THE LIMITS OF LAW IN THE EVALUATION OF MITIGATING EVIDENCE

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Abstract. Capital sentencers are constitutionally required to "consider" any mitigating evidence presented by the defense. Under *Lockett v. Ohio* and its progeny, neither statutes nor common law can exclude mitigating factors from the sentencer's consideration or place conditions on when such factors may be considered. We argue that the principle underlying this line of doctrine is broader than courts have so far recognized.

A natural starting point for our analysis is judicial treatment of evidence that the defendant suffered severe environmental deprivation ("SED"), such as egregious child abuse or poverty. SED has played a central role in the Court's elaboration of the "consideration" requirement. It is often given what we call "restrictive consideration" because its mitigating value is conditioned on a finding that the deprivation, or a diagnosable illness resulting from it, was an immediate cause of the crime. We point out, first, that the line of constitutional doctrine precluding statutory and precedential constraints on the consideration of mitigating evidence rests on a more general principle that "consideration" demands an individualized, moral—as opposed to legalistic—appraisal of the evidence. When judges restrict the moral principles under which they evaluate the mitigating weight of evidence on the basis of precedent or even judicial custom, they fail to give a reasoned, moral response to the evidence. We articulate a three-factor test for when legalistic thinking of this sort prevents a judge from satisfying the constitutional requirement. Restrictive consideration of SED evidence, in many jurisdictions, is a product of legal convention and thus fails the test.

Second, we contend that, when the capital sentencer is a judge rather than a jury, she has a special responsibility to refrain from restrictive consideration of mitigating evidence. The Constitution requires that death sentences must be consistent with community values. Unrestricted consideration of evidence—evaluating its mitigating weight in light of a range of moral principles—ensures that the diverse moral views of the community are brought to bear on the capital question.

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[1] The authors are equally responsible for the ideas and writing within this article; the ordering of names is alphabetical.

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"The sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing a sentence, so that the sentence imposed . . . reflects a reasoned *moral* response to the defendant's background, character, and crime."[2]

INTRODUCTION

It is well-established law, since *Eddings v. Oklahoma*, that evidence of "severe environmental deprivation" (SED)—such as egregious child abuse, neglect, or poverty—must be "considered" by judges as a mitigating factor during the penalty phase of capital trials.[3] In *Smith v. Texas*, the Supreme Court found unconstitutional under *Eddings* a judicial practice of excluding SED from consideration as a potential mitigating factor unless the deprivation suffered met a narrowly defined condition.[4] Rather than broadening their review of SED, the judges who previously engaged in this practice of outright exclusion switched to a subtly different practice: when SED evidence is presented by the defense, judges declare that they are "considering" SED as a mitigating factor but assign it little to no mitigating weight unless it meets the very same condition.[5] Mitigating factors that receive little to no weight make no difference, as far as we can tell, to the defendant's sentence.[6] The practice raises the question: is judicial treatment of SED evidence consistent with the kind of "consideration" the Constitution requires?

Courts of appeals declined to take a position on the issue—until the Ninth Circuit's ruling in *McKinney v. Ryan* in December 2015.[7] In *McKinney*, the Arizona Supreme Court had dismissed SED evidence as non-mitigating because it did not "causally contribute" to the capital crime, claiming that this counted as "consideration" under *Eddings*. A divided Ninth Circuit, sitting *en banc*, disagreed, finding that the state court failed "to evaluate and give

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[2] Penry v. Johnson, 532 U.S. 782, 788 (2001) (citations omitted).

[3] 455 U.S. 104, 113 (1982); *see also id.* at 114–15 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). Henceforth, we use the same *Eddings* pin citation for all grammatical forms of "consider."

[4] Smith v. Texas, 543 U.S. 37, 45 (2004) (per curiam).

[5] *See* discussion *infra* Part I.

[6] *See* discussion *infra* Parts I, II.

[7] McKinney v. Ryan, 813 F.3d 798, 802 (9th Cir. 2015) (en banc), *cert. denied*, 137 S. Ct. 39 (2016).

appropriate weight" to that evidence, contrary to *Eddings*, because the causal prerequisite it invoked mirrored the one that, until *Smith*, it had used to wholly exclude most SED evidence from consideration.[8] In an impassioned dissent, Judge Bea described the notion that the Arizona Supreme Court "did not *really* consider [the evidence] even though it used the word 'considering'" as "nonsense."[9] He argued that "giving little or no weight to such evidence [after consideration] is perfectly permissible under *Eddings*."[10]

Two dueling approaches to the "consideration" of deprivation evidence underpin this dispute.[11] A fact offered as mitigating by the defendant can only be judged mitigating based on a principle concerning moral responsibility or punishment. On some such principles, the fact might have greater mitigating value than on others. For instance, evidence of an act of kindness of the defendant might be mitigating given the principle that mercy is appropriate towards individuals of decent moral character or the principle that even murderers who may be rehabilitated should be spared execution. When a sentencer draws on just one normative principle, or an unduly restricted range of plausible principles, to explain the evidence's mitigating value, they engage in what we call *restrictive consideration*.[12] Restrictive consideration is not necessarily unlawful, but the consideration found inadequate in *McKinney* was both restrictive and unlawful. In that case, and many others in Arizona, the defendant's deprivation was deemed to have mitigating value *only if* it bore a very particular causal relation to the criminal act: namely, that the SED was an immediate or "specific" cause of the act. (For example, SED causes the crime in the relevant sense when it results in a psychological disorder like PTSD that results in an irresistible impulse or motive to commit the crime in question.) This restriction seems to rest on the principle that a defendant's prior deprivation only diminishes his punishment-worthiness when the deprivation directly causes his intention to commit the crime and negates his responsibility for the crime. The *McKinney* majority sought less restricted consideration, which would have appraised the mitigating significance of the deprivation based on alternative moral principles. In what follows, we demonstrate that numerous such alternative principles exist and are not only plausible but widely accepted.

We welcome *McKinney* as a clarification of the *Eddings* consideration doctrine. We argue that implicit in *Eddings* and its progeny is the attractive

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[8] *Id.* at 820, 823.

[9] *Id.* at 847 (Bea, J., dissenting) (emphasis in original).

[10] *Id.* at 843–44 (Bea, J., dissenting).

[11] *See* discussion *infra* Parts I, II.

[12] By plausible principles, we mean those that are believed by significant numbers of reasonable persons and should be known to the sentencer. *See* discussion *infra* Part I.

ideal that it is unconstitutional for sentencers to limit the moral principles under which they consider mitigating evidence for *legalistic* reasons; in evaluating which moral principles bear on the mitigating significance of evidence presented by the defense, the sentencer should rely exclusively on moral reasoning. *Eddings* explicitly held that capital sentencers must not be constrained by legal norms from considering any relevant mitigating evidence.[13] The holding was an extension of *Lockett v. Ohio*, which held that statutes excluding any mitigating factors from the sentencer's consideration are unconstitutional.[14] *Eddings* elaborated that the sentencer's consideration can be unconstitutionally constrained not just by statutes but also other sources of law, like judicial custom. And legal rules can operate as unconstitutional constraints not just by requiring outright exclusion of mitigating factors from consideration, but by subtly pressuring judges to limit the conditions under which evidence counts as mitigating. A later case, *Tennard v. Dretke*, clarified that judge-made rules or conventions limiting when mitigating evidence can be considered also amount to unconstitutional constraints on consideration.[15] We argue that *Lockett*, *Eddings*, and *Tennard*, together, stand for the proposition that a practice of restrictive consideration of mitigating evidence where the restrictions are imposed because judges feel *bound by the law* (in a sense to be made precise) is unconstitutional.

McKinney took a step toward this broader doctrinal interpretation by finding an *Eddings* violation in restrictive consideration of SED induced by an informal judicial practice. However, because the Ninth Circuit based its decision on historical facts specific to the Arizona practice, it missed an opportunity to articulate a general rule for identifying when restrictive consideration counts as unconstitutionally induced by a legal custom or practice under *Eddings*. We seize the opportunity *McKinney* missed, offering a three-factor test for just this purpose that applies most obviously to the review of SED evidence and potentially to the review of mitigating evidence more broadly.

We also present an argument, grounded in an original interpretation of Supreme Court precedent, that restrictive consideration of mitigating evidence may be inherently or *per se* unconstitutional when the sentencer is a judge, even if the judge was not acting on the basis of any assumed legal rules. As the Court has repeatedly emphasized since *Gregg v. Georgia*, a death sentence cannot be constitutionally legitimate unless it enjoys broad-based communal support.[16] This is in part why juries—representing a cross-

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[13] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

[14] Lockett v. Ohio, 438 U.S. 586, 606 (1976).

[15] Tennard v. Dretke, 542 U.S. 274, 287 (2004).

[16] *See* Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("Jury sentencing has been

section of their community—are so extensively involved in the administration of capital punishment in nearly every jurisdiction in the United States legal system. We argue that, because of their comparative disadvantage at fulfilling this constitutional function, judges who issue death sentences have a unique responsibility to consider each piece of mitigating evidence in light of different moral theories that give it the broadest potential mitigating value; and to give significant weight to the evidence if, under some such theories, it has significant mitigating value. Doing so does a better job ensuring that the death penalty if issued would enjoy broad based communal support than a practice of restrictive consideration (even if morally motivated). Given the common and (we argue) reasonable belief that SED is inherently mitigating, judges should give unrestricted consideration to deprivation evidence and assign substantial (though not necessarily dispositive) mitigating weight to it.

While the active controversy over what "consideration" requires has centered in the Ninth Circuit, the question is even more pressing in other jurisdictions. Although most states have shifted to exclusive jury sentencing in capital cases, Alabama, until last year, continued to allow death sentencing by a single judge through a jury override provision, and required no deference to the jury's preference for life; over a hundred inmates on Alabama's death row were subject to this provision and might still appeal their sentences.[17] Alabama is in the Eleventh Circuit, which has shown no signs of following the Ninth's lead in giving teeth to *Eddings's* "consideration" requirement. Prior to a significant shift in Supreme Court doctrine in 2002, many other states also employed judicial capital sentencing, and likely still have inmates on death row who were sentenced by judges under these older regimes.[18]

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considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (citation omitted)); Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty). *See also* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's task of expressing "the conscience of the community on the ultimate question of life or death"); Spaziano v. Florida, 468 U.S. 447, 461 (1984) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.") (quotation marks omitted) (citing *Gregg*, 428 U.S. at 184). *Accord* Steve Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144 n.232 (2002) ("[T]he case law as a whole indicates that communal values must play a role in capital sentencing.").

[17] *See* ALA. CODE §§ 13A-5-39 to -59 (2012); *accord* FLA. STAT. ANN. § 921.141(3) (West 2001). The Supreme Court recently struck down the Florida override in part, but the rest survives intact. Hurst v. Florida, 84 USLW 4032 (2016).

[18] Prior to the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which

In Part I, we illustrate how restrictive consideration can become an entrenched judicial practice, using examples of SED review from Arizona, Alabama, and Florida. We attempt to understand the underlying moral principle, called here the "causal nexus theory," which treats SED as mitigating when it has effects at the time of the crime that undermine the defendant's control over his act, similar to those of a serious mental illness. We find, however, that judges in these districts offer no justification for ignoring all *other* moral principles under which SED could have mitigating value.

In Part II, we review recent work in moral philosophy on the mitigating significance of SED, which informs our argument that the causal nexus theory is neither the only nor the most charitable available theory of SED's mitigating value. We make a brief case for the plausibility of three theories that regard SED as mitigating without proof of direct and specific causation, as well as for their popularity among capital jurors.

In Part III, we provide a two-pronged constitutional rationale for appellate courts to scrutinize lower courts' restrictive consideration of SED evidence. First, we trace the Supreme Court's jurisprudence on what constitutes adequate "consideration" of mitigating evidence at trial, arguing that the thread that unifies the holdings in *Lockett*, *Eddings*, and *Tennard* is the principle that the moral theories used by a sentencer to consider relevant mitigating evidence cannot be subject to legal constraint—whether statutory, precedential, or a matter of judicial custom. We articulate three factors for evaluating whether restrictive consideration of deprivation evidence violates this principle: (i) the court did not even attempt to justify or explain why the moral theory it used was the appropriate one to rely on, or why alternative theories were and should be dismissed; (ii) the same court, or other courts in its jurisdiction, have in the past routinely and without justification used the same theory—and only that theory—in considering mitigating evidence, while citing to precedent; and (iii) independent reasons exist for thinking that a substantial number of reasonable jurors would consider the evidence broadly mitigating on other moral grounds that the judge did not consider. *Second*, we make the case for sentencing judges at both the trial and appellate level having a unique responsibility to ensure that death sentences are issued

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required extensive jury involvement in capital sentencing, eight states in addition to Alabama—Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska—gave judges either exclusive authority to issue a death sentence or final authority with some level of input from the jury. *See generally* ARIZ. REV. STAT. ANN. § 13-703 (2001); COLO. REV. STAT. ANN. § 16-11-103 (West 2001); DEL. CODE ANN. tit. 11, § 4209 (West 2001); FLA. STAT. ANN. §921.141 (West 2001); IDAHO CODE ANN. § 19-2515 (West 2001); IND. CODE ANN. § xx-xx-x (West 2001); MONT. CODE ANN. § 46-18-301 (West 2001); NEB. REV. STAT. ANN. § 29-2520 (West 2001).

only when they enjoy broad-based communal support.[19] Applied to the SED context, this means ensuring that SED evidence is given unrestricted consideration regardless of the judge's particular moral beliefs.

I. A TROUBLING CASE OF RESTRICTIVE CONSIDERATION: THE CAUSAL NEXUS REQUIREMENT FOR SED

Nearly all death penalty states require three findings before the issuance of the death penalty: a finding of "aggravating factors," a finding of "mitigating factors," and a balancing of aggravating against mitigating factors based on the "weight" of each.[20] The weight of an aggravating or mitigating factor represents the degree to which it militates in favor of or against the death penalty. A death sentence is legally justified only if the aggravating factors outweigh the mitigating ones. Rules restricting the potential weight of relevant mitigating evidence can, therefore, make the difference between life and death for a defendant, at least in cases involving few or insignificant aggravating factors. The judicial custom of considering the mitigating value of SED evidence *only* on the causal nexus theory, prevalent in multiple jurisdictions, has been restrictive in precisely this way.

A. The Causal Nexus Requirement in Arizona

As mentioned earlier, the causal nexus theory once functioned as an exclusionary rule in Arizona. Under the old rule, SED evidence would be outright excluded from consideration unless the defendant was able to show that the deprivation "caused" the crime or "had an effect or impact on his behavior" at the time of the crime.[21] In practice, the rule demanded proof that

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[19] *See, e.g.*, *Gregg*, 428 U.S. at 181–84 (1976); discussion *infra* Part III.

[20] The current capital sentencing scheme in most states has emerged from the requirements articulated in *Gregg*, 428 U.S. at 189–96. *See also* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. CRIM. L. J. 117, 153 (2004) (describing that scheme).

[21] *See, e.g.*, Poyson v. Arizona, 743 F.3d 1185, 1193 (9th Cir. 2013) (quoting the Arizona trial court's statement that "[t]he court finds absolutely nothing in this case to suggest that [the defendant's commission of the murder] was a result of his childhood"); State v. Phillips, 46 P.3d 1048, 1060 (Ariz. 2002) ("[A]lthough Phillips presented evidence of substance abuse and a difficult childhood, he did not offer any evidence that these factors caused him to commit the robberies." (citation omitted)); State v. Djerf, 959 P.2d 1274, 1289 (Ariz. 1998) ("[D]ifficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior." (citation omitted)); State v. Mann, 934 P.2d 784, 795 (Ariz. 1997) ("Defendant did not show any [causal] connection."); State v. Towery, 920 P.2d 290, 311 (Ariz. 1996) (en banc) ("These events, however, occurred when Defendant was young, years before he robbed and murdered at the age of 27. They do not prove a loss of impulse control or explain what caused him to kill.");

the SED was a specific cause.[22] Accordingly, the test set a high bar for admission.[23] Few defendants could offer the required proof, for reasons we discuss below.[24]

Once the Supreme Court invalidated a similar exclusionary rule in the Fifth Circuit, judges switched from "excluding" SED evidence to "considering" it but assigning "little to no mitigating weight" unless the defendant could establish the required causal nexus.[25] The sentencing procedure was "indistinguishable" in practice "from an analytical 'screen' that excludes such evidence from consideration as a matter of law."[26] In practice, the results of restrictive consideration and exclusion were the same. We have found no case in which SED evidence was treated as having "little or no weight" but in which the defendant was ultimately sentenced to life imprisonment.[27] Indeed, the evidence suggests that judges who assign SED

State v. Murray, 906 P.2d 542, 573 (Ariz. 1995) ("[D]ifficult family background is nonmitigating unless defendant can show that something in that background impacted his behavior in a way beyond his control." (citation omitted)). Some early cases added that the "effect or impact" had to be "beyond the defendant's control." *E.g.*, State v. Murray, 906 P.2d 542, 573 (Ariz. 1995); State v. Wallace, 773 P.2d 983, 986 (Ariz. 1989). There were (rare) exceptions. *See generally* State v. Herrera, 850 P.2d 100 (1993) (life sentence in part because of "dysfunctional family background"); State v. Rockwell, 775 P.2d 1069 (1989) (life sentence in part because of SED).

[22] Many of the cases suggested that the causal link they sought was at the moment of the crime, such as an impulse or mental health symptom. *See, e.g.*, State v. Hoskins, 14 P.3d 997, 1022 (2000) (en banc), *supplemented*, 65 P.3d 953 (2003) ("Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established."); *Mann*, 934 P.2d at 795 ("An abusive background is usually given significant weight as a mitigating factor only when the abuse affected the defendant's behavior at the time of the crime.").

[23] In a review of cases since *Eddings*, we have found only two in which the court applied the causal nexus test but found the SED sufficiently mitigating to recommend against the death penalty. *See generally* State v. Trostle, 951 P.2d 869 (Ariz. 1989); State v. Bocharski, 189 P.3d 403 (Ariz. 2008).

[24] *See* discussion *infra* Part II.

[25] *See, e.g.*, State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (en banc) ("We consider [SED evidence from the defendant's childhood] in mitigation but give it little weight."); State v. McCray, 183 P.3d 503, 511 (Ariz. 2008) ("A difficult family history is considered in mitigating, but its strength depends on whether the defendant can show it has a causal connection with the crime." (citation omitted)).

[26] *Poyson*, 743 F.3d at 1205. *See also id.* ("Simply altering the label attached to an unconstitutional process does not magically render it constitutional.").

[27] A survey of Arizona capital cases makes clear that mitigating evidence given "little" or "slight" weight rarely, if ever, results in leniency. *See Prince*, 250 P.3d at 1170 ("little" weight); State v. Harrod, 183 P.3d 519, 534 (Ariz. 2008) (en banc) ("minimal weight");

"little to no" mitigating weight regard it as wholly non-mitigating.[28] These cases are now constitutionally suspect under the ruling in *McKinney*.[29] However, the Ninth Circuit's ruling was narrow: it placed substantial weight on the fact that the Arizona Supreme Court, despite claiming that it "considered" the evidence, included a pin cite to an older case that relied on the unconstitutional exclusionary rule.[30]

The nature of the causal nexus demanded by Arizona judges becomes clearer upon comparing cases in which SED was treated as mitigating with cases in which it was not. For instance, in the only recent case in Arizona where SED was given substantial weight, *State v. Bocharski*, a psychologist testified that events leading up to the murder triggered symptoms of the defendant's post-traumatic stress disorder, which stemmed from his childhood trauma.[31] In that case, the defendant had been "severely abused emotionally, physically, and sexually as a child" and had suffered from extreme neglect.[32] The court observed that "in assessing the quality and

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McCray, 183 P.3d at 503 ("little weight in mitigation"); *Hoskins*, 14 P.3d at 1022 (trial court accorded the SED evidence "slight" weight). Numerous other cases say that the lack of a causal nexus merely "lessens" the mitigating value of the SED evidence. While we suspect—and believe that an appellate court could find—that these cases, too, give little to no mitigating weight to the SED presented, because they do not address other theories under which the SED could be morally relevant, we do not address them here. *See, e.g.*, State v. Hampton, 140 P.3d 950, 968 (Ariz. 2011) (en banc) ("[The defendant's] troubled upbringing is entitled to less weight as a mitigating circumstance because he has not tied it to his murderous behavior."). Evidence assigned little to no weight is often excluded from the judge's final list of mitigating factors.

[28] Before affirming a death sentence, Courts routinely attach "little" weight to all of the mitigating factors—as though to emphasize that the mitigating evidence, even cumulatively, could not be decisive. *See, e.g.*, State v. Armstrong, 189 P.3d 378, 392-93 (Ariz. 2008) (en banc) (state supreme court dismissed each of the following mitigating factors as having "little" weight: the negative impact of Armstrong's death sentence on his children, his "troubled and unstable upbringing," his mental health history, and his "compassionate nature" and then affirmed the death sentence); State v. Murdaugh, 97 P.3d 844, 860 (Ariz. 2004) (en banc) (naming five mitigating factors, all of which the trial court had assigned "little weight" before imposing the death sentence); State v. Moody, 94 P.3d 1119, 1168 (Ariz. 2004) (en banc) ("[The trial judge] gave little weight to the [four mitigating factors] . . . and concluded that they were insufficient to call for leniency."). Evidence assigned little to no weight is often excluded from the judge's final list of mitigating factors. *See e.g., Poyson*, 743 F.3d at 1210 ("For at the end of its opinion, the state court listed all of the mitigating circumstances it considered in its independent review of Poyson's death sentence. It omitted from this critical tally both Poyson's personality disorders and his abusive childhood.").

[29] *McKinney*, 813 F.3d at 798.

[30] *Id.* at 820.

[31] 189 P.3d 403, 423 (Ariz. 2013) (en banc). *Bocharski* also mentions that the defendant suffered problems with alcoholism from a young age, and that he was in an alcoholic state on the day of the murder that may have made it harder for him to control his actions. *Id.*

[32] *Id.* at 424–25 (listing childhood hardships that included abandonment; physical abuse

strength of the mitigation evidence" it looks to the "strength of a causal connection between the mitigating factors and the crime."[33] It noted as "evidence of a causal connection" the fact that the psychologist "testified that Bocharski's troubled upbringing helped *cause* the murder of [the victim]."[34] The following facts were cited as supporting that determination: that the murder occurred immediately after a conversation between the defendant and the victim about the defendant's childhood abuse; that one especially traumatizing facet of that abuse involved the malicious killing of the defendant's childhood pet animals; and that the victim mistreated her pets. The explanation that elicited a merciful response from the court was that the defendant's deprivation made him vulnerable to stressful emotions when confronted with animal mistreatment, and the circumstances leading up to the murder placed him in a disturbed emotional state in which he was less able to "control and manage his feelings and reactions."[35]

The Court's reasoning in *Bocharski* contrasts with its reasoning in a case decided that same year where SED was given no weight. In *State v. Ellison*, the defendant argued that the abuse he suffered as a child significantly impaired his capacity to make moral choices as an adult.[36] A psychologist testified that "for a person having experienced Ellison's upbringing [and] history of physical and sexual abuse . . . , the damage would carry on into adulthood and potentially destroy the individual."[37] Yet the court determined that the defendant's "childhood troubles deserve[d] little value as a mitigator," given that he had "not provided any specific evidence that his brain chemistry was actually altered . . . so as to *cause* or *contribute* to his participation in the murders."[38] Notably, the court conceded that the psychiatric testimony made it more than likely "that Ellison did suffer some mental or emotional damage due to his [SED]." However, it could not find in this fact any grounds for mitigation.[39]

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and extreme neglect, including starvation, by his mother; squalid living conditions with little privacy; poverty that required foraging in garbage cans; exposure to drugs and sex at a young age; and repeated foster care).

[33] *Id.* at 426 (citing *Hampton*, 140 P.3d at 968).

[34] *Id.* at 426 (emphasis added).

[35] *Id.* at 423.

[36] 140 P.3d 899 (Ariz. 2006) (en banc).

[37] *Id.* at 928.

[38] *Id.* at 927-28 (emphasis added).

[39] *Cf.* State v. Anderson, 111 P.3d 369, 399 (Ariz. 2005) (en banc) (finding that the defendant's evidence of sexual abuse, low IQ, frequent moves between schools, and follower-type personality "do[es] not in any way explain his decision, decades later at age forty-eight, to kill three innocent people to steal a pickup," as defendant was not mentally retarded and was able to tell right from wrong in making his own decisions).

The different outcomes in *Ellison* and *Bocharski* seem to have turned on the different types of causal connections that the defendants drew between their childhood deprivations and their crimes. In *Ellison*, the nexus was a fairly general one: the defendant's emotional and mental traits, which were shaped by the SED, and, it could be inferred, played a role in his resort to crime. In *Bocharski*, the causal nexus was specific: the defendant's post-traumatic stress disorder, which was originally caused by his abuse and triggered by memories of the abuse at the time of the crime. In other words, the SED did not shape his moral and decision-making faculties themselves, but simply, via the PTSD, subverted them at the time of the murder. Because no such specific and direct causal link between the SED and the crime could be established in *Ellison*, the court deemed evidence that the defendant had suffered from much the same kind of extreme deprivation as Bocharski to be "not of such a quality or value as to warrant leniency."[40]

Similarly, in *State v. Prince* in 2011, the Arizona Supreme Court cursorily dismissed evidence of even severer deprivation—that the defendant's father was "an alcoholic, abusive to his wife and children and often on the run from law enforcement," and that as a child the defendant lived in an old barn that lacked adequate heat, running water, a kitchen, or a bathroom and then as a teenager with an adult male who molested and sexually abused him[41]—as having "little weight" because the defendant did not "establish[] a connection between his childhood trauma and the murder."[42] A lone citation to *Bocharski* made clear that the court sought a causal "connection" of a very immediate sort, such as a mental illness traceable to the deprivation that prompted the defendant to commit the crime, or to lose control of his mental faculties.[43]

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[40] *Ellison*, 140 P.3d at 928.

[41] State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (en banc).

[42] *Id*. at 1170–71.

[43] The only circumstance in which courts will infer a nexus is if the SED occurred close in time to the murder. The rule is that the mitigating value of SED evidence diminishes as time passes between the deprivation and the murder, entailing that SED seldom serves as a mitigating factor for older defendants. *See, e.g.*, *Prince*, 250 P.3d at 1170 ("Difficult childhood circumstances also receive less weight as more time passes between the defendant's childhood and the offense."); State v. McCray, 183 P.3d 503, 511 (Ariz. 2008) (en banc) ("[A] difficult childhood is given less weight when the defendant is older."); *Ellison*, 140 P.3d at 927–28 ("His childhood troubles deserve little value as a mitigator for the murders he committed at age thirty-three."); State v. Hampton, 140 P.3d 950, 968 (Ariz. 2006) ("Hampton was thirty years old when he committed his crimes, lessening the relevance of his difficult childhood."); State v. McGill, 140 P.3d 930, 944 (Ariz. 2006) ("[T]he impact of McGill's upbringing on his choices has become attenuated during the two decades between his reaching adulthood and committing this murder."); *Anderson*, 111 P.3d at 399 ("Anderson's childhood troubles do not in any way explain his decision, decades later at age forty-eight, to kill three innocent people."). It is clear from *State v. Mann* that the court was not looking for just any psychological connection, because a doctor in the case concluded

As far as we can tell from these cases, the causal nexus theory Arizona courts have used in considering SED evidence restrictively is similar to the causal nexus theory used to review mitigating evidence of mental illness. Mental illness is generally thought to be mitigating only if it undermines a defendant's control over her actions at the time of the crime.[44] One rationale for this rule is that defendants who lack control or free will when they commit crimes are not culpable, and the defendant's culpability is a critical factor in mitigation. Unfortunately, the opinions in cases like *Ellison* and *Prince* do not explain, in moral and legal terms, why the causal nexus theory is the *only* plausible explanation of the mitigating potential of either mental illness or SED evidence.[45] We argue in the next section that, at least in the case of SED, this absence of a justification for restrictive consideration is troubling because there appear to be many (and more compelling) alternative explanations for why SED is mitigating.

B. Failure to Justify the Causal Nexus Requirement in Alabama

Alabama courts also frequently give restrictive treatment to SED evidence, on a similar causal nexus theory, though they are perhaps more likely to offer an explanation grounded in individual responsibility. No one who suffers from SED is *determined* to commit murder, they emphasize.

For instance, in *Philips v. State*, the trial court rejected the mitigating value of the repeated violence and neglect suffered by the defendant during his childhood on the basis that it did not directly cause the criminal act.[46] It went on to observe: "[t]his Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result . . . from a bad childhood."[47] The Court of Criminal Appeals affirmed.[48] Similarly, in *Stanley v. State*, the trial court dismissed evidence of a difficult family background as "not mitigating"

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that the defendant's childhood "directly contributed to Defendant's behavior because he lacked 'healthy socialization experiences.'" 934 P.2d 784, 795 (Ariz. 1997) (en banc).

[44] *See, e.g.*, State v. Hoskins, 14 P.3d 997, 1022 (Ariz. 2000) ("Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established.").

[45] For instance, the court in *Prince* stated without explanation that "[d]ifficult childhood circumstances . . . receive less weight as more time passes between the defendant's childhood and the offense." *Prince*, 250 P.3d at 1170.

[46] Phillips v. State, No. CR–12–0197, 2015 WL 9263812, at *83–85 (Ala. Crim. App. Dec. 18, 2015).

[47] *Id*. at *81

[48] *Id.* at *85.

because the defendant did not offer any "credible evidence that any of these factors influenced the commission of the crime."[49] The trial court emphasized the fact that the defendant's sisters had suffered the same deprivation but did not become criminals.[50] Even more explicitly, the court in *Thompson v. Alabama* observed that:

> [T]he necessity for every person being morally responsible for his or her own actions causes these environmental factors which are offered as mitigation to appear weak . . . . The argument that when a bad social environment produces bad people, that fact should in some way mitigate the punishment for these bad people, leads ultimately to the absurd conclusion that only people who come from an impeccable social background deserve the death penalty if they commit capital murder.[51]

The court here also appeared to be laboring under the misimpression that a disadvantaged background is an *automatic* grant of leniency, rather than one sentencing factor to be considered among many.

In the end these courts also treat SED's mitigating potential on this theory as an all-or-nothing affair: either the extreme deprivation suffered makes it impossible for the defendant to choose not to commit a criminal act (perhaps because of a temporary mental inability at the moment of the crime), in which case SED is mitigating; or the deprivation *could* be overcome, in which case it is assigned *no* mitigating value. Of course, however, most of the effects of SED *can* be overcome, so in effect this reasoning renders SED non-mitigating unless it results in an effect—like a mental illness—that is generally thought to be less subject to the individual's control. In short, Alabama courts, too, engage in restrictive consideration of SED.

Alabama courts see no deficiency in their consideration. The appellate court that reviewed *Stanley*, mentioned above, affirmed, arguing that the sentencing judge adequately "considered all the evidence offered . . . including [the defendant's] family circumstances [and] background."[52] It rejected "Stanley's argument . . . that a trial court's failure to *find* a mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not *consider* that mitigating evidence."[53] Similar cases

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[49] Stanley v. State, 143 So.3d 230, 330–32 (Ala. Crim. App. 2011).

[50] *Id*. at 331.

[51] Thompson v. Alabama, No. CR–05–0073, 2012 WL 520873, at *85 (Ala. Crim. App. 2012).

[52] *Id*. at 332.

[53] *Id*. at 331.

abound.[54]

In Alabama, this restrictive consideration of SED has significant consequences not only for the weighing of evidence at sentencing but in other areas of criminal law: judges reject ineffective assistance of counsel claims that are based on counsel's failure to present SED evidence when the defendant cannot show a causal connection between the SED suffered and the crime[55]; and judges reject claims that juries were biased by prosecutorial suggestion that the SED evidence has no mitigating weight because of lack of a causal connection.[56]

C. Other Appearances of the Causal Nexus Requirement

Judges have appealed to the lack of a direct "causal connection" between SED and criminal conduct to justify giving SED no weight in a number of other jurisdictions. For instance, in a relatively recent Florida case, a trial court found that the defendant was emotionally and physically abused as a child, and yet gave those factors "little weight" because "there was no connection between Petitioner's alleged childhood emotional and physical abuse . . . and the murders."[57] The causal connection sought was, once again, a specific one; generally impaired moral and intellectual capacities due to extreme deprivation did not suffice. The Eleventh Circuit affirmed the trial court's treatment of the evidence, arguing that "[a]s long as the defense is allowed to present all relevant mitigating evidence and the sentencer is given the opportunity to *consider* it, there is no constitutional

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[54] *See, e.g.*, Davis v. Allen, No. CV 07-S-518-E, 2016 WL 3014784, at *50–51 (N.D. Ala. May 26, 2016) (rejecting defendant's argument that lower court's "failure to give appropriate weight to the evidence of Davis's childhood abuse because it occurred years earlier than the crime" was unconstitutional); Thompson v. State, 153 So.3d 84, 189 (Ala. Crim. App. 2012) ("While *Lockett* and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually [mitigating] is in the discretion of the sentencing authority") (quoting *Ex parte* Slaton, 680 So. 2d 909, 924 (Ala. 1996)); Waldrop v. State, 987 So.2d 1186, 1202 n.6 (Ala. Crim. App. 2007) (observing that defendant's counsel did not err in declining to present available SED evidence at sentencing, because the sentencing judge had "evidence of [a co-defendant's] abusive childhood and stated in his sentencing order that he afforded it little weight" because "[i]t would be ironic for the courts to determine that environmental factors which cause people to become violent offenders should then be taken into consideration to make these people less susceptible to the death penalty").

[55] *See, e.g.*, Jenkins v. Allen, No. 4:08-cv-00869-VEH, 2016 WL 4540920, at *41 (N.D. Ala. Aug. 31, 2016) ("Any contention that a causal connection exists between the abuse allegedly suffered by Jenkins and the murder of Tammy Hogeland, is undercut by evidence within Jenkins's own family.").

[56] *See, e.g.*, Scheuing v. State, 161 So. 3d 245, 267-68 (Ala. Crim. App. 2013).

[57] Lynch v. Sec'y, Dep't of Corr., 897 F. Supp. 2d 1277, 1299 (M.D. Fla. 2012).

violation."[58] In another case from Florida, the state supreme court suggested that the defendant's childhood abuse could not have reduced his moral responsibility because "the defendant's sister, who had also been abused, including sexually abused by the same alcoholic father, proceeded to live a normal and productive life."[59] As before, SED's mitigating value was seen to turn on whether it rendered virtually impossible the defendant's ability to conform his conduct to the law. Because it is difficult to show that SED has any such effect, it is routinely dismissed when no direct causal connection between it and the crime is found.[60]

Courts do sometimes dismiss proffered SED evidence on factual grounds. If the record does not show that the defendant experienced truly *severe* deprivation or if it reveals that the defendant was rescued from his unenviable circumstances fairly quickly and led a relatively normal adult life after a short period of deprivation, judges reasonably find that the alleged SED remains unproven.[61] We have no quarrel with this practice. Our concern is exclusively with the narrow scope of the mitigating analysis

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[58] *Id*. at 1339. *See also* Waldrop v. State, 987 So.2d 1186, 1202 n.6 (Ala. Crim. App. 2007) (observing that defendant's counsel did not err in declining to present available SED evidence at sentencing, because the sentencing judge had "evidence of [a co-defendant's] abusive childhood and stated in his sentencing order that he afforded it little weight" because "[i]t would be ironic for the courts to determine that environmental factors which cause people to become violent offenders should then be taken into consideration to make these people less susceptible to the death penalty").

[59] Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004).

[60] *See, e.g.*, Callahan v. Campbell, 427 F.3d 897, 923 (11th Cir. 2005) (rejecting IAC claim for failing to investigate mental health and abuse, noting that "no causal connection between the alleged abuse Callahan suffered as a child and the crime he committed, which were separated by 23 years"); Davis v. Scott, 51 F.3d 457, 461-62 (5th Cir. 1995), *overruled in part by* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of child abuse, alone, without demonstrating any link to the crime, does not constitute "constitutionally relevant" mitigating evidence); Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (evidence of troubled childhood not constitutionally relevant mitigating evidence when not linked in any way to the crime); Barnard v. Collins, 958 F.2d 634, 638-39 (5th Cir. 1992) (rejecting a *Penry* claim where the crime was not attributable to the proffered evidence of troubled childhood); Hines v. State, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) ("the trial court was not obliged to afford any weight to [the defendant's] childhood history as a mitigating factor in that [he] never established why his past victimization led to his current behavior.").

[61] *See, e.g.*, State v. Kuhs, 224 P.3d 192, 204 (Ariz. 2010) (defendant grew up in a poverty and was abused at least once); State v. Kiles, 213 P.3d 174, 191 (Ariz. 2009) (mixed evidence, because some witnesses testified that Kiles's family life as "ordinary"); State v. Dann, 207 P.3d 604, 628 (Ariz. 2009) (no evidence of child abuse other than spankings with a belt that his father later viewed as child abuse). We emphasize, throughout this article, that the environmental deprivation we reference is of an especially severe sort. The effects of SED we discuss may or may not be fairly inferable from milder forms of deprivation.

once it is recognized that the defendant did in fact suffer from especially severe neglect, abuse, and/or poverty.

II. UNRESTRICTED CONSIDERATION OF DEPRIVATION EVIDENCE: THEORY AND PRACTICE

Recent work in moral philosophy and psychology indicates a renewed interest in the reasons why severe environmental deprivation mitigates the punishment a defendant deserves. We briefly review some of this work, much of which forms a key part of the literature on retributive justice, to show that causal analysis plays a limited-to-non-existent role in prominent theories of SED's mitigating force. In addition, we try to show that such theories that support unrestricted consideration of SED are widely embraced, including by a great many judges and jurors.[62] Both the intuitiveness of such theories and their wide appeal will feature critically in the constitutional arguments we go on to offer in Part III.

A. The Defendant's Diminished Moral Capacities & Culpability

It is not just a scientific platitude but a matter of common sense that the development of key behavioral capacities is critical to pro-social decision-making.[63] These include emotional capacities, like the capacity to empathize with others or to form human attachments, and capacities for self-regulation, including impulse control and anger management. Still others involve basic executive brain function, such as working memory and the capacity to think through the consequences of one's actions.[64]

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[62] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 370-71 (2000) (concluding that the defendant's attorney had fallen "below the range expected of reasonable, professional competent assistance of counsel" for failing to investigate and present at his sentencing trial "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood" and "repeated head injuries"—evidence the Court described as "significant" mitigating evidence).

[63] Moral capacities are generally seen as being influenced by all three of these elements. *See* THOMAS KEENAN & SUBHADRA EVANS, AN INTRODUCTION TO CHILD DEVELOPMENT 297-98 (2009).

[64] *See* Tina Malti & Sophia F. Ongley, *On Moral Reasoning and Relationship with Moral Emotions*, *in* HANDBOOK OF MORAL DEVELOPMENT RESEARCH 166-69, 171-72 (Melanie Killen & Judith G. Smetana eds., 2d ed. 2014) (reviewing the relationship between moral emotions and moral reasoning, and the connection between empathy/sympathy and higher levels of other-oriented moral reasoning and prosocial moral reasoning); Roy F. Baumeister & Julie Juola Exline, *Self-Control, Morality, and Human Strength*, 19 J. SOC. & CLINICAL PSYCH. 29 (2000) ("Self-control refers to the self's ability to alter its own states and responses, and hence it is both key to adaptive success and central to virtuous behavior,

The development of these capacities, critical as they are to the process of becoming morally mature, is impaired by severe emotional, psychological, and sexual abuse.[65] The psychological evidence is extensive, and often presented at trial by experienced defense counsel in the form of expert testimony. Childhood abuse or neglect is associated with decreased levels of empathy and altruism, and increased levels of aggression and antisocial behaviors, well into adulthood.[66] Extreme poverty, too, is significantly correlated with increased levels of depression, low self-esteem, and diminished impulse control in children.[67] Darcia Narvaez and Daniel Lapsley explain that children who have been subject to regular threats, violence, and deprivation are more likely to develop a "survival-first" mindset—a persistent physical and mental state of "high alert"—that "subverts the more relaxed states that are required for positive prosocial emotions and sophisticated reasoning."[68] When a child's own caregivers are the source of threats and deprivation, the child can miss crucial opportunities to develop interpersonal trust and receive affection from others. These "disruptions and deviations in socialization" can seriously undermine later attempts to form relationships in adolescence and adulthood, and are linked to subsequent emotional and behavioral problems among abused children.[69] Studies also

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especially insofar as the latter requires conforming to socially desirable standards instead of pursuing selfish goals.").

[65] Darcia Narvaez & Daniel Lapsley, *Becoming a Moral Person—Moral Development and Moral Character Education as a Result of Social Interactions*, *in* EMPIRICALLY INFORMED ETHICS: MORALITY BETWEEN FACTS AND NORMS 227 (Markus Christen et. al eds., 2014).

[66] *Id.* at 228. *See also* Joanna Cahall Young & Cathy Spatz Widom, *Long-term Effects of Child Abuse and Neglect on Emotion Processing in Adulthood*, 38 CHILD ABUSE NEGLECT 1369 (2014) (the "effects of childhood abuse/neglect on emotion processing extend until middle adulthood" though it would be worthwhile to have multiple assessments over time); Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD ADOLESCE. PSYCHIATR. CLIN. N. AN. 2014 185 (2014) ("the data to date strongly suggests that childhood trauma is associated with adverse brain development in multiple brain regions that negatively impact emotional and behavioral regulation, motivation, and cognitive function"); Anthony Nazarov et al., *Moral Reasoning in Women with Post-Traumatic Stress Disorder Related to Childhood Abuse*, 7 EUR. J. PSYCHO-TRAUMATOLOGY 2016 (altruism); Paul A. Miller & Nancy Eisenberg, *The Relationship of Empathy to Aggressive and Externalizing/Antisocial Behavior*, 103 PSYCH. BULLETIN 324 (1988) (Childhood abuse is associated with low levels of empathy/sympathy, which are in turn associated with aggression and antisocial, externalizing behaviors).

[67] David T. Takeuchi et al., *Economic Distress in the Family and Children's Emotional and Behavioral Problems*, 53 J. MARRIAGE & FAM. 1031, 1037-39 (1991) (reporting that economic stress significantly impacts children's emotional and behavioral problems, often resulting in higher levels of depression, antisocial behavior, and diminished impulse control).

[68] Narvaez & Lapsley, *supra* note 65, at 228-29.

[69] DAVID A. WOLFE, CHILD ABUSE: IMPLICATIONS FOR CHILD DEVELOPMENT AND

show that these factors more generally limit the development of basic brain functions, including planning skills, inhibitory control, working memory, cognitive focus, and reward processing.[70] The younger the child is at the time of the severe abuse, and the more sustained the deprivation, the worse and more long-lasting are the cognitive, emotional, and behavioral effects.[71] Each one of these developmental deficits is individually linked to physical abuse, sexual abuse, and extreme neglect in childhood, and many capital defendants have experienced more than one of these deprivations.[72]

Adults with histories of childhood deprivation and maltreatment are almost twice as likely to have been incarcerated than those without such histories, and significantly more likely to have been arrested for a violent crime.[73]

PSYCHOPATHOLOGY 35-36 (2d ed. 1999).

[70] *See* Nicolas Berthelot et al., *Childhood Abuse and Neglect May Induce Deficits in Cognitive Precursors of Psychosis in High-Risk Children*, 40 J. PSYCHIATRY NEUROSCIENCE 336 (2015) (finding much lower IQ and poorer cognitive performance in visual episodic memory and in executive functions of initiation); DeBellis et al., *Neuropsychological Findings in Pediatric Maltreatment: Relationship of PTSD, Dissociative Symptoms, and Abuse/Neglect Indices to Neurocognitive Outcomes*, 18 CHILD MALTREATMENT 171 (2013) (maltreated persons performed significantly lower on IQ, academic achievement, and nearly all of the tested neurocognitive domains); Kathryn L. Hildyard & David A. Wolfe, *Child Neglect: Developmental Issues and Outcomes*, 26 CHILD ABUSE & NEGLECT 679 (2002) (even neglect alone can have "more severe cognitive and academic deficits, social withdrawal and limited peer interactions, and internalizing [] problems" than physically abused peers); Roy F. Baumeister & Julie Juola Exline, *Self-Control, Morality, and Human Strength*, 19 J. SOC. & CLINICAL PSYCH. 29 (2000) (neglected children can have difficulties predicting the consequences of their behavior); William B. Harvey, *Homicide Among Black Adults: Life in the Subculture of Exasperation*, *in* HOMICIDE AMONG BLACK AMERICANS 153 (Damell F. Hawkins ed., 1986) (describing how numerous social pressures, including a pervasive sense of hopelessness, contribute to high crime rates among impoverished African American communities within the inner city).

[71] Raquel A. Cowell et al., *Childhood Maltreatment and Its Effect on Neurocognitive Functioning: Timing and Chronicity Matter*, 27 DEV. PSYCHOPATHOLOGY 521 (2015) (children who suffered maltreatment as infants or chronically had higher deficits in working memory and inhibitory control); *see also* Hildyard & Wolfe, supra note 70, at 679.

[72] Gwendolyn M. Lawson et al., *Socioeconomic Status and Neurocognitive Development: Executive Function*, *in* EXECUTIVE FUNCTION IN PRESCHOOL AGE CHILDREN: INTEGRATING MEASUREMENT, NEURODEVELOPMENT AND TRANSLATIONAL RESEARCH (J.A. Griffin et al. eds., 2016); Kimberly G. Noble et al., S*ocioeconomic Gradients Predict Individual Differences in Neurocognitive Abilities*, 10 DEVELOPMENTAL SCI. 464 (2007).

[73] Hyunzee Jung et al., *Does Child Maltreatment Predict Adult Crime? Reexamining the Question in a Prospective Study of Gender Differences, Education, and Marital Status*, 30 J. INTERPERSONAL VIOLENCE 2248 (2015); Izabela Milaniak & Cathy Spatz Widom, *Does Abuse and Neglect Increase Risk for Perpetration of Violence Inside and Outside the Home?*, 5 PHYSICAL VIOLENCE 246, 250 (2015); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1154 (1998) (noting the

These facts about the link between childhood deprivation and psychological development are close to common knowledge in the judicial system. As Justice Rehnquist observed in *Santosky v. Kramer*, "[a] stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."[74] Judges also routinely take "judicial notice" of the fact that extreme neglect and sexual abuse "increases the probability of [maladjustment and mental] problems."[75]

Poverty, under-education, and immersion in a culture of violence similarly distort a person's moral compass even later in life. A number of theorists have argued that chronic stressors and high levels of psychological distress due to consistent economic deprivation severely erode "self-esteem and the sense of mastery, control, and personal efficacy."[76]

What is the mitigating upshot of the fact that SED causes such general impairment in the development of critical moral and behavioral capacities? Courts who engage in the restrictive consideration of SED assume that deprivations can only be mitigating if they entirely undercut the defendant's ability to conform to the law. Accordingly, judges look for evidence that the SED directly and specifically caused the criminal act. Interestingly, a similar view informed a seminal article by Judge David Bazelon in the 1970s that was highly *sympathetic* towards SED sufferers. Judge Bazelon likened "mental impairments associated with social, economic, and cultural deprivation" to mental diseases that undermine the defendant's free will, and argued that such deprivation provides grounds for *excusing* the defendant.[77] Courts reasonably resisted such arguments, sometimes pointing to socially well-adjusted siblings of capital defendants, like the Alabama courts cited

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"strong evidence . . . that a person who was abused as a child is at risk of suffering long-term effects that may contribute to his violent behavior as an adult").

[74] 455 U.S. 745, 788-9 (1982) (Rehnquist, J., dissenting).

[75] Bouchillon v. Collins, 907 F.2d 589, 590 n.2 (5th Cir. 1990). *See also* Russell v. Collins, 998 F.2d 1287, 1292 (5th Cir. 1993) (acknowledging that child abuse as "generally understood" would "have the tendency to affect the child's moral capacity by predisposing him or her toward committing violence").

[76] Mary Keegan Eamon, *The Effects of Poverty on Children's Socioemotional Development: An Ecological Systems Analysis*, 46 SOCIAL WORK 257, 258 (2001); *see also id.* (citing psychological research on the impact of poverty on moral development); Richard Lipke, *Social Deprivation as Tempting Fate*, 5 CRIM. L. & PHIL. 277, 283-84 (2011) (contending social deprivation reduces the incentives for self-control and may work to stunt its development, thereby reducing the culpability of the defendant).

[77] David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 394 (1976). *See also* Richard Delgado, *"Rotten Social Background" Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 L. & INEQUALITY. 9, 23-34 (1985) (arguing that, in some cases, a propensity toward crime arising from deprivation is so strong as to render the individual not responsible for their crimes).

above.[78] Indeed, none of the studies we have come across suggest that extreme deprivation *destines* persons to lead criminal or immoral lives—which it obviously does not.

But the sentencing question is not whether the defendant should be altogether excused. The question is whether he deserves to be held *fully* responsible and maximally punished. Accordingly, while the search for a causal nexus seems sensible in the context of evaluating questions of guilt and excuse at the trial stage, it is far from adequate in the context of mitigation once the defendant has already been convicted. Thus, modern theorists of SED's moral significance for punishment are less inclined to treat it as an excuse, and instead regard it in terms of the intuitive notion that moral responsibility comes in degrees.[79] Even a person who *could* have chosen to lead a law-abiding life, and is therefore culpable for his wrongful choices, can, by virtue of the extreme challenges he faced in achieving moral maturity, be *less than fully responsible* and/or deserving of less than maximal punishment.

Arguably the most well-known and influential contemporary moral philosopher, Thomas Scanlon, articulates the moral intuitions underlying this theory of "diminished responsibility" as follows. He argues that a wrongdoer's liability for punishment depends on the adequacy of his "opportunity to avoid" committing the wrongful act and thus suffering the associated punishment. A person's opportunity to avoid making a certain choice "depends on the conditions under which the choice is made: the quality of information that the person has, the absence of competing pressures, the attractiveness of the available alternatives, and so on."[80] In his discussion of a wealthy individual who compares himself to one living in poverty, Scanlon contends that the wealthy person's claim that he "chose" to use his opportunities better than the impoverished person is "weakened by our supposition that the conditions under which the poor man chose—and might have chosen differently—did not provide him with adequate

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[78] *See, e.g.*, Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004) (noting the diminished mitigating value of SED evidence where "the defendant's sister, who had also been abused, including sexually abused by the same alcoholic father, proceeded to live a normal and productive life"). Prosecutors often also present such evidence to persuade courts. *See, e.g.*, State v. Hester, 324 S.W.3d 1, 84 (Tenn. 2010) ("The State also presented evidence that Mr. Hester's other siblings, including a sister who had been sexually abused by her father, had managed to grow up in the same house with the same parents without having become killers.").

[79] *See* D. Justin Coates & Philip Swenson, *Reasons-Responsiveness and Degrees of Responsibility*, 165 PHIL. STUDIES 629 (2013).

[80] THOMAS M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 204-05 (2010).

opportunity [to achieve the same results]."[81] Note that "inadequate opportunity" is not equivalent to "no opportunity." The diminished opportunities that SED sufferers have for cultivating their moral capacities and avoiding punishment under the law, accordingly, limits the extent to which we can hold such persons responsible for their actions.[82]

Judges often appeal to the idea that moral responsibility and culpability come in degrees. Justice O'Connor opined, concurring in *California v. Brown*, that "evidence about the defendant's background and character is relevant [in mitigation] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be *less culpable* than defendants who have no such excuse."[83] Writing for the majority a couple of years later in *Penry v. Lynaugh*, O'Connor confirmed that, "[b]ecause Penry was mentally retarded . . . and because of his history of childhood abuse," a rational juror "could conclude that Penry was less morally culpable than defendants who have no such excuse."[84]

Note that on the diminished responsibility theory we are expounding, extreme deprivation's mitigating weight does not turn on any proof of immediate or specific causation of any *particular* crime. It turns on the fact, inferable from established SED evidence, that the deprivation impaired the defendant's capacities, which made it *generally* harder for him to live a law-abiding and decent life.

Many "death-eligible" jurors—that is, jurors who are not in principle opposed to the death penalty—are sympathetic to this theory and are less likely to vote for death because of it. Using data from the Capital Juror Project, Stephen Garvey finds that of 153 capital jurors interviewed who were presented with evidence of extreme poverty and "circumstances over which the defendant had no control [but] that may have helped form (or misform) his character," roughly 32% were less likely to sentence the defendant to death.[85] If a third of a capital jury refused to issue a death sentence, in a state

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[81] *Id.*

[82] MANUEL VARGAS, BUILDING BETTER BEINGS: A THEORY OR MORAL RESPONSIBILITY 245 (2013) (arguing that the "moral ecology" in which a person comes to make his choices—including whether or not he has been "trained up" with the resources to respond to moral considerations in the way we see fit—is relevant to whether or not that person can be thought to be a responsible agent); Lipke, *supra* note 75, at 287 (contending social deprivation reduces the incentives for self-control and may work to stunt its development, thereby reducing the culpability of the defendant).

[83] 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added).

[84] 492 U.S. 302, 322-23 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

[85] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1565 (1998).

where juries rather than judges control the ultimate sentence, the result would be a life sentence.

B. The Defendant's Suffering & the "Whole Life" View of Retributive Justice

Even if the defendant emerged from childhood trauma with critical behavioral capacities largely intact, the suffering inherent in experiencing severe deprivation can be directly relevant in mitigation. Physical, emotional, and sexual abuse combined with extreme poverty in childhood almost always means not just great physical and psychological pain at the time of the deprivations, but harmful ripple effects throughout a person's life. As Craig Haney observes, capital defendants have often "confronted chronic poverty, extraordinary instability, and, for some, almost unimaginably brutal and destructive mistreatment over which, for most of their lives, they have been granted little or no control."[86] On "whole life" views of retributive justice, such facts about the overall suffering experienced by a person over the course of his life are intrinsically relevant to what punishment the person deserves when he acts wrongfully.

Traditional retributive theories of punishment took a very restricted view of the times relevant to deciding what a wrongdoer deserves. The key animating principle behind such theories was, roughly, that the suffering a wrongdoer inflicts on others *must* be matched by his equivalent suffering in the future, regardless of what had already happened to him in the past: "[t]hose who perform specific criminal acts deserve specific punishments . . . largely independently of their acts or happiness at other times."[87] An eye can be taken for an eye, even if the wrongdoer already lost an eye a long time ago.

By contrast, on what is now called the "whole life approach" or the "life-cycle" view of retributive justice, what wrongdoers deserve cannot be decided without considering previous suffering and unhappiness. As Shelly Kagan, one of the leading proponents of this view, observes, "time drops out from further consideration: we look at lives *as a whole*, to see what one deserves (overall), and whether one has received it (overall)."[88] According to such theorists, the relevant question that the sentencer should be asking in capital cases is whether the defendant, in light of his criminal conduct *and* all

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[86] Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STANFORD L. REV. 1447, 1565 (1997).

[87] Thomas Hurka, *Desert: Individualistic and Holistic*, *in* SERENA OLSARETTI, DESERT AND JUSTICE 45, 52 (2003) (describing the view that he critiques).

[88] SHELLY KAGAN, THE GEOMETRY OF DESERT 11 (2012) (emphasis added); *see also* DAVID ROSS, THE RIGHT AND THE GOOD 58 (2d ed. 2003).

of the suffering he has so far endured in his life, deserves so much additional suffering that he should be executed. The sentencer should treat the defendant as substantially less deserving of the harshest and ultimate sentence if the defendant has already experienced incredible suffering in life, as SED sufferers undoubtedly have.[89]

One way of motivating this picture is by appeal to an intuitive principle (a kind of side-constraint on punishment): there is a limit to the amount of suffering we should expect any one person to bear in a lifetime. The need to ensure that no one suffers beyond tolerable levels militates against the execution of SED sufferers—those who have already suffered enough in life. The fact that the suffering happened in the past does not make it any less bad for the person. Defense attorneys routinely appeal to such considerations and judges give voice to them as well. The Court in *Eddings*, for instance, observed that the defendant's terrible family background was relevant to the sentencing decision, because of its "potential for *evoking sympathy*" for the defendant.[90] Arguably, the reason why such facts of deprivation evoke sympathy is that we recognize a duty to help those who have suffered too much in life. One way in which we help is by exercising mercy in sentencing.

As before, the whole life view favors looking beyond the causal nexus theory when considering SED. It regards SED as mitigating with no causal analysis. The morally relevant question is simply: how severe and injurious to the defendant was the deprivation suffered? The whole life view of SED's mitigating significance explains why jurors treat the factor as significantly mitigating on its own, without *any* causal connection to the crime or the defendant's capacities. In a study of juror receptivity to mitigation evidence based on 400 mock jurors, Mona Lynch and Craig Haney observed that childhood abuse history and bad family background were regularly treated as significant in mitigation without any indication of its relationship to the crime or the defendant's later life.[91]

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[89] *See, e.g.*, Knight v. Dugger, 863 F.2d 705 app. at 749 (11th Cir. 1988) (describing the defendant's "impoverished home" as abusive and lacking supervision); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (noting that the defendant was repeatedly verbally abused by his chronically alcoholic father, missed school one-third of the time, was ridiculed because he was slow, and dropped out in fifth grade; thereafter, he spent most of his time in prisons), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992) (stating that the defendant grew up in poverty and his parents were migrant workers "who often left the children unsupervised"); State v. Murphy, 605 N.E. 2d 884, 909 (Ohio 1992) (Moyer, C.J., dissenting) (stating that trial testimony established that the defendant was raised in "desperate poverty"; had an "unloving, unsupportive, and abusive family"; lived in a home described as a shack with no hot water or plumbing; lived on public assistance; and had a father who was an alcoholic).

[90] California v. Brown, 479 U.S. 538, 548 (O'Connor, J., concurring) (emphasis added).

[91] Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension:*

C. The Diminished Societal Standing to Punish

We consider one final alternative theory of SED's mitigating value before turning to the constitutional argument. As before, the focus is not so much on proving that these theories are correct from the moral point of view but, rather, on making vivid their plausibility and the unreasonableness of restrictive consideration based on the causal nexus theory alone.

A number of theorists have articulated SED's moral significance for criminal justice in terms of the state's "standing to punish." Such theorists take for granted that society has an obligation to provide a minimally decent quality of life for all of its citizens.[92] What constitutes a minimally decent quality of life is disputed, but it is generally agreed that it involves safety from physical abuse and access to basic necessities, including food, clothing, and shelter.[93] Accordingly, these theorists argue that our failure to mitigate extreme poverty and its effects diminishes our standing to punish those who have suffered from extreme poverty to the maximum extent allowable by retributive principles.[94]

An individual can lose standing—or moral authority—to *hold* another person wholly responsible for a wrongful act, even if the wrongdoer bears full moral responsibility for the act. This happens when the individual himself has "unclean hands" with respect to the act. One source of society's unclean hands when it comes to criminals is its moral failure to ensure an adequate safety net that protects everyone from severe environmental deprivations. As Victor Tadros writes, "[b]y perpetrating distributive injustice against the poor, we lose standing to hold them responsible for what they have done."[95] Another reason for the collective's "unclean hands" concerns the collective's

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Guided Discretion, Racial Bias, and the Death Penalty, 24 L. & HUMAN BEHAVIOR 337 (2000).

[92] *See, e.g.*, Philippe Van Parijs, *Why Surfers Should be Fed: the Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFFAIRS 101 (1991); *see also* Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449 (2013); Daniel Markovitz, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291 (2003).

[93] *See, e.g.*, HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1996); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 529, 531 (1993) (food, shelter, medical care, housing).

[94] For a discussion of this principle, *see* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 256-67 (2000). *See also* Atiq, *supra* note 92; Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFAIRS 317 (1973).

[95] Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 393 (2009).

complicity in the wrongdoer's conduct. Tadros observes:

> There are different explanations of how our standing to hold others responsible may be eroded but two are most important, One is grounded in hypocrisy: the fact that one person commits the same kinds of wrong as someone else deprives the one of standing to hold the other person responsible for his wrongs. The other [reason] is complicity: the fact that one person participates in the wrong of someone else deprives the one of standing to hold the other person responsible for the wrong. A person cannot act as judge when he ought to be a co-defendant.[96]

Tadros views the collective as complicit in the crimes of SED sufferers because we know—or at least ought to know—that extremely poor socioeconomic conditions result in crime, and that we have an obligation to alleviate those conditions. Yet we deliberately choose to invest our resources in causes other than poverty relief, even at the cost of higher crime rates. By so choosing, we are complicit in each crime that we could have prevented had we helped the worst-off. As Tadros put it, "distributive injustice is criminogenic. In perpetrating distributive injustice, the state shows itself to have insufficient concern for the victims of crime."[97] Such rationales for limiting how much we punish SED sufferers may be esoteric, but their logic is compelling.

Judge Bazelon echoes a similar sentiment:

> [I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, 'Behave—or else!' The overwhelming majority of violent street crime, which worries us so deeply, is committed by people at the bottom of the socioeconomic-cultural ladder . . . . We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advancement and personal fulfillment for a sizeable part of the population, and thereafter expect a

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[96] *Id.* at 394. *See also* G.A. Cohen, *Casting the First Stone: Who Can, and Can't, Condemn the Terrorists?*, 81 ROYAL INST. OF PHIL. SUPPS. (2006).

[97] For a defense of the two premises that poverty is criminogenic and that the collective has a responsibility to alleviate criminogenic conditions, *see* Tadros, *supra* note 94 (arguing that "the state [is] complicit in the crimes of the poor" and thus the poor have a moral claim "for the state to refrain from holding them responsible for their crimes, even if they are in fact responsible for them, which involves diminished blame").

crime-free society.[98]

Bazelon argues that our "unclean hands" are driven not just by our complicity in the criminal wrongdoing (given its predictability) but also our failure to give the wrongdoer his due: an adequate social safety net.

How is the collective's diminished standing to punish relevant in mitigation? Showing mercy at sentencing is one way of recognizing the collective's diminished standing to punish. The reasons for exercising mercy, again, do not turn on the causal connectedness between the deprivation suffered and the crime. While the standing view is less obviously embraced by jurors, it is a common strategy of defense counsel to portray the defendant as a "victim" of societal ills. We have found at least one attorney and psychologist, Deena Logan, who concludes, based on an analysis of 31 closing arguments at death sentencing trials, that effective characterization of the defendant as a victim by appeal to his poverty, diminished mental capacity, and deprived social background elicits mercy from juries.[99]

III. THE CONSTITUTIONAL ARGUMENT AGAINST RESTRICTIVE CONSIDERATION OF DEPRIVATION EVIDENCE

In this section, we argue that restrictive consideration of SED evidence warrants constitutional scrutiny. While it is often assumed that judges' weighing of mitigating factors is unreviewable, two strands of constitutional doctrine suggest otherwise. The first is found in a long line of cases identifying certain constraints on the "consideration" of mitigating evidence as unconstitutional.[100] The second is evident in the Court's refrain that the death penalty must not be issued unless it enjoys broad-based community approval. Our elaborations of these two lines of precedent, in combination with the evidence discussed in the previous section of the intuitiveness and broad-based appeal of the moral theories on which SED has mitigating weight absent a causal nexus with the crime, offer grounds for scrutinizing and invalidating restrictive consideration of deprivation evidence.

A. "Consideration" Requires a "Reasoned Moral Response," Not Legal Formalism

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[98] Bazelon, *supra* note 77, at 401-02.

[99] Deana Logan, *Pleading for Life: An Analysis of Themes in 21 Penalty Arguments by Defense Counsel in Recent Capital Cases*, 4 CAL. DEATH PENALTY DEF. MANUAL 2SN-19 (1982); *see also* Deana Logan, *Why This Man Deserves to Die: Themes Identified in Prosecution Arguments in Recent Capital Cases* (1983) (unpublished manuscript).

[100] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

It is a bedrock principle of Eighth Amendment jurisprudence that a death sentence must be based on "individualized consideration" of any mitigating circumstances.[101] The case establishing the principle, *Lockett v. Ohio*, found that a statute prohibiting capital juries from taking into account any mitigating factors other than three specifically mentioned violated the individualized consideration requirement.[102] We think the holding rests on a more general principle, which we defend below: that individualized *moral* consideration of mitigating factors requires that the sentencer's reasoning not be cabined by artificial *legal* constraints. The Court has spent three decades elaborating what counts as a legal constraint preventing individualized consideration, and SED evidence has played a central role in its elaboration.

Ten years after *Lockett*, the Court prohibited not just statutory limitations on what mitigating factors can be considered, but judge-made rules limiting the conditions under which a mitigating factor can be considered. In *Eddings v. Oklahoma*, the trial judge ignored evidence offered by the defendant of his youth and turbulent family history, stating that he could not "in following the law" consider such evidence unless it "tended to provide a legal excuse from criminal responsibility."[103] The court of criminal appeals affirmed the resulting death sentence. The Supreme Court expressed some uncertainty as to which *law* the trial judge was referring to. But he seemed to be alluding to a M'Naghten-style test for legal insanity, which gives the defendant a full defense if he lacked the capacity to know "the difference between right and wrong."[104] No Oklahoma statute at the time required sentencers to use the insanity defense standard in evaluating mitigating evidence presented at the penalty phase of a trial.[105] The Supreme Court concluded that, by excluding relevant mitigating evidence from consideration out of a sense—correctly or incorrectly—that the law requires it, the trial court and the highest state court had violated *Lockett*. As the Court explained, a judge has discretion to assign weight to a mitigating factor, but "may not give it no weight by excluding such evidence from their consideration."[106]

The Court further clarified the *Eddings* rule in a later case, *Tennard v. Dretke*, which held that judicial precedent—like a statute or a vague sense of

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[101] Lockett v. Ohio, 438 U.S. 586, 606 (1978) (sentencers must "treat each defendant in a capital case with the degree of respect due the uniqueness of the individual").

[102] *Id.* at 593-94.

[103] *Eddings*, 455 U.S. at 113.

[104] *Id.* at 109.

[105] *Id.* at 118. While the Oklahoma Supreme Court cited to an earlier decision, *Gonzales v. State*, for the test of criminal responsibility in the state, its use of the test as a means for weighing mitigating evidence was a judicial innovation. Eddings v. State, 616 P.2d 1159, 1170 (1980) (citing Gonzales v. State, 388 P.2d 312 (Okla. Crim. App. 1964)).

[106] *Eddings*, 455 U.S. at 115.

what the law demands—cannot cabin a sentencing agent's "consideration" of mitigating evidence.[107] Again, the case involved SED evidence. *Tennard* reviewed the Fifth Circuit's use of a "constitutional relevance" test in determining whether to grant certificates of appealability for *Penry* claims—defendants' claims that jury instructions at sentencing improperly reduced the effect of their mitigating evidence.[108] The Fifth Circuit's test required that the evidence in question represent a "uniquely severe permanent handicap" that bears a "nexus" to the crime.[109] The Fifth Circuit refused to grant a certificate in Tennard's case on the grounds that his evidence of a low IQ and childhood abuse failed the test. The Supreme Court held that the court of appeals was wrong to condition its review on whether the mitigating evidence met a judge-made legal standard.[110]

Eddings and *Tennard* indicate that judges cannot limit their own moral consideration of relevant mitigating evidence out of a sense that the law—whether statute or judicial precedent—requires it. These cases are a logical application of the *Lockett* holding that capital sentencing requires individualized consideration of mitigating factors. Implicit in these cases is an important general principle that has yet to be fully articulated: that a judge's consideration of relevant mitigating evidence is unconstitutionally narrow when it involves assessing the evidence relative to a limited set of moral principles out of a sense that *legal* rules demand it (where 'it' refers to the limitation on the moral principles by which the evidence is judged). We do not intend to offer an analysis here of what it means to follow a rule or practice *because it is the law*. But it is easy to identify paradigmatic cases of legalism or legal rule following. For example, a judge might follow a rule out of a sense that it is binding precedent or because other judges have an informal convention of following the norm. When restricted consideration of mitigating evidence is the result of judges imposing restrictions legalistically, this violates the principle implicit in the *Lockett* line of cases.

The key to our interpretation is that the individualization principle of *Lockett* has its roots in the distinction between moral reasoning and legal reasoning. In *Lockett*, *Eddings*, *Tennard*, and *Smith*, the Court did not decide in an ad hoc way that particular sorts of legal rules may not constrain the

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[107] Tennard v. Dretke, 542 U.S. 274 (2004).

[108] Penry v. Johnson, 532 U.S. 782 (2001) [hereinafter *Penry II*].

[109] *Tennard*, 542 U.S. at 274.

[110] We actually think that *Smith* and *Tennard* are best understood as applications of *Eddings*, though the Court did not discuss them that way. Why didn't the Court come out and explain that more directly? Because the Fifth Circuit was not in the business of weighing mitigating evidence; that task was left for the jury. The court of appeals was merely reviewing whether the SED evidence was relevant in order to decide *whether it should hear the case*.

capital sentencer's moral consideration of mitigating evidence. The Court was concerned with eliciting moral consideration from sentencers by removing legal constraints on their ability to consider the evidence from a purely moral point of view. This is why the Court has emphasized time and again that a capital sentence must reflect a "reasoned moral response to the defendant's background, character, and crime."[111] The Court itself has acknowledged that the "reasoned moral response" principle "first originated" in *Lockett* and *Eddings*.[112] As Justice Stevens once wrote, "in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the moral guilt of the defendant."[113] In a precursor case to *Lockett*, the Court explained that capital sentencing requires "particularized consideration of relevant aspects of the record of each convicted defendant" lest defendants be treated as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[114]

In *McKinney v. Ryan*, the Ninth Circuit appears to have implicitly relied on something like this insight in finding unconstitutional the longstanding practice among Arizona judges of considering a defendant's SED to have appreciable mitigating value only if it "caused" his crime.[115] As explained in Part I, judges who engaged in this practice did not view themselves as following binding judicial precedent, as they did when they relied on the old exclusionary rule invalidated by *Tennard*. Rather, they appeared to be following an informal custom amongst judges who had previously applied the exclusionary rule. Judicial customs can, of course, give rise to informal norms and rules that judges follow out of habit or a sense of their legality and

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[111] *Penry II*, 532 U.S. at 788 (citations omitted).

[112] Brewer v. Quarterman, 550 U.S. 286, 289 (2007) ("[W]e have long recognized that a sentencing jury must be able to give a 'reasoned moral response' to a defendant's mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death. This principle first originated in *Lockett v. Ohio* and *Eddings v. Oklahoma*, in which we held that sentencing juries in capital cases "must be permitted to consider *any* relevant mitigating factor."); *see also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence . . . the sentencing process is fatally flawed.").

[113] Spaziano v. Florida, 465 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part). *See also* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's task of expressing "the conscience of the community on the ultimate question of life or death"); Woodson v. North Carolina, 428 U.S. 280, 297-98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty); Witherspoon v. Illinois, 391 U.S. 510, 519-20 (1968) ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.").

[114] *Woodson*, 428 U.S. at 303.

[115] McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015).

the obligations of the judicial office. The practice of giving SED effectively no weight absent a causal nexus bore all the earmarks of such a judicial custom The court of appeals deemed the practice unconstitutional under *Eddings*. Unfortunately, *McKinney*'s decision remains unnecessarily localized, given the *en banc* court's decision to focus not on the existence of an entrenched judicial practice of restricted consideration but on the practice's historical link to the old exclusionary rule.[116] As previously mentioned, the court emphasized the Arizona Supreme Court's pin citation to the old rule.[117] Because of this choice of emphasis, the Ninth Circuit missed an opportunity to articulate a general test for identifying when the improper influence of a legal practice or custom makes a court's consideration of evidence inadequate under *Eddings.*

We offer a three-factor test for this purpose, drawn from cases—such as those reviewed in Arizona and Alabama—in which an entrenched judicial practice clearly seems to have induced restrictive consideration of relevant evidence. Appellate courts have grounds for finding an *Eddings* violation when all three of the following facts concerning a lower court's sentencing analysis obtain: (i) the court did not even attempt to justify or explain why restrictive treatment of the mitigating evidence was morally appropriate, or why alternative theories of the moral significance of the evidence should be rejected; (ii) the same court, or other courts in its jurisdiction, have in the past routinely appraised the evidence according to the same circumscribed set of moral principles while citing to prior precedent; (iii) independent reasons exist for thinking that a substantial number of reasonable jurors would consider the evidence mitigating based on principles that the court did not even consider. The combination of these factors suggest that the court did not engage in a careful, individualized *moral* assessment of the mitigating evidence, but instead simply followed an entrenched legal practice or custom. The first factor suggests an absence of moral analysis; the second indicates that the court was following a legal convention; and the third factor indicates that if the court had considered alternative, widely endorsed moral principles, then it would have reached a different conclusion about the evidence's mitigating value.

Of course, other factors might supplement an appellate court's review. For instance, it would undoubtedly be relevant if, as is in Arizona, a statute or precedent had previously demanded the same limited consideration.[118] The Arizona Supreme Court had, before *Tennard*, interchangeably described SED evidence lacking the requisite causal connection as "irrelevant" and as having

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[116] *Id.* at 813-18.

[117] *Id.* at 814.

[118] State v. Hoskins, 14 P.3d 997, 1022 (Ariz. 2003).

"little to no weight," and switched to exclusive use of the weighing language only after *Tennard*.[119] This suggests that the court saw the outright exclusion of SED evidence from consideration and the denial of weight to it after restrictive consideration as equivalent.

Our test applied in the SED context suggests that restrictive consideration of SED evidence by judges is frequently unconstitutional. To approach the analysis in reverse, consider the third factor. We offered arguments in Part II in support of the notion that SED evidence is mitigating irrespective of its exact causal relationship with the crime—arguments concerning the defendant's moral capacities and culpability, the defendant's prior suffering, and the state's moral standing to punish. We also referred to studies demonstrating that a substantial number of jurors tend to treat SED evidence as *inherently* mitigating.[120]

Now consider the first and second factors. We have struggled to find instances—in any American jurisdiction—where a court made a serious attempt to explain why from the moral point of view SED can only be mitigating if the causal nexus with the crime obtains, as discussed in Part I. Indeed, the opinions we have reviewed rarely if ever provide any rationale for the limitation. Instead, courts tend to cite earlier cases where a judge relied on restrictive consideration—and not as *persuasive* authorities, because the cited cases rarely include an explanation of the moral grounds of the causal nexus requirement.

In the rare instances in which judges attempt to critique alternative approaches to SED evidence, they critique caricatures of them. For instance, in one case the Alabama state court of criminal appeals stated that "[t]he argument that when a bad social environment produces bad people, that fact should in some way mitigate the punishment for these bad people, leads ultimately to the absurd conclusion that only people who come from an impeccable social background deserve the death penalty if they commit capital murder."[121] We are unaware of any judge or scholar who has argued either that *mild* deprivations are mitigating, or that even severe deprivations

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[119] The Ninth Circuit has expressed some confusion about the Arizona Supreme Court's application of the causal nexus exclusion rule, stating that "Arizona's case law in this regard is conflicting," and citing interchanging examples of the state supreme court saying that it was either (a) considering evidence without a causal nexus but giving it no weight or (b) altogether refusing to consider such evidence. Towery v. Ryan, 673 F.3d 933, 946 (9th Cir. 2012); *see also* Lopez v. Ryan, 630 F.3d 1198, 1200 (9th Cir. 2011) (noting that "Arizona has a checkered past" with respect to using the causal nexus test as a clearly illegal screening mechanism and as a weighing mechanism). This mixed record might be explained if the state court saw no difference between the two rules.

[120] *See* discussion *infra* Part II.

[121] Thompson v. Alabama, No. CR–05–0073, 2012 WL 520873, at *85 (Ala. Crim. App. 2012).

automatically disqualify a defendant from receiving the death penalty.[122] Certainly the arguments we consider in Part II do not have either of these implications. In another case, the Florida Supreme Court suggested that the defendant's childhood abuse could not have reduced his moral responsibility because "the defendant's sister, who had also been abused, including sexually abused by the same alcoholic father, proceeded to live a normal and productive life."[123] But on most theories of SED's mitigating value, as discussed in Part II, the deprivation need not *determine* a person's wrongful acts in order to diminish his punishment-worthiness.

Admittedly, the application of *Eddings* to the practice of restrictive consideration of SED evidence is imperfect, a point that the dissent in *McKinney* was eager to emphasize.[124] The court of appeals in *Eddings* explicitly stated that it was using the "legal test of criminal responsibility" to *exclude* the SED evidence as "non-mitigating." By contrast, courts that give restrictive consideration to SED's mitigating value do not claim to be "following the law," and they tend to give SED "little to no" mitigating weight rather than none at all. As we explained above, however, we think that *Eddings* rests on a broader principle: that a sentencing judge should not limit their moral evaluation of mitigating evidence based on any legal custom or authority, even if the custom is never expressly acknowledged or even recognized by the judge. A test for SED's mitigating value that is applied in customary fashion, one that drastically and counter-intuitively limits the deprivation's mitigating weight, is inconsistent with such a principle.

Moreover, as explained in Part I, in jurisdictions that favor restrictive treatment, "little to no" mitigating weight is equivalent, at least in effect, to excluding the evidence outright. A survey of Arizona capital cases, for example, makes clear that mitigating evidence given "little" or "slight" weight rarely, if ever, results in leniency.[125] Before pronouncing a death sentence, courts often cursorily attach "little" weight to *all* of the mitigating factors in the case—indicating both that the "little" modifier is meant as a dismissal, and that mitigating factors of "little" weight do not warrant a lighter sentence *even when considered in aggregate*.[126] In other cases, mitigating evidence assigned little to no weight is so far from the sentencing judge's mind that it is excluded from her final list of mitigating factors.[127]

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[122] Of course, mere humanity might be thought to be automatic disqualification—but this would apply to all persons and not just SED sufferers.

[123] Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004).

[124] McKinney v. Ryan, 813 F.3d 798, 843-44 (9th Cir. 2015) (Bea, J., dissenting).

[125] *See supra* note 27.

[126] *See supra* note 28.

[127] *See, e.g.,* Poyson v. Ryan, 743 F.3d 1185, 1210 (9th Cir. 2013) ("For at the end of its opinion, the state court listed all of the mitigating circumstances it considered in its

Accordingly, appellate courts have sound basis to find a failure to "consider" SED evidence under *Eddings* whenever lower courts routinely rely on restrictive consideration of deprivation evidence without explanation or defense, especially in light of the strong reasons for thinking that SED is mitigating in the absence of any causal connection with the crime. Restrictive consideration *may* pass constitutional muster when a sentencing judge offers some explanation or justification for taking a markedly limited view of SED's mitigating value, and there are indications that the judge is engaging in independent moral analysis. In general, however, restrictive consideration of SED evidence in the jurisdictions we have studied appears to be the product of an entrenched judicial practice or custom that has artificially cabined the individualized moral inquiry that *Lockett* and its progeny demand.

B. Communal Endorsement & the Constitutional Importance of Evaluating Mitigating Evidence Under a Range of Reasonable Moral Principles

Judges could simply consider SED's mitigating value on the basis of a variety of different moral perspectives and principles. For example, instead of considering whether SED is mitigating based on the impaired capacities/responsibility theory alone, they might also consider it's mitigating weight on the basis of the whole-life view of retributive justice. This would obviate the need to justify a restrictive view of SED's mitigating value in the sentencing decision. More importantly, it would be consistent with a line of Supreme Court precedent since *Gregg*, emphasizing that the death penalty depends for its constitutional legitimacy on its link with community values.[128]

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independent review of Poyson's death sentence. It omitted from this critical tally both Poyson's personality disorders and his abusive childhood.").

[128] *See, e.g*., McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's "task of express[ing] the conscience of the community on the ultimate question of life or death" (citation omitted)); Gregg v. Georgia, 428 U.S. 153, 184 n.30 (1976) ("Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them."(citation omitted)); *id*. at 181 (reflecting on the importance of maintaining a link between contemporary community values and the penal system (citation omitted)); Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (reflecting on the importance on the moral views of society to the administration of death sentences (citation omitted)); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (noting that the capital sentencing jury as a representative of a criminal defendant's community provides him with "diffused impartiality" (citation omitted)); Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (describing the sentencer's task as that of "express[ing] the conscience of the community on the ultimate question of life or death"). *See also* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144-45 n.232 (2002) (reciting evidence that the "the case law as a whole indicates that communal values must play a role in capital sentencing").

Whereas our argument above emphasized the constitutionally suspect nature of the practice of taking a restrictive view of SED's mitigating weight for granted and without explanation, here we argue that judges may be constitutionally obliged to give unrestricted consideration to SED evidence: that is, consideration based on a number of different moral principles that are sufficiently plausible. Unrestricted consideration is *inclusive*: it incorporates a diversity of perspectives on the mitigating potential of SED; and sole-sentencing judges have a special responsibility to ensure that the defendant is sentenced to death only if such a penalty would enjoy broad-based communal support.

The importance of broad-based communal support to the constitutionality of capital sentencing schemes is well established. The death penalty must be tested against the "conscience of the community,"[129] and "one of the most important functions" of the sentencing agent in a capital trial is to "maintain a link between community values and the penal system."[130] It is, indeed, no coincidence that the constitutionality of the death penalty, in light of the Eighth Amendment's familiar prohibition against "cruel and unusual" punishments,[131] turns on the contemporary moral values of the public. The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,"[132] and in the past fifteen years alone, the Supreme Court has held that capital punishment is unconstitutional for the mentally handicapped,[133] for minors,[134] and for crimes other than

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[129] *Witherspoon*, 391 U.S. at 519 ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."). *See also* Spaziano v. Florida, 468 U.S. 447, 469 (1984) (Stevens, J., dissenting) (a death sentence "is ultimately understood as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live"); *id.* at 483 ("But more important than its procedural aspects, the life-or-death decision in capital cases depends on its link to community values for its moral and constitutional legitimacy.").

[130] *See Gregg*, 428 U.S. at 181 ("[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." (citation omitted)).

[131] U.S. CONST. amend. VIII.

[132] *Gregg*, 428 U.S. at 173 (citation omitted). *See also* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id*. at 274-79 (Brennan, J., concurring); *id*. at 309-10 (Stewart, J., concurring); *id*. at 332 (Marshall, J., concurring); *id*. at 382-84 (Burger, C.J., dissenting); *id*. at 409 (Blackmun, J., dissenting); *id*. at 429-30 (Powell, J., dissenting); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[133] Atkins v. Virginia, 536 U.S. 304 (2002) (abolishing the death penalty for the mentally retarded).

[134] Roper v. Simmons, 543 U.S. 551 (2005) (abolishing the death penalty for individuals

murder and treason[135]—all to bring our sentencing practices into alignment with the evolving moral standards of the citizenry. The fact that the death penalty is ever on the verge of being cruel and unusual by contemporary standards underscores the fact that capital sentencing depends for its ongoing legitimacy on the people's approval.[136]

The importance of broad moral approval is also apparent in the near-universal state legislative preference for jury-based capital sentencing. Even before a Supreme Court ruling in the last decade constitutionally mandated jury participation in capital sentencing, 33 of 38 death penalty states already required it.[137] In 27 of the current 31 death penalty states, the jury's decision to sentence a defendant to life imprisonment is final and cannot be overridden by a trial judge.[138] The case law and academic commentary explain this legislative preference in terms of the jury's perceived status as an especially reliable indicator of the "conscience of the community."[139] The twelve-

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under the age of eighteen at the time of their capital crimes).

[135] *Kennedy* 554 U.S. at 407 (abolishing the death penalty for rape where the death of the victim was neither the result nor the intent).

[136]While it is not our concern in this article to defend this conception of capital sentencing, we take the rationale to be fairly obvious. The state, acting on society's behalf, needs to earn its moral approval before it inflicts such a grave harm on a person as death; in a pluralistic society, this means ensuring that a death sentence has been tested against as many of the dominant moral views of a community as possible.

[137] Ring v. Arizona, 536 U.S. 584 (2002), requires that juries find all aggravating factors in death penalty cases, so juries must be involved at least to that extent. The only state in which the jury continues to be formally uninvolved in capital sentencing is Montana, which issued its last death sentence in 1996, prior to *Ring*. *See* MONT. CODE ANN. § 46-18-301 (2013). Even before *Ring*, only four other states—Arizona, Colorado, Idaho, and Nebraska—used exclusively judicial capital sentencing.

[138] Woodward v. Alabama, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting). The only states in which jury decisions are not final are Delaware, where only one jury life sentence has been overridden in favor of death, and that was overturned by the state supreme court; and Indiana, where the judge may decide the sentence if the jury cannot reach a unanimous sentence, 2002 Ind. Acts 1734.

[139] *See* Atkins v. Virginia, 536 U.S. 304, 323 (2002) ("[the jury] . . . is a significant and reliable objective index of contemporary values") (quoting Coker v. Georgia, 433 U. S. 584, 596 (1977) (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976))); *id.* (noting the jury's function of "maintain[ing] a link between contemporary community values and the penal system"(citation omitted)); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (arguing that juries preserve the essential link between capital punishment and communal values). *See also* Stephen P. Garvey, "*As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1003 n.56 (1996) ("Capital sentencing juries are said to represent the 'conscience of the community.' However, they 'represent' the community only because they are members of the community, not because they discern and then apply community standards."); Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L REV. 1, 101-19 (1980) (arguing that the jury, as representative of the community, is more likely to accurately

person capital sentencing jury is selected to approximate a random cross-section of the community, one believed to be significantly more likely than a sole sentencing judge to bring a diversity of moral perspectives to bear on the sentencing decision.[140] The jury's unanimity—required for the imposition of the death penalty in every state save Florida and Alabama[141]—makes even likelier that each death sentence will enjoy widespread public support. Evidence that would mitigate the defendant's punishment-worthiness in the eyes of a substantial portion of the community is less likely to be overlooked by multiple jurors than by a judge acting as the sole sentencer—or so the advocates of jury sentencing argue.[142]

Until recently, two states allowed trial judges to independently issue death sentences, even when it meant overriding a jury's recommendation of life imprisonment. Yet even while doing so, Florida gave privileged status to the jury verdict, because of the jury's ability to represent communal sentiment. In that state, the trial judge could not impose death over a jury's recommendation of life unless "the facts suggesting a sentence of death [were] so clear and convincing that *virtually no reasonable person could differ*."[143] Florida's specific override provision was overturned in 2016 as a

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measure the offense against community outrage); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 48 (1986) (arguing that "the requirement that a capital sentencing jury consist of twelve persons as compared with a solitary person acting as judge also contributes to the prospect that a cross section of the community will be making the sentencing decision").

[140] *Id*. Of course, a single jury may not fully reflect dominant community sentiment insofar as voir dire challenges can skew a jury's cross-sectional character. *See* Williams v. Florida, 399 U.S. 78, 102 (1970) ("Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge."); Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 798 (1983) ("[W]hile the jury role is essential to ensure expression of present and developing community sentiment there is a risk that individual juries may not reflect that sentiment.").

[141] FLA. STAT. ANN. § 921.141(3) ("Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.").

[142] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 233-34 (1978) (surveying the empirical data and concluding that a greater number of decision makers increases the likelihood of approximating "the common sense of the community," and that "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result" (citation omitted)). *See also* SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 125 (2005) (describing the difference in moral perspectives of pro-life vs. pro-death jurors).

[143] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The Supreme Court recently, in Hurst v. Florida, 136 S.Ct. 616 (2016), invalided an iteration of Florida's override because it allowed the judge to override the jury not just on the overall weight of the aggravating factors against the mitigating factors but on the initial finding of aggravating/mitigating

violation of the Sixth Amendment right to have all critical findings necessary to impose the death penalty decided by jury, because the jury in Florida issued no factual findings with its recommended verdict.[144] Although the Supreme Court has previously approved Alabama's judicial override, which did not require deference to the jury but did require the jury to find aggravating factors, doubts about the constitutionality of the practice linger. Earlier this year, the Alabama governor signed legislation banning the override for defendants convicted after April 11th.[145] The constitutional question is not entirely moot, however, because Florida may still rewrite its judicial override scheme and the recent Alabama legislation left the 183 inmates already on the state's death row unaffected.[146]

One of the central doubts animating resistance to judge-determined death sentences regards the trial judge's capacity to adequately embody the "conscience of the community" in sentencing.[147] Justice Stevens, dissenting

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factors as well.

[144] *Hurst*, 136 S.Ct. at 624 (2016).

[145] "Alabama Ends Death Penalty by Judicial Override," Associated Press (Apr. 11, 2017),https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override; Harris v. Alabama, 513 U.S. 504, 515 (1995). *See also* Brooks v. Alabama, 2016 WL 266239, at *1 (U.S. Jan. 21, 2016) (Sotomayor, J., concurring in denial of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on *Hildwin v. Florida*, and *Spaziano v. Florida*, two decisions we recently overruled in *Hurst v. Florida*.").

[146] "Alabama Ends Death Penalty by Judicial Override," Associated Press, Apr. 11, 2017, https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override.

[147] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). *See also* Williams v. New York, 337 U.S. 241, 253 (1949) (Murphy, J., dissenting) ("In our criminal courts the jury sits as the representative of the community. Its voice is that of the society against which the crime was committed. A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression."); Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1431 (1996) (noting that a judicial override is problematic because "it tends to dilute the community's voice as represented by the collegial body—the jury"); *id*. at 1434 ("[T]his deficiency has created a situation in which the conscience of the community—the jury—has been all but removed from Alabama's capital sentencing process."); Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037 (1985) (arguing that the constitutional law demands a sentencing body that has competency to decide the death question fairly); Shannon Heery, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J. L. & POL'Y 347, 392 (2010) (noting the jury's role to represent the community); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 47 (1986) ("Given that the purpose of a death sentence is to reflect community standards, judges should be denied the power of the override unless or until we are willing to evaluate prospective judges as to their propensity to embody communal consciousness.") .

in *Harris*, where the majority approved Alabama's capital sentencing scheme, observed that, "an unfettered judicial override of a jury verdict for life imprisonment cannot be taken to represent the judgment of the community. A penalty that fails to reflect the community's judgment that death is the appropriate sentence constitutes cruel and unusual punishment under our reasoning in *Gregg*."[148] His dissent argued that:

> [T]he men and women of the jury may be regarded as a microcosm of the community, who will reflect the changing attitudes of society as a whole to the infliction of capital punishment, and that there could therefore be no more appropriate body to decide whether the fellow-citizen whom they have found guilty of murder should . . . [die] or receive a lesser punishment.[149]

More recently, Justice Sotomayor, dissenting from the Court's decision not to hear a case that would have provided an occasion to reconsider the constitutionality of Alabama's judicial override, observed that, "[b]y permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes."[150] Notably, these justices perceived a tension between the majority's tolerance for judicial overrides in *Harris* and the Court's earlier precedent, in cases like *Gregg*, emphasizing the need for death sentences to be issued *only if* they would enjoy broad-based communal support.[151]

Setting aside the question of the constitutionality of judge sentencing in the capital context, we think that, at the very least, the importance of ensuring

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[148] Harris v. Alabama, 513 U.S. 504, 525 (1995) (Stevens, J., dissenting).

[149] *Id.* at 517 (quoting Royal Commission on Capital Punishment 1949-1953, Report 200 (1953)).

[150] Woodward v. Alabama, 134 S. Ct. 405, 409-10 (2013 (Sotomayor, J., dissenting)) ("For example, Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict. In many cases, judges have done so without offering a meaningful explanation for the decision to disregard the jury's verdict. In sentencing a defendant with an IQ of 65, for example, one judge concluded that "[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests." Another judge, who was facing reelection at the time he sentenced a 19–year–old defendant, refused to consider certain mitigating circumstances found by the jury, which had voted to recommend a life-without-parole sentence. He explained his sensitivity to public perception as follows: "'If I had not imposed the death sentence, I would have sentenced three black people to death and no white people.'"(citations omitted)).

[151] Gregg v. Georgia, 428 U.S. 153, 181 (1976) (quoting *Witherspoon*, 391 U.S. at 519 n.15).

broad-based communal support for the death penalty militates strongly in favor of unrestricted consideration of deprivation evidence whenever the judge is the sole sentencer, precisely because such consideration involves assessing the evidence based on a diverse range of moral perspectives on SED's mitigating value. In fact, we think our argument generalizes to all mitigating evidence: judges should embrace unrestricted analysis whenever they and not the jury decide the death penalty. The consistency of the Supreme Court's death penalty jurisprudence would be well served by a more explicit acknowledgment of this fact.

The sole sentencing judge does not enjoy the benefits of multiple voices participating in the sentencing process. If she brings only her *own* private moral beliefs to bear on the sentencing decision, the likelihood becomes high that any death sentence she issues will reflect only her private, as opposed to a communal, moral response. To guard against that risk, the sentencing judge, unlike the individual juror, needs to take seriously moral principles endorsed by her fellow citizens that assign significant weight to relevant mitigating evidence that she may not ultimately be persuaded by.[152] If some factor would be deemed, for plausible reasons, to be substantially mitigating by a significant number of reasonable judges and jurors, the sentencing judge should regard it as such even if she is ultimately unconvinced of its mitigating worth.[153]

Accordingly, sole sentencing judges should embrace unrestricted consideration of SED evidence. Unrestricted consideration incorporates the view that SED is mitigating when it impairs the defendant's ability to control his conduct and thereby limits his culpability. It recognizes the life-cycle view of retributive justice and the constraints on inflicting excessive suffering on persons who have led miserable lives. It considers the state's diminished standing to punish individuals who have been left behind. In other words, unrestricted consideration involves recognizing SED's substantial mitigating significance in the absence of demonstrable causal connections with the crime, and thereby ensures that serious deprivation has the effect at sentencing that it would have had it been considered by a representative

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[152] In other words, the judge, as sentencer, needs to be a more self-conscious representative of public morality than the individual juror in a twelve-person jury. Feminist approaches to the role and responsibilities of the judge have been especially clear on the importance of "communal modes of decision-making" and the need to consult multiple, competing perspectives. *See, e.g.*, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1924-26 (1988).

[153] To be clear, we are not agreeing with Justice Stevens's view in his *Spaziano* dissent that only the jury should be permitted to impose the death penalty. *See Spaziano v. Florida*, 468 U.S. 447, 490 (1984) (Stevens, J., dissenting). We argue only that the judge ought to emulate the jury when performing a function traditionally—and for good reason—left to juries.

collection of members of the community. As discussed in Part II, the treatment of SED as inherently mitigating is based on moral considerations that are substantively reasonable and enjoy wide-appeal. If one of the most important functions that the sentencer can serve in capital cases is ensuring that the death penalty is only issued if would enjoy broad-based communal support, sole sentencing judges should embrace unrestricted consideration of SED's mitigating value (and of mitigating evidence more generally).[154]

Finally, it should be noted that our argument only extends to the *moral* or *normative* evaluation of mitigating evidence. There remains substantial room for judicial discounting of SED evidence on *empirical* grounds, and judges are under no obligation to consider communal values when reviewing the empirical facts. As mentioned above, the factual record may sometimes lead a judge to reasonably question whether claimed environmental deprivation actually occurred. In such cases, proffered SED evidence may well be properly dismissed by the judge before the question of moral significance even arises.

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[154] A few caveats are in order. Our argument may seem as relevant to evidence offered in aggravation as it is to evidence offered in mitigation. After all, the sentencing agent must aim to capture the community's outrage as well as its compassion. Does this not entail that, if a great many reasonable persons believe that SED mitigates only if it was a specific cause of the crime, judges should give *less* weight to such SED? The simple answer is no. Structurally, the capital sentencing process is designed to be more responsive to the compassionate side of the community's moral response than to its vindictive side. By requiring jury unanimity for death sentences, most states tilt the scales in favor of the community's mercy. A single holdout vote for a life sentence generally has decisive power on a jury, whereas a single vote for the death penalty is powerless. Moreover, while the Supreme Court prohibits any constraints on the sentencing agent's authority to assess factors as mitigating, it has imposed constitutional constraints on which factors may be regarded as aggravating. *See* Penry v. Lynaugh, 481 U.S. 279, 304 (1987) ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (noting that a greater degree of reliability is required precisely on the issue of death-deservingness). Indeed, the scope of potentially aggravating evidence must be narrowly defined by statute. Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[To avoid a constitutional flaw] an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others *found* guilty of murder."). Moreover, whereas the imposition of death must enjoy broad moral approval in order to be legitimate, the Supreme Court has never indicated that such broad appeal is necessary for a life sentence. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972). Our argument accordingly requires judges to take greater care in giving effect to the community's compassion than to its vengeance. Although we have not discussed it here, there may be further reason for judicial deference to merciful moral concerns discoverable in the fact that there are many members of society who do not favor the death penalty under any circumstance.

CONCLUSION

At critical junctures throughout the sentencing process, individual actors are tasked with making moral determinations. Yet very little attention has been paid to when this moral discretion is exercised correctly. That seems to be changing, at least in the capital sentencing context, with appellate courts being more willing to scrutinize sentencing decisions for failures to properly "consider and give effect to" relevant mitigating evidence. We have attempted to provide some clarity to this area of jurisprudence by closely examining the nature of the moral consideration of mitigating evidence that is required under constitutional law. Using the unusually restrictive treatment of severe environmental deprivation evidence in some jurisdictions as our starting point, we have devised a three-factor test for determining when restrictive treatment of such evidence—the conditioning of deprivation's mitigating potential on restrictive conditions like its being a specific cause of the crime—represents an *Eddings* violation. Our test is based on the principle, drawn from a long line of Supreme Court rulings, that the sentencer cannot artificially limit her consideration of the mitigating weight of evidence presented by the defense using legal rules, whether those rules are derived from statute, prior case law, or judicial custom. Additionally, we have argued that in light of the importance of ensuring that the death penalty is sanctioned by communal values, sole sentencing judges have an obligation to consider all of the possible ways in which SED might be seriously mitigating—at least those that many reasonable jurors and judges would endorse. In other words, unrestricted or broad consideration of deprivation evidence is in general mandatory under constitutional law. Between these two independent lines of constitutional argument, appellate courts have more than enough basis for review of cases in Arizona, Alabama, and wherever else restricted consideration of severe deprivation evidence by sentencing judges has unfairly and unlawfully prejudiced defendants convicted of capital crimes.

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