

## LEGITIMIZING ERROR

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Since *Furman v. Georgia*, the Supreme Court has sought to harmonize competing constitutional demands under Eighth Amendment rules regulating the two-step eligibility and selection stages of the capital decision-making process. *Furman*'s demand for rationality and consistency requires that, at the eligibility stage, the sentencer's discretion be limited and guided by clear and objective fact-based standards that rationally narrow the class of death-eligible defendants. The selection stage requires a determination of whether a specific death-eligible defendant actually deserves that punishment, as distinguished from other death-eligible defendants. Here, fundamental fairness and respect for the uniqueness of the individual are the cornerstones of the individualized sentencing requirements, which demand the sentencer consider and give effect to relevant mitigating evidence. The principles embodied in the individualized sentencing determination, as stated in *Lockett v. Ohio*, are rooted in the "fundamental respect for humanity underlying the Eighth Amendment." In *Woodson v. North Carolina*, the Court recognized that, because "death is different" from all other punishments, the Eighth Amendment requires a heightened degree of "reliability in the determination that death is an appropriate punishment in a specific case."

Though both constitutional demands are aimed at ensuring that state capital-sentencing procedures comply with *Furman*'s demand to eliminate the wanton and freakish infliction of the death penalty, there is an unmistakable—and oft-discussed—tension between them. While the demand for rationality and reliability at the eligibility stage places limits on the sentencer's discretion, the demand for fairness and respect for the individual at the selection stage requires an expanded discretion and the authority to dispense mercy based on mitigating evidence.

The Court's efforts to balance these demands have been difficult. Justice Blackmun, in his famous dissent in *Callins v. Collins*, withdrew from the effort altogether, and announced that he would no longer "tinker with the machinery of death." Justice Scalia, responding to Justice Blackmun in his concurrence in *Callins*, took another tack, and repeated his announcement four years earlier in *Walton v. Arizona*, that he would not enforce the requirements of the individualized sentencing determination because, in his view, there was no basis for it in the text of the Eighth Amendment. Justice Scalia reiterated that position in his concurring opinion in *Kansas v. Marsh*.

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But the rules regulating the capital decision-making process—particularly those governing the individualized sentencing determination—are designed to minimize the risk of error in sentencing a person to death. Thus, despite the natural tension between the competing constitutional demands at the eligibility and selection stages, the Court (except for Justice Scalia) has remained faithful to the effort to harmonize them, at least in form, if not always in substance. Until now.

I always thought that if there ever was a capital sentencing formula in which the constitutional demands of individualized sentencing could not be met, even in form, the Kansas statutory formula was it. How could a statutory scheme *requiring* death if the jury finds that the aggravating and mitigating factors are in equipoise possibly ensure a reliable determination that death is an appropriate punishment for an individual offender? Even if the jury's finding of equipoise is beyond a reasonable doubt, the resulting death sentence does not fulfill the requirements for individualized sentencing. Equipoise indicates only that the jury is *unable* to reach a conclusion whether the balance of aggravation and mitigation does or does not make the individual defendant worthy of death. A death sentence based on equipoise says nothing about a particular individual except that he or she is among the class of death-eligible defendants. The decision constitutionally required by the jury at the selection stage is left unfulfilled.

At the outset, the Court's treatment of the merits is puzzling, even apart from the well-publicized fireworks it sparked between Justice Scalia and Justice Souter. If—as the majority in *Marsh* contends—*Walton v. Arizona* is controlling authority on the constitutionality of the Kansas statute, why didn't the Court just reverse based on *Walton* and be done with it? But Justice Thomas, writing for the majority, hedges on *Walton*'s dispositive effect, and is compelled to justify the decision as if “*Walton* [did] not directly control.” Whether this indicates a lack of confidence in *Walton*'s real value as *stare decisis* in this case remains unexplained.

I have never believed *Walton* to be controlling on the equipoise issue. As both Justice Stevens and Justice Souter separately point out in *Marsh*, the *Walton* plurality never addressed the equipoise issue, and certainly avoided endorsing a rule which would require death if the aggravating and mitigating circumstances are equally balanced. (In fact, Arizona law requires that “doubtful cases” will be resolved in favor of life; the precise opposite of the Kansas law.) Justice Blackmun, who truly believed that the Arizona law did present an equipoise problem, wrote extensively in his dissent in *Walton* to point out that the plurality did not address the issue. The *Marsh* majority's reliance on Justice Blackmun's dissent as a basis for asserting that the equipoise issue was “resolved” by the plurality's holding in *Walton*, therefore, is tenuous.

Justice Thomas concludes for the majority that the Kansas statute contains the structural form of both narrowing and individualized sentencing. We never disputed that the Kansas statute satisfies the Eighth Amendment narrowing requirement at the eligibility stage, since the jury must find the existence of at least one aggravating factor before a defendant becomes

death-eligible. Justice Thomas then suggests that the Kansas procedure conforms to the individualized sentencing requirement because “a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant.”

It is here that the majority opinion becomes most interesting. As we argued, and as Justice Souter’s dissent makes clear, confining individualized sentencing to a mere requirement that a jury be allowed to consider relevant mitigating evidence falls short of the demand of constitutional reliability set forth in the Court’s own precedents. Justice Thomas acknowledges the incongruity by dismissing it.

For example, in answering Justice Souter’s claim that the Kansas equipoise provision increases the risk of error in capital sentencing, Justice Thomas asserts in a footnote that the jury instruction allowing consideration of “mercy” as a mitigating factor “alone forecloses the possibility of *Furman*-type error” by eliminating such risk. In making the assertion, however, Justice Thomas second-guesses the Kansas Supreme Court’s interpretation of how its own capital-sentencing formula operates, and in doing so, mischaracterizes the instruction.

In its earlier decision of *State v. Kleypas*, the Kansas Supreme Court authoritatively interpreted the statutory equipoise formula as mandating death in “doubtful cases,” *i.e.*, where the jury concludes that the aggravating and mitigating circumstances are in equipoise. Applying constitutional principles under the Eighth Amendment, the Kansas court concluded that the statute violated the demands of individualized sentencing. The *Kleypas* holding was reiterated by the Kansas Supreme Court in its decision in *Marsh*.

It was settled long ago, in cases like *Winters v. New York* and *Poulos v. New Hampshire*, that the Supreme Court has a duty, under principles of federalism, to accept the interpretation of a state statute by the state’s highest court. Yet, the only interpretation of the Kansas formula under which Justice Thomas’s assertion has any validity is one that assumes a Kansas jury is given the discretion and authority to dispense mercy *after* finding aggravating and mitigating circumstances in equipoise. Only then would the jury be asked to make an individualized determination whether to impose death. But, as interpreted by the Kansas Supreme Court, the Kansas formula ends with the weighing process. If the jury is in equipoise after considering aggravating and mitigating circumstances, the sentence *must* be death. By interpreting the Kansas formula differently than the Kansas Supreme Court, Justice Thomas mischaracterizes the mercy instruction. The only way a jury could dispense mercy under the Kansas instruction is by refusing to follow it.

The *Marsh* majority opinion further justifies the Kansas statute as “analytically indistinguishable” from the capital sentencing structures approved by the Court in *Blystone v. Pennsylvania* and *Boyde v. California*. Both cases involved formulas that mandate death upon a jury finding that aggravating circumstances outweigh mitigating circumstances. In response to

Justice Souter's argument—the fact that aggravators must predominate under those systems was crucial to finding them constitutional—Justice Thomas (again, in a footnote) merely states that both *Boyde* and *Blystone* turned on the idea that the formulas were not “impermissibly mandatory.” But under any analysis, a structure mandating death when the jury's reasons for favoring death are actually greater than the reasons for sparing a defendant's life is materially different from the Kansas structure of, “If it's a tie, you must die.” The majority does not answer.

As Justice Souter reminds us, constitutional reliability under the Eighth Amendment “demands both form and substance, both a system for decision and one geared to produce morally justifiable results.” A death sentence can only be “morally justifiable” if, as the Eighth Amendment requires, the decision to impose death constitutes a “reasoned moral response,” which turns on the uniqueness of the individual and the details of the crime, and identifies the defendant as one whose extreme culpability makes him or her particularly deserving of death. Kansas's “tie breaker” in favor of death, Justice Souter explains, does none of these things. It does the opposite, because the determining fact—a finding of equipoise—is not directly linked to a particular crime or criminal, and reflects no evidentiary showing that death must be the reasoned moral response. Rather than minimize the risk of an erroneous death sentence as the Eighth Amendment demands, the Kansas statute “guarantee[s] that in equipoise cases the risk will be realized.”

Justice Thomas maintains that it is simply “implausible” that an equipoise determination reflects an inability of the jury to decide between life and death, or that a Kansas jury would impose death by equipoise without making the constitutionally requisite “reasoned, moral decision” about whether death is an appropriate punishment. But his reasoning, as he himself states, is based on the claim that weighing is not an end under the Kansas statute, but rather, “merely a means to reaching a decision.” Again, this claim relies on a mischaracterization of the Kansas procedure that directly contradicts the Kansas Supreme Court's interpretation of how the statute operates. Weighing *is* an end under the Kansas formula; there is no further decision-making step. A finding of equipoise is, as Justice Souter states, the determining fact of death.

Consequently, Justice Thomas's statement that a determination of equipoise under the Kansas statute is a “*decision for death*” does nothing to satisfy the constitutional demands of individualized sentencing. Instead, it merely legitimizes what Professor Robert Weisberg, in his 1983 article, *De-regulating Death*, termed a “choice to be choiceless.” That is, at the very point when the jury does not find the defendant more deserving of death than any other generic death-eligible defendant, the Kansas law decrees death. This is the very antithesis of the reliable, rationally reviewable capital sentencing decision required under the Eighth Amendment.

Studies done by the Capital Jury Project have shown that jurors in death penalty cases often seek ways to deny personal moral responsibility for their sentencing decision. As we documented in our brief, Kansas prosecutors urge jurors that, under the law, death must be the result if they cannot decide

whether aggravating circumstances outweigh the mitigating circumstances, or vice versa. The Court's decision in *Marsh* encourages prosecutors to continue the practice. Under these conditions, there is great incentive for Kansas jurors, at the point of equipoise, to seek refuge from responsibility in a legal rule that chooses death for them.

Faithfulness to an effort to harmonize the competing constitutional demands of the eligibility (narrowing) and selection (individualized sentencing) stages of capital decision-making would have required that the Kansas Supreme Court's decision in *Marsh* be affirmed. Instead, a majority of the Supreme Court appears to have retreated from the core constitutional demand of heightened reliability that, under the Court's precedents, is integral to the individualized sentencing determination required under the Eighth Amendment.

It is instructive that constitutional "reliability" is mentioned nowhere in the majority opinion. And, to the extent Justice Thomas even acknowledges the Court's longstanding appreciation for the idea that death is truly "different" from all other punishments, he then debunks the idea entirely by chastising Justice Souter for arguing that recent death row exonerations provide "new empirical evidence" demonstrating the difference. Justice Thomas claims instead that "the thrust of our mitigation jurisprudence ends" with the right to present evidence in mitigation and the obligation of the sentencer to consider that evidence. As Justice Souter notes, the Court's holding "defies decades of precedent aimed at eliminating freakish capital sentencing in the United States."

The majority opinion in *Marsh* closes with a warning that the "logical consequence" of Justice Souter's argument against the Kansas statute "is that the death penalty can only be just in a system that does not permit error." This charge suggests that the dissent's insistence on the constitutional demand for reliability necessarily means that the administration of the death penalty must be perfect. Therefore, to insist on reliability is, *ipso facto*, to call for abolition of the death penalty. It is as if Justice Thomas projected Justice Blackmun's dissent in *Callins*—in which his response to the difficulty of harmonizing competing constitutional demands under the Eighth Amendment was to cease upholding the death penalty in any case—onto Justice Souter's dissent in *Marsh*. The problem is, Justice Souter never makes that argument. His argument is that the Kansas statute does not comport with the requirement of constitutional reliability in the determination of whether death is an appropriate punishment in a specific case—that, instead of minimizing the risk of error, it increases that risk by mandating death upon a finding of equipoise. In other words, the demands of individualized sentencing under the Eighth Amendment cannot be met. Harmonization of the competing constitutional demands at the eligibility and selection stages is impossible here, not because the demands are inherently irreconcilable, but because the demands indispensable to the selection decision under the Eighth Amendment cannot be fulfilled by the terms of the statute.

One can admit, without condoning the mistakes that do occur, and while striving to minimize the risk that they will occur, that even constitutional

procedures are prone to human error. Minimizing the risk of error in capital sentencing has been a fundamental goal of the Court's Eighth Amendment jurisprudence since *Furman*. But in *Marsh*, instead of enforcing constitutional rules designed to minimize mistakes, a majority of the Supreme Court retreats from those rules. The Court legitimizes error by approving a capital sentencing procedure that increases the risk an individual will be sentenced to death when the evidence does not demonstrate that he or she deserves it.

By its decision in *Kansas v. Marsh*, a majority of the Court comes perilously close to the position of Justice Scalia, whose answer to the difficulty of harmonizing demands under the Eighth Amendment is to eliminate the individualized sentencing requirements from capital sentencing procedures. The question remaining is whether the majority's retreat from those requirements in *Marsh* will have any effect on future capital cases that come before the Court, or whether—as Justice Stevens sees it—the decision represents “[n]othing more than an interest in facilitating the imposition of the death penalty” in Kansas. Stay tuned.