

As the Gentle Rain from Heaven: Mercy in Capital Sentencing

Stephen P. Garvey

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“AS THE GENTLE RAIN FROM HEAVEN”: MERCY IN CAPITAL SENTENCING

Stephen P. Garvey†

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INTRODUCTION

Our constitutional law of capital sentencing does not understand Shakespeare’s “gentle rain from heaven.”¹ Mercy confuses and befuddles it. The jury that sentenced Albert Brown to death was instructed

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¹ The quality of mercy is not strained. / It droppeth as the gentle rain from heaven / Upon the place beneath. It is twice blest: / It blesseth him that gives and him that takes. . . . / It is an attribute to God himself, / And earthly power doth then show likest God’s / When mercy seasons justice. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

that "mere . . . sympathy" should not play on its judgment.² Brown claimed this instruction violated his Eighth Amendment rights, but the Supreme Court disagreed.³ Justice Blackmun dissented, worried that some jurors might think the instruction denied them the power to grant mercy. That power, he thought, played a "special role" in capital sentencing.⁴ Some five years later, Justice Scalia dissented when the Court reversed Derrick Morgan's death sentence.⁵ Morgan won a new sentencing hearing because one of the jurors believed Morgan, if convicted of capital murder, should be sentenced to death no matter what evidence he presented in mitigation.⁶ According to Justice Scalia, the Court had held that no "merciless" juror could sit in judgment of a capital defendant. The Constitution, he thought, demanded no such thing.⁷

These dissents, one embracing mercy and the other rejecting it, reflect a basic confusion about the role of mercy in Eighth Amendment jurisprudence.⁸ We lack an adequate account of what mercy is

² *California v. Brown*, 479 U.S. 538, 539 (1987), *cert. denied*, 115 S. Ct. 138 (1994).

³ *Id.*

⁴ *Id.* at 563 (Blackmun, J., dissenting).

⁵ *Morgan v. Illinois*, 504 U.S. 719, 739 (1992) (Scalia, J., dissenting).

⁶ *Id.* at 729.

⁷ *Id.* at 752 (Scalia, J., dissenting) ("Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. . . . In my view, that not only is not required by the Constitution of the United States; it grossly offends it.")

⁸ The Court's members tend to use the concept of mercy without great care. *See, e.g.*, *Wills v. Texas*, 114 S. Ct. 1867, 1868 (1994) (Blackmun, J., dissenting from the denial of certiorari); *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from the denial of certiorari); *Delo v. Lashley*, 507 U.S. 272, 275 (1993); *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring); *Morgan v. Illinois*, 504 U.S. 719, 750-51 (1992) (Scalia, J., dissenting); *Dawson v. Delaware*, 503 U.S. 159, 175-76 (1992) (Thomas, J., dissenting); *Rector v. Bryant*, 501 U.S. 1239, 1242-43 n.2 (1991) (Marshall, J., dissenting from the denial of certiorari); *Walton v. Arizona*, 497 U.S. 639, 666 (1990) (Scalia, J., concurring); *id.* at 718 (Stevens, J., dissenting); *Saffle v. Parks*, 494 U.S. 484, 500 (1990) (Brennan, J., dissenting); *Watkins v. Murray*, 493 U.S. 907, 908 (1989) (Marshall, J., dissenting from the denial of certiorari); *Penry v. Lynaugh*, 492 U.S. 302, 304, 326 (1989); *Britz v. Illinois*, 489 U.S. 1044, 1045 (1989) (Marshall, J., dissenting from the denial of certiorari); *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987); *California v. Brown*, 479 U.S. 538, 561 (1987) (Brennan, J., dissenting); *id.* at 562 (Blackmun, J., dissenting); *Mitchell v. Kemp*, 483 U.S. 1026, 1026 (1987) (Marshall, J., dissenting from the denial of certiorari); *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting); *Buttrum v. Black*, 479 U.S. 902 (1986) (Marshall, J., dissenting from the denial of certiorari); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986); *Teague v. Tennessee*, 473 U.S. 911, 912 (1985) (Marshall, J., dissenting from the denial of certiorari); *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., concurring in part and dissenting in part); *Maxwell v. Pennsylvania*, 469 U.S. 971, 971 (1984) (Marshall, J., dissenting from the denial of certiorari); *Pulley v. Harris*, 465 U.S. 37, 50 n.10 (1984); *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983); *Lockett v. Ohio*, 438 U.S. 586, 607 n.14 (1978); *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 387 (1972) (Burger, C.J., dissenting).

and how it fits into the existing scheme of capital sentencing.⁹ Although talk of mercy is not completely absent from the Court's death-penalty jurisprudence, the talk is neither prominent nor especially illuminating. Mercy is sometimes portrayed as a benevolent virtue for which the law should make room. On these occasions—often in dissent—mercy's noble and compassionate side shines.¹⁰ At other times, the Court's reaction to mercy is more ambivalent, and sometimes even hostile. On these occasions the compassionate side of

⁹ The concept of mercy has received very little attention from criminal law scholars. See, e.g., Andrew von Hirsch, *Equality, "Anisonomy," and Justice: A Review of Madness and the Criminal Law*, 82 MICH. L. REV. 1093, 1107 (1984) (book review) ("[P]enologists . . . have hardly touched upon the concept of mercy."); Nigel Walker, *The Quiddity of Mercy*, 70 PHIL. 27, 27 (1995) ("Anatomists of criminal justice systems usually ignore the tiny organ called 'mercy' or 'clemency.'"). For rare exceptions, see Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 699 (1988) [hereinafter Dressler, *Excusing Wrongdoers*] (discussing the difference between justice and mercy); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 330-38 (1993) (discussing mercy in the context of noncapital sentencing); Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989) (discussing the decline of "mercy" throughout the entire system of capital sentencing).

Mercy has, however, received more attention from philosophers. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW 807-10* (1978); Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY 162* (1988) [hereinafter Murphy, *Mercy and Legal Justice*]; Andrew Brien, *Saving Grace*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 52; Cheshire Calhoun, *Changing One's Heart*, 103 ETHICS 76, 78-81 (1992); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1468-73 (1990) [hereinafter Dressler, *Hating Criminals*]; R.A. Duff, *Justice, Mercy and Forgiveness*, CRIM. JUST. ETHICS, Summer/Fall 1990, at 51; J.L.A. Garcia, *Two Concepts of Desert*, 5 LAW & PHIL. 219 (1986); Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 107 (Hyman Gross & Ross Harrison eds., 1992); Sterling Harwood, *Is Mercy Inherently Unjust?*, in CRIME AND PUNISHMENT 464 (Michael J. Gorr & Sterling Harwood eds., 1995); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOM. RES. 281 (1985); H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357 (1983); Carla Johnson, *Seasoning Justice*, 99 ETHICS 553 (1989); Herbert Morris, *Murphy on Forgiveness*, CRIM. JUST. ETHICS, Summer/Fall 1988, at 15; Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, CRIM. JUST. ETHICS, Summer/Fall 1988, at 3 [hereinafter Murphy, *Forgiveness, Mercy, and the Retributive Emotions*]; Jeffrie G. Murphy, *A Rejoinder to Morris*, CRIM. JUST. ETHICS, Summer/Fall 1988 at 20; Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993); Lyla H. O'Driscoll, *The Quality of Mercy*, 21 S. J. PHIL. 229 (1983); George W. Rainbolt, *Mercy: An Independent, Imperfect Virtue*, 27 AM. PHIL. Q. 169 (1990); N.E. Simmonds, *Judgment and Mercy*, 13 OXFORD J. LEGAL STUD. 52 (1993); Steven Sverdlik, *Justice and Mercy*, 16 J. SOC. PHIL. 36 (1985). For earlier discussions, see Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972); John Kleinig, *Mercy and Justice*, 44 PHIL. 341 (1969); H.R.T. Roberts, *Mercy*, 46 PHIL. 352 (1971); Alwynne Smart, *Mercy*, 43 PHIL. 345 (1968); James Sterba, *Can a Person Deserve Mercy?*, 10 J. SOC. PHIL. 11 (1979); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976).

¹⁰ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 718 (1990) (Stevens, J., dissenting); *Franklin v. Lynaugh*, 487 U.S. 164, 190 (1988) (Stevens, J., dissenting) ("Past conduct often provides insights into a person's character that will evoke a merciful response to a demand for the ultimate punishment even though it may shed no light on what may happen in the future."); *California v. Brown*, 479 U.S. 538, 562 (1987) (Blackmun, J., dissenting) ("The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure.").

mercy yields to its common association with arbitrariness and capriciousness, both of which supposedly flow from the irrationality at mercy's core.¹¹

In short, the Court has no coherent understanding of mercy or its place in the structure of the penalty phase of a capital trial. This Article proposes a new way to look at the penalty phase. It submits that the penalty phase should be reconstructed to incorporate and accommodate mercy, or at least that capital sentencing juries should be instructed, at the defendant's request, that mercy lies within their power to dispense.

Although mercy is the capstone of this proposal to reconfigure the penalty phase, two critical and controversial assumptions lie at its foundation. First, this Article assumes that retributive principles animate the basic structure of the penalty phase insofar as the object of capital sentencing is to impose deserved punishment. This assumption may seem unwarranted because the Court now permits the penalty phase to serve nonretributive goals.¹² For example, death sentences can be imposed to send a deterrent signal (general deterrence) or to keep the offender from offending again (specific deterrence, or incapacitation). Still, the Court insists that a death sentence should represent a "'reasoned moral response'"¹³ to the offender and the offense, and that it must reflect the offender's "moral guilt" or "moral culpability," all of which seems to resonate most naturally with the language and rhetoric of retributivism. If retribution is not the only goal of the penalty phase, perhaps it is first among equals.¹⁴

¹¹ For example, according to the Court in *Johnson v. Texas*, 509 U.S. 350 (1993): [W]e have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, we have said that "[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."

Id. at 371-72 (alteration in original) (quoting *Saffle v. Parks*, 494 U.S. 484, 493 (1990)); *accord* *Caldwell v. Mississippi*, 472 U.S. 320, 349 (1985) (Rehnquist, J., dissenting).

¹² See, e.g., *Harris v. Alabama*, 115 S. Ct. 1031, 1035 (1995).

¹³ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (O'Connor, J., concurring)).

¹⁴ See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) ("[R]etribution clearly plays a more prominent role in a capital case [than in a noncapital one]."); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 *BUFF. L. REV.* 85, 132 (1993) ("Over the course of capital jurisprudence since *Furman*, the Court has settled on a generally retributive approach to capital sentencing."); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655, 661 n.13 (1989) (noting that the "Supreme Court's eighth amendment jurisprudence emphasizes a . . . retributive view of punishment"); cf. Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 *CAL. L. REV.* 1143, 1159 (1980) ("The substantive judgment to be made [in capital sentencing] is a moral judgment: Does this person deserve death as punishment?"); Richard S. Murphy, Comment, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 *U. CHI. L.*

Moreover, because the idea of mercy is intelligible only within a retributive philosophy of punishment,¹⁵ we can investigate the role of mercy in capital sentencing only if we are prepared to look at the process from a retributive point of view.

Second, this Article assumes that it makes sense to claim a criminal defendant is "deserving" or "undeserving" of the death penalty,¹⁶ and that retributivism does not rule out capital punishment as a legitimate criminal sanction.¹⁷ In other words, it assumes that some of

REV. 1303, 1333 (1988) ("[T]he Court's approach to punishment, at least in the death penalty context, is essentially retributive despite protestations to the contrary.").

¹⁵ See *infra* note 93 and accompanying text.

¹⁶ For expressions of the view that we cannot know what punishment a defendant deserves, or that we have no "workable way" to determine what punishment is deserved, see, e.g., *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from the denial of certiorari); *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) ("The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them. Absent a mandatory sentence, there is no objective measure by which the sentencer's decision can be deemed correct or erroneous . . ."); Hugo A. Bedau, *Retributivism and the Theory of Punishment*, 75 J. PHIL. 601, 611-15 (1978); Vivian Berger, "*Black Box Decisions*" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1081 n.81 (1991) (suggesting it is dubious to assume a death sentence either can or cannot be "erroneous"); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1636-41 (1992) (arguing that retributivism does not explain what punishment a particular crime deserves); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 353 ("[T]he penalty trial is an existential moment of moral perception, neither right nor wrong, and therefore largely unreviewable."); J.L. Mackie, *Morality and the Retributive Emotions*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 3, 7-8. *But cf.* Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 186-87 (Ferdinand Schoeman ed., 1987) (suggesting that this epistemological objection is made against retributive judgments, but not against other judgments relying on moral desert).

¹⁷ For the view that retributivism is, for one reason or another, incompatible with the death penalty, see, e.g., Mary E. Gale, *Retribution, Punishment and Death*, 18 U.C. DAVIS L. REV. 973 1028-33 (1985); Robert S. Gerstein, *Capital Punishment—"Cruel and Unusual"?: A Retributivist Response*, 85 ETHICS 75, 78-79 (1974); *cf.* Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1184 (1981) ("Basic principles of moral justice that are believed to justify . . . [the death penalty] are necessarily offended by the attempt to impose a system of state executions in an imperfect world."); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501, 1516-23 (1981) (explaining that retributivism may be incompatible with the death penalty because of the difficulty of reconciling respect for an individual's dignity with executions); Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1053 (1978) (discussing Justice Marshall's view "that punishments imposed to serve the purposes of retribution are constitutionally prohibited"); Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 132 (1985) ("[W]e have no right to exact the full cost of murders from our murderers until we have done everything possible to rectify the conditions that produce their crimes."); George Schedler, *Can Retributivists Support Legal Punishment?*, 63 MONIST 51, 62 (1980) (concluding that a consistent retributivist condemns all legal punishment). For retributive defenses of the death penalty, see, e.g., Igor Primorac, *On Capital Punishment*, 17 ISR. L. REV. 133, 138 (1982) (defending position that death is the only proportionate punishment for murder); *cf.* WALTER BERNS, FOR CAPITAL PUNISHMENT 172-73 (1979) ("Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law . . ."); Ernest van den

fenders commit crimes for which the just punishment is death. Abolitionists and critics of retributivism, in contrast, find the retributive notion that some criminal offenders "deserve" death not only mysterious,¹⁸ but morally dangerous.¹⁹ Better, they think, to banish it from our discourse and thinking about the morality of crime and punishment altogether. They may be right.²⁰ The assumption that some criminal offenders deserve death as punishment begs a host of critical questions, none of which can be satisfactorily addressed here. Without this assumption, however, it becomes difficult, if not impossible, to understand the role of mercy in capital sentencing.

The discussion proceeds in three parts. Part I briefly reviews the constitutional history of the penalty phase. This is the history of a supposed paradox between the goals of consistency and individualization in capital sentencing. This paradox has caused some observers to conclude that the current structure of capital sentencing should either be dramatically reformed or done away with altogether. When the penalty phase is considered from a retributive perspective, however, the paradox becomes less beguiling. Moreover, our preoccupation with the paradox has diverted attention from other important dimensions of capital sentencing, one of which is the distinction between deserved punishment and mercy. Part II develops this distinction and demonstrates how the penalty phase can be restructured to incorporate mercy. Part III defends this new, mercy-inclusive approach to the penalty phase. It argues that failing to heed the distinction between desert and mercy needlessly increases the risk of wrongly condemning an undeserving defendant to death. From a retributive point of view, this is a cardinal sin. Various objections to this understanding of the penalty phase are then entertained.

Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) (concluding that execution is the "only fitting retribution" for murder).

¹⁸ See, e.g., David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 538-39 (1991) (suggesting that retributivists rely "heavily on metaphor and imagery").

¹⁹ Cf. *id.* at 559 (suggesting that retributivism as a philosophy of punishment has "bolster[ed] capital punishment and . . . encourag[ed] an increasing reliance on imprisonment."). But cf. Moore, *supra* note 16, at 209 (suggesting that the ability of a moral view to be used in ways which that view itself does not countenance or endorse "constitute[s] no argument against the truth" of that view).

²⁰ This Article takes no position on the moral defensibility or indefensibility of the death penalty. Its goal is simply to try to better understand the place of mercy within the existing framework of capital sentencing. The assumptions it makes are in the service of this goal.

I

THE "PARADOX" OF CAPITAL SENTENCING

A capital defendant is tried twice. His first trial determines whether he is guilty of capital murder.²¹ His second determines whether he will be sentenced to death or life imprisonment. This latter trial, the so-called "penalty phase," is perhaps the single most distinguishing feature of the Court's modern capital punishment jurisprudence.²² Yet, according to conventional wisdom, the Court has woven an irreconcilable paradox into the very fabric of the penalty phase.²³

A. The Paradox Created

Two principles—individualization and consistency—govern much of the structure of the penalty phase. Rooted in the Eighth Amendment's prohibition against the infliction of "cruel and unusual

²¹ Because the vast majority, some 98%, of death-row inmates are male, see *Death Row, U.S.A.* (NAACP Legal Defense and Education Fund, Inc., New York, N.Y.), Summer 1995, at 1, this Article generally uses masculine pronouns when referring to capital defendants.

²² "Modern" is meant to refer to the Court's jurisprudence since *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). For an excellent account of the forces behind the creation of this modern jurisprudence, see MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973); see also HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994* (1996) (giving an historical account of the roots of modern death-penalty jurisprudence); FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 26-49 (1986) (same). For an exceptionally nuanced and balanced examination of numerous aspects of this modern jurisprudence, see WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1991); WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987); WELSH S. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* (1984).

²³ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that there perhaps is an inherent tension between [*Woodson-Lockett*] and the line [of cases] stemming from *Furman* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II.") (internal quotations omitted) (citations omitted); Berger, *supra* note 16, at 1080 ("[T]he Court's dual sentencing objectives strongly resemble Siamese twins—locked at the hip but straining uncomfortably in opposite directions.") (citations omitted); Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1347 (describing tension as reflecting "ongoing struggle of . . . male against female"); Radin, *supra* note 14, at 1150 ("The achievable or imaginable level of individualization varies inversely with the achievable or imaginable level of consistency.") (emphasis omitted); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995) ("This tension between *Gregg's* seeming insistence on channeling and *Woodson's* insistence on uncircumscribed consideration of mitigating evidence constitutes the central dilemma in post-*Furman* capital punishment law."); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1148 (1991) (noting the tension between guided discretion and individual consideration under the Eighth Amendment).

punishments,"²⁴ these principles can be traced to the landmark decisions of *Furman v. Georgia*²⁵ and *Woodson v. North Carolina*.²⁶ Individualization and consistency form the twin stars around which the Court's modern death penalty jurisprudence orbits. They are also the source of the paradox of capital sentencing.²⁷

Furman stands for the principle of consistency. It represents the Court's initial effort to contain the penalty of death within the rule of law. Before *Furman*, most states left the death-selection decision wholly to the jury's good judgment.²⁸ Capital jurors exercised complete and "unfettered" discretion without any guidance from legal rules.²⁹ Such a "lawless" system naturally made it difficult to reliably predict who would and who would not be condemned.³⁰ In Justice Stewart's now-famous phrase, the death penalty "struck like light-

²⁴ For historical accounts of the "original meaning" of the Eighth Amendment, compare Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted." *The Original Meaning*, 57 CAL. L. REV. 839 (1969) (tracing historical origins of Eighth Amendment's prohibition against cruel and unusual punishments) with RAOUL BERGER, *DEATH PENALTIES* 29-58 (1982) (disputing Granucci's account).

²⁵ 408 U.S. 238 (1972) (per curiam).

²⁶ 428 U.S. 280 (1976) (plurality opinion).

²⁷ Precisely how these principles derive from the Eighth Amendment's textual prohibition against the infliction of "cruel and unusual punishments" is a matter of dispute. According to the Court, the individualization principle rests in part on respect for the humanity of the defendant. See, e.g., *Woodson*, 428 U.S. at 304 ("[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . ."). It is also said to be based on our "evolving standards of decency." *Id.* at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); see also Louis D. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991). But see *Walton*, 497 U.S. at 670-71 (Scalia, J., concurring) (arguing that the individualization principle lacks any grounding in the Constitution's text). The consistency principle can be traced to *Furman*, 408 U.S. 238, and, at least according to Justice Scalia, is grounded in the Eighth Amendment's prohibition against "unusual" punishments. See *Walton*, 497 U.S. at 670-71 (Scalia, J., concurring). But see Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 385 (1992) (suggesting that the consistency principle does not "correspond to any Eighth Amendment principle").

According to one thoughtful observer, both the individualization and consistency principles ultimately derive from the fundamental right to equal concern and respect as a person. Under this theory, the consistency principle is intermediately grounded in the idea of equal treatment and the individualization principle is intermediately grounded in the idea of deserved treatment. See Radin, *supra* note 14, at 1150; cf. JOEL FEINBERG, *SOCIAL PHILOSOPHY* 98-99 (1973) (distinguishing between absolute justice (deserved treatment) and comparative justice (equal treatment)).

²⁸ See, e.g., *McGautha v. California*, 402 U.S. 183, 207 (1971) (upholding a discretionary capital sentencing scheme under Due Process Clause).

²⁹ See, e.g., *Woodson*, 428 U.S. at 291-92; Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 387 (1994).

³⁰ See Frederick Schauer, *Playing by the Rules* 222 (1991) ("Discretion just is freedom from otherwise plausible fetters. As constraint is imposed then discretion diminishes *pro tanto*.").

ning.”³¹ This state of affairs was intolerable. Any legal sanction—let alone death—applied with no more regularity than a bolt out of the blue was an insult to the rule of law and the virtues associated with that ideal. The rule of law requires some appreciable sense of consistency, predictability, and even-handedness when the state applies its coercive power, especially its ultimate power.

In *Furman*, the Court issued a short *per curiam* order holding that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment.”³² Because the Court’s cryptic order was followed by nine separate opinions, no one knew precisely what *Furman* required. In time, however, the Court came to read *Furman* as condemning the death penalty’s arbitrary and capricious application.³³ *Furman*’s noble aspiration was to bring the death-selection process within the limits of the rule of law and to make that process “rational.”³⁴

In response to *Furman*, state lawmakers imposed rules on the sentencing process designed to regulate the jury’s discretion over who could and who could not be sentenced to death. Different states adopted different rules,³⁵ but each state’s response was based on the

³¹ See *Furman*, 408 U.S. at 309 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

³² See *id.* at 239-40.

³³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”); accord *California v. Ramos*, 463 U.S. 992, 1000 (1983) (noting that vague aggravating factors can lead to “arbitrary and capricious sentencing patterns condemned in *Furman*”).

³⁴ Problems of arbitrariness and discrimination exist throughout the capital sentencing system—not just at the penalty phase. These problems exist, for example, in the prosecutor’s decision to charge. See, e.g., Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 327 (1988) (reporting “clear and significant discrepancies in the treatment of potentially capital cases when cases were differentiated by race of defendant and victim and county of jurisdiction”); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520-57 (1988) (analyzing race and the prosecutor’s charging decision); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 775 (1990-91) (concluding that “prosecutorial decisions were based partially on legal factors and partially on the race of the victim”). However, the state enjoys a presumption that its prosecutions are brought in good faith. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985). But cf. *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting from the denial of certiorari) (urging that “where death is the consequence, the prosecutor’s [charging decision] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”) (quotations omitted).

³⁵ See, e.g., *Gregg*, 428 U.S. at 179 (plurality opinion) (noting that thirty-five states reenacted capital statutes after *Furman*); ZIMRING & HAWKINS, *supra* note 22, at 41-45 (describing “social psychology of backlash”); Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (questioning whether *Furman* really provides the states with any guidance); John W. Poulos, *The Supreme Court, Capital Punishment and the*

same underlying conviction that the addition of rules would satisfy *Furman's* demands. Some states concluded that the most efficient way to achieve consistency in capital sentencing was to condemn to death every defendant found guilty of a capital crime.³⁶ Under these so-called mandatory statutes defendants guilty of aggravated murder were condemned to death by operation of law. Mandatory statutes left the jury no discretion. Assuming the jury could easily apply the rules defining the condemned class, the death penalty would be imposed fairly and consistently, and *Furman's* aspiration would be satisfied.

Yet mandatory statutes came with a hefty moral price tag. Although they promised to produce an impressive degree of consistency, they ignored morally relevant detail about the particular characteristics of the offender and the particular circumstances of his

Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment, 28 ARIZ. L. REV. 143, 238-41 (1986) (listing state enactments made in response to *Furman*).

Three basic capital sentencing models emerged in response to *Furman*. (1) The Florida "weighing" model listed both aggravating and mitigating circumstances and required the sentencer to weigh them against each other in order to determine the sentence. *Profit v. Florida*, 428 U.S. 242 (1976) (plurality opinion). (2) The Georgia "threshold" model listed aggravating and mitigating circumstances but gave the jury no real guidance once it had found the existence of one statutory aggravating circumstance. *Gregg*, 428 U.S. at 153 (plurality opinion). (3) The Texas "definition" model narrowly defined the crime of capital murder—in essence building the aggravating circumstances into the definition of the offense—and then presented the jury with three special questions. An affirmative answer to each question required the jury to impose a death sentence. *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion). States have developed various permutations and combinations of these basic models including: vesting sentencing authority in a judge or panel of judges; splitting sentencing authority between judge and jury; allowing judicial overrides of jury sentences; listing "special circumstances" without enumerating them as either "aggravating" or "mitigating;" and requiring comparative proportionality review. For an analysis of early post-*Furman* capital sentencing schemes, see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 102-19 (1980).

This Article focuses on jury sentencing. It ignores special problems presented by judge sentencing or some combination of judge and jury sentencing. See, e.g., *Sochor v. Florida*, 504 U.S. 527, 539-41 (1992) (describing Florida system of shared sentencing responsibility). For criticisms of divided-authority systems like Florida's, see, *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 475 (1984) (Stevens, J., concurring in part and dissenting in part); Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923 (1991); 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 (1985); Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5 (1994).

³⁶ See, e.g., *Woodson*, 428 U.S. at 286; *Roberts v. Louisiana*, 428 U.S. 327 (1976); see also *Sumner v. Shuman*, 483 U.S. 66, 67 (1987); *Roberts v. Louisiana*, 431 U.S. 633, 634 (1977) (per curiam); cf. *Graham v. Collins*, 506 U.S. 461, 487 (1993) (Thomas, J., concurring) (stating that "mandatory penalty scheme[s] [were] a perfectly reasonable legislative response to the concerns expressed in *Furman*"). In the years preceding *Furman*, many states had rejected mandatory schemes, partly because juries would sometimes acquit guilty defendants in order to avoid imposing a death sentence. See, e.g., *Woodson*, 428 U.S. at 290-91. See generally Poulos, *supra* note 35, at 146-54 (discussing the history of mandatory capital statutes).

offense. Indeed, mandatory statutes could achieve a high degree of consistency precisely because they ignored such detail. Mandatory statutes, in the Court's words, treated "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."³⁷

Because mandatory statutes exacted such a heavy moral price and achieved only an artificial brand of consistency,³⁸ the Court struck them down four years after *Furman* in *Woodson v. North Carolina*.³⁹ *Woodson* stands for the second principle governing the modern penalty phase: A capital defendant must be treated as an individual.⁴⁰ Rejecting cruder forms of *lex talionis*,⁴¹ the *Woodson* Court explained that our "evolving standards of decency,"⁴² as well as the ideal of human dignity underlying the Eighth Amendment,⁴³ require individualiza-

³⁷ *Woodson*, 428 U.S. at 304.

³⁸ See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("[A] consistency produced by ignoring individual differences is a false consistency."); cf. Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1052-61 (1985) (arguing that mandatory statutes are unconstitutional because legislatures are "incompetent" capital sentencers); Yoram Shachar, *Sentencing as Art*, 25 ISR. L. REV. 638, 659 (1991) ("If inequality is artificially suppressed by uniform rules created on the basis of individual intuitive choice, or caprice, the only result will be to conceal the confusion from the public.").

³⁹ 428 U.S. 280 (1976) (plurality opinion).

⁴⁰ See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); see also *Parker v. Dugger*, 498 U.S. 308, 315 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings*, 455 U.S. at 114; *Bell v. Ohio*, 438 U.S. 637, 642 (1978).

⁴¹ *Lex talionis* requires that the harm a wrongdoer intentionally causes be reflected back upon him in punishment, with little or no attention paid to anything other than the harm. On *lex talionis* generally, compare HUGO A. BEDAU, *DEATH IS DIFFERENT* 41 (1987) ("[I]f we attempt to give exact and literal implementation to *lex talionis*, society as a whole will find itself descending to the cruelties and savagery that criminals employ.") with Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992) (developing and defending a modified version of *lex talionis*).

⁴² See, e.g., *Woodson*, 428 U.S. at 301 (citation omitted); see also Billionis, *supra* note 27, at 293-94 (discussing society's evolving standards of decency and the Eighth Amendment).

⁴³ *Woodson*, 428 U.S. at 304 ("[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender . . .") (citation omitted); cf. Hugo A. Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS* 145 (Michael J. Meyer & William A. Parent eds., 1992) (arguing that human dignity underlies our vision of the Eighth Amendment). The *Woodson* Court also noted that mandatory statutes "papered over the problem of unguided and unchecked jury discretion." See *Woodson*, 428 U.S. at 302; see also *Graham v. Collins*, 506 U.S. 461, 485-87 (1993) (Thomas, J., concurring). Whatever its constitutional grounding, individualization is commonly taken to be a requirement of justice. See SCHAUER, *supra* note 30, at 137 ("Frequently the goals of justice are served not by the rule-followers, but by those whose abilities at particularized decision-making transcend the inherent limitations of rules."); Murphy, *Mercy and Legal Justice*, *supra* note 9, at 171 ("This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is part of what we mean by taking persons seriously as persons and is thus a basic demand of justice."); cf. *Eddings*, 455 U.S. at

tion in capital sentencing. In *Lockett v. Ohio*,⁴⁴ the Court translated this principle into a constitutional rule entitling a capital defendant to present any evidence he wished in mitigation of his sentence. In a capital case, the *Lockett* Court said, the "sentencer [cannot] . . . be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁴⁵

Although the Court sometimes suggests that the individualization principle points only toward mitigation, the principle actually supports both mitigation and aggravation. It allows the decisionmaker access to all the relevant facts and circumstances, mitigating and aggravating alike, needed to determine what sentence is appropriate. The Court's decision in *Zant v. Stephens*,⁴⁶ taken together with *Lockett*, reflects this understanding. As already noted, *Lockett* entitles a capital defendant to present any mitigating evidence he wishes, whether or not it falls within the scope of a specific statutory mitigating circumstance. Conversely, once the state has proven the existence of at least one statutory aggravating circumstance, *Stephens* permits the state to introduce whatever aggravating evidence it sees fit, provided that evidence relates to the character of the offender or the circumstances of the offense.⁴⁷

112 ("[J]ustice . . . requires . . . tak[ing] into account the circumstances of the offense together with the character and propensities of the offender.") (quoting *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937) (citations omitted)).

⁴⁴ 438 U.S. 586 (1978).

⁴⁵ *Id.* at 604; see also *Hitchcock*, 481 U.S. at 394 ("[I]n capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.") (internal quotations omitted); *Lockett*, 438 U.S. at 605 ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). See generally Bilonis, *supra* note 27, at 300-13 (explaining structure of the *Lockett* rule).

⁴⁶ 462 U.S. 862 (1983).

⁴⁷ See *id.* at 876-79; *id.* at 900 (Rehnquist, J., concurring) ("[O]nce a single aggravating circumstance is specified, the jury then considers *all* the evidence in aggravation-mitigation in deciding whether to impose the death penalty.") (emphasis added); see also *Tuilaepa v. California*, 114 S. Ct. 2630, 2639 (1994) ("[T]he sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'") (quoting *Stephens*, 462 U.S. at 875); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Barclay v. Florida*, 463 U.S. 939, 954 (1983); *Berger*, *supra* note 16, at 1076; *Howe*, *supra* note 27, at 384 n.241 ("*Stephens* essentially granted the states a right to admit *Lockett* evidence . . .") (citing Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 358); Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317, 350-51 (1984) ("The opinion in *Zant v. Stephens* permits consideration of non-statutory aggravating circumstance [sic] as a basis for the decision to impose the death penalty, but only when one statutory aggravating circumstance is found to be present.").

Commentators have often remarked that *Furman's* mandate of consistency and *Woodson's* mandate of individualization compete with one another at some level. Complete realization of one can come only at the expense of the other. The more individualized the death-selection process becomes the more difficult it is for that process to generate consistent outcomes. By the same token, any increase in consistency is possible only at the price of ignoring individual considerations. The two are inversely related.⁴⁸ They are, as the Court itself has acknowledged, in "tension," or "somewhat contradictory."⁴⁹ Yet, according to the Court, the Constitution requires the penalty phase to incorporate both.

Shortly before his retirement from the Court, Justice Blackmun concluded in dissent that this tension could not be resolved. Moreover, because he thought this irresolvable tension rendered the death penalty unconstitutional, he vowed no longer to "tinker with the machinery of death."⁵⁰ Justice Scalia reasoned otherwise. According to Justice Scalia, the tension disappears if we eliminate one of the principles giving rise to it. He elected to eliminate the individualization principle, which he thought the Eighth Amendment simply did not require.⁵¹ If Justice Scalia's vision were to prevail, mandatory statutes

⁴⁸ See Berger, *supra* note 16, at 1080 ("[T]he Court's dual sentencing objectives strongly resemble Siamese twins—locked at the hip but straining uncomfortably in opposite directions."); Radin, *supra* note 14, at 1150 ("The achievable or imaginable level of individualization varies inversely with the achievable or imaginable level of consistency.") (emphasis omitted); Sundby, *supra* note 23, at 1161.

⁴⁹ See, e.g., *Tuilaepa*, 114 S. Ct. at 2635; *Romano v. Oklahoma*, 114 S. Ct. 2004, 2009 (1994); *Graham v. Collins*, 506 U.S. 461, 479 (1993) (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring); *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion); *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting); *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring).

⁵⁰ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari); see also *Sawyer v. Whitley*, 505 U.S. 333, 357-58 (1992) (Blackmun, J., concurring).

⁵¹ Justice Scalia reasoned that the individualization principle has less basis in the Eighth Amendment's text than does the consistency principle. See *Walton*, 497 U.S. at 671 (Scalia, J., concurring) ("The *Woodson-Lockett* line of cases . . . bears no relation whatever to the text of the Eighth Amendment."). In contrast, because a punishment whose application is unpredictable can plausibly be characterized as "unusual," Justice Scalia reasoned that the consistency principle has a stronger claim to constitutional status. Outside the death penalty context, however, Justice Scalia has taken a narrower view of unusualness. He has argued, for example, that a punishment cannot be considered constitutionally "unusual" as long as it is a punishment that has been traditionally used, or that was in use at the time the Eighth Amendment was adopted. See *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (plurality opinion) (Scalia, J., announcing the decision of the Court). Justice Thomas is sympathetic to Justice Scalia's position. See *Graham*, 506 U.S. at 498-99 (Thomas, J., concurring).

In a cryptic footnote to his *Walton* concurrence, Justice Scalia stated in response to a dissent by Justice Stevens: "If and when the Court redefines *Furman* to permit [sentencers to have complete discretion without a requisite finding of aggravating factors], and to re-

would once again be constitutional, and the states would be free to treat capital defendants as part of a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."⁵²

B. Individualization, Consistency, and Moral Error

When Justice Blackmun and Justice Scalia confront the paradox of capital sentencing, they see no way out short of abolishing the death penalty or eliminating one of the two core principles of Eighth Amendment jurisprudence. We can, however, come to terms with the paradox without embracing either of these alternatives. Indeed, once we assume that the primary purpose of the penalty phase is to impose deserved punishment, while reducing the risk of the undeserving being wrongly condemned, the two principles actually complement one another.

When all is said and done, the principles of consistency and individualization are "formal" principles of decisionmaking.⁵³ Consistency in decisionmaking—treating like cases alike⁵⁴—is associated

quire an assessment (I cannot imagine on what basis) that a sufficiently narrow level of the 'pyramid' of murder has been reached, I shall be prepared to reconsider my evaluation of *Woodson and Lockett*." *Walton*, 497 U.S. at 665 n.*. If by this Justice Scalia means that he is willing to uphold *Lockett* if the single-aggravator rule, see *infra* note 78, is rejected, but not otherwise, his position is untenable. The single-aggravator rule is so weak that little difference exists between the system now in place (in which complete discretion exists with respect to aggravating and mitigating evidence once a single aggravator is found) and the one Justice Scalia seems to imagine (in which complete discretion exists with respect to aggravating and mitigating evidence, but in which no aggravator need be found). Because the two systems are virtually the same, it makes little sense to reject the former, but accept the latter.

⁵² *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Accepting Justice Scalia's argument and rejecting *Lockett* would make mandatory statutes constitutionally permissible but probably not constitutionally required. See, e.g., Sundby, *supra* note 23, at 1186-90 (describing implications of Justice Scalia's call to overrule *Lockett*).

⁵³ On the distinction between rule-based and standard-based decisionmaking, see generally P.S. ATIVAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLICAN LAW 70-75* (1987) (describing the nature and role of rules); SCHAUER, *supra* note 30, at 77-78 (distinguishing between particularistic and rule-bound decisionmaking); Ronald J. Allen, *Foreword—Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. CRIM. L. & CRIMINOLOGY 727, 735 (1991) (noting the distinction between "individuated decisionmaking" and "categorical reasoning"). There is a vast literature on the relative virtues and vices of decisionmaking according to rules and standards. See, e.g., SCHAUER, *supra* note 30, at 135-45; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 650-51 (1991); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-67 (1992).

⁵⁴ Consistency in decisionmaking is also associated with "equality of treatment" or "formal justice." Indeed, the ideas of consistency and equal treatment only make sense by reference to some rule or description under which two cases can intelligibly be described as equal. See PETER WESTEN, *SPEAKING OF EQUALITY* 197-99 (1990); see also John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 70 (1987) ("[I]nconsistency under a rule is any difference

with decisionmaking based on rules. How much consistency a decisionmaking process achieves depends on the nature and content of the rule being applied. For example, a relatively precise rule will achieve a greater degree of consistency across a range of cases than will a more general rule. Any rule, however, will be over-inclusive and under-inclusive with respect to its underlying justification.⁵⁵ Such is the nature of rules.

In contrast, individualization in decisionmaking is not rule-bound. It seeks the "right" result in each case and thus takes into account any factor relevant to the decision at hand. Individualized decisionmaking is guided by and based upon the justification underlying the decision. That justification in turn identifies what considerations the decisionmaker should take into account. Rather than forcing the decisionmaker to rely on a rule derived from the underlying justification—a rule which will invariably be over- and under-inclusive—individualized decisionmaking allows the decisionmaker to base its decision on a direct application of the justification itself.

In a capital sentencing system premised on retributivism, death sentences should be imposed only if they are deserved. The individualization principle within a system of this sort allows the jury to gain access to all the facts and circumstances it needs to identify the defendant's just deserts.⁵⁶ These facts and circumstances are necessarily vast and varied, reflecting the rich texture of the moral world. No rule could fully capture all of the appropriate considerations. The pattern of death sentences resulting from such individualized decisionmaking will, however, be difficult to explain.⁵⁷ Human limitations and the different moral outlooks jurors bring to their task guarantee that this will be so.

At the same time, the point of the consistency principle in capital sentencing is to prescind from the particulars of the moral world, ignoring some and attending to others, in order to achieve an appreciable measure of consistency across cases. The consistency principle

among treatments that arise from ends left to the will of the individual decision-maker."); cf. WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 78-83 (1985) (distinguishing between equality *before* law and equality *in* law).

⁵⁵ SCHAUER, *supra* note 30, at 32.

⁵⁶ 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. See Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity and Capital Sentencing*, 64 IND. L.J. 617, 617-18 (1989).

⁵⁷ This does not mean, however, that capital sentencing within a purely individualized system would necessarily be "arbitrary" in the sense of being based on no standard. Cf. Michael Davis, *Sentencing: Must Justice Be Even-Handed?*, 1 LAW & PHIL. 77, 80 (1982) (distinguishing between "arbitrary" as in based on no standard and "arbitrary" as in based on no "usable" standard).

reduces the need for individualized judgment. It shifts decisionmaking power away from the sentencer and toward the rule formulated to guide the sentencer's decision. Yet whatever marginal gains in consistency we make when we transform an individualized decisionmaking process into a rule-bound one, those gains come only at the price of ignoring relevant moral detail. Inherent in this trade-off is the paradox of the penalty phase.

At first blush, the principles of individualization and consistency do indeed appear to be at odds with one another. When placed within a retributive model of the penalty phase, however, the two principles look less antagonistic and, in fact, work in tandem toward the ultimate goal of imposing just punishment. They simply serve that goal in different ways. More importantly, the way the two principles interact to structure decisionmaking within the penalty phase reduces the risk of condemning a defendant who does not deserve death.

In order to see how this happens, imagine the way the penalty phase would work if it were built on one principle to the exclusion of the other. A capital sentencing system dedicated solely to consistency would require a sentencing rule that left no room for meaningful disagreement about whether the rule applies. Under such a system, a legal rule would identify a particular class of offenders and would require the jury to impose death on every member in the class. As with any rule, the rule defining the condemned class would inevitably be both over- and under-inclusive with respect to its underlying justification.⁵⁸ If that justification is, as we have supposed, that death should be imposed only on those defendants who deserve it, any rule built on this justification would unavoidably impose death on some offenders who did not deserve it (i.e., a rule will be over-inclusive and will yield false-positives). It would also unavoidably spare some offenders who did not deserve to be spared (i.e., a rule will be under-inclusive and will yield false-negatives).

In other words, over-inclusiveness and under-inclusiveness, both of which inevitably arise in any rule-bound decisionmaking process, produce two forms of injustice and two forms of inequality. When a rule is under-inclusive and produces a false-negative, the injustice that results is imposing a punishment (life imprisonment) less than that which the defendant deserves (death). The resulting inequality is an instance of likes being treated unlike, because the defendant deserves death but gets life, while others who deserve death get death. When a rule is over-inclusive and produces a false-positive, the injustice that results is imposing a punishment (death) greater than that

⁵⁸ SCHAUER, *supra* note 30, at 32.

which the defendant deserves (life imprisonment).⁵⁹ The resulting inequality is an instance of unalikes being treated alike, because while others who get death deserve death, the defendant gets death but deserves life.

A system dedicated to individualization would suffer from neither over-inclusiveness nor under-inclusiveness. The jury in such a system would simply be instructed to impose death on those and only those offenders who deserve it. However, an individualized system would still produce false-positives and false-negatives.⁶⁰ Here, the problem is that jurors are human and make mistakes. They will mistakenly impose death on some offenders who do not deserve death, and mistakenly spare some who do. Under a completely individualized sentencing regime moral error would thus arise not from a feature of decisionmaking according to rules but from a failure of human judgment and moral insight.⁶¹ Omniscient jurors would never err. They would always impose death on only those defendants deserving of it.⁶² Real jurors, however, are not omniscient.

The penalty phase is a human institution, and human institutions produce injustice. Whether modeled wholly on the principle of individualization or wholly on the principle of consistency, the penalty phase will sometimes fail: Undeserving defendants will be condemned (false-positives) and deserving defendants will be spared (false-negatives). This inevitability of error, especially false-positive error, leads some to call for abolition. For them, no risk of error is morally tolerable. For those who are prepared to tolerate the inevitable risk of error, the most morally pressing of the two forms of injustice is that of executing defendants who do not deserve death. If some form of moral triage is unavoidable, the law's first priority should be to reduce

⁵⁹ Cf. Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1051-56 (1994) (describing this form of error as "retributive excess").

⁶⁰ Roscoe Pound observed this long ago. See Roscoe Pound, *Introduction*, to RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* xi, xvii (Rachel Szold Jastrow trans., 2d ed. 1911) ("Obviously the crude individualization achieved by our juries, and especially by leaving the assessment of penalties to trial juries, involves quite as much inequality and injustice as the mechanical application of the law by a magistrate.").

⁶¹ See, e.g., Joseph Raz, *Practical Reasons and Norms* 60 (reprint 1990) (noting that "human fallibility is a major reason for having . . . rules").

⁶² Margaret J. Radin, *Risk-of-Error Rules and Non-Ideal Justification*, in NOMOS XXVIII: JUSTIFICATION 33, 42 (J. Roland Pennock & John W. Chapman eds., 1986) ("The ideal observer does not make mistakes."); Margaret J. Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1168 (1985) (noting that in "an ideal system . . . the supposed paradox of fit 'versus' equal treatment would never arise") [hereinafter Radin, *Proportionality*].

the incidence of false-positives, since this—condemning the undeserving—is the greater moral wrong.⁶³

In fact, the penalty phase responds to this priority. As explained above, any unitary system of capital sentencing, whether individualized or rule-based, will generate two forms of moral error, with false-positive error being the greatest concern. The penalty phase is not unitary, however. It divides the capital sentencing process into two distinct stages—one known as the “death-eligibility stage” and the other as the “death-selection stage.” Moreover, each stage reflects one of the two principles governing the penalty phase.⁶⁴ At the first stage, which is governed by the consistency principle, the jury’s job is to apply the rules defining the so-called “death-eligible” class. If the rules apply and the defendant falls within the class, he is death-eligible and may be sentenced to death. If the rules do not apply and the defendant falls outside the class, he is death-ineligible. At the second stage, which is governed by the individualization principle, the jury’s task is no longer to apply a set of rules, but rather to exercise moral judgment and decide if the particular defendant before it deserves death.⁶⁵

⁶³ See, e.g., Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant’s Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 376 (1981) (“An erroneous decision to extinguish the defendant’s life is far more opprobrious than an erroneous decision to spare the defendant and sentence him to life imprisonment.”); cf. Radin, *Proportionality*, *supra* note 62, at 1169 (arguing that “norm of respect for persons requires that the risk of error [in capital sentencing] be borne by the punisher and not the punished”). This view has its challengers. A hard retributivist, for example, would rate the injustice of a false-negative on a par with the injustice of a false-positive. See, e.g., Ernest van den Haag, *supra* note 17 (arguing that it is as morally wrong to spare a defendant who deserves death as it is to condemn a defendant who does not deserve it); Ernest van den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165, 174 (1985) (same); cf. Allen, *supra* note 53, at 737 (“[R]educing the size of the death eligible class will almost surely reduce the number of arbitrary death sentences imposed, but it will just as surely increase the number of arbitrary life sentences imposed (again, whatever ‘arbitrary’ might mean.)”); Larry I. Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & CRIMINOLOGY 194, 198-99 (1979) (noting that Justice White is “more concerned that [those who deserve death] are condemned than with whether the system makes a ‘mistake’ and condemns a murderer who does not deserve the penalty”); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 863 (1992) (book review) (observing that “pre-Furman capital sentencing schemes were objectionable not simply because they resulted in *over*inclusive application of the death penalty, but also because they led to *under*inclusion”). Others are troubled by the inequality of sparing those who are more deserving of death than those actually condemned. Cf. Givelber, *supra* note 29, at 394 (hypothesizing an instance of a death-ineligible defendant who is arguably more deserving of death than a death-eligible defendant); Howe, *supra* note 27, at 386 (same).

⁶⁴ See, e.g., *Tuilaepa v. California*, 114 S. Ct. 2630, 2634 (1994) (“Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.”); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (same).

⁶⁵ See, e.g., Gillers, *supra* note 35, at 29-31; Sundby, *supra* note 23, at 1180-81.

For example, some states make murder committed in an “especially heinous, atrocious, or cruel” manner an aggravating circumstance.⁶⁶ If the jury finds the crime was committed in this fashion, the defendant becomes death-eligible. The state has decided that a defendant guilty of a “heinous” murder is, all else being equal, more deserving of death than a defendant guilty of a “nonheinous” murder. Still, death-eligibility means only that the defendant *may* deserve death. It does not mean that he does in fact deserve it. In order to reach *that* judgment, the jury must consider *all* the evidence in mitigation and aggravation. Only after receiving and deliberating on all the evidence is the jury in any position to judge whether death is deserved. “Death-eligible” does not mean “death-deserving.”

The two-stage system alleviates, but can never fully eliminate, the problem of false-positives. It moderates the problem inasmuch as those who fall within the rule-defined death-eligible class are not automatically condemned to death. The jury must still decide whether death is the deserved punishment for any particular class member. Dividing the process likewise alleviates the risk that a jury, otherwise left to its own devices without any rules to guide it, might mistakenly condemn undeserving defendants to death. In a two-stage system, the jury exercises moral judgment only over members of the death-eligible class, and the moral guilt of this group’s members is, all else being equal, greater than that of nonmembers.⁶⁷ Consequently, less room exists for the jury to make a mistake. In short, the two principles work hand-in-hand to structure a two-stage capital sentencing process that reduces the incidence of false-positive moral error.

⁶⁶ Circumstances of this type are considered aggravating in some twenty-nine jurisdictions and apply to 60-80% of all murders. See, e.g., James R. Acker & C.S. Lanier, “Parsing *This Lexicon of Death*: Aggravating Factors in Capital Sentencing Statutes, 30 CRIM. L. BULL. 107, 124-25 (1994). The Court has struggled to limit the potentially enormous scope of this aggravator, with questionable success. See, e.g., Arave v. Creech, 507 U.S. 463, 474-78 (1993); Shell v. Mississippi, 498 U.S. 1, 1 (1990) (per curiam); Walton v. Arizona, 497 U.S. 639, 654 (1990); Maynard v. Cartwright, 486 U.S. 356, 363 (1988); Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980). For criticisms of the Court’s efforts, see, e.g., Michael Mello, *Florida’s “Heinous, Atrocious or Cruel” Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984); Randall K. Packer, *Struck By Lightning: The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANCE 641 (1993-94); Richard A. Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941 (1986); cf. Paul J. Heald, *Medea and the Un-Man: Literary Guidance in the Determination of Heinousness Under Maynard v. Cartwright*, 73 TEX. L. REV. 571 (1995) (using the works of Dante, Lewis and Euripides to create an ethical framework for determining what constitutes an “especially heinous, atrocious, or cruel murder”).

⁶⁷ In his dissent from the denial of certiorari in *Callins*, however, Justice Blackmun suggested that singling out and imposing death on some members of this generally more culpable group of death-eligible defendants and not on others might seem *more* arbitrary, because members of this class are more alike than would be members of a larger class. See *Callins v. Collins*, 114 S. Ct. 1127, 1134 n.4 (1994) (Blackmun, J., dissenting from the denial of certiorari); see also Gillers, *supra* note 35, at 27-28.

This is not to suggest that the existing system cannot be modified to further reduce the risk of false-positive moral error. Abolish the death penalty, for example, and the risk drops to zero, though at some cost in false-negatives. Abolition, however, seems unlikely any time soon. For the time being, the more realistic question is whether the death-eligible class is too large.⁶⁸ Does it include some offenders who, on reflection, we think do not usually deserve death? Perhaps the death-eligible class should include only serial murderers.⁶⁹ Limiting the class in this fashion would reduce the incidence of false-positives and increase the consistency of the capital sentencing process. Moreover, we might conclude that we can achieve these gains without an unacceptably great increase in the incidence of false-negatives.⁷⁰

Taking this step would, however, require confronting hard questions of moral substance.⁷¹ It would require identifying more precisely what makes an offender deserving of death. Some would say this kind of question is not worth asking, either because no one de-

⁶⁸ The death-eligible class today is about as large as it was before *Furman*. Consequently, today's capital sentencing schemes yield no greater consistency than did their pre-*Furman* predecessors. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 911 (1983) (Marshall, J., dissenting) ("The only difference between Georgia's pre-*Furman* capital sentencing scheme and the 'threshold' theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance."); accord *Penry v. Lynaugh*, 492 U.S. 302, 360 (1989) (Scalia, J., dissenting in part and concurring in part) ("[T]he Court has come full circle, not only permitting but requiring what *Furman* once condemned."); *Johnson v. Singletary*, 938 F.2d 1166, 1180 (11th Cir. 1991) ("The Court has returned the law largely to its pre-*Furman* state but has ratcheted the doctrine up one step from its starting point."), cert. denied, 506 U.S. 930 (1992); DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 102 (1990) (concluding that more than 90% of those defendants eligible for death before *Furman* would be eligible after *Furman*); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 7 (1987-88) ("The pre-*Furman* situation in large part still exists."); Gillers, *supra* note 38, at 1061 (noting that only one statutory aggravating circumstance "satisf[ies] *Furman*"); Ledewitz, *supra* note 47, at 350 n.126 ("[I]t would seem clear that to allow unbridled discretion in imposing the death penalty returns the court to *McGautha v. California*, 402 U.S. 183 (1971)."); Steiker & Steiker, *supra* note 63, at 867 (noting that states have "largely reproduced the pre-*Furman* scheme"); Steiker & Steiker, *supra* note 23, at 373 (noting that "death-eligibility remains . . . nearly as broad [today] as under the expansive statutes characteristic of the pre-*Furman* era"); Weisberg, *supra* note 16, at 358 (describing the single-aggravator rule as an "aesthetic requirement").

For a more optimistic assessment of the existing doctrinal landscape, see Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643 (1993).

⁶⁹ See, e.g., Steiker & Steiker, *supra* note 23, at 415-18 (exploring ways to narrow the death-eligible class).

⁷⁰ Narrowing the death-eligible class might also help reduce the scourge of racial discrimination in capital sentencing. See *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting). It is, of course, possible that racial discrimination would simply turn up within the confines of a smaller death-eligible class.

⁷¹ See, e.g., Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 30-31 (1995) ("Further differentiating [between murderers who deserve death and murderers who do not] would require some painful soul-searching about the nature of human evil.").

serves death or because the question itself makes no sense.⁷² The point here is only to suggest that we are less likely to ask this kind of question until we look beyond the formal principles of individualization and consistency. Focusing on those two principles tends to obscure critical substantive questions and usually leads straight to the impasse of the paradox. Limiting the size of the death-eligible class is perhaps the most commonly recommended way to get beyond this impasse.⁷³ The next Part offers another.

II

THE PLACE OF MERCY IN THE PENALTY PHASE

The preoccupation with the paradox of capital sentencing has kept other issues off the intellectual agenda. Among these is the role of mercy in the penalty phase.

A. The Selection-Stage "Hodge-Podge"

The Constitution imposes some substantive limits on the power of the state to impose the death penalty. At the threshold, death cannot be imposed for crimes other than murder.⁷⁴ Moreover, within the category of murder, the state cannot execute those under age sixteen,⁷⁵ those who did not intend to kill,⁷⁶ or those who become insane after conviction and sentencing.⁷⁷ Finally, only an "aggravated" murder can render a defendant death-eligible.⁷⁸ These rules, derived

⁷² Or, some would say, because *all* aggravated murderers deserve death simply because they are guilty of aggravated murder. Indeed, far from limiting the size of the death-eligible class, the actual trend seems to be moving in the opposite direction.

⁷³ See, e.g., Steiker & Steiker, *supra* note 23, at 415-18 (analyzing strategies for narrowing the death-eligible class by state legislatures and by the Court); Kozinski & Gallagher, *supra* note 71, at 29-30.

⁷⁴ This is the proposition for which *Coker v. Georgia*, 433 U.S. 584 (1977), is generally understood to stand. Treason might be the exception to this general rule limiting the death penalty to murder. See, e.g., Steiker & Steiker, *supra* note 23, at 417 n.300. But see James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983).

⁷⁵ See *Thompson v. Oklahoma* 487 U.S. 815 (1988) (plurality opinion). See generally VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 21-40 (1987) (arguing that Eighth Amendment principles prohibit execution of those under eighteen).

⁷⁶ More precisely, the state cannot execute those who were not "major participants" in the crime and who did not display "reckless indifference" to the value of human life. See *Tison v. Arizona*, 481 U.S. 137, 138 (1987); see also *Cabana v. Bullock*, 474 U.S. 376 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982).

⁷⁷ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁷⁸ See, e.g., *Zant v. Stephens*, 462 U.S. 862, 876-78 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."); accord *Tuilaepa v. California*, 114 S. Ct. 2630, 2634-35 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Barclay v. Florida*, 463 U.S. 939, 954 (1983); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). This "single-aggravator" rule is best understood as an application of the proportionality doctrine. Cf. *Graham v. Collins*, 501 U.S. 461, 501 (1993) (Stevens, J., dissenting)

from the "proportionality" doctrine⁷⁹ and the "evolving standards of decency" doctrine,⁸⁰ set substantive constitutional limits on the death-eligible class. Once the defendant enters the death-selection stage, however, these limits evaporate.⁸¹

(describing the single-aggravator rule, or "narrowing requirement," as a "corollary to the proportionality requirement").

⁷⁹ See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977). Two things about the proportionality doctrine deserve mention. First, it is now confined to capital cases and exists only as a shadow of its former self in noncapital cases. See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality opinion) (holding that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime").

Second, although the proportionality doctrine has long been "informed by objective factors to the maximum possible extent," *Coker*, 433 U.S. at 592, more recent articulations have injected a heavier dose of positive indicia into the doctrine, so that it now approximates the "evolving standards" doctrine, see *infra* note 80. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (noting that "the two methodologies blend into one another"); Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1990) (noting the importance of "community sentiment" in both the "evolving standards" and proportionality doctrines). If the proportionality doctrine is to retain any independent vitality, however, the "Constitution contemplates that *in the end* [the Court's] *own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597 (emphasis added); accord *Enmund*, 458 U.S. at 797; *Thompson*, 487 U.S. at 833; *Stanford*, 492 U.S. at 392 (Brennan, J., dissenting); cf. *Harmelin*, 501 U.S. at 986 (plurality opinion) (Scalia, J.) ("The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not.").

⁸⁰ See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Two things about the evolving standards doctrine likewise deserve mention. First, the Court's articulation of our evolving standards depends critically on the methodology the Court uses to identify those standards. The Court today looks almost exclusively to the statutory enactments of state legislatures. If enough states allow the execution of a certain offender for a certain offense, then the evolving standards doctrine will not stand in the way. See, e.g., *Stanford*, 492 U.S. at 391 (Brennan, J., dissenting); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187, 191 (1991); cf. William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 142 (1994) (noting that standards of decency vary depending on how they are gauged and finding that most respondents preferred life imprisonment with restitution over capital punishment). Justice Marshall argued long ago in *Furman* that people would reject the death penalty if they understood how it was actually administered. See *Furman v. Georgia*, 408 U.S. 238 (1972) (Marshall, J., concurring); cf. Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (demonstrating that Marshall's hypothesis is empirically valid and that the results of the test may help to clarify the proper role for public opinion).

Second, and more importantly, insofar as the evolving standards doctrine depends on state law, its status as a constitutional doctrine is deeply suspect. A constitutional limitation on state power that yields when enough states choose to exercise that power hardly seems like a constitutional limitation. See, e.g., *Stanford*, 492 U.S. at 391-92 (Brennan, J., dissenting); Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 144 (1991). But cf. Steiker & Steiker, *supra* note 63, at 848-55 (employing contemporary standards of decency as reflected in state statutes to define proper scope of mitigation in penalty phase but recognizing limitations of methodology).

⁸¹ Although narrowing the death-eligible class is one of the most promising ways to reform capital sentencing, see *supra* notes 69-73 and accompanying text, the Court's cur-

During the death-selection stage, the Constitution entitles the defendant, and allows the state, to introduce almost anything. With respect to mitigation, the jury cannot be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense . . . proffer[ed] as a basis for a sentence less than death."⁸² With the exception of invidious factors, such as race, and totally irrelevant factors, such as how often the defendant showers, the jury must consider whatever mitigating evidence the defendant produces. With respect to aggravation, the Court will uphold any nonvague aggravating circumstance, so long as that circumstance can "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁸³ Moreover, once the jury finds a statutory aggravating circumstance, the state is free to introduce any nonstatutory aggravating evidence it wishes, provided the evidence relates to some "aspect of the defendant's character or record" or to some "circumstance of the offense."⁸⁴

What is most striking about the death-selection stage is its *laissez-faire* character. Once the defendant passes the critical threshold of death-eligibility and enters the individualized death-selection stage, the penalty phase becomes almost wholly unregulated. The individualization principle, which governs this second stage, has accordingly been characterized as imposing "no substantive limitation at all."⁸⁵ Some commentators see this lack of substance as a plus, arguing that it conveniently circumvents difficult moral questions about what justifies imposing death on this or that defendant and leaves the jury free to decide for itself whether death is an appropriate sanction.⁸⁶ Other commentators deplore this state of affairs, arguing that the death-selection stage has become a free-for-all in which the defendant introduces whatever he thinks will secure a life sentence, and the state introduces whatever it thinks will secure a death sentence. Indeed, one court aptly characterized the death-selection stage as a "hodgepodge."⁸⁷

If we assume that the goal of the penalty phase is to impose the death penalty only when it is deserved, this lack of substantive regulation at the selection stage is a distinct failing. If a jury is free to im-

rent approach to the proportionality and evolving-standards doctrines suggests that any narrowing is unlikely to come from the Court.

⁸² *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

⁸³ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

⁸⁴ *Lockett*, 438 U.S. at 604.

⁸⁵ *Steiker & Steiker*, *supra* note 63, at 853.

⁸⁶ *Billionis*, *supra* note 27, at 301 (arguing that *Lockett* contains "no reference to any particular moral theory" and this "moral neutrality" is a "considerable achievement").

⁸⁷ *United States v. Davis*, 904 F. Supp. 554, 559 (E.D. La. 1995).

pose death on the basis of facts and circumstances that shed no light on the defendant's just deserts, we run an unnecessary risk that the jury will impose death on defendants who do not deserve it. Moreover, as long as we continue to view the death-selection decision as an undifferentiated *mélange* or hodge-podge, our understanding of the penalty phase will remain incomplete. We will overlook the role of mercy in capital sentencing and how we might restructure the penalty phase in order to accommodate mercy.⁸⁸

B. Moral Desert and Mercy

Retributivism holds that punishment is justified when it is deserved. How much punishment a defendant deserves depends on how much harm he caused and the culpability with which he caused it.⁸⁹ The greater the harm a defendant causes the more severely he deserves to be punished. Likewise, the more culpable a defendant is—the more morally responsible he is for what he has done—the more severely he deserves to be punished. Finally, retributivism is deontological and backward-looking. In contrast to forward-looking consequentialist approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been. Punishment strictly predicated on moral desert is blind to the future.

Once we identify the punishment a defendant deserves, we face a fork in the philosophical road, for retributivism comes in two very different varieties.⁹⁰ The first—strong retributivism—places an *obligation* on the sentencer to impose the punishment the offender deserves.⁹¹

⁸⁸ Steiker & Steiker, *supra* note 23, at 414.

⁸⁹ See, e.g., FLETCHER, *supra* note 9, at 461; ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363 (1981); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* 155 (1987) ("According to the retributivist, the moral seriousness of an offence is a function of two major factors—the harm done by the offence and the culpability of the offender as indicated by his mental state at the time of committing the offence."); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* 64-67 (1985); ANDREW VON HIRSCH, *DOING JUSTICE* 69 (1976) [hereinafter *VON HIRSCH, DOING JUSTICE*] ("Seriousness' depends both on the harm done (or risked) by the act and on the degree of the actor's culpability."); Michael Davis, *Harm and Retribution*, 15 *PHIL. & PUB. AFF.* 236, 254 (1986); George P. Fletcher, *What Is Punishment Imposed For?*, 5 *J. CONTEMP. LEGAL ISSUES* 101, 107 (1994); Edward M. Wise, *The Concept of Desert*, 33 *WAYNE L. REV.* 1343, 1352 (1987) (noting that "two leading components of desert" are culpability and harm); cf. *Witte v. United States*, 115 S. Ct. 2199, 2211 (1995) (Stevens, J., dissenting) ("Traditional sentencing practices recognize that a just sentence is determined in part by the character of the offense and in part by the character of the offender.").

⁹⁰ See generally John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238 (1979) (attempting to categorize the various forms of retribution).

⁹¹ Kant is perhaps the most well-known strong retributivist. See, e.g., IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Ladd trans., 1965). However, some have questioned whether Kant even had a "theory of punishment." See, e.g., Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 *COLUM. L. REV.* 509 (1987).

The second—weak retributivism—merely *authorizes* the sentencer to impose the deserved punishment, thus leaving room for the exercise of mercy. For the weak retributivist, justice imposes no obligation to impose deserved punishment. It only confers a *right* to do so. Mercy consists in the supererogatory waiving of that right. At its most basic, an act of mercy is simply a decision to impose less punishment than is deserved.⁹²

The idea of mercy makes sense only within a retributive approach to punishment.⁹³ This is partly because retributivism is a multi-principled, or at least a dual-principled, ethic. In contrast, a utilitarian approach to punishment is monistic. The only relevant inquiry for a utilitarian sentencer is whether the punishment she imposes, taking into account the suffering of the defendant offset against the benefits his suffering brings to society, will produce a net increase in overall utility. This single-minded focus on utility washes away any distinction between imposing a punishment because it is deserved and imposing a punishment less than is deserved as an act of mercy. In short, whereas retributivism can at least contemplate the possibility of mercy, utilitarianism cannot.

Mercy finds its home within a retributive philosophy of punishment and consists, most simply, of imposing less punishment than is deserved. The moral status of mercy and its relationship to justice, however, remain matters much in dispute.⁹⁴ Mercy, Shakespeare tells us, is a gentle virtue twice over.⁹⁵ It shines on its giver, who reveals in his act of mercy a character and disposition gentler than justice demands of him, and it shines also on its beneficiary, who receives a punishment gentler than he deserves. Yet mercy is not only gentle, it is also puzzling. It may even be immoral. This is so precisely because mercy, being gentler than justice, stays the heavier hand of deserved

⁹² See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 168 (1990) (“[M]ercy is simply refraining, for good reasons, from imposing legally legitimate punishment.”); JOHN KLEINIG, *PUNISHMENT AND DESERT* 88 n.28 (1973) (stating that although “moral considerations determine merciful treatment, I do not think they are desert considerations.”); SADURSKI, *supra* note 54, at 240 (“Mercy, strictly, means that a judge . . . decides to impose less than just punishment.”); Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, *supra* note 9, at 39 (“[T]o show *mercy* . . . is necessarily to *act* (and not just feel) in a certain way.”).

⁹³ See, e.g., K.G. ARMSTRONG, *The Retributivist Hits Back*, in *THE PHILOSOPHY OF PUNISHMENT* 138, 155 (H.B. Acton ed., 1969); cf. MARVIN HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE* 5 (1990) (“[F]orgiveness is a derivative act—at home conceptually only in a larger panorama where retribution is the normal response to deliberate evil.”); Smart, *supra* note 9, at 356 (arguing that “[t]he notion of mercy seems to get a grip only on a retributivist view of punishment” because utilitarianism reduces everything to one value (utility) whereas retributivism is a “multi-principled” ethic).

⁹⁴ See sources *supra* note 9.

⁹⁵ See Shakespeare, *supra* note 1, at act 4, sc.1.

punishment and stops justice from being done.⁹⁶ When measured against the demands of justice, therefore, mercy seems to grant its recipient an unwarranted and illegitimate windfall.⁹⁷

Whether an act of mercy is inescapably unjust or immoral, mercy and justice are not the same thing, though the two are often confused. According to some, mercy merely requires that a decisionmaker pay attention to those moral particulars she would otherwise ignore under a rule-based decisionmaking regime. This view locates mercy in the grand tradition of equity and treats it as a means of ameliorating the injustice attributable to the strict application of rules. It fails, however, to treat mercy as a distinct and autonomous moral notion. Moreover, although mercy does indeed require individualization and attention to moral particulars, so too does justice.⁹⁸ Treating mercy as if it were simply a species of equity erroneously reduces mercy to justice. Individualization alone, therefore, is an inadequate account of mercy.

An adequate account requires a substantive dimension. Mercy and justice differ insofar as they attend to different constellations of moral particulars.⁹⁹ In other words, inasmuch as the decision to grant mercy is based on reasons, the domain of reasons on which a sentencer can legitimately rely in assessing deserved punishment is distinct from the domain of reasons on which she can legitimately rely when deciding to grant mercy.¹⁰⁰ Justice (desert) looks only to the

⁹⁶ See, e.g., Harrison, *supra* note 9, at 108; Smart, *supra* note 9, at 349 ("One of the other things we mean when we talk about showing mercy, is deciding not to inflict what is agreed to be the just penalty, all things considered.").

⁹⁷ See, e.g., Johnson, *supra* note 9, at 559; Simmonds, *supra* note 9, at 53 ("Mercy seems to require a *departure* from justice, and therefore to require *injustice*."); Walker, *supra* note 9, at 30 ("[T]empering [justice] is tampering [with it]."). But cf. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, *supra* note 9, at 14 (noting view that mixing justice with mercy makes it stronger).

⁹⁸ See, e.g., Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, *supra* note 9, at 12 ("This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and is thus a basic demand of justice."); see also KLEINIG, *supra* note 92, at 88 (noting a sense of "mercy" in which "mercy is not opposed to justice as such but to justice as it has been solidified in a system of legal rules"); SADURSKI, *supra* note 54, at 240 (noting that imposing less punishment than that "dictated by the strict application of law" is not "genuine 'mercy'").

⁹⁹ See, e.g., Dressler, *Hating Criminals*, *supra* note 9, at 1471 n.89 (implicitly noting distinction between mercy-based and desert-based reasons); Harwood, *supra* note 9, at 466 ("[W]hen other moral factors provide reasons for mercy, they can outweigh and override our reason and prima facie duty to punish."); cf. Hugo A. Bedau, *A Retributive Theory of the Pardoning Power*, 27 U. RICH. L. REV. 185, 194-95 (1992) (distinguishing between the claim that one deserves less punishment from the claim that one's punishment ought to be reduced).

¹⁰⁰ Mercy is here treated as a power that can properly be vested in an agency of the state, but this view is controversial. See, e.g., Harrison, *supra* note 9, at 108 ("[A] state cannot be merciful."); Stephen J. Morse, *Justice, Mercy, and Crazy*, 36 STAN. L. REV. 1485,

facts and circumstances surrounding the defendant's culpable wrongdoing. Mercy is not so constrained, countenancing facts and circumstances stretching well beyond the legitimate sphere of justice's influence. Mercy knows reasons which justice knows not.¹⁰¹

That we look to some facts and circumstances to decide what justice requires and to others to decide if mercy is appropriate may not be the only difference between them. A full account of the difference might also involve the moral character of the mercy-giver. When a person acts unjustly, he is rightly criticized for what he has done. His obligation to do justice is independent of his character. The same does not seem true of mercy.¹⁰² Whether a defendant receives mercy may depend—and legitimately so—as much on the character of the mercy-giver as on the constellation of moral particulars to which the mercy-giver attends. However, although a defendant is entitled to a just sentencer, he is not entitled to a merciful one.

The goal here is not to examine how mercy may or may not depend on the character of the sentencer. The goal is rather to identify the moral particulars on which a sentencer might rely in deciding whether to grant mercy. First, however, we need to distinguish two conceptions of mercy.¹⁰³ As discussed earlier, retributivism comes in two varieties, weak and strong. Mercy is compatible only with the weak variety. Mercy, too, can be usefully divided into strong and weak varieties. The strong conception of mercy allows the sentencer to consider only those facts and circumstances that are likely to elicit a merciful response. This conception is strong because the sentencer

1509 (1984) (book review) (remarking that "[g]ranting mercy cannot be the law's business."); Walker, *supra* note 9, at 30-31 ("Agents of the State cannot properly act on behalf of private individuals."); cf. Margaret R. Holmgren, *Forgiveness and the Intrinsic Value of Persons*, 30 AM. PHIL. Q. 341, 341 (1993) ("Only those who have been injured are properly situated to forgive."). Murphy would allow the state to dispense mercy, but only as an agent of the victim (i.e., only if the victim chose to be merciful). Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, *supra* note 9, at 13.

¹⁰¹ This paraphrase is purloined from Pascal, *quoted in* Pillsbury, *supra* note 14, at 710 ("The heart has its reasons, which reason knows not.") (quoting BLAISE PASCAL, *PENSEES* 343 (H.F. Stewart ed., 1950)).

¹⁰² See, e.g., Nussbaum, *supra* note 9, at 102 (suggesting that mercy is an "inclination of the soul to mildness in exacting penalties"); see also Muller, *supra* note 9, at 307 ("Mercy is not an action at all; rather it is an attitude that influences and guides the action that the sentencer ultimately takes."); cf. Allen Buchanan, *Justice and Charity*, 97 ETHICS 558, 569 n.22 (1987); Harwood, *supra* note 9, at 469.

¹⁰³ What is here called "mercy" should he kept distinct from what others have called "general deserts." See Howe, *supra* note 27, at 351 (distinguishing between "culpability" and "general deserts"). Both ideas are similar insofar as they distinguish between two different kinds of reasons for imposing punishment: those reasons that illuminate what punishment a defendant deserves and those that function in some other way. The difference between treating this latter set of reasons as bearing on "general deserts," rather than on mercy, comes down to this: The former characterization implies that a defendant is *entitled* to have his sentence reflect these reasons. The latter characterization, in contrast, carries no such implication.

never hears anything about the character of the offender or circumstances of the offense that might persuade her *not* to extend mercy. The weak conception of mercy, in contrast, is not so limited and allows the sentencer to consider facts and circumstances that weigh *against* granting mercy. Under this conception, mercy is a gift the defendant can seek, but it is also one the state can rightly urge the jury to withhold.

The strong conception of mercy draws support from the principle of *in favorem vitae*,¹⁰⁴ since a sentencer is more likely to grant mercy if the only pleas she hears are in favor of mercy. The weak conception, however, is more in keeping with the existing structure of the penalty phase. The penalty phase is in many ways like a trial. The proceeding is adversarial, and the state and the defendant each present evidence and argument to the trier of fact supporting their position. Once the state has proven the existence of at least one nonvague, aggravating factor, however, the defendant no longer enjoys many of the legal advantages he did during the guilt phase.¹⁰⁵ The penalty phase is more or less a "level playing field" where the state and the defendant stand on an equal footing. The weak conception of mercy is more faithful to this structure.

C. Reconstructing the Penalty Phase

Incorporating a weak conception of mercy into the capital sentencing process requires a conceptual reconstruction of the penalty phase. As explained earlier, the penalty phase is currently composed of two stages: the death-eligibility stage and the death-selection stage. The distinction between desert and mercy suggests that the second stage—the death-selection stage—is more complex than commonly thought. For once we flesh out the proper role of mercy, the penalty phase includes three levels, rather than two.

The first level is the familiar death-eligibility stage. The second level is the "desert phase" of the death-selection stage. During this phase the jury must determine if the defendant deserves death. As suggested in Part I, these two levels share the common goal of imposing deserved punishment. What separates them are the different

¹⁰⁴ "In favor of life." BALLENTINE'S LAW DICTIONARY 619 (3d ed. 1969).

¹⁰⁵ The state is not, for example, required to "prove" that the defendant deserves the death penalty "beyond a reasonable doubt." See, e.g., *Ford v. Strickland*, 696 F.2d 804, 817-19 (11th Cir. 1983) (en banc) (rejecting reasonable doubt requirement in capital sentencing), *cert. denied*, 464 U.S. 865 (1983); see also *Zant v. Stephens*, 462 U.S. 862, 878-79 (1983); *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991); *Dubber*, *supra* note 14, at 87 (stating that the Court "has established a level playing field"). But see Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 196 (1991) (arguing that the state should be required to prove "beyond a reasonable doubt" that death is the deserved punishment).

modes of decisionmaking they employ. The first is rule-bound, while the second is individualized. The third level becomes what we might call the "mercy phase" of the death-selection stage. During this phase, the jury must decide whether to grant the defendant mercy.

Under this proposed reconstruction, the death-selection stage has two goals. The first is to enable the jury to determine what punishment the defendant deserves. The second is to afford it an opportunity to show mercy. The mercy phase, together with the desert phase, would thus make up two separate and distinct moments in the death-selection decision.¹⁰⁶ These two phases are similar insofar as both rely on individualized decisionmaking, but they differ insofar as the purpose of the former is to impose just deserts, while the purpose of the latter is to allow for the possibility of mercy.

Setting aside for the moment how this conceptual distinction might actually be implemented, the more immediate task is to begin identifying which facts and circumstances now lumped together in the death-selection stage should be allocated to the mercy phase and which should be left in the desert phase. Penalty-phase evidence is usually classified as either "aggravating" or "mitigating." The distinction between desert and mercy cuts across this dichotomy. Aggravating evidence can be aggravating either because it provides a reason to believe death is deserved ("desert-aggravating"), or because it provides a reason not to extend mercy ("mercy-aggravating"). Likewise, mitigating evidence can be mitigating either because it provides a reason to believe death is not deserved ("desert-mitigating"), or because it provides a reason to extend mercy ("mercy-mitigating").¹⁰⁷ Existing doctrine ignores these distinctions.

The rich universe of evidence now admitted in the penalty phase must belong either to the domain of mercy or to the domain of justice. But figuring out which is tricky. For example, does victim impact evidence help us decide what punishment is deserved, or only whether to grant or withhold mercy? What about character evidence? What about evidence of future dangerousness? We now turn to these questions.

¹⁰⁶ Cf. Michael Davis, *How To Make the Punishment Fit the Crime*, 93 ETHICS 726, 750-52 (1983) (distinguishing between "retribution stage" and "clemency stage" of sentencing); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 368 (1996).

¹⁰⁷ Cf. Davis, *supra* note 57, at 88-89 (distinguishing between "first-stage" and "second-stage" aggravating evidence).

1. *Victim Impact Evidence*

In most states, a jury can sentence a defendant to death based on the suffering he causes his victim and his victim's family.¹⁰⁸ Evidence presented through so-called "victim impact statements" usually falls into one of two major categories: evidence about the victim and the victim's life, or evidence about the impact of the crime on the victim's family.¹⁰⁹

The Supreme Court first considered victim impact evidence in *Booth v. Maryland*.¹¹⁰ In *Booth*, the victims' family members described in detail how the defendant's crime had changed their lives.¹¹¹ Writing for a bare majority over a strong dissent, Justice Powell suggested that such evidence bore no rational relationship to the defendant's moral guilt and should therefore be excluded from the penalty phase. Unless the defendant was aware of the details of his victim's life, his family, and his place in the community at the time of the crime, he could not have known the full extent of the harm he would cause and therefore should not be held accountable for it. Punishment, the *Booth* Court implied, was properly a function of the harm one causes, but only insofar as the harm is foreseen or reasonably foreseeable.¹¹²

Although the rule articulated in *Booth* was extended two years later in *South Carolina v. Gathers*,¹¹³ the *Booth* dissenters eventually prevailed.¹¹⁴ Speaking through Chief Justice Rehnquist, the Court in

¹⁰⁸ Most states now allow victim impact evidence to be introduced at the penalty phase. See, e.g., *State v. Muhammad*, 678 A.2d 164, 177-78 (N.J. 1996) (collecting cases).

¹⁰⁹ A third category includes evidence about what sentence the victim's family thinks is appropriate. Victim impact evidence of this kind is probably inadmissible. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991); *id.* at 835 n.1 (Souter, J., concurring); *State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 116 S. Ct. 534 (1995); Kathryn E. Bartolo, *Payne v. Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1221-22 (1992).

¹¹⁰ 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808 (1991).

¹¹¹ The victim's experiences were compiled in a victim impact statement, which was then read to the jury. *Id.* at 496-501.

¹¹² *Id.* at 504 (victim impact evidence "may be wholly unrelated to the blameworthiness of a particular defendant."); *cf.* van den Haag, *supra* note 63, at 167 ("Retribution for the suffering of the individual victims, however much deserved, is not punishment . . .").

¹¹³ 490 U.S. 805 (1989) (extending *Booth* to cover prosecutorial comments about the victim), *overruled by Payne*, 501 U.S. 808 (1991).

¹¹⁴ In the meantime, the Court's membership had changed. Justice Powell retired and was replaced by Justice Kennedy. Although Justice Kennedy voted with the dissenters in *Gathers*, Justice White, who had dissented in *Booth*, voted with the majority in *Gathers*, saying only that unless *Booth* was overruled, it controlled the disposition in *Gathers*. Justice Brennan also retired, and was replaced by Justice Souter, who voted with the majority in *Payne*. See, e.g., David R. Dow, *When Law Bows to Politics: Explaining Payne v. Tennessee*, 26 U.C. DAVIS L. REV. 157 (1992).

The commentary on *Payne* has been almost uniformly negative. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 410 (1996) ("The victim impact statement dehumanizes the defendant and employs the victim's story for a particular end: to cast the defendant from the human community."); Vivian Berger, *Payne*

*Payne v. Tennessee*¹¹⁵ overruled both *Booth* and *Gathers*, noting that they “were decided by the narrowest of margins, over spirited dissents.”¹¹⁶ *Payne* dealt at length with the supposed unfairness of allowing the defendant, as was his right under *Lockett*, to portray himself to the jury as a “unique human being,” while the victim remained a “faceless stranger.”¹¹⁷ The more important question, however, is whether the “humanization” of the victim through victim impact evidence casts any light on a defendant’s just deserts.

Before *Payne*, the Court accepted the following syllogism: (1) a death sentence should reflect the defendant’s moral blameworthiness; (2) the only harm for which a defendant is morally blameworthy is the harm he foresaw or could reasonably have foreseen; (3) victim impact evidence is evidence of harm the defendant could not have reasonably foreseen; (4) therefore, victim impact evidence is irrelevant to the death-selection decision.¹¹⁸ Chief Justice Rehnquist, writing for the majority in *Payne*, seemed to accept the first proposition, that the death-selection decision should reflect the defendant’s moral blameworthiness, but reject the second. According to this view, moral blameworthiness *can* depend upon unforeseen and unforeseeable harm.¹¹⁹

and Suffering—A Personal Reflection and a Victim-Centered Critique, 20 FLA. ST. U. L. REV. 21 (1992) (contending that *Payne* actually represents a step back for victims’ rights); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78 (arguing that “*Payne* submerges rather than acknowledges the equality issues embedded in decisions about death”); R.P. Peerenboom, *Victim Harm, Retribution and Capital Punishment: A Philosophical Critique of Payne v. Tennessee*, 20 PEPP. L. REV. 25 (1992) (maintaining that victim impact statements are relevant only to the degree that the defendant was aware of the victim’s unique characteristics and family background); Michael Vitiello, *Payne v. Tennessee: A “Stunning Ipse Dixit,”* 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 165 (1994) (arguing *Payne* did not meet the necessary criteria for overruling recent precedent); see also Jonathan H. Levy, Note, *Limiting Victim Impact Evidence After Payne v. Tennessee*, 45 STAN. L. REV. 1027 (1993). But see Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863 (1996). On the role of victims in the criminal process more generally, see Andrew Ashworth, *Victim Impact Statements and Sentencing*, 1993 CRIM. L. REV. 498; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); Lynne N. Henderson, *The Wrongs of Victims’ Rights*, 37 STAN. L. REV. 937 (1985).

¹¹⁵ 501 U.S. 808 (1991).

¹¹⁶ *Id.* at 829. For a discussion of *Payne*’s treatment of precedent, see Vitiello, *supra* note 114; see also Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 129 (1991).

¹¹⁷ *Payne*, 501 U.S. at 825 (quoting *Gathers*, 490 U.S. at 821 (O’Connor, J., dissenting)).

¹¹⁸ *Id.* at 818-19.

¹¹⁹ In his concurring opinion, Justice Souter appeared to reject proposition (3). He argued that victim impact statements should be admissible because every “[m]urder has foreseeable consequences” and “evidence of the specific harm caused [i.e., victim impact evidence] when a homicidal act is realized is nothing more than evidence of the risk that the defendant originally chose to run.” *Id.* at 838 (Souter, J., concurring); see also Gewirtz, *supra* note 114, at 873 (“The account of the suffering of the victim’s survivors in individual cases is a particularization of a generally foreseeable harm.”). Although it seems plausible to impute to a murderer knowledge that “murder has foreseeable consequences” and that

At root, victim impact evidence raises what philosophers generally call the problem of "moral luck."¹²⁰ Take two defendants, both of whom commit capital murder. In one case, the victim is without friends or kin; in the other, she is the loving mother of four. In neither case did the defendant know who his victim was, nor could he have reasonably foreseen how his crime would ripple into the future. From all outward appearances, the victims and the crimes were indistinguishable. Nonetheless, one might contend that the first defendant deserves a lesser punishment, because he caused less actual harm, while the second deserves a greater punishment, because he caused more actual harm. It was, however, only a matter of luck that the first defendant's victim was a loner and the second defendant's victim a mother of four. Such luck, one might argue, should have no bearing on how severely a person is punished. As much as possible, punishment should be immune from luck's vagaries.

Payne rejects this immunity-from-luck principle. The Court noted how the law already allows luck to affect punishment.¹²¹ The law of attempts, for example, punishes a robber who aims, shoots and hits his victim more harshly than it does one who aims, shoots and misses.¹²² Both robbers are equally blameworthy if the only measure of blameworthiness is the harm they intend to cause. The only difference between the two is that one actually succeeded in causing the harm he intended.¹²³ This difference, however, is only a matter of

the act will cause harm beyond the immediate death of the victim, it seems implausible to impute to him knowledge of the specific and highly detailed harm conveyed by victim impact evidence. Cf. *Livingston v. State*, 444 S.E.2d 748, 759 (Ga. 1994) (Benham, J., dissenting) (describing victim impact statement as "detailed narration of the emotional and economic sufferings of the victim's family and members of the victim's community resulting from the victim's death" that could not have been foreseen).

¹²⁰ See generally Thomas Nagel, *Moral Luck*, in *MORTAL QUESTIONS* 24 (Thomas Nagel ed., 1979); Bernard Williams, *Moral Luck*, in *MORAL LUCK* 20 (Bernard Williams ed., 1981); see also Steven Sverdlik, *Crime and Moral Luck*, 25 AM. PHIL. Q. 79 (1988) (arguing that the theory of moral luck is "riddled with difficulties"); Kimberly D. Kessler, Note, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994) (describing the general idea of "moral luck" and offering practical solutions).

¹²¹ See, e.g., *Payne*, 501 U.S. at 819-20; see also *United States v. Martinez*, 16 F.3d 202, 206 (7th Cir.) (Posner, C.J.) ("'[M]oral luck' as philosophers refer to distinctions in culpability that are based on consequences rather than intentions, is, rightly or wrongly, a pervasive characteristic of moral thought in our society, at least the moral thought that informs the criminal law."), cert. denied, 115 S. Ct. 226 (1994).

¹²² *Payne*, 501 U.S. at 819.

¹²³ Other suggested explanations for why the law punishes failed attempts less harshly than completed crimes include treating failed attempts as evidence that the defendant did not *really* intend to cause harm after all (thus making the attempt less deserving of punishment), and offering an incentive for the would-be offenders to desist. See, e.g., Gail Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145, 147-48 (1994); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 145 (1995).

luck. The *Payne* majority saw no need to give capital defendants special treatment. Actual harm matters.

The problem of moral luck defies easy solution. Some urge that only intended harm is relevant to deserved punishment,¹²⁴ while others insist, as did the Court in *Payne*, that actual harm is also relevant.¹²⁵ Insofar as victim impact evidence raises the problem of moral luck, no simple solution exists. We can, however, find another way to look at the problem.

Both the majority and dissent in *Payne* assumed that the relevance of victim impact evidence turned on its relationship with moral desert. In a restructured penalty phase, however, victim impact evidence would be admitted not on the question of desert, but on the question of mercy. Once the jury concludes the defendant deserves death, the state would be allowed to introduce victim impact evidence, but only to defeat the defendant's plea for mercy. Conversely, if the victim's family members were willing to testify for the defendant, a rare but not unknown occurrence,¹²⁶ they would be permitted to do so, but only during the mercy stage. This approach to victim impact evidence respects the principle that capital defendants should be punished only for harm they could reasonably foresee causing, while at the same time allowing actual harm, foreseeable or not, to play a role in the final outcome. Actual but unforeseeable harm would play a role in

¹²⁴ See generally GEORGE P. FLETCHER, WITH JUSTICE FOR SOME 200 (1995) ("The offender is not accountable, not blameworthy, for things of which he or she is faultlessly ignorant."); TEN, *supra* note 89, at 157 ("[R]etributivists ought to accept the view that a person's culpability for his or her actions should not be affected by chance events over which the agent had no control and could not reasonably have foreseen."); Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 2 (1994) (presenting normative case for "centrality of the culpable act"); Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 275-76 (1974) (arguing that attempts and successful crimes should be punished equally); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Richard Parker, *Blame, Punishment and the Role of Result*, 21 AM. PHIL. Q. 269, 273 (1984) ("Fortune may make us healthy, wealthy, or wise, but it ought not determine whether we go to prison."); Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

¹²⁵ See generally Andrew Ashworth, *Taking the Consequences, in ACTION AND VALUE IN CRIMINAL LAW* 106, 117-120 (Stephen Shute et al. eds., 1993); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 B.Y.U. L. REV. 553; Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1 (1986); R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1 (1990); Michael Moore, *The Independent Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1995); Judith J. Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987).

¹²⁶ Don Terry, *Victims' Families Fight for Mercy*, N.Y. TIMES, Feb. 1, 1996, at A10.

capital sentencing, but only as a factor in the jury's decision to exercise mercy.¹²⁷

Payne responded to the widespread sentiment that crime victims had been disregarded in the process of prosecution and punishment. Hearing the voice of the victim at the mercy-phase will not satisfy victims' rights advocates who believe the victim's experience should help us decide what punishment a criminal offender deserves, but it nonetheless recognizes some role for the victim. Solidarity with the victim is affirmed,¹²⁸ but only to a point. This approach allows the victim's voice to deny the defendant mercy, but not justice.¹²⁹

2. Character Evidence

The more culpable a capital defendant is for his conduct, the more deserving he is of death.¹³⁰ During the penalty phase the defendant must show that his culpability, although sufficient to convict him of capital murder, does not warrant a capital sanction.¹³¹ Something "excuses" him from death. The *Lockett* doctrine governs what kinds of facts and circumstances are considered mitigating. According to *Lockett*, the sentencer must be allowed to consider "any aspect of the defendant's character . . . and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹³² The range of mitigating evidence admissible under *Lockett*

¹²⁷ Cf. Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 221 (1990) (noting that victim impact statements can "counter" sentiments of mercy).

¹²⁸ See FLETCHER, *supra* note 124, at 203 ("A primary function of punishment . . . is to express solidarity with the victim.").

¹²⁹ Whatever one thinks of this approach, victim impact evidence raises a host of problems. First, victim impact evidence threatens to turn the penalty phase into an unseemly spectacle in which the defense, forced to respond to the state's case, puts the character and moral worth of the victim on trial. See, e.g., Henderson, *supra* note 114, at 986; Catherine Bendor, Note, *Defendants' Wrongs and Victims' Rights*, 27 HARV. C.R.-C.L. L. REV. 219, 238 (1992); Dow, *supra* note 114, at 163. Second, victim impact evidence threatens to transform the penalty phase into a contest not between the state and the accused, but between the victim and the accused. See, e.g., Dubber, *supra* note 14, at 152; Harris, *supra* note 114, at 99. Finally, victim impact evidence threatens to accentuate the role of race in capital sentencing. See *id.* at 96-98. These problems have persuaded some state courts to reject *Payne*. See, e.g., *Sermons v. State*, 417 S.E.2d 144, 146 (Ga. 1992); *Clark v. Commonwealth*, 833 S.W.2d 793, 796-97 (Ky. 1991).

¹³⁰ See, e.g., Andrew von Hirsch & Nils Jarenborg, *Gauging Criminal Harm: A Living Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 1 (1990) ("[C]ulpability . . . [refers to] the factors of intent, motive and circumstance that determine the extent to which the offender should be held accountable for the act.").

¹³¹ The Court has analogized mitigating circumstances to affirmative defenses. The state can therefore impose upon the defendant the burden of proving the existence of mitigating circumstances by a preponderance of the evidence. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 649 (1990). The Court has not, however, treated aggravating circumstances as elements of an offense requiring the state to prove their existence beyond a reasonable doubt. See, e.g., John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 725 (1990).

¹³² *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

is quite broad. Indeed, once we include mercy in the penalty phase, *Lockett* is arguably too broad.

Although the Court has not developed any well-defined theory of moral culpability, two distinct theories of mitigation explain most of the evidence admissible under *Lockett*.¹³³ The first theory, which might be called the "will" or "choice" theory, holds an offender responsible for his act if and only if it was the product of his free will.¹³⁴ In the substantive criminal law, this theory of culpability is embodied in excuses such as insanity, duress, and involuntary intoxication.¹³⁵ These doctrines reflect the more general principle that a criminal defendant should not be convicted if his act was not the product of free will. However, these doctrines ordinarily shield an offender from criminal liability only where his will has been almost completely overborne.¹³⁶ In capital cases that reach the penalty phase, the defendant had no valid excuse. Any defect in the defendant's will is less than total and merely mitigates the severity of his punishment.¹³⁷

¹³³ These mitigation theories bear some resemblance to two other theories—the "choice" theory and the "character" theory—which scholars have developed to explain and justify the law of excuses in the substantive criminal law. Choice theorists include, for example, Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987); Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990). Character theorists include, for example, RICHARD B. BRANDT, *A Motivational Theory of Excuses in the Criminal Law, in MORALITY, UTILITARIANISM, AND RIGHTS* 235 (1992); FLETCHER, *supra* note 9; Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59 (1990); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5 (1982); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992); Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905 (1973); George Vuoso, *Background, Responsibility and Excuse*, 96 YALE L.J. 1661 (1987). *But cf.* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 973 (1992) (arguing that within the "constitutive paradigm" of responsibility "volition and character appear as complimentary rather than as hostile or mutually exclusive sources of responsibility"); Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1991); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 378 (1993) (arguing that "there is something spurious about the general controversy between 'choice' and 'character' theorists").

¹³⁴ For the classic articulation of this theory in the substantive criminal law, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 152 (1968); see also William Blackstone, Commentaries on the Laws of England *20 (1769) ("All the several pleas and excuses . . . may be reduced to this single consideration, the want or defect of *will*."). The "will" theory presupposes, as ultimately does the "character-will" theory, that the notion of free will can be rescued from the threat of determinism. See generally Andrew E. Lelling, *Eliminative Materialism, Neuroscience and the Criminal Law*, 141 U. PA. L. REV. 1471 (1993) (explaining the historical and scientific roots of, and modern day challenges to, the notion that one is only responsible for those actions which are the result of one's free will).

¹³⁵ See generally Joshua Dressler, *Foreword—Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1164 (1987) (discussing the law of excuses); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221-22 (1982) (same).

¹³⁶ See, e.g., Robinson, *supra* note 135, at 222.

¹³⁷ Some state capital statutes include as a mitigating factor that the "murder was committed under circumstances which the defendant believed to provide a moral justification

The second theory, which might be called the "character-will" theory, begins where the "will" theory ends. The will theory asks whether the offense was the product of the defendant's free will. The character-will theory, in contrast, locates responsibility not so much in the defendant's free will, but in his character. Acts are understood as the product of that stable and enduring structure of attitudes, concerns, and values forming one's character.¹³⁸ Culpable acts are in turn understood as the product of a defective or evil character.¹³⁹ The condition of the actor's will at the time of the offense is irrelevant.

Although the character-will theory begins with a shift in focus from the offender's will to his character, it does not stop there. The theory does not require the jury to determine whether the defendant's character itself warrants the death penalty. Instead, the jury must first determine whether the defendant's action was consistent with his character. If the defendant's act was "out of character," the character-will theory treats as mitigating those facts and circumstances that force a person "out of character," much as the will theory treats as mitigating those facts and circumstances that overwhelm a person's will. Indeed, when an offender has acted "out of character," the will theory and the character-will theory overlap substantially, treating much the same things as mitigating, but for different reasons.

However, if the defendant's act was not "out of character," the jury must determine to what extent the defendant can be held responsible for the character he has. As problematic as it is,¹⁴⁰ the central

or extenuation for his conduct." See, e.g., MODEL PENAL CODE § 210.6(4). This mitigator appears to be based more on a theory of justification than on extenuation. Most statutory mitigating factors, however, appear to be based on a theory of imperfect excuse and diminished culpability. See, e.g., Steiker & Steiker, *supra* note 63, at 848-49.

¹³⁸ See, e.g., JOHN KEKES, *FACING EVIL* 104 (1990) ("[C]hoices . . . are . . . the epiphenomena of character"); Duff, *supra* note 125, at 352; Moore, *supra* note 133, at 42 ("[C]haracter as I conceive it can *cause* the past behavior that evidences it and will or could cause the future or hypothetical behavior that manifests it. . . ."); Pincoffs, *supra* note 133, at 906 (defining "moral character traits" as a subclass of "personality traits [which are] relatively stable and permanent disposition[s] by means of which one individual may be distinguished from another."); cf. John R. Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47, 90 (1967) ("There are gradations of choice and degrees of voluntariness; at every instant, however, even in those acts of purest, freest, most voluntary choice, choice depends upon the being of the person and the matrix of his action . . .").

¹³⁹ ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS TRANSLATED* 74-75 (J.A.K. Thomson trans., 1953). See, e.g., Pincoffs, *supra* note 133, at 919; cf. Calhoun, *supra* note 9, at 93 (noting that sometimes "wrongdoing is less likely to be a blow directly aimed at us than simply shrapnel from something else more complicated and more interesting in the person's life.").

¹⁴⁰ See Moore, *supra* note 133, at 45; see also Dan-Cohen, *supra* note 133, at 973 ("If character traits are necessary to make choice intelligible and human action possible, how do we account for the choices that lead to the formation of character?"); Dressler, *Excusing Wrongdoers*, *supra* note 9, at 695-97; Moore, *supra* note 16, at 219 (suggesting that "[i]t is not

inquiry for the character-will theory in this situation is the extent to which a defendant can be held responsible for creating his malevolent character, or for sustaining that character once formed.¹⁴¹ By introducing the idea of character into the penalty phase, the character-will theory expands the relevant time-frame and increases the range of potentially mitigating facts and circumstances. It requires the jury to look beyond the immediate circumstances of the offense and to determine whether the defendant's character is the product of events beyond his control.

"Horrid backgrounds do not inevitably give rise to horrid people."¹⁴² Nonetheless, we often look less harshly on offenders who are in some sense the products of such backgrounds. The stories of the men and women on Death Row across the country are always the stories of people guilty of unspeakable acts. Almost as often, however, they are the stories of lives whose formative years were filled with neglect, abuse, and despair. Most have themselves suffered unspeakable acts, often inflicted at the hands of family members or others in positions of trust.¹⁴³ The character-will theory registers the significance of these character-forming facts and makes them relevant to the assessment of a defendant's moral culpability.¹⁴⁴

Despite their differences, the will and character-will theories both bear on the question of deserved punishment. Both ultimately ground culpability in some conception of free choice. The will theory holds a defendant less culpable when something impairs the exercise

senseless to talk of control over our character"); Pillsbury, *supra* note 133, at 732; Gary Watson, *Responsibility and the Limits of Evil*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS, *supra* note 16, at 256, 281 (suggesting that responsibility for character presupposes "a view of the self as an entity that mysteriously both transcends and intervenes in the 'causal nexus,' because it is both product and author of its actions and attitudes").

¹⁴¹ See, e.g., FLETCHER, *supra* note 9, at 805-06; Charles Taylor, *Responsibility for Self*, in THE IDENTITIES OF PERSONS 281-99 (Amelie Rorty ed., 1976); Robert Audi, *Responsible Action and Virtuous Character*, 101 ETHICS 304 (1991); Pincoffs, *supra* note 133, at 920 ("[T]he formation of one's character is neither entirely the doing of others nor entirely one's own doing."); cf. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

¹⁴² Watson, *supra* note 140, at 277.

¹⁴³ See, e.g., Graham v. Collins, 506 U.S. 461 (1993); Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994), cert. denied, 115 S. Ct. 711 (1995); see also Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705 (1995).

¹⁴⁴ At its outer limit this theory would allow social deprivation to constitute a full defense to criminal liability. See, e.g., Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQUALITY 9 (1985); accord R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U.L. REV. 459 (1994); cf. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994). But cf. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 98 ("The sentencing of convicted persons cannot wait until underlying social ills are remedied, nor can it be abandoned once they are addressed."); Moore, *supra* note 16, at 215 (suggesting that such an approach "is elitist and condescending toward others [because it does not] grant [them] the same responsibility and desert [one] grant[s] [to oneself].").

of his free will. The character-will theory holds a defendant less culpable when his offense was the product of a corrupt character for which he cannot be held responsible because it was not the character he chose to make for himself. In short, both theories forge a link between the offender's act and his free will—one proceeding directly from free will to the offense, and the other taking a detour through the concept of character. In the end, however, the measure of deserved punishment under both theories depends on the choices the defendant has made.

The will and character-will theories account for most of the evidence admitted under *Lockett*, but they leave out one important category—character evidence. The Court has suggested that *Lockett* is broad enough to entitle a defendant to introduce evidence showing he was, for example, a “fond and affectionate uncle.” Such evidence is, in the language of *Lockett*, an “aspect of a defendant’s character.”¹⁴⁵ The admissibility of this evidence rests on a theory, which we might call simply the “character theory,” that severs any link between the offender’s free will and his offense. This theory focuses not on the extent to which the defendant’s will was overcome, nor on the story behind the formation of the defendant’s character, but instead on the *content* of the defendant’s character itself. The character theory requires a jury to make a direct assessment of the defendant’s moral worth. It is concerned, as some might put it, with the state of the defendant’s “soul.”¹⁴⁶

We might think a capital defendant should have every chance to convince the jury to spare his life, including the chance to highlight the redeeming aspects of his character. Not all evidence of a defendant’s character will be mitigating, however. Indeed, the problem with the character theory may not come into focus until we see what happens when the state tries to highlight the darker side of the defendant’s character.

¹⁴⁵ *Lockett*, 438 U.S. at 604; see also *Payne v. Tennessee*, 501 U.S. 808 (1991) (good with children; assisted father with painting); *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990) (prize for dance choreography); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987); *California v. Brown*, 479 U.S. 538 (1987) (peaceful nature); cf. *Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (“We have never defined what . . . character” means.). Some commentators suggest that the admission of character evidence into the penalty phase is entirely appropriate. See, e.g., Howe, *supra* note 27, at 351, 355-57. Others argue that, whether appropriate or not, “consideration of evidence of good character . . . is [not] sufficiently rooted in societal consensus to command constitutionalization.” Steiker & Steiker, *supra* note 63, at 848.

¹⁴⁶ See, e.g., Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983) (noting that a “central issue [in the penalty trial] is the meaning and value of the defendant’s life”); Weisberg, *supra* note 16, at 335 (“The new [death penalty] laws of aggravation and mitigation make the defendant’s whole career and soul the subject of the penalty trial.”).

In *Dawson v. Delaware*,¹⁴⁷ the state tried to introduce evidence showing that the defendant was a self-professed member of a racist prison gang known as the Aryan Brotherhood.¹⁴⁸ The defendant argued that the First Amendment prohibited the state from asking the jury to return a death sentence based on his constitutionally protected right of association—here his membership in the Brotherhood.¹⁴⁹ Neither the defendant's membership in the Brotherhood, nor his racist beliefs, were in any way connected to his crime. The defendant was white, as were his victims.¹⁵⁰ The only reason for the state to disclose the defendant's membership in the Brotherhood was to show that he was a racist.¹⁵¹ Being a racist was, according to the state, one reason among a host of other reasons why the defendant should be executed.

The state's argument was simple: Membership in the Aryan Brotherhood manifests a racist character; a racist character is a malevolent character; and having a malevolent character is a valid reason for a capital sentencing jury to impose a death sentence. The Court's response was just as simple. Evidence of the defendant's gang membership, Chief Justice Rehnquist wrote for the Court, is "irrelevant" to the "issue being decided in the [sentencing] proceeding."¹⁵² This evidence, he continued, "prove[s] nothing more than the abstract beliefs" of the Brotherhood.¹⁵³ Unfortunately, the Chief Justice never explained why one's abstract beliefs are "irrelevant" to the "issue being tried." Indeed, he failed to explain exactly what the "issue" was.¹⁵⁴

¹⁴⁷ 503 U.S. 159 (1992).

¹⁴⁸ The prosecution and the defense agreed to a stipulation describing the Aryan Brotherhood as a "white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities." *Id.* at 162. The state also introduced evidence that Dawson called himself "Abaddon," which he said meant "one of Satan's disciples." *Id.* at 161-62. The state also wanted to introduce evidence that Dawson had painted a swastika on the wall of his prison cell, but the trial court ordered it excluded. *Id.* at 162.

¹⁴⁹ *Id.* at 160. Dawson apparently did not challenge the admission of the evidence on Eighth Amendment grounds. For present purposes, the case is interesting for what it reveals about capital sentencing in general, whether or not it arrives at the correct result as a matter of First Amendment doctrine.

¹⁵⁰ *Id.* at 166.

¹⁵¹ The Court contrasted *Dawson* with *Barclay v. Florida* where the defendant's crime was motivated by racial hatred. *See id.* at 164 (citing *Barclay v. Florida*, 463 U.S. 939 (1983)).

¹⁵² *Id.* at 159; *cf.* *Beam v. Paskett*, 966 F.2d 1563, 1572 (9th Cir. 1992) (holding that defendant's "non-violent, consensual or involuntary sexual conduct" could not be admitted in capital sentencing proceeding).

¹⁵³ *Dawson*, 503 U.S. at 159.

¹⁵⁴ The Court did not hold that evidence of gang membership was always irrelevant. On the contrary, it went out of its way to note that Dawson's membership in the Aryan Brotherhood would have been relevant if the state had introduced competent evidence that members of the Aryan Brotherhood are more likely to commit future violent acts. The association would then be made relevant to future dangerousness, though not to char-

Justice Thomas was the lone dissenter. Agreeing with a unanimous Delaware Supreme Court,¹⁵⁵ he argued that evidence of the defendant's membership in the Aryan Brotherhood is clearly relevant to his sentence, at least if his sentence is meant to "reflect a 'reasoned moral response' not only to the crime, but also to the 'background' and 'character' of the defendant himself."¹⁵⁶ In Justice Thomas's view, a defendant's racial prejudice forms a constitutive element of his character. It constitutes a piece of the puzzle of his soul. What the majority dismissed as "irrelevant," Justice Thomas passionately argued, could not be more relevant. Moreover, Justice Thomas reminded the majority that *Payne* had rejected the idea of holding the state and the defendant to different standards during the penalty phase. As long as a capital defendant is permitted to introduce evidence of his good character (e.g., through membership in various religious, fraternal, and civic organizations), the state, Justice Thomas argued, should be permitted to introduce evidence of bad character (e.g., through membership in less wholesome associations).

The majority in *Dawson* came close to saying that a capital defendant's bad character as such is simply irrelevant to the death-selection decision. Although the majority does not say why this should be so, it probably relied on the principle that punishment should be imposed for what one does, not for who one is.¹⁵⁷ From this viewpoint, the punishment an offender receives should not depend on his character, at least where the offender's character has no plausible connection

acter. See *Dawson*, 503 U.S. at 164. Yet future dangerousness has no more to do with assessing a capital defendant's moral desert than does character. See *infra* part II.C.3.

¹⁵⁵ See *Dawson v. State*, 581 A.2d 1078, 1102-03 (Del. 1990), cert. granted, 499 U.S. 946 (1991), vacated, 503 U.S. 159 (1992) ("The jury was also required to make an individualized determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime.") (emphasis added).

¹⁵⁶ *Dawson*, 503 U.S. at 174 (Thomas, J., dissenting) (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))).

¹⁵⁷ Cf. *Robinson v. California*, 370 U.S. 660 (1962) (holding criminalization of "status" of being narcotics addict to constitute cruel and unusual punishment); accord MICHAEL MOORE, ACT AND CRIME 53 (1993); Hyman Gross, *Benign and Malign Morality*, in IN HARM'S WAY 344, 349 (Jules L. Coleman & Allen Buchanan eds., 1994) ("It is a fundamental principle of criminal justice that criminal liability be imposed only for what was done and not because of the sort of person the person who did it has shown himself to be."); Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967); Moore, *supra* note 133, at 55 ("[N]o one deserves to be punished for being a poor specimen of humanity.") (emphasis added). But cf. Jeffrie Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEGAL ISSUES 283, 296 & n.36 (1994) (suggesting that a liberal state can, consistent with its underlying principles, punish certain character defects, such as "racial hatred, religious intolerance or failure to respect human rights," once defendant is legitimately within its "clutches" for having violated criminal law).

with his crime.¹⁵⁸ Yet, as Justice Thomas rightly pointed out, the Court *requires* capital sentencing juries to consider evidence relating to the defendant's *good* character. According to Justice Thomas, the Court's decision in *Dawson* creates a "double standard." It allows the defendant to highlight attractive aspects of his character, while denying the state the opportunity to highlight less attractive ones.

Mercy supplies a way around the double standard. Evidence of a defendant's character—good or bad—should play no role in determining what punishment he deserves. If the only purpose of the penalty phase is to impose deserved punishment, then character evidence should be excluded entirely. Assuming that the only "issue being tried"¹⁵⁹ during the penalty phase is what punishment the defendant deserves, the majority in *Dawson* was right. Evidence of bad character is irrelevant to that inquiry. What the majority failed to see, however, was that evidence of good character is also irrelevant. On the other hand, if the "issue being tried" during the penalty phase extends to mercy, then character evidence may indeed be relevant. A capital sentencing jury can rely on character evidence to help it decide whether mercy should be granted or withheld.¹⁶⁰ From this perspective, evidence of good character, together with evidence of bad character, may be admitted during the penalty phase, but only if both are allocated to the domain of mercy.

3. *Future Dangerousness*

Retributivism has a distinct temporal orientation.¹⁶¹ It looks backward. This simple point has important consequences if the basic goal of the penalty phase is to impose deserved punishment. From a

¹⁵⁸ Cf. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding constitutionality of "hate crime" ordinance). For commentary on the constitutional legitimacy of measuring punishment based on motivation in general and bias motivation in particular, compare Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993) with Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991). On the role of motivation in the criminal law generally, see Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635; Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, Winter/Spring 1989, at 3.

¹⁵⁹ See, e.g., *Dawson*, 503 U.S. at 168.

¹⁶⁰ Cf. Dressler, *Excusing Wrongdoers*, *supra* note 9, at 699 ("[M]itigating a convicted defendant's punishment because of that person's exemplary character or for any other reason of compassion, is not a function of justice but of mercy, an independent moral virtue.").

¹⁶¹ See, e.g., KLEINIG, *supra* note 92, at 61; GEORGE SHER, *DESERT* 5 (1987); VON HIRSCH, *DOING JUSTICE*, *supra* note 89, at 46 ("[T]o assert that someone deserves to be punished is to look to his past wrongdoing as reason for having him penalized."); Joel Feinberg, *Justice and Personal Desert*, in *NOMOS VI: JUSTICE* 69, 72 (Carl J. Friedrich & John W. Chapman eds., 1963); Ernest van den Haag, *Why Capital Punishment?*, 54 ALB. L. REV. 501, 503 (1990) ("[W]e punish for actual past behavior, not possible future behavior.").

retributive perspective, the punishment a defendant deserves is, to put it somewhat metaphorically, fully congealed at the time of the crime. The future is neither here nor there.¹⁶² Only the past matters.

In fact, however, the penalty phase departs dramatically from retributivism's command never to look forward. The Court has held that capital sentences can legitimately be based on predictions about the defendant's "future dangerousness."¹⁶³ A handful of states make predictions of future dangerousness a statutory aggravating circumstance,¹⁶⁴ while others make such predictions admissible as a nonstatutory aggravating circumstance.¹⁶⁵ Moreover, according to one recent study, capital juries tend to discuss future dangerousness more than anything else, including the defendant's background, his upbringing, his IQ and intelligence, or any remorse he feels.¹⁶⁶ Fear of

¹⁶² See, e.g., *Howe*, *supra* note 27, at 397 ("If the capital sentencing inquiry exists only to assess the offender's culpability, consideration of utilitarian issues would be improper.").

¹⁶³ See, e.g., *Tuilaepa v. California*, 114 S. Ct. 2630, 2637 (1994) ("Both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process . . ."). The Court has, however, expressed some reluctance to embrace incapacitation as a free-standing justification for a death sentence. See *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984) ("Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding."); cf. *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting) ("In capital sentencing decisions, . . . incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available . . ."); *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (describing incapacitation as simply "another purpose [of punishment] that has been discussed"). One interpretation of the Court's statement that "incapacitation has never been embraced as a sufficient justification for the death penalty" is that future dangerousness cannot, by itself, make a defendant death-eligible. See *Gillers*, *supra* note 38, at 1096.

¹⁶⁴ See *Acker & Lanier*, *supra* note 66, at 118 (noting that in six states—Idaho, Oklahoma, Wyoming, Texas, Oregon, and Virginia—future dangerousness is a statutory aggravating circumstance). The Court has also allowed the state to instruct the jury on the authority of the governor to reduce a sentence of life imprisonment without possibility of parole to one with the possibility of parole. See *California v. Ramos*, 463 U.S. 992, 1003 (1983). *But see* *People v. Ramos*, 689 P.2d 430, 441 (Cal. 1984) (rejecting *Ramos* on state constitutional grounds); *State v. Jones*, 639 So.2d 1144, 1155 (La. 1994) (same).

¹⁶⁵ Cf. *People v. Danielson*, 838 P.2d 729, 745-46 (Cal. 1992) (expert testimony on future dangerousness not permitted, but prosecutor may argue defendant is dangerous); *State v. Ward*, 449 S.E.2d 709, 740 (N.C. 1994) (holding that "specific deterrent" arguments are not improper).

¹⁶⁶ See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 6 (1993) ("Other than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues jurors discuss most."); *id.* at 4 ("Our data confirm that jurors' deliberations emphasize dangerousness and that misguided fears of early release generate death sentences."); see also Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 L. & HUM. BEHAV. 151, 160 (1994); Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crime and Defense Strategies*, 11 L. & HUM. BEHAV. 113, 113 (1987) ("[N]early all jurors also offered the observation that the penalty phase decision hinged on the issue whether the defendant would pose a continuing threat to society.").

what a defendant might do in the future overshadows all else and works as a powerful advocate on the side of death.

Assuming incapacitation is a legitimate justification for punishment, a capital offender could of course be incapacitated through life imprisonment, which would probably cost less than it now takes to litigate the average capital case to execution. In any event, relying on death to incapacitate would still only be warranted if a defendant did indeed present some appreciable risk of future danger. Reasonable minds will disagree over how great that risk must be. For those convinced that death-eligible defendants already deserve death, *any* future risk, no matter how slight, will usually be enough to dispel any lingering doubt and tip the scale in death's favor. For those not already convinced, however, the risk must be more substantial. Unfortunately, our power to predict future dangerousness seems on a par with our power to predict next month's weather. Study after study shows that long-term predictions of future dangerousness are more often wrong than right.¹⁶⁷

The Court faced this problem in *Barefoot v. Estelle*.¹⁶⁸ Thomas Barefoot was condemned largely on the strength of testimony from a psychologist named James Grigson, who the state of Texas routinely called upon to testify at capital sentencing hearings.¹⁶⁹ Dr. Grigson,

The Court has recently held that a capital defendant has a Due Process right to inform the jury that he would not be eligible for parole if sentenced to prison. *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). For commentary on this question, see, e.g., J. Mark Lane, "Is There Life Without Parole?: A Capital Defendant's Right to a Meaningful Alternative Sentence," 26 LOY. L.A. L. REV. 327, 334 (1993); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, COLUM. HUM. RTS. L. REV. 211, 211 (1987); William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1605 (1989).

¹⁶⁷ See generally JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, at 179 (1994) ("Overprediction dominates."); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 70-73 (1974) (discussing problem of overprediction of future dangerousness); Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 443 n.39 (1980); Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1098-1101 (1976) (reexamining the inability of psychiatrists to predict future dangerousness); George E. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1 (1981) (discussing the inaccuracies of psychiatric predictions); Charles P. Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 L. & HUM. BEHAV. 139 (1991) (collecting data); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110-11 n.50 (1984) (studying the rate of false-positives).

¹⁶⁸ 463 U.S. 880 (1983).

¹⁶⁹ See, e.g., MARQUART ET AL., *supra* note 167, at 176 (noting that Dr. Grigson has "testified for the prosecution in nearly one-third of the Texas cases involving death row inmates"); Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Future Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407, 410 (1983); Shellee Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's*

known as "Dr. Death," would just as routinely find that the defendant "constitute[d] a continuing threat to society."¹⁷⁰ At Barefoot's trial, Dr. Grigson found a "one hundred percent . . . chance" that Thomas Barefoot would kill again, unless he was executed. The doctor may have been right, but he was probably wrong. Speaking as amicus curiae, the American Psychiatric Association informed the Court that professional predictions of future dangerousness are wrong at least two out of three times.¹⁷¹

Nonetheless, the Court was in a decidedly deregulatory mood when it decided *Barefoot*.¹⁷² It was unprepared to say that incapacitation was an unconstitutional basis for a death sentence, or that predictions of future dangerousness should be disallowed because they were too speculative.¹⁷³ Such predictions, the Court explained, were common in other departments of the law, such as civil commitment, bail, and parole hearings, during which laymen and professionals alike regularly speculate about a defendant's future behavior. These practices had long withstood constitutional scrutiny.¹⁷⁴ Moreover, the Court explained that even if psychiatric predictions of future dangerousness were usually wrong, the defendant's own experts could attest to that fact,¹⁷⁵ and the jury could be relied upon to sort it all out.

The Court ignored a number of things in *Barefoot*. It did not, for example, dwell on the fact that a bad guess during the penalty phase of a capital trial commonly entails more serious consequences than a bad guess during a bail or parole hearing.¹⁷⁶ Nor did the Court worry that jurors who have already convicted a defendant of capital murder would, in all likelihood, be predisposed to accept the state's suggestion that execution is the only way to prevent the defendant from committing more violence in the future.¹⁷⁷ Nor, finally, did the Court stop to think that a damning prediction of future violence coming from an expert psychiatrist or psychologist might well encourage ju-

Capital Sentencing Statute After Penry v. Lynaugh, 69 TEX. L. REV. 407, 447-48 & n.188 (1990). At latest report, Dr. Grigson seems to be out of business. See Bruce Vincent, *Dr. Death's Demise? Prosecutors Shun Death Penalty Expert*, LEGAL TIMES, Jan. 1, 1996, at 4, 8.

¹⁷⁰ *Barefoot*, 463 U.S. at 919 (Blackmun, J., dissenting) (quotations omitted).

¹⁷¹ See Amicus Brief for the American Psychiatric Association at 9, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

¹⁷² See, e.g., Weisberg, *supra* note 16, at 343.

¹⁷³ See, e.g., Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); William S. Geimer, *Death At Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985); Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984); Weisberg, *supra* note 16.

¹⁷⁴ 463 U.S. at 898.

¹⁷⁵ *Id.* at 901.

¹⁷⁶ See, e.g., Gillers, *supra* note 38, at 1098.

¹⁷⁷ Cf. Eisenberg & Wells, *supra* note 166 at 6 ("Jurors usually conclude that the defendant will be dangerous.")

rors to defer to the expert's professional authority, thereby sidestepping the hard moral questions involved in capital sentencing.¹⁷⁸

Future dangerousness would play a very different role in a reconstructed penalty phase. From a retributive perspective, we cannot justly punish someone for what he might do in the future. Whether the future is calm or turbulent has nothing to do with the punishment a defendant deserves for a crime already committed. Consequently, evidence of future dangerousness, as well as evidence of future nondangerousness,¹⁷⁹ would play no role at the desert phase. Only if the jury finds the defendant deserves death would the state be allowed to rely on evidence of future dangerousness to resist the defendant's plea for mercy. Likewise, the defendant would be free to rely on evidence of nondangerousness to support his plea. As with unforeseeable harm and character evidence, future dangerousness would play a role in capital sentencing, but only insofar as it informs a grant of mercy.

The foregoing analysis is not meant to be exhaustive. On the contrary, victim impact evidence, character evidence, and evidence of future dangerousness represent only a small part of the rich universe of evidence now admitted during the penalty phase of a capital trial. Fully delineating the boundary between the sphere of justice and the sphere of mercy would require examining other elements of that universe. We would need to examine, among other things, the proper role for prior criminal convictions, expressions of remorse, a co-defendant's sentence, the victim's status (say, as a police officer or child), and the defendant's motive (say, pecuniary gain or racial hatred).¹⁸⁰ Hopefully, however, the forgoing analysis conveys a rough sense of how the conceptual distinction between moral desert and mercy might work in the real world.

¹⁷⁸ See, e.g., Claudia M. Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 BEHAVIORAL SCI. & L. 433, 439 (1987).

¹⁷⁹ See *Skipper v. South Carolina*, 476 U.S. 16 (1986); see also Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 845 (1990) (arguing that many death sentences are based on unjustified predictions of future criminality).

¹⁸⁰ Nigel Walker lists the following as *prima facie* candidates for the status of mercy-based reason:

[1] reducing the "just" sentence because the offender has served what seems an excessive sentence for an earlier offense; [2] reducing the just sentence because an equally guilty accomplice has been sentenced more leniently in error; [3] reducing the just sentence as a reward for meritorious conduct unrelated to the offense; [4] reducing the just sentence in response to a plea from the victim's relatives . . . ; [5] reducing the just sentence because of the offender's subsequent remorse.

See Walker, *supra* note 9, at 34 (citations omitted).

III

IN FAVOREM CLEMENTIAE

As a virtue, mercy may seem like it needs no defense. In fact, however, several objections may be lodged against a proposal to incorporate mercy into the penalty phase. These objections are twofold. The first claims that restructuring the penalty phase to accommodate mercy is unnecessary because mercy-based evidence is now admitted during the penalty phase, and juries may, if they wish, return a life sentence based on that evidence. The second claims simply that restructuring the penalty phase to accommodate mercy would, for a variety of reasons, be unwise.

A. An Unnecessary Virtue?

The first objection holds that the proposed reform of the penalty phase is unnecessary. The jury already hears evidence during the death-selection stage that, according to the analysis offered above, relates to the question of mercy. If the jury wishes to impose a life sentence on the basis of that evidence in the name of mercy, nothing stops it from doing so. Separating the two inquiries may be conceptually more elegant, but for all practical purposes it gains us nothing.

This objection overlooks at least two consequences arising from a failure to separate the questions of deserved punishment and mercy. The first is symbolic. The substantive criminal law makes a distinction between justification and excuse,¹⁸¹ and this distinction marks an important moral difference. A criminal defendant acquitted because he presents a valid justification, such as self-defense, has committed no moral wrong. What he did was morally correct, or at least permissible. In contrast, a criminal defendant acquitted because he presents a valid excuse is still guilty of wrongdoing. He is excused because he could not help himself.¹⁸² Similarly, a capital defendant who receives a life sentence because he deserves that sentence receives what justice requires. No more, and no less. A defendant who receives a life sentence through a grant of mercy, however, has cause for humility and

¹⁸¹ See George P. Fletcher, *The Psychotic Aggressor—A Generation Later*, 27 *ISR. L. REV.* 227, 245 (1993) (suggesting bifurcation between the liability and the excuse stage of criminal trial to ensure that the public understands the meaning of verdict); see also Dressler, *supra* note 135, at 1169 (discussing the distinction between excuse and justification); Dressler, *Excusing Wrongdoers*, *supra* note 9, at 689 (discussing the need to separate feelings of compassion from the decision to excuse). On law's expressive function, see generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021 (1996).

¹⁸² See, e.g., Robinson, *supra* note 135, at 290; see also Watson, *supra* note 140, at 260 ("In general, an excuse shows that *one* was not to blame, whereas a justification shows that one was not to *blame*"). See generally Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *COLUM. L. REV.* 1897 (1984).

thanks, for his sentence is less than his moral guilt warranted. The law should express this distinction.

The second consequence is more important, because it relates to the basic retributive goal of reducing the risk of false-positive moral error. Quite simply, the existing structure of the penalty phase creates an unnecessary risk that death will be imposed on defendants who do not deserve it. As things now stand, the penalty phase obscures the distinction between deserved punishment and mercy and creates a dangerous mix of mercy-based evidence and desert-based evidence. Some capital defendants are wrongly condemned on the basis of evidence whose only legitimate purpose is to suppress the inclination to show mercy (i.e., mercy-aggravating evidence).

Consider the following scenario. The defendant, a young man of twenty, already has a lifetime of despair. He was weaned on violence, fear, abuse, and deprivation at the hands of a sadistic father and alcoholic mother. For escape, the defendant turns to alcohol, drugs, and a life of petty crime, which finally culminates in an armed robbery. No one is harmed. The defendant pleads guilty to a lesser offense, spends a short time in prison, and is released on parole. Upon release, the cycle begins again. This time it ends in a convenience store with the defendant pointing a gun. The clerk at the counter, a young woman in her teens, is startled and panics. Her panic feeds the defendant's. The defendant shoots, and the young woman lies dead. The defendant flees, but not before taking money from the cash register.

Because he killed the young woman, and robbed the store, the defendant's crime is a capital offense. A murder committed in the "course of another felony"¹⁸³ is an aggravating circumstance in every state.¹⁸⁴ The jury accordingly finds the defendant death-eligible. During the penalty phase, the jury learns that the young woman was the oldest of three siblings. Her father was a teacher at the local high school; her mother a dental hygienist. The family is devoutly religious, and the young woman sang in the church choir every Sunday. She was a senior in high school, and getting ready to start college. She planned to become a doctor. Each member of her family takes the stand during the penalty phase and relates, in vivid detail, the

¹⁸³ Committing murder during the course of another felony is a widely applicable aggravating circumstance. See, e.g., Acker & Lanier, *supra* note 66, at 121 (noting that "[a]ll death penalty jurisdictions make the commission of a contemporaneous felony relevant to whether a murder is punishable by death" and that this aggravator applies to some 75-80% of all murders in some jurisdictions); see also Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 21, 25 (noting that felony aggravator was the "most common" aggravator charged in Philadelphia). At a speech given at Cornell Law School on April 17, 1995, the attorney general of New York, Dennis Vacco, characterized New York's version of this aggravating circumstance as a "catch-all." Dennis Vacco, Speech at Cornell Law School (Apr. 17, 1995).

¹⁸⁴ See Acker & Lanier, *supra* note 66, at 121.

emptiness they now feel. Their lives and dreams are shattered; justice is all they want.

The defense paints an equally vivid portrait of the defendant's life.¹⁸⁵ The jury hears about the years of abuse and neglect, about the beatings, and about the days on end without anything to eat. The jury hears how the defendant was shuffled from one relative to the next, because his parents didn't want him. The jury hears about the first time the defendant sniffed glue; how this escalated to beer, then wine, then marijuana, and then crack. The jury hears about the night of the crime. It started out as each day did, with a can of beer. Joined by some friends, the defendant continued drinking throughout the day. Then, the beer ran out. The money had run out long before. It was late, and the convenience store was isolated on the outskirts of town. It would be an easy job. No one would know; no one would get hurt. The defendant didn't anticipate the woman's panic. The defense notes that the autopsy report showed the gunshot killed the woman instantly.

The jury also hears from the police, the state's psychiatrist, and the state's custodian of records. The police describe the scene of the crime, and they spare no detail. Enlarged color photographs of the crime scene, which were already displayed to the jury during the guilt phase, are passed around once more. The state psychiatrist takes the stand. Based on his ten years of experience, his review of the defendant's criminal history, and a one-hour interview with the defendant, he confidently claims the defendant is a "continuing threat to society." The psychiatrist's prediction, which he sticks to despite aggressive cross-examination, is buttressed when the custodian of records takes the stand and describes the circumstances surrounding the defendant's prior conviction for robbery. The jury learns that if the defendant is sentenced to life imprisonment, he will be eligible for parole in twenty years. The verdict is death.

If we acknowledge the distinction between deserved punishment and mercy, any confidence we have in the jury's verdict should be shaken. The victim impact evidence and the testimony concerning the defendant's future dangerousness, both of which exercise a strong influence on juries,¹⁸⁶ cannot legitimately help the jury decide what punishment the defendant deserves. Neither piece of evidence

¹⁸⁵ This assumes that capital defendants receive adequate legal representation. Often they do not. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (examining the pervasiveness of deficient representation for the accused in capital cases); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) (concluding that lack of funding for capital defense services leads to arbitrary imposition of the death penalty).

¹⁸⁶ Eisenberg & Wells, *supra* note 166, at 5-6.

should have been permitted to enter the jury's moral calculus on that question. Permitting the jury to consider this evidence unnecessarily increased the risk of the defendant being wrongly condemned. If these facts are to play any part in capital sentencing, they should be limited to the question of mercy and cabined within the mercy phase.

As discussed above, the most straightforward way to reconstruct the penalty phase in order to accommodate mercy would be to actually bifurcate it, so that capital trials would have three separate stages: guilt, desert, and mercy. Within such a system, jurors could decide the question of deserved punishment apart from the question of mercy and without one influencing the other. Jurors electing to show mercy could do so, for example, without leaving the misimpression that the deserved punishment was life imprisonment.

This newly-trifurcated penalty phase would, however, further complicate an already complex process. It might also encourage unwelcome strategic behavior. Capital jurors deliberating on the defendant's fate during the desert phase and wanting to condemn the defendant's actions in the strongest way possible might, even though they believe the defendant deserves life imprisonment, nonetheless impose a death sentence. They could then grant mercy during the upcoming mercy stage, leaving the defendant with the punishment—life imprisonment—he should have gotten in the first place, albeit he now receives it under the guise of “mercy.” This strategy, however, sends the wrong moral signals and might even backfire. In the worst case, a jury exposed to powerful mercy-aggravating evidence might decide, despite its original plan to grant mercy, to withhold it. The net result: an undeserving defendant condemned to death.

Even if the penalty phase is not bifurcated and the existing, single-stage structure is retained, the defendant should, at the very least, have the option of seeking mercy. If he takes it, then both mercy-based and desert-based evidence would be introduced together, as they now are. Under the reformed system, however, the jury would be explicitly instructed that it must decide on *both* deserved punishment and mercy, relying on different evidence for each inquiry. Whether a jury could keep these two inquiries separate is, of course, open to doubt.¹⁸⁷ On the other hand, if the defendant decides not to seek mercy, then the only question for the jury would be what punishment is deserved. Mercy-aggravating evidence would accordingly be ex-

¹⁸⁷ Ample room exists to question how well capital juries understand and follow the instructions they receive during the penalty phase. See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590 (1996); Peter Meijes Tiersma, *Dictomies and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1.

cluded, so the defendant would face no risk of a death sentence based on the suffering of the victim's family or on the jury's prediction about his future dangerousness. By the same token, however, mercy-mitigating evidence would also be excluded, so the defendant would lose the chance of an undeserved life sentence based on some redeeming aspect of his character. How to proceed would be the defendant's choice.¹⁸⁸

B. An Unwise Virtue?

The second objection assumes that even if mercy could somehow be successfully integrated into the penalty phase, it would nonetheless be unwise to do so. Some specific objections of this sort are addressed below.

1. *The Injustice of Mercy*

When we decide to grant mercy, however we ultimately arrive at that decision, we impose less punishment than justice requires. As such, an act of mercy looks like an act of injustice, because "[i]f mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice."¹⁸⁹ If so, mercy is a virtue whose exercise produces injustice, which makes it an odd virtue indeed.

Philosophers have struggled to resolve this puzzle. Some argue that justice requires simply adhering to a rule, and that mercy requires individuation.¹⁹⁰ This solves the puzzle, but distorts the requirements of justice. Justice, as well as mercy, requires individuation. Others suggest that mercy merely requires selecting the lesser of two punishments, either of which is deserved, so that the exercise of mercy produces no injustice.¹⁹¹ This solves the puzzle, but only because justice sets a range of deserved punishments rather than identifying a uniquely deserved punishment. Still others suggest that mercy entails no injustice where no antecedent obligation to do justice exists. However, since judges and juries *are* presumably obligated to do justice, it would be unjust for *them* to show mercy. On this view, therefore, mercy's puzzle can be solved, but only if the power to grant mercy is

¹⁸⁸ This Article does not examine the *constitutional* status of mercy. It does not ask, in other words, whether or not the states are constitutionally required to afford capital defendants the possibility of receiving mercy in the penalty phase. Although it seems unlikely that the Constitution imposes any such obligation on the states, a capital defendant may be constitutionally entitled to exclude mercy-aggravating evidence from the penalty phase inasmuch as this evidence creates an unnecessary risk that an undeserving defendant will be wrongly condemned. This risk is arguably inconsistent with the Eighth Amendment's emphasis on heightened reliability in capital sentencing. Of course, if the defendant excludes mercy-aggravating evidence, the state should be free to exclude mercy-mitigating evidence.

¹⁸⁹ Murphy, *Mercy and Legal Justice*, *supra* note 9, at 167.

¹⁹⁰ See *id.* at 169-74.

¹⁹¹ See Hestevold, *supra* note 9, at 361.

vested exclusively with the victim. Mercy could come only from the victim, not from the state.¹⁹²

To address this problem fairly would take us far afield, without any confidence that the journey would end in success.¹⁹³ Still, even if it turned out that mercy and justice cannot be reconciled, such that capital sentencing juries must, for the sake of justice, be denied the power to grant mercy, then we would at least have improved the quality of justice. Capital jurors would no longer impose death sentences based on mercy-aggravating evidence, and capital defendants would no longer risk being wrongly condemned based on that evidence.

2. *Arbitrariness and Discrimination*

The mercy phase, like the desert phase, relies on an individualized mode of decisionmaking. In deciding whether to grant mercy, the potential mercy-giver must examine any and all facts bearing on the question of mercy. Discretion is needed to decide not only what punishment the defendant deserves, but also whether to grant mercy. At this point, one might object that incorporating mercy into the penalty phase would give capital sentencing juries more discretion than they already have. And, the argument continues, we should avoid this if possible, because with discretion comes arbitrariness and discrimination. One might further object that any effort to "expand" a capital jury's discretion in order to make room for mercy is at odds with *Furman's* demand for even-handedness in capital sentencing.¹⁹⁴

Take first the problem of arbitrariness. *Furman* has done little to improve consistency in capital sentencing. A capital jury must find the existence of one, nonvague aggravating circumstance. Otherwise, it is pretty much free to decide as it sees fit. Consequently, incorporating mercy into the penalty phase would not really "expand" the jury's

¹⁹² Murphy, *Mercy and Legal Justice*, *supra* note 9, at 174-77; see also Twambley, *supra* note 9, at 85 ("[A] judge has no right to be merciful."). Murphy ultimately modifies his position, concluding that:

Since individuals may legitimately show mercy in waiving their rights, a judge or any other official may exercise mercy in a criminal case *if* (and this is a very big "if") it can be shown that such an official is acting, not merely on his own sentiments, but as a vehicle for expressing the sentiments of all those who have been victimized by the criminal and who, given those sentiments, wish to waive the right that each has that the criminal be punished.

Murphy, *Mercy and Legal Justice*, *supra* note 9, at 179-80.

¹⁹³ Some journeys the unequipped should not take. Cf. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 80 (1992) (examining when "the promising scholarly endeavor of interdisciplinary research becomes a forum for posturing and the misuse of knowledge.").

¹⁹⁴ See, e.g., Howe, *supra* note 27, at 355 ("[A]rbitrary influences appear to run rampant where the inquiry extends to judging the offender's general deserts."); Sundby, *supra* note 23, at 1199 ("If *Lockett* was extended to require constitutionally that a trump card of mercy be given the sentencer, [*Furman* and *Woodson-Lockett*] would become even more difficult to reconcile.").

discretion, nor would it "exacerbate" the problem of arbitrariness. Instead, it would simply restructure how the jury exercises the discretion it already possesses. Whether or not the existing pattern of capital sentences is intolerably arbitrary, reconfiguring the penalty phase to accommodate mercy would not make things any worse. If we want greater consistency in capital sentencing, we should narrow the death-eligible class, not deny the jury the power to grant mercy.

Moreover, even if juries grant mercy "arbitrarily," we still need to ask why this is a problem. Incorporating mercy into the penalty phase would no doubt mean some defendants will receive mercy, while other defendants who seem like equally worthy candidates will not. Grants of mercy might have no more logic than the flip of a coin. Such arbitrary grants of mercy might appear to violate *Furman's* anti-arbitrariness injunction. Yet, insofar as no one is *entitled* to mercy, those who do not receive it have no standing in justice to complain.¹⁹⁵ Whatever force *Furman's* injunction does or should have in the domain of justice and deserved punishment, its writ does not run to the domain of mercy.

Consider next the problem of discrimination. It is difficult to exaggerate the influence of race in the administration of the death penalty.¹⁹⁶ If a jury has intentionally based its death-selection decision on a morally invidious fact, such as race, and the defendant can prove this intent, the law provides a remedy.¹⁹⁷ All too often, however, no outward sign betrays the invidious intent. Discrimination is frequently invisible, either because jurors are appropriately circumspect, or because they themselves are unaware of its influence over them.¹⁹⁸ Yet

¹⁹⁵ Mercy is perhaps best understood as an "imperfect virtue." See Rainbolt, *supra* note 9, at 172. In this view, the "principle of equal treatment" simply does not apply to mercy. *Id.*; cf. Davis, *supra* note 57, at 114 ("If there is a basis for rejecting 'clemency by chance,' the basis is, it seems, envy."). However, other moral restrictions do apply to the exercise of mercy. So, for example, it would be unacceptable to extend mercy to one defendant because he is white or to withhold it from another because he is African-American. See *infra* notes 201-02 and accompanying text.

¹⁹⁶ See BALDUS ET AL., *supra* note 68; WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Anthony G. Amsterdam, *Race and the Death Penalty*, CRIM. JUST. ETHICS, Winter/Spring 1988, at 2; Margaret Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924-1966*, 27 U. RICH. L. REV. 315 (1993).

¹⁹⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (noting that intentional discrimination violates equal protection).

¹⁹⁸ See, e.g., Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); cf. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1405 (1988) ("[T]he doctrine of purposeful discrimination insulates entirely many of the unconscious ways in which prejudiced social values give rise to differential treatment on the basis of race.").

even when no outward signs reveal the influence of invidious factors, we can still detect their presence. Looking at the capital sentencing system through statistical analysis has demonstrated the powerful effect of these otherwise invisible determinants of death. The most studied of these is, of course, race.¹⁹⁹ Statistics confirm what our experience has taught: Race plays a continuing role in deciding who is sentenced to death.²⁰⁰

One vehicle driving these discriminatory patterns is the jury's broad sentencing discretion. Insofar as mercy is thought to "expand" the jury's discretion, it might also be thought to expand the jury's opportunity to discriminate.²⁰¹ Again, this objection mistakenly assumes that incorporating mercy into the penalty phase would create new avenues down which discrimination could travel. In fact, the main consequence of incorporating mercy would simply be to divide the death-selection decision into two separate moments and to reconfigure the discretion the jury already has. On the other hand, if it turns out that jurors exercise the power to grant mercy in a discriminatory fashion and no way exists to ameliorate this discrimination, then the power to grant mercy should be withheld. Arbitrary grants of mercy are morally tolerable; discriminatory ones are not.²⁰²

3. Reason and Emotion

A third objection to incorporating mercy into the structure of the penalty phase is rooted in the traditional dichotomy between reason and emotion. Law is often understood to make its metaphorical home within the realm of reason. The nature of law, or perhaps its

¹⁹⁹ Another invisible determinant is the location of the crime. Crimes committed in rural areas are more likely to be prosecuted as capital crimes than are crimes committed in urban areas. See, e.g., Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983).

²⁰⁰ However, the Court held in *McCleskey v. Kemp* that the Constitution does not reach or remedy this hidden wrong. Only intentional discrimination is within its purview. See *McCleskey*, 481 U.S. at 291-99, 308-13.

²⁰¹ See, e.g., Howe, *supra* note 27, at 355 ("[A]rbitrary influences appear to run rampant where the inquiry extends to judging the offender's general deserts.").

²⁰² Cf. Gary Watson, *Closing the Gap*, 37 ARIZ. L. REV. 135, 140 ("If all of the prisoners on death row deserved the maximum sentence, it would still be injustice to the black prisoners to punish the white prisoners less."). Some commentators disagree with this view. For example, Ernest van den Haag writes:

If we grant that some (even all) murderers of blacks, or, some (even all) white and rich murderers, escape the death penalty, how does that reduce the guilt of murderers of whites, or of black and poor murderers, so that they should be spared execution too? Guilt is personal. No murderer becomes less guilty, or less deserving of punishment, because another murderer was punished leniently, or escaped punishment altogether.

aspiration, is commonly associated with ideas of rationality, predictability, and consistency.²⁰³

Indeed, this vision inspired *Furman*. It is, as the Court observed in *Gardner v. Florida*,²⁰⁴ of "vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."²⁰⁵ This same theme appeared in *California v. Brown*²⁰⁶ where the defendant complained that an instruction telling jurors not to be swayed by "mere . . . sympathy" would cause some of them to ignore mitigating evidence. Emphasizing that the instruction prohibited "mere" sympathy, a plurality of the Court rejected Brown's claim. A reasonable juror, the plurality explained, would "interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase."²⁰⁷

In contrast to the rational vision of law animating *Furman*, we commonly associate mercy with emotion and even caprice. Consequently, one might think that telling jurors they can dispense mercy would "inject emotion into the deliberative process."²⁰⁸ Measured against *Furman's* vision of law, mercy is an emotional, unpredictable, and unwelcome presence. This dichotomy between reason and emotion, together with mercy's association with capriciousness, exercises a powerful influence on the legal imagination and may seem to preclude a place for mercy in the penalty phase.

The links in the chain of reasoning leading from emotion to lawlessness are, however, too weak to sustain the objection. To begin with, the penalty phase would hardly be free from emotion even if its only goal was to impose just and deserved punishment. Nor would it be flooded with emotion if it incorporated mercy. The idea that a jury's inquiry into the defendant's moral desert is an act of reason untouched by emotion, while its decision to grant or withhold mercy is an act of emotion unmediated by reason, is untrue. Why

²⁰³ Cf. Paul Gewirtz, Commentary, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1049 (1988) ("In our time . . . advocates for reason's preeminent role in law remain ascendant virtually everywhere . . ."); Paul Gewirtz, Essay, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1029 (1996) ("All too often judges and scholars who write about law assert an inappropriately sharp distinction between the rational and the nonrational, especially between reason and emotion . . ."); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that the law ought to incorporate empathy); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (rejecting the idea that law and empathy are mutually exclusive).

²⁰⁴ 430 U.S. 349 (1977) (plurality opinion).

²⁰⁵ *Id.* at 358.

²⁰⁶ 479 U.S. 538 (1987).

²⁰⁷ *Id.* at 542.

²⁰⁸ *Chambers v. State*, 650 A.2d 727, 731 (Md. 1994) (noncapital trial).

should a grant of mercy be attended with any more emotion than a decision to impose deserved punishment? On the contrary, no decision made during the penalty phase can be totally insulated from emotion.

More to the point, the dichotomy between reason and emotion, though alluring, is also misleading. Emotions can indeed be powerful, and sometimes their power can overwhelm or "unhinge" our faculty of reason.²⁰⁹ Yet our emotions are not irrational. They are, at least in part, rational and cognitive.²¹⁰ Emotions do not strike randomly. When we experience an emotion we generally do so for a reason.²¹¹ Moreover, emotions can be a "heuristic guide to finding out what is morally right."²¹² When, among other things, they are "intelligently proportionate in intensity to their objects," they act as "trustworthy guides to moral insight."²¹³ The experience of pity, for example, depends on the belief that the person pitied is someone who has suffered undeserved misfortune.²¹⁴ Emotions cannot be written off as irrational, and neither can mercy.

4. *Jury Nullification*

A fourth objection to incorporating mercy into the penalty phase analogizes an act of mercy to an act of jury nullification. The operation of so-called "quasi-mandatory" sentencing statutes best illustrates this objection.

²⁰⁹ See, e.g., Moore, *supra* note 16, at 190 (noting "picture . . . in which the retributivist emotions unhinge our reason by their power").

²¹⁰ See, e.g., RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 141-70 (1987) (explaining how both rationality and objectivity could apply to emotions); JUSTIN OAKLEY, *MORALITY AND THE EMOTIONS* 34 (1992) (concluding that emotions are "complexes of cognitions, desires, and affects together"); Calhoun, *supra* note 9, at 84 ("No emotion is simply a feeling."); John Deigh, *Cognitivism in the Theory of Emotions*, 104 *ETHICS* 824, 824 (1994) ("Cognitivism now dominates the philosophical study of emotions."); Nussbaum, *supra* note 9, at 121 (noting that "contrast between morality and sympathy is a nest of confusions"); *id.* at 121 n.91 (noting that "merciful sentiments are based on judgments that are (if the deliberative process is well executed) both true and justified by the evidence"); Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *STAN. L. REV.* 1627, 1634 (1993) ("There is a remarkable degree of consensus, in recent philosophical work—and in anthropological and psychological work as well—that emotions are not just mindless pushes and pulls, but forms of perception or thought, highly responsive to beliefs about the world and changes in beliefs.") (footnotes omitted); Pillsbury, *supra* note 14, at 656 ("[E]motions involve cognitive assessments and possess their own form of rationality.").

²¹¹ See, e.g., Moore, *supra* note 16, at 190 ("Emotions are rational . . . and instantiate over time an intelligible character.").

²¹² *Id.* at 189; see also Pillsbury, *supra* note 14, at 710 ("The heart has its reasons, which reason knows not.") (quoting BLAISE PASCAL, *PENSEES* 343 (H.F. Stewart ed., 1950)).

²¹³ Moore, *supra* note 16, at 190.

²¹⁴ See, e.g., Deigh, *supra* note 210, at 836-37; cf. MARTHA NUSSBAUM, *POETIC JUSTICE* 65 (1995) (Pity "requires the belief that another person is suffering in a serious way through no fault of her own.").

Quasi-mandatory statutes require a jury to impose death if it finds that the applicable aggravating factors outweigh the mitigating ones. Assuming (counterfactually) that aggravating and mitigating factors bear only on what punishment a defendant deserves, and assuming that a defendant deserves death whenever aggravating circumstances "outweigh" mitigating circumstances, the end result is that quasi-mandatory statutes *require* the jury to impose death whenever it is deserved.²¹⁵ The law leaves the jury no other choice, insisting that it honor the outcome of its own moral calculus.²¹⁶ Within a quasi-mandatory sentencing scheme, a jury that grants mercy willfully ignores the law's command. The law mandates death, but the jury, moved by mercy, defies the law and imposes life.²¹⁷

Mercy so conceived becomes a form of jury nullification. Some courts have expressly drawn the analogy.²¹⁸ Outside the sentencing context, the law generally tolerates the practice of jury nullification, but it does so begrudgingly.²¹⁹ Nullification is treated as an unfortunate consequence of the jury's power to acquit, combined with the law's prohibition against double jeopardy and general refusal to sub-

²¹⁵ See, e.g., *Boyd v. California*, 494 U.S. 370, 374, 386 (1990) (upholding a jury instruction requiring the imposition of the death penalty when aggravating circumstances outweigh mitigating circumstances); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (same); see also *Walton v. Arizona*, 497 U.S. 639, 651-52 (1990) (plurality opinion) (upholding an instruction that the jury shall impose death if the mitigating circumstances are insufficient to "call for leniency"). But see *People v. Young*, 814 P.2d 834, 846 (Colo. 1991) (en banc) (plurality opinion) (invalidating on state constitutional grounds a capital statute that mandated death when aggravators and mitigators were in equipoise).

²¹⁶ Cf. *Allen*, *supra* note 53, at 733 (noting that "shall impose" language in Arizona capital statute "merely informs a sentencer of the implications of the [capital sentencing] process").

²¹⁷ See *Weisberg*, *supra* note 16, at 326 (characterizing *Lockett* as "a rule of jury nullification").

²¹⁸ See *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994) (holding that capital sentencing juries have right to grant mercy but that "it is improper for a court to instruct a jury that they [sic] have a right to disregard the law"), *cert. denied*, 116 S. Ct. 783 (1996); *Fox v. State*, 779 P.2d 562, 573 (Okla. Crim. App. 1989) (suggesting that "jury nullification" instruction in capital cases "would inform the jury of its right to return a sentence of life no matter how great the weight of evidence supporting the circumstances"), *cert. denied*, 494 U.S. 1060 (1990); *accord Pickets v. State*, 850 P.2d 328, 339 (Okla. 1993), *cert. denied*, 510 U.S. 1100 (1994). But see *Washington v. Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981) ("Jury nullification . . . goes to the question of [guilt]. By marked contrast, when a jury declines to impose the death penalty . . . [its decision] will not result in the defendant being set free."), *cert. denied*, 456 U.S. 949 (1982).

²¹⁹ See, e.g., *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996) ("Jury nullification is a fact because the government cannot appeal an acquittal; it is not a right, either of the jury or of the defendant."); *Scarpa v. Dubois*, 38 F.3d 1, 11 (1st Cir. 1994) ("[A]lthough jurors possess the raw power to set the accused free for any reason or no reason . . . [w]e do not accept the premise that jurors have the right to nullify the law on which they are instructed . . .") (citations omitted), *cert. denied*, 115 S. Ct. 940 (1995).

ject acquittals to appellate review.²²⁰ Tolerance, however, is as far as the law is willing to go. It refuses to openly acknowledge the jury's power to nullify or to otherwise lend the practice any legitimacy.²²¹ Viewed as a species of jury nullification, mercy cannot be expressly recognized as a valid part of the penalty phase, at least not without snubbing the rule of law.²²²

This objection is unpersuasive. Whatever one thinks about a jury's power to nullify the commands of the substantive criminal law, the practice of granting mercy is importantly different. For one thing, mercy in capital sentencing does not mean a guilty defendant goes free. It merely means that the defendant gets less punishment than he deserves, usually life in prison. Moreover, although the criminal law would lack integrity if it declared something a crime and then told jurors they were free to acquit someone guilty of that crime, the same is not true of mercy. The law does not send contradictory signals if it instructs jurors to impose death only if it is deserved but, at the same time, assigns them the power to impose a lesser sentence in the name of mercy.

5. *Executive Prerogative*

A final objection to incorporating mercy into the penalty phase looks to separation-of-powers doctrine. According to this objection, giving juries the power to grant mercy would violate the traditional Anglo-American view that mercy must come from the executive if it is to come at all.²²³ In short, mercy is an executive prerogative.

At least with respect to capital sentencing, however, practice has overtaken tradition. As explained above, the penalty phase already permits the jury to base its sentencing decision on facts and circumstances that properly belong only to the domain of mercy. In this limited sense, the jury already "decides" whether or not to grant mercy. Indeed, when governors deny clemency, they sometimes justify their denial on the ground that the jury has already considered

²²⁰ See, e.g., *United States v. Leach*, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980) ("If we were to consider jury nullification as a basis [for appeal], we would in effect be . . . greatly weakening the protection against double jeopardy.").

²²¹ See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C. Cir. 1972) ("Th[e] so called right of jury nullification . . . risks . . . anarchy.").

²²² See generally Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 250 (1993) (arguing against an instruction of jury nullification in all cases); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512 (1976) ("[J]urors told of their right to nullify would often frustrate the people's sense of justice. . ."). But see Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 56 (Autumn 1980).

²²³ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (describing clemency power as the "power to extend mercy").

everything the condemned inmate has put forward. In essence, governors invoke a self-imposed doctrine of *res judicata* and respectfully decline to second-guess the jury.²²⁴ Capital sentencing juries, however, are never told that granting mercy is part of their job description.²²⁵

To the extent that this objection reflects the view that mercy *ought* to be vested exclusively in the hands of the executive, it is unrealistic in today's world. Governors may have the power to grant mercy, but they no longer seem willing to exercise that power in a meaningful fashion. Faced with constituencies anxious to see capital sentences carried out swiftly, governors simply do not grant mercy, even in cases where mercy clearly seems appropriate.²²⁶ Executive clemency in the modern era is almost nonexistent.²²⁷ While no defendant who has been properly convicted and who deserves death has been treated unjustly if he is denied mercy, the decision to grant mercy should not turn on whether an election is fast approaching. If a genuine capacity

²²⁴ If jurors were told that they had the power to grant mercy, this *res judicata* principle would gain some force, but it would not eliminate the need for executive clemency. Executive clemency would still be needed to consider facts and circumstances that, for whatever reason, were never brought to the jury's attention. See, e.g., Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227, 234-38 (1993).

²²⁵ See, e.g., *Lusk v. Singletary*, 965 F.2d 946, 951 (11th Cir. 1992) ("[T]here was no constitutional error in the trial court's refusal to consider 'mercy' in the absence of any mitigating circumstances."), *cert. denied*, 508 U.S. 920 (1993); *Bertolotti v. Dugger*, 883 F.2d 1503, 1526 (11th Cir. 1989) ("[T]he Constitution [does] not mandate an instruction explicitly authorizing the jury to . . . exercise its power of mercy."), *cert. denied*, 497 U.S. 1032 (1990); *Rieber v. State*, 663 So.2d 985, 995 (Ala. Crim. App. 1994) (rejecting proposed instruction that "[e]ven if you find one or more aggravating circumstances beyond a reasonable doubt . . . [n]othing in the law forbids you from extending mercy"), *cert. denied*, 116 S. Ct. 531 (1995); *People v. Rodrigues*, 885 P.2d 1, 76 (Cal. 1994) (upholding refusal to instruct on mercy), *cert. denied*, 116 S. Ct. 147 (1995); *Thornton v. State*, 449 S.E.2d 98, 114 (Ga. 1994) (upholding refusal to instruct jury that it "could impose a life sentence based solely on mercy"); *Grandison v. State*, 506 A.2d 580, 616 (Md.) (holding that a mercy instruction would be impermissible within the modern capital punishment scheme), *cert. denied*, 479 U.S. 873 (1986); *Mack v. State*, 650 So.2d 1289, 1331 (Miss. 1994) ("The defendant has no right to a mercy instruction."), *cert. denied*, 116 S. Ct. 214 (1995); *Rogers v. State*, 890 P.2d 959, 978 (Okla. Crim. App. 1995) ("A life sentence may be given notwithstanding a jury finding of aggravating circumstances which outweigh mitigating circumstances, but an instruction on this point is not required."); *State v. Hartman*, 703 S.W.2d 106, 119 (Tenn. 1985) (holding that trial courts are not required to give jury charge on mercy), *cert. denied*, 478 U.S. 1010 (1986).

²²⁶ See, e.g., Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 268 (1990); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 607-10 (1991); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 347-49 (1996); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 304 (1993). But see Margery M. Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio's Death Sentences*, 19 CAP. U. L. REV. 695, 782-93 (1990) (suggesting political costs of clemency may not be as great as thought).

²²⁷ See, e.g., Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992).

for mercy is something a system of capital sentencing should have, then it makes sense to place the power of mercy in the hands of the jury.

CONCLUSION

The death penalty is a growing presence,²²⁸ and the public's strong support for capital punishment shows little sign of abating.²²⁹ To do justice should be the first goal of the penalty phase. Death should be imposed, if at all, only if it is deserved. The penalty phase fails most egregiously when it permits the undeserving to be condemned. As it now stands, however, a capital defendant runs an unnecessary risk of being condemned to death because capital sentencing juries are improperly swayed by evidence having no legitimately retributive purpose, except to weigh against a grant of mercy. From a retributive perspective, we should wonder how many of the 3000-plus death sentences imposed since *Furman v. Georgia* genuinely represent the punishment the offender deserved.²³⁰

Even if we had confidence that those sentences matched the unbending demands of justice, we might still pause. Over three hundred inmates have been executed since January 1973,²³¹ and more death sentences—fifty-six—were carried out last year than in any year since 1957.²³² Moreover, when we hear talk that lethal injection is “too easy,”²³³ when multiple executions are performed on the same day,²³⁴ when efforts are made to expand the death penalty to offenses

²²⁸ See, e.g., Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *STUD. IN L., POL. & SOC'Y* 71 (1993); Billionis, *supra* note 27, at 285; see also Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 *J. SOC. ISSUES* 19, 48-49 (1994) (noting consistently high support for the death penalty in recent public opinion polls).

²²⁹ See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60001-26, 108 Stat. 1796 (1994) (expanding scope of federal death penalty); 1995 N.Y. Laws 759-82 (restoring New York death penalty); *Connecticut Death Penalty Law is Toughened*, N.Y. TIMES, Apr. 13, 1995, at B6; David Barstow, *Executions Rise Sharply as Appeals Dry Up*, ST. PETERSBURG TIMES, Dec. 12, 1995, at A12; *Federal Government Set to Resume Executions*, N.Y. TIMES, Mar. 14, 1995, at A26; Kathy Walt, *Bush Signs Bill To Speed Executions, Limit Parole*, HOUSTON CHRON., June 8, 1995, at 32A; Jack Wardlaw, *Death Penalty for Child Rape Gets Final OK*, NEW ORLEANS TIMES-PICAYUNE, June 6, 1995, at A4.

²³⁰ *Death Row, U.S.A.*, *supra* note 21, at 1.

²³¹ *Id.*

²³² Richard Carelli, *U.S. Executions Highest Since 1957*, PORTLAND OREGONIAN, Dec. 30, 1995, at A14. Texas took the lead. See *States Executed 56 in '95, with Texas in the Lead*, DALLAS MORNING NEWS, Dec. 30, 1995, at 5A. Executions in the United States peaked in the mid-1930s, tapered off through the mid-1960s, and began to rise again starting in 1980. See ZIMRING & HAWKINS, *supra* note 22, at 27.

²³³ *Man's Execution "Too Easy," Says Victim's Mother*, ST. LOUIS DISPATCH, Nov. 23, 1995, at 70.

²³⁴ See Peter Baker, *Killer Executed After Allen Rejects Plea; Virginia Carries Out Fourth Death Sentence in Three Months*, WASH. POST, Jan. 5, 1996, at B3; *2nd Inmate in 2 days Dies in Florida's Electric Chair*, ORLANDO SENTINEL, Dec. 6, 1995, at D3; Michael Graczyk, *Texas Puts to Death*

in which no one is killed,²³⁵ and when the once-Great Writ of habeas corpus continues to shrink,²³⁶ the time is ripe to take stock. We should remind ourselves that while justice is the first and crowning jewel of the virtues, it is not the only one. There is another, which falls as a "gentle rain from heaven . . . twice blest."

1st Asian Executed in U.S. in 19 Years, DALLAS MORNING NEWS, Dec. 8, 1995, at 28A; *Killers Put to Death in Florida and Missouri*, S.F. CHRON., Dec. 6, 1995, at A3; Don Terry, *2 Executions in Illinois, Rarity There*, N.Y. TIMES, Mar. 23, 1995, at A21; *2 Texas Killers Are Executed in 88 Minutes*, N.Y. TIMES, Feb. 1, 1995, at A19; *Virginia and North Carolina Put Killers to Death*, N.Y. TIMES, Jan. 25, 1995, at A14.

²³⁵ See LA. REV. STAT. ANN. § 14:42C (West 1996) (aggravated rape of victim under age 12 punishable by death or life imprisonment).

²³⁶ Habeas corpus is the procedural vehicle by which state-sentenced inmates challenge the constitutionality of their convictions and sentences in federal court. For critical examinations of the Court's recent habeas revolution, see, e.g., LARRY YACKLE, RECLAIMING THE FEDERAL COURTS 151-214 (1994); Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991); Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL. L. REV. 2453 (1993); Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1009-23 (1994); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 528 (1995); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 800-01 (1992); Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2479-92 (1993); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 156-77 (1994); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); James S. Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-1991); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507 (1993); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939 (1991); Yale L. Rosenberg, *Kaddish for Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 320-88 (1993); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 642-44, 575, (1993).

For more positive assessments, see, e.g., Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433 (1994); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1994 SUP. CT. REV. 65.

Congress has recently entered the fray with its own amendments to the federal habeas corpus statute. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).