating factors creates an unlimited number of variables in the sentencing process).

36. Walton v. Arizona, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring). *Cf*. Scott E. Sunby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147, 1207 (1991) (stating that Justice Scalia's "viewpoint stands in contrast to that of the Lockett plurality, which crafted its inclusive definition of mitigating evidence precisely because it believed that *more reliable* death penalty decisions would result") (alteration in original).

37. Callins v. Collins, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari).

38. *See id*.

constitutionally significant ways. They stress that the modern death penalty still provides guidance in the form of aggravating factors, i.e., jurors cannot impose the death penalty unless they find a statutory aggravating factor. While the introduction of unharnessed mitigating factors may then introduce some arbitrariness, it is only arbitrariness with respect to the decision not to impose the death penalty.[39] And that arbitrariness only occurs after the group of death-eligible defendants has been narrowed by an initial finding of one or more aggravating factors.[40] Thus, the Court has explained that aggravating factors serve to rationally narrow the category of offenders eligible for the death penalty, while mitigating circumstances allow an individualized assessment of the punishment for the death-eligible defendant.[41]

In other words, the Constitution allows arbitrary decisions not to impose a death sentence, but does not permit such arbitrariness in the decision to sentence someone to death. Any inconsistency allowed by *Lockett* occurs among those cases with at least one aggravating factor. That, arguably, is not as constitutionally significant as jurors using unbridled discretion for every convicted murderer. As one commentator has reasoned, "While inconsistency is not ideal, the consistency objection states a lesser evil than the type of pre-*Furman* arbitrariness that risked significant over-inclusion of offenders who committed insufficiently culpable offenses"[42]

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39. "*Lockett* and *Furman* can be reconciled in that *Lockett* returned discretion to the jury only with regard to mitigating circumstances. Thus, after *Lockett*, constitutionally valid death penalty statutes must carefully guide the jury's consideration of aggravating circumstances, yet allow the jury broad discretion to consider mitigating factors." Miranda B. Strassman, Note, *Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances*, 38 CATH. U.L. REV. 907, 920 (1989).

40. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 870-72 (1983) (discussing the narrowing function of aggravating circumstances). "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. at 877). For more on the Eighth Amendment narrowing requirement, *see* Sam Kamin and Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 986-98 (2015).

41. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 317 (1989); Walton v. Arizona, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring). As Chief Justice Burger noted in *Lockett*, under the view of the three Justices at the heart of *Gregg*, "*Furman* did not require that all sentencing discretion be eliminated, but only that it be 'directed and limited' so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the . . . cases *in which it is imposed from . . . the many cases in which it is not*.'" *Lockett*, 438 U.S. at 601 (quoting Gregg v. Georgia, 428 U.S. at 188, 189 (1976)) (emphasis added).

42. Robert Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1161 (2015): "Arbitrariness is now mostly about consistency and not desert."

Yet, while there is some difference between arbitrarily imposing the death penalty and arbitrarily granting leniency, one may still argue there is little practical difference. States often employ broad death penalty statutes with many aggravating factors, meaning that little narrowing actually occurs before jurors are given the discretion to weigh mitigating factors.[43]

Of course, the Supreme Court has yet to find that today's death penalty is unconstitutionally arbitrary. But one may still ponder whether at some point the Court will conclude otherwise. In that situation, *Lockett* will have been a poison pill all along, waiting to invalidate the death penalty. It is unlikely that the Supreme Court Justices deciding in *Lockett* intended it that way, but the logic of the decision may inevitably still lead to the collapse of the death penalty. Although a majority of the Justices have yet to see *Lockett* this way, Justices Blackmun and Scalia both saw *Lockett* and its progeny as undermining the constitutionality of the death penalty.

One of the strongest arguments for the unconstitutionality of the *Lockett* death penalty was made in *McCleskey v. Kemp*.[44] In that decision, the African-American Warren McCleskey presented a sophisticated statistical study to argue that racial bias in the system invalidated his death sentence.[45] One of the sources where racial bias is allowed to enter the system is through jurors' discretion (as well as by the discretion of others like prosecutors). By a 5-4 decision, however, the Supreme Court rejected McCleskey's constitutional claims. Yet, studies continue to reveal racial bias in the system.[46] The *McCleskey* Court's evaluation of the evidence of disparities permitted by *Lockett* was the most recent instance where the Court came close to finding the death penalty unconstitutional.[47] Because of this country's history of racial violence and because that racial bias appears throughout the criminal justice system, standards providing juries more discretion also allow for more discrimination.

These arbitrariness problems are built into the *Lockett* capital punishment system. There are at least three significant ways that

43. Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 35, at 397- 431. *Lockett* is not the only reason that arbitrariness seeps into the death penalty system after one or more statutory aggravating factors are found. Many states also permit nonstatutory aggravating factors at that stage as well as victim impact evidence. *Id*. at 375-86.

44. McCleskey v. Kemp, 481 U.S. 279, 313 (1987).

45. *Id*. at 286-88.

46. KIRCHMEIER, IMPRISONED BY THE PAST, *supra* note 6, at 310-15.

47. *Id*. at 160-62.

arbitrariness still leaks into the system related to *Lockett*.[48] First, prosecutors generally maintain wide discretion in the decision of whether or not to seek the death penalty. The choice may depend on the individual prosecutor. This arbitrariness may have less to do with *Lockett's* rule on mitigating circumstances than other sources of arbitrariness. But at least in some cases, a prosecutor's choice may depend on that prosecutor's assessment of the mitigating circumstances allowed by *Lockett*.

A second way that arbitrariness enters the system is through defense attorneys. The quality of defense may affect the outcome of the case. Even if counsel's performance is not so bad as to constitute constitutional ineffective assistance of counsel, an attorney's decisions, investigation, and understanding of mitigating circumstances such as mental health issues affects the outcome of cases.[49]

A third way that the Supreme Court's command on mitigating circumstances may add arbitrariness to death penalty sentences is the way that jurors weigh the mitigating evidence presented by defense lawyers. Each juror brings their own beliefs to the jury room, therefore how much weight a mitigating factor receives may vary drastically from juror to juror.[50]

A study by the Capital Juror Project discovered that different jurors generally give different weight to different mitigating factors.[51] And a significant portion of jurors fail to give any mitigating weight to some mitigating factors. For example, only about a fifth of the jurors surveyed said they would give significant weight to the mitigating factors of lack

48. Besides the three listed sources or arbitrariness, other sources include vague and overbroad aggravating factors. Additionally, this article discusses arbitrariness within a jurisdiction's death penalty. There is a broader arbitrariness when one considers how the death penalty is applied or not applied across the country or even within one state with the use of the death penalty varying widely from county-to-county.

49. *See, e.g.*, Russell Stetler and W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 643-45 (2013). On a related note, a defense attorney's ability to communicate with a client may also affect how that client–and the client's family–cooperate with an investigation into the defendant's mental health issues. *See, e.g.*, Sarah Hur, Note, *An Attorney's Dilemma: Representing a Mentally Incompetent Client Who Does Not Wish to Raise Mental Illness Issues in Court*, 27 GEO. J. LEGAL ETHICS 555, 557-58 (2014); Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 662-63 (2009).

50. "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)).

51. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538-39 (1998).

of a criminal record, a co-defendant who received a life sentence, or that the crime was committed under the influence of alcohol or drugs.[52]

The study found that, as a whole, jurors give the most mitigating weight to the circumstances of residual doubt, youthfulness, and intellectual disability.[53] Even then, a significant number of jurors still do not give much weight to those factors.[54]

Additionally, only a third of jurors would give some weight to the mitigating factor that the defendant had been seriously abused as a child.[55] The study concluded, "[N]otions of collective or societal responsibility for shaping the defendant's character played some role in jurors' capital sentencing decision, especially if it appeared that the defendant tried to get help for his problems but society somehow failed him."[56] Yet, a juror's own beliefs about individual responsibility "played a larger role."[57]

The Court's decision in *Lockett* recognized that sentencers should be given more information before condemning a fellow human being to death. But in mandating that jurors be given the opportunity to understand the failings of human nature, the Court's decision also allowed the failings of human nature to affect the sentencing process.

The *Lockett* Court likely did not anticipate the disparities that would result from the constitutional command about mitigating circumstances. Having rejected mandatory and discretionary death penalty systems, though, the Court had little choice but to try a middle way. *Lockett* became the Court's grand attempt to guide states to craft a fair and constitutional death penalty. Yet, the experiment that resulted from the command of *Lockett* ultimately failed.

IV. CONCLUSION

Although the post-*Gregg* death penalty has survived for decades, evidence continues to accumulate about unfair disparities in the capital punishment system. While the Supreme Court has yet to find that the arbitrariness rises to the same unconstitutional level that existed at the time of *Furman*, the Court may one day reassess the modern death penalty.

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52. *Id*. at 1562-65.

53. *Id*. at 1563-64.

54. *Id*. Even for the mitigating factor of residual doubt about guilt, which was the most powerful mitigating factor, a significant number of jurors did not give it much weight. More than a third of jurors revealed that such doubts made no difference in sentencing. *Id*.

55. *Id*. at 1562-63, 1565.

56. *Id*. at 1565.

57. *Id*.

Lockett v. Ohio remains a landmark decision that ensured jurors can evaluate defendants as individuals rather than as categories. The case saved countless lives and led to a fairer jurisprudence that also created research providing new understandings about the causes of crime. It injected more compassion and mercy into our capital punishment system. But at the same time, the decision allowing jurors to balance the imperfections of human beings carved a hole revealing the imperfections of the death penalty itself. More juror discretion led to more fairness, but it also created cracks in the capital sentencing system by allowing more humanity and discretion. After all, "To err is human."[58]

Over time, *Lockett*'s impact revealed that it is impossible to have a fair, equal, and humane death penalty. *Lockett* planted the seeds of unconstitutionality within the modern death penalty when the Supreme Court had no other constitutional option for saving the death penalty when faced with the possible return to the days of harsh mandatory death sentences. Today, those *Lockett* seeds continue to grow and support the developing case for eliminating the death penalty in the United States.

58. Alexander Pope, *An Essay on Criticism*, Part II, line 525 (1711), in THE POEMS OF ALEXANDER POPE 160 (ed. John Butt) (1963) ("To err is Human; to Forgive, Divine").