II. ISSUES IN THE ADMINISTRATION OF THE DEATH PENALTY

The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing

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CONTENTS

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INTRODUCTION

Deciding whether a person eligible for execution shall live is an awesome task. Less immediate but no less awesome is selecting the procedural rules that describe how these choices shall be made. By whom? On what information? Against what standard? A sentence decides the fate of a single person; procedural choices influence the number of executions and the identity of those who will suffer them. In the seventeen years and more than three dozen cases that define the modern era of capital litigation,[1] the constitutionality of procedures for deciding who dies has been an issue, usually the sole issue, in nearly every Supreme Court opinion on the death penalty.[2]

The predominance of procedural challenges was predictable. Once the Court ruled death a constitutional penalty for murder but not for lesser crimes, process arguments became the sole refuge of the defense. The lawyer for a condemned person may point to a state procedure that allegedly increases the risk of execution and argue that it contravenes a clear holding of the Court. Perhaps, for example, the state rule does not let a defendant seek mercy by proving emotional disturbance. *Lockett v. Ohio*[3] and *Eddings v. Oklahoma*[4] forbid such a rule. More

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[1] The period begins with Witherspoon v. Illinois, 391 U.S. 510 (1968), and ends with the six cases on the Court's 1984 docket: Ake v. Oklahoma, 105 S. Ct. 1087 (1985); Baldwin v. Alabama, 105 S. Ct. 2727 (1985); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Francis v. Franklin, 105 S. Ct. 1965 (1985); Heckler v. Chaney, 105 S. Ct. 1649 (1985); and Wainwright v. Witt, 105 S. Ct. 844 (1985). *Ake*, *Witt*, and *Chaney* were decided before this Article was submitted for publication. *Francis*, *Caldwell*, and *Baldwin* were decided after this Article had been set in galleys. *Caldwell* supports the arguments in parts I(*B*), I(*C*)(3), and III, and is cited in their footnotes. *Baldwin* is cited in support of propositions in Parts I(*C*)(3) and III. On April 22, 1985, the Court granted certiorari in Cabana v. Bullock, 105 S. Ct. 2110 (1985), which will review a Fifth Circuit opinion vacating a death sentence in light of Enmund v. Florida, 458 U.S. 782 (1982).

[2] Enmund v. Florida, 458 U.S. 782 (1982) (execution unconstitutional when felony-murderer did not cause or intend death of victim), and Coker v Georgia, 433 U.S. 584 (1977) (execution for rape unconstitutional), considered the substantive content of the cruel and unusual punishments clause of the eighth amendment. Heckler v. Chaney, 105 S. Ct. 1649 (1985), upheld the legality of the Food and Drug Administration's decision not to regulate the use of lethal injections in capital punishment. Every other capital decision since 1968 partly or wholly concerned procedures for identifying death-eligible murderers and deciding who among them would be executed.

[3] 438 U.S. 586 (1978).

[4] 455 U.S. 104 (1982).

likely though, the defense lawyer will contend that a state rule, while not expressly forbidden by any case, has increased the risk of execution in violation of a constitutional theory of capital sentencing gleaned from the Court's opinions. Conversely, a prosecutor may argue that although a state rule could lead to more death sentences, it nevertheless violates no constitutional interest of the defendant. For it is of no moment that a procedure increases the risk of death unless the increase is one the Constitution will not tolerate.[5]

Both the prosecutor and the defense lawyer will read Supreme Court decisions from *Witherspoon v. Illinois*[6] to *Baldwin v. Alabama*[7] in an effort to extrapolate a principle for determining whether a particular risk is constitutionally tolerable. They will ask: What is the capital defendant's constitutional interest? What theory explains that interest? Does the rule under review accommodate it?

The search for a coherent constitutional sentencing theory will be arduous. The two lawyers will find cases that allow juries "unbridled" discretion in choosing the sanction for those guilty of capital crimes, but they will also find cases that say juries must be guided and may not be granted "free rein" in performing the same task.[8] They will discover that although the Court has rejected incapacitation as "a sufficient justification for the death penalty," it has upheld death sentences from Texas, where a prediction of future violence may make execution mandatory.[9] Eventually, the lawyers may conclude that there is no constitutional theory of capital sentencing, or, perhaps more accurately, that there are several. They may discern that the cases pretend otherwise, invoking the language of precedent to suggest an aura of continuity. Must the defendant be given a chance to respond to negative information in a presentence report? Yes.[10] May a sentencing jury be told that a life term can be commuted? Yes.[11] Must a state supreme

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[5] Barefoot v. Estelle, 103 S. Ct. 3383, 3400 (1983) ("There is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death, but this fact does not make that evidence inadmissible . . . .").

[6] 391 U.S. 510 (1968).

[7] 105 S. Ct. 2727 (1985).

[8] *Compare* California v. Ramos, 103 S. Ct. 3446, 3457 n.22 (1983) ("unbridled" jury discretion permitted) *with id.* at 3452 (requirement that jury be "given guidance") (quoting Gregg v. Georgia, 428 U.S. 153, 192 (1976) (plurality opinion)) *and* Spaziano v. Florida, 104 S. Ct. 3154, 3164 (1984) (jury may not have "free rein").

[9] *Compare Spaziano*, 104 S. Ct. at 3163 (incapacitation not "a sufficient justification for the death penalty") *with infra* notes 387-92 and accompanying text (prediction of future dangerousness may make death penalty mandatory in Texas).

[10] Gardner v. Florida, 430 U.S. 349 (1977).

[11] California v. Ramos, 103 S. Ct. 3446 (1983).

court compare a condemned person's sentence with those in comparable cases? No.[12] Does a capital defendant have a right to a jury sentence? No.[13] May a sentencer rely on nonstatutory aggravating information? Yes.[14] What theory reconciles the Court's answers to these questions?

The Court's language offers some hints. In *Bullington v. Missouri*,[15] a murder defendant was sentenced to life imprisonment, but the conviction was reversed and the defendant was retried. The Court held that the double jeopardy clause prohibited a death sentence following a second conviction because of the " 'unacceptably high *risk* that the [prosecution], with its superior resources, would wear down a defendant' . . . thereby leading to an *erroneously* imposed death sentence."[16] In *Spaziano v. Florida*, the Court remarked that it has always "carefully scrutinized the States' capital sentencing schemes to minimize the *risk* that the penalty will be imposed in *error*."[17] In *Zant v. Stephens*, the majority said: "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for *reliability* in the determination that death is the *appropriate* punishment in a specific case.' "[18] These sentiments appear throughout the capital cases but they do not describe a constitutional theory. What does it mean to call a death sentence "erroneously imposed?" What makes a death sentence "appropriate?" What makes it "reliable?"

In their effort to answer these questions, the hypothetical prosecutor and defense lawyer might conclude that the Court's death penalty cases occupy three categories. Cases in the first category determine whether the eighth amendment[19] permits execution for a particular crime. The Constitution allows a death sentence when the crime is murder,[20] but

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[12] Pulley v. Harris, 104 S. Ct. 871 (1984).

[13] Spaziano v. Florida, 104 S. Ct. 3154 (1984).

[14] Barclay v. Florida, 103 S. Ct. 3418 (1983); Zant v. Stephens, 462 U.S. 862 (1983).

[15] 451 U.S. 430 (1981).

[16] *Id.* at 445 (quoting United States v. DiFrancesco, 449 U.S. 117, 130 (1980)) (emphasis added).

[17] 104 S. Ct. 3154, 3162 n.7 (1984) (emphasis added).

[18] 462 U.S. 862, 884-85 (1983) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) (emphasis added).

[19] U.S. CONST. amend. VIII. On the history of the cruel and unusual punishments clause, see Gillers, *Berger Redux* (Book Review), 92 YALE L.J. 731 (1983); Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

[20] Gregg v. Georgia, 428 U.S. 153 (1976).

not for some felony-murders,[21] kidnapping,[22] or rape.[23] Next are cases that apply various provisions of the Constitution to capital sentencing — for example, the ex post facto[24] and double jeopardy[25] clauses, or the privilege against self-incrimination.[26] These cases rely on traditional interpretations of the provisions they construe, although their capital dimension may prove influential.[27] In the third category are decisions that address the constitutionality of state procedures for separating the murderers who will be executed from those who will be spared. These decisions, the subject of this Article, rest mainly on the eighth amendment for their theories of capital sentencing.[28]

The third category can be further divided into two separate groups. In one group are cases that determine whether a particular capital system is likely to yield a pattern of death sentences that are not "arbitrary" when compared to the crimes and characters of those receiving lesser punishment. A system might fail because it is fundamentally unable to produce the level of evenhandedness the Constitution demands, as was true of the systems in *Furman v. Georgia*[29] and the mandatory death cases,[30] but not of those in *Gregg v. Georgia*,[31] *Proffitt v. Flor-*

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[21] Enmund v. Florida, 458 U.S. 782 (1982).

[22] Eberheart v. Georgia, 433 U.S. 917 (1977).

[23] Coker v. Georgia, 433 U.S. 584 (1977).

[24] Dobbert v. Florida, 432 U.S. 282 (1977).

[25] Arizona v. Rumsey, 104 S. Ct. 2305 (1984); Bullington v. Missouri, 451 U.S. 430 (1981).

[26] Estelle v. Smith, 451 U.S. 454 (1981).

[27] *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 446 (1981) (because capital sentencing hearing "was like a trial on the question of guilt or innocence" double jeopardy clause forbids imposition of capital sentence following retrial when first trial ended in life sentence).

[28] Of lesser importance have been the sixth amendment's right to trial by jury, U.S. CONST. amend. VI, and the fourteenth amendment's due process clause, U.S. CONST. amend. XIV, § 2. Witherspoon v. Illinois, 391 U.S. 510 (1968), Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 105 S. Ct. 844 (1985), analyzed the sixth amendment in addressing the constitutionality of challenges of prospective jurors. Gardner v. Florida, 430 U.S. 349 (1977), cited the fourteenth amendment's due process clause for its conclusion that a capital defendant has a right to rebut negative information on which the sentencer will rely. Green v. Georgia, 442 U.S. 95 (1979), relied on the due process clause of the fourteenth amendment for its holding that the petitioner was entitled to introduce exculpatory hearsay evidence at the punishment phase of his capital trial.

[29] 408 U.S. 238 (1972).

[30] Roberts v. Louisiana, 431 U.S. 633 (1977) (Roberts II); Roberts v. Louisiana, 428 U.S. 325 (1976) (Roberts I); Woodson v. North Carolina, 428 U.S. 280 (1976).

[31] 428 U.S. 153 (1976).

ida,[32] and *Jurek v. Texas.*[33] Or a basically sound system might suffer from a single procedural rule that distorts its results to a constitutionally unacceptable degree, a claim pressed successfully in *Beck v. Alabama*[34] but rejected in *Pulley v. Harris.*[35] (Even a system structurally capable of nonarbitrary operation may on occasion impose an aberrational sanction, as happened in *Godfrey v. Georgia.*[36]) A system that fails the *Furman* test because it produces an arbitrary sentencing pattern need not necessarily increase the risk of execution for any member of the capital pool. The system may actually reduce the statistical likelihood that a particular defendant will be executed. Concern with risk comes later. It was the absence of minimal evenhandedness within the pool that invalidated the pre-*Furman* statutes.[37]

Now let us posit a constitutional system and a death sentence that is not aberrationally arbitrary. Unlike *Furman* or *Woodson*, our defendant was sentenced under a valid statute; unlike *Godfrey*, he may constitutionally be executed. A second group of cases, somewhat overlapping the first, tells us that this sentence may still be illegal because a procedural rule has impermissibly increased the risk of execution.[38] The various constitutional requirements intended to diminish this increased risk of execution must operate from a premise about what makes an

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[32] 428 U.S. 242 (1976).

[33] 428 U.S. 262 (1976).

[34] 447 U.S. 625 (1980) (capital sentence reversed when jury not given lesser included offense charge).

[35] 104 S. Ct. 871 (1984) (state law need not provide for horizontal proportionality review of capital sentences).

[36] 446 U.S. 420, 433 (1980) (death sentence overturned because there was "no principled way to distinguish [defendant's case] from the many cases in which" death penalty not imposed).

[37] *See* Pulley v. Harris, 104 S. Ct. 871, 876 (1984): "In *Furman*, the Court concluded that capital punishment, as then administered . . . was being imposed so discriminatorily . . . so wantonly and freakishly . . . and so infrequently . . . that any given death sentence was cruel and unusual." *See infra* note 86 and accompanying text.

[38] If so, our defendant can be resentenced, even to death, under an altered procedure. *See* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (case remanded so state court could "consider all relevant mitigating evidence"); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion) (remand to give defendant an opportunity to respond to negative sentencing information). In Dobbert v. Florida, 432 U.S. 282 (1977), the defendant had committed his crime but had not yet come to trial when the state's death law was declared invalid in Furman v. Georgia, 408 U.S. 238 (1972). He was eventually sentenced to death under the state's post-*Furman* capital statute. The ex post facto clause, U.S. CONST. art. I, § 10, was held no bar to the sentence. It is unclear whether any (or all) defendants whose death sentences were vacated when *Furman* was decided could have been resentenced to death under subsequently passed statutes.

increased risk impermissible.

As suggested above, the cases speak of the goal of "*individualized* sentences,"[39] the "need for *reliability*" in determining "the *appropriate* punishment,"[40] and the desire to "minimize the *risk* that the [death] penalty will be imposed in *error*."[41] These words speak to a single constitutional interest in sentencing accuracy, but not accuracy in the conventional sense of an objectively right sentence. As long as a state statute satisfies the *Furman* line of cases — and does not malfunction as in *Godfrey* — the Constitution is neutral on which murderers get executed. It requires that capital sentences be accurate but takes no position on what, in any case, an accurate sentence might be. Thus, a defendant whose death sentence is found inaccurate may be resentenced under different procedures and executed.[42] If a death sentence is inaccurate, it is not because it is the "wrong" sentence but because there is a defect in the selection process, a defect that impermissibly altered the odds to favor execution. Since the boundaries of the accuracy interest are not entirely clear, it is not always possible to predict whether a given state rule impermissibly alters those odds. At the very least, however, accuracy will be influenced by the identity of the sentencer, the reliability of the information the sentencer receives, and the kind and quantity of that information.

Woodson v. North Carolina[43] and the two *Roberts v. Louisiana* cases,[44] for example, concluded that the legislature may not be the sentencer. *Witherspoon v. Illinois*,[45] *Adams v. Texas*[46] and *Wainwright v. Witt*[47] told us that when a jury sentences, the Constitution has an interest in the jury's composition.[48] *Spaziano v. Florida*[49] found, however, that a capital defendant has no right to a jury sentence. The sentencer may be a judge. With regard to the correctness of information,

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[39] Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (emphasis added).

[40] Zant v. Stephens, 462 U.S. 862, 884-85 (1983) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) (plurality opinion) (emphasis added).

[41] Spaziano v. Florida, 104 S. Ct. 3154, 3162 n.7 (1984) (emphasis added).

[42] *See* cases cited *supra* note 38. Roosevelt Green, whose death sentence was vacated in Green v. Georgia, 442 U.S. 95 (1979), was executed after resentencing. N.Y. Times, Jan. 10, 1985, at A19, col. 1.

[43] 428 U.S. 280 (1976); *see infra* part I(B).

[44] Roberts v. Louisiana, 431 U.S. 633 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); *see infra* part I(B).

[45] 391 U.S. 510 (1968).

[46] 448 U.S. 38 (1980).

[47] 105 S. Ct. 844 (1985).

[48] *See infra* part I (C)(2).

[49] 104 S. Ct. 3154 (1984); *see infra* part I (C)(3).

Gardner v. Florida[50] gave a capital defendant the right to deny or explain damaging allegations on which the sentencing judge will rely, and *Green v. Georgia*[51] held that a capital defendant's mitigating evidence was sufficiently trustworthy to forbid its exclusion under an otherwise valid hearsay rule. Together, *Gardner* and *Green* make reliability a federal question at either end: the credibility of some information will be too low to permit its use while other information will be too trustworthy to be ignored. Last, accuracy in capital sentencing is influenced by the kind and quantity of the sentencer's information. *Lockett v. Ohio*[52] and *Eddings v. Oklahoma*[53] gave defendants the right to introduce and have the sentencer consider all relevant evidence inviting mercy. *Eddings* and *Green* made relevance, like reliability, a federal question. The interest in accuracy is two-edged, however. It also explains the prosecutor's right to introduce information that may suggest retribution or for other reasons encourage execution. *California v. Ramos*[54] upheld an instruction to the jury that the governor could commute a sentence of "life without parole." *Jurek v. Texas*[55] and *Barefoot v. Estelle*[56] allowed the sentencer to consider the likelihood that the defendant would commit acts of violence if permitted to live. *Barefoot* approved the use of psychiatric testimony to establish that likelihood.[57] *Zant v. Stephens*[58] and *Barclay v. Florida*[59] permitted sentencer consideration of a capital defendant's criminal record.

This typology of category three cases posits one group of decisions that turn on avoidance of the fact or likelihood of pre-*Furman* arbitrariness and a second group aimed at accuracy in sentencing. Principles derived from the first group control what I have previously called the *definition stage* of capital sentencing: rules that define which defendants will be subject to execution.[60] These rules must describe a pool of defendants who are sufficiently alike to satisfy *Furman*. Principles derived from the second group control the *selection stage* of capital sentencing: rules that guide the selection of those defendants who will be

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[50] 430 U.S. 349 (1977).
[51] 442 U.S. 95 (1979).
[52] 438 U.S. 586 (1978); *see infra* part I(B).
[53] 455 U.S. 104 (1982); *see infra* part I(B).
[54] 103 S. Ct. 3446 (1983); *see infra* parts II(C) & III.
[55] 428 U.S. 262 (1976); *see infra* part II(B).
[56] 103 S. Ct. 3383 (1983); *see infra* part II(C).
[57] *Id.* at 3397-99.
[58] 462 U.S. 862 (1983).
[59] 103 S. Ct. 3418 (1983).
[60] Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 23-26 (1980).

executed from among those in the death-eligible pool.[61] These rules must avoid too great a risk of sentencing "error." The Court has occasionally drawn the same distinction.[62] As long as a state avoids the danger of pre-*Furman* arbitrariness at the definition stage and does not employ procedures that encourage constitutionally inaccurate results at the selection stage, its death sentences are likely to be upheld.

There should not be much current activity at the definition stage. Ample precedent now guides lawmakers wishing to write a capital punishment law. Barring significant doctrinal change, or sloppy drafting, future legislation will probably satisfy *Furman*. Cases like *Godfrey v. Georgia*[63] and *Beck v. Alabama*[64] may still arise as a result of system malfunction or isolated and quirky state procedures, but not often. Since 1980 when *Beck* was decided, emphasis in the category three cases has been on selection stage rules that allegedly impede the accuracy of capital sentencing decisions.[65] Because that trend will likely continue, clarity is needed on the dimensions of the accuracy interest.

Any theory of capital sentencing must begin with an understanding of what the sentencer is expected to do when asked to decide if a particular defendant shall live or die. Without that understanding, it is impossible to rule on objections to evidence at the sentencing hearing, to describe the proper bounds of counsel's sentencing argument, to instruct a capital sentencing jury on its duty, or to determine the accuracy of a system's decisions. Whereas a noncapital sentencer selects a punishment from among the many available, the capital sentencer decides only whether the penalty should be life imprisonment or death.[66] The appropriateness of the *increment* in sanction, and only that, is the domain of the capital sentencing inquiry. There is nothing else to decide. And the increment is singular — death or not — it is not quantifiable, it is not reducible, it is not a question of degree. Death or not. In choosing be-

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[61] *Id.* at 26-31.

[62] Zant v. Stephens, 462 U.S. 862, 884-85 (1983).

[63] 446 U.S. 420 (1980).

[64] 447 U.S. 625 (1980).

[65] Pulley v. Harris, 104 S. Ct. 871 (1984), may be the lone exception. The Court characterized Harris' claim that the Constitution required judicial comparison of his death sentence with the sentences of others convicted of the same crime as "rooted in Furman v. Georgia." *Id.* at 876.

[66] ***But see*** the Texas procedure, ***infra*** text accompanying notes 387-92. The alternative to execution might be a term of years but it will usually be such a high term that it is effectively the same as life imprisonment. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(A) (Supp. 1985) (death or life without possibility of parole until prisoner has completed 25 years). If the term is too lenient, a death sentence may be encouraged for improper reasons. *See infra* part III.

tween these two strict options, the sentencer, whatever else it does, necessarily decides whether mercy is appropriate given the crime and the history and record of the accused. The defendant is entitled to introduce evidence of his history and record to assure that mercy is not denied despite facts that would support it. This description of the capital sentencer's role is not intended to be an argument for one view over others. It is the only role possible. One can debate the considerations that may properly influence a decision to increase the penalty from life to death — for example, whether mercy may be denied because future violence is foreseen or retribution desired — but not the fact that the increase, and nothing else, is before the sentencer for decision.

Focusing on this role, this Article proposes a theory of constitutional accuracy at capital sentencing that partly evolves from the Court's words and cases, explaining many but not all of them. Building on and somewhat rearranging the conventional typology described in this Introduction, the Article suggests that the prohibition against cruel and unusual punishments should be viewed to establish the following principles: A death sentence is accurate in the constitutional sense if, first, the election between life imprisonment and execution is made by an institutionally competent body. The concept of ***institutional competence*** in death sentencing is implicit in several important Supreme Court death penalty opinions concerned with sentencer identity. Drawing on these opinions, the Article advances a theory of institutional competence against which to measure these cases and future ones like them.[67] Second, the sentencer's choice must be based on ***historical*** information rationally related to the defendant's "character and record and to circumstances of the offense."[68] The Court was wrong in *Jurek* and later cases to allow capital choices to rest on predictions of future violent behavior.[69] Finally, a capital system must assign, and encourage the sentencer to accept, ***undivided responsibility*** for deciding whether a defendant's punishment should be increased from life to death. A death sentence, even if pronounced by a constitutionally competent body, cannot be trusted as accurate if the sentencer was systemically or otherwise encouraged to avoid accepting full responsibility for determining the "moral guilt" of the defendant.[70] These three procedural components

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[67] *See infra* part I.

[68] Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

[69] *See infra* part II.

[70] Enmund v. Florida, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his] criminal culpability' ") (quoting Mullaney v. Wilbur, 421 U.S. 684,

— institutional competence, historical information, and undivided responsibility — foster accuracy in capital cases by promoting congruence between a sentencing choice and the community's disposition toward retribution and mercy.

Constitutional law does not evolve with mathematical precision, but tolerance for inconsistency should vary with the subject. In capital sentencing that tolerance should be low. A single consistent theory against which to assess state sentencing rules promotes evenhanded results. Evenhandedness is a goal of all lawmaking but is especially important in capital sentencing. Evenhandedness fairly describes the constitutional interest that in 1972 impelled the Court to invalidate all death penalty laws in the nation.[71] Evenhandedness was the standard the Court used in 1976 to measure the death sentencing statutes of five states, upholding three and invalidating two.[72] Evenhandedness has been stressed as a constitutional value in years since.[73] The Court must bring to its interpretations the same concern for consistency that it has advised the states the Constitution requires of them.

I. Institutional Competence

An institution is competent to sentence or participate in sentencing a capital defendant if the state may legitimately assign it that responsibility. Although not generally perceived as such, several capital cases in fact establish a test of institutional competence in capital sentencing. *Furman v. Georgia*[74] reviewed the competence of all criminal justice institutions to act in a constitutionally tolerable manner under then current death penalty laws. The mandatory death cases,[75] as well as *Green v. Georgia*,[76] *Lockett v. Ohio*,[77] and *Eddings v. Oklahoma*,[78] considered

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698 (1975)); *see infra* part III.

[71] Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion).

[72] *Id.* at 206-07 (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 334-35 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 260 (1976) (plurality opinion).

[73] *See, e.g.*, Spaziano v. Florida, 104 S. Ct. 3154, 3162 (1984) ("Since [1976], the Court has emphasized its pursuit of the 'twin objectives' of 'measured, consistent application and fairness to the accused.' ") (quoting Eddings v. Oklahoma, 455 U.S. 104 (1982)).

[74] 408 U.S. 238 (1972).

[75] Roberts v. Louisiana, 431 U.S. 633 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[76] 442 U.S. 95 (1979).

[77] 438 U.S. 586 (1978).

[78] 455 U.S. 104 (1982).

the institutional competence of state legislatures in capital sentencing. *Witherspoon v. Illinois*,[79] *Adams v. Texas*,[80] and *Wainwright v. Witt*[81] addressed the capital sentencing competence of death-qualified juries. *Spaziano v. Florida*[82] decided the death sentencing competence of judges.

A. *Systemic Competence: The Lesson of* Furman

Furman v. Georgia did not hold capital punishment substantively invalid for any category of murder, even the least aggravated. The Court has since devised a calculus for determining whether it would be cruel and unusual to punish particular crimes with execution. That calculus has been applied to rape[83] and felony murder,[84] but never to intentional murders unaccompanied by aggravating circumstances. Yet persons who commit such murders may not be punished with death.[85] How can we explain this result?

The narrowest explanation for *Furman* is its finding that capital sentencing administration was so arbitrary as to violate the eighth amendment. The *Furman* plurality was troubled by the administration of capital punishment, not the relationship between the punishment and the crime. The administration of capital punishment produced too great a variance between those sentenced to life and those sentenced to death. Murderers who were less morally culpable or whose crimes were less shocking were condemned while some whose culpability was greatest received mercy. Even if every inmate then on death row could constitutionally be executed, current systems were imposing sentences so disproportionate to each other that the results were unacceptable.[86]

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[79] 391 U.S. 510 (1968).

[80] 448 U.S. 38 (1980).

[81] 105 S. Ct. 844 (1985).

[82] 104 S. Ct. 3154 (1984).

[83] Coker v. Georgia, 433 U.S. 584 (1977).

[84] Enmund v. Florida, 458 U.S. 782 (1982).

[85] Zant v. Stephens, 462 U.S. 862, 878 (1983) ("Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

[86] This description of *Furman* summarizes the common ground in the separate opinions of Justices Douglas, Stewart and White, whose views provide the narrowest basis for the judgments of the Court. *Furman*, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). The *Gregg* plurality characterized this common ground as follows: "Furman held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188

When Godfrey was condemned by Georgia, whose death penalty law had been upheld four years earlier,[87] the Court vacated his sentence not because execution was cruel and unusual for his homicide (as it was for Coker's rape, for example), or because any part of the Georgia law was unconstitutional, but because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."[88]

Could defendants like Godfrey be executed if the death penalty were also imposed in those "many cases?" Presumably yes. There would be a "principled" distinction and so no arbitrariness. But Georgia would first have to design a scheme to achieve this sentencing pattern, this greater evenhandedness. Some states thought it could be done with mandatory death laws but these were rejected.[89] The principal[90] response to *Furman*, discretionary death laws that made murder capital only when accompanied by an aggravating circumstance, satisfied *Furman* but made it impossible to target persons like Godfrey, whose homicides were unaggravated as a matter of constitutional law.[91] Consequently, while unaggravated murderers could be executed if sentenced evenhandedly, the only method of selection found sufficiently evenhanded under *Furman* excluded unaggravated murderers.

We now know that it is impossible to write a death sentencing law that will condemn Godfrey yet satisfy *Furman*. Eleven years after *Furman*, *Zant v. Stephens*[92] held that a capital homicide must contain

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(plurality opinion). This was a "holding of the Court" because it represented "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 169 n.15; *see also* the characterization of *Furman* in Pulley v. Harris, 104 S. Ct. 871, 876 (1984).

[87] Gregg v. Georgia, 428 U.S. 153 (1976).

[88] Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion). The aggravating circumstance under which Godfrey was sentenced had been approved in *Gregg*, 428 U.S. at 201 (plurality opinion), and was not invalidated in *Godfrey*. Only its application was found wanting.

[89] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976). *See infra* part I(B).

[90] Between *Furman* and *Gregg*, at least 35 states adopted capital punishment laws, *Gregg*, 428 U.S. at 179-80 (plurality opinion), ten of which provided for mandatory execution. *Woodson*, 428 U.S. at 313 (Rehnquist, J., dissenting).

[91] I put to one side, as did the *Godfrey* plurality, whether the fact that Godfrey's crime was a double murder would be a permissible aggravating circumstance. Georgia did not choose to make it so. Godfrey v. Georgia, 446 U.S. 420, 432-33 n.15 (1980) (plurality opinion). On remand, the state courts had no power to reinstitute Godfrey's death sentence. As a matter of federal law, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433.

[92] 462 U.S. 862, 879 (1983). *See supra* note 85. It should not matter whether that

at least one aggravating circumstance. Since executing unaggravated murderers has never been found substantively unconstitutional, what explains *Zant*? It can only be a conclusion that our criminal justice institutions are unable to administer a death penalty law in a constitutionally nonarbitrary manner so long as that law makes unaggravated murder capital.[93] The sentencing pattern found wanting in *Furman* will always recur.

If, however, death penalty laws are rewritten to require proof of at least one aggravating circumstance beyond the fact of the homicide — and so long as that circumstance is not "excessively vague"[94] — the pre-*Furman* sentencing pattern will be avoided. Why? Supposedly, because the sentencer will now have "guidance [and] direction," in the words of *Gregg v. Georgia*;[95] because "the question whether [a defendant] should be sentenced to death" will now follow after "an informed, focused, guided, and objective inquiry," according to *Proffitt v. Florida*;[96] and because there will now be "standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die," in the view of *Woodson v. North Carolina*.[97]

None of these explanations is accurate. The requirement that there be at least one aggravating circumstance, in addition to the murder itself, has simply led to the creation of a new crime, capital murder, one of whose elements is the aggravating circumstance. Like any element of a crime, it is a fact that a jury must find true beyond a reasonable doubt before a defendant may receive the heightened sentence the new crime carries.[98] Once the sentencer credits the aggravating circumstance, it may choose to impose a death sentence, but it may also choose not to. For constitutional purposes, its decision at this point may be as unguided as under the pre-*Furman* statutes, as the Court has marginally acknowledged. In *California v. Ramos*, Justice O'Connor noted

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circumstance is found at the culpability or sentencing stage of the trial. California v. Ramos, 103 S. Ct. 3446, 3452 n.11 (1983); *see also* cases cited *infra* note 155 and accompanying text.

[93] *Zant*, 462 U.S. at 877 (to satisfy *Furman*, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder") (footnote omitted).

[94] California v. Ramos, 103 S. Ct. 3446, 3452 (1983).

[95] 428 U.S. at 197 (plurality opinion).

[96] 428 U.S. at 259 (plurality opinion).

[97] 428 U.S. at 303 (plurality opinion).

[98] *See infra* text accompanying notes 153-60.

that the

> constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing "scheme that permits the jury to exercise 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 by statute."[99]

Interestingly, cases no longer stress the ameliorative effects of guidance and direction at the selection stage, although now and again the Court lapses into that language when doing so is congenial to its holding.[100]

If the concept of sentencer "guidance," the antidote to pre-*Furman* arbitrariness, is now to be abandoned, perhaps either *Furman* or *Gregg* should be overruled because in some degree caprice is inevitable. In fact, however, the "give" has occurred elsewhere — in the concept of arbitrariness. Four years after *Furman*, *Gregg* explained that only "substantial" arbitrariness was troublesome.[101] Seven and a half years after *Gregg*, *Pulley v. Harris*[102] confirmed the import of intervening cases: In the post-*Furman* era of capital prosecutions, the arbitrariness criterion has minimal utility at the selection stage. Justice White wrote: "Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic

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[99] 103 S. Ct. 3446, 3457 n.22 (1983). The internal quote is how Zant v. Stephens, 462 U.S. at 875, described the *defendant's* characterization of Georgia's capital sentencing system. The *Zant* Court affirmed the death sentence without challenging this description, holding by implication that "unbridled" sentencer discretion was acceptable once the defendant was properly located in the death-eligible pool. *Ramos* made this holding explicit. Compare *Woodson*, 428 U.S. at 302 (plurality opinion) (*Furman* described as having "reject[ed] . . . unbridled jury discretion in the imposition of capital sentences"). The scope of sentencer discretion is further discussed *infra* notes 348-56 and accompanying text.

[100] *See, e.g.*, Wainwright v. Witt, 105 S. Ct. 884, 851 (1985) ("sentencing juries [may] no longer be invested with [unlimited sentencing] discretion"); Spaziano v. Florida, 104 S. Ct. 3154, 3164 (1984) ("the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable"). These descriptions are inaccurate outside Texas. *See infra* notes 141-52, 259-67, & 348-61 and accompanying text. Perhaps, as Professor Welsh S. White recognized early on, the contest between discretion and guidance was inevitable as the Court moved from *Witherspoon*, to *McGautha*, to *Furman*, to *Gregg*, and to *Lockett* and *Eddings*. *See* White, Witherspoon *Revisited: Exploring the Tension between* Witherspoon *and* Furman, 45 U. CIN. L. REV. 19 (1976); W. WHITE, LIFE IN THE BALANCE 52-53 (1984) ("although the tension between *Witherspoon* and *Furman* still exists, the Court's post-*Gregg* decisions demonstrate a clear preference for *Witherspoon*'s commitment to individualized sentencing").

[101] 428 U.S. at 188 (plurality opinion).

[102] 104 S. Ct. 871 (1984).

defects identified in *Furman*. There can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' "[103]

Furman concluded that under conditions then prevailing our justice institutions lacked competence fairly to administer a law that sent people to their deaths. When the capital pool was more narrowly defined, however, and the sentencer better informed, the risk of uneven treatment decreased to a tolerable level. Sentencing discrepancies would continue, but among a more homogeneous pool, avoiding the "freakish"[104] pre-*Furman* pattern. The post-*Furman* inquiry then shifted from the risk of different sentences for similarly situated defendants — or worse, of harsher sentences for those less culpable — to insistence on sentencing procedures that respected the differences among defendants, a shift from arbitrariness to "uniqueness."[105]

B. Legislative Competence: Woodson *to* Eddings

A legislature has no constitutional power to select those who will be executed but only power to authorize a judge or jury to make the selection.[106] Similarly, a legislature has no power to encourage a death sentence by denying the sentencer authority to give " 'independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense.' "[107] The sentencer can use mitigating information as it likes and different sentencers can make different choices based on identical mitigating information and crimes. Finally, a legisla-

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[103] *Id.* at 881 (quoting Zant v. Stephens, 462 U.S. at 884, and Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

[104] *Gregg*, 428 U.S. at 206 (plurality opinion).

[105] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) ("rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual"); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion). Professor Radin has stated the dilemma: "We must be sure we treat like cases alike; we must be sure we consider each case as that of a unique individual. We cannot simultaneously maximize the extent to which we satisfy both of these moral requirements." Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1151 (1980).

[106] *See, e.g.*, Roberts v. Louisiana, 431 U.S. 633 (1977). There may be an exception for "prisoners serving life sentences." *Id.* at 637 n.5 (plurality opinion). *Contra* People v. Smith, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 105 S. Ct. 1226 (1985) (mandatory death law for prisoner serving life sentence unconstitutional).

[107] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)).

ture may not decide that certain items of mitigating evidence, presented through hearsay, are insufficiently trustworthy to credit.[108] The sentencer decides whether to credit them. The Court has explained these results in part by citing the need for individualized sentences in capital cases, but that explanation is not entirely adequate. An additional explanation is required, one that relies on a theory of institutional competence.

Woodson v. North Carolina held that laws mandating execution for all persons guilty of murder were void for three reasons: they have been rejected by "contemporary standards of decency;"[109] they "have simply papered over the problem of unguided and unchecked jury discretion" condemned by *Furman*;[110] and they fail to allow for "consideration of the character and record of the individual offender and the circumstances of the particular offense."[111] The need for individualized consideration is said to follow from "the interest in reliability in the determination that death is the appropriate punishment in a specific case."[112] That need in turn "rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."[113]

As we have seen, the second reason must be refined. The Court has acknowledged that jury discretion need not be guided, but may be "unbridled" once a category of aggravated murders is properly defined.[114] In place of the second reason goes a new one: if all murders are capital the unacceptable pre-*Furman* pattern[115] will reappear. Even if execution is mandatory, juries will simply exercise a random mercy by occasional refusals to convict of the highest offense.

The North Carolina mandatory death penalty law invalidated in *Woodson* applied to all murderers. If capital homicide is redefined to encompass only a few egregious murders, with execution mandatory for those, the Court's first reason is harder to apply. The narrower the category, the less clear will be the evidence that "contemporary standards of decency" have rejected mandatory execution of those within it. The second *Woodson* reason (as refined) also seems doubtful. Once the mandatory death category is properly restricted, the death-eligible pop-

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[108] Green v. Georgia, 442 U.S. 95, 97 (1979).
[109] 428 U.S. at 294-95 (plurality opinion).
[110] *Id.* at 302.
[111] *Id.* at 304.
[112] *Id.* at 305.
[113] *Id.*
[114] *See supra* note 99 and accompanying text.
[115] *See supra* notes 37 & 86-93 and accompanying text.

ulation will be too small to support predictions of a return to the pre-*Furman* sentencing pattern. (That is why, without violating *Furman*, a sentencer may be allowed unbridled discretion once the capital pool is limited to aggravated murderers.) The third *Woodson* reason — the need for individualized sentences in capital cases — remains pertinent, but it cannot fully explain the prohibition on legislative sentencing in capital cases.[116]

The statute in *Roberts v. Louisiana* (*Roberts I*)[117] limited capital murder to five narrow circumstances and mandated execution. Despite this narrowing, the Court invalidated the law for all three *Woodson* reasons.[118] A year later the statute in the second *Roberts v. Louisiana*[119] case (*Roberts II*) mandated execution only if the victim was a police officer performing her lawful duties. The law was invalidated, but this time only because of the third *Woodson* reason.[120] The Court did not (and surely could not) say that contemporary standards had rejected mandatory execution for this crime or that the state law promoted arbitrariness. Finally, in *Lockett v. Ohio*[121] and *Eddings v. Oklahoma*,[122] the Court reversed death sentences imposed under state laws that excluded mercy, or which the sentencer construed to exclude mercy, based on certain classes of mitigating information. These sentences, while not mandatory in the conventional sense, were deemed so in effect[123] because the sentencer was required — or considered itself required — to impose a death sentence if it could find no authorized reason to spare the defendant, even if it would have chosen life were it permitted to rely on the excluded information. The Court again relied on the third of the *Woodson* reasons — the need for individualized sentencing.[124]

On close inspection, however, the interest in individualized sentencing cannot be so easily transported from *Woodson*, in which mandatory execution was invoked on a wholesale basis, to *Roberts II*, in which the

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[116] *See infra* text accompanying notes 125-30.

[117] 428 U.S. 325 (1976).

[118] *Id.* at 332-35 (plurality opinion).

[119] 431 U.S. 633 (1977).

[120] *Id.* at 636-37 (plurality opinion).

[121] 438 U.S. 586 (1978).

[122] 455 U.S. 104 (1982).

[123] In *Lockett*, Chief Justice Burger wrote that under the Ohio law once the three sentencing questions were answered the "statute mandates the sentence of death," 438 U.S. at 608 (plurality opinion), "in spite of factors which may call for a less severe penalty." *Id.* at 605; *see infra* text accompanying notes 142-44.

[124] 455 U.S. at 112 n.7 (citing *Woodson*); *Lockett*, 438 U.S. at 603-04 (citing *Woodson*).

mandatory death law was exceedingly narrow, and even less to *Lockett* and *Eddings*. In *Woodson*, the legislature made no attempt to weigh particular mitigating factors against particular homicides. Its exclusion was total. So the Court could easily conclude that there had been no legislative effort to individualize. But if the crime is narrow and the excluded mitigating facts objective (therefore easy to isolate and describe in advance), a legislator seems as able as either courtroom sentencer to give the evidence "independent mitigating weight."[125] If she may not, it must be for a reason other than the goal of individualized sentencing.

Consider this hypothetical: A state experiences a rash of kidnap-murders of children. The legislature passes a law that authorizes the death penalty for anyone over eighteen convicted of the kidnap and murder of a person under ten. It gives the sentencer power to consider all mitigating evidence, but after long debate concludes that neither the relative youth of a convicted defendant nor the absence of a criminal record ought to justify mercy for a person convicted of the particular crime. "[T]he rule in Lockett," *Eddings* stated, "recognizes that 'justice . . . requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' "[126] The hypothetical presumes compliance with this rule. The legislature has concluded that age and record, two traditional mitigating circumstances sufficiently objective to identify and debate in advance, should not save certain kidnap-murderers from execution. But *Lockett* and *Eddings* also say that "the sentencer"[127] must do the accounting. By "sentencer" the Court clearly meant the judge or jury, not the legislature. The reason advanced for the *Lockett-Eddings* holdings — the need for greater individualization in capital sentencing — only explains the requirement that relevant mitigating evidence be weighed. It cannot explain why only a judge or jury may do the weighing, no matter how narrow the crime and how limited the excluded mitigating information.[128]

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[125] *Lockett*, 438 U.S. at 605 (plurality opinion).

[126] *Eddings*, 455 U.S. at 112 (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937)).

[127] *Id.* at 110 (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)). *See also* Caldwell v. Mississippi, 105 S. Ct. 2633, 2640 (1985) (in *Eddings* and *Lockett*, the Court "clearly envisioned that . . . consideration [of mitigating circumstances] would occur among sentencers who were present to hear the evidence and arguments and see the witnesses").

[128] This hypothetical presents a more difficult case for denying legislative authority than either *Lockett* or *Eddings*. In *Lockett*, broad categories of mitigating evidence were

In *Eddings*, Justice Powell seemed to suggest that a second reason for *Lockett* (besides the need for individualization) is the interest in consistency. He wrote for the Court: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring differences is a false consistency."[129] How is it false? If two defendants are convicted of the same crime and one is young with no record while the other is at the end of a criminal career, it would of course be false to say they are the same. Still, we may choose to sentence them the same. It is only false to blind ourselves to their differences, making it impossible to weigh these in choosing punishment. If this is what Justice Powell meant by the goal of consistency, and it appears to be, it is no different from the goal of individualized sentencing and does not explain why the mitigating difference between the two defendants must be weighed in the courtroom, as *Lockett* and *Eddings* require, and not in the legislature. If instead consistency means evenhanded treatment, that goal would seem better served by having legislatures make the kinds of decisions raised in the hypothetical, for then we would eliminate the prospect of one jury sentencing a kidnap-murderer to death despite his youth and, on identical facts, a different jury choosing life because of it.[130]

If only judges or juries may sentence in capital cases or even decide the consequence and sometimes credibility of any piece of mitigating evidence, we need a reason in addition to the interest in individualization to explain it. The Court has given none. In my view, legislatures are not competent death sentencers for two reasons. First, competence requires that the sentencer be and appear to be able to decide, free of distortion by other considerations, whether a particular defendant deserves to die for his crime. In *Zant v. Stephens*, Justice Stevens wrote for the Court: " 'It is of vital importance to the defendant and to the

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excluded from independent sentencer consideration no matter what the crime. In *Eddings*, once the Court found that the state court had erroneously refused to consider the mitigating information, 455 U.S. at 114, despite apparent statutory authority to do so, *id.* at 115 n.10, it followed that no state institution had determined whether the "youthful" defendant's "mental and emotional development" should influence his punishment. *Id.* at 116. It is clear from *Eddings*' reliance on *Lockett* that the legislature could not have excluded this evidence in any event.

[129] 455 U.S. at 112 ("capital punishment [must] be imposed with reasonable consistency, or not at all").

[130] The goal of evenhandedness at the selection stage would seem elusive in any event. *See supra* text accompanying notes 101-05 and *infra* text accompanying notes 371-76.

community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' "[131] One may add: "or politics." One need only read a daily newspaper to be aware of the role "tough on crime" posturing plays in political elections.[132] A legislature is institutionally incapable of designating rules that encourage execution of particular members of the death-eligible pool. A legislator's judgment is influenced by considerations unrelated to the single issue before the capital sentencer — does *this* defendant deserve to have his sentence increased from life to death for *this* crime? Or does he deserve mercy?[133] To the extent extraneous considerations impinge on the sentencer's ability to answer that question, capital sentences cannot be said to "be, and appear to be, based on reason." They cannot be said to be reliable. It is not unusual in American constitutional law to construe a provision of the Bill of Rights to exclude the political branches of government from participation in categories of decisions in criminal litigation.[134] In that tradition, legislative participation in the *selection* stage of capital sentencing should be prohibited because at that juncture political influence compromises the eighth amendment's goals of reason and accuracy in death sentencing.

Second, the legislature is an incompetent sentencer because it cannot apply the community's sentiment on retribution and mercy to the sole capital sentencing question: should this defendant's punishment be increased from life to death? Community sentiment on this question is the required reference point.[135] The legislature is too far removed from

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[131] 462 U.S. 862, 885 (1983) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)) (plurality opinion).

[132] *See* N.Y. Times, Sept. 28, 1984, at A1, col. 2 (North Carolina governor's clemency decision a factor in Senate race); Kaplan, *In Florida, A Story of Politics and Death*, NAT'L L.J., July 16, 1984, at 1 (political considerations in governor's decisions to sign death warrants); *see also Florida's Future*, Miami Herald, Feb. 17, 1985, at 1D, reporting on a statewide poll in which respondents were asked, among other things, whether they "would rate the following issues as big problems." Crime received the most affirmative responses (66%), compared with 49% (the next largest category) for "too many people" and 30% for "poor public schools."

[133] *See supra* note 66 and accompanying text.

[134] *See* Green v. Georgia, 422 U.S. 95 (1979) (legislature may not use rule against hearsay to exclude mitigating sentencing information as untrustworthy); Mullaney v. Wilbur, 421 U.S. 684 (1975) (legislature may not create presumption of existence of fact that is element of crime); Washington v. Texas, 388 U.S. 14 (1967) (legislature may not declare criminal accomplice incompetent to testify for defense).

[135] In citing the retributive purpose served by capital punishment, the *Gregg* plurality wrote: "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct . . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that

actual imposition of a death sentence to predetermine whether a future complex of considerations will actually "call for"[136] execution. A statute's static calculus is not a reliable index of a community's changing retributive standards, and becomes less reliable with time. The failure to repeal a particular law cannot, in death sentencing, be trusted as a tacit reaffirmance of the initial legislative balance. Inaction may spring from too many unrelated causes to afford assurance that the original equation accurately describes the legislature's current sentiment.[137] Furthermore, state legislators are demographically different from their constituents,[138] inviting the risk that their standards in these matters will too markedly diverge from those of the community.

This Article does not propose legislative incompetence at the selection stage. The cases necessarily imply, but do not fully explain, that conclusion. I offer an explanation premised on the view that a capital sentencer must be competent in the two senses identified: First, it must be free, and appear to be free, of other influences and, second, it must

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certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 428 U.S. at 183-84 (plurality opinion) (footnotes omitted); *see also Furman*, 408 U.S. at 388 (Burger, C.J., joined by Blackmun, Powell, & Rehnquist, J.J., dissenting); Gillers, *supra* note 60, at 46-57. Although the Court has upheld judicial sentencing, Spaziano v. Florida, 104 S. Ct. 3154 (1984), it has not questioned the proposition that the retributive purpose behind capital punishment is intended to recognize "the community's beliefs." *See infra* notes 345-47 and accompanying text. I separately argue that retribution and its converse, mercy, are the sole informants of the capital sentencing choice. Incapacitation may not be considered. *See infra* parts I(C)(3), II.

[136] *Lockett*, 438 U.S. at 605 (plurality opinion); *cf.* Roberts v. Louisiana, 428 U.S. at 333 ("the diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony . . . underscores the rigidity of Louisiana's enactment"). Compare Caldwell v. Mississippi, 105 S. Ct. 2633, 2640-41 (1985), where in responding to the defense lawyer's plea that the sentencing jury show mercy, the prosecutor stressed that a death sentence was not final because it would "automatically" be reviewed by the state supreme court. In vacating the ensuing death sentence, the Supreme Court emphasized that "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance" because of its "inability to confront and examine the individuality of the defendant," citing *Eddings* and *Lockett*. *Id.* The Court quoted the dissent in the court below to the effect that " '[t]he [mercy] plea is made directly to the jury as only they may impose the death sentence . . . . There is no appellate mercy.' " *Id.* (quoting Caldwell v. State, 443 So. 2d 806, 817 (1983)).

[137] *See* Grabow, *Congressional Silence and the Search for Legislative Consent: A Venture into "Speculative Unrealities"*, 64 B.U.L. REV. 737 (1984).

[138] *See, e.g.*, J. FEAGIN & C. FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM 138-41 (1977); Cayer & Sigelman, *Minorities and Women in State and Local Government: 1973-1975*, 40 PUB. AD. REV. 443 (1980).

be able accurately to apply the community's current sentiments on mercy and retribution. Both parts of this test explain why legislatures (and, as I shall argue, judges[139]) are incompetent capital sentencers; the second part explains why death-qualified juries may not sentence.[140]

Whether one accepts this theory of legislative incompetence or the incomplete explanations advanced by *Lockett* and *Eddings*, the Court's opinion in *Jurek v. Texas*[141] upholding the Texas statute is an anomaly. *Lockett* struck down the Ohio death law because the sentencer could not give "independent mitigating weight" to the defendant's role in the offense.[142] The Chief Justice wrote:

> We see, therefore, that once it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.[143]

Similarly, the *Eddings* Court vacated an Oklahoma death sentence because the trial judge had concluded that he was legally unable to weigh the defendant's "violent background" in mitigation.[144]

The Texas statute is a virtual copy of the law *Lockett* invalidated. Under it, the sentencing jury may consider all facts in mitigation but only as they bear on three statutory questions and not "independently."[145] The above quote from *Lockett* fully describes the Texas procedure save only differences in the three questions. If a Texas jury believes a defendant ought to be spared solely because of emotional disturbance — as in *Eddings* — or because of her minor participation in the offense — as in *Lockett* — yet concludes that answers to the

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[139] *See infra* part I(C)(3).

[140] *See infra* part I(C)(2).

[141] 428 U.S. 262 (1976).

[142] 438 U.S. at 605 (1978) (plurality opinion).

[143] *Id.* at 608. Although this is a plurality opinion in which four of eight participating Justices joined, it may be considered a holding of the Court because Justice Marshall would have reversed the death sentence on a broader basis. *Id.* at 619 (Marshall, J., concurring in the judgment); *see supra* note 86. Furthermore, a majority of the Court reaffirmed *Lockett* in Eddings v. Oklahoma, 455 U.S. 104 (1982).

[144] *Eddings*, 455 U.S. at 113 ("the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*").

[145] *Jurek*, 428 U.S. at 268-69 (1976) (plurality opinion).

state's three statutory questions must nevertheless be yes, it has two choices. It may obey its oath and answer yes, in which case the death sentence is mandatory,[146] but in violation of *Woodson*, *Lockett,* and *Eddings*. Or it may violate its oath and answer no to one of the questions,[147] thereby forcing a life sentence.[148] If it does the second, the defendant's constitutional right to have the jury give "independent mitigating weight" to his youth or degree of involvement is preserved, but at the cost foreseen by *Roberts v. Louisiana*. For the Texas procedure, no less than the one in *Roberts*, "plainly invites the jurors to disregard their oaths . . . whenever they feel the death penalty is inappropriate."[149] And as in *Roberts*, "[t]here is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions."[150]

How the Court can continue to affirm or let stand Texas death sentences while capital defendants from other states are afforded the protection of *Lockett* and *Eddings* remains a great and unexplained mystery. Justice White's carefully crafted majority opinion in *Adams v. Texas*[151] strongly implies that the Court is aware of the discrepancy. This is not the only unusual aspect of the Texas law, however, nor the only instance of the Court's strained effort to preserve it.[152]

If the legislature may not sentence at the selection stage, we are left with judge and jury as the two criminal justice institutions available to make the life or death choice in each case. The next section discusses

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[146] Adams v. Texas, 448 U.S. 38, 41 (1980) (if all three questions are answered affirmatively "the court is required to impose a sentence of death"); Woodson v. North Carolina, 428 U.S. 280, 315 (1976) (Rehnquist, J., dissenting).

[147] The *Jurek* plurality read Texas law to allow a capital defendant to "bring to the jury's attention whatever mitigating circumstances he may be able to show," 428 U.S. at 272 (plurality opinion), presumably including such factors as youth and degree of participation in the crime, but these factors may be introduced only to aid the jury in " 'determining the likelihood that the defendant would be a continuing threat to society.' " *Id.* at 272-73 (quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975)). The jury cannot consider any such circumstance as an "independently mitigating factor." *Lockett*, 438 U.S. at 607 (1978) (plurality opinion); *see* Gillers, *supra* note 60, at 33 n.152, 37 n.166.

[148] Adams v. Texas, 448 U.S. 38, 41 (1980).

[149] 428 U.S. 325, 335 (1976).

[150] *Id.*

[151] 448 U.S. 38 (1980); *see* Gillers, *supra* note 60, at 37 n.166; *see also* Justice Rehnquist's opinion in Wainwright v. Witt, 105 S. Ct. 844 (1985), discussed *infra* text accompanying notes 219-313.

[152] *See infra* part II(A), (B).

their respective competences.

C. Sentencer Competence

1. The Sentencer's Responsibility

Capital murder is murder plus one fact in aggravation. Proof of at least one aggravating fact is a constitutional, and so a statutory, prerequisite to an enhanced sentence.[153] Some state statutes require proof of more than one aggravating circumstance.[154] Whether the prosecutor attempts to prove aggravating facts at a special sentencing hearing, or whether proof of some or all of them is made part of the culpability trial, is immaterial. This, as Justice Harlan wrote in *McGautha v. California*,[155] is a matter of definition. Under either approach, a defendant has the right to have a jury find beyond a reasonable doubt any fact that state law requires be "proved or presumed" as a condition of a heightened sentence.[156] Of course, a state may ease its burden if it makes only a single aggravating fact prerequisite for execution, thereby satisfying *Furman*, and then lists additional facts for the sentencer's discretionary consideration.[157] The Constitution only requires the first aggravating fact; whether additional aggravating facts are part of the crime's definition or simply discretionary sentencing considerations depends on state legislative policy.

Capital sentencing differs from other sentencing because at least one additional fact must be proved before a death sentence may be imposed. When a jury convicts of burglary, a trial judge is generally authorized to sentence the defendant to any term of years up to the statutory maximum. Proof of the elements of the crime of burglary is a sufficient predicate for the maximum statutory sentence.[158] True, there may be a

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[153] *See supra* text accompanying notes 92-93.

[154] *See, e.g.*, the Ohio capital statue in Marshall v. Lonberger, 459 U.S. 422, 426 n.2 (1983); *id.* at 453 (Stevens, J., dissenting).

[155] 402 U.S. 183, 206 n.16 (1971); *see also* Zant v. Stephens, 462 U.S. 862, 875 n.13 (1983); Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion).

[156] Patterson v. New York, 432 U.S. 197, 215 (1977); Duncan v. Louisiana, 391 U.S. 145 (1968); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977); *cf.* Specht v. Patterson, 386 U.S. 605, 609-10 (1967) (full due process rights must be given defendant before he can be sentenced under a harsher provision whose invocation depends on a "new finding of fact").

[157] *See, e.g.*, the California statute described in Pulley v. Harris, 104 S. Ct. 871, 880-81 (1984), and the Georgia statute as described by the Georgia Supreme Court and quoted in Zant v. Stephens, 462 U.S. 862, 886 (1983).

[158] *See, e.g.*, CAL. PENAL CODE §§ 459-464 (West Supp. 1985) (definition and penalties for burglary). There is a limit in the eighth amendment. Solem v. Helm, 463

sentencing hearing to decide where in the authorized range the sentence shall lie, and the defendant will enjoy certain rights at the hearing, but these rights will be substantially fewer than at trial because no further fact *must* be established at the hearing before the maximum sentence may be imposed.[159] The opposite is often true in capital cases.[160]

In his separate opinion in *Zant v. Stephens*, Justice Rehnquist recognized these distinctions:

> The decision by a Georgia death jury at the final stage of its deliberations to impose death is a significantly different decision from the model just described [factfinding at a culpability trial]. A wide range of evidence is admissible on literally countless subjects . . . . In considering this evidence, the jury does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves . . . .
>
> The role of aggravating circumstances in making this judgment is substantially more limited than the role played by jury instructions or allegations in an indictment in an ordinary trial. In Georgia, aggravating circumstances serve principally to restrict the class of defendants subject to the death sentence; once a single aggravating circumstance is specified, the jury then considers all the evidence in aggravation-mitigation in deciding whether to impose the death penalty . . . . An aggravating circumstance in this latter stage is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.[161]

This description omits only that if state law independently makes more than one aggravating fact necessary to a capital conviction, then any such additional fact cannot be relegated to the status of "one of the

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U.S. 277 (1983) (eighth amendment prohibits life sentence without parole for habitual offender with bad check conviction); *see also infra* note 367.

[159] *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion).

[160] Compare the Ohio procedure, *infra* note 167, in which the aggravating fact is proved at the culpability trial, not at sentence. The right to a jury trial of those aggravating facts that are a precondition to execution was not addressed in Spaziano v. Florida, 104 S. Ct. 3154 (1984), which upheld the state's judicial sentencing scheme. The trial judge found two statutory aggravating circumstances and overruled the jury's recommendation of life imprisonment. *Id.* at 3158. The only sentencing question the *Spaziano* Court considered was whether the defendant was entitled to a jury determination of penalty. *Spaziano* is discussed *infra* part I(C)(3). Neither was the issue of jury trial of aggravating facts addressed in United States v. DiFrancesco, 449 U.S. 117 (1980), which upheld, against a double jeopardy challenge only, a federal statute that permitted the government to appeal a trial court's enhanced sentence following a judicial finding that a convicted defendant was a "dangerous special offender."

[161] 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). The Court quoted some of this language in California v. Ramos, 103 S. Ct. 3446, 3457 (1983); *see infra* note 240.

countless [sentencing] considerations." Instead, it becomes an element of the offense with consequence to the identity of the factfinder and the burden of proof.

Aggravating facts may occupy two categories. My conclusions apply to both. The first and largest category contains facts that are historical in a narrow sense — for example, whether the crime was committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"[162] — so that they are indistinguishable from, and could easily have been made, elements of the crime. As such, they fit easily within the orthodox analysis bounded by *Duncan v. Louisiana*[163] and *Patterson v. New York*.[164] A few aggravating facts — for example, whether the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"[165] — are less precise and more like traditional sentencing considerations. They are nevertheless facts and sufficiently definite to survive constitutional challenge.[166] If a state chooses to include them in the definition of capital murder as alternative preconditions to execution, a defendant will have the same rights available at the adjudication of narrower, conventional facts. Nothing in *Duncan* or *Patterson* suggested that a state might avoid their constitutional mandates simply by broadening the factual elements of a crime.

If a jury finds at least one aggravating fact beyond a reasonable doubt, the defendant is entitled to have the sentencer "consider" facts in mitigation.[167] These facts, unlike aggravating ones, are not elements of the capital crime and so not subject to traditional sixth amendment procedures. In deciding punishment, the sentencer must determine the mitigating facts, assess any aggravating evidence that is not a statutory prerequisite to execution, and weigh and compare all information, whether

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[162] Arizona v. Rumsey, 104 S. Ct. 2305, 2307 (1984).

[163] 391 U.S. 145 (1968).

[164] 432 U.S. 197 (1977); *see supra* note 156 and accompanying text.

[165] Gregg v. Georgia, 428 U.S. 153, 201 (1976) (plurality opinion).

[166] *Id.*

[167] Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence") (emphasis in original). In most states, the sentencer will consider both mitigating and aggravating information at the same time, *see, e.g.*, Zant v. Stephens, 462 U.S. 862, 886 (1983) (describing the Georgia statute), but in at least one state, Ohio, the sentencing jury hears the aggravating evidence (called a "specification") at the culpability trial. If the specification is found, there is a separate sentencing hearing at which the defendant may introduce evidence in mitigation. This procedure was upheld in Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983).

presented at the culpability trial or a later proceeding. The Court has concluded that any judge[168] and certain juries[169] may perform these sentencing tasks. If a statute gives sentencing authority to judges, no rule constrains the methods for choosing which judges shall preside at capital trials nor specifies what may be their attitudes toward execution. If, however, juries play a role in sentencing, whether they only find facts or actually choose (or recommend) the sanction, the Constitution restricts efforts to control their composition.[170] Sentencer identity is consequential. Not only do the sentencing choices of judges and juries differ, but judges impose more death sentences than juries.[171] In the following pages,[172] this Article examines the rules governing the competence of sentencing juries and the finding that judges are also competent sentencers. I conclude that restrictions on legislative sentencing and the rules governing the composition of sentencing juries are compatible with a single theory of institutional competence. But the same theory is at odds with *Spaziano v. Florida*, which held that a capital defendant has no right to be sentenced by a jury rather than a judge.[173]

2. The Sentencing Jury

a. Witherspoon *and* Adams

Were a contest held for the Supreme Court opinion whose holding is both intuitively correct and conceptually enigmatic, first prize might well go to *Witherspoon v. Illinois*.[174] At a time when Illinois juries sentenced at unitary capital trials,[175] a state rule permitted challenges for cause of jurors with "conscientious scruples against capital punishment, or [who are] opposed to the same."[176] The Court invalidated the rule. Although a state has a valid interest in jurors "willing to *consider*

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[168] Spaziano v. Florida, 104 S. Ct. 3154 (1984). *See infra* part I(C)(3). After Caldwell v. Mississippi, 105 S. Ct. 2633, 2640 (1985), a statutory scheme could not constitutionally give sentencing authority to an appellate court "in the first instance." *See supra* note 136.

[169] *See infra* part I(C)(2).

[170] *Id.*

[171] Spaziano v. Florida, 104 S. Ct. 3154, 3178 n.34 (Stevens, J., dissenting); *see also* Gillers, *supra* note 60, at 67-68 & n.318.

[172] *See infra* part I(C)(2), (3).

[173] 104 S. Ct. 3154 (1984).

[174] 391 U.S. 510 (1968).

[175] *Id.* at 512.

[176] ILL. REV. STAT. ch. 38, § 743 (1959).

all of the penalties provided by state law,"[177] the majority wrote, Illinois juries "fell woefully short of that impartiality to which [defendants were] entitled under the Sixth and Fourteenth Amendments."[178] Jurors responsible for determining punishment in a capital case could be challenged for cause only if they "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."[179] I will call this group total abolitionists. In contrast, a juror who would consider the death penalty in some kinds of cases but reject it in others, a partial abolitionist, could not be challenged,[180] and could not be "expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him."[181] These conclusions are puzzling in several ways.

First, at a time when a state could have mandated death following conviction of designated crimes or required death absent a unanimous jury recommendation of mercy,[182] *Witherspoon*'s denial of the seemingly lesser power to control the composition of the sentencing jury is difficult to explain.[183] A second problem was the basis for *Witherspoon*. It purported to rest on the sixth and fourteenth amendments, but it was decided two weeks before *Duncan v. Louisiana*,[184] which was not retroactive,[185] made the sixth amendment applicable to the states. Even if the sixth amendment right to a jury trial[186] is the basis for *Witherspoon*, as *Adams v. Texas* eventually and retroactively concluded it was,[187] what sixth amendment theory explains the Court's distinction between total abolitionists, who will reject the death sentence every time, and whom the state may challenge for cause, and partial abolitionists, who might reject the death sentence quite often, perhaps in all

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[177] 391 U.S. at 522 n.21.

[178] *Id.* at 518.

[179] *Id.* at 522 n.21.

[180] *Id.* (jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment").

[181] *Id.*

[182] *Id.* at 541-42 (White, J., dissenting).

[183] The Court explained that Illinois had not made death the "*preferred* penalty." *Id.* at 519 n.15 (quoting People v. Bernette, 30 Ill. 2d 359, 369, 197 N.E.2d 436, 442 (1964) (emphasis added by Supreme Court)).

[184] 391 U.S. 145 (1968).

[185] DeStefano v. Woods, 392 U.S. 631 (1968).

[186] U.S. CONST. amend. VI.

[187] 448 U.S. 38, 40 (1980) (construing *Witherspoon* as based on "the Sixth and Fourteenth Amendments").

but "the direst cases,"[188] but whom *Witherspoon* left immune to challenge?[189] The case on trial might be one of those on whose facts a prospective juror would "refuse to recommend capital punishment."[190] The state cannot know whether it is because it cannot ask. It takes the risk that partial abolitionists will render the jury unable to vote for execution in the case before it. If contrary to *Witherspoon* total abolitionists were also immune to challenge (or identification), the risk would simply be higher.[191] *Witherspoon* did not explain the sixth or fourteenth amendment theory that requires the state to run the lesser but not the higher risk or, conversely, that entitled the defendant to have the "scruples" of the partial but not the total abolitionist voiced in deliberation. Its holding seems a constitutional compromise, not the application of a principle.[192] Finally, *Witherspoon* contemplated that even a person absolutely opposed to the death penalty might be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."[193] That mental gymnastic, whatever its utility in traditional factfinding, is out of place in capital sentencing because personal views are precisely what we ask the sentencer to use in deciding appropriate punishment.[194]

A dozen years later, *Adams v. Texas*[195] applied *Witherspoon* to the selection of the Texas capital jury. A Texas law required each juror to swear that the "mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."[196] As a result, a juror's qualification to sit depended upon his or her attitude toward capital punishment, the very inquiry *Witherspoon* curtailed. But the

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[188] *Witherspoon* quoted Comment, *Jury Challenges, Capital Punishment, and* Labat v. Bennett: *A Reconciliation*, 1968 DUKE L.J. 283, 308-09, as follows: " '[Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.' " 391 U.S. at 516 n.9.

[189] *See* the hypothetical in Gillers, *supra* note 60, at 77-78.

[190] 391 U.S. at 522 n.21.

[191] The size of the risk is also a product of the apparently ubiquitous statutory requirement that sentencing juries be unanimous. *See generally* Gillers, *supra* note 60, at 16-17.

[192] For an argument that persons irrevocably opposed to capital punishment may not be excluded from capital sentencing juries and that the unanimity requirement is not constitutionally compelled, see *id.* at 74-99.

[193] 391 U.S. at 514 n.7.

[194] *See infra* text accompanying notes 240-44.

[195] 448 U.S. 38 (1980).

[196] *Id.* at 42.

Texas jury "merely gives answers to"[197] three supposedly factual questions, with penalty following "automatically"[198] on its responses, whereas the Illinois jury had "unfettered discretion"[199] to decide penalty. Surely the state has a paramount interest in avoiding distortion in factfinding. "Nevertheless," said the *Adams* Court, because answering the three questions "is not an exact science . . . a Texas juror's views about the death penalty might influence the manner in which he performs his role."[200] In striking down the law, the Court said the "prospects of the death penalty may affect what [jurors'] honest judgment of the facts will be or what they may deem to be a reasonable doubt."[201]

Adams was remarkable for its willingness to apply *Witherspoon* to factfinding at sentencing — and by necessary extension even to factfinding at the culpability trial.[202] Although *Witherspoon* could easily have been distinguished away, perhaps permanently,[203] it was instead reaffirmed. Together *Witherspoon* and *Adams* offer a capital defendant facing a jury sentence impressive if somewhat theoretical[204] safeguards to assure a fair decision. The language the Court used was strong: Illinois and Texas had "no valid interest in such a broadbased rule of exclusion."[205] The defendants were denied "the impartial jury to which [they were] entitled under the law."[206] By allowing these challenges, Illinois and Texas "crossed the line of neutrality"[207] required by the sixth and fourteenth amendments.

Can *Witherspoon* be explained with a theory of sentencer competence? Legislatures are not competent capital sentencers because their

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[197] *Id.* at 46.

[198] *Id.* at 42.

[199] *Id.* at 45.

[200] *Id.* at 46-47.

[201] *Id.* at 50.

[202] *Id.* at 54 (Rehnquist, J., dissenting) ("the Court's observations . . . are as true when applied to the initial determination of guilt as they are when applied to the sentencing proceeding"). Although the improperly chosen jury engaged in factfinding at both the culpability and penalty stages of Adams' trial, only his death sentence, not his conviction, was reversed. *Id.* at 51. Perhaps the Court considered its grant of certiorari limited to the issue of penalty.

[203] Justice Rehnquist, alone in dissent, seemed inclined to do so. *Id.* at 52 (Rehnquist, J., dissenting).

[204] On the implementation problems, see Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 35-39 (1982). A state can avoid the safeguards by requiring judicial sentencing. *See infra* text accompanying note 314.

[205] 448 U.S. at 43.

[206] *Id.* at 50; *see also Witherspoon*, 391 U.S. at 518.

[207] 448 U.S. at 44 (quoting *Witherspoon*, 391 U.S. at 520).

position and composition prevent them from accurately expressing community sentiment in answering the only possible capital sentencing question: Does this defendant deserve to have his sentence increased from life to death or does he deserve mercy?[208] A courtroom sentencer must answer the same question. A jury chosen in conformity with *Witherspoon* can be expected to represent the community's standards of retribution and mercy. A jury devoid of all scrupled members will produce some inaccurate death sentences by distorting the community's disposition on these standards. The greater the state's power to insist on jurors inclined to vote for execution — the greater the commitment the state may exact from prospective jurors — the larger the potential distortion.

Application of the same theory of sentencer competence to *Adams* is difficult because the Texas capital jury does not actually sentence. It inserts findings of fact into a predetermined legislative formula.[209] By denying the jury authority to bring considerations of mercy to its limited question-answering assignment, the Texas scheme violates *Lockett* and *Eddings*,[210] but so long as the Supreme Court chooses to allow the discrepancy we must treat the Texas law as we find it. So treated, I suggest that *Adams* was not strictly speaking a case in the *Witherspoon* tradition at all, but something broader. By acknowledging that a person's moral views may legitimately influence how he or she treats evidence and finds facts — that facts are subjective and indeterminate in this way — *Adams* added ideology or belief system to gender,[211] race,[212] and perhaps economic status and age,[213] as an attribute a state may not use to exclude jurors for cause, so long as their belief systems do not cause "conscious distortion or bias."[214] In capital cases, *Adams*' conclusion that a scrupled juror's attitudes toward the death penalty "may affect what [his] honest judgment of the facts will be or what [he] may

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[208] *See supra* note 66 and accompanying text.

[209] *See supra* text accompanying notes 145-52 & *infra* text accompanying notes 387-92.

[210] *See supra* notes 145-50 and accompanying text.

[211] Duren v. Missouri, 439 U.S. 357 (1979).

[212] Peters v. Kiff, 407 U.S. 493 (1972).

[213] Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) (daily wage earners are a cognizable class) (relying on Court's supervisory powers); Hamling v. United States, 418 U.S. 87 (1974) (assuming arguendo that young people are a cognizable class); *see also* Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 780 n.36 (1977); Winick, *supra* note 204, at 66-73.

[214] Adams v. Texas, 448 U.S. at 46.

deem to be a reasonable doubt"[215] should influence the debate over whether "the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."[216] Unless the Court limits *Adams* to capital cases — conceptually difficult given its sixth (not eighth) amendment foundation[217] — its reasoning should also foreclose blanket attitudinal challenges in noncapital cases. *Adams* resembles *Witherspoon* only because both are capital cases presenting similar ideational tests, but their differences with regard to juror responsibility — facts in *Adams*, sentence in *Witherspoon* — put them in separate legal categories,[218] each in its own way highly sensitive to the rights of a capital accused.

b. Wainwright v. Witt

The opinion in *Wainwright v. Witt*[219] betrays the snarled state of the Supreme Court's capital cases. The Eleventh Circuit had reversed a Florida death sentence after concluding that a juror had been excused in violation of *Witherspoon*.[220] The juror had "personal beliefs" against the death penalty that she was "afraid" would "interfere with judging the guilt or innocence of the Defendant in this case."[221] The Supreme Court took the "opportunity to clarify"[222] *Witherspoon* in light of

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[215] *Id.* at 50.

[216] *Witherspoon*, 391 U.S. at 518. The Eighth Circuit recently so held, though without reliance on this aspect of *Adams*. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc). This aspect of *Adams* is the subject of my forthcoming article in 47 U. PITT. L. REV. (1985) (forthcoming); *see also* W. WHITE, *supra* note 100, at 116-20 (applying principles of Ballew v. Georgia, 435 U.S. 223 (1978), and evidence from empirical studies to fairness of using death-qualified juries to decide issues of guilt); *id.* at 149-52 (discussing district court's opinion in Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. (1983)).

[217] Justice Rehnquist emphasized *Witherspoon*'s sixth amendment basis in Wainwright v. Witt, 105 S. Ct. 844, 851 (1985), to support his argument that inquiries for capital sentencer "bias" were no different from traditional bias inquiries. *Id.* at 855; *see infra* text accompanying notes 271-75.

[218] *But see* Wainwright v. Witt, 105 S. Ct. 844 (1985), discussed at length *infra* text accompanying notes 219-313.

[219] 105 S. Ct. 844 (1985).

[220] *Id.* at 847.

[221] The quoted material comes from the prosecutor's questions and the juror's responses. *Id.* at 848. The Court read the colloquy as a unit, saying that the "attempt to separate the answers from the questions misses the mark." *Id.* at 858.

[222] *Id.* at 852.

Adams and then held that the trial judge's ruling on "bias"[223] was a "finding of fact" entitled to a "presumption of correctness."[224] Two points should be noted initially. This case was from Florida, a state in which the jury does not sentence,[225] and thus *Witherspoon*'s applicability might have been questioned. Still, the Florida jury recommends sentence,[226] to which state law requires some judicial deference,[227] so the defendant retains a significant interest in the identity of the panel.[228] Furthermore, *Adams* applied a variation of *Witherspoon*'s attitudinal standard to factfinding,[229] and Witt's jury necessarily found facts when it determined his guilt. The second and related point is that the *Witt* juror was excused because her "personal beliefs" were found to "interfere . . . with" her ability to determine "guilt or innocence," and not because they would "interfere . . . with" her recommendation of sentence.[230] This difference between functions — factfinding and sentencing — is critical, although the Court's analysis obscured it.[231]

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[223] Use of the word "bias" throughout the opinion to describe the aim of the voir dire inquiry, *see, e.g.*, *id.* at 852 n.5 & 855, contributed to the confusion. *See infra* text accompanying notes 271-77.

[224] 105 S. Ct. at 856 (trial judges findings of fact are presumed to be correct); *see also id.* at 855:

> The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to [the presumption of correctness].

The presumption of correctness can be overcome with "clear and convincing evidence," which *Witt* lacked, in part because his lawyer, who did not object to the juror's exclusion, made no request that the trial judge probe further. *Id.* at 858; *see also infra* note 312.

[225] Spaziano v Florida, 104 S. Ct. 3154 (1984).

[226] *Id.* at 3156.

[227] *Id.*

[228] By the time of the *Witherspoon* decision, the Illinois jury only recommended sentence as well, but the *Witherspoon* Court thought the intervening change immaterial. 391 U.S. at 518 n.12. The *Witt* Court did not reassess this dictum. *Cf.* Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980) (defendant sentenced by jury under unconstitutional provision of state law entitled to jury resentence under constitutional provision of same law even though jury's sentence only advisory); *see also* Winick, Witherspoon *in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825 (1983).

[229] *See supra* text accompanying notes 195-207.

[230] Wainwright v. Witt, 105 S. Ct. at 848, 857. Any discussion of the latter point may therefore be considered dicta. *See infra* note 234.

[231] *See infra* text accompanying notes 271-77.

Witherspoon identified those individuals who could not be excluded from capital sentencing juries as well as those who could be.[232] *Witt* concluded that at least one of *Witherspoon*'s tests for identifying those who could be excluded — persons making it "unmistakably clear" that they "would automatically vote against the imposition of capital punishment"[233] — was dicta[234] and unworkable.[235] It purported to reformulate the test with language from *Adams v. Texas*:

> We therefore take this opportunity to clarify our decision in *Witherspoon* and to reaffirm the . . . standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[236]

In isolation, this alternate phrasing need not augur a very great break with *Witherspoon*,[237] and in the end *Witt*'s incomplete analysis and lack of guidance to lower courts should limit its influence.[238] But it would be ingenuous to assume that the opinion intended only modest tinkering. *Witt* says too much to say so little. The lurking question in *Witt* was not the phraseology of the exclusionary test but the permissible target. *Whom* may a state constitutionally decline to allow on capital sentencing juries? We cannot ask the *Adams-Witt* question — will a juror's views "prevent or substantially impair the performance of his duties as a juror?"[239] — until we have identified exactly what duties a state may constitutionally assign to its capital sentencing juries.

A capital sentencing jury might engage in two operations. Nearly all sentencing juries "weigh" the appropriateness of retribution (aggravating evidence) against the justifications for mercy (mitigating evi-

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[232] 391 U.S. at 520-21, 522 n.21.

[233] *Id.* at 522 n.21. A somewhat different exclusionary test is given *id.* at 520 (state may exclude "prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death"). That test and the issue of *Witherspoon*'s dicta are both discussed *infra* notes 278-304 and accompanying text.

[234] 105 S. Ct. at 851. The dicta label may also be applied to *Witt*. The Court only needed to decide the exclusionary standard when a prospective juror's views bear on her ability to decide "guilt or innocence." *Id.* at 852. *Witt*'s facts did not require consideration of the relationship between a juror's views and her ability to comply with a discretionary sentencing law.

[235] *Id.* at 852 ("What common sense should have realized experience has proved.").

[236] *Id.*

[237] So Justice Stevens thought. *Id.* at 858 (Stevens, J., concurring in the judgment).

[238] *See infra* text accompanying notes 308-12.

[239] 105 S. Ct. at 857 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

dence).[240] Some sentencing juries (but not Witt's[241]) may also be called upon to predict whether a defendant will commit a violent crime in the future.[242] Identification of the proper balance between retribution and mercy requires the sentencer to make a moral judgment, and a moral judgment, of course, can only be made by reference to one's personal moral views.[243] *Witherspoon*'s suggestion that one unalterably opposed to capital punishment might be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"[244] makes no sense in this context. A juror cannot fulfill his sentencing responsibility without a moral position and "the law of the State" to which the juror supposedly defers will prescribe none.

When a state assigns capital sentencing authority to a jury, it must accept the fact that each juror will be free to exercise unchecked discretion in determining the punishment for one within the death-eligible pool. To effect an indirect control over that discretion, a state might restrict jury membership to persons more inclined to vote for death, that is, to persons whose moral views will lead them to give greater

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[240] Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment . . . . As we have noted, the essential effect of [an instruction informing the jury of the governor's power to commute a sentence of life without parole] is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness . . . . This element "is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant."

California v. Ramos, 103 S. Ct. 3446, 3456-57 (1983) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment)); *see also* Spaziano v. Florida, 104 S. Ct. 3154, 3164 (1984) ("The sentencer is responsible for weighing the specific aggravating circumstances and mitigating circumstances . . . in determining whether death is the appropriate penalty."); Jurek v. Texas, 428 U.S. 262, 271 (1976) (plurality opinion) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."); Adams v. Texas, 448 U.S. 38, 46 (1980) (same).

[241] Florida's aggravating circumstances do not include a prediction of future dangerousness. Barclay v. Florida, 103 S. Ct. 3418, 3428 (1983) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 248 n.6 (1976) (plurality opinion).

[242] *See infra* part II.

[243] A juror's moral values (or personal or religious beliefs) are the only "scale" on which the "weighing" can be done. State laws can prescribe no other. *See supra* text accompanying notes 106-08.

[244] 391 U.S. at 514 n.7.

weight to the goal of retribution than to arguments for mercy. To what extent, if any, may a state control jury composition in this way? Imagine a spectrum at one end of which are persons who believe that everyone in the death-eligible pool should be executed. At the other end of the spectrum are persons who believe no one in the death-eligible pool should be executed. A question in both *Witherspoon* and *Witt* was how much of the "lenient end" of the spectrum may the state exclude. Until that question is answered as a matter of constitutional law, it is meaningless to talk, as *Witt* did, of jurors who "might frustrate administration of a State's death penalty scheme."[245] If, for example, the state *must* accept jurors from all points on the moral spectrum except the ends, then a juror disposed toward mercy can no more "frustrate administration of [that] scheme" than one disposed toward retribution. Similarly, it is impossible to know whether a "juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror' "[246] unless the state is constitutionally authorized to exclude the juror on the ground that his or her moral stance is too lenient. If it does not have that authority, the "juror's views," far from "prevent[ing] or impair[ing] the performance of his duties" under the law, are exactly what the law intends to recognize. "Law" in this context includes not only a state's death penalty law, but also constitutional limitations on the state's exclusionary authority in administering its law.[247]

Witherspoon at least determined which jurors a state had authority to exclude. In one of its tests, it said that a state may remove for cause persons who were unable to "consider returning a verdict of death."[248] *Adams* echoed this sentiment.[249] These cases reflected the views of the majorities of their Courts that a state could not exclude from death penalty juries persons clustered at the lenient end of the moral spectrum. Only if these persons were at the very end of the moral spectrum, only if they were "irrevocably committed . . . to vote against the pen-

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[245] 105 S. Ct. at 848.

[246] *Id.* at 857 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[247] *Witt*, 105 S. Ct. at 851; *Adams*, 448 U.S. at 47-48 (*Witherspoon* is "a limitation on the State's power to exclude").

[248] 391 U.S. at 520. This test is further discussed *infra* notes 279-307 and accompanying text. *Witherspoon* also contained the broader test contained in the second paragraph of its footnote 21, which *Witt* rejected as dicta. *See infra* notes 283-91 and accompanying text.

[249] 448 U.S. at 44 (1980) (referring to a "juror wholly unable even to consider imposing the death penalty" as excludable). *Adams* also quoted the exclusionary standard in the second paragraph of *Witherspoon*'s footnote 21. *Id.*

alty of death,"[250] could a state conclude that they would "ignore the law or violate their oaths."[251] Did *Witt* offer a substitute standard? Which persons would it allow a state to exclude from the capital sentencing decision?

Here *Witt* appeared to switch onto a sidetrack. Rather than demark new constitutional boundaries for a state's exclusionary authority in composing capital sentencing juries, it proceeded to equate that authority with a state's power to challenge jurors charged with traditional factfinding. The Court wrote:

> The tests with respect to sentencing and guilt, originally in two prongs, have been merged . . . .
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> . . . .
>
> [S]imply because a defendant is being tried for a capital crime . . . he is [not] entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.
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> . . . .
>
> [E]xcluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias . . . .[252]

By drawing this parallel, *Witt* meant to say that there was no difference between applying the *Adams v. Texas* test ("prevent or substantially impair") in capital sentencing and applying it elsewhere, and that bias in factfinding and bias in sentencing were one and the same. The equation of sentencing with factfinding, the key to *Witt*, may be valid in Texas,[253] where the sentencer *is* a factfinder,[254] but it breaks down in states where a *discretionary* sentencer, whatever its other duties, must elect between life and death.[255] Moreover, *Witt*'s equation does not clarify the *content* of the oath that a discretionary sentencer may be asked to take; and unless we know the oath's content, we cannot determine whether a "juror's views" will "prevent or substantially impair" her ability to obey it.

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[250] *Witherspoon*, 391 U.S. at 522 n.21.

[251] *Adams*, 448 U.S. at 50.

[252] *Witt*, 105 S. Ct. at 851, 852, 855.

[253] To support its equation, *Witt* relied exclusively on the Texas jury's role. It ignored the jury's authority in the very state from which the case before it originated. *See infra* text accompanying notes 264-67.

[254] *See supra* text accompanying notes 145-50 and *infra* text accompanying notes 387-92. Justice Rehnquist has written: "It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury while at the same time allowing them [sic] to consider the particular circumstances of each case . . . ." *Adams v. Texas*, 448 U.S. at 54 (Rehnquist, J., dissenting).

[255] *See infra* text accompanying notes 271-77.

While it might therefore appear that *Witt*'s sidetrack has reached a dead end, perusal reveals it was no sidetrack at all, but a shortcut. When *Witt*'s truncated voir dire inquiry is coupled with "the presumption of correctness" that attaches to state court "findings of fact,"[256] which is how *Witt* characterized rulings on capital sentencer "bias,"[257] the result is to delegate determinations of the breadth of the exclusionary power to the largely unreviewable domain of state trial courts. Far from "clarify[ing]"[258] the *Witherspoon* standard substantively, *Witt* attempted to dismantle it procedurally.

Witt's effort to equate factfinding with discretionary sentencing through the alchemy of *Adams* is logically and historically insupportable. In substituting "the Adams test"[259] for *Witherspoon*'s, Justice Rehnquist explained that while "[i]n Witherspoon the jury was vested with unlimited discretion in choice of sentence . . . [a]fter our decisions in Furman v. Georgia . . . and Gregg v. Georgia . . . sentencing juries [can] no longer be invested with such discretion."[260] This statement is inaccurate. Juries in Florida (except that their sentences are advisory), Georgia, California, and *nearly* every other state in which juries sentence have as much discretion as the Illinois jury had in *Witherspoon*. The effect of *Furman* and *Gregg* was only to limit the size of the pool within which their discretion could operate, not to limit their discretion,[261] as Justice Rehnquist has elsewhere explained.[262] Capital sentencing discretion, the Court has said, may remain "unbridled."[263] That surely cannot be said of factfinding. In only one state, Texas, with its cryptomandatory death law, do juries lack discretion, merely finding facts in accordance with a legislatively predetermined sentencing formula.[264] It is not surprising, therefore, that immediately following

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[256] 105 S. Ct. at 856. *Witt*'s facts made it relatively easy to indulge in the presumption of correctness and difficult to rebut it. *See infra* note 312.

[257] *See, e.g.*, *Witt*, 105 S. Ct. at 852: "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." This use of the word "bias" to refer to a discretionary capital sentencer's predisposition makes little sense. *See infra* text accompanying notes 271-75.

[258] 105 S. Ct. at 852.

[259] *Id.*

[260] *Id.* at 851.

[261] *See supra* notes 98-100 and accompanying text and *infra* text accompanying notes 348-56.

[262] *See supra* text accompanying note 161.

[263] *See supra* note 99 and accompanying text.

[264] *See supra* text accompanying notes 145-50 and *infra* text accompanying notes 387-92.

the statement about the capital jury's limited "discretion" "[a]fter . . . Furman . . . and Gregg,"[265] Justice Rehnquist ignored the jury's role in Florida, the state that had condemned Witt to death, and sought his proof elsewhere. "As in the State of Texas," he wrote "many capital sentencing juries are now asked specific questions, often factual, the answer to which will determine whether death is the appropriate penalty."[266] Yet Texas is apparently the only state in which the sentencer's role is so circumscribed, a condition that cannot be reconciled with the discretion the Court has elsewhere required.[267]

Nor does the fact that *Adams* adopted a test derived from *Witherspoon* mean that the "tests with respect to sentencing and guilt . . . have been merged,"[268] even if, after *Witt*, the same language is used to probe for bias in the performance of either function. This common language merely identifies the *degree of interference* ("prevent or substantially impair") that will not be tolerated in connection with a juror's performance of her assignments. It does not identify the assignments, which in the case of factfinding and discretionary sentencing remain distinct. To see that they do, consider first how a judge or lawyer might phrase a voir dire question in a Texas case: Will your views prevent or substantially impair your ability to follow your oath to "answer the statutory questions without conscious distortion or bias?"[269] Next, how would the same inquiry be phrased in a state like Georgia or California, where the jury exercises discretion in choosing penalty for those within the death-eligible pool? Will your views prevent or substantially impair your ability to follow your oath to . . .? To what? To sentence the defendant to life or death, of course, but that tells us almost nothing. It is impossible to complete the question — or if the question is ended after the word "oath," it is impossible to answer it intelligently — unless we first identify the particular moral views a state may properly exclude from a sentencing jury in a capital case. *Witt* relied on *Adams v. Texas* for the first half of its voir dire question, but since Texas juries only find or predict facts, *Adams* is no help in formulating the balance of the question, which must identify the boundaries of a state's exclusionary authority in states where juries have sentencing discretion. *Witherspoon* would complete the question with: consider the death penalty depending on "the facts and circum-

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[265] 105 S. Ct. at 851.

[266] *Id.*

[267] *See supra* text accompanying notes 145-52.

[268] 105 S. Ct. at 851.

[269] *Adams v. Texas*, 448 U.S. at 46.

stances that might emerge in the course of the proceedings."[270]

Witt's use of the words "bias"[271] and "impartial"[272] in connection with both factfinding and sentencing, in an apparent effort to facilitate "merge[r]"[273] of the two, is also misconceived. A state is authorized to excuse a factfinder for "bias" if she is inclined to distort the factfinding process in favor of a particular result.[274] The state interest in avoiding factual distortion is clear. But how might a discretionary capital sentencer be biased? Presumably by being predisposed to vote for one or another of the two possible sentences.[275] If that is so, then every prospective juror is biased save only those in the exact middle of the moral spectrum (probably no one) and those who have given the question no thought. If a juror may constitutionally be excused because she is too much in favor of death or too much opposed to it, we might *then* choose to say that she was excused for "bias" or lack of "impartiality," but that begs the question, which is "whom may the state excuse?" Bias, if we want to call it that, is a consequence, not a determinant, of our answer. *Witt*'s error was to assume that we could identify excusable bias without first describing the category of those whom a state may lawfully excuse.

Witt's effort to equate sentencing with factfinding is illogical in another way. Accuracy in factfinding presumes the existence of a right answer, an objective fact that, however difficult, our justice institutions must attempt to identify or predict. (Did the defendant pull the trigger? Did she fear for her life when she did?) *Adams* recognized that a person's values and beliefs, coupled with the consequences of crediting or predicting a particular fact, may to some legitimate extent influence the quantity and quality of information she will require before answering questions like these.[276] Where, however, a prospective juror's views do not simply make her cautious or skeptical but raise the prospect of

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[270] 391 U.S. at 522 n.21.

[271] *See, e.g.*, 105 S. Ct. at 852 (referring to "juror bias"); *see also supra* notes 223 & 257.

[272] 105 S. Ct. at 850 (defining "impartial" jury).

[273] *Id.* at 851.

[274] *See, e.g.*, Adams v. Texas, 448 U.S. at 46 (juror must be able to answer the statutory questions without "conscious distortion or bias"); Smith v. Phillips, 445 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ."); Ham v. South Carolina, 409 U.S. 524 (1973) (black defendant had a constitutional right to have prospective jurors questioned for racial bias); Irvin v. Dowd, 366 U.S. 717, 722 (1961).

[275] I exclude the situation in which jurors have a connection to the crime or the defendant that might encourage more or less severity.

[276] *See supra* notes 211-14 and accompanying text.

"conscious distortion,"[277] the state may properly exclude that person as one who will not be able to obey her oath and follow the court's instructions. Discretionary capital sentencing is different for the simple reason that there is no external event that a juror, by her verdict, decides has or has not been proved. There is no objective right answer. The discretionary sentencing decision — life or death — is entirely subjective. Sentencing jurors obey their oaths simply by exercising their moral judgments, unless the state may validly excuse persons with their particular moral judgments.

On this critical issue *Witt* was silent. It offered language for the implementation of a standard without articulating a standard. It told us that a juror may be excused if her views would "***prevent or substantially impair***"[278] her ability to follow her oath, but it did not explain what oath the state could exact. Given this lacuna and *Witt*'s assertion that it meant only to "clarify"[279] *Witherspoon* — to "simply modify the test stated in Witherspoon's footnote 21"[280] while "adher[ing] to the essential balance struck by Witherspoon"[281] — a juror who reveals herself as one who will be reluctant to vote for the death penalty, but whose views will not "prevent or substantially impair" her from doing so depending on the facts, may not be excused under *Witt* just as she could not have been excused under *Witherspoon*. Jurors may be removed only if their "views would prevent or substantially impair" their ability to "***even consider returning a verdict of death***"[282] no matter what the evidence. It might be thought that the italicized language from *Witherspoon* is part of the very exclusionary dicta *Witt* rejected. To the contrary, the language is not dicta and *Witt* did not reject it.

Witt emphatically dismissed the broad exclusionary language contained in the *second* paragraph of *Witherspoon*'s note twenty-one. That standard permitted removal of prospective jurors who "made [it] unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial."[283] This was the only part of footnote twenty-one that *Witt* quoted or specifically referred to.[284] The

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[277] *Adams*, 448 U.S. at 46.

[278] 105 S. Ct. at 850.

[279] *Id.* at 852.

[280] *Id.* at 852 n.5.

[281] *Id.*

[282] *Witherspoon*, 391 U.S. at 520 (emphasis added); *see also id.* at 522 n.21.

[283] 391 U.S. at 522 n.21.

[284] 105 S. Ct. at 848 (quoting from second paragraph of footnote 21); *id.* at 849 (referring to "similar language in *Witherspoon*'s footnote 9"); *id.* at 850 (referring to

Witherspoon Court also offered, in the text[285] of the opinion, a narrower exclusionary standard: "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty."[286] *Witt* did not reject this language. Furthermore, in the *first* paragraph of footnote twenty-one, *Witherspoon* invoked the same test of "willingness to consider" the death penalty, but this time in *in*clusionary form:

> The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.[287]

Witt's many references to the dicta of footnote twenty-one did not quote or identify this inclusionary test,[288] good evidence that it did not mean to dismiss it. Further evidence that *Witt*'s disapproval was directed at the second rather than the first paragraph of footnote twenty-one appears in this statement: "Despite Witherspoon's limited holding, later opinions in this Court and the lower courts have referred to the language in footnote 21, or similar language in Witherspoon's footnote 9, as setting the standard for judging the proper exclusion of a juror opposed to capital punishment."[289] Notes nine and twenty-one are "similar" only in their use of the "automatically" language of the latter's second paragraph. Finally, while *Witt* "discounted" "references to 'automatic' decisionmaking in both Maxwell v. Bishop . . . and Boulden v. Holman,"[290] it did not mention *Davis v. Georgia*, which vacated a death sentence after quoting from the first paragraph of *Witherspoon*'s footnote twenty-one.[291]

Witt aside, *Witherspoon*'s "willingness to consider" standard was quite clearly a holding of the Court, not dicta. Consider first the test

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"the 'automatically' language of *Witherspoon*'s footnote 21").

[285] The location of the standard was important to the *Witt* Court, which emphasized that "the Witherspoon footnotes are in any event dicta" and stated that the "Court has on other occasions similarly rejected language from a footnote as 'not controlling.' " *Id.* at 851.

[286] 391 U.S. at 520.

[287] *Id.* at 522 n.21.

[288] *Witt* did refer to jurors "willing to *consider* the death penalty," though without quoting footnote 21. This reference is discussed *infra* text accompanying notes 305-07.

[289] 105 S. Ct. at 849.

[290] *Id.* at 851 n.4 (citing Maxwell v. Bishop, 398 U.S. 262 (1970), and Boulden v. Holman, 394 U.S. 478 (1969)).

[291] 429 U.S. 122, 123 (1976).

Witt applied to separate *Witherspoon*'s dicta from its holding: "[T]he statements in the Witherspoon footnotes are in any event dicta. The Court's holding focused only on circumstances under which prospective jurors could *not* be excluded; under Witherspoon's facts it was unnecessary to decide when they *could* be."[292] If this language suggests that an inclusionary-exclusionary distinction can suffice to identify *Witherspoon*'s dicta, its inquiry is artificial. The prior discussion[293] demonstrated that the same test (willingness to consider capital punishment) may be phrased in both inclusionary and exclusionary terms. One need only shift the negatives so that "a juror may not be excluded if he is willing to consider the death penalty" becomes "a juror may be excluded if he is not willing to consider the death penalty." The search for *Witherspoon*'s dicta surely cannot turn on accidents of phrasing.

The Illinois law excluded persons with "conscientious scruples against capital punishment, or [who were] opposed to the same."[294] This broad language could encompass views all along the lenient end of the moral spectrum. Some of these views might properly be subject to exclusion while others would not be. A person unalterably opposed to capital punishment and a person who would hesitate before voting for it might both describe themselves as within the Illinois language. It would have been singularly uninstructive had the Court held, without elaboration, that persons with "conscientious scruples against" or who were "opposed to" capital punishment could not be excluded. Depending on its resolution of the issue, the Court had to identify the points of view that were (as the defendant claimed) or were not (as the state claimed) improperly barred under the language of the Illinois law.

To identify those views, the Court might have described the moral positions of the excluded jurors and ruled on whether the state could properly exclude them. The trial court had excused forty-seven prospective jurors.[295] Five had said that "under no circumstances would they vote to impose capital punishment."[296] The Court wrote that persons with these views could be excluded under the Illinois law.[297] Arguably, this was dicta since it appears that Witherspoon did not specifically challenge the exclusion of these five.[298] The rest were excused

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[292] 105 S. Ct. at 851.

[293] *See supra* notes 283-88 and accompanying text.

[294] *Witherspoon*, 391 U.S. at 512.

[295] *Id.* at 514.

[296] *Id.*

[297] *See id.* at 520.

[298] *Id.* at 513-14 ("The issue before us . . . does [not] involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never

after it was determined that they had "conscientious or religious scruples against the infliction of the death penalty," or did not "believe in the death penalty."[299] In only one case did the voir dire go beyond the language of the statute, and then only barely.[300] Therefore, the record provided no help in identifying the moral views of the jurors whose exclusion was challenged. Some (perhaps all) of these jurors might properly have been excluded; some (perhaps all) might not have been. The Court could not know because the record was bare. Ironically, the case that for a generation would guide lower courts on how to parse the *Witherspoon* inquiry itself contained no such inquiry.[301] Enlarging this irony by a degree is the fact that seventeen years later, the record of the case that purported to "clarify" *Witherspoon*, and which may serve as no less of a guide, was similarly barren.[302]

Whatever further examination might have revealed about the actual views of the challenged *Witherspoon* jurors, at the very least, all were excused because they had "conscientious scruples against" or were "opposed to" capital punishment. The Court, in deciding whether that reason was sufficient, was required to answer two questions. The first was factual: What might likely have been the range of views of those who answered affirmatively in response to the Illinois inquiry ("Do you have conscientious scruples against capital punishment or are you opposed to it?")? The second was legal: Was there an unacceptable risk[303] that among this group were prospective jurors who could not be excluded for cause? Once the Court concluded that the state's inquiry could reasonably have led to removal of jurors willing to "consider" returning a verdict of death and that such jurors could not constitutionally be excluded, its task was completed. The death sentence had to be vacated. There was no need to go further and talk about automatic decisionmaking or whether exclusion of those much further toward the

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vote to impose the death penalty . . . .").

[299] *Id.* at 514-15.

[300] *Id.* at 515.

[301] *Witherspoon*'s generality may explain problems with its implementation. For a painstaking analysis of these, which "draws heavily on actual voir dires reported in published opinions," see Schnapper, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977, 980 (1984).

[302] The colloquy with the excluded *Witt* juror was limited to her ability to determine guilt or innocence. 105 S. Ct. at 848. The Supreme Court was not required to decide whether she could properly have been excluded from sentencing, nor did it discuss that issue. Factfinding bias and discretionary sentencing "bias" are not interchangeable. *See supra* text accompanying notes 271-75.

[303] With an undeveloped record, the Court's analysis had to be in terms of the degree of risk.

lenient end of the moral spectrum would also be improper.[304]

Under this analysis, the *Witherspoon* Court was required to support its judgment by identifying a category of jurors whom the Illinois test improperly excluded. It did so with the "willingness to consider" language, and that language is therefore a holding of the Court. Most of *Witt* is consistent with this explanation, but one implication in the case might be taken to reject even the "willingness to consider" language of *Witherspoon*. The *Witt* Court elliptically remarked that the *Witherspoon*

> jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to "follow the law and abide by his oath" . . . .
>
> After our decisions in Furman v. Georgia . . . and Gregg v. Georgia . . . however, sentencing juries could no longer be invested with such discretion. As in the State of Texas . . . .[305]

The inference from this dictum — that after *Furman* and *Gregg* a state may exclude jurors willing to consider execution — is accompanied by no authority or explanation and rests on the assumptions (false beyond Texas) that post-*Gregg* sentencing juries must have their discretion limited,[306] and that factfinding bias and sentencing bias are "no different."[307]

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[304] With how broad a brush could the *Witherspoon* Court have painted? The less complete its explanation of the scope of the exclusionary power, the more likely would there have been conflicting application of the case in the lower courts and the more such cases would the Supreme Court have been asked to decide. If the *Witherspoon* Court reasonably believed the fair and efficient administration of justice required it to specify whom a state could exclude from capital sentencing juries, why should that be dicta? A fair argument could be made that it was not. On the other hand, if the idea that a court's authority is limited by a case's facts has meaning, there must be some limit on the power to pronounce.

The issue of dicta was a question of law properly before the *Witt* Court, just as later cases will have to determine the character of *Witt*'s pronouncements (including the ones about *Witherspoon*). *See supra* note 234. For the reasons discussed in the text, *Witt*'s conclusion that *Witherspoon*'s "automatically" language was dicta is reasonable. All three members of the *Witherspoon* Court who participated in *Witt* (as well as the other six Justices) seemed to accept (or did not resist) the view that it was. *Witt*, 105 S. Ct. at 851; *id.* at 868 (Brennan, J., joined by Marshall J., dissenting) ("That footnote 21 might have been dictum is not, of course, an affirmative reason for adopting the particular alternative the Court advances today.").

[305] 105 S. Ct. at 851. This point is dictum because the juror excused in *Witt* was not questioned about her ability to recommend sentence. *See supra* note 234.

[306] *See supra* text accompanying notes 98-103 and *infra* text accompanying notes 350-56.

[307] *See supra* text accompanying notes 271-77.

Aside from matters of dicta and holding, a good reason to maintain the *Witherspoon* standard for exclusion of discretionary capital sentencers, implemented now with the *Adams* phraseology, is the absence of alternatives. The requirement of individualization[308] and the prohibition against mandatory capital laws[309] forbid a state to restrict jury membership to persons who will pledge to sentence to death once guilt is proved. Nor may a state limit jury service to those disposed to vote for death but willing to "consider" mercy. *Witherspoon*'s "limited holding,"[310] which *Witt* did not disturb, prohibits a state from "excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[311] In short, the *Adams* phraseology will, in voir dire, begin a colloquy, which will in turn reveal that the prospective juror's views about capital punishment place her somewhere between the two ends of the moral spectrum (or reveal that the juror does not know where she stands), and the trial judge will then have to decide whether the juror's position subjects her to challenge for cause. Since *Witt* provides no guidance on this issue, its inutility will soon become apparent.[312]

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[308] *See supra* text accompanying notes 39 & 142-44.

[309] *See supra* text accompanying notes 109-13.

[310] *Witt*, 105 S. Ct. at 849.

[311] *Id.* (quoting *Witherspoon*, 371 U.S. at 522).

[312] *Witt* held that a trial judge's determination of "bias" following a *Witherspoon* inquiry was a factual finding entitled to the presumption of correctness. 105 S. Ct. at 854. *Witt*'s facts made the presumption easy to indulge and nearly impossible to rebut. It will not always be so. First, *Witt*'s lawyer did not object to the judge's decision to excuse the juror, *id.* at 848, and therefore did not urge the judge to pursue the inquiry or explain to the juror exactly what the law could properly demand of her. Counsel will not ordinarily be so casual. Second, the *Witt* Court emphasized that the trial judge had had an opportunity to view the juror's demeanor. *Id.* at 857. But the juror's demeanor was relied upon to confirm, not contradict, her declaration that her "views" would "interfere" with her ability to sit. *Id.* at 848. How far will demeanor evidence carry when a juror opposed to the death penalty tells the trial judge she is nevertheless willing to consider it? Will the judge be presumed correct if she responds, "Based on your demeanor I think you're lying, step down"? (If the judge says only "step down," a reviewing court will not know whether it was because she disbelieved the juror or because she applied the wrong substantive standard.) The facts of *Witt* do not require federal habeas courts to defer to a trial judge's unexplained transcript "finding," based on demeanor evidence, that a juror's assertion is false. Finally, it must be recalled that the *Witt* juror said that her views would "interfere" with her ability to decide guilt, not choose penalty. *Id.* at 848. Since the state has greater exclusionary power in connection with factfinding than it has when impaneling a discretionary sentencer, *see supra* text accompanying notes 276-82, it is much easier to fail the test for the first assignment

Finally, allowing all members of the community "willing to consider" a state's authorized sanctions to sit on capital sentencing juries fosters decisions that accurately convey community attitudes of retribution and mercy and so comports with the same theory of institutional competence that disallows legislative sentencing and that should also forbid judicial sentencing.[313]

3. The Judicial Sentencer: *Spaziano v. Florida*

Even as filtered through *Witt*, the substantive legacy of *Witherspoon* and *Adams* remains admirable. But it is an eminently defeasible legacy. The state may topple its delicate balance — its enforceable rights to impartiality, to state neutrality, and to have jurors of most viewpoints eligible to pass sentence — by giving sentencing authority to judges. While the theories behind *Witherspoon* and *Adams* are elusive, much more perplexing is the ease with which the Court in *Spaziano v. Florida*[314] allowed states entirely to circumvent their forceful directives. The Court did so, however, only by misconstruing and contradicting precedent and by ignoring the capital petitioner's strongest constitutional argument.

The *Spaziano* Court first held that capital and noncapital sentencing were substantially alike so there was no reason to treat them differently with regard to the identity of the sentencer.[315] It next held that even if the two were different, they were not different in a way that entitled a defendant to a jury sentence.[316] In the first of these two lines of argument, *Spaziano* seemed to acknowledge that capital sentencers cannot base their decisions on deterrence considerations.[317] Legislatures may rely on the statistical probability of deterrence in passing death penalty laws, but a sentencer cannot rationally predict whether executing a particular defendant will deter other murderers.[318] The Court wrote,

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than the test for the second.

[313] *See supra* text accompanying notes 131-38 and *infra* text accompanying 362-70.

[314] 104 S. Ct. 3154 (1984).

[315] *Id.* at 3163 ("distinctions between capital and noncapital sentences are not so clear as petitioner suggests").

[316] *Id.* at 3164 ("even accepting petitioner's premise . . . it does not follow that the sentence must be imposed by a jury").

[317] *Id.* at 3163.

[318] *See* Gillers, *supra* note 60, at 47-53. Legislators may rely on deterrence rationales in enacting a system of capital punishment. Enmund v. Florida, 458 U.S. 782, 798-99 (1982); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion). Jurors are trusted to predict whether individual capital accuseds will commit violent acts in the future. *See infra* part II.

however, that "[t]he same is true . . . in noncapital cases."[319] This conclusion is questionable. Whereas the death sentencer has a choice between two stark options, death or life, noncapital sentencing offers a variety of choices — prison or not, fine or not, length of confinement, possibly the conditions of confinement, the appropriateness of various nonincarcerative alternatives. It has generally been assumed that a sentencing judge may weigh the deterrent effect of each option when choosing a sanction[320] and may even impose a prison sentence solely for its probable deterrent force.[321] It would be quite remarkable if in a brief sentence, with no authority, the *Spaziano* Court meant to disown general deterrence as a consideration in noncapital sentencing.[322] Even if deterrence were as inappropriate at noncapital as at capital sentencing, that would be an insufficient reason for treating them alike on the issue of sentencer identity. We must ask how the two events are the same or different in what they do, not in what they do not do.

The *Spaziano* Court attempted to answer that question, discussing incapacitation first. It concluded that "[a]lthough incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital-sentencing proceeding."[323] Incapacitation is obviously a legitimate factor in noncapital sentencing.

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[319] 104 S. Ct. at 3163.

[320] *See, e.g.*, United States v. Brubaker, 663 F.2d 764, 770 (7th Cir. 1981) ("[W]here there has been an individualized determination, it is proper for a sentencing court to place greater emphasis upon deterrence than other goals of criminal justice."); United States v. Colmenares-Hernandez, 659 F.2d 39, 42 (5th Cir.) ("Deterrence is a legitimate aspect of sentencing."), *cert. denied*, 454 U.S. 1127 (1981); United States v. Moore, 599 F.2d 310, 315 (9th Cir. 1979) (upholding sentence of life imprisonment for deterrence), *cert. denied*, 444 U.S. 1024 (1980); *cf.* Wayte v. United States, 105 S. Ct. 1524, 1531 (1985) (government may prosecute for deterrence reasons). In sentencing Martin Light, a lawyer convicted of possessing heroin with intent to distribute it, Judge Eugene Nickerson of the United States District Court for the Eastern District of New York gave the following reason for imposing the maximum term of 15 years imprisonment: "It is the court's duty to try to deter those lawyers who might be tempted to act as has the defendant. Nothing less than the maximum sentence will serve that end." N.Y. Times, Feb. 22, 1985, at B3, col. 1.

[321] *See, e.g.*, United States v. Foss, 501 F.2d 522, 528 (1st Cir. 1974). A legislature, too, may impose lengthy mandatory minimum sentences in anticipation of their general deterrent effect. *See, e.g.*, Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979).

[322] *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 39-45, 63-69, 261-69 (1968); F. ZIMRING & G. HAWKINS, DETERRENCE 32-50 (1973); Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1175-76 (1974).

[323] 104 S. Ct. at 3163.

A judge might consider whether it is safe to release the defendant on probation or to impose a short jail term.[324] How does the issue of incapacitation get framed in capital sentencing? Since the alternative to a death sentence is a life sentence (or a sentence of such duration that it is effectively the same[325]), it must be that the sentencer is asked to predict whether the defendant, while confined or following a contemplated escape, would commit an illegal act of such seriousness that he must be executed before that occurs. Part II argues that this is an impermissible basis for a capital decision,[326] but one now permitted. Spaziano's assertion that "incapacitation has never been embraced as a *sufficient* justification for the death penalty"[327] can only mean that future violence is not an aggravating circumstance that will satisfy *Furman* at the *definition* stage of capital sentencing.[328] Factually, incapacitation has been held quite sufficient to support a death sentence at the *selection* stage, the locus of *Spaziano*'s challenge. In Texas, notably, a prediction of future violence at the selection stage may even make execution mandatory.

Assuming that capital and noncapital sentencing are the same because neither calls for assessment of deterrence, and postponing to part II[329] the discussion of whether and how they differ with respect to incapacitation, we are left with rehabilitation and with retribution and mercy as the final determinants of criminal punishment. Rehabilitation dramatically distinguishes noncapital from capital sentencing. In choosing between life and death sentences, rehabilitation plays no part. It is foreclosed by either option. By contrast, in choosing a noncapital sentence a judge often weighs how each alternative will encourage or impede a defendant's chance of productive return to society. Since judges are likely far superior to juries in performing this task, this issue deserved but received no discussion in an opinion whose reasoning relied on the view that capital and noncapital sentencing are alike.

Finally, the Court addressed the key issues of retribution and mercy. Each plays a legitimate role in both noncapital and capital sentencing choices, and judges routinely consider both in the former context.

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[324] One "purpose of a recidivist statute [is] . . . at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." Rummel v. Estelle, 445 U.S. 263, 284 (1980).

[325] *See supra* note 66 and accompanying text.

[326] *See infra* part II.

[327] 104 S. Ct. at 3163 (emphasis added).

[328] *See supra* part I(A).

[329] *See infra* text accompanying notes 393-403.

Spaziano, advancing alternate arguments, concluded that judges can do the same in capital sentencing. It held first that "[w]hile retribution clearly plays a more prominent role in a capital case, retribution is an element of all punishments society imposes and there is no suggestion as to any of these that the sentence may not be imposed by a judge."[330] This says only that the question remained open. In other capital cases the Court has relied on differences in sanction to impose procedures not previously required in noncapital matters.[331] In *Spaziano*, for the first time, an argument about sentencer identity rested on the same differences. The central question before the Court was whether these differences entitle a capital defendant to a jury sentence. Almost reaching it, the majority wrote that even if

> the retributive purpose behind the death penalty is the element that sets the penalty apart, it does not follow that the sentence must be imposed by a jury. Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable . . . . The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined.[332]

This is all the Court had to say on the matter. Spaziano did not have a right to have the jury decide whether it was the "community's belief [that his crime was] so grievous an affront to humanity that the only adequate response may be the penalty of death"[333] because he had already enjoyed the benefit of the community's view at the legislative or definition stage. Furthermore, even if the jury had sentenced, its discretion would have been "reviewable" and "limited" by prior legislative judgments. Both reasons are insufficient and partly inaccurate. Both reasons suffer from a failure first to isolate *how* "the retributive purpose . . . sets the [death] penalty apart" from other penalties. In noncapital sentencing the goal of retribution, or the willingness to afford mercy, will with other goals sway the selection from among sanctions of many kinds and degree, but in capital sentencing it influences one

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[330] 104 S. Ct. at 3164.

[331] *See, e.g.*, Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979); Gardner v. Florida, 430 U.S. 349 (1977).

[332] 104 S. Ct. at 3164.

[333] *Id.* at 3163 (quoting *Gregg*, 428 U.S. at 184 (plurality opinion)).

choice only,[334] and it is the only influence on that choice.[335] *Spaziano* collapsed this distinction into the uninstructive phrase "sets . . . apart" and proceeded to obscure important differences between capital and noncapital sentencing, as a careful reading of the quoted paragraph will show.

In defense of its holding, *Spaziano* first explained that "the sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty" and that "[t]he community's voice is heard at least as clearly in the legislature."[336] This description substantially overstates the legislature's constitutional role and, therefore, the community's chance for participation. The legislature does not determine mitigating circumstances. The Constitution does, and it admits all that are relevant.[337] The legislature has one power only: to define those aggravated murders it wishes to make capital and to identify the other aggravating evidence the sentencer may consider.[338] The legislature decides who may die but must give to others authority to determine who will. It is incompetent to say whether and to what extent mitigating information should counsel mercy.[339] That is the meaning of cases from *Woodson v. North Carolina*[340] to *Eddings v. Oklahoma*.[341] Consequently, in so far as "the community's voice is heard at least as clearly in the legislature," it is heard on only a small part of the question, the abstract part, the part that asks "why a death sentence should be imposed"[342] and then only in general, before there is a crime or an accused, before there is a chance for individualization. The community's voice cannot be heard in the legislature on the remainder of the question, which requires the facts of a crime and an actual defendant, which calls for consideration of the appropriateness of mercy, and which asks "why [a death sentence] should not be imposed."[343]

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[334] *See supra* note 66 and accompanying text.

[335] I have postponed my argument against the use of incapacitation as a capital sentencing criterion to part II.

[336] 104 S. Ct. at 3164.

[337] *See supra* part I(B).

[338] *See supra* text accompanying notes 153-66.

[339] *See supra* text accompanying notes 106-08.

[340] 428 U.S. 280 (1976).

[341] 455 U.S. 104 (1982).

[342] Adams v. Texas, 448 U.S. 38, 46 (1980) (quoting Jurek v. Texas, 428 U.S. 262, 271 (1976) (plurality opinion)).

[343] *Id.*

A regime of judicial sentencing, in short, does nothing less than exclude the community from all participation on mercy's proper place in death penalty decisions. This total exclusion defies reconciliation with descriptions of the interest that justified a capital punishment law in the first place. The death penalty was constitutional, we were told, because "not infrequently, cases arise that are so shocking or offensive that the public demands the ultimate penalty for the transgressor"[344] and because "in extreme cases [it] is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[345] The death penalty was not upheld to give "expression" to the "demands" of judges or to judicial "belief" about the gravity of "certain crimes." The Court deferred to the community. *Spaziano*, accepting this premise, called capital punishment "an expression of community outrage."[346] Nevertheless, it proceeded to hold that the same community may be barred from all participation in selection stage capital sentencing decisions, and that the Constitution is satisfied by the public's opportunity to influence legislative identification of abstract aggravating circumstances at the definition stage.[347]

The *Spaziano* Court next rejected a right to jury sentencing on the ground that the sentencer may not in any event be "given free rein;" instead, its discretion "must be limited and reviewable."[348] It is clear, however, from other of the Court's statements that the sentencer may indeed be given free rein. The Court's own earlier word for the permissible scope of the sentencer's discretion, "unbridled,"[349] substantively and metaphorically contradicts *Spaziano*'s assertion. Even if it were true that the sentencer's decision must be "limited and reviewable," one wonders why this should matter. It does not follow that because a jury may not have absolute sentencing authority, a defendant has no right to

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[344] Furman v. Georgia, 408 U.S. 238, 454 (1972) (Powell, J., dissenting). Justice Powell's dissent, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, was cited by the plurality in Gregg v. Georgia, 428 U.S. 153, 184 (1976) (plurality opinion).

[345] *Gregg*, 428 U.S. at 184; *see also* Gillers, *supra* note 60, at 46-57; *supra* note 135. The *Gregg* plurality also called capital punishment "an expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183 (plurality opinion).

[346] 104 S. Ct. at 3163.

[347] The *Spaziano* Court said the argument that jury sentencing affords a conduit for community beliefs "obviously has some appeal," but ultimately rejected it as containing "two fundamental flaws." *Id.* This part of the Article contends that the flaws the Court described are themselves in error.

[348] *Id.* at 3164.

[349] *See supra* text accompanying note 99 and *infra* text accompanying note 435.

have it have any. In any event, a jury's sentence is "limited and reviewable" in ways and for reasons that have nothing at all to do with the question in *Spaziano*.

A jury's discretion is constitutionally "limited" only to the extent that it cannot be exercised until an aggravating circumstance is found.[350] In that sense, one could also say that the jury's discretion is limited because it cannot impose the death sentence on car thieves. This limit, imposed at the definition stage to prevent a return to the capital sentencing pattern found wanting in *Furman*,[351] has no application once a defendant is convicted of a capital offense. True, a state can choose to restrict the aggravating evidence a sentencer may consider in deciding whether a death-eligible defendant lives or dies, and if it does, its rule might be said to place "limits" on sentencer discretion. Since the Constitution does not require these limits, however, the defendant's federal rights will not be violated if the sentencer ignores them.[352] Statutory mitigating circumstances, it was once supposed, also served to "guide [] and channel []" the sentencing choice.[353] Whatever validity that description might once have had is gone. Legislation notwithstanding, a defendant may introduce and a sentencer must be able and willing to consider[354] any relevant mitigating evidence. In brief, in deciding sanction for death-eligible defendants, a capital sentencer may be given discretion as great as Illinois delegated to *Witherspoon*'s jury (and possibly more since a judge today has substantially less control over the evidence a sentencing jury will hear). Declarations otherwise in *Spaziano* and *Witt* were wrong and contrary to assertions in *Zant v. Stephens*[355] and *California v. Ramos*.[356]

Spaziano also stressed that a jury's sentence had to be "reviewable."[357] This is true only in the sense that a court must be able to

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[350] *See supra* part I(A).

[351] Zant v. Stephens, 462 U.S. 862, 876-77 (1983).

[352] Barclay v. Florida, 103 U.S. 3418, 3428 (1983) (plurality opinion) ("no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances"); *id.* at 3433 (Stevens, J., concurring) ("the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime"); Zant v. Stephens, 462 U.S. 862, 881 (1983) (death sentence affirmed although jury considered aggravating evidence not recognized by state law).

[353] Proffitt v. Florida, 428 U.S. 242, 258 (1976) (plurality opinion).

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

[355] 462 U.S. 862 (1983); *see supra* text accompanying note 99.

[356] 103 S. Ct. 3446 (1983); *see supra* text accompanying note 99.

[357] 104 S. Ct. at 3164.

reverse the sentence when the evidence does not support the aggravating circumstance found,[358] when the circumstance was defined in an unconstitutionally vague manner in the case at hand,[359] or perhaps for other errors of *law*. No more than in *Witherspoon*'s day need the sentencer's decision be reviewable on the *facts* for a capital punishment law to be constitutional.[360] Nor need it even be reviewable for purposes of determining whether the defendant's sentence is horizontally proportional to sentences of other defendants in the state.[361]

Spaziano may be faulted as much for its errors of omission as for its analytical lapses. Not a line in the opinion discussed whether, in capital cases, judges can reliably speak for the community on questions of retribution and mercy. Yet on this, the central issue in the case, the petitioner may have had his strongest arguments.

In determining the constitutionality of judicial sentencing in capital cases, two questions must be addressed. First, how great is the risk that sentencing judges will be unable accurately to apply the community's standards of retribution and mercy? Of course, the degree of risk engendered by a particular capital sentencing procedure will rarely be

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[358] *Cf.* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). *Gregg* emphasized that the Georgia Supreme Court was "required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Id.* at 198. It is unclear whether the first two review functions were deemed constitutionally required. The third has been held not to be. Pulley v. Harris, 104 S. Ct. 871 (1984). The *Proffitt* plurality, 428 U.S. at 250-51 (plurality opinion), and the *Jurek* plurality, 428 U.S. at 276 (plurality opinion), also stressed the appellate review required by the statutes before them, although the Florida statute prescribed no "specific form of review," *Proffitt*, 428 U.S. at 251; nor did the Texas law. *Pulley v. Harris*, 104 S. Ct. at 881 n.15; *Jurek*, 428 U.S. at 269.

[359] Godfrey v. Georgia, 446 U.S. 420 (1980).

[360] The California law was upheld although the scope of judicial review appeared limited to the requirement that in the event of a death sentence the trial court make an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." CAL. PENAL CODE ANN. § 190.4(e), *quoted in* Pulley v. Harris, 104 S. Ct. at 880. While the trial judge's determination was reviewable on appeal, no form of review was prescribed. *Id.* at 881; *see also id.* at 879 (*Gregg*, *Proffitt*, and *Jurek* did not rely on "proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review"); Caldwell v. Mississippi, 105 S. Ct. 2633, 2641 (1985) (noting limitations on appellate review of capital sentences and the general "presumption of correctness" they enjoy); *cf.* Arizona v. Rumsey, 104 S. Ct. 2305, 2310 (1984) (Arizona Supreme Court's "role [in reviewing trial judge's sentence] is strictly that of an appellate court, not a trial court" and the "appellate process [is not] part of a single continuing sentencing proceeding").

[361] Pulley v. Harris, 104 S. Ct. 871 (1984).

capable of calibration. We make a judgment based on reason and experience. One way of doing this is to compare the challenged procedure with others that have been found wanting. If neither legislators nor death-qualified juries can convey the community's will on whether an increase in sanction from life to death is called for, and if death-qualified juries cannot even be "impartial" in answering questions of fact,[362] it is hard to understand how trial judges — working alone, all trained in the same profession, unrepresentative of their neighbors in class, income, education, gender, race, age, and point of view — can be expected to do better. A conclusion that they can runs counter to the Court's other decisions on sentencer identity, which *Spaziano* barely discussed, and to the Court's pronouncements in the fair cross-section and minimum jury size cases,[363] which *Spaziano* completely ignored.

The risk in judicial sentencing, furthermore, is not limited to the established and sizeable gulf[364] between the moral judgments of a state's randomly chosen judges and those of juries, for judges, unlike capital juries, are not chosen at random and may in fact be picked with an eye to their death penalty views. Yet *Spaziano* would grant the defendant in a judicial sentencing state no right to protest, for example, that the trial judge was elected following a campaign in which she touted her support of capital punishment; or that she was appointed by a governor who did the same and who then excluded "scrupled lawyers" from consideration for the bench; or that in seeking reelection or reappointment the judge can expect to be judged by single issue groups whose sole concern will be her execution rate.[365] Indeed, it appears that if a state were to delegate all capital sentencing authority to a single statewide

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[362] *See supra* text accompanying notes 195-201.

[363] *See* Burch v. Louisiana, 441 U.S. 130 (1979) (minimum jury size); Ballew v. Georgia, 435 U.S. 223 (1978) (minimum jury size); Taylor v. Louisiana, 419 U.S. 522 (1975) (representative jury); *see also* Gillers, *supra* note 60, at 63-65; *cf.* Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) (appellate judges are not competent to decide whether defendant deserves mercy).

[364] *See Spaziano*, 104 S. Ct. at 3178 n.34 (Stevens, J., concurring and dissenting). As of the time of the *Spaziano* decision, Florida judges had overridden jury recommendations of mercy 83 times. *Id.* at 3171 n.14; *see also* Gillers, *supra* note 60, at 67-68.

[365] These considerations are founded in the values that underlie Duncan v. Louisiana, 391 U.S. 145, 156 (1968), which *Spaziano* cited and then ignored. 104 S. Ct. at 3161 (petitioner "does not urge" that capital sentencing "is controlled by" Duncan); *id.* at 3174-75 (Stevens, J., concurring and dissenting) (quoting passage from *Duncan*, 391 U.S. at 155-56); Gillers, *supra* note 60, at 65-67; *see also* Baldwin v. Alabama, 105 S. Ct. 2727, 2741-42 & nn.5-7 (1985) (Stevens, J., dissenting); Barclay v. Florida, 103 S. Ct. 3418, 3440 (1983) (Marshall, J., dissenting) (commenting on sentencing practices of a particular Florida trial judge).

trial court of one or more judges, a capital defendant could not complain that its members were selected by a method that *Witherspoon*, *Adams*, and *Witt* would forbid states to employ in convening sentencing juries.

The second question *Spaziano* did not address examines the consequences of the risk entailed by the state's procedure. It is unsatisfactory to say, as *Spaziano* did, that "retribution is an element of all punishment society imposes and there is no suggestion as to any of these that the sentence may not be imposed by a judge,"[366] for what we accept in noncapital cases is not necessarily tolerable in death sentencing. A harsh denial of mercy in a noncapital case can be mitigated through probation or modification of confinement conditions. In a capital case, there need be no procedure to correct a severe but legal sentence. If in a noncapital case, an overly retributive sentence is not mitigated, the consequence is measured in time or degree of confinement. The defendant is alive and has the prospect of eventual release. In a capital case, an unduly severe sentence is absolute.[367]

In sum, judicial sentencing mutes the community's sentiment on the question of mercy, a question that can only be answered on the particular facts of each case. Advisory juries are no substitute.[368] Judges are no substitute. Like legislators and unlike juries, judges are and appear

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[366] 104 S. Ct. at 3164.

[367] Commutation is possible. Still, the validity of a capital regime ought to be evaluated by reference to those attributes that are systemic and regular, and without regard to those that are external and random. For these reasons, the commutation power was dismissed when the Court reviewed the sentence in Solem v. Helm, 463 U.S. 277 (1983). South Dakota argued that Helm's life term without possibility of parole had to be judged in view of the availability of commutation, just as the life term in Rummel v. Estelle, 445 U.S. 263 (1980), had been judged, and upheld, in view of the availability of parole. The Court, in striking the sentence under the eighth amendment, responded:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases . . . . Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards . . . .
>
> The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

463 U.S. at 300-01, 303.

[368] *See infra* part III.

subject to influences extraneous to the proper considerations of the life or death sentencing decision. Like legislators and death-qualified juries, judicial views on the appropriateness of mercy cannot be trusted to correspond to those of the community. Mercy, and its converse, retribution, are the only "touchstones in determining whether death is the appropriate penalty."[369] They guide the choice between life and death. Though judges may excel in predictions of future violence, *Spaziano* and earlier cases were wrong to allow any place for incapacitation in capital sentencing.[370]

One proposition the Court did not advance in *Spaziano* warrants mention. The Court did not speculate, as had the *Proffitt* plurality,[371] that judicial sentencing would lead to greater consistency at the selection stage. Consistency is a goal of the definition stage.[372] Except for extreme decisions, which are possible whoever sentences and are correctable in other ways, consistency is largely a mirage once the death-eligible pool is defined. There is, first, no evidence that trial judges sentence so many capital defendants that each has a large enough sample of comparable cases against which to compare each decision.[373] Even if some judges do sentence large numbers of capital defendants, consistency presumes that it is possible to find rational common denominators in the factual jumble of individual capital cases. This is a dubious goal markedly at odds with the recognition, at the selection stage, of "the uniqueness of the individual"[374] and the quest for "individualization."[375] No one has proposed a formula that will enable sentencers to scale and compare the diverse facts of capital cases. Even if systems of measurement could be devised, each judge could be expected to apply her own formula and in any event apply it only to her own sample of

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[369] *See Spaziano*, 104 S. Ct. at 3164. *See also* Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), quoted *supra* note 136.

[370] *See infra* part II.

[371] Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion):

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

[372] *See supra* part I(A).

[373] Gillers, *supra* note 60, at 57-59.

[374] Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion); *see also* Eddings v. Oklahoma, 455 U.S. 104, 112 n.7 (1982) (mandatory punishment law " 'treats all persons convicted of a designated offense not as uniquely individual human beings' ") (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

[375] *Lockett*, 438 U.S. at 605.

cases. The cases of other judges would not be included, and in many instances no record of them would be accessible. To the extent consistency is at all feasible at the selection stage, it would have to be introduced from atop the pyramid of cases — from the state's highest court. But *Pulley v. Harris*[376] held that appellate review for horizontal proportionality is not constitutionally mandated. Given that holding and the preceding arguments, the Court wisely did not continue its attempt to defend judicial sentencing through reliance on an anticipated greater consistency.

II. Historical Facts

A. Preventive Executions

This Article's theory of constitutional accuracy at capital sentencing has three elements. The discussion has so far emphasized institutional competence, the first element. The remainder of these pages discusses the two other elements of the theory: that the defendant is entitled to a responsible sentencer (part III) and that the sentencer must base its decision solely on historical information rationally related to the appropriateness of increasing the defendant's sanction from life to death. The discussion will develop the earlier, abbreviated definition of responsibility and the contention that retribution and mercy are the only valid sentencer considerations. I will also describe the implications of these positions to issues beyond sentencer competency, and in the process discuss several of the Court's capital decisions since *Furman*.

The Court has found legislatures and death-qualified juries incompetent to be capital sentencers[377] but has found judges competent.[378] This Article has offered reasons for the first two holdings that contradict the third.[379] In doing so I assumed that retribution and mercy were the sole determinants of capital sentencing.[380] This part of the Article will defend that assumption. Any advantage gained from a judge's arguably superior skill at forecasting the risk of future violence is irrelevant because predictions of future violence may play no part in the choice of a capital punishment. In holding otherwise, *Jurek v. Texas*[381] and subsequent cases[382] were wrong.

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[376] 104 S. Ct. 871 (1984).

[377] *See supra* text accompanying notes 106-08 & 174-79.

[378] *See supra* text accompanying note 314.

[379] *See supra* text accompanying notes 131-38, 208, & 361-70.

[380] *See supra* text accompanying note 329.

[381] 428 U.S. 262 (1976).

[382] I especially criticize California v. Ramos, 103 S. Ct. 3446 (1983), and Barefoot v.

The role of incapacitation in capital sentencing is somewhat ambiguous. Although *Spaziano v. Florida* declared that "incapacitation has never been embraced as a sufficient justification for the death penalty," it cited it as a "legitimate consideration."[383] This statement can only mean that incapacitation is not *constitutionally* sufficient to separate a simple murder from a capital murder and thereby place an accused in the death-eligible pool.[384] In other words, after *Furman* it may not be the only aggravating circumstance supporting an execution.[385] But incapacitation may be a *factually* sufficient justification for execution. For if it may be a "legitimate consideration," then as Justice Stevens wrote in a similar context, "we must assume that in some cases it will be decisive in the . . . choice between a life sentence and a death sentence."[386] For example, if state law allows a sentencer to weigh the need for incapacitation in deciding the fate of a defendant who is already death-eligible by virtue of another aggravating circumstance, the sentencer may impose death because of this perceived need even though, guided by retributive factors alone, it would have sentenced to life imprisonment.

Indeed, a state may go even further and make preventive execution mandatory. In Texas, once a defendant is convicted of one of five categories of aggravated murder, the sentencing jury must answer three questions. The first and third of the questions ask whether the defendant acted deliberately and "with the reasonable expectation that the death of the deceased . . . would result," and whether the defendant's conduct was "unreasonable in response to . . . provocation . . . by the deceased."[387] These questions, which seek historical information pertaining to the crime itself, could easily have been incorporated into the culpability trial as elements of the offense and may well have been answered there anyway.[388] Wherever they are addressed, their effect is to narrow the group of death-eligible murderers. It still remains to be decided whether persons within that group live or die. To settle that issue the Texas jury answers the middle question — "whether there is a

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Estelle, 103 S. Ct 3383 (1983).

[383] 104 S. Ct. 3154, 3163 (1984).

[384] *See also* the discussion of incapacitation as a sentencing consideration, *infra* text accompanying notes 393-407.

[385] *See* the discussion of the post-*Furman* requirement of at least one aggravating circumstance beyond the fact of the homicide, *supra* part I(A).

[386] Gardner v. Florida, 430 U.S. 349, 359 (1977) (plurality opinion) (commenting on use of negative sentencing information).

[387] Adams v. Texas, 448 U.S. 38, 40-41 (1980).

[388] *See supra* note 155 and accompanying text.

probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[389] If the jury says yes, death follows. If the jury says no, it does not.[390] Two defendants guilty of the same crime must receive different sentences if the jury for the first predicts future violence while the jury for the second disagrees.[391] And since a Texas jury may not give "independent mitigating weight"[392] to evidence that calls for mercy, a finding of probable future violence is not only a factually sufficient justification to execute the first defendant, but a legally necessary one as well.

B. Jurek's *Four Errors*

The constitutionality of incapacitation as a sentencing consideration in capital cases rests almost entirely on this paragraph from *Jurek v. Texas*:

> Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.[393]

Condensed, this passage says that predictions of future violence, though "difficult," command a degree of confidence adequate to permit

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[389] *Adams v. Texas*, 448 U.S. at 41.

[390] *Id.*

[391] Charles Sanne admitted shooting Patrick Randel, a narcotics agent, six times while Doyle Skillern was in a car nearby. Skillern was convicted as an accomplice and executed after a jury found him a continuing threat to society. The same jury sentenced Sanne to life. N.Y. Times, Jan. 17, 1985, at A13, col. 1.

[392] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)). *See supra* text accompanying notes 144-50.

[393] 428 U.S. 262, 274-76 (1976).

their use in making other criminal justice choices, so they may also be employed in capital sentencing. This explanation, coming early in the development of modern capital punishment law, is flawed for four reasons.

First, it fails to appreciate that predictions of future dangerousness elsewhere in criminal justice administration or in civil commitment proceedings[394] are virtually always tentative and subject to revision. It says something about our trust in these predictions that in even routine matters we provide so many opportunities to correct them. A defendant's own future conduct may encourage judicial, parole or prison authorities to amend earlier expectations of his behavior. Death cases, by contrast, can provide no similar chance for self-correction nor opportunity for the accused to prove a prediction wrong. This is true not only because execution moots the issue, but also because no state procedure contemplates (or is ever likely to contemplate) successive sentencing hearings to reconsider whether the first hearing's prediction of future violence should be revised.[395] The paradox of *Jurek* is that without recognition or discussion it allowed forecasts of dangerousness greater weight in capital sentencing than our legal institutions afford them anywhere else.

The *Jurek* analysis also fails to compare the consequences of a bail or parole decision that mispredicts the defendant's future conduct with a death sentence that does so, and therefore does not discuss whether the degree of confidence tolerable for the former is constitutionally sufficient for the latter. Yet if the Court's capital cases say anything consistently it is that capital and other criminal justice decisions are not fungible.[396] What works for the second may be unacceptable for the first because tolerance for error is lowest when it leads to executions.[397] An incorrect bail prediction, for example, even if beyond revision, results only in pretrial detention, unfortunate in the event of acquittal but generally credited against the sentence if the accused is convicted.[398] Similar points can be made for parole and sentencing decisions.

A third deficiency in *Jurek*'s analysis is its failure to address the effect of less harsh alternatives on the propriety of incapacitation. If a

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[394] Barefoot v. Estelle, 103 S. Ct. 3383, 3395-99 (1983) (civil commitment cited as an area in which expert predictions of future dangerousness are allowed).

[395] Commutation is analytically irrelevant for the reasons set out *supra* note 367.

[396] *See* California v. Ramos, 103 S. Ct. 3446, 3451 n.9 (1983).

[397] *Id.*

[398] CAL. PENAL CODE § 2900.5 (West 1982) (credit for time in custody prior to commencement of sentence).

sentencer is disposed to choose execution to incapacitate, may it do so even if highly restrictive confinement will achieve the same goal? Must the state offer the sentencer the alternative of highly restrictive confinement in any event? This is yet another way in which the capital sentencing choice differs from other choices that rely on a prediction of probable future dangerousness. If in making a bail or sentencing decision a judge finds that an accused would pose a danger to society if free, confinement is the only alternative. If prison officials find that a prisoner is likely to be violent if left within the general prison population, segregation is the only alternative. If parole authorities conclude that an inmate will behave criminally if released, continued confinement is the only alternative. In none of these cases do we allow the prediction to justify a qualitatively harsher response than is reasonably required by the need to incapacitate. We would not, for example, permit a sentencing authority to order a defendant placed in solitary confinement simply because it deems him too great a probation risk. Standing alone, that conclusion justifies no more than incarceration within the general prison population. A more extreme reaction "makes no measurable contribution to acceptable goals of punishment and hence [would be] nothing more than the purposeless and needless imposition of pain and suffering."[399]

Similarly, in those cases in which the death penalty would not be imposed but for a need to incapacitate (that is, when the sentencer deems retribution an insufficient reason to execute), solitary confinement would seem a satisfactory alternative. Surely, our faith in predictive accuracy is not strong enough to rest a death sentence on the anticipated inadequacy of solitary confinement for particular defendants or on conjecture about their powers of escape, at least not without some proof. Yet if social or medical scientists believe that this projection can be made with confidence, they have so far chosen to remain silent. Does the availability of the less harsh, apparently adequate response of solitary confinement exclude incapacitation as a justification for execution? While *Jurek* did not say, other capital and noncapital decisions suggest that the answer is yes.[400] Assuming, however, that the answer is no,

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[399] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); *see also id.* at 601 (Powell, J., concurring "in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman"); Enmund v. Florida, 458 U.S. 782, 798 (1982).

[400] In the capital area, *Enmund* held that execution was an unconstitutional punishment for a felon who neither intends nor causes the death of the victim because it would not "measurably contribute[] to" the goals of retribution or deterrence, the " 'two principal social purposes' " served by the death penalty. 458 U.S. 782, 798

Jurek also failed to discuss whether a death penalty statute must offer the sentencer the less extreme option of greatly restrictive confinement before the sentencer may conclude that incapacitation demands nothing less than execution. Surely a state could not, after *Beck v. Alabama*,[401] tilt the sentencing choice toward execution by offering the jury a choice between death and a ten year prison term. As the severity of the non-capital option increases, the likelihood that the jury will choose death because the alternative is insufficiently incapacitative (or retributive for that matter) decreases; but there may be cases, as *California v. Ramos* recognized and opinion polls have confirmed, when the jury will choose death over any other penalty short of a guaranteed life sentence.[402] If the state does not make that option available, an ensuing death sentence will be the unreliable product of the state's artificial (if benign) alternatives and not a consequence of the jury's conclusion that execution is the only way to incapacitate the accused or the only proper retributive response.[403]

Finally, *Jurek* did not address what is perhaps the most troubling consequence of permitting incapacitation to be one, and therefore some-

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(1982) (quoting *Gregg v. Georgia*, 428 U.S. at 183 (plurality opinion)). If, similarly, execution does not "measurably contribute[] to" the goal of incapacitation because other restraints suffice, a like conclusion should follow. Outside the capital area, Bearden v. Georgia, 461 U.S. 660, 668-69 (1983) (footnote omitted), held that if an indigent "probationer has made all reasonable efforts to pay [a] fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." These cases should be distinguished from the Court's deference to a state's determination of the proper *length* of imprisonment. *See* Rummel v. Estelle, 445 U.S. 263 (1980). In *Enmund* and *Bearden*, the challenge was to a state's effort to change the *quality* of the punishment in response to asserted state goals which could have been (*Enmund*) or might have been (*Bearden*) achieved less harshly.

[401] 447 U.S. 625, 643 (1980) (refusal to give lesser-included offense charge in capital case "introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case"). *But cf.* California v. Ramos, 103 S. Ct. 3446, 3456 (1983) (distinguishing *Beck* by reference to "the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase"). *Ramos* is discussed *infra* text accompanying notes 414-19.

[402] *Ramos*, 103 S. Ct. at 3448 (informing the jury of the governor's commutation power in the event of a life sentence "invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society"). In a recent Gallup poll, support for capital punishment dropped from 72% to 56% when respondents were offered the alternative of life imprisonment without parole. N.Y. Times, Feb. 3, 1985, at 15, col. 1.

[403] The structure of the sentencing choice as an influence on sentencing accuracy is discussed *infra* part III.

times the only, justification for the death penalty. An accused may be preventively executed because a sentencer *predicts* he will commit conduct for which he could not be executed if he were actually to commit it. The facts of *Coker v. Georgia*[404] exemplify this point. Coker was serving sentences for murder, rape, kidnapping, and aggravated assault when he escaped and committed armed robbery, kidnapping, and rape.[405] He was captured, tried, and convicted of the additional offenses and sentenced to death for the rape. The Court vacated the death sentence after it "concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[406] Though he had already committed one murder for which he had received a sentence of life, Coker could not constitutionally be executed for his subsequent nonhomicidal crimes of violence. Now imagine a person convicted of murder in a jurisdiction that permits (or like Texas requires) the death penalty if the sentencer concludes that a death-eligible defendant is prone to future violence. The violence need not be homicidal; the prediction may be of robberies or assaults.[407] *Jurek* would allow the sentencer to condemn the hypothetical defendant because of what it foresees he will probably do, while Coker would prohibit execution if the same defendant were spared and subsequently committed that or an even worse crime.

C. Jurek's *Influence:* Ramos *and* Barefoot

Despite *Jurek*'s terse and faulty defense of incapacitation, its holding was accepted in *Estelle v. Smith*[408] and *Barefoot v. Estelle*,[409] both from Texas, and in *California v. Ramos*.[410] In *Smith* a psychiatrist whom the court had appointed to examine a defendant for competency to stand trial subsequently testified at the sentencing trial that the defendant had a propensity for future violence. The Court ruled that the testimony violated the defendant's privilege against self-incrimination and

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[404] 433 U.S. 584 (1977).

[405] *Id.* at 587 (plurality opinion).

[406] *Id.* at 592 (plurality opinion); *see also id.* at 601 (Powell, J., concurring "in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman").

[407] The Texas statute speaks of "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Adams*, 448 U.S. at 41.

[408] 451 U.S. 454 (1981).

[409] 103 S. Ct. 3383 (1983).

[410] 103 S. Ct. 3446 (1983).

right to counsel.[411] In the course of its opinion, the Court also read *Jurek* to say that "the inquiry mandated by Texas law [into probable future violence] does not require resort to medical experts."[412] The jury could make that prediction on its own experience. Conversely, in *Barefoot* the Court ruled that in proving probable future violence, a state was free to rely on a nonexamining psychiatrist's answers to hypothetical questions.[413] Finally, in *Ramos*, the Court upheld a California law that required trial judges to instruct capital sentencing juries on the governor's power to commute a death sentence.[414] *Smith*, *Barefoot*, and *Ramos* each quoted most of the *Jurek* passage set out above,[415] making little or no independent effort to support its conclusion. By taking *Jurek* as a given, these cases perpetuate its deficiencies; *Ramos* and *Barefoot* compound them.

In approving the California jury instruction, the *Ramos* Court treated it as merely emblematic of the issue of future dangerousness and made no effort to defend its literal language. Justice O'Connor wrote:

> By bringing to the jury's attention the possibility that the defendant may be returned to society, the [instruction] invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Like the challenged factor in Texas' statutory scheme, . . . the [instruction] focuses the jury on the defendant's probable future dangerousness. The approval in *Jurek* of explicit consideration of this factor in the capital sentencing decision defeats respondent's contention that, because of the speculativeness involved, the State of California may not constitutionally permit consideration of commutation.[416]

Add this transmutation to *Jurek* and there was little left to write except a response to Justice Blackmun's charge that the Court's substitution was an "intellectual sleight of hand."[417]

> The analogy between the matters raised in the jurors' minds by the [instruction] and the Texas statutory factor of the defendant's future dangerousness is no "intellectual sleight of hand." . . . To avoid this analogy is to ignore the process of thought that the [instruction] inevitably engenders in the jury's deliberations. To be sure, the [instruction] by its terms

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[411] 451 U.S. at 469, 473.

[412] *Id.* at 473.

[413] 103 S. Ct. at 3388-89.

[414] 103 S. Ct. at 3459.

[415] *Ramos*, 103 S. Ct. at 3453-54; *Barefoot*, 103 S. Ct. at 3396; *Smith*, 451 U.S. at 473.

[416] *Ramos*, 103 S. Ct. at 3454.

[417] *Id.* at 3468 (Blackmun, J., dissenting).

> may incline their thoughts to the probability that the current or some future Governor might commute the defendant's sentence. Nevertheless, whatever the jurors' thoughts on this probability alone, the inextricably linked thought is whether it is desirable that this defendant be released into society. In evaluating this question, the jury will consider the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society.[418]

One fault with this explanation is that in its effort not to "avoid" the "analogy," the Court avoided ruling on what the jury actually heard. Justice O'Connor analyzed the instruction as though its meaning were solely referential. A related flaw is the speculativeness of the Court's telepathic prediction of a jury's "inextricably linked thought." The jury, after hearing the challenged instruction, might just as likely choose death because it deems the prospect of a commuted sentence insufficiently retributive. *Ramos* did not assess this possibility. Part III, which analyzes the relationship between capital sentencing accuracy and the structure of the sentencing choice, maintains that a retributive or incapacitative death sentence is untrustworthy if imposed in anticipation of downward revisionary authority.[419]

The Court in *Barefoot v. Estelle* also began with unquestioning acceptance of *Jurek* and proceeded to treat the issues before it as routine evidentiary ones. The capital nature of the case brought no special scrutiny. In permitting the state to prove probable future violence through the hypothetical answers of nonexamining psychiatrists, the Court wrote: "[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party."[420] In response to a challenge to the hypothetical nature of the expert testimony, the Court cited a century old civil case approving hypothetical answers from experts.[421] Faced with uncontested amicus assertions from the American Psychiatric Association that " '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession' and that *two out of three* [psychiatric] predictions of long-term future violence . . . are wrong,"[422] the Court wrote:

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[418] *Id.* at 3454 n.17.

[419] *See infra* text accompanying notes 448-60.

[420] *Barefoot*, 103 S. Ct. at 3397.

[421] *Id.* at 3399.

[422] *Id.* at 3408 (Blackmun, J., dissenting) (quoting from the APA brief) (emphasis in original).

> If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling members of the Association who are of that view and who confidently assert that opinion in their amicus brief. Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time . . . . We are unconvinced . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.[423]

And:

> All . . . professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument, as well as that of Justice Blackmun's dissent, is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.[424]

We might expect to find this kind of language in the appeal of an automobile accident case. Not a line in *Barefoot* analyzed whether the ordinary rules of evidence and the standard assumptions of the adversary process might operate differently at capital sentencing hearings than they do in civil or noncapital cases, at least in regard to evidence that is "wrong . . . most of the time." One would have assumed that they do, given that the reliability interest in capital cases had earlier been held to require different treatment of such diverse issues as mandatory sentencing,[425] the rule against hearsay,[426] the right to confront negative sentencing information,[427] the operation of the double jeopardy clause,[428] the right to introduce and have the sentencer weigh all relevant mitigating facts,[429] and the requirement of a lesser included offense charge.[430] The reliability of a death sentence pronounced after exposure to evidence that is mostly wrong would seem at least as suspect as the death sentences rejected in those earlier cases. Yet the Court dismissed the capital dimension of *Barefoot* with a single sentence: "Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony."[431]

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[423] *Id.* at 3398.
[424] *Id.* at 3398 n.7.
[425] Woodson v. North Carolina, 428 U.S. 280 (1976).
[426] Green v. Georgia, 442 U.S. 95 (1979).
[427] Gardner v. Florida, 430 U.S. 349 (1977).
[428] Arizona v. Rumsey, 104 S. Ct. 2305 (1984).
[429] Eddings v. Oklahoma, 455 U.S. 104 (1982).
[430] Beck v. Alabama, 447 U.S. 625 (1980).
[431] *Barefoot*, 103 S. Ct. at 3400.

Despite *Jurek*, *Ramos*, and *Barefoot*, the Court appears ambivalent about allowing people to be sent to their deaths based on predictions of future violence. This ambivalence first surfaced when the *Gregg* plurality described incapacitation as "another purpose that has been discussed,"[432] not exactly a ringing endorsement; then on the same July day, without mentioning this characterization, the same plurality upheld the Texas capital statute with its decisive inquiry into probable future violence.[433] Eight years later *Spaziano* went so far as to accord incapacitation the status of a "legitimate consideration," but added the disclaimer that it "has never been embraced as a sufficient justification for the death penalty."[434] The Court cannot have it both ways. Just as the occasional assertion that jury discretion may be "unbridled" conflicts with the view that a jury may be given "free rein,"[435] *Spaziano*'s disclaimer — referring to the constitutional insufficiency of incapacitation as an aggravating circumstance at the definition stage[436] — conflicts with *Jurek*, with *Barefoot*'s faith in the predictive accuracy of the adversary process, and with its own recognition of incapacitation as "a legitimate consideration" at the selection stage. For if, as *Barefoot* concluded, predictions of violence are reliable enough in capital sentencing to be the basis for determining which aggravated murderers will be executed, they should be no less reliable if used in the first instance to define the death-eligible pool. There too the sentencer will be able to separate "the wheat from the chaff."[437] The pre-*Furman* pattern of arbitrariness will not then reemerge because there will be a principled way to distinguish the defendants subject to execution from those who are not. It will have been established that the former will commit further violence, while the latter will not. If *Barefoot* is right, *Spaziano*'s subsequent disclaimer is suspect. Conversely, if a prediction of future violence is not sufficiently trustworthy to satisfy *Furman* and define the death-eligible pool, as *Spaziano* held, how can it be "a legitimate consideration" (and so a factually sufficient, even a necessary, consideration) in identifying who among the members of that pool (otherwise defined) will be executed, as *Spaziano* would also allow? If *Spaziano* is right about the constitutional insufficiency of incapacitation as an

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[432] 428 U.S. at 183 n.28. The *Spaziano* Court cited this footnote in support of its conclusion that incapacitation "is a legitimate consideration in a capital-sentencing proceeding." 104 S. Ct. at 3163.

[433] 428 U.S. at 274-76.

[434] 104 S. Ct. at 3163.

[435] *See supra* text accompanying notes 348-49.

[436] *See supra* text accompanying notes 383-86.

[437] *Barefoot*, 103 S. Ct. at 3398 n.7.

aggravating circumstance at the definition stage, *Barefoot*, *Ramos*, and *Jurek* are all suspect.

Since it is hard enough for the adversary process accurately to determine historical facts, we should not wonder at the Court's reluctance to endorse efforts to predict the future, especially in death penalty cases. But because it is also unprepared to reject these efforts, the result is legal uncertainty and doctrinal inconsistency. Both will likely continue until the Court either reconsiders *Jurek* and recognizes that its holding undermines the professed goal of greater reliability in capital sentencing[438] or announces that it has chosen to abandon that goal.

If incapacitation is eliminated as a valid capital sentencing consideration, there remains only the disposition toward mercy measured against the wish for retribution. The motives of retribution and mercy cogently explain the holdings in several other capital cases with challenges based on the fact that the sentencer was given, or allowed to consider, certain information or on the fact that it was not. *Zant v. Stephens*[439] and *Barclay v. Florida*[440] found nothing in the Constitution that would forbid the sentencer to consider "a substantial history of serious assaultive criminal convictions"[441] or even a "criminal record"[442] of any kind. Past misconduct, in other words, is relevant to a decision about retribution. Conversely, *Lockett v. Ohio*[443] and *Eddings v. Oklahoma*[444] denied power to withhold, or to refuse to consider, information that may rationally invite mercy. And *Roberts* II,[445] which invalidated a law mandating execution for the murder of a police officer in the line of duty, is the last in a line of cases[446] telling us, among other things, that legislatures cannot reliably convey the community's position on the issue of mercy or retribution. Finally, *Gardner v. Florida*[447] held that before a historical fact could be relied upon to deny mercy, the defendant had to have a chance to contest its accuracy.

These cases do not exhaust the consequences of viewing the sen-

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[438] *See id.* at 3400 (1983) (Court concluded that "[a]t bottom, to agree with petitioner's basic position would seriously undermine and in effect overrule Jurek v. Texas . . . . We are not inclined, however, to overturn the decision in that case.").

[439] 462 U.S. 862 (1983).

[440] 103 S. Ct. 3418 (1983) (plurality opinion).

[441] *Zant v. Stephens*, 462 U.S. at 885.

[442] *Barclay v. Florida*, 103 S. Ct. at 3427.

[443] Lockett v. Ohio, 438 U.S. 586 (1978).

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

[445] 431 U.S. 633 (1977).

[446] *See supra* text accompanying notes 109-19.

[447] 430 U.S. 349 (1977).

tencer's task as choosing between mercy and retribution. Relevance at the sentencing hearing is broadly defined because the question before the jury — what kind of person is the accused? — subsumes nearly everything the defendant has or has not done. The state may authorize the prosecutor to offer evidence on any aspect of the defendant's life or crime that may rationally encourage a conclusion that this person deserves no favor. The defendant in turn may seek to explain his life and crime and emphasize deeds and qualities that reasonably call for the leniency of a life sentence. Each side may argue to the jury that the evidence heard on punishment or on guilt does or does not establish that mercy is called for or that retribution is appropriate. The jury does not guess at what the defendant may do in the future, while incarcerated, but by its sentence takes the moral measure of what the defendant has already done in the past.

III. Undivided Sentencer Responsibility: The Structure of the Sentencing Choice

The final element of my theory posits the need for a responsible sentencer. Responsibility requires, first, that the sentencer disregard whether others have downward revisionary authority over its decision, either for death or life. Second, responsibility requires that at least one sentencing option be sufficiently severe so that the sentencer is not impelled to choose execution simply to avoid what it perceives to be an insufficiently retributive or incapacitative alternative.

Information on downward revisionary authority, whether through instruction or argument and whether or not accurate, fosters an unreliable death sentence by inviting the jury to escape full moral responsibility for its choice. The jury's task is to bring considerations of mercy and retribution to the selection between two authorized punishments. Its sentence is meant to reveal the community's view on the reprehensibleness of the defendant and his crime. Procedures that divert its attention from this moral duty undercut the accuracy of its choice. To be sure, a sentencing system may employ corrective procedures. Judges may reduce a death sentence for discretionary or legal reasons. Governors and administrative boards may reduce either a life or death sentence for many reasons. But the existence of these powers should not be permitted to distract the jury from making its threshhold moral judgment.

There are two principal dangers, depending on whether the revisionary authority is from a death sentence or a life sentence. When a jury is told that a governor, the trial judge, an appeals court, a pardon board, or several of these are empowered to reduce a capital sentence, it is

encouraged in the view that any death penalty it imposes is essentially preliminary. This perception will promote sentencing motives that have no bearing on the moral question of desert. For example, the jury may sentence to death to scare the defendant or to "send a message," leaving it to subsequent authority to revise an "erroneous" choice. Or the knowledge of later review may simply make the jury less scrupulous in its resolution of the moral question, either because of the opportunity for correction or because its decision is not seen to matter. Finally, in deliberation the prospect of downward revisionary power over a death sentence will enable pro-death jurors to urge a capital sentence by arguing that it can be reduced if "wrong," whereas misguided leniency may be (or may be thought to be) final. Though a death sentence imposed in anticipation of downward review is unreliable for these reasons, it is not without force. Subsequent authority often cannot ignore it; legal or political considerations may require deference.[448] Thus, while the jury may be counting on the fail-safe mechanism of a final review, especially if its availability was announced by the court or counsel, the reviewer in turn will pay heed to the jury's determination that the defendant deserves to die. Here is Alphonse and Gaston without comedy. In capital sentencing, divided responsibility is avoidance of responsibility.

A parallel risk arises if the jury is informed of downward revisionary power in the event of a life sentence. Possessed of this information, it may choose death to negate the possibility of eventual release, which it could view as dangerous to the community or simply too lenient. To take an extreme but illuminating example of how downward revisionary authority over a life term might encourage a death sentence, consider a capital statute that gives the jury two choices: death, or a life

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[448] See the California law, *supra* note 360; Caldwell v. Mississippi, 105 S. Ct. 2633, 2641 (1985) ("most appellate courts review sentencing determinations with a presumption of correctness"). *Cf.* Baldwin v. Alabama, 105 S. Ct. 2727, 2733 (1985) (while argument that jury's "mandatory 'sentence' " of death on conviction of aggravated murder makes judge's subsequent discretionary death sentence invalid "might have merit if the judge actually were required to consider the jury's 'sentence' . . . and . . . accord some deference to it," analysis reveals that "jury's verdict is not considered in that fashion"); *id.* at 2741 (Stevens, J., dissenting) ("it is unrealistic to maintain that such a sentence from the jury does not enter the mind of the sentencing judge"); *see also id.* at 2741 nn.5-7. Compare the converse situation: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Supreme Court has several times cited this standard with approval. Spaziano v. Florida, 104 S. Ct. 3154, 3165-66 (1984); Dobbert v. Florida, 432 U.S. 282, 295 (1977).

sentence with parole eligibility after five years. To the extent the legislative scheme makes the potential alternative to execution too threatening or too generous, it invites the harsher penalty, but for irrelevant reasons. Whether in fact a later authority will reduce a life sentence has no bearing on whether the defendant deserves to die for his crime. The state has presumably delegated the commutation or parole power for a valid purpose and the recipient of the power will presumably invoke it if intervening events or new information make it appropriate to do so. If the jury is permitted to anticipate that the power will in fact be invoked, and to choose a sentence based on this anticipation, it is in the impossible position of reviewing the wisdom of an authorized decision that has yet to be made based on a record that has yet to be compiled. Call that reliability and Alice in Wonderland is science. A person deserves death or mercy for what he has done or failed to do, and not because the law separately gives one or more officials power to commute or reduce designated sanctions. Nevertheless, as before, a death sentence imposed for this tainted purpose will necessarily enjoy respect from authorities assigned to review it.

A death sentence imposed to avoid downward revisionary authority is a manifestation of a larger problem. Pressure to condemn will vary directly with the leniency of the alternative sentence, a decision over which the state has complete control. A state might exercise that control for suspect purposes. For example, it might give sentencing juries a choice between execution and a relatively brief prison term, thereby encouraging the death penalty by limiting the jury to a contrived and artificial choice not unlike the one condemned in *Beck v. Alabama.*[449] The problem, however, does not depend on the legislative purpose. The commutation power, at issue in *California v. Ramos*,[450] and the power of parole are routinely attached to life sentences with proper — indeed with enlightened — legislative motives. Still, if a jury chooses a death sentence because it is offered no other way to avoid the possibility of parole or commutation, or because it deems the length of the alternative prison term inadequate, its decision will be no less a response to the state's artificial (if not contrived) categories. The defendant will have suffered by virtue of the state's benign wish to offer an avenue of hope to life prisoners.[451] Possibly, that disquieting irony can be avoided only

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[449] 447 U.S. 625 (1980). *But cf. supra* note 401 (purporting to limit *Beck* to "guilt/innocence determination").

[450] 103 S. Ct. 3446 (1983).

[451] *See supra* note 402 (support for capital punishment decreased from 72% to 56% of those polled when respondents were offered the alternative of a life sentence without

by giving the jury the less harsh option of a life sentence without chance of release, perhaps as one of several alternatives to execution. At the very least, court and counsel should not be permitted to focus the jury's attention on avenues of sentence modification.

California v. Ramos[452] indirectly addressed these arguments. The defendant there challenged an instruction that informed the jury of the governor's commutation power in the event of a life sentence. The Court chose to ignore the literal instruction and instead treated its language as merely emblematic of the question of future dangerousness.[453] It then upheld the instruction, citing *Jurek v. Texas*[454] and distinguishing *Beck v. Alabama*[455] and *Lockett v. Ohio*.[456] This Article argued that *Jurek* was wrong to approve incapacitation as a capital sentencing consideration.[457] If *Jurek* were overruled, *Ramos* would fall because its reasoning entirely depended on the validity of incapacitation.[458] The fact that the *Ramos* instruction was "accurate," as the Court several times took pains to stress,[459] is without moment if its content serves no legitimate purpose while promoting illegitimate ones. Even with *Jurek* standing, *Ramos* is a weak opinion, whose reasoning the California Supreme Court rejected on remand.[460] *Ramos* failed to defend the actual message of the instruction against the charge that it fostered unreliable capital sentences; failed to anticipate that a jury, to block the authority revealed in the instruction, might impose a death sentence for retributive, not incapacitative, motives; and failed to examine whether a state could increase the risk of execution by refusing (for whatever reason) to provide the sentencer with an acceptably harsh noncapital alternative.

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parole).

[452] 103 S. Ct. 3446 (1983).

[453] *See supra* notes 416-19 and accompanying text.

[454] 428 U.S. 262 (1976).

[455] 447 U.S. 625 (1980); *see supra* note 401.

[456] 438 U.S. 586 (1978).

[457] *See supra* text accompanying notes 393-407.

[458] *See supra* notes 416-19 and accompanying text.

[459] *Ramos*, 103 S. Ct. at 3454 (instruction "gives the jury accurate information"); *id.* at 3455 n.19 ("respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices"); *id.* at 3457 ("we emphasize that [the instruction] was merely an accurate statement of a potential sentencing alternative").

[460] People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) (relying on state constitution).

CONCLUSION: ONE RIGHT THEORY

The majority in *Spaziano v. Florida* declared itself "unwilling to say that there is any one right way for a state to set up its capital-sentencing scheme."[461] That statement should bring no dissent. There must, however, be one right theory against which to test the various methods the states employ. That theory, which can come only from the Court, has so far eluded it. This is partly understandable, given the nature of the subject, the variety of state responses to *Furman*, and the many capital cases with no majority opinion. But a consequence of conceptual confusion is inconsistent treatment, undesirable anywhere in criminal law administration, but least tolerable in death sentencing.

This Article has offered a theory for the selection stage of capital sentencing that has three interdependent parts. A death sentence is valid if a competent sentencer acting responsibly makes the moral judgment that the defendant deserves execution. The quality of mercy is the common denominator.[462] To increase the likelihood that a sentence will accurately convey community standards of retribution and mercy on the facts of each case, a capital accused has the right to be sentenced by a jury (one that is not death-qualified), the jury must decide sanction without reference to the possibility of future revision, the jury must be offered an acceptably severe noncapital alternative, and the selection between life and death must be based solely on the historical facts of the defendant's crime and life. A theory of capital sentencing built around the due implementation of the community's standards of retribution and mercy will not yield precision in selection from the death eligible pool, but it will encourage punishments calculated to convey "the evolving standards of decency that mark the progress of a maturing society."[463] As long as we have execution, that degree of reliability is the least, and probably the most, we can expect.

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[461] 104 S. Ct. 3154, 3165 (1984).

[462] In Caldwell v. Mississippi, 105 S. Ct. 2633, 2639-40 (1985), the Supreme Court explicitly acknowledged the primacy of consideration of the quality of mercy in capital sentencing decisions. *See supra* note 136.

[463] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).