

**A SENTENCE REINSTATED, A TEXT SET ASIDE:
SHIRKING THE *LOCKETT* DILEMMA IN
Ayers v. Belmontes, 127 S. Ct. 469 (2006)**

Following the Supreme Court's pronouncements in *Lockett v. Ohio*¹ and *Eddings v. Oklahoma*,² courts have construed the Eighth Amendment to require broad and virtually limitless consideration of mitigating evidence during capital punishment sentencing hearings. The Supreme Court appears to have avoided grappling with these cases, however, in its recent decision in *Ayers v. Belmontes*.³ In *Belmontes*, the Supreme Court reinstated the death sentence of Fernando Belmontes, holding that there was no reasonable likelihood that jurors were precluded by California's "factor (k)" jury instruction from considering evidence of future good conduct during incarceration and so the jury instruction did not violate the Eighth Amendment right to present mitigating evidence in capital sentencing trials. In so holding, the Court neglected the clearest textual approach to the jury instruction, skirted the difficulties of the *Lockett-Eddings* mandate, and forewent an opportunity to address fundamental inconsistencies in the application of the death penalty.

In 1982, Fernando Belmontes was convicted of first-degree murder for striking nineteen-year-old Steacy McConnell on the head fifteen to twenty times with a steel dumbbell bar during a burglary of McConnell's home.⁴ At the sentencing phase of his trial, Belmontes introduced evidence to show that "he would become a model prisoner who could contribute something of value to society."⁵ Several witnesses, including two chaplains and Belmontes himself, testified that Belmontes had behaved constructively during a previous incarceration with the California Youth Authority (CYA), even rising to the number two

1. 438 U.S. 586, 604 (1978) (plurality opinion) (holding that death penalty statutes must allow the jury or judge to consider "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").

2. 455 U.S. 104, 110, 112 (1982) (embracing *Lockett*).

3. 127 S. Ct. 469 (2006).

4. *Belmontes*, 127 S. Ct. at 473.

5. *Belmontes v. Brown*, 414 F.3d 1094, 1139 (9th Cir. 2005).

position on the CYA fire crew.⁶ He also had participated in and gotten baptized as part of a Christian sponsorship program, had been a positive influence on the son of a married couple with whom he had formed a good relationship, and had counseled young inmates not to make the same mistakes he had made once they left prison.⁷ Despite his own post-release lapse in religious commitment and McConnell's murder, Belmontes claimed he would rededicate himself to religion, and he asked for a chance to "make a positive contribution to the welfare of others while in prison."⁸

In accordance with the then-applicable statutory scheme, the trial court instructed the jury to consider certain factors as either aggravating or mitigating, among them being the existence of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."⁹ After being sentenced to death, Belmontes challenged the trial court's jury instructions, including this latter instruction—the so-called "factor (k)" instruction—through several state and federal remedial avenues. Belmontes argued that they violated the Eighth Amendment by precluding from the jury's consideration the "forward-looking mitigation evidence" that he would lead a productive life in prison.¹⁰ The Ninth Circuit Court of Appeals overturned Belmontes's death sentence in federal habeas review, holding the jury instructions to be unconstitutional.¹¹ The Ninth Circuit, sitting en banc, declined to review its ruling.¹² The United States Supreme Court vacated the Ninth Circuit's decision¹³ and remanded for reconsideration in light of the Court's decision in *Brown v. Payton*, in which the Court held that the California Supreme Court's determination that the "factor (k)" instruction allowed a jury to consider post-crime mitigating evidence of a defendant's religious conversion did not constitute an unreasonable application of Supreme Court precedent for purposes of habeas relief under the Anti-

6. *Id.*

7. *Ayers*, 127 S. Ct. at 473.

8. *Belmontes*, 414 F.3d at 1140.

9. CAL. PENAL CODE § 190.3(k) (West 2000). This instruction has since been amended. See Cal. Jury Instr., Crim., No. 8.85(k) (7th ed. 2005).

10. *Belmontes*, 127 S. Ct. at 472.

11. *Id.* at 473.

12. *Id.*

13. *Brown v. Belmontes*, 544 U.S. 945 (2005) (mem.).

terrorism and Effective Death Penalty Act (AEDPA).¹⁴ On remand, a divided Ninth Circuit panel again vacated Belmontes's death sentence, concluding that the factor (k) "instruction, read most naturally, suggested to the reasonable juror that Belmontes's evidence tending to show his probable future good conduct should be excluded from consideration," in violation of the Eighth Amendment requirement that the jury consider and weigh all mitigating evidence presented by the defendant.¹⁵ The Court of Appeals once again denied rehearing en banc.¹⁶

The Supreme Court granted certiorari and reversed. Writing for the Court,¹⁷ Justice Kennedy agreed with the Ninth Circuit that, "just as precrime background and character (*Boyde*) and postcrime rehabilitation (*Payton*) may extenuate the gravity of the crime, so may some likelihood of future good conduct count as a circumstance tending to make a defendant less deserving of the death penalty."¹⁸ Justice Kennedy further insisted that it would be "counterintuitive if a defendant's capacity to redeem himself through good works could not extenuate his offense[.]"¹⁹ But applying the *Boyde* test of whether the trial court's instructions had given rise to "a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence,"²⁰ the Court concluded that future conduct evidence actually had been considered in Belmonte's sentencing hearing, pointing to the time spent on presenting future conduct evidence to the jury, both parties' closing arguments, and the judge's other instructions.²¹

Justice Scalia concurred,²² joining in the Court's application of *Boyde* and re-asserting the view he first articulated in *Walton v. Arizona*.²³ He contended that even if the instruction did, in

14. 544 U.S. 133 (2005). The relevant provision of AEDPA is codified at 28 U.S.C. § 2254(d).

15. *Belmontes*, 414 F.3d at 1135.

16. *Belmontes*, 127 S. Ct. at 472.

17. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy.

18. *Belmontes*, 127 S. Ct. at 475 (internal marks omitted).

19. *Id.*

20. *Boyde v. California*, 494 U.S. 370, 380 (1990).

21. *See Belmontes* 127 S. Ct. at 480.

22. Justice Thomas joined Justice Scalia.

23. 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment).

fact, limit the jury's consideration of mitigating evidence, there would still be no Eighth Amendment violation.²⁴

Justice Stevens dissented,²⁵ with a lengthy description of the "significant residual confusion" surrounding the Belmontes sentencing hearing as to the extent of mitigating evidence that the Constitution requires courts to consider. Justice Stevens argued, "it is difficult, if not impossible, to see how evidence relating to future conduct even arguably 'extenuate[d] the gravity of the crime under factor (k).'"²⁶ The dissent insisted that evidence of future good conduct offers a separate "principled basis for imposing a sentence other than death."²⁷ Justice Stevens emphasized the prosecutor's statement that he was "not sure it really fits in [factor (k)]"²⁸ and that "both counsel agreed that *none* of the mitigating evidence could detract from the gravity of the crime."²⁹ Furthermore, Justice Stevens underscored the judge's answers to juror questions that "cemented the impression that the jurors' lone duty was to weigh specified, limited statutory factors against each other"³⁰ and did not "invite the jury to weigh 'potentially infinite mitigators'."³¹ Because "factor (k)'s restrictive language sent the unmistakable message that California juries could properly give no mitigating weight to evidence that did not extenuate the severity of the crime," the dissent maintained that the jury in Belmontes's sentencing hearing did not consider future conduct evidence.³²

In its endeavor to determine the reasonable likelihood of the jury's consideration of the evidence at issue, the Court should have more carefully employed textual statutory analysis.³³ In-

24. *Belmontes*, 127 S. Ct. at 480 (Scalia, J., concurring).

25. Justices Souter, Ginsburg, and Breyer joined Justice Stevens.

26. *Belmontes*, 127 S. Ct. at 488 (Stevens, J., dissenting).

27. *Id.* at 484.

28. *Id.*

29. *Id.* at 485.

30. *Id.* at 487.

31. *Belmontes*, 127 S. Ct. at 486 (Stevens, J., dissenting). A broad reading of *Lockett* would require that such an invitation to weigh the evidence be extended to the jury. See *Lockett v. Ohio*, 438 U.S. 539, 604 (1978) (plurality opinion); see also *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986) (noting that the *Lockett-Eddings* mandate includes a duty to consider future behavior with respect to the likelihood that the defendant would not pose a future danger if spared but incarcerated).

32. *Belmontes*, 127 S. Ct. at 482 (Stevens, J., dissenting).

33. In his essay on interpretation, Justice Scalia defines the textualist approach: "[T]he objective indication of the words . . . is what constitutes the law." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal*

stead, the Court attempted to ascertain what the jury subjectively believed. For example, the Court dissected an exchange between the judge and several of the jurors to speculate about what one juror “surmised” or what other “jurors were considering.”³⁴ In pursuing this subjective inquiry, however, the Court’s approach subjects itself to a textualist critique. A jury, like a legislature, is a complex multimember body; each member’s individual understanding blends into the group understanding, and the group’s holistic subjective reasoning or intent is therefore unknowable.³⁵ Thus, the Court would fare better by looking to the objective meaning of the words of the statutorily-mandated instruction.³⁶

A text-based analysis is especially pertinent here—when determining the jury’s likely understanding of an instruction—because juries “construe their mandate to use common sense” and “aim to apply the law as neutrally and directly (textually) as possible.”³⁷ Particularly in cases of juror confusion, as in the present case, jurors normally pay close attention to the judge’s last clarifying instruction,³⁸ which, here, included a recitation of factor (k).³⁹

The words of factor (k) emphasize the crime at issue, inviting jurors to focus on evidence related to the defendant and his commission of the crime. Factor (k) instructs the trier of fact to

Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (Amy Gutmann ed., 1997).

34. *Belmontes*, 127 S. Ct. at 479.

35. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 110 (2006) (“[W]hereas focusing on the text was said to represent an objective measure of statutory meaning, focusing on purpose unrealistically sought to discover the unknowable subjective intentions of a complex, path-dependent, and opaque multimember lawmaking body.”).

36. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2398 (2003) (“[I]f a statutory text is clear by virtue of a perceived social consensus about the meaning of its words in context, that conventional meaning may supply the most reliable evidence of what a multimember legislative body collectively ‘intended.’”).

37. Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1317–19 (1996).

38. See *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (“Particularly in a criminal trial, the judge’s last word is apt to be the decisive word.”).

39. Transcript of Oral Argument at 11, *Belmontes*, 126 S. Ct. 469 (No. 05-493) (“[T]he last reference was to the list, that the list included Factor (k) without embellishment, and that jurors tend to give—we have held that the jurors tend to give the greatest emphasis to clarifying instructions or later instructions in response to questions.”).

take into account “[a]ny other circumstance which extenuates the gravity of the *crime* even though it is not a legal excuse for the crime.”⁴⁰ The instruction does not, however, “explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant.”⁴¹ Instead, “factor (k), by its very language, inexorably retain[s] its focus on the crime itself, and specifically on the crime’s gravity.”⁴² The Court has previously condoned a definition of “extenuates” to mean “lessens the seriousness of a crime as by giving an excuse.”⁴³ By common understandings, then, evidence of hardship and human frailties—such as an “impoverished and deprived childhood” and “inadequacies as a school student”⁴⁴ or a “disadvantaged background” and “emotional and mental problems”⁴⁵—might make the commission of a crime seem more excusable.⁴⁶ Each of these can plausibly fit within the textual meaning of factor (k) because each is “functionally related to the culpability for the crime.”⁴⁷

Evidence of likely future conduct, however, is entirely distinct. Whether Belmontes will become a churchgoer in the future or whether he will mentor fellow inmates has nothing to do with the crime that he committed. As Justice Souter has noted, “it would be more than a stretch to say that the seriousness of the crime itself is affected by a defendant’s subsequent experience.”⁴⁸ Indeed, there is “no reported case in California where either a defense attorney or the California Supreme Court makes a text-based argument that [future-

40. CAL. PENAL CODE § 190.3(k) (West 2000) (emphasis added). This instruction has since been amended. See *infra* note 55.

41. *People v. Easley*, 671 P.2d 813, 825 (Cal. 1983).

42. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 59 (1997). Indeed, Justice Scalia’s paraphrase, “I would have interpreted the phrase to mean anything that justifies you in giving a lesser punishment for the crime,” Transcript of Oral Argument at 9, *Belmontes*, 127 S. Ct. 469 (No. 05-493), still maintains a tie to *the crime*.

43. *Boyd v. California*, 494 U.S. 370, 381 (1990).

44. *Id.*

45. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

46. The controlling factor is not necessarily whether such evidence took place before or after the crime. Even post-crime “remorse” bears an intuitive connection to the crime. See *Brown v. Payton*, 544 U.S. 133, 142 (2005).

47. Transcript of Oral Argument at 36, *Belmontes*, 127 S. Ct. 469 (No. 05-493) (Eric S. Multhaup, on behalf of Respondent).

48. *Brown*, 544 U.S. at 157 (Souter, J., dissenting).

conduct] evidence extenuates the gravity of the crime.”⁴⁹ Even the State’s lawyer admitted in oral arguments that Belmontes’s post-crime prison conduct “does not relate to the seriousness of the crime at all.”⁵⁰ Counsel further conceded that an instruction directing jurors only to consider mitigating evidence if it extenuates the gravity of the crime “would appear not to be” constitutional, assuming that consideration of Belmontes’s future good conduct evidence was constitutionally obligatory.⁵¹ Indeed, Belmontes’s evidence of how he could be of value to the community by counseling fellow inmates “had nothing whatsoever to do with the crime.”⁵² To think that the jury took into consideration such future plans, which are unrelated to the crime, would be “simply at odds with common attitudes and the English language.”⁵³ Confirming and recognizing this asymmetry, the California Supreme Court supplemented the factor (k) instruction so that jurors are instructed to also consider “any other aspect of [the] defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death,” thus mimicking the language in *Lockett*.⁵⁴ The California legislature later amended factor (k) accordingly.⁵⁵

By allowing the jury instruction and concomitant death sentence to pass muster without adhering to the text, the majority sidestepped a fundamental tension underlying capital punishment jurisprudence. *Lockett*’s mandate of “unconstrained dis-

49. Transcript of Oral Argument at 36–37, *Belmontes*, 127 S. Ct. 469 (No. 05-493).

50. *Id.* at 6.

51. *Id.* at 8. Counsel later reneged to say that future conduct evidence did relate to circumstances extenuating the crime with the caveat “for sentencing purposes.” *Id.* at 12. One wonders why the Court would expect a juror’s plain-text, common-sense interpretation of the statute to be different “for sentencing purposes” than in ordinary discourse. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (“[J]udges must seek and abide by the public meaning of the enacted text . . .”).

52. *Belmontes*, 127 S. Ct. at 490 (Stevens, J., dissenting).

53. *Brown*, 544 U.S. at 159 (Souter, J., dissenting).

54. *People v. Easley*, 671 P.2d 813, 826 n.10 (Cal. 1983).

55. Cal. Jury Instr., Crim., No. 8.85(k) (7th ed. 2005) (“Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant’s character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.” (brackets omitted)); see also 3 BERNARD E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 484 (3d ed. 2000) (“An instruction complying with *Easley* is now routinely given.”).

cretion"⁵⁶ in the name of individualized sentencing grates against the requirement given in *Furman v. Georgia*⁵⁷ that discretion be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁵⁸ Some, like Justice Stevens, have refuted this tension as unproblematic, arguing that providing limitless discretion to the sentencer is necessary and may actually help prevent arbitrariness.⁵⁹ By that logic, the Court should have vacated Belmontes's sentence in order to faithfully apply *Lockett*, as the dissent insists.

But experience has shown, and a number of Justices have recognized, that consistency and individualization are inversely related.⁶⁰ Indeed, as Justice Scalia has asserted, they are "two quite incompatible sets of commands: The sentencer's discretion to impose death must be closely confined, but the sentencer's discretion *not* to impose death (to extend mercy) must be unlimited."⁶¹ This is a "zero-sum dilemma,"⁶² and it

56. *Walton v. Arizona*, 497 U.S. 639, 664–65 (1990) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia explained this tension in his concurrence:

Pursuant to *Furman*, and in order to achieve a more rational and equitable administration of the death penalty, we require that States channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance. In the next breath, however, we say that the State *cannot* channel the sentencer's discretion . . . to consider any relevant mitigating information offered by the defendant, and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not deserve to be sentenced to death.

Id. (citations and internal marks omitted).

57. 408 U.S. 238 (1972).

58. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

59. See *Graham v. Collins*, 506 U.S. 461, 503–04 (1992) (Stevens, J., dissenting); see also Louis D. Bilonis, *Criminal Law: Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 294 (1991) ("The range of moral considerations that reasonable, civilized people might find relevant to the appropriateness of a particular death sentence is inestimably broad and impossible to articulate completely in advance.").

60. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (mem.) (Blackmun, J., dissenting from denial of certiorari); *Graham*, 506 U.S. at 491 (Thomas, J., concurring); *Walton*, 497 U.S. at 656–73 (Scalia, J., concurring in part and concurring in judgment); *Franklin v. Lynaugh*, 487 U.S. 164, 181–82 (1987) (plurality opinion); *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting).

61. *Callins*, 510 U.S. at 1141–42 (Scalia, J., concurring in denial of certiorari) (internal citations omitted).

62. Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1042 (1995).

has prompted at least one former Justice to give up on a constitutional enforcement of the death penalty altogether.⁶³ Alternatively, Justice Scalia has suggested abandoning the *Lockett* principle entirely, a point that he reemphasized in his concurrence in the instant case as a means of reinstating Belmontes's death sentence.⁶⁴

Justice Thomas has proposed that the Court simply reconstrue *Lockett* more narrowly.⁶⁵ The *Lockett* doctrine need not be so unbounded: *Lockett* requires simply that the courts ensure consideration of relevant mitigating evidence.⁶⁶ But relevance is a circular legal conclusion.⁶⁷ It is a matter of what "the State, representing organized society, deems particularly relevant to the sentencing decision."⁶⁸ Courts, in numerous instances, have made relevance determinations.⁶⁹ Guiding such determinations must be some theory about why a particular piece of evidence

63. See *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.").

64. See *Belmontes*, 127 S. Ct. at 480 (Scalia, J., concurring) ("I adhere to my view that limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment."); see also *Callins*, 510 U.S. at 1142 (Scalia, J., concurring in denial of certiorari) ("[A]t least one of these judicially announced irreconcilable commands . . . must be wrong.").

65. See *Graham v. Collins*, 506 U.S. 461, 490 (1993) (Thomas, J., concurring); see also *McAllister*, *supra* note 62, at 1043.

66. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

67. See Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 731 n.127 (2006) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (quoting *State v. McKoy*, 372 S.E.2d 12, 45 (N.C. 1988) (Exum, C.J., dissenting))) ("[R]elevance in the mitigation context suffers from circular reasoning: 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'").

68. *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

69. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (noting that the Court had "no quarrel" with the statement that "how often [the defendant] will take a shower" is irrelevant); *Glass v. Butler*, 820 F.2d 112 (5th Cir. 1987) (holding that the trial court need not allow a defendant to introduce evidence not relevant to his or her character, prior record, or the circumstances of the offense, and that evidence of churches' opposition to death penalty is not relevant); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986) (holding co-defendant's life sentence not relevant to defendant's character or offense); *People v. Carter*, 70 P.3d 981, 1018 (Cal. 2003) (holding the jury should have known that issues of deterrence or cost were improper to consider); *People v. Ochoa*, 966 P.2d 442 (Cal. 1998) (holding the jury may not consider the impact of a death sentence on the defendant's family).

is relevant.⁷⁰ This theory can be extracted from the Court's own prior jurisprudence, as "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant."⁷¹ Thus, evidence might be deemed relevant if it contributes to a "reasoned *moral* response" because "individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant."⁷² In this vein, the Court has deemed evidence relevant as it relates to society's interest in retribution.⁷³ The Court has also required consideration of mitigating factors "stemming from the diverse frailties of humankind,"⁷⁴ in acknowledgment of their relation to society's interest in deterrence.⁷⁵ In addition, the Court has deemed relevant evidence related to a defendant's future dangerousness,⁷⁶ in line with community concerns regarding incapacitation.⁷⁷

The future conduct evidence at issue in this case fits neither of the above theories, but rather stands apart on a separate utilitarian notion. The evidence neither "relate[s] specifically to [the] petitioner's culpability for the crime he committed,"⁷⁸ nor pertains to concerns over incapacitation of a dangerous indi-

70. See Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 324–25 (1992) ("Unless a sentencing inquiry serves to resolve some specific question, there appears to be no coherent Eighth Amendment theory for requiring it or for defining a particular sphere of sentencing evidence as necessarily relevant.").

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

72. *Id.*

73. See *Skipper*, 476 U.S. at 13 (Powell, J., concurring) (citing *Lockett v. Ohio*, 438 U.S. 586, 597 (1978)) ("Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted.").

74. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

75. See *Skipper*, 476 U.S. at 13 (Powell, J., concurring) (citing *Eddings*, 455 U.S. at 115 n.11) ("[T]he death penalty has little deterrent force against defendants who have reduced capacity for considered choice.").

76. See *id.* at 5 (majority opinion). *But cf id.* at 11 (Powell, J., concurring) (noting that such evidence is relevant for purposes of rebutting the prosecutor's argument that defendant would likely rape other inmates if given life imprisonment, but otherwise irrelevant on its own as it has no bearing on defendant's culpability for the crime).

77. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998) ("[Jurors] are deeply concerned that such a defendant will cause more harm to someone else unless he's executed. They would rather have the defendant's blood on their hands than that of another victim.").

78. *Skipper*, 476 U.S. at 4.

vidual. Here, the argument is about a defendant's "future value to the community."⁷⁹ Yet, whether an individual can participate in church activities and do social work while in prison is not necessarily "commonly thought to lessen or excuse a defendant's culpability" for murder.⁸⁰ Indeed, to think such factors irrelevant would not necessarily be a "surprising conclusion;"⁸¹ "society has not had a long held view that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime."⁸² Does someone who is more valuable to the community deserve to live? There is likely no "societal consensus" on the matter "to command constitutionalization."⁸³ On these grounds, the Court might have reached the same judgment in the present case by deeming the evidence to be irrelevant and thereby narrowing *Lockett* in a step towards consistency.

If, on the other hand, the evidence is relevant, then the Court would have had to set Belmontes's sentence aside out of allegiance to the text of the jury instruction, an allegiance that is all the more important where, as here, common moral tenets do not necessarily justify the mitigation.⁸⁴ Instead, the majority failed to utilize the clearest textual reading of the factor (k) statutory instruction. In so doing, the Court undermines textual interpretation. In the words of Justice Harlan, the Court should not "subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question The

79. *Belmontes*, 127 S. Ct. at 477 (internal marks omitted).

80. *Brown v. Payton*, 544 U.S. 133, 143 (2005).

81. *Id.* at 142 (noting that to believe the jury did not consider the disputed evidence, "one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime").

82. *Belmontes*, 414 F.3d at 1134 (internal marks omitted). *But see* *Boyde v. California*, 494 U.S. 370, 382 (1989) ("[W]e see no reason to believe that reasonable jurors would resist the view, *long held by society*, that in an appropriate case such [background and character] evidence would counsel imposition of a sentence less than death." (emphasis added) (emphasis added and internal quotation marks omitted)).

83. Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 *YALE L.J.* 835, 848 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)).

84. *See* Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 *UTAH L. REV.* 1, 12 ("[P]roper jury instructions are critical in this area because a strong conflict exists between the precepts of the law and the retributive morality of 'an eye for an eye and a tooth for a tooth.' . . . Comprehensible instructions are crucial in precisely those areas where morality and the law do not coalesce.").

problem must be faced and answered.”⁸⁵ The Court might have followed the lead of any number of guiding principles as proposed by its own Justices: adhering to *Lockett*, abandoning *Lockett*, narrowing *Lockett*, or even abandoning the death penalty. By doing none of the above, the Court once again “re-treat[s] from the field”⁸⁶ and adds to the “confusing array of ill-defined concepts, conflicting pronouncements, *ipse dixits* and short-lived precedents” that constitute modern capital punishment doctrine.⁸⁷ In skirting the deeper constitutional question,⁸⁸ the Court in *Belmontes* misses an opportunity to bring a much needed measure of steadiness, character, and coherence⁸⁹ to capital punishment jurisprudence.

Saritha Komatireddy

85. *Welsh v. United States*, 398 U.S. 333, 354–55 (1970) (Harlan, J., concurring).

86. *Callins v. Collins*, 510 U.S. 1141, 1156 (1994) (Blackmun, J., dissenting from denial of certiorari).

87. Note, *A Reasoned Moral Response: Rethinking Texas’s Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 416–18 (1990); see also Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975) (“[A judge] must construct a scheme of . . . principles that provides a coherent justification for all common law precedents and . . . constitutional and statutory provisions as well.”).

88. See *Walton v. Arizona*, 497 U.S. 639, 666 (1990) (Scalia, J., concurring in part and concurring in the judgment) (“The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard.”).

89. Professor Fried has indicated that these characteristics are not only important but are also interrelated:

Steadiness and commitment are not just virtues that keep us unwaveringly on course to some goal or end point: they make our lives more or less coherent; they allow us to understand and describe what it is that moves us at all. They give character. They give character to a judge as she pursues a course of decision, but this same steadiness and commitment give character to the Court. Without such steadiness the Court’s work would not only be unpredictable and the law unreliable, it would be threatened with incoherence.

CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 7 (2004).