LOCKETT V. OHIO AND ITS SUBSEQUENT JURISPRUDENCE: BETWEEN LAW AND POLITICS

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The death penalty raises serious questions regarding the unequal and arbitrary application of the law. Indeed, the appropriateness of a death penalty verdict has long been considered as relying on myriad elements, as indicated in the Model Penal Code, drafted by the American Law Institute in 1959. The code states "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula."[1] Using a similar rationale, in the case *McGautha v. California*, the Supreme Court held that the jury did not need to follow defined guidelines that could have limited the scope of elements of fundamental importance.[2] However, this trend was reversed in the early 1970s in *Furman v. Georgia*, which annulled all existing penalty laws.[3] The *Furman* Court asserted, in a lengthy decision comprised of nine separate opinions, the necessity of guiding the jury's discretion. Fundamental to this guidance of capital punishment are the principles of cruel and unusual punishment in the Eighth Amendment and due process in the Fourteenth Amendment as set forth in *Lockett v. Ohio.*[4] As Justice Stevens stated elsewhere, the death sentence "is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules,"[5] but is instead an ethical judgment expressing the conscience of the community as to whether "an individual has lost his moral entitlement to live."[6]

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1. MODEL PENAL CODE § 210.6 cmt. 3 at 71 (Tentative Draft No. 9, 1959) (quoting Royal Commn. on Cap. Punishment, Report 498) (1953).
2. 402 U.S. 183, 221 (1971).
3. 408 U.S. 238, 239 (1972).
4. 438 U.S. 586, 598 (1978).
5. Spaziano v. Florida, 468 U.S. 447, 468–69 (1984).
6. Symposium: *Capital Jury: Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 119 (2004).

A death penalty "decision must occur past the point to which legalistic reasoning can" be applied, since the death penalty exceeds the threshold of law and relates to arguments beyond it, among which there are several fundamental political elements.[7] The advent of the neoliberal revival of the 1970s, first as a new ideology emphasizing the value of free market competition, and then as a policy model and practice of government, has had a significant impact on the consideration of individuals within society. *Lockett v. Ohio* is part of this context, setting the stage for a societal mutation featuring a revaluation of the individual and his or her fundamental freedoms within a certain consensus outlined by the Supreme Court, and in this case its legacy. Still, a fissure has emerged in the interpretation of the *Lockett* ruling among the Justices: the arbitrary aspect of mitigating factors divided the Court. Political elements have influenced and built upon the jurisprudence of this judgment and its legacy, both at the constitutional and national levels, with an emphasis on states that have particularly changed their position on this issue in their jurisprudence. These states have followed a Supreme Court that is internally and locally challenged by the *Lockett* ruling and have opened new perspectives and issues.

I. SOCIETY AND THE INDIVIDUAL: *LOCKETT* AND ITS SUBSEQUENT CONSENSUS

The first part of this article aims to contextualize *Lockett v. Ohio* in relation to the changes that neoliberalism has brought about in American society by emphasizing the notion of individual responsibility. This notion has been celebrated in political discourse, in the face of the State losing its economic authority and replacing its authority in the security domain with the prism of a political discourse crystallizing these elements. The economic appeal of the commutation of a death sentence to life imprisonment has generated greed and a heightened political focus on the capital sentence decisions.

As far as legal theory is concerned, the corollary of the concept of neoliberalism in relation to the death penalty can find support in different legal camps even though it is more likely to be present in neo-conservatism. From Bruce Ackerman's perspective, the issue is not liberalism v. conservatism, but conservatism v. neoconservatism, the latter having its

7. Patrick E. Higginbotham, *Colloquy*: *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048–49 (1991).

triumph confirmed by President Reagan's selections or stealth appointments.[8] It is on the basis of these elements that the second part of the article will analyze the *Lockett* case law and legacy during the following four decades that defined its interpretation and reduced the use and practice of the death penalty, by establishing mitigating factors.

A. Neoliberalism: From Exogenous to Endogenous Factors

In order to fully understand the *Lockett* Court and its Justices, it is essential to appreciate the political context in which the Court functioned. Prior to the appointment of Chief Justice Burger, liberal democrats dominated from 1932-1968, with one exception during Eisenhower's two terms. Eisenhower's success was not really that of the Republican party. Rather, it was an idiosyncratic accomplishment resulting from his lack of previous political affiliation and his skills as a military commander. Thus, Democratic liberalism mostly dominated the political scene, particularly when it came to Congress. Meanwhile, the Supreme Court had a natural inclination towards such ideals, especially under the Warren Court. At the same time the homicide rate in the United States, more than doubled from 1957 to 1980, increasing from 4 to 10.2 homicides per 100,000 inhabitants.[9] The crime rate increased in all domains from petty theft to first-degree murder. Between 1964 and 1974 alone, the U.S. homicide rate nearly doubled to 9.8 per 100,000 people.[10]

Beginning in the 1960s and continuing through the 1980s, the flood of violence had a major impact on American society and transformed the political scene while impacting institutions and their policies. In the 1960s the issue of violence became a cornerstone of public debate. During this decade, a paradox arose: while crime increased, punishment did not. The probability of a crime being resolved by an arrest went from 10% to 2%.[11] That is, it became five times less likely for a crime to be punished.[12] The war on poverty led by Presidents Kennedy and Johnson can be seen as an interventionist approach with the federal state taking over the prerogatives of local actors. Such an approach aligned with the liberal legacy of the

8. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1169 (1988).

9. James Alan Fox et al., *Homicide Trends in the U.S.*, U.S. BUREAU OF STATISTICS (2007), https://www.bjs.gov/content/pub/pdf/htius.pdf. [https://perma.cc/ZNZ9-ASGB].

10. *Id.*

11. *See* James Q. Wilson & Richard J. Herrnstein, CRIME AND HUMAN NATURE 424-25 (1985); Franklin E. Zimring, THE GREAT AMERICAN CRIME DECLINE 47 fig. 3.2 (2007).

12. *See* Stephen Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 6 (Steven Raphael & Michael A. Stoll eds., 2008).

1930s, namely President Roosevelt's New Deal. The liberal interventionist policy of the Democrats in the 1960s focused on targeted policies. For instance, the Great Society represented a set of domestic programs under the Democratic administration of President Johnson seeking to tackle racial inequalities and poverty.[13] Johnson's first public reference to the "Great Society" took place during a speech to students on May 7, 1964, at Ohio University in Athens, Ohio: "And with your courage and with your compassion and your desire, we will build a Great Society. It is a society where no child will go unfed, and no youngster will go unschooled."[14] Johnson's programs outlined the need to address the root causes of crime.

The 1960s brought about a pendulum swing in views regarding social issues, particularly in terms of how to deal with crime. The 1960s became a decade of transformational change and federal activism. The political wars between liberals and conservatives caused angry divisions over law and order. Even though Republican Senator Barry Goldwater of Arizona lost the 1964 presidential election to Democratic liberal Lyndon Johnson, his campaign and discourse paved the way for Ronald Reagan's new conservatism (or neoliberalism) in 1980. Thus, the 1960s led to the emergence of political debate on the issue of public order in the face of growing crime. The political spectrum became divided into two antagonistic postures regarding how to eradicate crime.

On the one hand, the Democratic Party sought to tackle deterministic factors, such as poverty and discrimination, in order to counter the crime wave phenomenon. By comparison, the Republicans promoted a more punitive approach, in which strengthening the police state took a prominent position in the political discourse. The end of the 1960s saw the election of Republican Richard Nixon in a time characterized by polarization of the electorate. This time period represents a major political realignment. Southern states fell into the conservative fold when they had been a solid bastion of Democrats in past decades. A political breakthrough in the sunbelt states significantly impacted the Republican approach to violence, reinforcing a conservative perspective. There began a public association between crime and the African American community in a society experimenting with desegregation. A growing proportion of the white

13. *See* Elizabeth Hinton; *"A War within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. OF AM. HISTORY 100, 100-12, (June 2015); also see CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 280 (1992).

14. President Johnson, Remarks in Athens at the Ohio University, (May 7, 1964) http://www.presidency.ucsb.edu/ws/?pid=26225 [https://perma.cc/B5U8-Q6RJ].

population began to assign responsibility for crime to the African American population. Meanwhile, the rise in national crime rates paralleled an exceptional period in which punishments for many crimes were easing.

At the Supreme Court level, a series of landmark decisions characterized by judicial activism under the Warren Court left an unprecedented legacy in civil rights and liberties while restricting police authority and expanding the rights of the accused.[15] Conservative critics began charging the Court with being soft on crime. As for the American Bar Foundation, its research emphasized the need to avoid arbitrary power with ideas of uniformity, neutrality, and proceduralism in law enforcement and sentencing.[16] In essence, the Supreme Court was at the heart of the crime debate in the 1970s, with its own political vision of crime and its corollary death penalty.

The acceptance of *Lockett* was important for the Burger Court because it took up the issue of the constitutionality of the death penalty. This question had already been taken up in *Gregg v. Georgia*, so it became essential to consider the importance of individual elements in these particular cases. Sandra Lockett, who physically did not take part in the crime, was a perfect candidate to stir up deeper discussion and debate.[17] The *Lockett* decision is rare when it comes to the Supreme Court. Chief Justice Burger's opinion refers to the plea bargain offered three times to Sandra Lockett in order to uphold his stance favoring an aggravated murder charge and thus the possibility of the death penalty.

This decision in 1978 by the U.S Supreme Court was surprising following the moratorium and the reinstatement of executions in *Gregg v. Georgia*.[18] In *Lockett* (and its companion case, *Bell v. Ohio*)[19] the Supreme Court invalidated Ohio's death penalty statute because it was "incompatible with the Eighth and Fourteenth Amendments."[20]

The decision was based on the fact that the defendant was not given an opportunity to present as mitigating factors any aspect of her character.

15. Miranda v. Arizona, 384 U.S. 436, 524 (1966) (holding that statements made during an interrogation while in police custody, "without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination"); Mapp v. Ohio, 367 U.S. 643, 643 (1961) (holding that "evidence obtained by unconstitutional search was inadmissible and vitiated conviction"); Gideon v. Wainwright, 372 U.S. 335, 335 (1963) (holding that in all criminal prosecutions the accused has the right to counsel and that an "indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him").

16. Fellman, David, *Constitutional Law in 1959-1960*, 55 THE AM. POLITICAL SCI. REVIEW 1, 112-35 (1961).

17. 428 U.S. 153, 195 (1976).

18. *Id.*

19. 438 U.S. 637, 643 (1978)

20. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

The Court held that the legislature could limit what were considered aggravating factors but could not limit the category of mitigating factors, stating that juries must "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."[21] The Court asserted the principle of individualized sentencing and ruled that "the need for treating each defendant in a capital case with the degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[22]

The Lockett doctrine did not fit with all points in the Court's previous reasoning. Although both *Gregg v. Georgia* and *Furman v. Georgia* are fundamental, *Lockett v. Ohio* is of a new era in the interpretation of the 8th Amendment but also serves as a fundamental marker of a whole new detention and interpretative policy. [23] With particular reference to the penal state, *Lockett* involves an individual consideration and the analysis of factors inherent to each individual's background, initiating the entry of a new form of law rationale relating to the death penalty. From considerations of intrinsic principles to exogenous social factors, such as poverty, racism and violence, the *Lockett* case law refocuses on endogenous individual factors such as one's childhood, personality, situation, and motives to name a few. What Aristotle called the difference between equity and justice might be illustrated in this change in death sentencing.[24] *Lockett* opened a new era. Dworkin and Hart agree that judges in hard cases frequently exercise strong discretion.[25] Discretion has become even stronger since *Lockett v. Ohio*.

The *Lockett* decision discusses application of the death penalty but does not call into question its constitutionality. Rather it emphasizes personal responsibility for one's detrimental acts against the social fabric. It aims to provide a better appreciation for endogenous personal factors. One may criticize the fact that it places responsibility fully on the criminal while excluding certain elements of the American history; it negates society's joint responsibility for poverty and exclusion by emphasizing free will. The decision also represents a balance of power between politics and

21. *Id*. at 604.

22. *Id*. at 587.

23. *See generally* Furman v. Georgia, 408 U.S. 238, 239 (1972).

24. *See* Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 LEG. THEORY 33, 33-50 (2004); Anton-Hermann Chroust, *Aristotle's Conception of Equity (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942); Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1247 (1994).

25. *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967).

law—though the law also was influenced by policy. Following the *Furman* judgment for instance, states gained clearer legislative provisions; legislative revisions have provided states more clarity. From a political perspective, the neoliberal current within the Republican party has been very influential. Neoliberals desire to renew the country following the early liberal tradition of John Locke and Adam Smith—the triumphant capitalism of the 19th century. Neoliberalism emphasizes the individual in conformity with the Lockean principle that individual choices transcend states imposing law: "every man has a 'property' in his own 'person'. This nobody has any right to but himself."[26] According to this thinking, people have inherent rights that preempt government, and governments exist to protect these rights.

Locke's principle of individuation differentiates the self from others. This idea forms the conceptual basis and logical continuity of the *Lockett* decision. Indeed, it follows naturally from the logic of the 1973 *Roe v. Wade* decision made by the Burger Court.[27] This new societal orientation based on neoliberalism has promoted the adoption of new public management principles aligned with public choice theory. In essence, this approach viewed human behavior as essentially self-interested.[28] The neoliberal position does not pose the "market against the state," or even the ideal of "more market, less state."[29] Rather, it supports a particular kind of state.

At the end of the 1970s and 1980s, along with the neoliberalism ideology came positions of monetarism and supply-side economics, which appealed to the Reagan administration. Active and punitive security policies were deployed and disseminated in order to circumscribe insecurity, be it concrete and physical, or be it a vague and obscure feeling exacerbated for the political purpose of conquering the electorate based on a discourse of the necessity of further repression of violence. The penal state was thus reinforced and consolidated. This security policy generated a tenfold increase in the resources of prison administrations, in parallel with the privatization of prisons managed by private companies, which quickly appeared to be active and present on the stock market. In 1983 for-profit confinement unfolded. Prison administrations thus started to become the

26. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 116 (1690).

27. 410 U.S. 113, 166 (1973).

28. John M. Kamensky, *Role of the "Reinventing Government" Movement in Federal Management Reform*, 56 PUB. ADMIN. REV. 247, 247 (1996); *See also* Richard Culp *Prison Privatization Turns 25*, U.S. CRIMINAL JUSTICE POLICY: A CONTEMPORARY READER 183, 183-210, (2011).

29. JAMIE PECK & ADAM TICKELL, CONCEPTUALIZING NEOLIBERALISM, THINKING THATCHERISM, IN CONTESTING NEOLIBERALISM: URBAN FRONTIERS 26-50 (2007).

third largest employer in the United States[30], with major political consequences and constant pressure on the issues and the exercise of justice.

Garland describes this new policy as a "reinvention of the prison."[31] Institutions were largely discredited between 1960 and 1970. They again became a pillar of the social order with the decline of the rehabilitative perspective in favor of the incapacitate one. It was therefore a global, societal transformation. The punitive approach to law and order holds the punitive economy as a central pillar for prisons. The managerial model turned away from penal welfarism to move towards neoliberalism under the support of President Reagan. As Jamie Peck and Adam Tickell explain: "Only rhetorically does neoliberalism mean 'less state'; in reality, it entails a thoroughgoing *reorganization* of governmental systems and state-economy relations."[32] In this sense, the relationship between the judiciary branch and politics has become fundamental, particularly when it comes to the death penalty.

Lockett v. Ohio raised more questions about mitigating factors as it provided a new framework by redefining its search for a viable standard in death penalty cases. Nevertheless, it left the door open to wide interpretation. On the other hand, this trend in using the death penalty, with the consideration of individual and vague elements *Lockett* allowed, led the legislator of the federal states to reiterate and re-conceptualize the notion of aggravating factors as an interpretative legislative check on the judiciary by circumscribing the possibilities for interpretation while either reducing the prosecutor's possibilities for a capital punishment application or reinforcing the options for charging. A series of significant cases in the 1980s provided some clarification on *Lockett*'s scope with a Supreme Court's relatively clear-cut approach on the legal rationale

B. The Contours of the Lockett Principle

Eddings v. Oklahoma falls within the ideological line of *Lockett*. The Supreme Court states that it now applies "the rule in *Lockett* to the circumstances of this case."[33] This decision allowed the Supreme Court to define more precisely the contours of the jurisprudence thus established by the *Lockett* decision concerning mitigating factors. This 1982 decision

30. WACQUANT, LOÏC, PRISONS OF POVERTY 47-54 (2002).

31. David Garland, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 14 (2001).

32. Peck & Tickell, *supra* note 29, at 26.

33. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982).

clarifies the concept of mitigating circumstances in the *Lockett ratio decidendi*.

In this case, the defendant Eddings, 16 years old at the time of the offence, had been in the lower courts convicted of first-degree murder for killing a police officer and sentenced to death. The Court avoids the issue of the constitutionality of executing a juvenile. The sentencing judge as well as the state appellate court had operated on the grounds that various mitigating elements could not be considered as a matter of law. In *Eddings v Oklahoma*, in a majority opinion delivered by Justice Powell (joined by Justices Brennan, Marshall, Stevens, and O'Connor, Chief Justice Burger and Justices Blackmun, Rehnquist, and White dissenting) the Court asserted that " it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."[34] The Court reversed and considered that the death penalty had not been properly imposed in this case.[35] The majority opinion held that "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances."[36]

In *Eddings*, the Court reaffirmed the principle enunciated in *Lockett* that capital punishment must be imposed by taking mitigating factors into account in accordance with Eighth and Fourteenth Amendments. In this 5-4 decision, the Court recalled the principle as stated in *Lockett*: "the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual."[37] *Eddings v. Oklahoma* thus required state courts to hear any mitigating circumstances offered by a juvenile defendant subject to the death penalty. Each legislature was also left to decide whether the execution of a juvenile was constitutional.

To further comprehend the *Lockett* principle, it is also interesting to focus on the dissenting opinion of the Chief Justice Burger, who drafted the *Lockett* judgment. Chief Justice Burger's *Eddings* dissent further explained elements behind the rationale in *Lockett*. He listed three mitigating factors: the role played in the offence, the intention, and the defendant's age. Chief Justice Burger states: "We therefore found the Ohio statute

34. *Id.* at 116.
35. *Id.* at 117.
36. *Id.*
37. *Id.* at 110.

flawed, because it did not permit individualized consideration of mitigating circumstances—such as the defendant's comparatively minor role in the offense, lack of intent to kill the victim, or age."[38] Chief Justice Burger's approach refers to the fact that it is not a problem related to the lack of consideration of mitigating, individual circumstances, but that this is a semantic consideration. In this sense, previous decisions have established that the accused had a chaotic and problematic family background and an emotionally unstable personality.

According to the dissenting opinion, these elements were indeed considered in the decisions rendered previously, even though they do not appear as clearly labeled, individual, attenuating factors. However, their importance in view of the aggravating circumstances remains minor power in the balance assessing the required sentence. It is a question of confronting the individual attenuating circumstances, comparing them with the aggravating factors, and determining the most just sanction. The dissent does not violate the rule established in *Lockett*. It is therefore relevant to note that on the one hand this dissenting opinion opens a broad semantic direction since Burger's position is part of an implicit consideration of elements which are not required to be explicitly stated. On the other hand, the reasoning applicable in situations involving the death penalty is recalled, as well as a justification of the particular nature of the decision concerning Sandra Lockett who was not directly involved in the murder. Therefore, behind this rationale, we can understand the fundamental factors that take precedence in Chief Justice Burger's reasoning: the role played in the murder as well as the intention. He deepened the arguments presented in *Lockett* and extended them to clarify the legal contours.

Nevertheless, the decision has certain limits as to the instructions to be followed since the Court in *Eddings* did not directly establish a standard for similar cases when a sentence did not consider mitigating evidence in conformity with *Lockett* principles. From then on, Chief Justice Burger departed from the Court's majority opinion in subsequent cases.

In *Skipper v. South Carolina*, the defendant was convicted of murder and rape, but three testimonies were barred.[39] These were the testimonies of two jailers and one visitor regarding the defendant's good adjustment to his situation while in jail awaiting trial. The Supreme Court, in a unanimous decision following the *Lockett v. Ohio*[40] jurisprudence and also *Eddings v. Oklahoma*,[41] reversed the inmate's death sentence on the grounds

38. *Id.* at 121-22.
39. 476 U.S. 1, 8 (1986).
40. 438 U.S. 586, 608 (1978).
41. 455 U.S. 104, 117 (1982).

that the trial court had excluded "from the sentencing hearing of the testimony of the jailers and the visitor denied petitioner his right to place before the sentencing jury all relevant evidence in mitigation of punishment."[42] Yet the Supreme Court was divided 6-3: Justice White wrote the majority opinion which was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O' Connor while three justices took part in concurring opinion written by Justice Powell. In this concurrence, Chief Justice Burger along with Justices Powell and Rehnquist considered the majority opinions as "overly broad" and joined the reversal on the narrower grounds that the defendant should have been allowed to testify to defend himself against the prosecutor's charges that he represented a danger both outside and inside prison and that he was highly likely to commit further crimes involving sexual abuse within a penitentiary system. This concurring opinion does not rest on the reasoning established by previous case law.[43]

The *stare decisis* on which the opinion in the *Gardne*r case was based was the fact that due process had been denied because "petitioner in this case was not permitted to 'deny or explain' evidence on which his death sentence may, in part, have rested."[44] It is worth noting that once again the Supreme Court seems to encounter difficulties interpreting *Lockett* and thus the individuality of each situation involving a possible sentence of punishment is reinforced. Nevertheless, the *Skipper* judgment adds a new dimension to the *Lockett* doctrine. Hence, it is on individual particularism that the rule of law in the *Lockett* judgment is reaffirmed to allow for the consideration of individual elements, in this case the behavior of the detainee during his pre-trial detention. *Skipper* thus extends the notion of mitigating factors, as interpreted by the Burger Court, to the post-crime period and, in relation to this, not just to the prior elements that characterized the circumstances surrounding the *Lockett* decision. "It is indeed novel doctrine that compliance with this advice by a defendant charged with capital murder becomes a 'mitigating factor' that the sentencing judge or jury must—as a matter of constitutional law—consider in passing sentence."[45] Thus, in the continuity of the *Lockett* precedent, states resorting to the death penalty must take into consideration the period of pre-trial detention in terms of mitigating factors, that is to say ''character or record '' as the majority opinion indicates.[46]

42. *Skipper*, 476 U.S. at 1.
43. *Id*. at 9.
44. Gardner v. Florida, 430 U.S. 349, 11 (1977).
45. *Id*. at 15 n.3.
46. *Id*. at 12.

A *per curium* opinion was filed by Justice Scalia—appointed in 1986 by President Reagan to the Court upon the retirement of Chief Justice Burger (replaced in his position by Justice Rehnquist)—in the 1987 case *Hitchcock v. Dugger*.[47] This case concerned a death penalty statute, which crafted a jury and judge instruction that limited their consideration of mitigating factors to those which were listed. The Court unanimously held that it was not in conformity with *Lockett* and its progeny as it presented an exhaustive list of mitigating factors. In a unified voice, the Supreme Court asserted that "our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."[48] It should be noted that in this ruling the Supreme Court directly refers to the *Lockett* jurisprudence using the terms "the requirements of *Lockett*," which may suggest that the Court operates in total consensus in the individualization and interpretation of the scope of mitigating factors.[49] Nevertheless, this consensus in extending and clarifying the *Lockett* principle was not sustained over time.

In 1988 the Court seized a case that extended *Skipper*. *Franklin v. Lynaugh* involved an inmate who was in a similar situation to that of the defendant in *Hitchock*, where the jury instruction relating to mitigating factors represented the major issue of the case.[50] Here it does not relate to the civil party but to the defendant. The Court affirmed the Court of Appeals for the Fifth Circuit's sentence of death via a 6- 3 decision. Justice White wrote the plurality opinion joined by Justices Scalia and Kennedy while Justice O'Connor filed a concurring opinion in which Justice Blackmun joined. Justice Stevens filed a dissent in which both Justices Brennan and Marshall joined. The Court found no constitutional error in the case as far as mitigating circumstances were concerned and explained the legal grounds on which *Skipper* was based.[51]

The Court asserted that the "discussion in *Skipper* of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior."[52] It held that "the Texas capital sentencing system adequately allows for jury consideration of mitigating circumstances, and therefore sufficiently provides for jury discretion."[53] The

47. 481 U.S. 393, 399 (1987).
48. *Id.*
49. *Id.*
50. 487 U.S. 164, 170 (1988).
51. 476 U.S. at 8.
52. *Franklin*, 487 U.S. at 178.
53. *Id*. at 166.

Court reiterated that each state has its own discretion in the scheduling of mitigating circumstances for the attention of the jury and that it "has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his guilt as a basis for mitigation."[54] Even though *Skipper* had extended the *Lockett* doctrine to the inmate's record in detention for mitigating circumstances, *Franklin v. Lynaugh* does not confer further rights to inmates.[55] *Parker v. Dugger* is a continuation of the *Lockett* legacy and its application in the individual character of the death penalty. [56] This case included a situation that is not uncommon to states that are defined as "weighing state[s]" (i.e., where state legislation enumerates a list of both aggravating as well as attenuating circumstances).[57] Per this type of legislation, the death penalty can be imposed when the aggravating circumstances significantly surpass the mitigating factors regarding both the crime and the criminal.[58] Many states took an approach similar to that of Florida during this period. In *Parker*, under the legislation of the state of Florida, per Fla. Stats. §§ 921.141 (2) and 921.141 (3), the judge can determine the sentence solely by referring to the aggravating circumstances following a jury's recommendation. consider any attenuating elements.

The Supreme Court, in a 5–4 decision, ruled for Parker in a majority opinion by Sandra Day O'Connor, which Justices Marshall, Stevens, Blackmun, and Souter joined. Justice White filed a dissenting opinion, which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. The Court considered that the position adopted by the State of Florida was arbitrary and inconsistent with its jurisprudence, stating that "the Florida Supreme Court acted arbitrarily and capriciously by failing to treat adequately Parker's nonstatutory mitigating evidence."[59] Based on *Lockett* case law, the Court reiterated all the major roles played by appellate courts in relative cases involving a possible sentence of death and they accentuated "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."[60]

The Court examined the issue of mitigating factors, considering the difficulty of their assessment. It stated that "nonstatutory evidence, pre-

54. *Id*. at 165.
55. *Id*. at 183.
56. 498 U.S. 308, 318 (1991).
57. *Id.* (Referring to the following statutes: Fla. Stat. §§ 921.141(5) and 921.141(6) (1985 and Supp. 1990).
58. Fla. Stat. § 921.141(3) (1985).
59. 498 U.S. at 308.
60. *Id*. at 321.

cisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion."[61] The Court stated the that several elements fell within this framework: "finally, numerous witnesses testified on Parker's behalf at the sentencing hearing concerning his background and character. Their testimony indicated both a difficult childhood, including an abusive, alcoholic father, and a positive adult relationship with his own children and with his neighbors."[62] The U.S. Supreme Court held that the defendant was denied meaningful appellate review when the Florida Supreme Court failed to acknowledge the availability of non-statutory mitigating evidence by confirming the orientation of its Lockett case law, on the basis of which, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime."[63] The Court then remanded the case.

Another feature of *Lockett* case law concerns the prerogatives of states regarding decisions on the death penalty. This element, presented in the dissenting opinion, reveals a certain erosion of the concept of cooperative federalism. This concept faces major difficulties, particularly within the Supreme Court's approach and with the legal and political conceptions driving then recently appointed Justice Scalia.

Several appointments of Justices to the U.S. Supreme Court were part of President Reagan's desire to influence the Court in accordance with his 1980 election campaign agenda. This influence began with the appointment of Arizona Justice Sandra Day O'Connor to the Supreme Court in 1981. The President then decided to elevate a conservative Justice, William Rehnquist, to the position of Chief Justice in 1986 when Warren Burger retired. Much political attention and debate occurred after this elevation. Reagan filled Justice Rehnquist's role as an associate justice with Antonin Scalia. Additionally, in 1988, Anthony Kennedy replaced Justice Powell.

By 1991, Reagan's appointees' influence over the Court was fundamental, especially regarding the legal conservatism of Justice Scalia. In 1982, Scalia stated in the *Harvard Journal of Law and Policy*, "the decision concerning which level of government should have the last word is, therefore, a pragmatic one, to be determined by the practicalities of the matter."[64] Notably, in 1950, Edward Corwin, for whom the conception of

61. *Id*. at 318.
62. *Id*. at 314.
63. *Id*. at 321.
64. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & PUB. POL'Y 19, 19-20 (1982).

cooperative federalism resulted in ever expanding federal power, which impacted state sovereignty, had expressed a major concern regarding the challenge of institutional relations in the future. In his article *The Passing of Dual Federalism*, Corwin asked whether, given the new federal dominance, states could even be salvaged "for any useful purpose."[65]

The dissenting opinion in *Parker v. Dugger*, made it possible to initiate an answer. It takes the form of a "do-over" in favor of states in the face of over-invasive federalism. Justice White, joined by Chief Justice Burger and Justices Scalia and Kennedy, argued that in this *habeas corpus* review, the majority had given "far too little deference to state courts that are attempting to apply their own law faithfully and responsibly."[66]

Yet, the consensus ended in 1990 thus starting to expose the Court to fissures on the doctrine of *stare decisis* correlated with the *Lockett* ruling.

II. A FISSURE IN THE *LOCKETT* DOCTRINE FROM THE SUPREME COURT TO STATES

Lockett v. Ohio redefined the search for a viable standard in death penalty cases, and raised more questions about mitigating factors as it provided a new framework. This trend in the sentencing of the death penalty, with the consideration of individual and vague elements led the legislator of the federal states to reiterate and re-conceptualize the notion of aggravating factors as a legislative check on judicial interpretation. The new laws circumscribed the possibilities for interpretation by either reducing the prosecutor's possibilities for a capital punishment application or reinforcing the options for charging. Political considerations and controversies appeared in the politics–law relationship, particularly around rulings generated in the wake of *Lockett* in order to determine their impact and significance. It is a question of analyzing the excesses of the ultra-safe speech both in a perspective of conquest of public opinion or satisfaction of the electorate.

A. The End of Consensus, Beyond and Back to stare decisis

A doctrinal consensus of the Supreme Court under *Lockett* that lasted for more than a decade began to erode in *Penry v. Lynaugh*.[67] In this judgment, the Court addressed two questions. The first was the conformity of its execution regarding the Eighth Amendment and an accused having

65. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 1-24 (1950).
66. Parker v. Dugger, 498 U.S. 308, 324 (1991).
67. 492 U.S. 302, 328 (1989).

mental disabilities. Penry's psychological evaluations revealed that his overall intelligence was that of a child aged 6 and a half years and that he had a social age of a child aged 9–10 years.[68] The second issue was connected to *Lockett* and its case law. On this point, the Court considered Penry's claim that under Texas law, the death penalty was unconstitutional because his mental retardation was a mitigating circumstance. In *Penry v. Lynaugh*, the Supreme Court delivered its first decision regarding the execution of offenders with mental retardation. This decision was important due to its abandonment of "mental age" as a useful forensic concept.[69] Indeed, the term "mental age" was considered insufficient for a categorical Eighth Amendment rule. Regarding the execution of a convicted murderer with mental retardation, the Court offered "no direction home,"[70] opting for a vague position by indicating that "the Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers."[71] On this point, the majority opinion ruled that, "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing a sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case."[72]

In *Lockett* case law, the plural majority opinion reaffirmed the need to consider attenuating circumstances because:

> [T]he jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision, as is required by the Eighth and Fourteenth Amendments under *Lockett*, *Eddings*, and subsequent decisions. Those decisions were based on the

68. *Id.* at 307–08.

> At a competency hearing held before trial, a clinical psychologist, Dr. Jerome Brown, testified that Penry was mentally retarded. As a child, Penry was diagnosed as having organic brain damage, which was probably caused by trauma to the brain at birth. Penry was tested over the years as having an IQ between 50 and 63, which indicates mild to moderate retardation. Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealed that Penry, who was 22 years old at the time of the crime, had the mental age of a 6 1/2-year-old child, which indicated that, "he has the ability to learn and the learning or the knowledge of the average 6 1/2-year-old kid." Penry's social maturity, or ability to function in the world, was that of a 9–10 year old. Dr. Brown testified that, "there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range."

69. Ian Freckelton QC, *Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges after the Abolition of Execution in the United States*, 23 PSYCHIATRY, PSYCHOL. & L. 321, 321-35 (2016).

70. Michael L. Perlin, *"No Direction Home": The Law and Criminal Defendants with Mental Disabilities*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 605, 605-12 (1996).

71. Penry v. Lynaugh, 492 U.S. at 305.

72. *Id.* at 340.

> principle that punishment must be directly related to the defendant's personal culpability, and that a defendant who commits crimes attributable to a disadvantaged background or emotional and mental problems may be less culpable than one who has no such excuse.[73]

This is a reaffirmation of the constitutionality of the death penalty because crime-related facts as well as the influence of endogenous and exogenous criminal factors and their impact on the criminal and his act are considered. The Court stated that there was "[an] absence of instructions informing the jury that it could consider and give effect to a petitioner's mitigating evidence of mental retardation and abused background by declining to impose the death penalty."[74]

In *Penry v. Lynaugh*, Justice Scalia began to create distance from *Lockett* case law by declaring in his concurring and dissenting opinion that, "in providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence."[75] His criticism of the majority opinion is clear when he refers to "an unguided, emotional 'moral response' that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy."[76]

Walton v. Arizona caused a major split in the Supreme Court when Justice Scalia led a direct, major confrontation of the *Lockett* doctrine and its subsequent jurisprudence by constructing his opinion as a fundamental disagreement with the premises put forth in *Penry*.[77] Justice Scalia refuted the overly vague definition of mitigating circumstances as individualized in the *Lockett* ruling, which has since been articulated via *stare decisis*. Justice Scalia clearly stated his belief that there was major disagreement between *Lockett* and *Furman*, with the former creating an arbitrary assessment due to the individualization of the mitigating factors, latter precisely denouncing the arbitrary aspect of the death penalty.

Thus, per Justice Scalia, the effects of this legacy included a lack of coherence and a failure of the Court to achieve a uniform and rational system of capital punishment that followed the intention of *Furman*.[78] This resulted in a suspension of the death penalty, including a retroactive

73. *Id*. at 304.
74. *Id*. at 303.
75. *Id*. at 358-59 (Scalia, J., concurring in part and dissenting in part).
76. *Id*. at 359-60.
77. 497 U.S. 639, 690 (1990).
78. 408 U.S. at 239.

effect and readjustment by national laws to achieve more precise criteria for compliance with the Eighth Amendment. Moreover, in this major and profound reversal, Justice Scalia indicated that he would not comply with the *Lockett* principle and would no longer defend contentious situations under the Eighth Amendment, which would limit the discretionary power of lower courts. Thus, in the logic of his previous opinions, Justice Scalia referred to state sovereignty and an appreciation of the mitigating aspect of circumstantial factors in the context of a case involving capital punishment. The Supreme Court's opinion was problematic:

> The majority's failure to address the conflicting principles governing state death penalty statutes and the narrow split between the Supreme Court justices in *Walton v. Arizona* are likely to further confuse, rather than resolve the concerns of, state legislatures as to what is constitutionally required when sentencing capital defendants to death.[79]

Following the *Furman* decision, the Supreme Court attempted to combat discrimination in judgments and the notion of using arbitrary elements against the black community in the United States (which was overrepresented not only among those executed but also among victims) by implementing an outline and instructions that would help eliminate these elements. Justice Scalia was joined by Justice Thomas in 1993 after President George H. W. Bush appointed the rather conservative justice to the Supreme Court. Thomas decided to no longer consider *Lockett* as a reference in the matter of the death penalty but to return to *Furman* in *Graham v. Collins*.[80]

Justice Thomas's Supreme Court opinions have been based upon originalism and thus have correlated with natural law yet have varied, depending on the case. His judicial philosophy has been characterized by applying the approach of a color-blind Constitution. While the different ways in which Justice Thomas approaches constitutional questions are understandable. Given "his life experiences, the inconsistent originalism that results is itself a policy choice."[81] Although this approach ensures that Justice Thomas will not go against his personal beliefs regarding inherent equality in racial cases, it causes him to apply strict originalism systematically to other issues.[82]

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79. Lori L. Nader, *Walton v. Arizona: The Confusion Surrounding the Sentencing of Capital Defendants Continues*, 40 CATH. U. L. REV. 475, 508 (1991).

80. 506 U.S. 461, 470 (1993).

81. Clarence Thomas, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1438 (2008).

82. Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1331-33 (1999).

In *Graham v. Collins*, granting Graham a writ of *habeas corpus* would result in the creation of a constitutional rule, which would in turn require a special instruction to the jury to consider the extenuating circumstances as presented by the defense.[83] Justice White delivered the 5–4 majority opinion of the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined. Justice Thomas filed a concurring opinion. The U.S. Supreme Court affirmed the judgment of the Court of Appeals by ruling that to support Graham's petition would indeed create a new constitutional rule extending beyond the reasoning of the precedents that were in place at the time of the conviction. In his concurring opinion, Justice Thomas seized the opportunity to express his judicial conception of the doctrine of *Lockett*.

For Justice Thomas, the purpose of this decision was to end the arbitrator's role in a specific context after the implementation of the Civil Rights Act. "*Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States and most particularly in rape cases."[84] Above all, it was intended to counterbalance the well-known effects of discrimination against African Americans. As he indicated in his opinion,

> the unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc. This representation was part of a concerted 'national litigative campaign against the constitutionality of the death penalty' waged by a small number of ambitious lawyers and academics on the Fund's behalf.[85]

This originalist interpretation of *Lockett* now implies that the intention is no longer the same: "We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*."[86]

The individualized nature of the award is notable when considering that individual factors *de facto* deprived the black community of the mitigating historical factors that are associated with recent segregation. These elements were ultimately dismissed by also individualizing the crime and disempowering society to reinforce the notion of individual choices being linked to individual trajectories based on the conservative political ap-

83. 506 U.S. at 476.
84. *Id*. at 479.
85. *Id*. at 481.
86. *Id*. at 500.

proach that advocated for democracy and a society without discrimination.

In the judgment of Justice Thomas, one can see a rejection of positive discrimination yet an increased emphasis on free arbitrariness of the human being beyond explanatory environmental mitigating factors. The following cases, in the context of the *Lockett* legacy on the issue of extenuating circumstances, focused on a jury instruction regarding mitigating factors. In 2001, the U.S. Supreme Court again heard the *Penry* case,[87] which was known as *Penry II*.[88] They ruled that a nullification instruction did not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" when determining the most appropriate sentence.[89] The same position was shared in *Smith v. Texas*, in which the Court cited *Penry II* in a 7-2 *per curiam* opinion and ruled that instructing the jury to return a false answer to a special issue to avoid a death sentence did not allow them to fully consider Smith's relevant mitigating circumstances.[90]

In 2004, the Court considered the question of age as a mitigating circumstance making the death sentence impossible in *Tennard v. Dretke,*.[91] In a 6–3 decision written by Justice O'Connor, the Court held that Tennard's mental retardation could reasonably be understood as relevant to his crime. The Court found that the jury instructions did not sufficiently allow the jury to weigh Tennard's mental retardation in his favor.

In *Atkins v. Virginia*, the Supreme Court ruled that the execution of persons with limited intellectual capacity constituted a violation of the Eighth Amendment because it represented major mitigating circumstances but left the states with an appreciation of the notion of mental retardation.[92] This interpretation and return to national legislation were confirmed in 2014, when *Hall v. Florida* adopted the term "intellectually disabled" to replace "mentally retarded." [93] This reduced the state's margin of discretion regarding this element in relation to capital punishment. The majority opinion asserted the following:

> In *Atkins* v. *Virginia,* we explained that impaired intellectual functioning is inherently mitigating: '[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal.' Nothing in our opinion suggested that a mentally retarded individual

87. Penry v. Lynaugh, 492 U.S. 302, 340 (1989).
88. Penry v. Johnson, 532 U.S. 782, 784 (2001).
89. *Id.* at 797.
90. 543 U.S. 37, 38 (2004).
91. 542 U.S. 274, 289 (2004).
92. 536 U.S. 304, 316 (2002).
93. 134 S.Ct. 1986, 1992 (2014).

> must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence—and thus that the *Penry* question need not even be asked—unless the defendant also establishes a nexus to the crime.[94]

Clearly, we are witnessing a complex relationship between the discretionary power of the state and the directives of the Supreme Court, where ambiguity prevails on this point. Each party readjusts, with the states doing so per constraints that are specific to them, including popular sovereignty, which is of major importance at the local level.

B. Lockett's Legacy and its Contemporary Political and Legal Challenges

The *Lockett* principle has strengthened the discretion of the judges and the jury, as well as discretion in individualizing the mitigating factors. This approach is of great importance to the American constitutional practice of the jury as an institution. The case *Ring v. Arizona* has also reinforced the importance of a jury and, when the evaluation of the sentence involves examination of aggravating and mitigating circumstances, the necessity of entrusting case decisions that could lead to the death penalty to a popular jury and not to a judge.[95] The arguments put forward by the Court reference the arbitrary aspect of applying the death penalty when a judgment is rendered by a judge. Nevertheless, in continuity with the Supreme Court's case law, the decision resurfaces in this perspective on procedural harmonization of the whole question raised by the *Furman* decision,[96] one that *Gregg*[97] and the individualization of the mitigating circumstances of *Lockett*'s jurisprudence seemed to have spread for several decades.[98] Beyond the debate's new beginning, it is apparent that regarding the application of the death penalty, the entire political relationship in the exercise of the institutions displaces the issue of individualization and harmonization with a question of power relations between state and federal institutions.

In an 8–1 decision in *Kansas v. Carr* (only Justice Sotomayor dis-

94. *Tennard*, 542 U.S. at 287.
95. 536 U.S. 584, 609 (2002).
96. 408 U.S. 238, 283 (1972).
97. 428 U.S. 153, 207 (1976).
98. 438 U.S. 586, 608 (1978).

sented), the Supreme Court held that the Eighth Amendment does not require juries deciding capital cases to be informed that mitigating circumstances need not be proved beyond a reasonable doubt, and that the previous sentence was in conformity with the Eighth Amendment as it did not violate the principle of "individualized sentencing determination."[99] The Court's very broad approach is consistent with relevant case law, yet it differs from its traditional approach in similar cases in the sense that very few referrals are made to previous jurisprudence. Written by Justice Scalia, the opinion opts for text-focused methodology. It is not surprising that the decision is based on this procedure given Scalia's position on the *Lockett* case, which is no longer *stare decisis*; instead, he skips to *Furman*. The central issue is that the merits of the case focus on the notion of reasonable doubt and jury instruction on the subject of mitigating factors. The scope is thus differentiated from the notion of mitigating factors and their place in the procedure.

The question of intervention or interference in the autonomy of the federated states as a major institutional stake in the entirety of American constitutional history, beginning with the debates of the federalist and anti-federalist factions. Some states fundamentally began by adopting the concept of judicial override, allowing the judge to go against the jury's sentence in favor of execution in cases where the jury pronounces the death penalty.

Unlike federalist judges who according to the Constitution "shall hold their offices during good behavior" and therefore once appointed and confirmed serve until their resignation, retirement or death, state court judges are subject to an effective removal power exercised by the people.[100] Indeed, they must face voters. As Justice Oliver Wendell Holmes stated:

> the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[101]

As Kenneth Culp Davis underlined:

> the reality is that nearly all [the prosecutor's] decisions to prosecute or not to prosecute. . . and nearly all his reasons for decisions are carefully

99. 136 S.Ct. 633, 644 (2016).
100. U.S. Const. art. 3, § 1.
101. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1909).

> kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized. The plain fact is that more than nine-tenths of local prosecutors' decisions are supervised or reviewed by no one.[102]

The cases which receive a wider public attention are those with a death penalty or life sentence charge. As the Supreme Court held in *Imbler v Pachtman*, prosecutors are totally immune for any activity considered to be "intimately associated with the judicial phase of the criminal process."[103] Even though the principle of prosecutorial immunity has been challenged several times, it is still in effect and also clearly appears in the Rule 3.8 of the American Bar Association.[104]

Accountability to the electorate is thus fundamental and their satisfaction essential. As more than 95% of county and municipal chief prosecutors are elected, it is evident that the electoral process operates and influences the Judiciary.[105] In *Morrison v. Olson*, Justice Scalia also emphasized that "under our system of government, the primary check against prosecutorial abuse is a political one."[106] As Hamilton pointed out in *Federalist Paper No. 70*, "The ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility."[107] The fact that prosecutors and judges of the national courts are subject to popular sovereignty through elections leads to a difficult separation of powers and an impact on elements that divide the electorate. With regards to this as far as the death penalty and where the *Lockett v. Ohio* jurisprudence is concerned, both the concept of judicial override in situations with respect to the constitutional application of *Locket*t's jurisprudence and the fundamental role played by prosecutors are underlined. As Justice Sotomayor noted while dissenting in *Woodward v. Alabama,*

> there is no evidence that criminal activity is more heinous in Alabama than in other states, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to

102. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 207-08 (1969).

103. 424 U.S. 409, 430 (1976).

104. MODEL RULES OF PROF'L CONDUCT r. 3.8. Rule 3.8 Special Responsibilities of a Prosecutor, American Bar Association.

105. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996).

106. 487 U.S. 654, 728 (1988).

107. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

electoral pressures.[108]

The rate of judicial overrides is therefore correlated to election years for judges.

A study conducted by Reuters reviewed 2,102 state Supreme Court rulings on death penalty appeals from the 37 states that heard such cases over the past 15 years.[109] The study connected the results in those cases to the way each state chooses its justices: "in the 15 states where high court judges are directly elected, justices rejected the death sentence in 11 percent of appeals, less than half the 26 percent reversal rate in the seven states where justices are appointed."[110] "There are men all over the U.S. who are going to die because of politics. That's a basic component of the death penalty," said Tim Young, director of the Office of the Ohio Public Defender.[111] Until 2016, there were three states where judicial override was in force, namely Alabama, Florida, and Delaware. The Supreme Court struck down Florida's capital sentence in January 2016 on the grounds that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[112] In response, the Florida legislature eliminated override power in March of 2016,[113] and the Delaware Supreme Court invalidated its own override system on August 2, 2016.[114]

In 2017, the Alabama legislature passed a statute banning judicial override that came into effect on April 11, 2017.[115] However, the statute does not have a retroactive effect, so each accusation and detention occurring prior to this statute might be subject to judicial override.[116] Judges in Alabama have reserved the right to override jury verdicts.[117] In Colbert

108. *Id*. at 408.

109. Dan Levine & Kristina Cooke, *In States With Elected High Court Judges, A Harder Line on Capital Punishment*, REUTERS INVESTIGATES (Sep. 22, 2015), https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/ [https://perma.cc/TV5X-VW44].

110. *Id*.

111. *Id*.

112. Hurst v. Florida, 136 S. Ct. 616, 619 (2016); *See* H.B. 7101, 118th Gen. Assemb., Reg. Sess. (Fl. 2016).

113. *See* H.B. 7101, 118th Gen. Assemb., Reg. Sess. (Fl. 2016).

114. Rauf v. State, 145 A.3d 430, 490 (Del. 2016); *See* Patrick Mulvaney & Katherine Chamblee, *Innocence and Override*, 126 YALE L.J. F. 118, 228 (2016).

115. Ashley Remkus, *Did Judicial Override End in Alabama? Some Say Judges Can Still Overrule Jury Over Death Penalty*, AL.COM (Jul. 21, 2017), https://www.al.com/news/huntsville/index.ssf/2017/07/death_penalty_judicial_overrid.html. **[**https://perma.cc/LKD3-URNB].

116. Adam Liptak, *Alabama Judges Retain the Right to Override Juries in Capital Sentencing*, NY TIMES (Nov. 18, 2013), https://www.nytimes.com/2013/11/19/us/alabama-judges-retain-the-right-to-override-juries-in-capital-sentencing.html [https://perma.cc/GQ2F-ZK96].

117. *Id.*

County, for example, Circuit Judge Hal Houghston Jr. had the final say by sentencing the defendant Benjamin Young to death using his judicial override power on March 13, 2018.[118] Meanwhile, in the Stephen Stone Case, the trial is set for January 28th, 2019.[119] In late August of this year, the defense requested that the Madison County circuit judge not apply judicial override on the grounds that the law "fails to directly address the circumstances here: Specifically, a case where a defendant is charged . . . prior to April 11, 2017, "but neither convicted, nor sentenced before April 11, 2017. . . Mr. Stone falls into this gap created by the Statute's ambiguity."[120] However, Madison County Circuit Judge Pate replied, "the Court finds that there is no prohibition against judicial override in this case."[121] In a recent interview with AL.com, Madison County Chief Trial Attorney Tim Gann reaffirmed this position saying, "It is our opinion that this case predates the law and we believe that judicial override still applies."[122] Clearly, the issue of judicial override in death penalty cases remains unresolved and will fuel political and judicial debate for years to come.

III. CONCLUSION

Four decades later, the evolution of the *Lockett* principle and its heritage underscores the interpretative problem of a lengthy but imprecise jurisprudence. *Lockett v. Ohio* has exposed the difficulties inherent to satisfying a volatile and ambiguous electorate. Indeed, it raises broader fundamental questions regarding law and politics.

The *Lockett* case and its progeny paralleled the climax of neoliberalism which marked the following decade. In terms of mitigating factors, it has been difficult to define them or their impacts on a fair trial. Crime analysis has shifted from the circumstances to the criminal, establishing a difficult balance between aggravated circumstances and mitigating factors. The Supreme Court has provided some clarification and attempted to

118. Bernie Delinksi, *Young Sentenced to Death*, TIMES DAILY (Mar 13, 2018), https://www.timesdaily.com/news/local/young-sentenced-to-death/article_b53e9fb7-b60d-5efd-b755-424c01c5d1b.html [https://perma.cc/EP4U-XT74]. B.Young was convicted of Ki-Jana Freeman 's capital murder, first-degree assault of Tyler Blythe and shooting into an occupied vehicle

119. Ashley Remkus, *Man Competent for Death Penalty Trial in Slayings of Wife and 7-Year-Old Son, Judge Rules*, ADVANCE LOCAL, Aug. 24, 2018 , https://www.al.com/news/huntsville/index.ssf/2018/08/stephen_marc_stone_huntsville_1.html. [https://perma.cc/JQ9P-DF4Z].

120. Ashley Remkus, *Lawyers Ask Judge to Ban Herself from Overriding Jury's Sentence in Death Penalty Case*, Advance Local, July 19, 2018, https://www.al.com/news/huntsville/index.ssf/2018/07/stephen_stone_judicial_ov.html. [https://perma.cc/6HQX-4KXF].

121. *Id*.

122. *Id*.

counter this arbitrariness. However, these clarifications have occurred in a nonlinear and vague manner. The current Supreme Court is further divided in its appreciation of mitigating factors and individualization in 2018. This situation raises concerns about the norm of *stare decisis* related to the Lockett rule, its conflict with *Furman*'s objective, and its *contradicto in adjecto*.

In this period of confusion and conflicts, even though judicial override is no longer characterized as a constitutional practice, the principle of non-retroactivity places it at the core of issues related to the death penalty and the individualization of mitigating factors. The jury's emotional response may conflict with its moral response. The tendency towards leniency may contradict public opinion seeking greater stiffness. The notion of the "government of judges when it comes to capital punishment opens up another perspective. In this particular situation, this viewpoint combines the notion of popular sovereignty and its corollary, direct representation, creating the controversial notion of a government of judges by the people. Here, Bickel's counter-majoritarian difficulty and Ackerman's theory of dualism come into play. With a pivotal appointment in the Supreme Court in 2018 and more to come in the future, the predictability of an unpredictable institution may lead to a more partisan Court. Chief Justice Roberts's influence certainly will not lead to controversial orientations, but it might provide a more precise vision of *Lockett*'s legacy.