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RETHINKING THE PENALTY PHASE

Kyron Huigens*

I. INTRODUCTION

The Supreme Court tells us that the issue in the penalty phase of a capital trial is the defendant's culpability, responsibility, blameworthiness, or desert. These words are used more or less interchangeably, and therein lies an explanation for the confusion that besets death penalty law. These words do not all mean the same thing, and each of them often is used to mean more than one thing. In its decades-long effort to ensure just punishment for those who are accused of capital crimes, the Court rarely has invoked or examined the theory of punishment. Instead, it has made do, and made a mess, with misplaced notions of equal protection and due process. As a result, the basic

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1. "Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime rather than mere sympathy or emotion." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)).

2. In Eddings, the judge refused to consider the defendant's youth and history of "beatings by a harsh father, and of severe emotional disturbance." We emphasized that this evidence tended to diminish the defendant's responsibility for his acts, noting that youths "are less mature and responsible than adults, and they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." Skipper v. South Carolina, 476 U.S. 1, 12 (1986) (quoting Eddings, 455 U.S. at 115-16).

3. "Nor did the second special issue provide a vehicle for the jury to give mitigating effect to petitioner's evidence of mental retardation and childhood abuse . . . . Although such evidence may lessen his blameworthiness, it made an affirmative answer to the second issue more likely." Penry v. Lynaugh, 492 U.S. 302, 304 (1989).

4. "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." Zant v. Stephens, 462 U.S. 862, 900 (1983) (citing Lockett, 438 U.S. at 602-05).

5. "If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant." Mills v. Maryland, 486 U.S. 367, 397 (1988).
terms of the Court's death penalty jurisprudence are worse than useless in its efforts to create a coherent, humane, and effective body of law under the Eighth Amendment.

This Article offers a single, central point of clarification. The word "culpability" has been invoked in connection with the penalty phase of capital trials, but "culpability" is ambiguous between the concepts of eligibility for punishment and fault in wrongdoing. With this distinction in hand, the values which the Court has pursued with the concepts of aggravation and mitigation can be more precisely addressed. Because aggravation and mitigation only imperfectly correspond to fault and eligibility, the basic terms of constitutional analysis in the matter of the death penalty must change. The fundamental, imperative nature of these changes cannot be overstated. For example, the existence of mitigating factors consistently has been mis-assigned to the defendant for proof by a preponderance. Because most of these mitigators indicate non-fault, and because none of them are quasi-excuses, the theory of punishment tells us that the government ought to be required to disprove the existence of mitigating factors beyond a reasonable doubt.

This Article takes the Supreme Court to task over its failure to draw on the conceptual resources of criminal law theory. This will seem an unfair criticism to anyone who is familiar with the radical lack of consensus in this body of literature. The point is well taken. This Article, while it advocates greater attention to the theory of punishment, has at least the virtue of championing only one of the competing schools of thought. This Article's ulterior purpose, indeed, is to demonstrate the superiority of one particular theory of punishment by a demonstration of its capacity to clarify the Court's death penalty law.

The two principal theories of punishment are commonly known as the deterrence and retributive theories. Both of these names are misnomers. Deterrence and retribution are merely functions of punishment, as are incapacitation, education in social norms, public catharsis over wrongdoing, and so on. Whether any of these functions serves to justify punishment—which is the principal, but not the only, question in the theory of punishment—depends on whether a broader moral or ethical theory gives it a justifying effect. Therefore, theories of punishment are properly distinguished and named according to their underlying ethical theories. Consequentialism stresses the justifying effects of deterrence (but not only deterrence), and deontological morality stresses the unique justification provided by retribution.
The theory of punishment on which this Article's analysis of constitutional death penalty jurisprudence is based is neither a consequentialist nor a deontological theory of punishment. It draws instead on the third major tradition in philosophical ethics: virtue ethics. Originally framed by Aristotle, virtue ethics was more or less dormant for centuries, but received a vigorous revival in the last half of the twentieth century. Several writers have suggested a distinctive virtue ethics theory of punishment. This Article's focus on the distinction between fault and eligibility reflects the importance of this distinction in such a theory of punishment. The prevailing consequentialist and deontological theories of punishment obscure the distinction between fault and eligibility. To demonstrate the value of this distinction in the death penalty context is to demonstrate the explanatory power of a virtue ethics theory of punishment.

Part II of this Article is an unorthodox critical history of the Supreme Court's death penalty cases. I argue that an unfounded and destructive underestimation of the Court's institutional competence has led it to neglect the theory of punishment in its regulation of death sentencing. The Court's

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8. The consequentialist theory of punishment employs the concept of fault as a side constraint on punishment in order to avoid the implication that consequentialism justifies the punishment of scapegoats for the sake of optimizing social welfare. Given that eligibility operates only as a side constraint on punishment, the consequentialist can get by perfectly well with a unitary concept of culpability that comprehends both fault and eligibility. Huigens, Deterrence, supra note 7, at 959-51, 970-73. Deontologists collapse fault and eligibility into culpability in a different way. Following Kant, deontologists take the will to be the seat of moral agency. See Alan Brudner, Agency and Welfare in the Penal Law, in ACTION AND VALUE IN CRIMINAL LAW 21, 29-30 (Stephen Shute et al. eds., 1993). They treat intentional-states and other indicators of fault as modes of voluntariness and excuse as the absence of voluntariness. This “two sides of the voluntariness coin” approach conflates fault and eligibility, and leads deontologists, as well, to work with a unitary concept called “culpability.” See infra notes 155-60 and accompanying text.
inattention to the theory of punishment has caused it to overlook a double layer of ambiguity in its Eighth Amendment jurisprudence: capital sentencing statutes employ the ambiguous concept of mitigation, which the Court then analyzes in terms of the ambiguous concept of culpability.

Part III explicates culpability, distinguishing between fault in wrongdoing and eligibility for punishment according to capability. The Court’s working theory of punishment is a vague amalgam of consequentialist and deontological ideas, and in order to draw the distinction between fault and eligibility clearly, it is necessary to take a different view. Under a virtue ethics theory of punishment, fault is an aspect of wrongdoing that necessarily is determined in adjudication, and eligibility is a question of the expressive rationality of punishing an individual offender, in light of his capacity to govern his conduct at the level of motivation.

Part IV evaluates the principal death penalty cases in light of this distinction. I resolve the central conflict in the case law, between the Furman-Gregg line of cases and the Woodson-Lockett line of cases, and describe the structure of a constitutionally valid penalty phase. In the course of this analysis, I reconsider five specific issues which the Court has addressed with mixed success: the necessity of “weighing;” the nature of mandatory death sentencing; the right to a jury at the penalty phase; the burden of persuasion on mitigators; and jury unanimity on mitigation at the penalty phase. The Conclusion briefly assesses the scope of the reform in capital sentencing that my argument implies.

II. A DIAGNOSTIC HISTORY OF THE SUPREME COURT’S DEATH PENALTY JURISPRUDENCE

Punishment by death for rape is a per se violation of the Eighth Amendment and, in all likelihood, the same is true for any other crime except murder. The Supreme Court also recognizes a few circumstances in which the amendment absolutely bans the death penalty for murder. In all other cases, the validity of the death penalty depends on whether the sentencing decision is adequately structured by law. The Eighth


10. See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (holding that the death penalty applied to juveniles under the age of 16 is per se unconstitutional).

11. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (arguing that the aim of the Eighth Amendment is “to forbid arbitrary and discriminatory penalties”).
Amendment is said to require sentencing procedures that guard against the arbitrary and capricious imposition of the death penalty.\textsuperscript{12} However, the Court also has said that death sentencing juries must give individualized consideration to each case,\textsuperscript{13} and must determine each offender's culpability, in light of the particular facts of his crime and personal history.\textsuperscript{14} Commentators and some members of the Court have decried the apparent conflict between the constitutional command of structured death sentencing and the constitutional command of individualized death sentencing.\textsuperscript{15}

In this Part, I argue that the Court's difficulty is not that it has pursued conflicting objectives of structure and individualization. The real problem has three stages, which are addressed in the three Sections of this Part. First, the Court has not been clear about the value that the Eighth Amendment is to serve. The Court originally framed its objective as equality in death sentencing, but quickly began to pursue the distinct value of proportionality in sentencing. Second, the Court's requirement of individualized consideration is actually an attempt to find the proper structure for the jury's determination of proportionality. The apparent conflict between structured sentencing and individual consideration is in fact a failure to find a workable structure for an inquiry into proportionality. Third, the reason for this failure is the fact that proportionality in punishment is a problem of substantive criminal law, for the solution of which the Court needs a robust theory of punishment. The Court has concluded, mistakenly, that the use of such a theory is beyond its institutional competence. As a result, its difficulties in the constitutional regulation of the death penalty continue, and will continue until the Court engages the theory of punishment in a serious way.

The foregoing analysis will serve to set the stage for the main business of this Article, which is an argument that a theory of punishment can resolve the seemingly intractable conflicts in the Court's death penalty cases. The point of this Part, in other words, is to explain why the Court ought to be fully engaged with the theory of punishment in its Eighth Amendment jurisprudence.

\textsuperscript{12} Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").


\textsuperscript{15} See infra note 55 and accompanying text.
A. The Equality Proxy

In Furman v. Georgia, a fractured Court decided that the Eighth Amendment effectively prohibits the grant of absolute discretion over the death penalty to the jury in a criminal case. In spite of the diffuse nature of the decision, one theme emerges from the nine Furman opinions. The Justices sought to eliminate arbitrariness in jury death-sentencing in the interest of equality. Justice Douglas made this value most explicit, asserting that "the idea of equal protection of the laws . . . is implicit in the ban on 'cruel and unusual' punishments." The other Justices largely followed suit. Justice Brennan argued that correcting the unequal application of capital punishment, not its frequent application, was "[t]he more significant function of the Clause." Justice White's comment that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," is cited as a statement of the principle of equality that ought to inform death sentencing. In the course of a comprehensive historical analysis of the death penalty, Justice Marshall frankly condemned the racial discrimination that had occurred as a result of jury discretion in sentencing. Finally, Justice Stewart supplied the most frequently-quoted rationale for the Furman decision:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many

17. In holding that the Eighth Amendment required the jury's decision in a capital case to be structured by rules, the Court repudiated very recent authority that was only nominally distinguishable. One year before the Court decided Furman, it held that the Due Process Clause did not prohibit states from granting the jury in a murder case the absolute discretion to sentence a defendant to death. McGautha v. California, 402 U.S. 183, 207-08 (1971). The Furman opinions themselves are less than frank in explaining that decision's relation to McGautha. Furman, 408 U.S. at 427 n.11 (Powell, J., dissenting) (stating that McGautha presents a "severe problem of stare decisis for those Justices who treat the Eighth Amendment essentially as a process prohibition"); Id. at 400 (Burger, C.J., dissenting) ("[I]t would be disingenuous to suggest that today's ruling has done anything less than overrule McGautha in the guise of an Eighth Amendment adjudication.").
18. This emphasis reflects the scholarly analysis of death sentencing that guided the litigation that led to Furman. See Michael Meltsner, Cruel and Unusual, The Supreme Court and Capital Punishment 170-85 (1973); see also Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1792-94 (1970).
20. Id. at 277 (Brennan, J., concurring).
21. Id. at 313 (White, J., concurring).
22. Id. at 364-66 (Marshall, J., concurring).
just as reprehensible as these, the petitioners are among a
capriciously selected random handful upon whom the sentence of
death has been imposed. My concurring Brothers have
demonstrated that, if any basis can be discerned for the selection of
these few to be sentenced to die, it is the constitutionally
impermissible basis of race. . . . [T]he Eighth and Fourteenth
Amendments cannot tolerate the infliction of a sentence of death
under legal systems that permit this unique penalty to be so
wantonly and freakishly imposed.23

The value of equality as the guiding principle in death sentencing could not
have been more clearly articulated.

Four years after Furman, the Court held in Gregg v. Georgia24 and in two
accompanying cases that the Eighth Amendment requirement of structured
decision-making could be met by the use of a bifurcated trial, in the penalty
phase of which the jury was to consider aggravating and mitigating factors.25
Gregg and its companion cases also reaffirmed the importance of equality as
an Eighth Amendment value.26 The Court emphasized that the states had
guaranteed "evenhandedness" in death sentencing because their statutes
provided for automatic appeals of right to each state's highest court,27 and for
a post-conviction "proportionality" review consisting of a comparison
between the case on appeal and other capital cases in the jurisdiction.28

However, almost immediately after deciding Furman and Gregg, the
Court stopped using the language of equality in its decisions. In a relatively
few years, the Court made it clear that equality was not an Eighth
Amendment value at all.

23. Id. at 309-10 (Stewart, J., concurring).
25. Gregg, 428 U.S. at 189 (Stewart, Powell, and Stevens, JJ.) ("Furman mandates that
where discretion is afforded a sentencing body on a matter so grave as the determination of whether
a human life should be taken or spared, that discretion must be suitably directed and limited so as to
minimize the risk of wholly arbitrary and capricious action."); see also id. at 196-207 (holding that
the Georgia statute meets constitutional standard of Furman).
26. Id. at 188 n.36 ("The decisive grievance of the opinions . . . is that the present system of
discretionary sentencing in capital cases has failed to produce even-handed justice . . . ." (quoting
Furman, 408 U.S. at 398-99 (Burger, C.J., dissenting))).
jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the
evenhanded, rational, and consistent imposition of death sentences under law.").
the death sentence is "conscientiously reviewed by a court which, because of its statewide
jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the
state law").
In the case of *Pulley v. Harris* the Court concluded that the comparative proportionality review that it had commended in *Gregg* and its companion cases was not constitutionally required. The Court argued that, in spite of its clear, even enthusiastic, approval of this exercise in its earlier cases, comparative review was not essential to those holdings. Instead, the saving feature of these statutes for Eighth Amendment purposes was their use of aggravating and mitigating factors to assess the gravity of offenses and the desert of offenders in a trial-like penalty hearing. In other words, *Pulley* held that the relevant comparison for Eighth Amendment purposes was not between death penalty defendants in relation to one another, but instead between each individual defendant and some measure of desert.

A few years after *Pulley*, the Court was asked to state expressly that equality is an Eighth Amendment value, and the Court declined. Warren McCleskey offered Professor David Baldus' detailed statistical analysis of Georgia death sentencing as evidence of racial discrimination in the administration of the penalty, and argued that this discrimination violated both the Equal Protection Clause and the Cruel and Unusual Punishments Clause. The Court rejected both claims. Regarding the Eighth Amendment claim, the Court stated explicitly that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." 

The abandonment of equality as an Eighth Amendment value is troubling in some ways, but on the whole it is perfectly understandable. Equality in death sentencing is not a negligible value, but it is an odd one to pursue under the rubric of cruel and unusual punishment. The difficulty is that equal treatment requires us to avoid not only overinclusion—the execution of those who do not deserve it—but also to avoid underinclusion: the failure to execute those who do deserve it. Indeed, underinclusion is the complaint

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30. Id. at 59.
31. Id. at 44-50.
32. Id. at 50.
implicit in Justice Stewart's "struck by lightning" simile. However, as Professor Scott Howe points out, the notion that not to sentence an offender to death constitutes cruel and unusual punishment is strongly counterintuitive, even if one supposes that another similarly situated offender has been sentenced to death.\(^36\) To take the elimination of underinclusion to be an Eighth Amendment value conjures up the disturbing image of death row inmates' clamoring for others to be put to death, and carries the unsettling implication that these inmates would have been treated more fairly if this were to occur.

The reason for this conceptual dissonance, and for the Court's relatively quick abandonment of equality as an Eighth Amendment value, is the fact that equality is nothing more than a proxy value in the constitutional analysis of death sentencing. The Court's real concern is not equality in punishment, but proportionality in punishment.

Equal punishment and proportionate punishment are not the same thing. The proportionality of punishment is evaluated for a single case; no comparison to another person and his punishment is involved. The question is only whether, roughly speaking, the punishment imposed is accurate with respect to the person's desert.\(^37\) In contrast, to judge equality in punishment obviously does involve a comparison between two persons who have been punished. The question is whether they have been treated alike, given that they are alike in a relevant respect—in this case, with respect to their deserts. The fact that the likeness of the cases is likeness with respect to desert makes equality a plausible proxy for proportionate punishment. If A and B are similarly situated with respect to desert, then it is impossible to punish them proportionately but unequally. But the converse is not true. If A and B are

\(^{36}\) Scott W. Howe, The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial, 146 U. PA. L. REV. 795, 825 (1998) (commenting on the "profound irony" of executing an offender on equality grounds, so that he will be spared the cruel and unusual punishment of unequal treatment in death sentencing). Professor Howe argues, as I do, that proportionality in punishment is the value that the Court has pursued in the Eighth Amendment regulation of the death penalty. As the title of his article suggests, however, Howe concludes that this goal cannot be attained because "no evident consensus exists as to how to refine the deserts measure." \textit{Id.} at 836. Howe is correct about the absence of consensus, but he also contributes to the difficulty when, like the Court, he uses the words "desert," "culpability," "blameworthiness," and "responsibility" interchangeably, making no effort to give any of them a precise, distinct meaning. \textit{See, e.g.,} \textit{Id.} at 829-30. No consensus is likely to develop if we use the same language to talk about different things. This Article attempts to move us toward a consensus on proportionality in death sentencing with the obvious first step of clarifying our meaning.

\(^{37}\) A considerably more refined account of proportionality is given below. \textit{See infra Part III.D.}
similarly situated with respect to desert, then it is entirely possible to punish
them disproportionately but equally. Imagine, for example, that A and B are
equally culpable shoplifters, each of whom has been sentenced to be drawn
and quartered. Their punishment is equal, but disproportionate, because the
proportionality of the punishment in each case is independent of the two
cases’ relationship to one another.

Proportionality in punishment is a substantive criminal law value that is
impossible to understand, or even to identify in the Court’s cases, without
resort to the theory of punishment. The case of Zant v. Stephens38 serves to
illustrate this point.

The Zant decision authorizes the unequal treatment of similarly situated
offenders, in apparent contradiction of Furman. In Zant, Georgia’s highest
court informed the Supreme Court explicitly that the aggravating factors in
the statute at issue served to define a death-eligible class of murderers, but
that, after this narrowing function had been performed, the jury retained
absolute discretion to impose or not to impose a death sentence in light of an
unlimited range of mitigating factors.39 Nothing in the Georgia statute served
to channel the jury’s discretion toward the imposition of a death sentence in
any death-eligible case, regardless of the fact that all such offenders, by
definition, had been found to be deserving of death.40 In other words, the
jury was permitted to “underinclude” death-eligible offenders in the class of
those who actually would be executed.

If equality were a core Eighth Amendment value, as Furman asserted,
then the Georgia statute at issue in Zant would have been struck down.
Equal treatment of similarly situated cases requires one to avoid both
underinclusion and overinclusion with respect to the relevant traits in the
disposition of a body of cases so defined. For example, to permit the jury to
consider only a limited menu of mitigating factors in its deliberations on the
fate of the death-eligible class would further narrow this class, while it also
would have the effect of channeling all death-eligible offenders who could
not show one of the required mitigators onto death row. This approach
would avoid underinclusion and ensure equal treatment of all death-eligible
offenders. But by the time Zant was decided, the Court already had decided
that a limited menu of mitigators would itself violate the Eighth
Amendment.41 In its approval of underinclusion, Zant merely confirmed a
foregone conclusion: equal treatment is not a core Eighth Amendment value.

39. Id. at 870-72.
40. Id. at 870-73.
The true core Eighth Amendment value is proportionality in punishment. Proportionality, or accuracy with respect to desert, might require one to avoid underinclusion, but probably would not do so.

Whether the principle of proportionality makes underinclusion with respect to desert objectionable depends upon one's understanding of the role of desert in punishment. A strict deontological theory of punishment might condemn underinclusion with respect to desert. But this theory is an extraordinarily radical one, and there is no evidence whatsoever that the Supreme Court adheres to it. Other theories of punishment would not condemn underinclusion with respect to desert. The more common view among deontological theorists is that desert provides a moral justification for punishment, and a reason to punish, but not a categorical duty to punish. Punishment according to desert is not inconsistent with the pursuit of other aims in punishment, nor with the exercise of mercy. For her part, the consequentialist holds that desert operates only as a side constraint on punishment. Desert is not a reason to punish, plays no role in the moral

42. The strict deontological theory of punishment stated in Immanuel Kant's *Metaphysics of Morals* imposes a duty to punish in those cases in which punishment is deserved. Kant writes that:

> Even if a civil society were to be dissolved by the consent of all its members . . . the last murderer remaining in a prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

**IMMANUEL KANT, THE METAPHYSICS OF MORAIS** 142 (Mary Gregor trans., Cambridge University Press 1991) (1797). Underinclusion with respect to desert would be a vice in death sentencing under such a theory. Jeffrie Murphy has argued that Kant's conception of punishment is not as starkly retributive as this passage suggests. Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 512 (1987) (arguing that the views Kant stated in the *Metaphysics of Morals* are unrepresentative of and inconsistent with Kant's philosophy as a whole). However, Murphy himself has argued that the extension of mercy is inconsistent with a Kantian theory of punishment. Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 167-77 (1988).

43. See, e.g., NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 106 (1990) (advocating "a system that is parsimonious in the use of punishment within the concepts of desert, equality, and proportionality"); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 48 (1993) ("[W]e may agree that sanctions should be proportionate in the main, and still debate a certain degree of deviation.").

44. Eric Muller has argued, against Jeffrie Murphy, that a proper understanding of the value of human autonomy in a deontological theory of punishment implies that sentencing should involve discretion and mercy. Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 341-44 (1993); see also J.L.A. Garcia, Two Concepts of Desert, 5 LAW & PHIL. 219, 230 (1986) ("That a person deserves punishment implies no obligation to punish her."); R.A. Duff, Justice, Mercy, and Forgiveness, CRIM. JUST. ETHICS, Summer/Fall 1990, at 51, 59 (book review) ("But if a criminal is suffering seriously . . . we might, and perhaps should, come to see him from the perspective of compassion and mercy rather than from that of retributive justice.").
justification of punishment, and certainly imposes no duty to punish.45 Neither of these latter conceptions of desert condemns underinclusion in death sentencing with respect to desert, and the Court in various places has relied on these theories in its Eighth Amendment analysis.46 If the Court’s conception of desert does not condemn underinclusion with respect to desert, then Zant’s authorization of underinclusion in death sentencing suggests that proportionality, not equality, is the core Eighth Amendment value.

B. The Structure of Individualized Sentencing

From one perspective, the Court has made it perfectly clear that proportionality, not equality, is its primary concern under the Eighth Amendment. The concern for proportionality that lay behind the Court’s

45. Under a consequentialist theory of punishment, the criminal law’s system of prohibitions is morally justified as a whole by virtue of its optimizing social welfare. If the optimization of social welfare is the only basis for moral justification, then the justification of punishment at the individual level potentially authorizes scapegoating for the sake of this optimum. For this reason, the consequentialist argues that punishment is not morally justified at the individual level. It is distributed by legal rules within the morally justified legal system. These rules for the distribution of punishment may be premised on desert, but desert plays no morally justifying role here, because the moral justification of punishment is not in issue. For the consequentialist, then, desert is never more than a side-constraint on punishment. See H.L.A. HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT, IN PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 5-11 (1968) (advancing this argument).

46. In at least one critical juncture in its Eighth Amendment jurisprudence, the Court has invoked the principles of a sophisticated consequentialism. Spaziano v Florida, 468 U.S. 447 (1984). In response to a claim that only retribution justified a death sentence, the Court argued that deterrence justifies the penalty at the level of legislation, which then justifies the application of that rule in the individual case. Id. at 461. This, of course, echoes Hart. See supra note 45. When it refers to the deontological theory of retributivism, the Court usually states a common but utterly misconceived notion of what retribution is. See, e.g., Furman v. Georgia, 408 U.S. 238, 304 (1972) (Brennan, J., concurring) (equating retribution with “naked vengeance”); Id. at 308 (Stewart, J., concurring) (referring to “the instinct for retribution”); Id. at 311 (White, J., concurring) (arguing that the “need for retribution” would not be satisfied if executions were infrequent); Id. at 363 (Marshall, J., concurring) (characterizing retribution as “purposeless vengeance”); see also K.G. Armstrong, THE RETRIBUTIVIST HITS BACK, 70 MIND 471 (1961), reprinted in THE PHILOSOPHY OF PUNISHMENT 138, 139 (H.B. Acton ed., 1969) (evaluating the misconception of retribution as revenge). Properly speaking, retribution refers to punishment’s fitness in retrospect according to desert. MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 33 (1997). On the few occasions when a member of the Court has stated a recognizable deontological principle of punishment, it seems to come from a moderate deontological theory. See, e.g., Ford v. Wainwright, 477 U.S. 399, 408 (1986) (Marshall, J.) (commenting that retribution “is not served by execution of an insane person, which has a ‘lesser value’ than that of the crime for which he is to be punished”). The balance of benefits conception of retribution is commonly attributed to Herbert Morris. See R.A. Duff, PENAL COMMUNICATIONS: RECENT WORK IN THE PHILOSOPHY OF PUNISHMENT, 20 CRIME & JUST. 1, 25-28 (1996) (citing Herbert Morris, PERSONS AND PUNISHMENT, 52 MONIST 475-501 (1968)).
equality analysis in Furman and Gregg quickly emerged in a distinct line of cases that has vied with them for authority. In the leading case of Woodson v. North Carolina—decided the same day as Gregg—the Court banned the most obvious method of ensuring equal treatment in death penalty cases: simply to mandate the death penalty in all cases of murder in the first degree. Instead, states must provide for individualized death sentencing. Within five years, the Court extended the principle of Woodson to hold, in Lockett v. Ohio, that a state may not place limitations on the jury’s consideration of mitigating evidence. In Penry v. Lynaugh, the Court held that the jury must be able to use this evidence effectively to consider the defendant’s “personal culpability,” so that death sentencing constitutes a “reasoned moral response to the defendant’s background, character, and crime.”

The conflict between Furman-Gregg and Woodson-Lockett is fairly obvious. If a state cannot impose limitations on the introduction of

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47. 428 U.S. 280 (1976).
49. Id. at 604-05.
51. Id. at 336. Whether this proposition is a holding of the case depends on how Justice Marshall’s vote is counted. See Franklin v. Lynaugh, 487 U.S. 164, 191 n.1 (1988) (stating that Justice Marshall’s concurrence on broader grounds gives the Lockett plurality the “same precedential value” as an opinion). In any event, a majority adopted Lockett’s reasoning in Eddings v. Oklahoma, 455 U.S. 104, 115 n.10 (1982) (stating “Lockett requires the sentencer to listen” to all mitigating evidence).
52. 492 U.S. at 337.
53. The term Furman-Gregg refers to the line of cases in which a concern for equal treatment of offenders and/or structure in jury deliberations predominates. These cases include: Blystone v. Pennsylvania, 494 U.S. 299, 301 (1990) (holding sentencer’s consideration of whether aggravating factor standing alone is sufficient to support death sentence is not required); Boyde v. California, 494 U.S. 370, 377 (1990) (agreeing with the holding in Blystone); Clemons v. Mississippi, 494 U.S. 738, 741 (1990) (holding a state appellate court may affirm a death sentence “based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of the aggravating or mitigating evidence or by harmless-error review”); Saffle v. Parks, 494 U.S. 484, 492-93 (1990) (finding the jury instruction not to consider sympathy permissible); Walton v. Arizona, 497 U.S. 639, 653-54 (1990) (finding appellate weighing of aggravation versus mitigation after invalidation of an aggravating factor is permissible); California v. Brown, 479 U.S. 538, 543 (1987) (holding that the so-called “anti-sympathy” instruction is permissible).
54. This term refers to the line of cases in which the Court has stressed the importance of individualized sentencing and has invoked substantive criminal law principles in doing so. These cases include: Mckoy v. North Carolina, 494 U.S. 433, 444 (1990) (White, J., concurring) (stating unanimity on mitigating factors cannot be required where defendant carries the burden of persuasion on the issue); Mills v. Maryland, 486 U.S. 367, 384 (1988) (finding risk that jury believed that unanimity on mitigating factors was required is constitutionally intolerable); Sumner v. Shuman, 483 U.S. 66, 83-84 (1987) (holding mandatory death penalty for defendant who kills while under a life sentence is invalid); Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding evidence of good behavior while defendant was incarcerated must be considered by jury); Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) (finding it impermissible to suggest to jury that it may not bear ultimate
mitigating evidence or the uses to which it may be put, then does it have any constitutional capacity to channel the jury’s decision-making toward the imposition of the death penalty in order to avoid underinclusion? Apparently not; but if not, then has not the Court, in Woodson and Lockett, actually precluded compliance with Furman and Gregg, at least where mitigation is concerned? We have already noted one affirmative answer to this question, in Zant’s authorization of underinclusion with respect to desert. Zant is only one of a number of cases in the Woodson-Lockett line, in which the Court has sought to ensure proportionate punishment with a guarantee of individualized sentencing.

The apparent conflict between Furman-Gregg and Woodson-Lockett has caused most commentators to overlook an important fact. The individualized sentencing that the Court mandated in Woodson has a structure of its own. This structure was set up in Lockett and Penry, and it is made up largely of concepts drawn from the theory of punishment, including mitigation, aggravation, deterrence, retribution, culpability, and desert. In this light, the conflict between Furman-Gregg and Woodson-Lockett is not a conflict between structure and its absence, but instead between two conflicting structures. The structure implied by Furman-Gregg serves the value of equality or consistency. The structure implied by Woodson-Lockett serves the value of proportionality. Furthermore, Woodson-Lockett ought to prevail in this conflict. Neither equality nor consistency has ever been more than a proxy for proportionality, and it would seem to be a simple matter to resolve responsibility for death); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (holding that youth and mental disturbance are issues that the sentencer must be permitted to consider); see also Morgan v. Illinois, 504 U.S. 719, 738-39 (1992) (holding due process requires exclusion of jurors predisposed against mitigating evidence in order to effectuate Eighth Amendment rights).

55. See Vivian Berger, "Black Box Decisions" on Life or Death—If They’re Arbitrary, Don’t Blame the Jury: A Reply to Judge Patrick Higgenbotham, 41 CASE W. RES. L. REV. 1067, 1080 (1991); Stephen P. Garvey, "As the Gentle Rain From Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1001 (1996); Howe, supra note 36, at 819 n.102; Steiker & Steiker, Sober Second Thoughts, supra note 35, at 368-70; Steiker & Steiker, Sort Them Out, supra note 35, at 861-66; Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. REV. 1147, 1164-86 (1991). Among members of the Court, two Justices have stated that Furman-Gregg and Woodson-Lockett are irreconcilable. Justice Blackmun drew the inference that the death penalty therefore ought to be abolished. Callins v. Collins, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting). Commentators also have made this argument. See, e.g., Berger, supra, at 1092; Margaret Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1143, 1155 (1980) (“Thus, if death as a punishment requires both maximum flexibility and non-arbitrariness, and these requirements cannot both be met . . . then death cannot be a permissible punishment.”). Justice Scalia has concluded that Woodson-Lockett ought to give way to Furman-Gregg. See Walton, 497 U.S. at 671 (Scalia, J., concurring).
a conflict between a proxy value and the fundamental value for which it stands.

One reason that Woodson-Lockett has not clearly prevailed in its conflict with Furman-Gregg has to do with the Court's apparent fear that the theory of punishment invoked in the former line of analysis is too controversial and too robustly normative to be given a leading role in constitutional analysis. I will consider this problem in the next Section. For now, I want to consider another reason for the relative weakness of Woodson-Lockett: the fact that, on its own terms, the structure of individualized sentencing which the Court has established in this line of cases is incoherent. The Court has used the rudimentary concepts of aggravation, mitigation, and culpability in its regulation of individualized sentencing, and these concepts import a double layer of ambiguity into the analysis.

After Furman, most states adopted some version of the Model Penal Code's Section 210.6. Section 210.6 contains a list of aggravating factors.


57. (3) Aggravating Circumstances.
   (a) The murder was committed by a convict under sentence of imprisonment.
   (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
   (c) At the time the murder was committed the defendant also committed another murder.
   (d) The defendant knowingly created a great risk of death to many persons.
   (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
   (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
and a list of mitigating factors. In a sentencing proceeding that is separate from the trial on the merits, the jury is to determine the existence of aggravating and mitigating factors, and then to weigh these factors against one another in order to determine whether the death penalty is to be imposed. This sentencing hearing must be separated from the trial on the merits because some evidence which is relevant to aggravation or mitigation is barred from the trial on the merits by well-established evidence rules.

Gregg and Proffitt v. Florida decided on the same day, indicated the status of Section 210.6 as the paradigm of a valid death penalty statute. In Gregg, the Court approved a statute that required the jury to consider and determine aggravating and mitigating factors, but that did not require the jury to balance these factors against one another. In Proffitt, the Court approved a statute that required the jury to weigh aggravating and mitigating factors against one another, but that made the jury's decision only advisory; the sentencing decision was to be made by the trial judge.

A third case decided on the same day as Gregg and Proffitt indicated the extent to which the Court was willing to tolerate different procedural schemes under Furman. The statute that the Court approved in Jurek v.

(g) The murder was committed for pecuniary gain.
(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

MODEL PENAL CODE § 210.6(3) (1985).

58. (4) Mitigating Circumstances.
(a) The defendant has no significant history of prior criminal activity.
(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
(f) The defendant acted under duress or under the domination of another person.
(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
(h) The youth of the defendant at the time of the crime.

Id. § 210.6(4).

59. Id. § 210.6 cmt. 8.
60. Id. § 210.6.
63. Proffitt, 428 U.S. at 247-60.
Texas asked the jury to determine the defendant’s eligibility for the death penalty based on five additional offense elements to be determined at trial, and on two penalty phase issues to be determined at a sentencing hearing. The Court’s affirmance of this statute was surprising, because none of these offense elements or sentencing factors resembled mitigating factors. All of them resembled aggravating factors. Nevertheless, the Jurek decision approved the Texas scheme on the ground that the statute’s reference to the defendant’s future dangerousness permitted the defendant to offer evidence of youth, duress, extreme emotional disturbance, or other mitigating circumstances. This evidence, the Supreme Court held, was sufficient to “guide[] and focus[] the jury’s objective consideration of the particularized

64. 428 U.S. 262 (1976).
65. Id. at 265-69.
66. In two other cases decided the same day, the Court had held that a mandatory death sentence for murder was unconstitutional. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976). In Jurek, the Court drew the inference that a death penalty statute which asked the jury to consider only the aggravated nature of a murder must be unconstitutional. 428 U.S. at 271.
67. The five additional offense elements of capital murder are:
   (1) the person murdered a peace officer of fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
   (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
   (3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
   (4) the person committed the murder while escaping or attempting to escape from a penal institution;
   (5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.
TEX. PENAL CODE ANN. § 1257(b) (1973), cited in Jurek, 428 U.S. at 265 n.1. The three penalty phase issues are:
   (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
   (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
   (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
circumstances of the individual offense and the individual offender before it can impose a sentence of death."

This reasoning was flawed or incomplete, because a jury that was instructed in the language of the Texas statute would have no way to make sense of, or to give effect to the mitigating evidence that the defendant had been permitted to introduce. For example, a mentally retarded defendant who had little capacity to control his impulses or to learn from his mistakes would be a continuing danger to society, and so his condition would dictate death under jury instructions written in accordance with the Texas statute. If jurors happened to consider the same condition to be a mitigation, a reason not to execute the defendant—as most jurors might be expected to do—then they would have no way to give effect to this conclusion under their instructions. In a subsequent Texas case, *Penry v. Lynaugh*, the Supreme Court recognized this particular difficulty, and reversed Penry's conviction on a challenge to the Texas statute as applied. The Court held that the jury's instructions must enable the jury to give mitigating effect to the defendant's evidence at the penalty phase, regardless of how, or even whether, it relates to the question of future dangerousness.

The decisions in *Jurek* and *Penry* give rise to a host of questions. I want to focus attention on one in particular which is raised in Justice Scalia's *Penry* dissent. Justice O'Connor insists on behalf of the majority that the jury instructions in a capital case must allow the jury to consider the "personal culpability" of the defendant, so that the jury can arrive at a "reasoned moral response" on the question of life or death. Justice Scalia points out that the part of the Texas scheme known as Special Issue One—whether the killing of the victim "was done deliberately and with the reasonable expectation that the death of the deceased or another would result"—addresses the "personal culpability" of the defendant. Mental states such as these are thought to be paradigmatic indicators of culpability. Penry asked for and received an instruction to the effect that his mental retardation affected his ability to deliberate upon and foresee the death of the victim. Therefore, the jury in his case did have the opportunity—within the Texas statute as written—to consider the defendant's "personal culpability"

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69. *Id.* at 274.
71. *Id.* at 326-28.
72. *Id.* at 327-28.
73. *Id.* at 356 (Scalia, J., dissenting).
74. *MODEL PENAL CODE § 2.02(2)* (1985) (listing mental states as "Kinds of Culpability").
75. *Penry*, *492 U.S.* at 356 (Scalia, J., dissenting).
as required by the majority. Why was this not sufficient to validate Penry's trial and conviction in the majority's eyes?

This question is more deeply puzzling than might at first appear. In Justice Scalia's argument, no less than in Justice O'Connor's, the categories of aggravation and mitigation seem protean or unstable. Special Issue One seems to be an aggravating factor; indeed, it extends the inquiry into malice or intention in killing which defines murder, and asks whether the malice or intention was so extreme as to call for a higher punishment. But Justice Scalia seems perfectly justified in drawing attention to the significance of a negative finding on this question, and in calling this effect mitigation. If, as seems to be the case, aggravation and mitigation are two sides of a single issue, then what is the issue? If the issue is culpability, then what accounts for Justice O'Connor's refusal to acknowledge that the instructions in the Penry case did address culpability in the way that Justice Scalia describes?

The ambiguities that Penry displays extend beyond the matter of aggravation versus mitigation, to the matter of aggravation versus the definition of an offense. An unacknowledged confusion over the relationship between culpability, aggravating factors, and offense elements distorts the constitutional concept of mandatory death sentencing. This distortion matters tremendously because, not surprisingly, the word "mandatory" is a term of art in this context. To say that a death penalty statute imposes mandatory death sentencing is simply a way to say that the legislature has imposed too much structure or too rigid a structure on the sentencing process. In other words, the concept of a mandatory death sentencing provision governs the line of conflict between Furman-Gregg and Woodson-Lockett.

Consider the two cases which first outlawed mandatory death penalties: Woodson v. North Carolina and Roberts v. Louisiana. Commentators and the Court ordinarily treat Woodson and Roberts as indistinguishable; or they treat Roberts as an application of principles stated at greater length in Woodson. On closer examination, however, the cases are significantly different from one another.

In Woodson, the Court examined the history of the death penalty in terms ironically reminiscent of McGautha v. California. First, the Court

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76. Id. at 310 (O'Connor, J.) (Special Issue One asked "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result").
described an era in which death was a mandatory punishment for many offenses, and in which juries balked at convicting in cases of obvious guilt—apparently because they wished to avoid this harsh and disproportionate punishment. Then the court recounted the states' efforts to define an ultimate degree of homicide for which death would be a mandatory punishment, by means of the concepts of malice aforethought and premeditation—and the failure of those efforts. Finally, the court described the states' resort to the expedient of frankly granting juries absolute discretion over death sentencing. These were the systems struck down in Furman.

The Woodson case represented the latest stage in this history: a post-Furman return to mandatory death sentencing. North Carolina had employed a murder statute that defined first degree murder as any "willful, deliberate and premeditated killing;" that imposed a penalty of death for first degree murder; and that gave the jury the prerogative of recommending life imprisonment. After Furman was decided, North Carolina eliminated the jury's prerogative to recommend life imprisonment. The effect of this deletion was to return North Carolina to the second historical era described by the Court in Woodson: that in which concepts such as malice aforethought and premeditation defined an ultimate degree of homicide that warranted death as a punishment. The Court held in Woodson that, as a constitutional matter, North Carolina could not simply return to an approach to death sentencing that history showed to be inadequate.

In Roberts, the Court struck down Louisiana's mandatory death penalty scheme on the same rationale as that employed in Woodson. The Court concluded that: "As in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences . . . . " The remarkable thing about this statement is that it is patently false. Louisiana had done something fundamentally different with its murder statute than North Carolina had done. Louisiana had not simply imposed a mandatory penalty of death on a standard-issue premeditated murder. Louisiana had redefined its first degree murder offense completely. Thus, there were five specific, alternative ways

81. Woodson, 428 U.S. at 289-90. See supra note 17 (explaining the irony).
82. Woodson, 428 U.S. at 290-91.
83. Id. at 291-93.
84. Id. at 298-99.
86. N.C. GEN. STAT. § 14-17 (Supp. 1975).
87. Woodson, 428 U.S. at 301-05.
in which one might commit first degree murder in Louisiana: to kill with a specific intent to kill or to inflict great bodily harm, and also, at the same time, (1) to commit a specified felony; (2) to kill a fireman or police officer; (3) to have been convicted of murder or to be serving a life sentence; (4) to have more than one victim; or (5) to receive payment for the killing. Four of these five alternative offense elements correspond to aggravating sentencing factors in Model Penal Code section 210.6. This raises a seemingly obvious question. If these aggravating factors can operate in the penalty phase to facilitate an inquiry into the particular circumstances of the offense and the offender, and to narrow the class of death-eligible defendants, then why can they not perform this function as offense elements? Bifurcation is not constitutionally required. The penalty phase is separated from the trial on the merits in order to facilitate a fair trial under standard evidence rules, but this has never been held to be a matter of constitutional necessity, and in any event it does not imply a distinction between offense elements and aggravating factors as vehicles for the issue of culpability. Louisiana's law clearly did provide for individualized consideration of the offense and the offender in a way that North Carolina's law did not. Whatever the case in Woodson, it was not true in Roberts that there were no "standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences." Furthermore, Roberts is distinguishable from Woodson in the way suggested by Justice Scalia's Penry dissent: a negative finding on these offense elements has a mitigating implication. The defendant who is found not to have killed for hire or not to have committed an accompanying felony

89. LA. REV. STAT. ANN. § 14:30 (West 1974), cited in Roberts, 428 U.S. at 329 n.3.
90. See supra note 57 (listing Model Penal Code aggravating factors of previous conviction of a felony, multiple victims, murder in the course of a felony, and pecuniary gain).
91. Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988) ("We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.").
92. The Louisiana law was constitutionally objectionable because it invited compromise verdicts. Roberts, 428 U.S. at 334-35. The Court in Roberts stated that "[u]nder the current Louisiana system, however, every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts." Id. at 334 (citation omitted). But this was a problem of jury discretion that was completely unmoored from the law, such as that which Furman condemned, not a problem of mandatory death sentencing.
93. Id. at 335.
94. Failure to convict of this degree of murder would have resulted in a conviction of a lower degree of homicide, even under proper evidentiary requirements. Id. at 334 (citing LA. CODE CRIM. PROC. ANN. §§ 809, 814 (Supp. 1975)).
is less culpable than a murderer who actually did do one of these things. In
the terms which the court later adopted in *Penry*, Louisiana had adopted
rules which would permit the jury to formulate “a reasoned moral
response”\(^95\) based on the defendant’s “personal culpability,”\(^96\) including the
matter of mitigation, as later required by *Lockett*. And yet, as would be the
case in *Penry*, the Court seemed not to recognize the legislature’s attentions
to the issues of mitigation and culpability, as it had been willing to do in
*Jurek*.\(^97\)

Given that this difficulty arose under both Louisiana’s death penalty
statute in *Roberts* and under Texas’s fundamentally different death penalty
statute in *Penry*, one begins to suspect that the categories of aggravation and
mitigation are largely meaningless, and that the “culpability” determination
which the Court has tried to ensure is an essentially ambiguous undertaking.
The *Lockett* decision confirms both of these suspicions.

Sandra Lockett played a very minor role in a pawn-shop robbery in which
her friend Parker killed the shop owner. Lockett was found guilty of felony
murder as an accomplice, which made her eligible for the death penalty.\(^98\)
Ohio law limited consideration of mitigating factors to three questions:
whether the victim had induced or facilitated the offense; whether the
defendant was under duress, coercion, or strong provocation; and whether
the offense was primarily the product of psychosis or mental deficiency.\(^99\)
Lockett was sentenced to death because there was no evidence to support an
affirmative answer to any of these questions.\(^100\)

The Supreme Court reversed Lockett’s conviction on the ground that the
Ohio statute’s limited menu of mitigating factors violated the principle of
*Woodson*. It failed to ensure “consideration of the ‘character and record of
the individual offender and the circumstances of the particular offense as a
constitutionally indispensable part of the process of inflicting the death
penalty.’”\(^101\) Specifically, the Ohio statute did not allow the jury to consider
the fact that Lockett did not intend the victim’s death or the fact that her role
in the crime was a minor one.\(^102\) The mitigating effect of both of these facts
is obvious. Minor involvement as an accomplice is listed as a mitigating


\(^{96}\) *Id.*

\(^{97}\) *See supra* notes 64-69 and accompanying text.


\(^{99}\) *Id.* (citing OHIO REV. CODE ANN. §§ 2929.03-2929.04(B) (1975)).

\(^{100}\) *Id.*

\(^{101}\) *Id.* at 601 (quoting *Woodson* v. North Carolina, 428 U.S. 280, 304 (1976)).

\(^{102}\) *Id.* at 608.
factor in the Model Penal Code’s section 210.6. The fact that Lockett did not intend to kill has a mitigating implication if mitigation is a question of culpability, and if (as is generally agreed) intentional-states indicate culpability and its degrees.

However, each of these mitigating factors also has an obvious aggravating converse. Not to intend the victim’s death mitigates a homicide only because to intend the victim’s death makes a homicide worse than it would be otherwise. Murder is a knowing or purposeful killing, whereas manslaughter requires only recklessness, and a killing with no intentional state will be a negligent homicide or no crime at all. A killing which is low on this scale is mitigated only because a killing which is high on this scale is aggravated. The second of the considerations on which Lockett turned also has two sides. To be an accomplice who plays only a minor role in a murder clearly mitigates the offense, but the general matter of one’s role in a crime, relative to the roles played by others, can easily be framed in aggravating terms. We might well treat as an aggravating factor the fact that one is a leader in a homicidal conspiracy or other deadly criminal enterprise.

These converse formulations are important because they suggest that one might simply factor the question of mitigation out of the Lockett case. Lockett’s conviction was overturned because the Ohio statute did not permit consideration of her intent to kill and her relative level of involvement in the form of mitigating factors. However, if the same considerations had been available to the jury in converse form—as offense elements or aggravating factors—then it is likely that the Court would have affirmed the conviction and sentence. The jury would have had an opportunity to consider Lockett’s state of mind and relative degree of involvement. But if we can satisfy the

104. See, e.g., id. § 2.02 (describing a hierarchical set of intentional-states as “Kinds of Culpability”).
105. See, e.g., id. §§ 210.2 (defining Murder), 210.3 (defining Manslaughter), 210.4 (defining Negligent Homicide).
106. See, e.g., 720 ILL. COMP. STAT. ANN. 5/9-1(b)(13) (West 1999) (listing as an aggravator: “the defendant was a principal administrator, organizer, or leader of a calculated criminal drug conspiracy consisting of a hierarchical position of authority superior to that of all other members of the conspiracy”).
107. In order to factor mitigation out of the Lockett case, suppose that the evidence in the case was more ambiguous than it was in fact. Suppose that there was evidence from which the state had argued that Lockett knew that it would be necessary to kill the shop owner in order to rob him; whereas Lockett might have argued from the same evidence that she recognized a risk of death at most. Suppose further that there was evidence from which the state had argued that Lockett had manipulated Parker into committing the crime, and that he did so primarily to benefit her; whereas Lockett might have argued from the same evidence that Parker had acted on his own initiative and primarily for his own benefit. On these less appealing facts, Lockett’s case before the Supreme
Court's concerns without touching Ohio's limited menu of mitigating factors, then mitigation was not the issue in \textit{Lockett}. If the issue in the penalty phase of a capital trial is the defendant's culpability, then the concept of mitigation is an unnecessary and potentially misleading device for the analysis of culpability.

Furthermore, the term "culpability" itself is ambiguous. In order to demonstrate this, let me confess to a sleight of hand. In my analysis of \textit{Lockett} so far, I have supposed that the Court was concerned with Lockett's ability to argue that her role as an accomplice in a non-intentional felony murder did not warrant the death penalty. The absence of an intent to kill and Lockett's minor role in the offense were the Court's main concerns, but there was at least one more. The Court also cited Lockett's inability to argue that her age was a mitigating factor.\footnote{In summarizing the constitutional defects of the Ohio law, Justice Burger's exact words for the Court were:}

\begin{quote}
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.
\end{quote}

Lockett's age was indeed a mitigating factor, and it does not fit the analysis that I have presented so far, because it does not have a converse form. The fact that Lockett was twenty-one at the time of the murder might indicate an understandable lack of judgment or the undue influence of older co-defendants. But this mitigator has no flip-side. Age works differently as a mitigating factor from intent to kill and relative level of participation. We
do not view age as an affirmative reason to punish or as a reason to punish an offender more severely than we would otherwise. Intentional-states are included in the definitions of criminal offenses, whereas age very rarely is. Even though the lists of aggravating factors in state death penalty statutes have proliferated from Section 210.6's eight elements to over twenty, the offender's being middle-aged or elderly has yet to appear on one of these lists, and is unlikely ever to do so.

If age is a mitigating factor that has no converse in the form of offense elements or aggravating factors, then this mitigating factor cannot be factored out of the Lockett case. This is the reason that I concentrated my initial analysis of the case on the questions of Lockett's having no intent to kill and only a minor role as an accomplice in the murder.

My confession to this sleight of hand does not weaken my argument; it strengthens and extends it. If age works differently as a mitigating factor, in comparison to Lockett's minor role in the murder or her lack of intent to kill, then this is not a difference which the Lockett court noticed. Nor is it a difference which the term "mitigation" captures. If some mitigating factors are the flip-side of an aggravating factor, and some mitigating factors do not have an aggravating converse, then "mitigation" is ambiguous.

Furthermore, whereas proof of mitigation does tend to show that the defendant is not culpable, the ambiguity of mitigation does not come to light when the concept of mitigation is used to analyze culpability, for one simple reason: the concept of culpability also is ambiguous. One kind of culpability pertains to things such as one's role in the offense and one's state of mind; and another, fundamentally different, kind of culpability pertains to things such as one's age.

109. One exception is the use of the age of the accused in the definition of statutory rape. The rationale for this use, and the reason that it does not constitute a counter-instance to the argument presented above, is explained below. See infra note 223.


111. Incidentally, the distinction between age and the other mitigating factors at issue in Lockett does not correspond to a distinction between aspects of the person and aspects of the crime. Lockett also argued that she had a demonstrated capacity for rehabilitation and reform, based on her successful history in a drug treatment program, and that she ought to have been permitted to present this fact in mitigation. Lockett, 438 U.S. at 597. This mitigating factor was a feature of Lockett as a person. However, in the analysis of her culpability, it operates like her having no intent to kill and her minor role as accomplice, because it has an obvious aggravating converse. We easily can imagine a crime premised on the converse of reform potential, incorrigibility, because we have such laws, in the form of habitual offender statutes. See Rummel v. Estelle, 445 U.S. 263, 268 (1968); Oyler v. Boles, 368 U.S. 448, 503 (1962). Incorrigibility also can be framed as an aggravating factor. See, e.g., TEX. PENAL CODE ANN. § 37.071(b) (Vernon Supp. 1975-1976) ("[W]hether
This double layer of ambiguity is the culprit in much of the Court's confusion over capital punishment. It forms the subject matter of Parts II and III of this Article. To resolve the ambiguity in the concepts of mitigation and culpability leads to, a powerful conception of proportionality in punishment that has concrete implications for the constitutional regulation of the penalty phase of the capital trial.

C. The Problem of Undue Deference

If the Court's effort to guarantee proportionate death sentencing has been thwarted by the rudimentary concepts that it has used for this purpose, then some responsibility for this failure lies with the theorists of punishment. The theory of punishment is a diverse and contentious field. The Court can hardly be expected to pursue a consistent theoretical path if it is confronted with a maze.

On the other hand, no one can hope to synthesize the theory of punishment for the Court's use. The most that any punishment theorist can do when the Court appears to need a theory of punishment is to offer one—preferably with the implications for the constitutional problem at hand already worked out as fully as possible.

However, the question remains whether the Court is willing to accept any assistance of this kind. In spite of the fact that it jumped squarely into a substantive criminal law question when it mandated individualized death sentencing, the Court seems unwilling frankly to embrace either proportionality in punishment as the prime Eighth Amendment value, or the theory of punishment as an essential tool in the constitutional analysis of the death penalty. The question is, why? One answer to this question is that the Justices believe—mistakenly—that the theory of punishment is not within the institutional competence of the Court.

The concepts and concerns of the theory of punishment are irreducibly normative. To articulate a theory of punishment that authorizes unjust punishment is to fail to articulate a viable theory of punishment. For example, the principal occupation of consequentialist theorists of punishment at mid-point in the last century was to escape the objection that consequentialism authorized the unjust punishment of the innocent for the

there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 
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sake of maximum welfare.\textsuperscript{112} Similarly, to advance any definition of desert or proportionate punishment is to invoke some conception of just punishment.

The Supreme Court's reluctance to regulate criminal justice at this normative level is notorious,\textsuperscript{113} and this reluctance is fully evident in its interpretation of the Cruel and Unusual Punishments Clause. The Court's fundamental Eighth Amendment standard—under which it decides not only claims of improper death sentencing procedure,\textsuperscript{114} but also claims concerning prohibitions on capital punishment,\textsuperscript{115} methods of execution,\textsuperscript{116} conditions of confinement,\textsuperscript{117} and proportionality in non-death sentencing—asks whether the challenged practice conforms to "the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{119} On its face, the evolving standards of decency test is an appeal to "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."\textsuperscript{120}


\textsuperscript{115} See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (holding death penalty per se prohibited for offenders under sixteen years of age, under the evolving standards of decency test).


\textsuperscript{117} See, e.g., Farmer v. Brennan, 511 U.S. 825, 832-35 (1994) (applying the "evolving standards of decency" test in case requiring conscious disregard of risk of harm by prison officials to support Eighth Amendment claim for denial of humane conditions of confinement); Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (applying the evolving standards of decency test to hold that deliberate indifference to an inmate's medical needs is cruel and unusual punishment).


\textsuperscript{120} Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968), \textit{quoted in} Estelle v. Gamble, 429 U.S. 97, 102 (1976).
In practice, however, the standard receives a minimalist construction, because the constitutional regulation of the criminal law is dominated by the "legal process" orientation of the Court.\textsuperscript{121} The Court attempts, to the greatest extent possible, to defer to legislatures' institutional competence in the matter of criminal justice policy,\textsuperscript{122} and to balance the constitutional value of federalism against constitutional values embodied in the Eighth Amendment, the due process clauses, and the First Amendment.\textsuperscript{123} Under this approach, the two principal indicators of the evolving standards of decency are legislation and jury verdicts.\textsuperscript{124} This approach guarantees a proper degree of deference and automatically balances competing concerns within the federal system.

This deferential construction of the evolving standards of decency test has prompted the criticism that the Court's Eighth Amendment jurisprudence is a sham, because to hold states only to the standard of their existing practices is an empty constitutional requirement.\textsuperscript{125} This assessment may be unduly bleak. The evolving standards of decency test has a substantive component that has the potential, at least, to set significant limits on death sentencing. The Court has held that, in addition to legislation and jury verdicts, the Court must examine the challenged sentencing practice in light of substantive

\textsuperscript{121} Bilionis, supra note 113, at 1300-02 (arguing that seemingly inconsistent or unprincipled decisions on punishment can be explained by the Court's commitment to legal process principles). The term "legal process" refers to a theory of adjudication that combined the Legal Realist's rejection of formalism and recognition of the political dimension of law with the rationalist insistence of Cardozo and others that principled adjudication was nevertheless possible. William N. Eskridge, Jr. & Philip P. Frickey, \textit{An Historical and Critical Introduction to THE LEGAL PROCESS, in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW}, at liv-lxviii (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994) (1958). The legal process school stressed the relative institutional competence of legislatures and courts; assigned legislatures primacy in the creation of law; and described the courts' distinctive role in the reasoned elaboration of law, subject to legislative primacy. \textit{Id.} at xci-xcvi. While it originated as a theory of legislation and statutory interpretation, the legal process approach was quickly and easily adapted to the constitutional context. \textit{Id.} at cxv-cxviii.

\textsuperscript{122} Bilionis, supra note 113, at 1318-32 (describing this deference in the Court's Eighth Amendment regulation of death sentencing).


\textsuperscript{124} Woodson v. North Carolina, 428 U.S. 280, 293 (1976) ("The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences.").

\textsuperscript{125} Goldberg & Dershowitz, supra note 18, at 1782; see also Susan Raeker-Jordan, \textit{A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty}, 23 Hastings Const. L.Q. 455, 513 (1996) (arguing the Court's decisions "insidiously help to manipulate sentencing juries into death sentences and thus skew this indicator of the evolving standards of decency when the Court employs it to evaluate substantive challenges to the death penalty" (footnote omitted)).
criminal law principles, including culpability, proportionality, and the justifying purposes of punishment. However, support for this substantive criminal law approach rests with a shifting and uncertain majority. The legal process instincts of the Court ensure unanimous support only for the much thinner inquiry into the relative number of states endorsing a given position.

In this controversy over the meaning of the evolving standards of decency test, a substantial minority on the Court has taken the view that any invocation of concepts from the theory of punishment can reflect only the subjective opinions and personal preferences of individual Justices, and that such an inquiry is therefore inconsistent with the Court's proper role. Justice Scalia stated this position most explicitly in Stanford v. Kentucky.

126. The uncertainty is due primarily to changes in the Court’s personnel and the subtle shadings of Justice O’Connor’s views. In banning the execution of those who are insane at the time of execution, Justices Marshall, Brennan, Blackmun, Stevens, and Powell provided a bare majority for the view that the evolving standards of decency test was to be interpreted by reference to indicators other than legislation and jury verdicts, and that the Justices’ own views on substantive criminal law principles, especially as they may be found in common law, were a permissible consideration. Ford v. Wainwright, 477 U.S. 399, 406-10 (1986); see also id. at 419-23 (Powell, J., concurring). Justices Burger, Rehnquist, White and O’Connor formed a substantial minority behind the view that the only permissible considerations in the application of the evolving standards of decency test are legislation and jury verdicts. Id. at 427 (O’Connor, J., concurring in part and dissenting in part); see also id. at 431-33 (Rehnquist, J., dissenting).

127. For example, in Penry v. Lynaugh, the Court considered the question whether the execution of a mentally retarded offender ought to be prohibited as inconsistent with the evolving standards of decency under the Eighth Amendment. All members of the Court agreed on the relevance, if not the implications, of the fact that two states had prohibited such executions in legislation. Id. at 334 (1989). However, only Justice O’Connor and the four dissenters extended the inquiry into matters such as whether the “execution of a mentally retarded person . . . with a reasoning capacity of approximately a 7-year-old would be cruel and unusual because it is disproportionate to his degree of personal culpability” (citing the brief for the Petitioner 49-50), and whether the “execution of mentally retarded people convicted of capital offenses serves [any] valid retributive purpose.” Id. at 336-37.

It has never been thought that [the evolving standards of decency test] was a shorthand reference to the preferences of a majority of this Court. By reaching a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens, the dissent displays a failure to appreciate that "those institutions which the Constitution is supposed to limit" include the Court itself. To say, as the dissent says, that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty," . . . and to mean that as the dissent means it, i.e., that it is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals and punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.¹²⁹

Stanford and the other cases in which the Court has considered the meaning of its evolving standards of decency test involved claims of a prohibition on capital punishment. The question is less acute in the regulation of the penalty phase, because the Court is not asked to determine the proportionality of any given punishment, but only to ensure that the jury's deliberations on the proportionality of a death sentence are properly provided for. However, neither the evolving standards of decency test nor the Justices' fear of entanglement in "subjective" questions is confined to the matter of per se Eighth Amendment prohibitions.¹³⁰

¹²⁹. Id. at 379. Justice O'Connor did not join this part of Justice Scalia's opinion in Stanford, but apparently this was not because she did not share his views on the "subjectivity" of the Justices' views on proportionality. In Thompson v. Oklahoma, decided the year before Stanford, she had written:

> The special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to Eighth Amendment proportionality analysis. These characteristics, however, vary widely among different individuals of the same age, and I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures.

Thompson v. Oklahoma, 487 U.S. 815, 854 (1988) (O'Connor, J., concurring). Counting votes, the upshot of the Ford, Thompson, and Stanford opinions seems to be that the Court ought to make an independent determination under the evolving standards of decency test; that principles from the theory of punishment such as proportionality and culpability are relevant to this determination; but that these questions are dangerously "subjective" and therefore ought to be handled with constant deference to legislative judgment.

¹³⁰. See, e.g., Furman v. Georgia, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting) ("We should not allow our personal preferences . . . guide our judicial decision in cases such as these."). Id. at 431 (Powell, J., dissenting) ("It is too easy to propound our subjective standards of
The Justices’ anxiety about their institutional competence to consider questions of proportionality, culpability, and so on, probably explains their reluctance to abandon Furman-Gregg in the constitutional regulation of the penalty phase. In the prohibition cases, the Court confines itself to state-by-state tallies of legislation and jury verdicts in order to remain within its area of institutional competence. In the penalty phase cases, the Court has maintained Furman-Gregg’s insistence on structure in the death sentencing jury’s deliberations for the same reason. The demand for structure was originally intended to guarantee equality—a paradigmatic judicial function. In its present guise as a due process ban on “arbitrary and capricious” sentencing,131 Furman-Gregg’s structure-in-sentencing requirement seems appropriately deferential to states and legislatures.

The difficulty is that, as Woodson-Lockett recognizes, a constitutional guarantee of proportionality in death sentencing requires more than the avoidance of arbitrary and capricious action. The conflict between Furman-Gregg and Woodson-Lockett is attributable to the Court’s failure, in either line of cases, to find the appropriate kind or level of structure that would ensure proportionality in death sentencing.

The Court’s reluctance to permit Woodson-Lockett to predominate, and their further reluctance frankly and fully to employ the theory of punishment in the development of this line of constitutional regulation, is unfounded. The syllogism that leads to the Court’s present impasse is suggested by Justice Scalia’s disdain for the “preferences” of the Justices, and by an often-quoted maxim from Justice White to the effect that “these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justice.”132 These pejorative usages of “preference” and “subjective” are meant to suggest that matters such as culpability or proportionality are not capable of rational resolution; that the only rational means to resolve such issues is by the orderly, democratic aggregation of arational preferences; and that these matters are therefore properly committed to the legislatures.

wise policy under the rubric of more or less universally held standards of decency.”); see also Herrera v. Collins 506 U.S. 390, 428 (1993) (Scalia, J., concurring) (contending that, in a case involving a claim of actual innocence, “the dissenters apply nothing but their personal opinions to invalidate the rules-of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible.”); Harmelin v. Michigan, 501 U.S. 957, 986 (1991) (Scalia, J.) (cautioning that, in a case of allegedly disproportionate non-death sentencing, “the proportionality principle becomes an invitation to imposition of subjective values”); McCleskey v. Kemp, 481 U.S. 279, 300 (1987) (eschewing “subjective judgment” in the Eighth Amendment regulation of the penalty-phase).

This syllogism is fallacious, because the "merely subjective" premise rests on a philosophical mistake. The view that value judgments are merely arational expressions of feeling, a view that defines a position in ethics known as non-cognitivism, received a thorough philosophical debunking in the 1950's and 1960's. The syllogism's other premise also is false. The idea that the only rational means to resolve issues of public concern is by the orderly aggregation of arational preferences in elections and legislation contradicts an older, wiser, tradition in American legal and political philosophy. Classical republicanism places greater faith in human beings' capacity for reasoned deliberation on questions of value in the public sphere. In sharp contrast to Justice Scalia's conception of adjudication, the republican constitutional tradition permitted the Court to engage in full-blooded judging—properly respectful of the legislative branch, but cognizant of its own distinctive role in public deliberations on questions of value.

133. See Hilary Putnam, Objectivity and the Science-Ethics Distinction, in The Quality of Life 143, 144 (Martha Nussbaum & Amartya Sen eds., 1997). See, e.g., R.M. Hare, The Language of Morals 111-50 (1966) (describing the interplay of evaluative and descriptive uses of words such as "good"); Paul W. Taylor, Normative Discourse 48-67 (1961) (arguing against the view that value judgments are merely expressions of non-cognitive attitudes). But see Alfred Jules Ayer, Language, Truth and Logic 102-120 (2d ed. 1967) (arguing for the view that value judgments are merely expressions of non-cognitive attitudes); J.L. Mackie, Ethics: Inventing Right and Wrong 50-63 (1977) (arguing that "good" has no objective meaning apart from "egocentric commendation").

134. The classical republicanism of the founding era was based on a universally shared assumption that reasoned deliberation on the public good was the very point of government. See generally Symposium, The Republican Civic Tradition, 97 Yale L.J. 1493 (1988); see also Richard H. Fallon, Jr., What is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695, 1697 (1989); Frank I. Michelman, The Supreme Court 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 55-73 (1986). In the contest between Federalists and Anti-Federalists, the former faction prevailed, not because it supplanted the latter's classical republicanism, but because the Federalist Constitution brilliantly reconceptualized the republican tradition. Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 562-64 (1969).

135. It is perfectly clear that in the original constitutional design the Supreme Court was to have a full, distinctive, counter-majoritarian role in public deliberations. This, after all, was the avowed point of life tenure. See The Federalist No. 78, at 527 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id.
The rise of a radical legal process stance on the Court coincides, historically, with the Rehnquist Court's deliberate effacement of the Warren Court legacy. It is instructive, then, to consider Chief Justice Warren's conception of Eighth Amendment jurisprudence, as he stated it in Trop v. Dulles.

In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged . . . . This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

For Justice Scalia, the only conceivable alternative to deference to legislative judgment is the judicial enactment of personal preferences. But this is a false dilemma—the product of an untenable philosophical non-cognitivism that unaccountably lingers on in some intellectual circles. In contrast, Chief Justice Warren viewed the judicial enactment of personal preferences in opposition, not to institutional deference, but to the exercise of sound practical judgment. In doing so, he drew on a far deeper tradition in political theory and ethics.

136. The founders of the Legal Process school would not have endorsed Justice Scalia's positions. Henry M. Hart urged the Court to take a "substantive due process" approach to the constitutional regulation of the criminal law. Hart, supra note 113, at 411. Herbert Wechsler's conception of "neutral" constitutional adjudication was much closer to Chief Justice Warren's than to Scalia's. Wechsler wrote: "The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does." Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959).


138. Id. at 104 (Warren, C.J.).

139. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (Scalia, J.) ("'[P]roportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.").


141. The faculty of practical judgment is a central feature of Aristotelian ethics. See Aristotle, The Nicomachean Ethics, bk. I, ch. 7, § 1098a & bk. VI, ch. 7, § 1141b (Martin Ostwald trans., 26th prtg. 1988); see also Terence Irwin, Aristotle's First Principles 334-46 (1988) (describing Aristotle's conception of rational agency in relation to the good and responsibility). The republican political tradition is descended from Aristotle, by way of Polybius...
The constitutional regulation of the penalty phase of capital trials is not a deferential project. It involves judging. In *Furman-Gregg*, the Court attempted to justify its active regulation of death sentencing by remaining within the bounds of the paradigmatic judicial formalism of equality analysis. Subsequent cases, beginning with *Woodson*, and continuing with *Lockett* and *Lockett*’s progeny, such as *Penry* and *Zant*, brought the underlying concern with proportionate punishment to the surface, and led the Court to judge penalty phase cases explicitly in terms drawn from the theory of punishment.

The difficulty is that the Court has not done this very well. When the Court has employed the theory of punishment in the constitutional regulation of death sentencing, it has done so tentatively, and with a poorly conceived terminology. A fully coherent body of death sentencing law requires not only the termination of *Furman-Gregg* as a distinct line of authority, but also the adoption of a more sophisticated approach to the core Eighth Amendment value of proportionality. I propose to pursue this diagnosis and course of treatment in the remainder of this Article.

### III. Fault and Eligibility Distinguished

Sandra Lockett raised three points in mitigation, all of which bore on her culpability for the murder in which she was involved and all of which the Court believed ought to have been considered by the jury in some fashion, before it imposed a death sentence. These three mitigators fall into two groups. Her not having an intent to kill and her minor role as an accomplice are mitigators which can be translated into converse forms, as offense elements or aggravating factors. The matter of her age is a mitigator which does not have any such converse forms. This distinction between kinds of mitigators has profound implications, because it indicates an ambiguity in the concept of culpability—the concept which, more than any other, has guided the Court’s thinking on the constitutional adequacy of the penalty phase. This Part will further distinguish these two strains of culpability, and will explicate them in ways that will prove helpful in resolving the muddles into which the Court’s Eighth Amendment jurisprudence has fallen.

The two strains of culpability that the Court has failed to distinguish are fault in wrongdoing and eligibility for punishment according to capability. In Lockett’s case, for example, her lack of an intent to kill and her minor role as an accomplice were matters of fault; her age was an eligibility concern.

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However, let me defer further discussion of these concepts in relation to the *Lockett* case or death sentencing, in favor of a more general approach.

Fault in wrongdoing is an inference from the particular manner or circumstances of wrongdoing that provides an affirmative, justifying reason to punish the wrongdoer, above and beyond the reasons provided by the bare conduct or harm of the wrongdoing itself. In other words, to find fault is to say not only that it is just to punish the wrongdoer, but also that to fail to punish him would be unjust. Fault traditionally has been conceptualized as mens rea, and usually is framed in terms of intentional-states on the occasion of wrongdoing. A presumption exists that the accused is not at fault, and the state bears the burden of proving that he is at fault. Fault, unlike eligibility, is an element of the criminal offense. The absence of fault results in a failure of proof.

Eligibility for punishment is a question of the rationality of punishing the defendant in light of her capacity for criminal wrongdoing. In order to be eligible for punishment, the accused must have been capable of the alleged wrongdoing, in the sense that she had power or control over the actions in question. The accused is not capable in this sense, and is not eligible for punishment, if she is insane, if she is an infant, if she acted involuntarily.

142. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 34(b) (1984).

143. Id. § 22 (describing the defenses of mistake, intoxication, and diminished capacity as failure of proof defenses, which involve the negation of a required fault element of the offense).

144. The so-called "involuntary act" requirement for crime is typically categorized as "actus reus" instead of "mens rea," and so might seem to be out of place here. However, the term "involuntary act" is itself a confusion, because the act requirement for crime and the voluntariness requirement for crime are two different things. DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 91 (1987) ("Hence definitions of actus reus that include voluntariness become confusing at best and useless at worst."). Cf. George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1444 (1994) (distinguishing the question of act versus omission from the question of human agency). The criminal act is a normative category, not a natural kind. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1651 (1994). It is clarifying, then, to conceive of the criminal act as any behavior that violates a criminal prohibition, and to consolidate the question of voluntariness with other such questions in the category of eligibility and excuse. See, e.g., *id.* (arguing that the significance of unconsciousness for criminal responsibility should be assessed as a matter of excuse rather than as a matter of the existence of a criminal act). For these reasons, I treat involuntariness as a matter of eligibility.

For example, if a bystander on a beach fails to save a drowning child because he chooses not to do so, then he has not committed a criminal act, but his behavior is voluntary within the meaning of the criminal law: he exercised his will when he chose not to save the child. If a state-employed lifeguard who is presently on duty behaves exactly like the bystander on the beach, then she has committed a crime, because her duty converts her omission into a criminal act, and she also behaved voluntarily when she chose not to save the child. Suppose, however, that this lifeguard does not act to save the child, but she is incapable of choosing whether or not to do so because she has been drugged against her will and without her knowledge. In this case, her omission is still a criminal act, but she will be excused on the ground that her involuntariness makes her ineligible for punishment in a just system of punishment.
and so on. A presumption exists that the accused has ordinary human capabilities and is therefore eligible for punishment, and the accused bears the burden of proving otherwise.\footnote{Leland v. Oregon, 343 U.S. 790, 799 (1952).} The term “excuse” denotes ineligibility for punishment on grounds of incapability.\footnote{ROBINSON, supra note 142, § 25(b) (“Each of these excusing conditions will give the actor a defense, so long as the condition has been caused by the actor’s disability.”).}

I explicate fault and eligibility in more detail below, in Sections III.A. and III.B., respectively, and summarize the differences between them in Section III.C. I will use these concepts to frame a conception of proportionality in Part III.D. Part IV applies this set of concepts to the leading death penalty cases and to the basic issues concerning mitigation and aggravation that I discussed in Part I, Section B, and also to five fundamental issues in the Court’s Eighth Amendment jurisprudence.

A. Fault as an Aspect of Wrongdoing

The word “culpability” often is used indiscriminately to refer to two different features of crime. One kind of culpability, unlike the other, is an aspect of criminal wrongdoing and is defined in relation to particular offenses. “Fault” is a more precise term for this kind of culpability because it accords with our ordinary usage. When we say that someone is at fault in some matter, we mean both that she has done something wrong and that she is to be blamed and possibly punished for it. And yet we find no difficulty in separating wrongdoing from fault when it is clear that blame and punishment for the wrongdoing are not warranted. If I run a stop sign and ram your car broadside at an intersection, then I will (if I am honest) get out of my car and say “My fault,” meaning both that I ran the stop sign and that there is nothing in the manner or circumstances of my doing so that makes me undeserving of blame and possibly punishment. But if my view of the stop sign and the street from which you entered the intersection are totally obscured by overgrown bushes, then I will not concede fault, even if I will concede wrongdoing, \textit{i.e.}, that I did run the stop sign and ram your car.

In most instances of its use, the word “culpability” means fault. Consider the “Kinds of Culpability” that are listed in Model Penal Code’s section 2.02(2): purpose, knowledge, recklessness, criminal negligence.\footnote{MODEL PENAL CODE § 2.02(2) (1985).} The culpability to which this section refers is fault, because this culpability is
defined in relation to the elements of a criminal offense. For example, the first three of these kinds of culpability are intentional-states. Obviously, none of these intentional-states standing alone describes a kind of culpability. To act with a purpose with respect to a result or circumstance is to act with the objective of bringing it about.\footnote{148} If I pat my baby's back with the objective of raising a burp, then I act with a purpose, but I do not act culpably. In order to act culpably, I must act with a purpose to bring about a result or circumstance that constitutes a crime. A purpose to kill is a culpable mental state, whereas a purpose to burp a baby is not a culpable mental state. The difference is that wrongdoing is involved in the former case, but not the latter. This strain of culpability which is an aspect of wrongdoing is more precisely termed fault.

To isolate fault within the concept of culpability and to recognize that fault is an aspect of wrongdoing produces a number of benefits, analytically speaking. Not the least of these benefits is the recognition that fault is not always indicated by an intentional state on the occasion of action. We infer fault from the particular manner and circumstances of the defendant's wrongdoing. A discrete intentional state is only one such aspect of wrongdoing, only one indicator of fault, and it is not always present.

Consider strict liability and the usual definition of it as criminal liability which is imposed without proof of a culpable mental state. Some cases in which a defendant is convicted of a crime without proof that he acted with a particular intentional state are genuine cases of liability without fault.\footnote{149} These cases are troubling because punishment that is imposed without regard to desert seems, and is, unjustified. However, we can easily identify many other cases in which the accused is convicted without proof of an intentional state on the occasion of wrongdoing, but in which the defendant clearly is at fault and clearly does deserve punishment. A drunken rapist might have no fixed intentional state regarding his victim's non-consent. He might not even recognize her non-consent, no matter how forcefully she expresses it.\footnote{150}

\footnote{148. Id. § 2.02(2)(a).}
\footnote{149. See, e.g., United States v. Dotterweich, 320 U.S. 377 (1952) (convicting the president and general manager of the corporation of misbranding drugs sold by the company).}
\footnote{150. For example, suppose that a defendant claims that he genuinely believed that the victim of his rape, his friend's wife, had consented to have sex with him. The defendant claims that he and his friend were extremely drunk, and his friend persuaded him that the friend's wife was "kinky," and that she would be "turned on" by being raped. In light of these representations, the defendant interpreted the victim wife's overt refusals and resistance to intercourse as consent. On an intentionalist construction of mistake and fault, this defendant is entitled to an instruction to acquit because (if the jury believes his story) the defendant lacked a mental state of purpose, knowledge, or recklessness regarding the victim's non-consent to intercourse—an essential element of rape. But this defendant is nevertheless at fault, and his fault lies in the combination of his
However, to say that such a rapist is not at fault and does not deserve punishment is absurd. The fault of the drunken rapist is inferred from the particular manner and circumstances in which the crime was committed. In cases such as this, we can see that fault is an aspect of the defendant’s wrongdoing, and that intentional-states are only one such aspect of this wrongdoing.

The question of non-intentional fault is especially pertinent to the analysis of the penalty phase of a capital trial because the fault in capital murder characteristically is non-intentional fault. The extreme fault of capital

particular circumstances, including: his severe voluntary intoxication; his poor choice of friends; his evident ability to make himself believe whatever he finds it convenient to believe; and a general moral obtuseness, as evidenced by his failure to perceive not only a woman’s genuine resistance to forced sexual intercourse, but also the fact that even a simulated rape is an act degrading to human dignity. Were he denied a jury instruction to acquit based on his lack of any intentional state regarding non-consent, to affirm his conviction would nevertheless be consistent with reason and justice. See Regina v. Morgan, 1976 A.C. 182 (H.L. 1976) (appeal from the English Court of Appeals), 203-04 (Lord Cross), 214-15 (Lord Hailsham), 237-39 (Lord Fraser) (affirming rape convictions of several British military officers on these facts, citing the Criminal Appeal Act, 1968, c. 19, §2(1) (Eng.), and authorizing the affirmance of convictions in spite of error when not inconsistent with justice)).

151. This view of fault makes a case such as Montana v. Egelhoff much less alarming than it might otherwise be. 518 U.S. 32 (1996). Egelhoff holds that due process permits a state to bar evidence of intoxication offered for the purpose of disproving the culpable mental states of purpose and knowledge that ordinarily are required for proof of murder. Because this rule separates murder from intentional-state culpability, some have worried that the case represents a turn toward the incapacitation of dangerous persons in disregard of fault or desert—with disastrous implications for the values of liberty, autonomy, and human dignity. Stephen J. Morse, Fear of Danger, Flight from Culpability, 4 PSYCHOL. PUB. POL’Y. & L. 250, 251-52 (1998). This might be so if the departure from proof of intentional-states necessarily entailed criminal liability without fault, a transfer of culpability between distinct offenses, or major criminal liability for the minor culpability of negligence. But non-intentional fault need not entail any of these things. Fault as a reflection of the quality of the offender’s practical reasoning can be denoted either by an intentional state or by some other aspect of the manner and circumstances of the crime. As I explain elsewhere, this conception of fault is perfectly consistent with a liberal legal order and the rule of law. Huigens, Deterrence, supra note 7, at 982-84 (regarding Egelhoff), 1031-34 (regarding the rule of law objection to this conception of non-intentional fault).

152. The Supreme Court has recognized this point:

A narrow focus on the question of whether or not a given defendant “intended to kill,” however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers... [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an “intent to kill.”
murder might be evident in premeditation, but it also is likely to be evident in the murderer's status as the leader of a homicidal conspiracy, in the murders being done for money, in the murders involving multiple victims, or in any of the other non-intentional features of the crime that appear in capital punishment statutes as aggravating factors, and that purport to justify the extreme punishment of death. Historically, the inability of intentionality concepts such as premeditation to capture the full range of reasons to punish by death resulted in an unlimited discretion in juries to impose death sentences. This led in turn to the Model Penal Code's abandonment of the concept of premeditation, and its effort to define the fault that justifies death as a punishment in more objective terms. Therefore, the central task for any theory of punishment that is invoked to assist in the constitutional analysis of the penalty phase is to account for the non-intentional fault that is characteristic of capital murder.

Neither deontological nor consequentialist theories of punishment can perform this task. Difficulties over non-intentional fault are endemic to deontological theories of punishment. Following Kant, the deontologist takes Tison v. Arizona, 481 U.S. 137, 157 (1987). Tison authorizes the imposition of the death penalty for non-intentional murder, but this holding is somewhat buried in the facts of the case. In Tison, two brothers were convicted of murder and sentenced to die because they helped their father break out of prison and, soon thereafter, he killed a family of three. The Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient" to constitute fault for capital murder. Id. at 158. Recklessness is ordinarily considered an intentional state. MODEL PENAL CODE § 2.02(2)(c) (1985). But Tison does not require proof of an intentional state regarding death for a capital murder conviction. The Tison brothers did not participate in the killing, and there was no evidence that they-created a risk of death, except by helping their father to escape from prison. Tison, 481 U.S. at 141. At one point, just before the murders, the brothers were aware that their father might kill the victims, but neither the killings nor the risk that the killings might occur was attributable to conduct of the brothers at this point in time. Id. at 144. As the Tison opinion makes clear, the brothers' fault lay in the fact that they helped their father to escape at an earlier point in time, when they ought to have known that he was likely to kill. This is non-intentional fault. Cf. Andrew H. Friedman, Note, Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken, 75 CORNELL L. REV. 123, 145-50 (1989) (arguing that the Tison brothers lacked fault because their conduct was neither purposeful nor reckless).

153. Benjamin Cardozo offered this classic assessment:

If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.

BENJAMIN N. CARDOZO, What Medicine Can Do For Law, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 70, 100 (1931).

the will to be the seat of moral agency. The matter of culpability is framed in terms of modes of voluntariness, intentional-states are construed as such modes, and an intentional state on the occasion of wrongdoing is therefore held to be a necessary condition of criminal liability. However, we do not in fact limit criminal liability to cases in which an intentional state is present. We impose punishment in cases of negligence, unreasonable mistake, voluntary intoxication, switched victims, careless accomplices, felony murder, depraved heart murder, and so on.

This pattern of liability places the deontologist in a dilemma. He can embrace his counterintuitive position that a defendant such as the unreasonably mistaken rapist is not guilty, or he can embrace "arrant, bare-faced fiction[s] of the kind dear to the heart of the medieval pleader," in order to transfer intentional-states around the criminal transaction.

156. Stephen J. Morse, The "Guilty Mind:" Mens Rea, in HANDBOOK OF PSYCHOLOGY AND LAW 207, 211 (D.K. Kagehiro & W.S. Laufer eds., 1992) (describing the "just deserts" position as holding that "there is no blameworthiness unless there is an appropriate mental state such as intent or knowledge, that marks an actor's offending conduct as 'hers'"). See, e.g., Jerome Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 COLUM. L. REV. 632, 634-35 (1963) (making such an argument).
159. In cases of switched victims, or "transferred intent," if A shoots at B, intending to kill B, but A succeeds in killing bystander C instead, an apparently widespread intuition holds that A is guilty of the murder of C. The deontologist's intentional-states construction of fault dictates that A is guilty of only attempted murder in the death of B; and A is guilty of only manslaughter, probably of the negligent homicide variety, in the death of C. In order to avoid this implication and to accommodate the intuition that A is guilty of C's murder, the deontologist decrees that A's intention to murder B transfers to C. Douglas N. Husak, Transferred Intent, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 66-67 (1996). I use the term "switched victims" for this problem because the transference of intentions to fill gaps in the deontologist's theory is not limited to this particular gap.

Similarly, the deontologist's construction of fault as intentional-states implies that a severely intoxicated offender is innocent because of his severe intoxication. The Model Penal Code partially avoids this implication by means of a prohibition on proof of voluntary intoxication to negate the intentional state of recklessness, and justifies the prohibition with the transparent fiction of a "general moral equivalence" between recklessness in getting drunk and recklessness while one is drunk. MODEL PENAL CODE § 2.08 cmt. 1 (1985).

Sometimes, the deontologist's identification of intentionality with fault leads him simply to decree the existence of facts to match intentional-states. For example, suppose that a man has sex with a nine year-old girl in the belief that she is eleven. The law defines sex with a person who is younger than 10 as a class A felony, and sex with a person who is at least ten and under 12 as a class B felony. Our defendant is guilty of neither crime on a strict intentional-states construction of
difficulty with the latter option, for the deontologist, is not only that the doctrines are fictions, but that fiction cannot ground theory. Cases decided under these doctrines cannot be defended as instances of just punishment. This means that they are to be explained only as public welfare measures. But if this is conceded, then the deontologist has ceded much of the theoretical field to the consequentialist.\footnote{160}

The consequentialist theory of punishment has a different sort of difficulty in explaining cases of non-intentional fault. The consequentialist, of course, has no theoretical commitment to intentional-states as necessary conditions to criminal liability. Indeed, the consequentialist theory is open to the objection that it authorizes scapegoating, because it seems to authorize punishment where no culpability of any description is present, provided that this punishment would optimize social welfare. In response to this objection, sophisticated consequentialists, such as H.L.A. Hart, adopt the strategy of rule consequentialism.\footnote{161} They contend, plausibly, that public welfare is more likely to be optimized by a set of regular rules for the distribution of punishment. They add that these distribution rules are most likely to optimize welfare if they are premised on traditional or intuitive notions of desert.\footnote{162}

These desert-based distribution rules serve as side-constraints on punishment, and this is their first weakness. In spite of its widespread acceptance, this conception of fault suffers from a certain implausibility: in cases of culpable wrongdoing, we feel not only that to punish is justified, but also that to fail to punish would be an injustice. Fault provides a reason to punish and a justification for punishment. Its function is not limited to that of a side-constraint on punishment.

A more serious problem than implausibility lurks here. The consequentialist interprets the rule that criminal liability is limited to cases in

\footnote{160. Kant, the progenitor of the deontological theory of punishment, adamantly distinguished matters of punishment from matters of utility or welfare. KANT, supra note 42, at 141 (“The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment . . . .”). The word “eudaemonism” is from the Greek word “eudaemonia,” which is usually translated as “happiness.” Eudaemonia belongs to the realm of phenomena and cannot ground morality. See Paul Guyer, Introduction, in THE CAMBRIDGE COMPANION TO KANT 1, 10-11 (Paul Guyer ed., 1992).}

\footnote{161. See supra note 45.}

which an intentional state is present on the occasion of wrongdoing as an optimizing rule for the distribution of punishment. If and when we impose criminal liability in the absence of such an intentional state, this is interpreted as an optimizing departure from the otherwise optimizing rule. The difficulty is that there is no theoretical limit to these optimizing departures from the rule. Depending on shifting circumstances—including changes in the public's beliefs about punishment and culpability—optimizing departures from the rule that limits criminal liability to cases of intentional wrongdoing will simply swallow that rule. Like all rule-consequentialisms, this one collapses back into act-consequentialism, and the scapegoating objection is revived. If we punish a person who commits a criminal act without an intentional state, we may be doing this, not on any principled basis, but only because a majority finds it satisfying to do so.

Contrary to the deontologist, we do not limit criminal liability to cases of intentional wrongdoing; but, contrary to the consequentialist, we punish non-intentional wrongdoing on some principled basis that makes these cases cases of genuine fault. A virtue ethics theory of punishment resolves these difficulties over the explanation of non-intentional fault with a fundamentally different conception of wrongdoing and fault. Because it is able to do this, the virtue ethics theory can explain the non-intentional fault that is characteristic of capital murder. For this reason alone it presents the best means to analyze proportionality as an Eighth Amendment value in the regulation of death sentencing.

Consider the nature of criminal wrongdoing. The deontologist maintains that wrongdoing consists of violations of principle; for example, we punish because of the disparagement of another person's moral worth as autonomous beings that is implicit in any crime.163 The consequentialist maintains that criminal wrongdoing consists of the infliction of harm or, more broadly, negative utility.164 A virtue ethics theory of punishment conceives of wrongdoing as a violation of ethical generalizations. The conduct rules of the criminal law are sound practical judgments on particular matters, generalized as rules and positively adopted in legislation. The significance of harm is caught up in this generalization. Criminal wrongdoing is the violation of these legal rules.165

Fault is determined when wrongdoing is adjudicated. If the conduct rule that defines a criminal offense is premised on an ethical generalization, then

165. Huigens, Deterrence, supra note 7, at 1023-25.
the conduct rule presents an implicit demand that the accused should engage in sound practical reasoning in the circumstances in which such a crime might be committed. However, if this demand for good practical judgment and the offender's failure to comply with it are to be invoked as a justification for punishment, then no individual case can be decided under the criminal law until the ethical generalization of the conduct rule is returned to the level of particularity from which the conduct rule originated, and at which good judgment or its absence is manifest. The jury's comparison between the defendant's practical reasoning in the relevant circumstances and the sound practical reasoning that is implicit in the applicable conduct rule is an inquiry into the particular manner and circumstances of the offender's wrongdoing, as they reflect the quality of his practical judgment. Fault is an inference, drawn in the course of this adjudicative process, that the practical judgment of the accused is inadequate or flawed.

In order to draw this inference, the jury compares the conduct of the accused under the particular circumstances of the case with the conduct of a person of sound practical judgment, similarly situated. This latter conduct is inferred from the evidence and from the offense definition, because the offense definition is a generalization of sound practical judgments in the area of conduct covered by the offense. The jury's "specification" of the criminal prohibition reverses the legislature's generalization, and returns the norm to the level of particulars at which sound practical judgment or its absence is manifest.

This adjudicative determination of fault brings the justification for the criminal prohibition to bear upon the individual case of punishment in a justifying way. The inference of fault justifies his punishment, not only because of its relationship to the prohibition at issue, but more generally because the justifying purpose of the criminal law is the inculcation of sound practical judgment—a quality which is also known as virtue. This is why fault is not merely a side constraint on punishment, but also an affirmative, justifying reason to punish.

166. See infra notes 207-12.
167. One should not be put off from this theory of punishment by the colloquial meaning of the word "virtue." The virtue ethics theory of punishment is not premised on, nor does it seek to revive, a rigid traditional morality. The word "virtue" refers to self-governance at the level of motivation by means of the conscious cultivation of one's values, attitudes, and propensities. The principal characteristic of a person of virtue is sound practical judgment: the capacity to do the right thing in any given context because one perceives, values, and pursues the good as it presents itself in particular circumstances. This quality of judgment is the focus of virtue ethics, and it stands in direct contrast to a doctrine of moral duties. Huigens, Virtue, supra note 7, at 1449-56.
This analysis accounts for non-intentional fault as genuine fault. In most cases, the offender’s flawed or inadequate practical judgment is evident in an intentional state with which the wrongdoing was done. In other cases, the evaluation of the practical reasoning of the accused will turn on a broader set of facts pertaining to his wrongdoing—such as his indifference to whether his sex partner is 9 or 11 years old; or his torturing to death a victim whom he had intended to keep alive long enough to reveal information.

As we will see below, the foregoing analysis of fault is required for a full understanding, not only of aggravating factors, but also of most mitigating factors. One cannot hope to structure a constitutionally adequate penalty phase without these theoretical resources.

B. Eligibility and the Expressive Rationality of Punishment.

We usually use the word “culpability” to denote fault, but we also use it to describe a feature of punishment that is quite independent of wrongdoing. For example, when we say that an insane wrongdoer is not culpable, we do not mean that he has not committed an offense with the requisite fault—because in most cases he has done so. We mean instead that our categories of wrongdoing and fault as a whole, and the hard treatment that may follow their application, are in some fundamental sense inapplicable to his case. In order to avoid this ambiguity in the word “culpability,” we ought to speak of eligibility for punishment according to the capabilities of the offender if this—instead of fault—is what we mean.

For this purpose, the word “eligibility” is preferable not only to “culpability,” but also to “blameworthiness” and to “responsibility.” We might say that an insane person is not blameworthy. The difficulty is that the word “blameworthy” is equally apt to describe a person who deserves punishment because of the manner and circumstances of his wrongdoing, and also to describe a person who is an appropriate candidate (worthy) for the application of the concepts (including blame, fault, and desert) that regulate punishment. Similarly, the word “responsible” usually means that the agent to whom it is applied is eligible for punishment, but the language of responsibility has been prominently and deliberately mis-used, by no less a

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168. For example, if I kill a man because I believe that I am Jack Ruby and he is Lee Harvey Oswald, then I have purposely killed a human being. I have the mens rea, or requisite fault, for murder. Nevertheless, I will be excused because I am insane. In contrast, if I kill a man because I believe that I am God’s avenging angel and that he is the fallen angel Beelzebub, then I did not have a purpose to kill a human being. I will have acted without the legally prescribed kind of fault, with the result that I have a failure of proof defense of diminished capacity, in addition to my insanity excuse.
figure than H.L.A. Hart, to describe the mens rea elements of offenses which properly speaking denote fault. Furthermore, "responsibility" often is used as a synonym for "liability." This usage compounds the potential for confusion if we were also to use "responsibility" to refer to only one aspect or component of legitimate criminal liability: eligibility, or, that which is present when we do not excuse.

1. Eligibility for Punishment and Expressive Rationality

We excuse wrongdoing when the offender suffers from some incapacity or incapability, such as insanity, duress, or infancy. Incapability is a reason not to punish—to think that it would be unjust or unfair to do so. But this intuition of unfairness or injustice has to be further accounted for. The incapability that grounds excuse has been described variously as irrationality, involuntariness, the loss of control, or the absence of genuine action, free will, intention, or choice. However, these are descriptions of natural kinds or psychological categories, not norms. It is not self-evident that we ought not to punish in such cases. We want to say that it makes no sense to punish the insane offender, for example, but the important question, for present purposes, is why it makes no sense.

The standard account goes something like this. It might well be rational to punish the insane offender. Other, sane people would be as strongly deterred by this instance of punishment as by any other instance of punishment, if not more so. The sanity or insanity of the person punished has no direct bearing on the criminal law's system of incentives. However, we do not punish those who are insane when they commit crimes because social welfare is optimized if we forgo the short-term benefits of sending


170. Morse, supra note 144, at 1590-1605.

171. Jeremy Bentham, the father of consequentialist legal theory, thought that it did not make sense to punish the insane offender. He argued that punishment could not act as an incentive to a person who is unable to appreciate the threat of punishment or to conform his conduct to it. Therefore, punishment could not deter such a person and his punishment would not be justified on consequentialist (in Bentham's case, Utilitarian) grounds. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 174 (J.H. Burns & H.L.A. Hart eds., 1982). But, of course, this is a non-sequitur. Hart, supra note 45, at 19. If we punish the insane offender, then other, sane, people will be as strongly deterred by this instance of punishment as by any other instance of punishment. In fact, one could argue that the deterrent effect of the punishment of the insane would be greater than it is in the ordinary case. If legal authorities punish the insane in spite of the widespread intuition that there is something wrong with such punishments, then the legal authorities send the message that no criminal wrongdoing, by anyone, under any circumstances, will be tolerated.
this forceful deterrent message, and instead adopt a rule that accommodates the public's belief that punishment of the insane offender is unjust.\footnote{172}

There are two problems with this explanation of the irrationality of punishing the insane offender. First, it is not plausible. To judge from the public's reaction to the last high-profile insanity verdict, there is no widespread popular consensus or intuition to the effect that it is unjust to punish the insane offender.\footnote{173} If this is so, then social welfare would be optimized by the abolition of the insanity excuse, not by its creation or retention. The second, more fundamental problem with this explanation of the logic of the insanity excuse is that the argument equates rationality with optimization. The public's beliefs about the punishment of insane offenders can change, and the balance of costs and benefits that takes these beliefs into account eventually will seem to dictate the abandonment of the rule that grants an excuse from punishment. What then? If we follow the rule that excuses insane offenders, then we behave irrationally or arationally, if practical rationality requires us consistently to optimize social welfare. If we do the rational thing, then we will discard the rule and optimize social welfare by punishing the insane offender. This standard account of the insanity excuse forces us to choose between abiding by the rule and behaving rationally.

The conflict raised by this standard account of the insanity excuse should cause us to question the standard account, not the insanity excuse. The suggestion that we might require eligibility for punishment according to capability on irrational or arational grounds is attributable to the dominant consequentialism of mainstream legal theory. Consequentialism and its attendant conception of practical rationality\footnote{174} impede our understanding of eligibility as a feature of a rational system of punishment.

\footnote{172. Robinson & Darley, supra note 162, at 477-78 (advancing this explanation).}

\footnote{173. See PETER W. LOW ET AL., THE TRIAL OF JOHN HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 127 (1986) ("The Hinckley trial crystallized public discomfort with the insanity defense and its administration, and triggered legislative activity throughout the country."); Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. CAL. L. REV. 777, 779 (1985) ("The shock generated by the verdict in the Hinckley case has revived recurrent criticism and efforts to abolish or reform the insanity defense."). In response to the Hinckley verdict, the United States Congress adopted a narrow definition of the offense. 18 U.S.C. § 17(a) (1994) (excusing only for cognitive impairment, and omitting any excuse for volitional or "capacity to control" impairment). Two states abolished the insanity defense. See IDAHO CODE § 18-207 (Michie 1982); MONT. CODE ANN. § 46-16-201(2) (1999).

174. This simplified description of a complex relationship between an ethical theory and a theory of practical reasoning is accurate with respect to a simple consequentialism, such as economics, but perhaps less so with regard to more sophisticated consequentialist theories. See Justin Oakley, Varieties of Virtue Ethics, 9 RATIO 128, 128 (1996) (describing varieties of consequentialism that assume different conceptions of value and practical reasoning). However, my
When we analyze the law, we make certain fundamental assumptions about practical reasoning; that is, about the nature of value, the nature of a rational response to value, and the nature of motivation to action. In this regard, consequentialism in one form or another has dominated Anglo-American legal thought for at least the last one hundred years. Consequentialism of any variety assumes that value is a single thing that can be optimized across all practical contexts; that reason requires us always to optimize value; and that action is motivated by non-cognitive desires. One sees the consequentialist conception of practical rationality everywhere, from Holmes's invocation of "the bad man" to the current prestige and influence of law and economics. It is audible in the foregoing standard analysis of the insanity defense, in that argument's references to the criminal law's system of incentives and to the optimization of social welfare.

However, alternative conceptions of practical rationality have always been available. For example, Kantian deontology, which is characterized in part by a cognitivist conception of value and motivation, has never ceased to play a major role in the theory of punishment. Recently, another alternative conception of practical rationality, commonly known as the theory concern is not with philosophical consequentialism, but with the naive consequentialism that is pervasive in Anglo-American legal and popular thought, and its instrumentalist, non-cognitivist conception of practical rationality. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 379-80 (1989) (Scalia, J.) (describing judicial decisions about the proportionality of some death sentences as "subjective").

175. Huigens, Deterrence, supra note 7, at 994-97.
176. See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . . .")
177. For example, Nobel laureate Gary Becker writes:
The economic approach to human behavior is not new, even outside the market sector. Adam Smith often (but not always!) Used this approach to understand political behavior. Jeremy Bentham was explicit about his belief that the pleasure-pain calculus is applicable to all human behavior: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. . . . They govern us in all we do, in all we say, in all we think."

BECKER, supra note 164, at 8 (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1963) [1781]).
179. Brudner, supra note 8, at 29; Duff, supra note 46, at 7. See, e.g., Hampton, supra note 163, at 1667 (invoking the support of Kant's theory of moral worth in a retributive theory of punishment).
of expressive rationality, has gained currency in legal scholarship. In connection with the criminal law, the expressivist conception of practical rationality implies an Aristotelian or virtue-ethics theory of punishment that is distinct from both the deterrence theory of the consequentialist and the retributive theory of the deontologist. If we frame the question of eligibility for punishment in terms of expressive rationality and the virtue ethics theory of punishment, then we see the sense in which eligibility is a matter of the rationality of punishment.

In contrast to the consequentialist conception of value as something monistic or homogeneous, the expressivist conception of practical rationality portrays value as something plural, because value is strongly determined by the context in which it occurs. Value has an affective component; we value or disvalue objects according to our emotional responses to them. But value also has a cognitive component, because neither emotion nor valuation is reducible to raw feelings. Emotions have propositional content; appropriate and inappropriate occasions; and intelligible and unintelligible manifestations. We rationally reflect on the propriety of our emotions, and


181. Huigens, Deterrence, supra note 7, at 1015-36.

182. Sunstein, Incommensurability, supra note 180, at 784-85.


we take deliberate, effective steps to alter our emotional propensities. Because our valuations cannot be severed from these cognitive features of emotion, value is dependent on practical context. Because human life is rich in distinct practical contexts—boating safety, spiritual quests, investing in municipal bonds—the appropriate occasions and intelligible manifestations of emotion are manifold and various. Value is plural, not monistic, because valuation consists of these context-specific affective-cognitive responses.\(^{186}\)

The expressivist portrays rational response to value in correspondingly plural terms. Depending on the practical context in which value arises, the rational response to value might be to honor or express it, in ways that are not reducible to optimization.\(^{187}\) Indeed, the valuation which is premised on a particular emotion might have no existence apart from the conduct which is the distinctive manifestation of that emotion on its proper occasion. For example, if I go to visit a friend in the hospital, and explain that I have come to see him because this visit optimizes social welfare, quite apart from our shared history and emotional ties, then he will rightly conclude that I have misunderstood either my own motivations or the nature of friendship.\(^{188}\) In this light, to treat optimization as the unique rational response to value is a mistake.\(^{189}\) Optimization may or may not be the response which the value in question calls forth.\(^{190}\)

Within an expressivist conception of practical reason, motivation to action is far more than an impulse of desire. One non-optimizing response to value

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185. GAUS, supra note 183, at 31-34.
186. Id. at 25; see also ANDERSON, supra note 180, at 55-59.
189. The consequentialist ordinarily will concede that his representation of practical reasoning is not a perfect representation, but he will contend that it is a sufficiently accurate representation. This elicits the question, sufficient for what? Surely it cannot be sufficient for normative governance in all practical contexts. The limitations of the consequentialist's account of practical reasoning necessarily limit his theory's normative range. ANDERSON, supra note 180, at 129-40 (arguing that consequentialist's rational choice theory tracks reliable judgments of value only because it is parasitic on the expressive theory); Sunstein, Incommensurability, supra note 180, at 820-24 (describing the distorting effects on normative questions of the assumption that value is homogeneous or monistic). But cf. Fred S. McChesney, Desperately Shunning Science? 71 B.U. L. REV. 281, 281 (1991) ("Economic methodology is thoroughly general and applicable to any subject.").
190. See Swanton, Satisficing, supra note 188, at 40.
is the integration of the value into one's identity.\textsuperscript{191} This integration occurs at a basic affective level.\textsuperscript{192} We engage in rational reflections on the propriety of our emotional responses, and as we attempt to form and maintain a coherent personal identity, reflections such as these form ongoing deliberations on value and on our ultimate ends in light of these values. When we take steps to alter our emotional propensities in accordance with these deliberations on value, we engage in the rational construction of our motivations.\textsuperscript{193} For example, my annoyance at my children for interrupting me when I work at home might tip me off to the fact that I am allowing my role as a lawyer to overwhelm my role as a father, in contradiction to my deeply held beliefs about the relative value of these roles to me and to society. I might consciously prolong these interruptions in the future, giving my children my full attention, in order to allow my love for them to dispel my annoyance in the short term and to re-order the distribution of my time and energies away from work and toward my family in the long term.

This view of motivation contradicts Hume's dictum that: "Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."\textsuperscript{194} Hume's non-cognitivist conception of value and motivation continues to dominate Anglo-American legal thought.\textsuperscript{195} In this light, the expressivist conception of motivation might be

\textsuperscript{191} For example, if I devote my life to relieving human suffering in a poor country, and a government soldier tells me that either I will kill one villager or his platoon will massacre the entire village, it is not perfectly obvious—as the consequentialist would have it—that to kill the villager is the rational thing for me to do. It is also rational for me to seek integrity between my actions and my standing motivations. Bernard Williams, \textit{A Critique of Utilitarianism}, in \textit{UTILITARIANISM, FOR AND AGAINST} 98-99, 108-18 (1973).

\textsuperscript{192} GAUS, \textit{supra} note 183, at 300-06 (describing the acquisition of a disposition to act for moral reasons at the level of emotional response).

\textsuperscript{193} ROBERT AUDI, M\textsc{oral} K\textsc{nowledge} AND E\textsc{thical} C\textsc{haracter} 157-73 (1997) (describing control over and responsibility for character traits); MICHAEL SMITH, THE M\textsc{oral} PROBLEM 165-75 (1994) (describing the deliberate acquisition of dispositions as part of a neo-Humean theory of motivation); BERNARD WILLIAMS, \textit{Internal and External Reasons}, in \textit{M\textsc{oral} L\textsc{uck}: P\textsc{hilosophical} P\textsc{apers} 1973-1980}, at 101, 104 (1981) (describing deliberations over and adjustments to one's "motivational set" as part of a neo-Humean conception of motivation).

\textsuperscript{194} DAVID HUME, A TREATISE OF H\textsc{uman} N\textsc{ature}, bk. II, pt. III, § III, at 415 (L.A. Selby-Bigge & P.H. Nidditch eds., 2nd ed. 1978).

\textsuperscript{195} For example, Richard Epstein writes:

\[E\text{ven though we might not be able to explain why certain individuals value certain goods, we can still say that ceteris paribus they prefer more of those goods to fewer, although after some point, additional utility from an additional unit of good will start to decline. It therefore becomes relatively easy to explain the relationship between changes in behavior and changes in the various quantities of available goods, even if some ultimate mystery surrounds the fact that certain goods have positive value in the first place.}\]
the most significant of the three features of the expressivist conception of practical rationality discussed here. It permits us to view human action as more than a product of non-cognitive appetites and passions; and to view practical rationality as more than the instrumental matching of means to satisfactions.\textsuperscript{196} It enables us to premise law on a conception of the person as the causal agent of her identity, capable of deliberating on the standing motivations that constitute her character.\textsuperscript{197}

2. Eligibility as Expressive Rationality

If we frame the principal question in the theory of punishment in terms of the expressivist conception of practical rationality, then we see eligibility as a matter of the rationality of punishment in light of the capabilities of the wrongdoer—and do so in a way that genuinely preserves and explains our rule against the punishment of the insane offender.

Justified punishment is a response to wrongdoing and fault, and we can distinguish three lines of explanation for justified punishment. For the consequentialist, the justification of punishment is to be found, of course, in its consequences. These include not only deterrence, but also incapacitation, and also some effects that have an "expressive" dimension.\textsuperscript{198} Punishment functions as a concrete declaration of the criminal law, and in this light it serves both to publicize the law and to provide an effective but appropriately formal catharsis for the outrage that the public often feels over violations of the law. According to the consequentialist, all of these effects and functions of punishment serve to justify it, because and to the extent that each of them contributes to a net gain in social welfare.

For the deontologist, only one function or effect of punishment serves to justify it. The infliction of just deserts, or retribution, serves to rectify the

\textsuperscript{196} ANDERSON, supra note 180, at 132-40 (describing the effects on motivation of reflections on value, and contrasting this with consequentialist accounts of motivation). Self-governance at the level of motivation is a central feature of virtue ethics in the Aristotelian tradition. \textit{See} M.F. Burnyeat, \textit{Aristotle on Learning to be Good, in ESSAYS ON ARISTOTLE'S ETHICS 69, 74-80} (Amelie Oksenberg Rorty ed., 1980).

\textsuperscript{197} See, e.g., Huigens, \textit{Deterrence, supra note 7, at 1028-31} (describing criminal fault in virtue ethics terms).

\textsuperscript{198} Kahan, \textit{Alternative Sanctions, supra note 180, at 597}. \textit{But see} Huigens, \textit{Deterrence, supra note 7, at 987-1016} (criticizing Kahan's invocation of expressive rationality in support of a consequentialist theory of punishment).
situation created by the offender, and to bring human relationships back into line with categorical principle.\textsuperscript{199} The way in which just punishment does this, of course, has received a wide variety of treatments,\textsuperscript{200} but the paradigmatic deontological theory of punishment holds that to punish the offender is an imperative, categorical duty upon the other members of society.\textsuperscript{201}

Under the theory of punishment which draws on an expressivist conception of practical rationality, the punishment of the offender also is a requirement of principle, but of practical rather than categorical principle. Under a virtue ethics theory, punishment is a justified response to wrongdoing and fault\textsuperscript{202} because it is the response that a person of sound practical judgment would have.

We know at least two things about how a person who is wise in practical matters responds to wrongdoing. First, she responds to it intelligently and not unemotionally in a way that will, among other things, forestall any repetition of the wrongdoing. Hard treatment as punishment for crime fits this description. Second, in light of the harshness and gravity of this response to wrongdoing, the practically wise person commits this project to a framework of legal rules, in order to prevent its being carried out in an \textit{ad hoc} and \textit{ad hominem} fashion.\textsuperscript{203} Retaliation and revenge are no more a part of the justification of punishment under a virtue ethics theory than they are under a deontological retributive theory of punishment.\textsuperscript{204}

We can surmise a third feature of the practically wise person's response to wrongdoing. Her grasp of the nature of her own virtue as self-governance at the level of motivation would prompt her to seek the adoption of legal rules that forestall the repetition of the wrongdoing in a particular way. In order to affect another person's behavior, it is not enough to write rules and insist that they be obeyed. Nor is it enough to provide incentives within a system of rules, in a way that takes advantage of the motivations that people happen to have. In order truly to affect behavior, one must shape motivation itself, and an effective legal system can hope to forestall wrongdoing only if it reduces or eliminates the motivation to engage in wrongdoing.\textsuperscript{205}

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\textsuperscript{199} KANT, \textit{supra} note 42, at 140-45.
\textsuperscript{200} Duff, \textit{supra} note 44, at 51-53.
\textsuperscript{201} See \textit{supra} note 42 (referencing Kant on the categorical duty to punish).
\textsuperscript{202} On the relationship between fault and wrongdoing see Huigens, \textit{Deterrence, supra} note 7, at 1027-31. See also \textit{supra} notes 165-167 and accompanying text; \textit{infra} note 275 and accompanying text.
\textsuperscript{203} Huigens, \textit{Deterrence, supra} note 7, at 1030-34.
\textsuperscript{204} \textit{Id.} at 1024.
\textsuperscript{205} \textit{Id.} at 1024-27. This point is recognized even by consequentialists in the theory of punishment. See e.g., Kenneth G. Dau-Schmidt, \textit{An Economic Analysis of the Criminal Law as a}
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the principal functions of the criminal law—the way in which it deters wrongdoing—is to bring about and to guide rational self-governance at the level of motivation.206

This function of the criminal law is the inculcation of virtue, as Aristotle conceived of it: the deliberate cultivation of character toward the propensity to do the right act in any given situation—not only because one knows the right thing to do, but because one values the right ends.207 The several effects of punishment—the deterrence of wrongdoing as a matter of instrumental reasoning on the occasion of action; the publication and concrete exhibition of legal norms in the public trial of cases; the visceral effect of public catharsis over wrongdoing—are not justifying effects of punishment because they promote a generic social welfare. These effects of punishment are integral parts of the criminal law’s project of fostering rational self-governance at the level of motivation, or the inculcation of virtue.208


206. Model Penal Code § 2.09 cmt. 1 (1985) (“No less important, legal norms and sanctions operate not only at the moment of climactic choice, but also in the fashioning of values and of character.”).


208. The notion that law inculcates virtue has an ominous ring of brainwashing or subliminal conditioning to it, but such fears are prompted mostly by the prevailing habit of thinking of motivation in non-cognitive terms. The law can govern us at the level of motivation without being illiberal or oppressive, because motivation, like the emotions that constitute it, is a cognitive as well as an affective response to value, and because the virtues are, accordingly, cognizably, articulable, and defeasible reasons for action. Burnyeat, supra note 196, at 74. The content and binding force of these norms can be intelligently debated, and they can be intelligently adhered to, modified, or abandoned. Id. at 76, 80. The inculcation of virtue is not only a matter of living according to the virtues until they have become second-nature, as Aristotle prescribed. Id. at 77. It is also a matter of understanding the point of the virtues; of apprehending the connection between certain kinds of conduct and one’s welfare within a community. See Aristotle, supra note 141, at bk. II, ch. 1, §§ 1103a-1103b; bk. II, ch. 4, §§ 1105a-1105b, bk. X, ch. 9, §§ 1179b-1180a; see also Burnyeat, supra note 196, at 69, 74. A person who acquires the virtues maintains an internal debate about the requirements of virtue in particular practical contexts throughout the remainder of his life. See Aristotle, supra note 141, at bk. I, ch. 3, § 1094b, bk. II, ch. 2, § 1104a, bk. II, ch. 4, § 1105a, bk. V, ch. 10, §§ 1137b, bk. VI, ch. 7, §§ 1141b-bk. VI, ch. 9, § 1142b, bk. VI, ch. 12, § 1144b, bk. VI, ch. 13, §§ 1144b-1145a, bk. IX, ch. 2, § 1165a. This is even more true if the capacity to
The criminal law's requirement of eligibility for punishment according to personal capabilities can be represented as a fourth feature of the practically wise person's response to wrongdoing. No virtuous man or woman would punish the insane offender, for example, because to punish a person who has no capacity to comprehend or to respond to the criminal law would be to commit a pointless act of brutality. If punishment is expressive and if the expressive features of punishment serve to inculcate virtue, then punishment must be intelligible to the offender. The offender who lacks the capacity rationally to construct a character in light of deliberations on his standing motivations because he is insane is simply outside the reach of the criminal law's method of rational governance. The offender for whom punishment is unintelligible is ineligible for punishment because she is incapable of taking part in the project with which the criminal law is concerned.

This is not to say that the punishment of the insane offender would not be effective in the inculcation of virtue in others. It might be so. Indeed, if we broaden our view of the eligibility requirement to include cases of duress, infancy, and involuntariness, then we can see that the punishment of these offenders might serve to inculcate virtue in them: given that they will not always be under duress, immature, or in an involuntary state, they could well take punishment's lesson into account in the cultivation of their ends and motivations in the future. But if the criminal law tracks the choices of the practically wise person, then the question whether the punishment of an insane or otherwise incapacitated offender would be effective in the inculcation of virtue as a consequence is beside the point.

In the ongoing project of the criminal law, we are concerned not only with the virtue of offenders and potential offenders, but also with the virtue of the punishing majority. The project of the criminal law is not the optimization of virtue as such—as an ingredient in, or for the sake of generic social welfare. The criminal law's inculcation of rational self-governance at

think critically is considered one of the virtues; and we have every reason to believe that critical thinking is considered a virtue and can be taught as such in a modern liberal democracy. In short, the accusation of "brainwashing" against a criminal law which inculcates virtue is wildly off the mark.

209. Huigens, Deterrence, supra note 7, at 950-52.
210. Id. at 975.
211. See Huigens, Virtue, supra note 7, at 1445-49.
212. The deontological morality of the retributive theory of punishment represents the requirement that the criminal law produce its effects by intelligible means as a categorical imperative to respect the autonomy of the person. FRED D. MILLER, JR., NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS 131-39 (1995). But we need not be persuaded that unaided reason imposes categorical imperatives in order to value respect for personal autonomy as a virtue—as a practical principle that can be inferred from the experience of previous generations. Id. at 137-38.
the level of motivation is part of a more comprehensive process of the deliberate, ongoing construction of social life in the conduct of practical affairs.213 When, in our collective legal capacity, we consider whether or not to punish an individual, we are concerned, not only with the offender’s practical judgment and his set of standing motivations, but also with our own judgments, motivations, and characters, both individually and as a society. To punish an offender whose practical judgment simply was not engaged and is not implicated in his wrongful act would define us, the punishing majority, in a way that ultimately would prove self-defeating.214 We will not punish in some cases even if it might be effective to do so, if to punish in this way would make us a brutal society instead of an enlightened one.

For example, take the paradigm case of the insane offender. The punishment of such a person would be unintelligible to her: she could not draw any appropriate lesson from punishment or apply it to the project of cultivating her standing motivations. This kind of punishment—regardless of the actual intelligibility or effectiveness of punishment in individual cases—is one which the practically wise person would disdain. Punishment that is unintelligible to the offender can produce its good consequences only by force. If motivation were to be affected at all by an unintelligible punishment, this effect could amount to nothing more than subliminal conditioning, instead of the inculcation of virtue—the difference being that the latter involves the deliberate incorporation of cognizable, articulable, and defeasible reasons for action into one’s standing motivations.215

To impose unintelligible punishments routinely and systematically as a standard feature of our criminal law would define us not only as a brutal and uncompassionate society, but also as a society oblivious to the value and devices of rational self governance. Not to adopt standing rules that will excuse the incapable offender would be an irrational act on our part, in our collective capacity as the punisher—unless, of course, we wish to make ourselves a brutal, uncompassionate, and manipulative people.

This is the expressive rationality of the eligibility requirement. A defendant’s eligibility for punishment is a matter of social self-definition in our collective rational response to the highly distinctive disvalue of criminal wrongdoing. We do not punish the insane offender, not only because of what such punishment would say about us, but because of what it would make us.

214. Id.
215. See supra note 208.
One way to look at this conception of punishment is to note that it takes the Eighth Amendment "evolving standards of decency" test quite seriously. Decency is a virtue—a character trait, a quality of practical judgment that combines compassion for others and respect for oneself. As is the case with all virtues, the requirements of decency are context-dependent.\(^{216}\) We state this norm in terms of a character trait precisely because we cannot state it as a rule.\(^{217}\) Because of this context-dependency, the requirements of virtue evolve in response to changing circumstances. This means that it might be difficult to say, at a given point in history, in a particular practical context, what our evolving standard of decency requires. But we often do need an answer to this question and it often happens that this need arises in the morally hazardous matter of punishment—as it does when we must decide whether or not to punish an insane offender or to execute a particular murderer.

If this kind of limitation on punishment is included in our Constitution, then we must be able to commit questions such as this to the Supreme Court for an authoritative determination. When we do this, we hope, at a minimum, that the Court will understand what it is that we require from them—that they will not utterly misunderstand the question, deem all answers "subjective," and refuse to respond.

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\(^{216}\) Consider David Wiggins's description of context-dependency in Aristotelian virtue: No theory, if it is to recapitulate or reconstruct practical reasoning even as well as mathematical logic recapitulates or reconstructs the actual experience of conducting or exploring deductive argument, can treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system. For it is of the essence of these concerns to make competing and inconsistent claims. (This is a mark not of irrationality but of rationality in the face of the plurality of ends and the plurality of human goods.) The weight of the claims represented by these concerns is not necessarily fixed in advance. Nor need the concerns be hierarchically ordered. Indeed, a man's reflection on a new situation that confronts him may disrupt such order and fixity as had previously existed, and bring a change in his evolving conception of the point (to \(\text{hou heneka}\)), or the several or many points, of living or acting.

David Wiggins, *Deliberation and Practical Reason*, in ESSAYS ON ARISTOTLE'S ETHICS, supra note 196, at 221, 233 (footnote omitted).

\(^{217}\) Rosalind Hursthouse wisely cautions that, in evaluating ethical theories, we should avoid treating it "as a condition of adequacy, that any adequate action-guiding theory must make the difficult business of knowing what to do if one is to act well easy, that it must provide clear guidance about what ought not to be done which any reasonably clever adolescent could follow if she chose." Rosalind Hursthouse, *Virtue Theory and Abortion*, reprinted in VIRTUE ETHICS, supra note 6, at 217, 223-24.
C. Fault and Eligibility Distinguished

Fault is difficult to distinguish from eligibility because fault is also a matter of expressive rationality and a limitation on just punishment.\(^{218}\) Just punishment cannot be inflicted where fault is absent, but not because there are no good consequences to be achieved by doing so (the existence of regulatory strict liability offenses tells us otherwise) nor because it is optimal in terms of welfare effects not to do so.\(^{219}\) We treat fault as a necessary condition on just punishment because it would not be expressively rational to punish a person whose actions do not evince poor or inadequate practical reasoning. If the inculcation of virtue, or rational governance at the level of motivation, is one of the principal functions of punishment, then it would be incoherent—even if it might be consequentially effective—to punish one whose actions do evince sound practical judgment, even when these actions constitute criminal wrongdoing.

However, fault is unlike eligibility in at least three respects. First, fault is not only a necessary condition for punishment, but is also an affirmative, justifying reason to punish.\(^{220}\) That is, fault is not only a reason to think that punishment in a given case is just, but also a reason to think that to fail to punish would be unjust. The offender’s poor or inadequate practical judgment that a finding of fault reveals gives us cause to invoke the deterring, incapacitating, retributive, condemnatory, and rehabilitative functions of punishment. Eligibility, in contrast, is only “a necessary condition for punishment.”\(^{221}\) We do not suppose that a person’s being possessed of ordinary capabilities is an affirmative, justifying reason to punish him. Such an assumption contradicts the presumption of innocence.\(^{222}\)

Second, fault is a matter of character. The question is whether the offender’s conduct demonstrates the absence of virtue; that is, a failure to govern himself by the acquisition of a set of standing motivations that gives a due regard to others. Eligibility, in contrast, is a matter of capabilities. The question is whether the offender exhibits an inability to govern himself by the

\(^{218}\) Consequentialist theories of punishment recognize only this side-constraint function of fault, which leads them to conflate fault with eligibility under the rubric of “culpability.” See supra note 8.

\(^{219}\) If the optimization of welfare were the reason that we recognize fault as a side-constraint on punishment, then we would eventually face a choice between continued adherence to this rule and the abandonment of this rule when changed circumstances make adherence to the rule irrational in optimizing terms. We should abandon the consequentialist’s conception of practical reasoning before we abandon the practice of requiring fault for criminal liability. See supra note 173 and accompanying text (making the same argument regarding the insanity excuse).

\(^{220}\) Huigens, Deterrence, supra note 7, at 951.

\(^{221}\) Id. at 952.

\(^{222}\) See generally In re Winship, 397 U.S. 358 (1970).
acquisition of a set of standing motivations that gives a due regard to others. If an offender is in a condition that renders him unable to develop his character, unable to acquire and maintain a proper set of ends, then he is outside the criminal law's project with respect to virtue, and it would be expressively irrational to punish him.\textsuperscript{223}

Third, fault is an aspect of wrongdoing, and eligibility is not. The rules that govern eligibility for punishment according to capability are not correlated to the criminal law's conduct rules.\textsuperscript{224} Eligibility concerns are manifested, doctrinally, in the excuses, whereas the defenses which turn on the terms and scope of the criminal law's prohibitions are justifications, such as self-defense, and failure of proof claims, such as mistake and diminished capacity.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{223} This distinction does not correspond to a distinction between features of the crime and features of the criminal. \textit{See supra} note 111. As a corollary, it is possible that some features of the criminal that ordinarily are relevant to eligibility will sometimes be relevant to fault. For example, some statutory rape definitions use the age of the defendant as an element of the offense in order not to criminalize consensual sexual conduct between young peers. \textit{See, e.g.}, \textsc{Wash. Rev. Code} \textsection 9A.44.070 (1983) (defining Statutory Rape in the First Degree as sex involving a defendant who is greater than 13 years old and a victim who is less than 11 years old). This age element can be read as a non-intentional fault element. A great disparity in age between the defendant and the victim is something in the manner and circumstances of the crime that evinces poor or inadequate practical judgment, and that serves to justify punishment in the individual case. \textit{See supra} notes 165-67 and accompanying text; \textit{infra} note 275 and accompanying text. This is a different use of the defendant's age from that which was at issue in \textit{Lockett}. \textit{See supra} notes 98-111 and accompanying text.
\item \textsuperscript{224} The paradigmatic excuse of insanity exhibits the relative independence of eligibility considerations from the criminal law's primary norms and questions of wrongdoing. If the question in a case of insanity is the defendant's ability to appreciate the difference between right and wrong, then this question must be framed in terms of moral right and wrong. If we attempt to frame the question more narrowly, in terms of the legal rights and wrongs that are defined by the criminal code, then we produce anomalous results. For example, suppose that I am schizophrenic and I believe that my death at the hands of the state will redeem the sins of all mankind. I kill a police officer and immediately surrender after doing so, in order to ensure that I will be convicted of murder and executed. If the insanity defense is framed in terms of an inability to distinguish legal right and wrong, then I will not be able to claim the defense, because I understood that I was violating the law against murder. I also have demonstrated my capacity to conform my conduct to the requirements of the law, albeit perversely. \textit{See Model Penal Code} \textsection 4.01 (1985). But I ought to be able to assert the defense, because I am mentally ill and utterly delusional. The reasons behind my right to be excused from punishment turn on considerations which are independent of the prohibitions contained in the criminal code. Of course, the jury cannot help but to assess the sanity of a defendant in light of the crime with which he is charged. Perhaps I would be less likely to succeed with an insanity defense if my crime were the machine-gunning of a kindergarten class. But this distortion in the jury's deliberations is a far cry from the kind of necessary, conceptual relationship that one finds between fault and wrongdoing.
\item \textsuperscript{225} Huigens, \textit{Deterrence}, \textit{supra} note 7, at 951. Incidentally, the name of the defense known as diminished capacity is, under the terminology used here, a misnomer. When used properly, the term refers to a failure of proof on an essential mental- or intentional-state element of an offense. \textit{United States v. Brawner}, 471 F.2d 969, 998 n.52 (1972). This defense is not a junior insanity defense. It is not an excuse defense. \textit{Id.} It is not in any way a matter of eligibility for punishment.
\end{itemize}
The foregoing virtue ethics analysis accounts for the principal doctrinal manifestation of the distinction between fault and eligibility. The government bears the burden of proof on matters of fault, but the defendant bears the burden of proof on matters of eligibility. Fault usually is explicitly represented in an offense definition by intentional-states. These mental elements—purpose, knowledge, recklessness, and the like—must be proved beyond a reasonable doubt, just as any other material element of the offense must be proved. The reason for this requirement is the fact that fault is an aspect of wrongdoing that serves to justify punishment in the individual case. If the offense is one in which fault is not indicated by an intentional state—think of the drunken rapist—then the determination of fault is more subtle, but it is no less a matter of the prosecution's proof of the offense beyond a reasonable doubt.

In contrast, the defendant bears the burden of persuasion on the excuses because they are matters of eligibility, and because eligibility for punishment is fundamentally distinct from fault. The general application of the penal law to those who fall within its jurisdiction reflects a presumption that each

according to (and herein lies the potential for confusion) capability or capacity. Diminished capacity is a failure of proof defense that is a function of an intentionalist construction of fault such as that set forth in the Model Penal Code. MODEL PENAL CODE § 2.02 (1985).

226. Despite some recent confusion on this point on the part of the Supreme Court, the state has always borne the burden of proving all the facts which constitute affirmative, justifying reasons for punishment. See Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) (holding that, except for criminal history, any fact that increases the level of punishment beyond the statutory maximum must be proved to a jury beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (holding that to require defendant to prove heat of passion is unconstitutionally to assign defendant the burden of proof on the essential element of fault in homicide); see also Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact, (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”). See generally Mark D. Knoll & Richard G. Singer, Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057 (1999); Note, Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors, 112 HARV. L. REV. 1349 (1999).

member of society is capable of bearing the burdens that the law imposes—to respect property, not to kill other people, and so on. To claim an excuse is to claim that one is extraordinary in this regard. It is to claim an exemption from the general application of the penal law because the presumption of capability does not hold. The burden of persuasion is properly assigned to the person who makes such a claim. The defendant who invokes an excuse invokes a special kind of legal rule that negates the force of vast stretches of law. It makes sense for the law to guard such a rule jealously, and only rarely to permit a person to impose a legal obligation on all others to free him from his own legal obligations.228

D. Proportionality as Expressive Rationality

In the next Part, I argue that fault and eligibility are or ought to be the governing concepts in Eighth Amendment analysis. One obvious objection can be lodged against this proposal. How can eligibility be an issue in the penalty phase at all? If the defendant is ineligible for punishment, then he will be acquitted. The penalty phase concerns sentencing, and innocent defendants are never sentenced.

Eligibility remains an issue in the penalty phase because the matter of eligibility actually consists of two lexically-ordered questions about the expressive rationality of punishment: eligibility for punishment in general and eligibility for a particular punishment, such as death. The first question is whether punishment of any kind is expressively rational in the case, in light of the defendant's capabilities. This is the question of excuse, and I have elaborated upon it above, using the example of the insane offender. If the answer to the question of excuse is that the infliction of any punishment is irrational, then the defendant is acquitted. If the answer to the question of

228. The principles that govern the assignment of burdens of persuasion in criminal cases are neither settled nor clear. See generally George S. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880 (1968) (discussing differing burdens of proof); Barbara Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 YALE L.J. 1299 (1977) (discussing controversy surrounding the criminal reasonable doubt standard). Even the claim that the government must disprove non-fault is not uncontroversial. At one time, the defendant routinely bore the burden of persuasion on issues of non-fault such as mistake, because the law distinguished only crudely between matters of inculpation and matters of exculpation. See Fletcher supra, at 899. George Fletcher makes a persuasive case that the long-term historical trend is toward a recognition that all issues which bear on punishment's justification, including all issues of culpability, are for the government to prove. Id. at 930-35. Fletcher does not distinguish between fault and eligibility in this argument. This is unfortunate, because in the history he recounts it is clear that his thesis is borne out for matters of fault, but not for matters of eligibility. Id. at 917-19.
excuse is, instead, that punishment of some kind is expressively rational, then the second question arises. This is the question of proportionality: whether a particular punishment is expressively rational in the individual case, not only in light of the offender's capabilities, but also in light of the wrongdoing and fault at issue.

Proportionality in punishment, like all questions of expressive rationality, is in part a question of self-definition. We have determined, for example, that death is disproportionate even for a crime as extreme as rape, because such a punishment does not meet our evolving standard of decency.229 This is an expressive, not a consequentialist, criterion. The question is not whether something or other will be produced in an optimal amount, and certainly not whether more or fewer legislatures have revealed a preference for executing rapists.230 The question is instead how law will give our rational responses to rape—fear; anger, sadness—the emotional resonance that will best serve society's purposes, not the least of which are the inculcation of rational self-governance at the level of motivation and the maintenance of our shared identity as an enlightened civilization. In this process of social self-definition—constitutional law in its deepest sense—we ask whether execution is the kind of punishment that a decent person would inflict, and we recognize that decency is a matter of context-sensitive practical reasoning in light of our ongoing deliberations on the meaning of the word, the practices which we are willing and unwilling to place under its rubric, and the implications of these practices for the construction of our identity and standing motivations. In other words, decency is a virtue.231

We presently do understand punishment by death for murder to be a decent act, a proportionate punishment in at least some cases.232 However,

230. See supra notes 132-37 (a plurality of the Court holds the view that proportionality review under the evolving standards of decency test cannot involve anything more than an assessment of existing legislation and jury verdicts).
231. Martha Nussbaum effectively describes our deliberations on the decency of capital punishment when she writes that each virtue is a:

[Letter]perspicuous mapping of the sphere of the grounding experiences. When we understand more precisely what problems human beings encounter in their lives with one another, what circumstances they face in which choice of some sort is required, we will have a way of assessing competing responses to those problems, and we will begin to understand what it might be to act well in the face of them.

we must consider more than the kind of wrongdoing which is at issue before we can say that death is a proportionate punishment in a particular case. We cannot conclude that an individual offender ought to die, even for the extreme crime of murder, unless and until we consider his fault; that is, the particular manner and circumstances in which he committed this wrongdoing.  

This brings out an important difference between the two lexically-ordered questions that comprise the matter of eligibility. Whereas the question of excuse can be answered without regard to the defendant's wrongdoing and fault, the question of proportionality obviously cannot be. An extremely harsh punishment might mark us as a brutal, callous, and blindly vengeful society—or it might not, depending upon the wrongdoing and fault for which this punishment is inflicted.

The question of proportionality, then, is whether it is expressively rational to inflict a particular punishment on an offender, not only in light of his capabilities, but also in light of his wrongdoing and fault. So stated, this formulation of proportionality might seem to tell us little about whether a particular punishment is proportionate in a given case. But one reason to formulate proportionality in this way is to stress precisely the fact that we cannot tell in advance whether a particular punishment is proportionate in a given case. Even from the relatively abstract point of view of the legislature or the Supreme Court, where the question is proportionate punishments for classes of cases, no abstract formula exists for the determination of proportionality.  

This is even more true in the adjudication of individual

233. The reasons that we cannot do this relate to the justification of punishment in virtue ethics terms and the nature and necessity of the fault determination in light of this justification. See supra notes 165-67 and accompanying text; infra note 275 and accompanying text.

234. This legislative task has at least two parts: the determination of ordinal proportionality, or the relative ranking of offenses according to severity of punishment; and the determination of cardinal proportionality, which is the anchoring of the penalty scale as a whole at some absolute level of severity. No abstract formula exists for either of these questions. The more difficult of the two is cardinal proportionality, and both consequentialist and deontological theorists have proposed the adoption of a decremental strategy for its determination. See JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 137-55 (1990) (advancing a consequentialist version of the decremental strategy); VON HIRSCH, supra note 43, at 40-46 (advancing a deontological version of the decremental strategy). That is, from a starting point of some level of severity, we might incrementally decrease punishments for each kind of crime until we encounter a rise in the rate at which it is committed. In this way, we might determine an optimal level of severity. This answer to the question of cardinal proportionality is essentially political. It is also inherently controversial, because the meaning of optimality for this purpose is up for grabs. Even Pettit and Braithwaite's consequentialist account of it is considerably more robust than the economist's would be. The definition of proportionality given in the text is formulated with an eye to the adjudicative determination of a punishment in an individual case, but it would also be relevant to the legislative question at this level. That is, it states the core of a
cases, in which the issues of fault and eligibility according to capacity are intensely context-dependent. Only the sentencer can make these determinations. The most one can do from a theoretical standpoint is to state the relevant considerations and the point of the exercise.

For present purposes, however, this is sufficient. If we understand the nature of fault and eligibility, then even a broad definition of proportionality tells us a great deal about the constitutional regulation of the penalty phase.

IV. THE CLARIFYING EFFECTS OF THE FAULT-ELIGIBILITY DISTINCTION

With the distinction between fault and eligibility in hand, we can see what the Court has been trying to say in the Woodson-Lockett line of cases. I have used the Penry, Roberts, and Lockett cases to raise doubts about the utility of culpability, aggravation, and mitigation as governing concepts in the penalty phase of a capital trial. In Section A of this Part, I show that the issues raised by these cases dissolve when we substitute fault and eligibility in this role. Furthermore, if we pursue the idea of fault and eligibility as governing concepts, then we can describe the structure of a constitutionally valid penalty phase. In Section B of this Part, I use the conception of proportionality advanced above to describe the respective roles of legislatures, courts, and juries in the determination of proportionate death sentences. Questions about the right to jury sentencing, the nature of mandatory death sentencing, the apportionment of burdens of persuasion, and the necessity of jury unanimity can be answered more clearly than the Court has done. To do this frames a penalty phase that will ensure the proper determination of proportionality in death sentencing.

A. Dispensing with Aggravation and Mitigation

The difficulties which I raised over the Penry, Roberts, and Lockett cases served to bring out the inadequacy of culpability, aggravation, and mitigation as governing concepts. The same difficulties serve just as well to demonstrate the value of substituting fault and eligibility in this role.

Recall Justice Scalia’s argument, in dissent, that Texas law as applied to Johnny Paul Penry did address mitigation sufficiently well to ensure the “reasoned moral response”235 from the sentencing jury upon which the Penry majority insisted. Penry received an instruction to the effect that his mental virtue ethics theory’s approach to the decremental strategy for the determination of cardinal proportionality.

retardation could be considered in connection with the question of whether or not he deliberated on his victim's death.\(^\text{236}\) Doesn't this mean, Justice Scalia asked, that the jury considered Penry's "personal culpability" before it imposed a death sentence on him?\(^\text{237}\)

The answer to this question, of course, is yes and no. The answer is yes because the jury considered the question of culpability in the sense of fault. Whether or not Penry deliberated on death was a question of the presence or absence of an intentional state regarding one of the material elements of the crime—the usual form of the adjudicative inquiry into fault. But the answer also is no, because Penry did not have an opportunity to argue the question of culpability in the sense of eligibility. Whether or not it was expressively rational to punish Penry by execution in light of his limited capabilities was not a question presented by the jury instructions which were given at the penalty phase of his trial. The Penry majority wisely declined Justice Scalia's invitation to affirm a death sentence that was supported by a determination of fault, but that had been imposed without regard to proportionality, the second question of eligibility.

Did the Louisiana statute which the Court struck down in Roberts create a mandatory death penalty? It seems that it did not. As I argued above, Louisiana's first degree murder statute, unlike North Carolina's law, incorporated well-recognized aggravating factors as offense elements.\(^\text{238}\) Furthermore, most of these aggravators had a converse mitigating form, or a negative finding on these aggravators had a mitigating implication. It seems a mistake to call a statute that permits consideration of aggravating and mitigating factors an impermissible mandatory death penalty provision.

Nevertheless, the Court's decision in Roberts to strike down this statute as a mandatory death penalty provision was correct. A closer reading of the Louisiana law shows that it permitted the jury to consider the question of culpability—but only in the sense of the defendant's fault or non-fault. None of the offense elements in Louisiana's first degree murder statute pertained to the other strain of culpability, the question of eligibility for punishment.\(^\text{239}\) Jury instructions that presented only the elements of Louisiana's first degree murder for the jury's decision would have permitted the jury to consider the

\(^{236}\) Id. at 310.

\(^{237}\) Id. at 358-59.

\(^{238}\) See supra notes 88-97 and accompanying text.

\(^{239}\) See LA. REV. STAT. ANN. § 14:30 (West 1997) (providing the elements of first degree murder: that the murder occurred in the course of a kidnaping, rape or robbery; that the victim was a fireman or peace officer; that the offender had been previously convicted of an unrelated murder or was serving a life sentence; that there were multiple victims; that the killing was a contract killing).
quality of the offender's practical reasoning in light of the manner and circumstances of his wrongdoing, but would not have permitted the jury to consider the expressive rationality of the offender's execution. No death sentencing procedure that failed to provide for the consideration of proportionality could produce a just sentence, and the term "mandatory death penalty" seems a fair, if somewhat imprecise, name for this problem.

In the analysis of the *Lockett* case, we confront an ironic dilemma. The case is noteworthy for its holding that the jury must be permitted to consider all mitigating evidence, but the case demonstrates either the irrelevance or the ambiguity of mitigation as a concept. Mitigation is irrelevant because it can be factored out of the case. The principal concern of the Supreme Court was that Lockett had been unable to argue the relevance of her not having an intent to kill and her being only a minor accomplice in the crime. But Lockett could have made these arguments if Ohio law had required proof of intent to kill or a leading role in the deadly enterprise as offense elements or aggravating factors. It is true that a third mitigator was at issue in the case—Lockett's age—and that this mitigator cannot be factored out of the case because it has no plausible converse form as an offense element or aggravating factor. However, this tells us only that the concept of mitigation is ambiguous; that it refers to two fundamentally different kinds of consideration.

The *Lockett* court overlooked the ambiguity of mitigation for a simple reason: the Court focused on the adequate adjudication of Lockett's culpability, and culpability too is an ambiguous concept. Culpability's components are fault and eligibility. Intent to kill and an accomplice's relative role in an offense are questions of fault because they might present affirmative, justifying reasons to punish in light of the particular manner and circumstances of the offender's wrongdoing. Age is a question of eligibility for punishment because it concerns the expressive rationality of punishment in the case, in light of the offender's capabilities; that is, it causes us to ask whether this punishment makes sense for us, the punishing majority, in the ongoing process of defining ourselves as a society. The *Lockett* opinion would have been more clear had the Court recognized the distinction between fault and eligibility. Given *Lockett*'s central role in the most prominent conflict in Eighth Amendment jurisprudence, the value of this greater clarity would be difficult to overestimate. However, the Court's use of the concept of mitigation precluded any recognition of culpability's ambiguity, just as surely as the Court's focus on culpability reinforced its use of the ambiguous concept of mitigation.
The superiority of fault and eligibility to aggravation and mitigation as governing concepts matters enormously. *Penry* tells us that the objective of the penalty phase of a capital trial is a reasoned moral response to the offender and his offense240—but the concepts of aggravation and mitigation cannot tell us what this means. We run the risk of overlooking an essential consideration—as Justice Scalia did—if we do not frame our evaluation of the penalty phase in terms of fault and eligibility.241 Florida created a mandatory death penalty, and the Court was right to strike it down in *Roberts*—but we cannot explain why this is so if we use the concepts of aggravation and mitigation. If we do not use fault and eligibility as our governing concepts, then the constitutional category of the mandatory death penalty has no clear content or parameters, and, by the same token, neither does the jury’s proper role in death sentencing. Finally, *Lockett* lies at the heart of the central conflict in the Court’s Eighth Amendment jurisprudence, and it seems fair to say that the conflict is attributable at least in part to the concept of mitigation itself. We can resolve this central conflict only if we make fault and eligibility the governing concepts in Eighth Amendment analysis.

B. The Proper Structure for Proportionate Death Sentencing

The question in the constitutional regulation of the penalty phase is not whether any given death sentence is proportionate, nor is the Supreme Court the body which determines the question of proportionality that arises in the course of the penalty phase of individual cases. In these respects, the regulation of the penalty phase differs from the prohibition of some death sentences under the Eighth Amendment on the ground that they are disproportionate per se. Furthermore, the question in the regulation of the


241. In subsequent cases arising under the Texas sentencing scheme which was at issue in *Penry*, the Court has indeed seemed to miss the point of Justice O’Connor’s opinion. See, e.g., *Johnson* v. *Texas*, 509 U.S. 350, 371 (1993) (holding that instruction on future dangerousness based on probability of violence constituting continuing threat to society allowed adequate consideration of defendant’s youth); *Graham* v. *Collins*, 506 U.S. 461, 476-77 (1993) (holding that petitioner’s argument that Texas special issues sentencing scheme precluded consideration of his youth, unstable family background, and positive character traits constituted a new rule on which habeas corpus relief could not be granted under retroactivity doctrine). In *Johnson*, the jury considered something that could plausibly be called mitigation and culpability, but did not consider the issue of eligibility for the punishment of death in light of the offender’s capabilities. *Johnson*, 509 U.S. at 367-68. In *Graham*, the Court could not possibly have read the petitioner’s arguments as constituting a new rule for purposes of habeas corpus retroactivity doctrine if it had recognized the issue as the petitioner’s eligibility for the punishment of death in light of the offender’s capabilities. *Graham*, 506 U.S. at 477. Far from being a new rule, proportionality in this sense has always been an essential feature of just punishment.
penalty phase is not, as has been claimed, a question of structure in death sentencing versus individualized consideration in death sentencing. To frame the question in this way simply perpetuates the Furman-Gregg versus Woodson-Lockett conflict.

The question in the constitutional regulation of the penalty phase is the proper kind and degree of structure in death sentencing, in light of the core Eighth Amendment value of proportionality. This structural question involves a proper division of authority between legislatures and juries in the determination of proportionate death sentences, and a definition of the proper content of these respective roles. This Section performs these tasks by means of the analysis of five issues: the necessity of "weighing," the concept of mandatory death sentencing, the right to a jury at the penalty phase, the distribution of burdens of persuasion, and the necessity of jury unanimity on mitigating factors.

1. The Necessity of "Weighing"

The Model Penal Code recommended the weighing of aggravating and mitigating factors, but this weighing has never been constitutionally required. In contrast, the "weighing" of fault and eligibility is constitutionally required. It is difficult, at first, to see how this could be so. I have been at pains throughout this Article to argue that eligibility and fault are fundamentally different matters. We can envision the weighing of aggravating and mitigating factors, but to weigh fault and eligibility against one another in the penalty phase would be to weigh apples and oranges.

The answer to this conundrum lies in the necessity of the concurrent consideration of fault and eligibility under the rubric of proportionality. A death sentence violates the Eighth Amendment if its proportionality has not been properly determined, and the proportionality of a sentence is a question of its expressive rationality. The expressive rationality of death as a penalty for an individual murderer can be finally determined only in light of the particular manner and circumstances in which the murder was committed. Therefore, the imposition of a constitutionally valid death sentence must be preceded by this consideration of fault in the context of the second question of eligibility: whether a particular sentence is proportionate as a matter of expressive rationality, in light of the offender's fault as well as his capabilities.

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242. See Zant v. Stephens, 462 U.S. 862, 875 n.13 (noting that the Georgia statute approved in Gregg and the Texas statute approved in Jurek did not require weighing).
Our actual experience with death sentencing tends to confirm this theoretical account. Consider California’s pattern jury instruction on the definition of “weighing” in death sentencing.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.243

This instruction contemplates an appropriately broad-ranging inquiry into the proportionality of a death sentence, and explicitly rejects a monistic view of the values involved, in favor of a more pluralistic approach. To ask whether death is an appropriate punishment in light of the totality of aggravating and mitigating circumstances is to ask whether death is an expressively rational sentence in light of the offender’s capabilities and fault.

Proportionality in this sense is indeed a broad question. But consider the alternative. Were this instruction more strictly structured, it would be more precisely prescriptive and more in accord with the Furman-Gregg conception of death sentencing. But the experience of the last twenty-five years tells us that we do not really believe that more structure in this context produces more just sentences.244 The Woodson-Lockett line emerged for precisely this reason. The California instruction is part of a constitutionally adequate death sentencing regime because it asks whether death is an expressively rational sentence in light of the offender’s capabilities and fault. California’s version of the penalty phase treats the core Eighth Amendment value of proportionality in punishment in the right way, because this kind of “weighing” is required in death sentencing.


244. Commentators have noted that the Court’s death penalty jurisprudence has essentially returned to the pre-Furman state of the law, under which jury discretion played a large and legitimate role in death sentencing. Steiker & Steiker, Sober Second Thoughts, supra note 35, at 359 (“Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-Furman world of capital sentencing.”).
2. The Nature and Significance of Mandatory Death Sentencing

The question of mandatory death sentencing is the question of who is to make the proportionality determination. No death sentence is literally mandatory, of course, because every death sentence is imposed in the course of or as a consequence of adjudication. The concept of mandatory death sentencing refers, broadly speaking, to the legislature’s exercise of an impermissible degree of control over this adjudication. For example, in *Woodson*, the jury determined the offender’s sentence when it decided whether or not he had committed a premeditated murder. The Court decided, however, that the North Carolina legislature ought to have ceded to North Carolina juries a greater role in death sentencing than was provided by the standard definition of capital murder as a premeditated murder. *Woodson* is the simplest case of mandatory death sentencing.

To consider a more subtle case of the same problem, using the concepts of fault and eligibility instead of aggravation and mitigation, allows us to define a mandatory death sentencing regime more precisely as one in which the ultimate question of the proportionality of a death sentence has been taken away from the sentencer. We also can see the way in which the rudimentary concepts used in the *Woodson-Lockett* line of cases have led the Court astray on the proper division of authority between the legislature and the sentencer in this regard.

In *Blystone v. Pennsylvania*, the defendant offered no evidence on mitigation in the penalty phase of his trial. Nevertheless, the trial court instructed the jury that it should consider any mitigating circumstances which it might infer from any evidence offered by either party at the guilt phase of the trial. The jury also was instructed that it must sentence the offender to “death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance.” The Supreme Court concluded that this procedure did not violate the command of *Lockett* and *Penry* that the jury must be able to give effect to any and all mitigating evidence. It also did not constitute mandatory death sentencing as defined by *Woodson, Roberts*, or *Sumner v. Shuman*. Whereas neither North Carolina, Louisiana, nor

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246. Id. at 306 n.4.
247. Id.
248. Id. at 302.
249. Id. at 304-05.
250. 483 U.S. 66 (1987). In each of its early cases holding that a mandatory death penalty violated the Eighth Amendment, the Court reserved the question of whether a murder by an inmate already serving a life sentence might justify a mandatory sentence of death. Id. at 77 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978); *Roberts v. Louisiana*, 431 U.S. 633, 635 n.2
Nevada had provided any opportunity for the jury to consider mitigating factors, both the Pennsylvania statute and the instructions at Blystone's trial directed the jury to consider mitigating factors, to find them if the evidence presented them, and to weigh them against aggravating factors.251

The dissent contended that Blystone had received a mandatory death sentence. Regardless of the instructions on mitigation, the jury had not been granted an opportunity to consider whether or not the aggravating factor, standing alone, was sufficient to justify a death sentence.252 Under Pennsylvania's procedure, the jury's role was limited to finding the existence of an aggravating factor. The legislature's determination that such an aggravating factor, if found, would justify a sentence of death, in the absence of a finding of mitigation, was dispositive. The fact that this determination was made by the legislature instead of the jury, made the procedure a mandatory death sentencing provision.

In this way, Blystone came down to the question of whether an aggravating factor has an absolute weight that the jury ought to assess; or whether the weight of an aggravating factor need be assessed only in relation to a mitigating factor. For the Blystone dissenters, Justice Brennan complained that, "[t]he 'weight' of an aggravating circumstance is just as relevant to the propriety of the death penalty as the 'weight' of any mitigating circumstances."253 The majority answered that the legislature has the power to structure the consideration of mitigating and aggravating evidence in any way it wishes.254 In a companion case, the majority suggested that to require the sentencer to determine the absolute weight of an aggravator, even when no mitigator can be found to set against it, would be

(1977); Gregg v. Georgia, 428 U.S. 153, 186 (1976); Roberts v. Louisiana, 428 U.S. 325, 334 n.9 (1976); Woodson v. North Carolina, 428 U.S. 280, 287 n.7 (1976)). In 1987, the Court resolved this question by overturning the death sentence of Raymond Shuman, who had been sentenced for such a murder in 1975, under Nevada's pre-Woothon mandatory capital punishment regime. Sumner, 483 U.S. at 85. Not only Woodson, but also the intervening Lockett line of cases, persuaded a majority that "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." Id.

251. Furthermore—as Pennsylvania, if not the majority, argued—if the jury ought to have considered reasons not to impose a death sentence, then the jury had done so, even though it had only aggravating factors before it. Each of the aggravating factors had a mitigating converse that the jury had considered and rejected. Blystone v. Pennsylvania, 494 U.S. 299, 319 n.8 (Brennan, J., dissenting). This argument, of course, exploits the ambiguity of culpability and the dual aspect of fault. The jury had considered fault, as Pennsylvania pointed out, but it had not considered the question of eligibility in the sense of proportionality.

252. Id. at 310-11.
253. Id. at 323-24.
254. Id. at 309.
to require unfettered sentencing discretion in the jury.\textsuperscript{255} \textit{Blystone} passed into the books as one more unenlightening round in the \textit{Furman-Gregg} and \textit{Woodson-Lockett} contest. Whereas the advocates of individualized adjudication of "personal culpability" had prevailed in \textit{Sumner},\textsuperscript{256} the advocates of structured jury decision-making had prevailed in \textit{Blystone}.\textsuperscript{257}

The heart of the difficulty in \textit{Blystone} is that the categories of eligibility and fault cut across the categories of aggravation and mitigation in such a way that a jury's finding no mitigating factors does not necessarily mean that the question of proportionality—the offender's eligibility for the punishment of death in light of his fault as well as his capabilities—has been answered. In \textit{Blystone}, it so happened that the question of proportionality turned on a matter of fault, with no controversy over capabilities, and that the kind of fault at issue was one which is ordinarily framed as an aggravating factor.\textsuperscript{258} The result was that, as the dissenters perceived, the question of the expressive rationality of a sentence of death in the case was confined to, but not fully addressed in, the matter of this aggravating factor. The jury's finding that the aggravating factor existed was a determination of fault, but to determine the question of proportionality required the jury to consider the further, distinct question of whether this fault was such that a death sentence was expressively rational in light of this fault, and in light of the offender's normal capabilities. Confined to the language of aggravation and mitigation, the dissenters could only frame this question as whether the aggravating factor ought to be weighed against itself, or whether the aggravator had an absolute weight that ought to be determined by the jury.\textsuperscript{259} Their argument failed, not on the underlying logic of the question, but because of an overextended metaphor.

In response to the dissent's awkward imagery, the \textit{Blystone} majority was able to exploit the fact that heretofore, under the influence of \textit{Lockett} and \textit{Penry}, the Court happened to have analyzed questions of proportionality under the rubric of mitigation. In \textit{Blystone}, the trial court's instructions on mitigation and the jury's conclusion that no mitigating factors were present made it appear that the question of death as a proportionate punishment had been decided by the jury, when in fact it had not been.

The statute at issue in \textit{Blystone} was an impermissible mandatory death sentencing provision because it failed to provide for the sentencer's

\begin{itemize}
\item \textsuperscript{255} See Boyde v. California, 494 U.S. 370, 377 (1990).
\item \textsuperscript{256} See supra note 250 and accompanying text.
\item \textsuperscript{257} \textit{Blystone}, 494 U.S. at 309.
\item \textsuperscript{258} \textit{Blystone} was found to have "'committed a killing while in the perpetration of a felony.'" \textit{Id.} at 302 (quoting \textit{42 PA. CONS. STAT.} § 9711(d)(6) (1988)).
\item \textsuperscript{259} \textit{Id.} at 318.
\end{itemize}
determination of the question of proportionality. The expressive rationality of a death sentence is a matter of community identity and social self-definition. We will not punish even murder in this way if to do so would make us a brutal society instead of an enlightened one. Like all questions of expressive rationality, the question of a death sentence's proportionality is context-dependent. Whether or not we will kill a murderer is a question of our decency, and like all questions about virtue, this one cannot be reduced to rules. It requires the consideration of particulars in context. The proportionality of death as a punishment in an individual case is, therefore, an inherently adjudicative question, and it cannot be answered prospectively, in the abstract, by a legislature.

Notice, however, that to say the question of proportionality must be answered by the sentencer is not to say that it must be answered by a jury. In Blystone, the jury was the sentencer under Pennsylvania law, and to commit the question of proportionality to the sentencer meant committing it to the jury. But this is not universally or necessarily true. To say that proportionality is not a question that can be answered in the abstract is to exclude only the legislature from the role of sentencer. It is not to exclude the trial judge, or even an appellate court, from the list of adjudicative decision-makers who might make the proportionality decision based on the particular facts of the individual case. Given that proportionality is a question in every sentencing, and given that jury sentencing is unique to death sentencing, this should not be surprising. If a jury is required at the penalty phase, then it must be for a different reason.

3. The Right to a Jury at the Penalty Phase

The Furman-Gregg and Woodson-Lockett conflict adumbrates two views on the wisdom and necessity of jury adjudication in the penalty phase. If the objective in death sentencing is the consistent application of the death penalty over the full range of cases, and the avoidance of arbitrary and capricious decision-making, then judicial sentencing actually is preferable to jury adjudication. On the other hand, a sympathetic, hindsight examination of the offender and his choices, within a reconstruction of the practical situation that he faced, seems to be exactly what is needed if the issue to be decided is

260. See supra note 216.
the proportionality of death as a punishment. The Supreme Court has failed to recognize that an offender has a jury right at the penalty phase, principally because of the distorting influence of Furman-Gregg and its misplaced repertoire of equal protection and due process concepts. But other errors also have contributed to the Court's failure to recognize the right to a jury at the penalty phase.

The central error of the Court's decisions on the right to a jury at the penalty phase is its conclusion that aggravating and mitigating factors are not elements of a distinct offense of capital murder, to which trial rights such as jury adjudication ought to attach. This conclusion rests on nothing more than the fact that legislatures happen to have assigned aggravating and mitigating factors to the sentencing phase of the capital trial for decision. This unduly deferential approach to the question of a jury right at the penalty phase reflects, and is partly predicated upon, the Court's unduly deferential approach to the general question of the jury right under the Due Process Clauses and the Sixth Amendment. The Court's errors there have been perpetuated in the Eighth Amendment context.

263. "Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."'" Gregg v. Georgia, 428 U.S. 153, 190 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).


266. In the constitutional regulation of punishment under the Due Process Clauses and the Sixth Amendment, the Court is reputed to have taken the position that it is for the legislature to decide whether a particular fact is relevant to punishment, and to determine the particular relevance that this fact will have—whether as an element of an offense, an element of a defense, or a factor in sentencing. See, e.g., Bilionis, supra note 113, at 1305. However, this is not quite right. In the leading case of McMillan, the Court said that it would defer to the legislature to a great extent, but that ultimately legislatures do not have a free hand in the definition of crime. McMillan, 477 U.S. at 86. Only a moment's reflection is required to see why this is so: constitutional requirements of notice, jury, and proof beyond a reasonable doubt would be empty if the states could escape these obligations by redesignating offense elements as defenses or sentencing factors. What the Court declined to do in McMillan was to state the limitation on the states as a rule, or even to provide a statement of the principle beyond the suggestion—that it would not permit a defense or sentencing factor "to be the tail which wags the dog of the substantive offense." Id. at 88. In McMillan, in other words, the Court placed its trust in the legislatures' fidelity to tradition and fundamental fairness under a standard that was the criminal law equivalent of Justice Stewart's definition of obscenity. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").

This approach has had a predictable result: the legislatures, particularly Congress, have run roughshod over the Court's trust. They have relieved their governments of any obligation to provide notice of essential allegations of crime, or to prove these allegations to a jury beyond a
In *Cabana v. Bullock*, the Court considered whether a jury must make the determination, required by *Enmund v. Florida*, that an accomplice who is convicted of felony murder must have had an intention to kill, or must in fact have killed or attempted to kill. In the course of denying this Eighth Amendment claim, Justice White wrote for the Court:

> If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the Enmund determination is of little concern from the standpoint of the Constitution. The State has considerable freedom to structure its capital sentencing system as it sees fit . . .

This passage demonstrates as clearly as any other the cost of the Court's inattention to the theory of punishment. The Court recognizes that the issue at hand is the defendant's culpability. But had the Court recognized further the nature and significance of culpability as fault it could not possibly have concluded that an offender has no right to a jury at the penalty phase—certainly not on grounds as meager as the Court's preference for deference.

Jury adjudication at the penalty phase is required because issues of fault and non-fault are presented for decision. Not only the elements of capital murder but also the aggravating factors that are invoked to justify a death sentence are fault elements: indications that the murder was committed under circumstances or in a manner that justifies the most extreme penalty. Furthermore, most "mitigating" factors present issues of fault: they are reasonable doubt, by the simple expediency of declaring the facts at issue to be sentencing factors. The Court has found it necessary to signal a halt to this erosion of fundamental law. See *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) (finding that any fact, except criminal history, that increases punishment beyond the statutory maximum must be proved to a jury beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227, 242-43 n.6 (1999) (Congress cannot have intended to make "serious bodily injury" and "death" sentencing factors instead of elements of the offense of "car-jacking," because to do so probably would have violated due process under the Fifth Amendment and the jury trial and notice guarantees of the Sixth Amendment).

270. *Id.* at 386-87.
271. In this regard, consider the fact that a single consideration can function simultaneously as an element of capital murder and as an aggravating factor. See *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988).
indications that the murder was committed under circumstances or in a manner that will not justify the most extreme penalty. These are the mitigators—such as Lockett's minor role as an accomplice and her not having an intention to kill—which we can easily translate into converse, aggravating forms. No less than the elements of capital murder and the aggravating factors, these mitigating factors pertain to the manner and circumstances of the offender's wrongdoing, and they bear on the affirmative justifying reasons to punish in his case.

These fault issues ought to be decided by a jury to the same extent and for the same reasons that the other essential elements of a crime ought to be determined by a jury. No one would suggest that the mental state elements of a crime ever should be determined otherwise than by a jury. This is because fault is an aspect of criminal wrongdoing, and cannot be determined in isolation from the determination of wrongdoing. The same logic applies to non-intentional fault elements, including aggravators and mitigators, regardless of whether they are to be decided at the trial or at the penalty phase.

In this light, jury adjudication is required in the penalty phase of a capital trial not because the penalty phase is sufficiently similar to the trial on the merits, but because it is continuous with the trial on the merits along the parameter of fault. The distinctive offense elements of capital murder, all aggravating factors, and most mitigating factors present a single issue: the offender's fault in the commission of murder. The issues of fault that are relevant to death sentencing are variously framed as offense elements, aggravators, or mitigators for exogenous reasons having to do with prior legal practice and intuitive phrasing. In turn, these several issues of fault are assigned to the trial or to the penalty phase for exogenous reasons having to do with evidence rules, lesser included offense analysis, and maintaining the gravity of the sentencing proceeding. If a jury is required to resolve the

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272. For example, consider the Model Penal Code's list of mitigating factors. See supra note 58. Factors a through e are questions of fault, and only f and g present questions of eligibility in the form of excuse analogues; specifically, insanity and duress.


274. The virtue ethics theory of punishment makes the right to a jury at the penalty phase especially clear, because it portrays legal rules and jury adjudication as complementary, rather than antithetical, to one another. See supra notes 165-67 and accompanying text; see also Huigens, Deterrence, supra note 7, at 1022-24, 1028-31.

275. See MODEL PENAL CODE § 210.6 cmt. 8 (1985) (prejudicial effect at trial of, e.g., criminal history evidence requires bifurcation); see also Caldwell v. Mississippi, 472 U.S. 320, 336 (1985) (finding bifurcation impresses the gravity of death sentencing on the jury). The lesser included offense concern arises from the fact that to incorporate aggravating factors into a highly specific definition of murder increases both the possibility of an acquittal on that charge and the
issues of fault that are assigned to the trial on the merits, then a jury is required to decide the issues of fault that only happen to be framed as aggravators and mitigators, and that only happen to be assigned to the penalty phase. A death sentence cannot be justified if the fault that serves to justify such a punishment has not been properly determined, regardless of the several forms that the inquiry into fault might take. The proper determination of fault in all its guises requires a jury determination at the penalty phase, no less than at the trial on the merits.

The nature of fault requires a jury at the penalty phase, if the penalty phase is used to determine an extra degree of fault in the offender’s crime in order to justify his execution. However, this is not to say that a penalty phase is constitutionally required, or to say that the other issues to be determined at the penalty phase require a jury determination. Questions of eligibility, including the question of proportionality, are not elements of the offense; nor are they analogous to elements of the offense. They do not serve to justify punishment, but serve instead to limit it. For Eighth Amendment purposes, our evolving standards of decency have long held that punishment cannot be inflicted unless wrongdoing and fault have been determined by a jury. But we cannot say that the evolving standards of decency of our society require a jury determination of the proportionality of a death sentence. Proportionality is a question in all sentencing, and jury sentencing has always been the exception rather than the rule. One might argue that our practice in death sentencing in particular is the only proper measure of the evolving standard of decency on this question. But even here, a substantial number of jurisdictions place the ultimate question of life or death in the hands of a judge and not in the hands of a jury. Therefore, one cannot say that our evolving standards of decency require a jury decision on the question of proportionality.

Preliminary factual determinations of capability appear not to require jury adjudication, for similar reasons. For example, if the offender claims that his mental retardation renders a death sentence disproportionate, then the fact of his mental retardation must be determined. This predicate fact is vastly
different from the matter of fault, because it is not a mixed question of law and fact, nor does its proof serve to justify punishment. Strictly speaking, therefore, the mitigators that do not present issues of fault—the capability mitigators that resemble duress and insanity,\textsuperscript{277} for example—do not require a jury determination.

However, on this question, one can make the case that our practice over the last quarter century has established a right to a jury determination. Our evolving standards of decency have always provided for the jury’s determination of claims of excuse. Whether because of the capability mitigators’ similarity to the excuses, or because of a simple failure to distinguish between the two, the vast majority of jurisdictions have provided for the jury adjudication of capability mitigators, at least since the post-

\textit{Furman} redrafting of their capital sentencing statutes.\textsuperscript{278} Regardless of whether this practice might have originated in confusion about the nature and function of the capability mitigators, this guarantee of a jury determination on predicate facts of capability is now part of our standard of decency in death sentencing.

\textsuperscript{277} Virtually all modern death penalty statutes, following section 210.6 of the Model Penal Code, list duress and insanity as mitigating factors. These are not excuses, of course, because the defendant who successfully proves them will not be acquitted. These capability mitigators pertain to the second of the two lexically-ordered questions of eligibility: proportionality. \textit{See, e.g.}, CAL. PENAL CODE §§ 190.3(g) (duress), 190.3(h) (insanity) (West 1999); COLO. REV. STAT. ANN. §§ 16-11-103(4)(b) (insanity), 16-11-103(4)(c) (duress) (West 1999); N.Y. CRIM. PROC. LAW §§ 400.27(9)(b) (insanity), 400.27(9)(c) (duress) (McKinney Supp.2000); N.C. GEN. STAT. §§ 15A-2000(f)(5) (duress), 15A-2000(f)(6) (insanity) (1999).

4. The Burden of Persuasion on Mitigators

Regardless of whether a judge or jury makes the determination, the matter of fault and the predicate facts of capability must be proved. We are therefore required to assign the burden of persuasion on these issues. The assignment of mitigating factors to the offender for proof by a preponderance is a nearly universal feature of death penalty statutes. If our Eighth Amendment jurisprudence drew adequately on the principles of substantive criminal law, then this feature would also render these statutes unconstitutional.

a. The Burden of Persuasion on Non-Fault Mitigators

As a general matter, the burden of persuasion on the matter of fault always remains with the government, because fault serves to justify, in part, the punishment which the government seeks to inflict. This burden of persuasion extends to the disproof of non-fault. For example, when a defendant presents evidence that he had a mistaken belief that is inconsistent with his having the requisite intent for a crime, the government nevertheless

279. The question of proportionality—that is whether the offender will receive a life or a death sentence—ordinarily is not thought to be subject to a burden of persuasion. The ultimate question in sentencing never is, although it might be. See Deborah Young, Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules, 79 CORNELL L. REV. 299, 305-32 (1994) (describing the absence of procedural protections, including clearly assigned burdens of proof, in sentencing). To the extent a burden of persuasion does attach to this ultimate question, it is a burden on the prosecution. This point turns on the fact, explored in the next Section, that to assign the risk of non-unanimity to a party is effectively to assign that party the burden of persuasion. Most states assign the risk of non-unanimity on the ultimate question at the penalty phase to the prosecution. That is, if the jury is non-unanimous, a life sentence is imposed. See ARK. CODE ANN. §§ 5-4-603(a), (c) (Michie 1997); GA. CODE ANN. § 17-10-31.1(c) (Harrison 1998); 720 ILL. COMP. STAT. ANN. 5/9-1(g) (West Supp. 2000); KAN. STAT. ANN. § 21-4624(e) (1995); LA. CODE CRIM. PROC. ANN. art. 905.6 (West 1997); MD. ANN. CODE art. 27, § 413(k)(2) (Supp. 1999); MISS. CODE ANN. § 99-19-101(3) (2000); N. H. REV. STAT. ANN. § 630:5(IX) (1996); N.J. STAT. ANN. § 2C:11-3c(3)(e) (West 2000); N.M. STAT. ANN. § 31-20A-3 (Michie Supp. 2000); N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney Supp. 2000); N.C. GEN. STAT. § 15A-2000(b) (1999); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997); OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 2000); OR. REV. STAT. § 163.150(2)(a) (1999); 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (West Supp. 2000); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 1999); TENN. CODE ANN. § 39-13-204(h) (Supp. 1999); TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f) (Vernon Supp. 2000); UTAH CODE ANN. § 76-3-207(4)(c) (Supp. 1999); VA. CODE ANN. § 19.2-264.4(E) (Michie 2000); WASH. REV. CODE ANN. § 10.95.060(4) (West 1997); WYO. STAT. ANN. § 6-2-102(e) (West 1997); see also COLO. REV. STAT. ANN. § 16-11-103(2)(d) (West 1999) (providing that if three-judge sentencing panel is non-unanimous, a life sentence is imposed).

280. See supra notes 226, 266.
must prove, beyond a reasonable doubt, that he did have the requisite intent.\textsuperscript{281}

If the government seeks to justify a death sentence on the ground that a murderer’s fault is extraordinarily great, then the distribution of the burden of persuasion on this issue ought to parallel the general distribution of the burden of persuasion on fault. Not surprisingly, we find that the government does bear the burden of proving the special offense elements of capital murder and aggravating factors beyond a reasonable doubt.\textsuperscript{282} However, capital punishment statutes either assign to the offender the burden of proving all mitigators by a preponderance, or, under the influence of \textit{Woodson-Lockett}, simply leave the burden of persuasion on mitigators unspecified.\textsuperscript{283} This is a conceptual error that ought to be recognized as a

\textsuperscript{281} See ROBINSON, \textit{supra} note 142, § 62(1) at 244-45.


A number of jurisdictions require the offender to prove mitigators by a preponderance. See 18 U.S.C. § 3593(c) (1994); ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 1999); CONN. GEN. STAT. ANN. § 53a-46a(c) (West Supp. 2000); DEL. CODE ANN. tit. 11, § 4209(d) (1995); MD. ANN. CODE art. 27, § 413(g) (Supp. 1999); N.H. REV. STAT. ANN. § 630:5(III) (1996); N.J.
constitutional error. In accordance with the substantive criminal law's rule on disproof of non-fault, the burden of persuasion on fault-based mitigators should remain with the government. If the government seeks to justify a death penalty on the ground of extraordinary fault, and if the offender contends that his fault is not extraordinarily great—because he was an accomplice with a minor role in the crime, for example—then the government must be obliged to disprove this claim of non-fault beyond a reasonable doubt.

The fact that these fault elements usually have been framed as mitigating factors in a sentencing hearing, instead of as elements in the definition of capital murder, is immaterial to the proper apportionment of the burden of persuasion. Several legitimate considerations might lead a legislature to apportion proof of essential elements, including fault, variously into trial and sentencing proceedings. Nevertheless, these considerations are exogenous to the matter of fault and the justification of punishment, and the principle that the government bears the burden of persuasion on all matters that justify the penalty to be imposed must be observed.284 Capital sentencing statutes do, almost uniformly, observe this limitation where aggravating factors are concerned. These statutes require aggravators to be proved beyond a reasonable doubt, usually to a jury, and frequently under evidence rules, in spite of the fact that this proof occurs at the penalty phase, for the purpose of sentencing, and not at the guilt phase of the trial.285 Legislatures and the

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284. See supra notes 226, 266.

285. On the proof of aggravating factors beyond a reasonable doubt, see supra note 282. Most jurisdictions commit these aggravators to the jury for decision, but do not subject the proof to rules of evidence. See 18 U.S.C. § 3593(B) (1994); MD. ANN. CODE art. 27, §§ 413(b)-(c) (Supp. 1999); N.H. REV. STAT. ANN. § 630:5(II)(a), (III) (1996); N.M. STAT. ANN. § 31-20A-1 (Michie Supp. 2000); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 2000); OR. REV. STAT. § 163.150(1)(a) (1999); 42 PA. CONS. STAT. ANN. § 9711(a)(1), (2) (West Supp. 2000); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 1999); S.D. CODIFIED LAWS § 23A-27A-2 (Michie 1998); TENN. CODE ANN. § 39-13-204(a), (c) (Supp. 1999); TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a) (Vernon Supp. 2000); UTAH CODE ANN. §§ 76-3-207(1)-(2); VA. CODE ANN. § 19.2-264.4(C) (Michie 2000); WASH. REV. CODE ANN. §§ 10.95.050(2), 10.95.060(3) (West 1997); WYO. STAT. ANN. § 6-2-102(c) (1999).

Some states require the prosecution to prove aggravators under to the jury under evidence rules. See ARK. CODE ANN. § 5-4-602(4) (Michie 1997); CONN. GEN. STAT. ANN. § 53a-46a(b)-(c) (West Supp. 2000); 720 ILL. COMP. STAT. ANN. 5/9-1(e), (f) (West Supp. 2000); KY. REV. STAT. ANN. § 532.025(1)(a)-(b) (Banks-Baldwin 1995); LA. CODE CRIM. PROC. ANN. art. 905.1 (West
Court have recognized that any given aggravator might be labeled an element of capital murder and *vice versa*, and that the manner of proof cannot, in justice, vary with this designation. In contrast, neither legislatures nor the Court have recognized that most mitigators are part of this same fault continuum. Once this point is recognized, the manner of proof for these mitigators, including the burden of persuasion, ought to be adjusted accordingly. Any death penalty statute which requires the defendant to disprove fault by proving a "mitigating" factor by a preponderance ought to be deemed unconstitutional.

**b. The Burden of Persuasion on Capability Mitigators**

Not all of the standard mitigators are claims of non-fault. Some mitigators are excuse analogues or other matters of eligibility in light of personal capability. We have yet to consider the distribution of the burden of persuasion on these capability mitigators.

Given that most capability mitigators are excuse analogues—claims that pertain to insanity, duress, minority, voluntariness, and the like—one might argue that the burden of persuasion on capability mitigators ought to be assigned to the offender. Claims of excuse are generally assigned to the defendant for proof by a preponderance, and properly so: the defendant who claims an excuse is making the extraordinary claim that the law imposes a legal obligation on all others to free him from his own legal obligations.286 Some other principles of burden-assignment also support this view. The capability mitigators are (predominantly) factual predicates for a finding of disproportionality, the proof of which will redound to the offender’s benefit and the evidence for which is most often in the offender’s control.287 And, of course, there is the consideration which probably led the drafters of Model Penal Code section 210.6 and virtually all state legislatures to assign the burden of persuasion on mitigators to the offender: the crude distinction

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A number of states commit the question to the judge, for whom no evidence rules are required. See ARIZ. REV. STAT. ANN. § 13-703(B)-(C) (West Supp. 1999); DEL. CODE ANN. tit. 11, § 4209(c) (1995); IDAHO CODE § 19-2515(c) (Michie Supp. 2000); MONT. CODE ANN. §§ 46-18-301, 302 (1999); NEB. REV. STAT. § 29-2521 (1995).

286. See supra note 228 and accompanying text.

287. Underwood, supra note 228, at 1312-13, 1331-33.
between matters of inculpation and matters of exculpation. To adopt this analysis leaves these mitigators in the same position with respect to burdens of persuasion that they now occupy.

However, the better rule is that the burden of persuasion on all mitigators, capability as well as non-fault, is on the government. In addition to the inherent weaknesses of benefit and evidence-possession as guides to the distribution of the burden of persuasion,288 at least two reasons point toward this conclusion.

The first reason is that the analogy between capability mitigation and excuse is imperfect and misleading. The claim that a penalty of death is disproportionate in an offender's case is different from a claim of excuse, even though excuse and proportionality are both questions of eligibility, and even if the offender invokes excuse analogues in support of his claim of disproportionality. These mitigators are not near-excuses. They are not premised on a theory of residual doubt on issues of genuine insanity, duress, or other excuse which might have been decided against the defendant at trial.289 Nor are capability mitigators quasi-excuses. They share the logic of expressive rationality with the excuses, but they otherwise have their own rationale. Capability mitigators are predicates for the finding of proportionality as a matter of eligibility for the particular punishment of death. The offender who invokes a lack of capability at the penalty phase does not contend that he is exempt from the criminal law's obligations on the ground that to punish him in any way would be expressively irrational. He contends that a particular punishment, death, is expressively irrational in his case.

The second reason to conclude that the prosecution should bear the burden of persuasion on capability mitigators is the fact that the Supreme Court has effectively placed this burden on the prosecution in its decisions concerning unanimity on mitigation in the penalty phase. This is an imperfect solution to a problem that arises only because of the initial misassignment of the burden of persuasion on mitigators. The Court's imperfect solution ought to be improved upon by the explicit assignment of the burden of persuasion on all mitigators to the prosecution.

288. The argument that the defendant benefits from a defense and therefore should be required to prove it cannot be kept within any reasonable bounds. See id. at 1325-30. Control over the evidence is too contingent a matter to govern the distribution of burdens of persuasion in a principled fashion. See id. at 1333-36.

5. Jury Unanimity on Mitigation

The Supreme Court has groped its way toward the correct decision on burdens of persuasion on all mitigators under the rubric of jury unanimity. It has effectively re-assigned this burden of persuasion to the government by the adoption of a ban on unanimity requirements for the finding of mitigating factors. The sheer inelegance of this solution counts as a reason to think in terms of fault and eligibility according to capability, instead of mitigation.

In *Mills v. Maryland*\(^{290}\) and *McKoy v. North Carolina*,\(^{291}\) the Court struck down statutes that implicitly and explicitly required unanimity for a finding of mitigation, and that thus placed the risk and prejudice of non-unanimity on the offender. The Court explained the concern that drove its decisions in this way:

> The unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a ‘sentence less than death.’ Moreover, even if all 12 jurors agree that there are some mitigating circumstances, North Carolina’s scheme prevents them from giving effect to evidence supporting any of those circumstances in their deliberations [on the ultimate question of death] unless they unanimously find the existence of the same circumstances.\(^{292}\)

Therefore, the Court concluded, the government must bear the risk of non-unanimity on all mitigators, and a requirement of jury unanimity on the question of mitigation is constitutionally prohibited if, as is usually the case, the offender bears the burden of proving mitigators.

As a result of *Mills* and *McKoy*, the burden of persuasion on all mitigators has been shifted, as a constitutional matter, to the government, regardless of the nominal assignment of this burden of persuasion to the offender in virtually all capital sentencing statutes.

In order to see this effect more clearly, consider the relationship between the burden of persuasion and the requirement of unanimity. The party to whom the burden of persuasion is distributed bears the risk of indecision: the issue will be decided adversely to him if the jury cannot determine the issue by the required margin of votes. In the context of the criminal law, the required margin is unanimity, and so the party to whom the burden of persuasion has been distributed bears the risk of non-unanimity.

\(^{292}\) Id. at 439 (citations omitted).
To shift the risk of non-unanimity is, in effect, to shift the burden of persuasion. Suppose that we adopt a rule that a non-unanimous verdict should go against the defendant. The effect of this change will be significant even if we leave the weight of the burden unchanged. We can retain the rule that the government must prove its case beyond a reasonable doubt, but if we reassign the risk of non-unanimity, then the defendant will win only if he can raise a reasonable doubt in the minds of all jurors. The government must produce a greater degree of confidence in the minds of jurors in order to win: it must prove its case beyond a reasonable doubt. But if the risk of non-unanimity is placed on the defendant, then the government can win by producing this degree of confidence in the mind of only one juror. To shift the risk of non-unanimity to the defendant is to shift the burden of persuasion to the defendant—and the balance of power to the government.

Mills and McKoy shifted the burden of persuasion on all mitigators in the opposite direction from that in the foregoing example. The states require the offender to prove any mitigating factors by a preponderance, or they simply leave this burden unspecified and unassigned. By assigning the risk of non-unanimity to the government, the Court effectively shifted the burden of persuasion on all mitigators to the government.

This shift is consistent with the position on the burden of persuasion that I advocated above. Furthermore, the Court’s reasoning tends to corroborate the theoretical case that I advanced for such a distribution, based on the difference between excuses and capability mitigators as questions of expressive rationality. We might have qualms about the fact that a hold-out juror can deny a defendant the benefit of an excuse such as an acquittal on grounds of insanity. But these qualms do not tempt us to alter the requirement of jury unanimity in the adjudication of the excuses. In contrast, the specter of the hold-out juror who condemns an offender to death is far more compelling—so compelling, in fact, that it has caused us to abandon our usual requirement of jury unanimity. The expressive rationality of a defendant’s eligibility for any punishment in light of his capabilities is different from the expressive rationality of an offender’s eligibility for the punishment of death in light of his capabilities.

Nevertheless, the Court’s method of ensuring expressive rationality in death sentencing—the problem that Mills and McKoy frame in terms of the hold-out juror—is a highly imperfect substitute for explicitly assigning the burden of persuasion on all mitigators to the government, for two reasons. First, the Mills-McKoy solution leaves the weight of the burden unaffected.

293. See supra note 283.
294. See supra notes 290-291 and accompanying text.
If the defendant must prove mitigation by a preponderance, then even if we shift the risk of non-unanimity, and thereby the burden of persuasion, to the government, the government need only dis-prove the mitigator by a preponderance. In the case of fault-based mitigators in particular, this is unacceptable. Proof of fault is no less essential to the justification of punishment than the proof of the other material elements of an offense. This is the reason that intentional-state offense elements must be proved beyond a reasonable doubt, even in those cases in which this issue is framed in terms of the dis-proof of the defendant's alleged mistake. By the same token, we ought to require non-fault in the guise of a mitigator to be disproved beyond a reasonable doubt.

The second difficulty with Mills and McKoy is that they reach the correct result in the most confusing and inelegant way possible. To ban unanimous jury decision-making in any criminal matter is to court implausibility, because jury unanimity is a fundamental value in criminal law. Juries in criminal cases define the prohibitory norms that they apply, because these norms present predominantly mixed questions of law and fact for decision, and because the jury inevitably possesses substantial latitude to interpret the law in the course of applying it to facts. Given the jury's power to frame these norms, unanimity is an essential counterbalance to the relatively unrepresentative make-up of criminal juries, their un-democratic selection, and their secret deliberations. In the decision of questions such as fault and eligibility, unanimity is particularly important, because these decision are about the nature of a decent society—our society. A grave and authoritative decision is called for, and the unanimity requirement forces deeper deliberations and produces a more credible judgment.


296. See Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MINN. L. REV. 1149, 1169 (1997) (arguing that some jury nullification consists of inevitable interpretive construction of law); see also Commonwealth v. Pahel, 689 A.2d 963 (Pa. Super. Ct. 1997). In Pahel, the defendant was convicted of having "knowingly endanger[ed] the welfare of [a] child by violating a duty of care, protection, or support," on evidence that she had failed to seek prompt medical attention for a child's broken nose. Id. at 964 (citation omitted). The appellate court left undisturbed evidence to the effect that "the amount of trauma needed to inflict a nasal fracture could have caused injury to the brain." Id. Nevertheless, the appellate court reversed for insufficient evidence of risk to the child. Id. at 967. In other words, it rejected the jury's interpretation of the statute, under which the endangerment of a child encompassed a failure to treat a broken nose.

Given the place of unanimous jury decision-making in the criminal law, Justice Scalia was able to cast the McKoy decision in an unflattering light without much difficulty. For the reasons given in the foregoing paragraph, the sentencer in a capital case is the jury, not individual jurors, and it follows that mitigating evidence is given effect by the sentencer, in accordance with Lockett, regardless of how the individual jurors’ votes are tabulated to arrive at this sentencer’s decision. The juror’s vote has been given effect even if her view does not prevail in the verdict. Justice Scalia was right to conclude that, “Lockett and Eddings are quite simply irrelevant to the question before us, and cannot be pressed into service by describing them as establishing that ‘a sentencer [by which the reader is invited to understand an individual member of the jury] may not be precluded from giving effect to all mitigating evidence.’”

Justice Scalia’s argument is sound, but it is also insensitive to the problem of the hold-out juror. The reason that neither the majority nor the dissent seems right in Mills and McKoy is that the issue was fundamentally misconceived in terms of mitigation. We can resolve the problem of the hold-out juror in one of two ways. We can ban unanimous jury decision-making for mitigating factors; or we can explicitly place the burden of persuasion on mitigators on the government, so that the prejudicial effect of a non-unanimous verdict does not fall on the offender. The latter solution is obviously superior, because it allows us to maintain the practice of requiring jury unanimity in criminal matters, but the former solution is virtually dictated by the use of the word “mitigation.” The crude language of aggravation and mitigation confines us to an equally crude apportionment of burdens of persuasion according to whether the matter is one of inculpation or exculpation. This places the burden of proving mitigation on the offender, and leaves the manipulation of jury unanimity as the only means of avoiding the injustice that the Mills and McKoy opinions cast in terms of the hold-out juror.

In contrast, if we frame the mitigators in terms of fault and eligibility according to capability, then can we see that they are properly assigned to the government for disproof beyond a reasonable doubt. This places the risk of non-unanimity on the government, and allows us to maintain the practice of jury unanimity in the penalty phase, where it is most critically required.

299. Id. at 466 (citation omitted).
300. However, the defendant might be required to give notice of his claims of incapability shortly after conviction, to provide ample discovery on these claims, and to bear a heavy burden of production on these issues at the penalty hearing. One point of clarification about my proposal will make the need for these provisions apparent. When I say that the prosecution must bear the burden
V. CONCLUSION

The foregoing analysis of constitutional death sentencing suggests a pressing need for the radical reform of present law. I have argued above for changes in the Supreme Court’s assessment of the penalty phase under the Eighth Amendment. Ideally, however, this reform would occur in the state legislatures and in Congress. Only a short time ago, the chances for such reform would have seemed remote. However, some recent developments indicate that the issue is stirring in state capitals. The Nebraska Legislature recently passed a moratorium on executions that ultimately was vetoed.301 The Republican governor of Illinois declared an executive moratorium on executions.302 Even if abolition remains a remote eventuality, then reform might nevertheless be a viable option.

Only the broad outlines of reform legislation can be sketched here, but at a minimum it must include the elimination of the standard lists of aggravating and mitigating factors, and of the requirements of proof associated with them. Instead, capital sentencing statutes ought to set forth those special fault elements that the legislature believes can justify a sentence of death. The law should place the burdens of production and persuasion for these issues on the prosecution. The defendant, of course, has no opportunity, and therefore no responsibility, to set forth in advance of indictment or trial the indicators of non-fault and incapability that would make him ineligible for death as a punishment. Nor should the defendant be required to bear the burden of proving that these factors do not render death an unjust punishment. See supra notes 226, 266. I mean that the prosecution must bear the burden of disproving the factual predicates of the offender’s claims about non-fault and incapability as well. This is indeed an extraordinary burden, the evidence to decide these issues might well be in the control of the offender, and a proper issue can be framed only if the defendant brings forth the evidence to do so. For reasons that I have given above, these considerations do not justify placing the burden of persuasion regarding capability mitigators on the offender, see supra note 283, but they might well justify the trial judge’s not finding a justiciable issue if the offender has not made a strong showing at the penalty hearing and has not been fully forthcoming prior to the hearing on these issues. If a defendant relies on a specific claim of non-fault, the same requirements might be imposed, for the same reasons.


burden of persuasion on these issues at the penalty hearing. He should, however, be required to sustain a burden of production on his claims of incapability and non-fault at the penalty hearing, in order to frame a triable issue.

The offender has a right to a jury trial and a unanimous determination on the predicate matters of fault and incapability that arise at the penalty phase. He does not, however, have a constitutional right to have the jury make the ultimate decision on whether or not death is a proportionate punishment in his case.

Finally, the relevant statute and instructions on the ultimate issue of death or life ought to be phrased in a way that makes it unmistakably clear to the judge or juror that she is to be, by her decision, the principal agent of the offender's death, if he is to die. I have argued that the question of proportionality is whether a particular sentence, in this case death, is expressively rational in light of the fault and the capabilities of the offender. The expressive rationality of this punishment is a matter of community identity and social self-definition. It is a matter of whether the killing of this offender for this crime will make us a brutal or an enlightened society. The difficulty is that a question about society's identity is abstract, and that to pose the ultimate question to the sentencer in this way would defeat the purpose of asking it. If the sentencer is to feel the enormity of the decision before it, so that our identity as a civilized society is fully at stake in its decision, then the sentencing question must be framed in immediate terms. The judge or juror must be forced to ask: "Can I bear to be the agent of another human being's death? Can I incorporate this killing, forever, into my identity as a civilized being?"