California v. Brown: Against the Antisympathy Instruction

> "Judges, by long custom, become hardened in the business of condemning, and may sometimes pronounce sentences, which even when legal, may be unnecessary. Jurors, less accustomed to the cruel task, retain those feelings which sometimes plead against evidence in favor of humanity, and soften the rigor of penal laws."[1]

On January 27, 1987, the United States Supreme Court took a step toward limiting the discretion allowed the jury during the sentencing phase of a death penalty trial. In *California v. Brown*,[2] the Supreme Court held that instruction 1.00 of California Jury Instructions, Criminal (the antisympathy instruction)[3] read to the jury during the penalty phase of a capital punishment trial did not violate the Eighth and Fourteenth Amendments of the United States Constitution. That instruction cautioned the jurors "not [to] be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[4]

Until *Brown*, the Supreme Court consistently held that a jury must be permitted to consider *all* mitigating evidence when deciding whether to impose the death penalty.[5] To the extent that the antisympathy instruction prevents jurors from considering sympathy as part of the defendant's mitigating evidence, the holding of *Brown* contradicts and implicitly overrules precedent. The *Brown* court intended for the antisympathy instruction to limit juror sympathy during the penalty phase of a capital case to feelings evoked by the evidence. However, a reasonable juror could easily misunderstand the instruction and conclude that she should not allow any sympathy to influence her decision on the death sentence.[6]

This Comment analyzes the reasoning the Supreme Court used to uphold the constitutionality of California's antisympathy instruction, discusses the strong line of conflicting precedent, and suggests an alternative instruction. Part I sets forth the background and holding of *California v. Brown*. Part II analyzes the antisympathy instruction and critiques the

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1. NOAH WEBSTER, *A Collection of Essays*, no. XXIII, 291 (1789).

2. 107 S. Ct. 837 (1987).

3. Instruction 1.00, 1 California Jury Instructions, Criminal (4th ed.1979) [hereinafter CALJIC].

4. *Brown*, 107 S. Ct. at 838 (quoting CALJIC 1.00).

5. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

6. *Brown*, 107 S. Ct. at 843-44 (Brennan, J., dissenting).

majority's holding on its constitutionality. Part III suggests an instruction which is less likely to confuse jurors or to lead them to disregard sympathy entirely.

This Comment concludes that by preventing jurors from considering sympathy factors at the penalty phase of a capital punishment trial, the Court contradicts its own precedent on the value and importance of mitigating factors in a capital case. The antisympathy instruction confuses jurors who interpret the instruction as an admonition not to consider any sympathetic factors because they have a conflicting duty to weigh *all* the mitigating factors presented by the defendant. The majority's conclusion that California jurors interpret the instruction as a direction to consider only the sympathy that is raised by the evidence presented at trial presumes a complex and unlikely inferential leap on the part of a reasonable juror.

I. Facts and Procedural History

A California jury convicted Albert Greenwood Brown, Jr. of the forcible rape and first degree murder of a fifteen-year-old girl.[7] At the sentencing phase of the trial,[8] the state produced evidence of his 1977 conviction for the rape of another young girl.[9] Defendant Brown introduced, as mitigating evidence, the testimony of several family members regarding his peaceful nature. Brown also introduced the testimony of a psychiatrist who explained that Brown's sexual dysfunction may have contributed to his actions. Brown himself took the stand, expressed shame for his actions, and asked the jury for mercy. The trial court instructed the jury that when determining Brown's penalty, they must consider and weigh the aggravating and mitigating circumstances.[10] The trial judge then read the antisympathy instruction, which directed the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[11] The jury sentenced Albert Brown to death.[12]

The California Supreme Court reversed Brown's sentence on automatic appeal.[13] The court held that the antisympathy instruction given during the penalty phase of Brown's trial violated his eignth amendment

7. *Id.* at 838.

8. In California, the capital punishment trial is a bifurcated process. During the first phase, a judge or jury determines the guilt or innocence of the defendant. Only in the second phase does the trier of fact consider the aggravating and mitigating factors presented in evidence and determine the sentence. CAL. PENAL CODE § 190.1 (West Supp. 1988).

9. *Brown*, 107 S. Ct. at 838.

10. *Id.* at 839.

11. People v. Brown, 40 Cal. 3d 512, 537, 709 P.2d 440, 452, 220 Cal. Rptr. 637, 649 (1985) (quoting CALJIC 1.00).

12. *Id.* at 521, 709 P.2d at 442, 220 Cal. Rptr. at 639.

13. CAL. PENAL CODE § 190.6 (1977).

right to have the jury consider all the mitigating evidence he introduced.[14]

The Eighth Amendment of the United States Constitution prohibits the federal government from imposing any cruel and unusual punishment.[15] This prohibition also applies to the states.[16] A majority on the United States Supreme Court has held that the infliction of the death penalty is not per se cruel and unusual punishment, provided such penalty is not imposed in an "arbitrary and capricious" manner.[17] To safeguard against an arbitrary and capricious imposition of capital punishment, the Court has held that the Eighth Amendment, as it applies to the states through the Fourteenth Amendment,[18] requires that the sentencing body in a capital case meet two basic requirements before imposing a sentence of death. First, it must not act with unbridled discretion,[19] and second, it must not fail to consider any mitigating factors introduced by the defendant.[20]

Given these broad limitations on the imposition of the death penalty, the California Supreme Court held that Brown's eighth amendment rights were violated. The court stated that the "individualized sentencing concerns inherent in the Eighth Amendment" mandate that the jury, when deciding whether or not to impose the death penalty, consider any sympathy factor raised by the evidence.[21] The court held that giving the antisympathy instruction during the penalty phase of a capital trial is error because the instruction denies the defendant "the right to have the jury consider any 'sympathy factor' raised by the evidence when determining the appropriate penalty."[22]

The United States Supreme Court, in a five-to-four opinion written by Chief Justice Rehnquist, reversed the California court's decision and held that Brown's rights had not been violated.[23] The Court examined the two eighth amendment juror prerequisites for imposition of the death penalty, found that they had been met,[24] and ruled that the death penalty could be imposed.[25]

14. People v. Brown, 40 Cal. 3d at 536, 709 P.2d at 453, 220 Cal. Rptr. at 650.

15. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

16. Robinson v. California, 370 U.S. 660, 667 (1962).

17. Furman v. Georgia, 408 U.S. 238 (1972).

18. *Robinson*, 370 U.S. at 667.

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

20. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

21. People v. Brown, 40 Cal. 3d 512, 536, 709 P.2d 440, 453, 220 Cal. Rptr. 637, 649 (1985).

22. *Id.* at 537, 709 P.2d at 453, 220 Cal. Rptr. at 650 (citing People v. Easley, 34 Cal. 3d 858, 876, 671 P.2d 813, 824, 196 Cal. Rptr. 309, 320 (1983)).

23. California v. Brown, 107 S. Ct. 837, 838 (1987).

24. *Id.* at 839.

25. *Id.*

The majority's decision that the Eighth Amendment had not been violated was rendered after three initial findings, all of which center on juror interpretation of the antisympathy instruction. First, the majority determined that the constitutional validity of the instruction depends on a reasonable juror's interpretation of the instruction, rather than the California Supreme Court's interpretation.[26]

The majority's second point on juror interpretation was that the California Supreme Court incorrectly interpreted the instruction as prohibiting any consideration of sympathetic factors.[27] In contrast to the California Supreme Court's view that the instruction prohibits all emotional responses, Chief Justice Rehnquist proposed that the antisympathy instruction only prohibits jurors from basing their sentences on factors not presented at trial and on emotions not rooted in the aggravating and mitigating evidence introduced by the defendant.[28] The instruction, the Court concluded, limits jury sentencing determinations to record evidence, thus ensuring meaningful judicial review and enhancing the reliability of the sentencing process. [29]

The majority's third point on juror interpretation of the antisympathy instruction was that the California Supreme Court improperly focused on the word "sympathy" in determining that the instruction hindered the jury's consideration of the mitigating evidence presented by Brown.[30] The United States Supreme Court determined that the California Court's focus on "sympathy" led it to ignore the other factors prohibited by the *Brown* instruction: sentiment, conjecture, passion, prejudice, public opinion, and public feeling.[31] The Court concluded that since the "instruction was given at the end of the penalty phase, only after respondent had produced thirteen witnesses in his favor," no juror would interpret the antisympathy instruction issued during Brown's trial in the "hypertechnical manner" of the California Supreme Court.[32]

According to a majority of the Court, the two eighth amendment requirements together ensure that imposition of the death penalty is constitutional. In her concurring opinion, however, Justice O'Connor noted the tension between the two requirements.[33] In her view, the issue in *Brown* was whether an instruction, designed to ensure that jurors make capital sentencing decisions on the basis of clear and objective standards, not mere whim, violates the requirement that the sentencer consider any

26. *Id.* (citing Francis v. Franklin, 471 U.S. 307, 315-16 (1985)).
27. *Id.* at 840.
28. *Id.*
29. *Id.*
30. *Id.* at 839-40.
31. *Id.* at 840.
32. *Id.*
33. *Id.* at 841 (O'Connor, J., concurring).

relevant evidence.[34]

Justice O'Connor agreed with the majority that the *Brown* instruction alone did not violate the Eighth Amendment.[35] She stated that "a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence" is a valid basis for assessing the appropriateness of the death sentence.[36] On that basis she agreed with the majority's conclusion that the California antisympathy instruction is constitutionally valid. However, Justice O'Connor also called attention to the danger inherent in attempts to restrict jury consideration of mitigating evidence. A confusing instruction that "attempts to remove emotion from capital sentencing," compounded by a prosecutor's statements that the jury should "ignore the mitigating evidence about the respondent's background and character," might cause the jury to mistakenly forgo "its obligation to consider all of the mitigating evidence introduced by the respondent."[37] She concluded that, on remand, the California Supreme Court should determine whether Brown's jury was adequately informed of its duty to consider all the mitigating evidence introduced by the defendant.[38]

Justice Brennan, joined by Justice Marshall, and in part by Justice Stevens, dissented from the *Brown* majority on several grounds.[39] His dissent focused on defects in the antisympathy instruction that could lead to misinterpretation by jurors. To demonstrate the impropriety and ambiguity of the *Brown* antisympathy instruction, Justice Brennan focused on the language of the instruction, the manner in which it had been construed in California trials, and experience with other provisions of the California sentencing procedure.[40]

First, Justice Brennan dispensed with the three grounds on which the majority based its holding. The majority focused on the language of the instruction, and determined how a reasonable juror would interpret the instruction.[41] The dissent argued, however, that the California Supreme Court is better able to determine how a reasonable juror in California would interpret the instruction than a United States Supreme Court Justice, and that therefore the final interpretation should be left to the state's highest court.[42]

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 841-42.

38. *Id.* at 842.

39. *Id.* at 842 (Brennan, J., dissenting). The first part of Justice Brennan's dissent is based on his belief that the death penalty is cruel and unusual punishment and a violation of the Fourteenth Amendment. Justice Stevens did not join in this part of the dissent.

40. *Id.* at 843.

41. *Id.* at 840.

42. "The facial language of the instruction, the manner in which it has been construed in trials in California, and experience with other provisions of the state sentencing scheme all

Justice Brennan also contested the majority's construction of the modifier "mere" in the antisympathy instruction. While the majority contended that "mere" would limit emotional responses considered in sentencing determinations to those emotions produced by the aggravating and mitigating evidence presented,[43] Justice Brennan noted that use of the word "mere" is not sufficient to validate the instruction.[44] The instruction counsels the jury to avoid "*mere* sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[45] From this syntax, Justice Brennan argues, a juror could conclude that the adjective "mere" only modifies the word "sentiment" and not the other nouns listed in the instruction.[46] Justice Brennan further explains that inferring that "mere" modifies every word thereafter is not appropriate because the word "prejudice" is included in the list of factors. Applying "mere" to "prejudice" would indicate that a juror who allowed prejudice to influence his deliberation would be acting within the bounds of the instruction if her prejudice arose from the evidence presented.[47] Since prejudice should never enter into a jury's decision, the Court's implicit assumption that "mere" modifies every word which follows, including both "sympathy" and "prejudice", produces an anomalous result.[48] Therefore, Justice Brennan asserted that the word "mere" is not sufficient to keep the instruction within constitutionally permissible limits.[49]

Justice Brennan also challenged the Court's assumption that character and background evidence introduced by the defendant would be considered by the jury despite the antisympathy instruction. An "equally likely" result would have the jury looking to the court for guidance when considering evidence, and inferring from the issuance of the instruction that the defendant went too far when presenting mitigating evidence.[50]

Justice Brennan's final rebuttal to the majority's interpretation of the instruction addressed the Court's conclusion that "sympathy" and the other factors listed are "no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty."[51] Chief Justice Rehnquist, for the majority, held that a reasonable juror would interpret the instruction "as a directive to ignore only the sort of sympathy that would be totally divorced from the

buttress California's interpretation of its own jury instructions." *Id.* at 843 (Brennan, J., dissenting).

43. *Id.* at 840.

44. *Id.* at 843-44 (Brennan, J., dissenting).

45. CALJIC 1.00 (emphasis added).

46. *Brown*, 107 S. Ct. at 843-44 (Brennan, J., dissenting).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 844.

51. *Id.* (rebutting majority's interpretation at 840).

evidence adduced during the penalty phase."[52] In contrast, Justice Brennan proposed that the instruction would lead a juror to believe that any emotional response was inappropriate.[53] Brennan resolved that the jury would interpret the instruction as a directive to avoid considering any mitigating factors that evoked sympathetic reactions favorable to the defendant.[54] The instruction, barring "several emotions in unqualified language," neither prepares the juror for, nor warns her of the inferential leap in interpretation required to construe the instruction "as a directive that certain forms of emotion are permissible while others are not."[55]

Justice Brennan's dissent next addressed the inconsistent interpretation of the instruction in other California trials. Justice Brennan contended not only that the instruction can be easily misunderstood by jurors, but also that it can be misconstrued by the prosecutors in their arguments to the jury.[56] During Brown's trial, the prosecutor's closing argument utilized the instruction to dissuade the jury from considering the mitigating evidence presented by the defendant.[57] Justice Brennan directed the Court's attention to other California cases that illustrate the tendency of prosecutors to interpret the instruction in a manner contrary to the understanding ascribed to the reasonable juror by the majority.[58] For Justice Brennan, these cases demonstrate that the antisympathy instruction often has at least two plausible interpretations, one of which has the effect of "precluding consideration of precisely those factors of character and background this Court has decreed *must* be considered by the sentencer."[59]

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52. *Id.* at 840.

53. *Id.* at 844 (Brennan, J., dissenting).

54. *Id.*

55. *Id.*

56. *Id.* at 845-47.

57. In his dissent, Justice Brennan included the prosecutor's closing argument: Mr. Brown's relatives "told us [the court and jury] what a good boy he was at the time of his youth when they knew him. And he brought them gifts and that he cared for his siblings. . . . *They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case.* Their testimony here, ladies and gentlemen, I would suggest, was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant, and although that is admirable in the context of an advocate trying to do his job, *you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case. As the Judge will instruct you, you must not be swayed by sympathy.*" *Id.* at 845 (emphasis in original).

58. *Id.* at 846 (citing People v. Robertson, 33 Cal. 3d 21, 56-57, 655 P.2d 279, 300, 188 Cal. Rptr. 77, 98 (1982); People v. Walker, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169, 182 (1985)); *see also* People v. Easley, 34 Cal. 3d 858, 879 n. 11, 671 P.2d 813, 826 n. 11, 196 Cal. Rptr. 309, 322 n. 11 (1985) (prosecutor informed jury that "sympathy was not one of the mitigating factors which the law authorized it to consider").

59. *Brown*, 107 S. Ct. at 846 (Brennan, J., dissenting) (emphasis in original) (citing Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (holding that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider . . . any relevant mitigating evidence")).

Justice Brennan then reviewed a second instruction, which the state claimed would cure any constitutional deficiency in the antisympathy instruction. The majority did not reach an analysis of the second instruction because it held that only "[i]f the specific instruction fails constitutional muster, [will] we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law."[60] Instruction 8.84.1, subsection (k) of California Jury Instructions, Criminal (CALJIC) advises the jury that they may consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[61] Justice Brennan stated that the language of subsection (k) narrows the jury's focus to mitigating factors related to "the nature of the crime or the condition of the defendant at the time it was committed."[62] Brennan pointed out that subsection (k) has been consistently interpreted narrowly.[63] A narrow interpretation of subsection (k) would not cure the antisympathy instruction. Instead, Justice Brennan insisted that since precedent has not shown that subsection (k) yields a broader consideration of the defendant's background or character, the jury is limited to consideration of factors concerning the circumstances of the crime itself.[64] Under Justice Brennan's analysis, if the jurors do not consider all the defendant's mitigating evidence, any capital punishment imposed is in violation of the defendant's eighth amendment rights.[65]

Finally, Justice Brennan concluded that even if the *Brown* jury did interpret subsection (k) broadly, they were probably confused by conflicting instructions.[66] CALJIC 1.00, the antisympathy instruction, which may be interpreted as instructing the jurors not to base their decision on the factors listed, conflicts with a broad interpretation of CALJIC 8.84.1, subsection (k), which allows jurors to consider "any other circumstances."[67] Justice Brennan noted that such a conflict is impermissible under *Francis v. Franklin:*[68] "Nothing in [the] specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."[69]

60. *Id.* at 839.

61. CALJIC 8.84.1(k).

62. *Brown*, 107 S. Ct. at 847 (Brennan, J., dissenting).

63. *Id.*

64. *Id.*

65. *Id.* at 849-50.

66. *Id.* at 848-49.

67. CALJIC, 1.00, 8.84.1(k).

68. 471 U.S. 307 (1985).

69. *Brown*, 107 S. Ct. at 848 (Brennan, J., dissenting) (quoting *Francis*, 471 U.S. at 322).

II. Unconstitutionality of California's Antisympathy Instruction

A. Possibility of Jury Misinterpretation Renders Instruction Invalid

In overruling the California Supreme Court, the majority in *California v. Brown* noted that the constitutionality of a jury instruction must be assessed, first, in light of a reasonable juror's interpretation,[70] and then, if necessary, by examining the controverted parts in the context of the whole instruction.[71] The majority focused its constitutional inquiry on a reasonable juror's understanding of the disputed instruction. The majority ultimately concluded that although sympathy was listed with several impermissible factors, a reasonable juror would naturally assume that she could consider only sympathetic evidence actually introduced in the sentencing phase.[72]

This interpretation places a high level of confidence in jurors' ability to reason. The majority assumes that the jury interpreted the instruction in the same manner as the Supreme Court majority — as an admonishment to limit emotional responses to the aggravating and mitigating factors presented during the sentencing phase.[73] Chief Justice Rehnquist doubts jurors' capacity to perform the reasoning that this interpretation would require,[74] yet in *California v. Brown* he expected the jurors to comprehend the instruction in a way that requires "telepathic abilities."[75] Chief Justice Rehnquist did not consider that trained criminal attorneys often fail to consistently interpret the instruction at issue in *Brown*. As several California cases illustrate, prosecutors themselves are frequently confused by the antisympathy instruction.[76] Prosecutors, unlike most jurors, are familiar with the legal concepts involved in a capital case. Despite their training and knowledge, prosecutors have failed to interpret "mere . . . sympathy" as the majority assumes a reasonable juror will. In *People v Robertson*,[77] the prosecutor told the jury that the evidence showing the defendant "didn't get the breaks in life" was irrelevant because it

70. *Id.* at 839 (citing *Francis*, 471 U.S. at 315-316).

71. *See*, Sandstrom v. Montana, 442 U.S. 510, 528 (1979).

72. *Brown*, 107 S. Ct. at 840.

73. *Id.*

74. In Sandstrom v. Montana, then Justice Rehnquist stated, "I continue to have doubts as to whether this particular jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between 'infer' and 'presume'." 442 U.S. 510, 528 (Rehnquist, J., dissenting).

75. "The inclusion of 'sympathy' in an expansive list of impermissible emotions would logically lead a juror to conclude that *any* response rooted in emotion was inappropriate," *Brown*, 107 S. Ct. at 844. (Brennan, J., dissenting) (emphasis in original).

76. *Id.* at 845-846 (citing People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982); People v. Gates, 43 Cal. 3d 1168, 743 P.2d 301, 240 Cal. Rptr. 666 (1987); People v. Walker, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169, (1985)).

77. 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

amounted to "a sympathy factor that does not focus on the real issue, the crime and person Andrew Robertson was at the time [the crime] was committed."[78] Similarly, in *People v. Gates*,[79] the prosecutor told the jury,

> "It's not a time to talk for mercy or forgiveness for Oscar Gates. It's too late for that . . . .The evidence that you received in the case, that [sic] what you promised the judge you'd base your decision on, because the time now is not for philosophy or religion, mercy or forgiveness, sorry [sic] for the family, feelings of guilt on your own part."[80]

These two excerpts demonstrate that even legally trained minds interpret the instruction differently than the *Brown* majority. The excerpts also demonstrate that the majority's conclusion regarding a reasonable juror's interpretation of the instruction is questionable. Finally, these excerpts show that prosecutors have communicated their misinterpretation to the jury.

The evidence that CALJIC instructions 1.00 and 8.84.1 are read differently by the majority, the dissent, and various prosecutors indicates that even well-trained legal minds are unable to establish one reasonable interpretation. In a capital case, it is especially important that the jury have a clear understanding of the instruction as well as of their duty to consider the mitigating and aggravating circumstances.[81] In *Jurek v. Texas*,[82] the United States Supreme Court held that the jury must receive clear instructions which "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender."[83]

To illustrate the confusion in *Brown*, if a jury understood the *Brown* instruction in the manner of Chief Justice Rehnquist, the jury would consider all the relevant mitigating evidence presented, and let only the sympathy invoked by that evidence affect their decision.[84] If, on the other hand, a jury interpreted the instruction as Justice Brennan feared, it would incorrectly interpret the instruction as a direction to preclude from consideration *any* sympathetic response to the evidence presented. In the latter case, the jury would disregard the defendant's mitigating evidence regarding his background and character. The defendant's eighth and fourteenth amendment rights would be violated, since the

78. *Brown*, 107 S. Ct. at 846 (Brennan, J., dissenting) (quoting *Robertson*, 33 Cal. 3d at 56-57 n.22, 655 P.2d at 300 n.22, 188 Cal. Rptr. at 98 n.22).

79. 43 Cal. 3d 1168, 793 P.2d 301, 240 Cal. Rptr. 666 (1987).

80. *Brown*, 107 S. Ct. at 846 (Brennan, J., dissenting) (quoting *Gates*, 43 Cal. 3d at 1200, 743 P.2d at 322, 240 Cal. Rptr. at 687).

81. *See* Jurek v. Texas, 428 U.S. 262 (1978).

82. 428 U.S. 262 (1978).

83. *Id.* at 274.

84. *Brown*, 107 S. Ct. at 840.

misinterpreted instruction would keep the jury from considering the evidence properly presented by the defendant.[85]

If two constructions of a jury instruction are possible, and one of the constructions is unconstitutional, the Court has said that the instruction must be declared invalid.[86] The Court in *Sandstrom v. Montana*[87] held that it is irrelevant that jurors could have interpreted the instruction in a lawful way, for it is not certain that they did so.[88] Thus, even if the instruction in *Brown* did not actually result in a violation of Brown's eighth or fourteenth amendment rights, the instruction is invalid if an unconstitutional construction is possible.[89] Thus, Chief Justice Rehnquist's hypothesis of a reasonable juror's understanding of the instruction is irrelevant if the *Brown* jury could have interpreted the instruction in an unconstitutional manner.[90]

B. Procedural Safeguards in Capital Cases Rendered Ineffectual by Instruction

The Court has recognized that the stakes in a capital punishment case are different from those in other criminal cases. As Chief Justice Rehnquist noted, "one of the principal reasons why death is different is because it is irreversible."[91] For this reason, the Court has consistently been concerned with the fairness of capital-sentencing procedure. As stated in *Woodson v. North Carolina*,[92] a process which does not allow consideration of the individual defendant and the circumstances of the crime "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[93]

Because of the finality of capital punishment, it is especially important for the jury to have an opportunity to consider all the mitigating evidence before invoking the death penalty.[94] Consequently, the Court has developed several procedural safeguards. One such safeguard is the defendant's right to present mitigating evidence on his own behalf. A plurality of the Court in *Lockett v. Ohio*[95] concluded that a statute which

85. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).
86. Sandstrom v. Montana, 442 U.S. 510, 519 (1979).
87. 442 U.S. 510 (1979).
88. *Id.* at 526.
89. *Id.*
90. *Brown*, 107 S. Ct. at 842-51 (Brennan, J., dissenting).
91. Woodson v. North Carolina, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting).
92. 428 U.S. 280 (1976).
93. *Id.* at 304.
94. The Court in *Woodson* expressed its fear of a procedure that "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.*
95. 438 U.S. 586 (1978).

"prevents a sentencer in all capital cases from giving independent mitigating weight" to relevant evidence proffered by the defendant for that purpose "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[96] The Court pronounced such a risk "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."[97]

Although these procedural safeguards appear to protect defendants' rights in theory, in *Brown* their application yielded the opposite result. Brown was granted the procedural guarantee of presenting mitigating evidence during the penalty phase of his trial.[98] This presentation consisted of the testimony of thirteen character witnesses, which involved elements of an appeal for sympathy.[99] However, Brown was denied the effect of the procedural safeguard because of the risk that the jury, mistakenly believing that it could not consider sympathy in determining whether to impose the death penalty, failed to consider the testimony of these witnesses. Thus, the defendant was effectively prevented from exercising his eighth amendment right to present mitigating evidence on his behalf.[100]

C. Arbitrary Imposition of the Death Penalty Violates Defendants' Fourteenth Amendment Right to Equal Protection

The Fourteenth Amendment to the United States Constitution guarantees all citizens equal protection under the laws.[101] This guarantee is particularly important when the Eighth Amendment's prohibition against cruel and unusual punishment is invoked and the death penalty is imposed. The Court in *Furman v. Georgia*[102] recognized that since "the basic theme of equal protection is implicit in 'cruel and unusual' punishments, a penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."[103] To avoid the arbitrary or discriminatory imposition of the death penalty, the Court has emphasized the need for consistent application of death penalty procedures.

The Supreme Court has noted the importance of mitigating evidence in preserving the right to equal protection for defendants in capital cases. The Court pointed out that if a jury is prevented from considering all of a defendant's mitigating evidence, there is a risk that the death penalty will

96. *Id.* at 605.

97. *Id.*

98. *Brown*, 107 S. Ct. at 838-39.

99. *Id.* at 840.

100. *Id.* at 849 (Brennan, J., dissenting).

101. "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

102. 408 U.S. 238 (1972).

103. *Id.* at 249 (citing Goldberg, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1969-70)).

be imposed arbitrarily.[104]

The antisympathy instruction in *California v. Brown* is susceptible to at least two interpretations.[105] These dual constructions subject capital defendants to potentially disparate treatment. Although designed to guide the jury in the sentencing decision, and thus minimize arbitrary impositions of the death penalty, the instruction actually fosters an inequitable application of the death penalty by opening the door to different jury interpretations.[106] A "freakish" and "wanton" application of the death penalty would result if different juries supplied different interpretations to the instructions, and so considered different mitigating evidence in different capital cases.[107]

III. Proposed Alternative Instruction

The antisympathy instruction could be misconstrued by a jury, resulting in a violation of the defendant's rights. In *California v. Brown*, the violation could have been cured by remanding the case to the lower court to determine if the instruction as written, together with the prosecutor's closing remarks, rendered its probable interpretation unconstitutional.[108]

However, to avoid similar problems in the future, some important changes should be made to the antisympathy instruction. First, the language of the instruction should be clarified to correct its inherent contradiction. CALJIC instruction 1.00, the antisympathy instruction, is contradictory when issued in conjunction with instruction 8.84.1. CALJIC 8.84.1 instructs the juror to consider each applicable factor that is listed in the instruction and presented at trial.[109] CALJIC 1.00 admonishes the jury *not* to rely on "mere sentiment, conjecture, [or] sympa-

104. *See* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). As the Court stated in Woodson v. North Carolina, 428 U.S. 280, 304 (1976), "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense . . . treats all persons convicted of a designated offense not as uniquely human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

105. *See supra* text accompanying notes 27-32, 43-49, 51-52.

106. In his concurring opinion in Furman v. Georgia, Justice Douglas stated, "we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding the prejudice against the accused if he is poor and despised and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." 408 U.S. at 255 (Douglas, J., concurring).

107. In the words of Justice Stewart, "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 309-10 (Stewart, J., concurring).

108. *Brown*, 107 S. Ct. at 842 (O'Connor, J., concurring).

109. CALJIC 8.84.1.

thy. . . ."[110] Thus the two instructions together tell the jury not to be influenced by emotional factors, yet to give close consideration to all factors presented at trial. In *Francis v. Franklin*, the Court held that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."[111] To cure the constitutional defect the antisympathy instruction in *Brown* could be rephrased as follows:

> Although you must properly weigh and balance all the mitigating and aggravating factors presented into evidence during the penalty phase of this trial, as jurors you must not be swayed by mere sentiment or mere sympathy. That sentiment or sympathy which may be considered by the jury must be raised by, but must not extend beyond,. mitigating and aggravating evidence presented at trial. Prejudice, passion, public opinion or feeling, or conjecture should not be considered to any degree when determining whether to impose the death penalty or to grant a life sentence.

This revised instruction expressly limits the factors that the jury may consider to those raised by the evidence actually presented at trial.

The instruction could be further refined by replacing "mere" with "solely." Thus the instruction would read "as jurors you must not be swayed solely by sentiment or sympathy." This change would ensure that juries understand the instruction as a direction not to base their decisions entirely on sympathy or sentiment, rather than as a direction to consider sympathy and sentiment to be of no consequence in their deliberation.

Finally, the instruction should be accompanied by a revision of the part of instruction 8.84.1 that conflicts with instruction 1.00.[112] This revision should explain how the jury must weigh and balance the evidence of the mitigating and aggravating factors that evoke sympathetic responses. The instruction could be rewritten as follows:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider, *as long as you do not base your decision solely on sympathy or sentiment.*[113]

Jurors would then understand why they must consider such mitigating factors and the effect that their assessment of a particular factor would have.[114]

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110. CALJIC 1.00.

111. *Francis*, 471 U.S. 307, 322 (1985).

112. *See supra* text accompanying notes 60-65.

113. CALJIC 8.84.1 (author's suggested additions emphasized).

114. Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983).

If the jurors in *California v. Brown* had had an express authorization to consider mitigating factors, accompanied by the antisympathy instruction as revised above, and a more detailed explanation of the purpose of the mitigating and aggravating factors, the majority's conclusion that the instruction was constitutional as interpreted would have been consistent with Supreme Court precedent. The revised instruction would ensure that jurors understand that the emotional responses evoked by mitigating evidence are proper for their consideration, as long as they confine their consideration to the mitigating evidence presented during the penalty phase of the defendant's trial. The suggested changes would produce a more equitable and consistant application of the death penalty.

IV. Conclusion

The inherent tension between the two jury requirements of the Eighth and Fourteenth Amendments is especially significant in capital punishment cases, particularily those involving jury instructions similar to the one given in *Brown*. In cases of this type, it is especially important to establish procedural safeguards that meet these requirements, permitting the jury to consider any mitigating factors presented by the defendant,[115] yet preventing the jury from acting with unbridled discretion. Over the last two decades the Court has emphasized the uniqueness of the death penalty, and, in order that the imposition of any penalty be fair and consistent, the special need for individualized consideration of the character and background of the defendant.

However, in *Brown*, the majority stepped back from this concern. The majority's determination regarding a reasonable juror's interpretation of the antisympathy instruction requires jurors to interpret the instruction to mean that they should limit their consideration of the listed factors to those factors presented in the mitigating and aggravating evidence during the penalty phase of the defendant's trial. If the jury actually does follow the majority's "reasonable juror interpretation," and if such interpretation was the only interpretation possible, then imposition of the death penalty following the instruction would be constitutional.

However, the instruction in *Brown* is unconstitutional because a reasonable juror could intrepret the instruction differently from the Supreme Court majority. The dissent interpreted the instruction as an admonishment to refrain from considering any emotional response at all. If the jury were to follow this interpretation, then a defendant could be sentenced to death without a full consideration of all relevant mitigating evidence. Such a sentence is clearly unconstitutional in light of the pre-

115. Gregg v. Georgia, 428 U.S. 153, 189 (1976); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

cedent regarding procedural safeguards for the constitutional imposition of the death penalty.

The differing interpretations of the majority and the dissent demonstrate that the instruction could logically be interpreted in more than one manner.[116] The Court has established that if there is more than one logical interpretation of an instruction, and one of these interpretations is unconstitutional, then the instruction cannot stand. Here, since the instruction as interpreted by Justice Brennan would lead to the unconstitutional imposition of the death penalty, the instruction cannot stand.

However, if the instruction were revised to provide a clearer understanding of the duty of the jury and an explanation of the manner of consideration of the factors listed in CALJIC 1.00, then the death penalty could be more consistently and equitably imposed. When balancing the right of the capital defendant to present mitigating evidence against the interest of our penal system in consistent imposition of the death penalty, it is necessary to prevent a possible imbalance by using instructions that are patently clear. To refuse to rephrase the instructions is to encourage the pronouncement of sentences that, as Noah Webster predicted, "even when legal, may be unnecessary."[117]

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116. *See supra* text accompanying notes 27-32, 43-49, 51-52.

117. NOAH WEBSTER, A COLLECTION OF ESSAYS, no. XXIII, 291 (1789).

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