

Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence

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Introduction

The constitutional law of capital sentencing currently is torn between its past and its future. It is built upon a utilitarian, offender-based sentencing theory, but that theory looks increasingly inapposite in the face of retributivism's resurgence as the dominant justification for criminal punishment. Since *Furman v. Georgia*,¹ the Court's death penalty rhetoric has reflected this resurgence, and has increasingly embraced the language of retribution: Is the death penalty a morally appropriate response to the defendant's acts?² Does this defendant deserve to die for this crime?³ However, the basic procedural and jurisprudential structures – including the foundational principle of “individual consideration,” which directs the focus of the sentencing

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1. 408 U.S. 238 (1972) (per curiam).

2. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender.”); *Penry v. Johnson*, 532 U.S. 782, 788 (2001) (noting that a capital sentence must reflect “a reasoned moral response to the defendant’s background, character, and crime”) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)).

3. See, e.g., *Gray v. Mississippi*, 481 U.S. 648, 666-67 (1987) (characterizing the death penalty as a decision regarding “whether a man deserves to live or die”) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 n.20 (1968)); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (noting that capital defendant’s “punishment must be tailored to his personal responsibility and moral guilt.”).

process primarily to the character of the offender rather than the nature of the offense, the open-ended evidentiary rules that govern sentencing processes, and the procedural devices by which that unbounded evidence is evaluated – all originated as the offspring of an explicitly non-retributive penal theory crafted in large part by Herbert Wechsler and codified in the Model Penal Code (“MPC” or “the Code”).

The result is a disjuncture between purpose and practice, giving rise to an analytical and moral vacuum at the center of contemporary capital jurisprudence. Indeed, not only has the Court failed, with a few critical exceptions, to identify the specific criteria by which sentencers decide if a criminal defendant deserves to live or die,⁴ it has affirmatively declared that territory off limits to the state.⁵ As a result, it has constructed a peculiar constitutional space in which only the capital fact-finder may tread, and in so doing, it has with one hand unraveled the fabric of “guided discretion” that it professedly has sewn with the other.

The American Law Institute (“ALI” or “the Institute”), which drafted the MPC in the late 1950s, and adopted it in the early 1960s,⁶

4. *Coker v. Georgia*, 433 U.S. 584 (1977), established that the death penalty was not a proportionate penalty for rape. *Enmund*, 458 U.S. at 782, as modified by *Tison v. Arizona*, 481 U.S. 137 (1987), established that the death penalty was not available in the absence of a sufficiently culpable mental state – e.g., intent to kill or reckless indifference to life. Most recently, *Atkins*, 536 U.S. at 304, established a prohibition on executions of mentally retarded persons.

5. For instance, the Court has stated:

Nor may States channel the sentencer’s consideration of this evidence by defining the weight or significance it is to receive—for example, by making evidence of mental retardation relevant only insofar as it bears on the question whether the crime was committed deliberately. Rather, they must let the sentencer ‘give effect’ to mitigating evidence in whatever manner it pleases. Nor, when a jury is assigned the sentencing task, may the State attempt to impose structural rationality on the sentencing decision by requiring that mitigating circumstances be found unanimously; each juror must be allowed to determine and ‘give effect’ to his perception of what evidence favors leniency, regardless of whether those perceptions command the assent of (or are even comprehensible to) other jurors.

Walton v. Arizona, 497 U.S. 639, 663-64 (1990) (Scalia, J., concurring in part) (citations omitted).

6. See, e.g., Henry Weihofen, *Retribution Is Obsolete*, 39 NAT’L PROBATION & PAROLE NEWS 1, 4 (1960) (discussing the merits of a rehabilitative stance regarding punishment over a retributive stance). In the 1970s, retributive ideas began to be dusted off as the star of rehabilitation waned. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 979 (1999) (“Beginning in the early 1970s, a widespread disaffection with rehabilitation as a theory and in practice took hold . . .”); Michael Tonry, *Sentencing Guidelines and the Model Penal Code*, 19 RUTGERS L. J. 823, 824 (1988).

itself recently embarked on a major revision to the sentencing provisions of the Code that would return retributivism to its pride of place as the predominant justification of criminal punishment.⁷ Although the ALI's Plan for Revision does not yet indicate what direction the Institute might take with respect to the MPC's capital sentencing provisions, the little-noticed disconnect⁸ between the Supreme Court's predominantly retributive capital sentencing philosophy and the non-retributive MPC-based procedures it has sanctioned make revisions in this area especially important.

The Court's reliance on legal structures developed in service of a utilitarian sentencing theory has caused mischief in two principal respects. First, it has led to the development of a sentencing regime in which individuals are selected to die not only because of what they have done, but also, and perhaps primarily, because of who they are. By permitting sentencing proceedings to focus on the character of the offender, capital defendants are often sentenced to death even where there was un rebutted mitigating evidence that they were not fully culpable for their acts. Second, the Court's MPC-derived capital jurisprudence has fostered procedures with many of the same deficiencies inherent in the pre-*Furman* era of unguided jury discretion, while investing the decision-making process with an aura of "legality" that diminishes the sentencer's sense of personal moral responsibility.⁹ Despite thirty years under *Furman's* rubric, death penalty decision-making is as arbitrary and unguided as ever.¹⁰

In Part I of this article, I discuss the theoretical infrastructure of the Model Penal Code's treatment of homicide and the death penalty. That infrastructure was developed in early work that Herbert

7. See Kevin R. Reitz, *Model Penal Code: Sentencing, Plan for Revision* 6 BUFF. CRIM. L. REV. 525 (2002).

8. Wechsler's anti-retributivist views have done little to detract from the tremendous influence his scholarship has exerted on the shape of contemporary criminal law. In particular, Wechsler's influence can be seen in the refinement of mens rea concepts, wherein "the dominant view today sees an essential link between punishment and moral wrongdoing." Alan C. Michaels, "Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 57 (2000).

9. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 383 ("The formal, legalistic image of the law of capital punishment that the jury now receives from the court and the prosecutor is often a great advantage to the state.").

10. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) ("[T]he overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-*Furman* [sic] world of capital sentencing."); Weisberg, *supra* note 9, at 313 ("Despite its apparent formal complexity, the Model Penal Code's proposed capital sentencing law only minimally constrains the jury's discretion.").

Wechsler, who was the MPC's first Chief Reporter, produced in conjunction with his senior colleague, Jerome Michael. Considered together, commentary to the MPC and Wechsler and Michael's influential treatment of criminal homicide provide a clear outline of the utilitarian, offender-based theory of punishment that underlies the Code, and which places an inordinate emphasis on the character of the offender, principally defined as his perceived "future dangerousness."

In Part II, I demonstrate that just as the states borrowed heavily from the Code to fashion post-*Furman* capital punishment schemes, so too the Court borrowed heavily from the Code, and from Wechsler's offender-based theory of sentencing, to fashion an accompanying capital jurisprudence. Although that approach has provided important protections to capital defendants, it also imposed substantial burdens by expanding the state's freedom to introduce virtually any type of inflammatory evidence regarding the defendant and his characters.

In Part III, I argue that the Court has continued to recognize the uniquely powerful role that retribution plays in any capital punishment scheme. In the death penalty context, the Court has essentially repudiated the anti-retributivist views held by Wechsler and embedded in the Code's death penalty provisions. However, because the Court has continued to sanction the procedural structures outlined by the MPC – structures which reflect the non-retributive theoretical underpinnings of the Code – contemporary sentencing procedures lack coherence.

I thus attempt, in Part IV, to sketch out a retributive approach to capital sentencing. Such an approach would diverge from the utilitarian, offender-based model envisioned by Wechsler and codified in the MPC in three ways. First, the evidentiary universe upon which sentencing decisions are made would be more tightly circumscribed to ensure that the sentencing decision is based on appropriate retributive considerations. Although the virtually unlimited rules of relevance currently applicable at the penalty phase are typically thought to favor capital defendants, in fact, they place those defendants who are least deserving of a death sentence at special risk, because they allow prosecutors to introduce inflammatory character evidence that often rhetorically overwhelms relevant mitigating evidence of reduced or diminished culpability. Second, the paradigm by which aggravating and mitigating factors are "weighed" would be abandoned. Contrary to what is implied by typical "weighing" schemes, aggravating and mitigating circumstances

are not reverse sides of the same coin, and cannot validly or reliably be compared.

Third, I argue that in recrafting the penalty phase, it would be essential also to disaggregate mitigation evidence, which concerns “moral desert,” from mercy pleas, in which defendants seek leniency even where a more severe punishment may, under retributive principles, be warranted. The “bad character” evidence that is now routinely admitted at penalty phase proceedings should be admissible only to rebut a defendant’s plea for mercy, not in response to evidence of diminished culpability. To bring death penalty procedure more in line with contemporary understandings of the death penalty’s retributive justification, the ghost of Herbert Wechsler must be exorcised from the constitutional law of capital sentencing.¹¹

I. Capital Punishment and the Model Penal Code: Penalizing “Dangerous Character”

Professor Herbert Wechsler was one of the most influential proponents of utilitarianism in criminal theory,¹² and was one of the most influential shapers of the contemporary approach to capital jurisprudence. His position as the first Chief Reporter for the ALI’s Model Penal Code ensured a dominant role in the drafting of that critically important document, and helped to ensure, for better or worse, his strong theoretical influence in the approach to capital punishment adopted in the MPC.¹³ That approach can be traced to a

11. Indisputably, the best way to resolve the inherent tensions that beset the effort to administer the death penalty is to abolish it. For purposes of this article, I accept, as the ALI did when it first drafted the MPC death penalty provisions, that regardless of the moral and policy wisdom of capital punishment, it will persist as a practice for the foreseeable future. See MODEL PENAL CODE § 210.6(2) cmt. 1 at 110-11 (Official Draft and Revised Commentaries, Part II 1980).

12. Wechsler was a self-described utilitarian. See Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 869 (1993) (observing that “I have always been exceedingly utilitarian in my views and approaches”).

13. By all accounts, Wechsler was “the undisputed father of the Model Penal Code.” Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 517 (2000); see also Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1072 n.240 (2001) (recognizing Wechsler’s influence on the capital punishment provisions of MPC). Wechsler’s hand in bringing the Code into being was wide and varied: “He drafted a large part of the Code’s general part, oversaw the whole, and played a key role in the commentaries that accompanied the Tentative Drafts.” Harold Edgar, *Herbert Wechsler and the Criminal Law: A Brief Tribute*, 100 COLUM. L. REV. 1347, 1352-53 (2000) (recognizing Wechsler as the “architect,” “engineer[,] and chief craftsman” of the MPC).

pair of landmark articles co-authored by Professor Wechsler and Professor Jerome Michael in 1937, which posited a sophisticated non-retributivist account of the law of homicide.¹⁴

A. A New Rationale For the Law of Homicide

While the common law of homicide was shaped in the spirit of *lex talionis* – the biblical notion of “an eye for an eye,”¹⁵ Wechsler and Michael sought to recast the law of homicide in the spirit of the great enlightenment utilitarians, Bentham and Beccaria, and their codifying disciples, Livingston and Stephen,¹⁶ and the proposition that the primary aims of criminal punishment are the “deterrence of potential offenders and the incapacitation and reformation of actual offenders.”¹⁷ This understanding of the aims of criminal law naturally grew out of the Benthamite view that “the end to be achieved is the protection of the public against human behavior that has undesirable consequences.”¹⁸ Wechsler and Michael affirmatively rejected

14. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 (1937) [hereinafter Wechsler & Michael I]; Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: II*, 37 COLUM. L. REV. 1261 (1937) [hereinafter Wechsler & Michael II]. Wechsler subsequently stated that in writing these articles, the authors were even then “trying to influence the ALI effort” to draft a model penal code. Silber & Miller, *supra* note 14, at 869.

15. See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 844-45 (1969) (discussing codification and development of the *lex talionis* in the English common law).

16. See generally, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart, eds., The Athlone Press 1970) (1780); JEREMY BENTHAM, 1 THE WORKS OF JEREMY BENTHAM (Russell & Russell 1962) (1843); JEREMY BENTHAM, PRINCIPLES OF THE PENAL LAW (Edinburgh, W. Tait 1843); EDWARD LIVINGSTON, THE COMPLETE WORKS ON CRIMINAL JURISPRUDENCE: CONSISTING OF SYSTEMS OF PENAL LAWS FOR THE STATE OF LOUISIANA AND FOR THE UNITED STATES OF AMERICA: WITH THE INTRODUCTORY REPORTS TO THE SAME (Patterson Smith 1968) (1873); CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (Richard Bellamy ed., Richard Davies et al. trans., Cambridge Univ. Press 1995); Wechsler & Michael II, *supra* note 14, at 1268 n.22 (explaining that “our effort has been to take the scheme of ideas set forth in such books as [Bentham’s *Principles of Morals and Legislation* and Livingston’s *The Complete Works on Criminal Jurisprudence*] and develop or modify them for our purpose in the light of a century of writing on the problems with which they dealt”); *id.* at 1263-64 n.7 (noting agreement with the general theoretical approach of Beccaria); JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (London, MacMillan 1883).

17. Wechsler & Michael II, *supra* note 14, at 1262.

18. Herbert Wechsler, *A Caveat on Crime Control*, 27 AM. INST. CRIM. L. & CRIMINOLOGY 629, 631 (1937); see also Wechsler & Michael I, *supra* note 14, at 702 (starting point in their analysis of the law of homicide: That “[a]ll men agree that in general it is desirable to prevent homicide and bodily injury,” and, thus, that “[t]he scope of reasonable controversy is therefore limited to the way in which the criminal law can and

retributivism as an appropriate basis for the development of a modern penal code.¹⁹ Their aversion to retributive theory went so far as to compel them to avoid even uttering the word “punishment;” they preferred the term “treatment.”²⁰ When Wechsler and Michael did invoke the language of punishment, or “punitive treatment,” they did so primarily to suggest that offenders may “be treated punitively for the sake of deterrence.”²¹

Wechsler’s project, as it developed over the course of his long and distinguished career, was consistent with the modernizing spirit of the progressive movement: To extract criminal law from its common law origins and refound it based on sound, scientific principles. Wechsler viewed criminal law’s obsession with retribution as one of its particularly antiquated features. According to Wechsler, present penal codes were ineffective in large part because of “the extent to which sanctions are governed by the injury inflicted rather than the future danger the defendant may present and the requirements for an effective therapy.”²² Wechsler was thus a strong proponent of shifting the focus of criminal punishment from a “balancing of accounts” to a forward-looking consideration of social interests.

To effectuate that goal, Wechsler and Michael proposed a sentencing regime that empowered the sentencer to thoroughly evaluate the offender’s character, defined as the “sum of a man’s potentialities for good and evil conduct at whatever time they are estimated.”²³ By focusing on character, Wechsler and Michael argued, criminal law could simultaneously fulfill its functions both as a deterrent to the “generality of men” and as a treatment of the particular offender (for either incapacitative or rehabilitative purposes).²⁴

Of course, the ultimate aspiration of criminal law is to deter

should operate to this end.”)

19. Wechsler & Michael I, *supra* note 14, at 730 n.126 (rejecting the “contention that the penal law should serve the end of retribution”).

20. *See, e.g., id.* at 729 (“[A]ny provision of the criminal law serves the end of protecting life in so far as it makes possible the incapacitative or reformatory treatment or [sic] persons who, unless they were subjected to such treatment, would engage in behavior threatening life.”).

21. *Id.* at 728.

22. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1103 (1952).

23. Wechsler & Michael II, *supra* note 14, at 1272.

24. Wechsler & Michael I, *supra* note 14, at 730-31.

antisocial conduct rather than merely to treat it.²⁵ But Wechsler and Michael argued that a character-focused penal theory would serve both goals. For purposes of deterrence, careful evaluations of character are important to determine how severe penalties must be in order to achieve sufficient deterrent effect on different classes of offenders.²⁶ Character evaluations are also important with respect to treatment. Wechsler and Michael reasoned that incapacitation was only sensible if the individual subject to treatment was “sufficiently more likely than the generality of men to engage in undesirable behavior in the future,”²⁷ or, in modern parlance, if the individual posed a risk of future dangerousness. Likewise, they argued, the severity of the criminal penalty should be proportioned to the extent or severity of the risk of such dangerousness.²⁸ “[T]he more dangerous men are, the more desirable it is that they be thoroughly incapacitated.”²⁹ Thus, regardless of whether deterrence or incapacitation (or possibly, rehabilitation)³⁰ is preferred, “the problem of estimating the characters of offenders is the same.”³¹

The approach to homicide law advocated by Wechsler and Michael shared features in common with a traditional, retribution-

25. However, “for deterrence to work effectively to prevent antisocial behavior, the behavior triggering the imposition of “treatment” must be “desirable to prevent and possible to deter.” *Id.* at 731.

26. Wechsler & Michael II, *supra* note 14, at 1291 (“[T]he penalties designed to control relatively good men on the more or less rare occasions when they are moved to evil deeds need not be as vigorous as those directed at bad men who are habitually moved to such acts . . .”).

27. Wechsler & Michael I, *supra* note 14, at 731.

28. Because of their rejection of retributive principles, Wechsler and Michael were relatively unconstrained by conventional notions of moral culpability in assessing dangerousness. For instance, Wechsler and Michael viewed “behavior attributable to physical or psychical condition which is permanent” as grounds for greater incapacitation, because of the irremediable danger persons with such conditions posed to society. Wechsler & Michael II, *supra* note 14, at 1300. Only temporary, or treatable, physical or psychical disorders were seen as appropriate mitigators of punishment. *Id.*

29. *Id.* at 1269-70.

30. Rehabilitation is either consistent or inconsistent with the goals of incapacitation and deterrence, depending on whether it is possible to design an incapacitative treatment sufficiently unpleasant to deter, and of sufficient duration to protect society while the individual poses a threat, but which also actually succeeds in reforming the wrongdoer. Wechsler and Michael were, rightly, skeptical that such a course of treatment was possible.

31. Wechsler & Michael II, *supra* note 15, at 1315 (“[T]he problem of estimating the characters of offenders is the same problem whether character is estimated in order to determine the extent of incapacitation or the severity of punitive treatment for deterrent purposes.”). If reformation is prioritized over both deterrence and incapacitation, however, it might or might not require fundamentally different orders of treatment to offenders. *Id.* at 1318-1324.

centered, sentencing theory. For instance, they recognized that any rational system must incorporate the principle of proportionality, that is, that “the severity of penalties should be correlated with the relative undesirability of the behavior for which they are imposed.”³² They argued, however, that proportionality could be justified on grounds other than the retributive aim of giving offenders their “just deserts,”³³ but that strict proportionality between “treatment” and “moral guilt” was unnecessary.³⁴ One of the most serious drawbacks of rigid proportionality, Wechsler and Michael argued, was that it was impossible to make reliable judgments about the character of the offender based solely on the nature of his or her criminal act.³⁵

Rather, the type and duration of treatment appropriate could only be determined based on a careful analysis of the “actor’s physical and psychical condition at the time of his act, of his past, and of the changes wrought in him by the criminal experience itself.”³⁶ Although the aims prioritized by Wechsler and Michael – deterrence, incapacitation and reform – point penal policy solutions in different directions, the authors suggested a practical convergence of solutions – centering on the need to incapacitate most extensively those exhibiting the most defective characters – regardless of which specific penal theory – deterrence, incapacitation, or rehabilitation – was accorded priority. After all, those persons with the best characters are the easiest to deter, are least in need of incapacitation, and are most amenable to reform.³⁷

Wechsler and Michael’s belief that the proper disposition of a criminal offender depends on an understanding of the dangerousness of his character led them to reconceptualize the functions played by the traditional indicia of moral gravity: the harm reasonably foreseeable to the actor and the actor’s culpability – that is, the

32. *Id.* at 1269.

33. *Id.* at 1265-66 (arguing that the “popular insistence upon an ordering of the severity of punitive treatment is not necessarily based upon a retributive philosophy, as many have come to think”).

34. Wechsler & Michael I, *supra* note 15, at 730 n.126 (arguing that “no legal provision can be criticized merely on the ground that it fails to . . . call[] for the punishment of the morally guilty by a penalty proportionate to their moral guilt”).

35. “[W]hile we cannot ignore our evaluation of different sorts of criminal behavior in making inferences as to the characters of criminals from the nature of their criminal behavior, neither can we regard it as conclusive. More than this, we ought not base our judgment of the character of a criminal upon his criminal conduct alone, and there is no reason why we should try to do so.” Wechsler & Michael II, *supra* note 14, at 1273.

36. *Id.* at 1273.

37. *Id.* at 1291.

mental state, or mens rea, accompanying the acts. Rather than apportion judgment based on the actor's mens rea alone, Wechsler and Michael believed that such aspects of the offense should be viewed as subordinate components in the larger project of estimating the character of the offender, and judging "the extent to which his values are askew."³⁸

This reconceptualization of the grading inquiry undergirded what is perhaps the most radical break from traditional law in their work: the rejection of the significance of deliberation. Building on arguments made by Sir James Fitzjames Stephen,³⁹ they reasoned that the traditional "premeditation" or "deliberation" requirement, so central historically to an evaluation of the objective seriousness of a homicide, is only relevant to a rational evaluation of the severity of the offense, or the appropriate severity of punishment, to the extent that "the more carefully considered and the less impulsive the act is, the more it indicates basic perversion of the actor's conceptions of good and evil."⁴⁰ They thus concluded that "deliberation has no independent significance" in the grading or punishment of offenses.⁴¹

Although the attack on the relevance of deliberation, and the broader critique of the whole doctrine of malice aforethought, was amply justified,⁴² it also was consistent with Wechsler and Michael's campaign to unseat retributivism from its traditional pride of place. Malice, premeditation, and deliberation each provides a tool, however compromised through centuries of common law usage, to measure the degree of volition motivating the offender's criminal

38. See, e.g., *id.* at 1278; *id.* at 1277 ("[T]he less dangerous to life he believed his act to be, the less is the depreciation of the value of human life which his act indicates and, hence, the less grave the moral weakness which it manifests, even though the defect to which it points is habitual."); *id.* at 1280 ("[T]he more cruel the actor's homicidal behavior is, the more extensively it imperils life, limb and property, the more inappropriate any homicide or the particular homicidal behavior is as a means to the actor's ends, the greater his demoralization is indicated to be.").

39. See STEPHEN, *supra* note 16, at 94; see also REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENSES (1879), reprinted in 6 BRITISH PARLIAMENTARY PAPERS 373 §§ 174-175 (1971).

40. Wechsler & Michael II, *supra* note 14, at 1283.

41. *Id.* at 1284.

42. The abandonment of the doctrine of malice aforethought could easily be justified regardless of one's philosophical orientation. As Wechsler and Michael noted, and as the commentary to the MPC reiterated, the idea of malice aforethought had, over time, been reduced to a virtually meaningless formula that signified little more than intent to kill. It therefore could not logically serve, as it was called to do, to separate merely "intentional" homicides from "premeditated" or "deliberate" ones deserving more severe punishment. See MODEL PENAL CODE, § 210.6 cmt. at 69 (Tentative Draft No. 9, 1959).

act.⁴³ They thus serve as (sometimes crude) yardsticks of culpability, and in that manner play an important role in a system of criminal justice based on retribution. As Wechsler and Michael observed, however, those markers serve little purpose if the primary question is not desert but future dangerousness. After all, a premeditated murder and a spontaneous murder both result in a dead victim, and it is far from clear that a person who deliberately and with premeditation chooses to kill another poses a greater future danger to society, or is more in need of rehabilitation, than one who, at the slightest provocation and without any deliberation at all, takes a life.⁴⁴

Wechsler and Michael therefore argued that the proper indicia of the defendant's dangerousness is not deliberation, but habituation. That is, the goal of the character inquiry is to determine whether the criminal act committed by the offender reflects a "habitual" or a "sporadic" ordering of the offender's passions and reason.⁴⁵ Individuals evidencing "habitual defect of character" pose the greatest threat to society,⁴⁶ and are properly subject to the most extensive treatment. To make such a judgment, however, the sentencer must consider much more information than typically was available to a judge or jury following the guilt phase of a criminal trial. For instance, the sentencer must consider not only the extent to which the defendant acted purposefully or inadvertently and the extent to which the actor intended the consequences of the acts, but also the motivations that caused the acts and the ends the actor sought to achieve thereby, antecedent circumstances such as relevant provocations, the actor's physical and psychical condition, his history, and the extent to which he demonstrates remorse for his conduct.⁴⁷ As Wechsler and Michael explained, "[t]he character of men is revealed in part by the needs which they seek, by the desires which they endeavor to satisfy, as well as by the ways in which they try to satisfy them."⁴⁸ Only the most comprehensive evaluation of the offender's life history and moral values would provide sufficient information to make informed sentencing choices.

43. *Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through 'Benefit of . . . Clergy' would be spared.") (citing 23 Hen. 8, c. 1, §§ 3, 4 (1531) (Eng.)).

44. Wechsler & Michael II, *supra* note 14, at 1284.

45. *Id.* at 1273.

46. *Id.* at 1286.

47. *Id.* at 1274-1290.

48. *Id.* at 1277.

That broad inquiry, however, must be structured to ensure that sentences are consistent and rational. Thus, foreshadowing the approach adopted by the ALI twenty-odd years later, Wechsler and Michael formulated two extensive lists of factors they thought should be considered by the sentencer⁴⁹ in fixing a sentence.⁵⁰ One list described factors “favorable to mitigation,”⁵¹ another described factors “unfavorable to mitigation.”⁵² The “extenuating” and “aggravating” factors identified by Wechsler and Michael emerged from their basic premise that appropriate punishment may only be determined through an evaluation of all logically-relevant facts that contribute to an estimation of the degree of defect of the offender’s moral character. Such an inquiry cannot be reduced to a simple formula, they contended, because “[i]t is impossible in the present state of knowledge to determine with any precision what weight

49. Wechsler and Michael urged that sentencing proceedings be bifurcated from guilt proceedings, and recommended that the sentencing decision should be entrusted either to the judge presiding over the trial or to a tribunal or agency “specially constituted for the purpose,” rather than a jury. *Id.* at 1311.

50. Wechsler and Michael were not the first codifiers to employ this practice. In one of the first comprehensive efforts to codify criminal law, Edward Livingston adopted the practice. See EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA: CONSISTING OF A CODE OF CRIMES AND PUNISHMENTS, A CODE OF PROCEDURE IN CRIMINAL CASES, A CODE OF PRISON DISCIPLINE, AND A BOOK OF DEFINITIONS, PREPARED AND PRESENTED TO THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (William S. Hein & Co. 2000) (1858).

51. Wechsler & Michael II, *supra* note 14, at 1300. Factors favorable to mitigation included the following: (1) Slight probability that behavior will cause death; (2) consent of the person killed; (3) behavior infrequent; (4) behavior serves some desirable ends; (5) creation of risk inadvertent; (6) death not intended and risk low; (7) good motives, i.e., desirable ends; (8) great provocation; (9) behavior attributable to physical condition or well defined psychical disorder which is temporary or remediable; (10) past life indicative of good habits; (11) youth, especially if disadvantaged; (12) sensitive response to homicidal experience; (13) death not intended and homicidal means involving danger to the actor as well as to others; (14) no undesirable result in the particular case; of greater importance when death is intended or risk created inadvertently than when death is not intended but risk created consciously; (15) behavior attributable to some injustice to the actor as an external cause.

52. *Id.* Factors deemed unfavorable to mitigation include: (1) High probability that behavior will cause death; (2) lives of many persons endangered; (3) other interests endangered in addition to the preservation of life; (4) unusually painful death threatened; (5) behavior frequent; (6) behavior serves no desirable ends; (7) unjustifiable risk consciously created; (8) death intended or degree of risk known to be high; (9) bad motives, i.e., undesirable ends; (10) means unnecessarily dangerous, cruel or indicative of professionalism; (11) slight provocation; (12) behavior attributable to physical or psychical condition which is permanent; (13) past life indicative of bad habits, especially criminal habits; (14) maturity; (15) insensitive response to homicidal experience; (16) widespread conditions of provocation may warrant general heightening of severity and fewer distinctions among persons; (17) undesirable result in the particular case.

should be given the various aggravating and extenuating circumstances, either absolutely or relatively.”⁵³ The appropriate “treatment” can only be determined, they argued, based on a “complete analysis of the particular case, an analysis that will take into account the presence or absence of each relevant factor.”⁵⁴

Indeed, what treatment is proper ultimately turns not only on an educated understanding of the defendant’s future potentialities, but also on a judgment of the individual’s “relative social worth.”⁵⁵ Accordingly, sentencing determinations require a comprehensive understanding of virtually every aspect of the offender’s life history and character to arrive at an appropriate “treatment” for a criminal act, the latter a symptom of the greater disease and a rationale for intervention. The relevance of facts to sentencing is limited not by the circumstances surrounding the offense, but rather by all the considerations that are relevant to a judgment of relative social worth and dangerousness and the prospects for “treatment” of that individual.⁵⁶ With no scientific mechanism to resolve those questions, the sentencer, like a novelist, is left to construct a narrative out of the raw material available.⁵⁷ If the motivation for the offense is one which indicates a small likelihood of repetition, or establishes that the individual poses little threat to the community in the future, a less severe punishment is warranted. If, however, the evidence indicates that the individual poses a great threat of future harm, then the principles of general deterrence – deterring others with a similar disposition – specific deterrence – deterring this particular individual – and incapacitation – by killing him, if necessary – justify imposing punitive treatment.⁵⁸

The utilitarian, offender-based framework set forth by Wechsler and Michael was exceedingly influential in academic circles and

53. *Id.* at 1301.

54. *Id.*

55. *Id.* at 1263.

56. These include factors relevant to an estimation of the harm that was foreseeable to the actor at the time he or she engaged in the offensive conduct. The foreseeability requirement is necessary to the coherence of a deterrence-based approach. More severe punishment based on the totality of consequences will not deter persons from committing acts to the extent that those consequences are not reasonably foreseeable.

57. Wechsler & Michael II, *supra* note 15, at 1273.

58. Of course, in reality predictions of future dangerousness are highly unreliable. Therefore, in practice, the utilitarian deterrent approach to punishment is no more “scientific” than any other. *See infra*, text accompanying note 332.

among practicing jurists of the day.⁵⁹ Indeed, the framework laid down by Wechsler and Michael⁶⁰ formed the foundation for the approach to capital punishment adopted 25 years later by the American Law Institute in the Model Penal Code, and ultimately, embraced by the Supreme Court as the states sought out new procedural models to replace constitutionally outmoded ones in the post-*Furman* era.⁶¹

B. Codifying the New Rationale

Wechsler continued to develop his utilitarian, non-retributivist penal theories in subsequent years until the completion of the Model Penal Code in 1963. In drafting the Code, he hoped to encourage legislatures to replace retributive principles – what he referred to as “concessions to retaliatory passions” – with a penal approach directed solely to the ends of “diminishing the incidence of major injuries to individuals and institutions.”⁶² “In short,” Wechsler argued, “while invocation of a penal sanction necessarily depends on past behavior, the object is control of harmful conduct in the future.”⁶³

The offender-based sentencing approach eventually adopted by

59. For instance, the sentencing philosophy advocated by Wechsler and Michael of basing the sentence on the possession of the fullest information possible concerning the defendant's life and characteristics was adopted by the Supreme Court in *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (referring to “a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”) (citation omitted); *id.* at 247 (“The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”); *see also* *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting) (citing Wechsler and Michael I, *supra* note 14, at 703-04). In *Williams*, the new philosophy of penology was employed to affirm the trial court's decision, based on his review of a presentence report, to override the jury's recommendation of a life sentence and instead impose a sentence of death. Commenting on the case, one scholar characterized the outcome as incapacitation prevailing over mitigation. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 5-6 (Yale Univ. Press 1981).

60. In turn, Wechsler was highly influenced by the work of Sir James Fitzjames Stephen. *See* Wechsler, *supra* note 22, at 1131 (noting Stephen's impact on the course of English criminal legislation).

61. *See, e.g., Conference: The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 247-48 (1995) (noting that “when the states went back basically to rewrite their statutes, . . . they ended up falling back on procedures that had been devised by no less an authority than Professor Herbert Wechsler, when he was one of the principal reporters and draftsmen of the American Law Institute Model Penal Code back in the 1950s”).

62. Wechsler, *supra* note 22, at 1105.

63. *Id.*

the ALI embodied virtually all of the prescriptions earlier advocated by Wechsler and Michael, including the foundational view that the principal determinant of sentence is not the moral desert of the offender but his perceived future dangerousness.⁶⁴ This shift in focus from desert to dangerousness,⁶⁵ as Paul Robinson has observed, is reflected throughout the MPC.⁶⁶ To be sure, the MPC reflects a multiplicity of foundational values. But its overall tenor was overwhelmingly, and self-consciously,⁶⁷ in the direction of the utilitarian and non-retributivist preferences of its principal reporter,⁶⁸ reflecting, as the ALI's plan for revision notes, the "supposition that retributive considerations should not play any important role in policymaking or case-specific dispositions."⁶⁹

The Code's death penalty provisions shared the same theoretical approach. The non-retributivist leanings of the Code's drafters were reflected in a report on the death penalty accompanying the 1959 draft of the Model Penal Code, which framed the death penalty debate itself as a contest between "ancient" retributivist impulses and progressive democratic enlightenment:

64. As the ALI revisionists have recently explained:

The Code's chosen mechanism was *selective* incapacitation, based on the belief that judges and parole officials, primarily through careful observation of offenders (although aided somewhat by the datum of past behavior), could accurately select out those offenders who were especially dangerous to society, and who should therefore be confined for terms much longer than the typical criminal.

Reitz, *supra* note 7, at 552 (emphasis added).

65. To be sure, the MPC does provide that factors such as the nature of the offender's acts and intentions, as well as his character narrowly construed, are relevant to sentence. However, these factors are relevant primarily because they are the best indicators of future dangerousness.

66. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1447-48 (2001) (noting that the MPC "generally grades inchoate offenses the same as substantive ones," reflecting the drafters' goal of "maximiz[ing] societal control over dangerous people").

67. See generally MODEL PENAL CODE § 1.02 (Official Draft and Revised Commentaries, Part I 1985) (detailing the purposes and principles of construction for the MPC); see also MODEL PENAL CODE Articles 6 & 7, introductory cmt. at 2 (Official Draft and Revised Commentaries, Part I 1985) (explaining that the "Model Penal Code's approach to sentencing is basically utilitarian or consequentialist").

68. It does, however, in a nod to retributive values, acknowledge that punitive treatment is appropriate, at times, not only in response to the "risk that the defendant will commit another crime" or to allow for "correctional treatment," but also "to avoid the depreciation of the seriousness of the crime, under the circumstances of its perpetration." Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 476 (1961).

69. Reitz, *supra* note 7, at 549.

[T]he struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.⁷⁰

Reflecting the offender-based sentencing theory, the Code adopted Wechsler and Michael's broad conception of the evidence that was relevant to sentencing decisions. As the MPC provides, the sentencer must be entitled to consider evidence "as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition"⁷¹

To facilitate the evaluation, the Code borrowed the analytical device of enumerating aggravating and mitigating considerations. Recognizing that most jurisdictions provided sentencers almost absolute discretion to impose death sentences, this device was deemed desirable to impose "tighter controls" to "guide" the exercise of court or jury discretion.⁷² The aggravating and mitigating circumstances enumerated in the Model Penal Code constitute a pared-down and refined version of the list proposed in Wechsler and Michael's earlier work,⁷³ albeit one which, on the mitigating side,

70. THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 15 (1959).

71. MODEL PENAL CODE § 210.6(2) (Proposed Official Draft 1962).

72. *Id.*

73. Aggravating circumstances as set forth in section 210.6(3) of the Model Penal Code:

(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.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting

retains more of the traditional formulations of excuses and justifications, and on the aggravating side, more of the traditional criteria, such as felony-murder, relied upon by the common law to identify especially serious homicidal conduct, than did Wechsler and Michael's list.⁷⁴

The Model Penal Code also adopted Wechsler and Michael's argument that the traditional criteria used to distinguish capital from non-capital offenses – the concepts of premeditation and deliberation – should be abandoned.⁷⁵ As the comments to the Code explain, “the notion that prior reflection should distinguish capital from non-capital murder is fundamentally unsound.”⁷⁶ In place of clearly defined degrees of murder, the MPC adopted a sliding scale approach that recognizes multiple factors as relevant to the determination of appropriate punishment: “[T]here are not in fact two classes of

exceptional depravity.

Mitigating circumstances as set forth in section 210.6(4) of the Model Penal Code:

- (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.

Model Penal Code § 210.6(3)-(4) (Proposed Official Draft 1962).

74. Compare the mitigating factors described by Wechsler and Michael, *see supra* note 51 (e.g., “(3) behavior infrequent,” “(7) good motives, i.e., desirable ends,” “(10) past life indicative of good habits,” with the mitigating factors enumerated in the MPC, *see supra* note 73 (e.g., “(b) extreme mental or emotional disturbance,” “(d) justification,” “(f) duress,” “(g) mental disease or defect or intoxication”).

75. *See, e.g.*, MODEL PENAL CODE § 210.6 cmt. at 70 (Tentative Draft No. 9, 1959) (rejecting traditional reliance on finding of premeditation because fact of premeditation may or may not bear about a “true reflection of the actor's normal character”); MODEL PENAL CODE § 210.6 cmt. 4(b) at 127 (Official Draft and Revised Commentaries, Part II 1980) (“Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis.”).

76. MODEL PENAL CODE § 210.6 cmt. 4(b) at 128-33 (Official Draft and Revised Commentaries, Part II 1980).

murder but an infinite variety of offences which shade off by degrees from the most atrocious to the most excusable” and the “factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula”⁷⁷

Finally, the Model Penal Code’s provisions reflected the assumption that the character of the offender, defined as his future dangerousness or reformability,⁷⁸ is the primary issue in assessing appropriate punishment. This in turn requires both a *sui generis* inquiry to evaluate, and depends on consideration of types of evidence not usually admissible at the guilt phase under traditional rules of evidence. The Code thus bifurcated trial into separate guilty and penalty phases,⁷⁹ and required the sentencer in the penalty phase to weigh a predetermined list of aggravating and mitigating circumstances to arrive at a sentencing outcome.⁸⁰ On the belief that it is impossible to enumerate all the considerations proper to the sentencing inquiry, the Code also stipulated that the sentencer should be entitled to consider any other factors the Court deems relevant to the sentencing determination. The drafters further recommended that no capital sentence be imposed unless at least one aggravating factor was established and “there is no substantial mitigating circumstance.”⁸¹ This approach, they argued, ensured that capital sentences would not be imposed in cases where there were no aggravating circumstances, but preserved the ability of the sentencer to impose lesser punishment when mitigating circumstances so warranted.

II. The Model Penal Code and the Landscape of

77. MODEL PENAL CODE § 210.6 cmt. at 71 (Tentative Draft No. 9, 1959)(quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 174 (1953)).

78. Although, parts of the MPC suggest that a retributive character-based theory is also operative. *See, e.g.*, MODEL PENAL CODE § 210.3(a) cmt. 4(a) at 55 (Official Draft and Revised Commentaries, Part II 1980) (noting that provocation is acknowledged as a defense, even though it does not strictly impede intentionality, but rather heightens it, as “a concession to human weakness and perhaps to non-deterrability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence”).

79. MODEL PENAL CODE § 210.6 cmt. at 74 (Tentative Draft No. 9, 1959) (advocating separate proceedings to determine sentence).

80. *Id.* at 72.

81. MODEL PENAL CODE § 210.6 cmt. 5 at 135 (Official Draft and Revised Commentaries, Part II 1980).

Contemporary Death Penalty Law

The analytical framework crafted by Wechsler proved tremendously influential, and the basic infrastructure of contemporary death penalty law adheres to the broad outlines sketched out in the Model Penal Code. References to the MPC's death penalty provisions first appeared in the Court's cases a year before *Furman* was handed down, when Justice Harlan cited the lack of state interest in adopting the statutory criteria suggested in the Code as a reason to conclude that such criteria would not work.⁸² The following year, after the Court in *Furman* struck down the nation's death penalty laws, however, several states did turn to the MPC for guidance. What followed is a familiar story.

In response to *Furman*, virtually every state then utilizing the death penalty opted to rewrite, rather than abandon, its death penalty laws.⁸³ The states' responses were of two principal types. In response to *Furman's* call for objective standards and guidance,⁸⁴ eighteen states resurrected mandatory death penalty statutes.⁸⁵ If unguided discretion was the problem, mandatory sentencing schemes were a logical response.⁸⁶ After all, if sentencers were improperly picking and choosing who should live or die from among a pool of equally

82. *McGautha v. California*, 402 U.S. 183, 202 (1971) ("In recent years academic and professional sources have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959."); *id.* at 203 (observing that, of the several states that have modified their laws with respect to murder and the death penalty since 1959, "[n]one of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty"); *id.* at 199 n.9 (citing Wechsler & Michael I). Indeed, Harlan appended the Model Penal Code death penalty provisions to his opinion in *McGautha* precisely to illustrate the apparent impossibility of identifying, before the fact, who should live and who should die. *Id.* at 222-25.

83. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

84. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). In *Furman*, the Supreme Court established the constitutional requirement that the sentencer's discretion to impose the death penalty must be "channell[ed] and limit[ed]," and that juries must be provided with "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Walton v. Arizona*, 497 U.S. 639, (1990) (Scalia, J. concurring) (citations omitted).

85. See Model Penal Code § 210.6 cmt. 12(a) n.145 at 156 (Official Draft and Revised Commentaries, Part II 1980).

86. North Carolina, for instance, enacted a statute that provided mandatory death sentences for willful, deliberate, and premeditated killings and felony murders. N.C. GEN. STAT. § 14-17 (1975). Other states emulated the structure recommended in the Model Penal Code, using enumerated and unenumerated aggravating and mitigating factors to guide the sentencer's inquiry.

culpable defendants, then mandating the death penalty for all who fit in one legally-defined category was one way to guard against selectivity bias at sentencing. The rest of the states modeled their new death penalty laws on the MPC in an effort to do what Harlan thought impossible: provide “statutory criteria for imposition of the death penalty.”⁸⁷

Reviewing these various statutes, the Supreme Court rejected the mandatory sentencing schemes,⁸⁸ and approved those based on the Model Penal Code.⁸⁹ According to the Court, both standardless and mandatory sentencing schemes were constitutionally deficient, the former because they gave rise to arbitrary and capricious sentencing outcomes, and the latter because they failed to accord the individual the requisite degree of individual consideration. In contrast, the MPC approach seemed to strike the right balance: it imposed some structure on the decision-making process, but it did not determine the outcome, allowing the ultimate choice of sentence to turn on an individualized consideration of its appropriateness in each case.

Virtually every death penalty jurisdiction now follows the MPC model with greater or lesser variations.⁹⁰ Commentators have thus rightly observed that “the Code’s death penalty standards have had a greater impact on state legislation on this subject than on any other.”⁹¹

As noted above, the Supreme Court’s constitutional capital jurisprudence also reflects an acceptance of the MPC model. This is manifested, most obviously, in the Court’s validation of the MPC model and rejection of mandatory sentencing schemes. Wechsler’s influence, however, penetrated to much deeper levels. Indeed, both of the “twin pillars”⁹² of the Court’s constitutional capital

87. *McGautha*, 402 U.S. at 203.

88. *Woodson*, 428 U.S. at 304; *Roberts*, 428 U.S. 325 (1976).

89. *Gregg* 428 U.S. at 206-07 (rejecting argument that the death penalty was per se unconstitutional, and upholding Georgia’s guided discretion scheme, which established a bifurcated death penalty procedure and directed the jury to consider specific aggravating and mitigating circumstances in determining whether a death sentence was appropriate); *Proffitt v. Florida*, 428 U.S. 242 (1976); see also *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas scheme).

90. See, e.g., Stacy, *supra* note 13 at 1016 (“[A]ll death penalty regimes now effectively follow the basic structure of the Model Penal Code.”).

91. Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115, 116 (1986). See also Markus Dirk Dubber, *Pénal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 90 (2000) (noting the Model Penal Code provided a “highly influential blueprint for capital sentencing”).

92. Steiker & Steiker, *supra* note 10, at 427.

jurisprudence – the principles of “guided discretion” and “individual consideration” – were drawn from the Model Penal Code. The Court’s rejection of Harlan’s view in *McGautha v. California*, specifically that limits on capital sentencing discretion were unworkable, was premised on the MPC’s contrary claims.⁹³ “Guided discretion” was an experiment predicated on the MPC model.

The Court’s recognition of a constitutional right to individual sentencing consideration also flowed directly from its acceptance of the Wechsler/MPC premise that capital sentencing, like all sentencing, should be based on a thorough evaluation of the character of the offender. Because the Court accepted the idea that character can be understood as the criminal propensity of the individual or the future dangerousness he presents,⁹⁴ it logically concluded that any type of evidence is admissible that helps predict future dangerousness. This criteria, in turn, opened the door to all the evidence thought important by Wechsler and the ALI.⁹⁵ In other words, the doctrine of individual consideration and the decision to permit future dangerousness to be argued at the penalty phase both grow out of a philosophical belief that capital sentencing decisions should turn on non-retributive, offender-based evaluations of the defendant’s character.⁹⁶

Several important features of contemporary death penalty procedure resulted from the Court’s embrace of the MPC approach to capital sentencing, two of which figure prominently here. First, because the main inquiry in the sentencing determination is the degree to which the defendant’s character manifests a risk of future dangerousness, any evidence indicative of “bad character” is logically relevant – indeed, central – to the question of whether a capital defendant should live or die. This has moved the Court to strip away

93. *Gregg*, 428 U.S. at 195 n.47 (plurality opinion) (explaining that the aggravator/mitigator weighing scheme developed by the Model Penal Code and adopted by Georgia proved that “*McGautha*’s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience”).

94. *Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (holding that the sentencing jury is free to evaluate defendant’s character defined as “his likely future behavior”).

95. *Gregg*, 428 U.S. at 203-204 (plurality opinion) (“[I]t [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”).

96. The Court’s reliance on the Code as a basis for its new constitutional jurisprudence of the death penalty is no accident. Commentary to the Model Penal Code asserts that the Code’s provisions were specifically drafted with the intent to provide “a model for constitutional adjudication as well as for state legislation.” MODEL PENAL CODE § 210.6 cmt. 12(d) at 167 (Official Draft and Revised Commentaries, Part II 1980).

virtually all evidentiary restrictions on mitigating and aggravating evidence. Second, in order to provide guidance to the jury in weighing all of the evidence proffered by the prosecution and defense, the mechanism of weighing or balancing aggravating and mitigating factors advocated by Wechsler and adopted by the MPC has become the predominant analytical rubric for capital sentencing.⁹⁷

A. Offender-Based Sentencing: The Good, the Bad, and the Expert

One of the most familiar refrains of post-*Furman* capital jurisprudence is the proposition, advanced by Wechsler and codified in the MPC, that the primary focus of capital sentencing must be a thorough evaluation of the character of the defendant. Citing the MPC, and echoing Wechsler and Michael, the plurality in *Gregg* explained that capital sentencing requires careful scrutiny of the character of the offender rather than a mere categorization of his acts.⁹⁸ Such information, it reasoned, was “an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.”⁹⁹ Accordingly, the Court has deemed it “desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”¹⁰⁰

1. Individual Consideration

Although the constitutional requirement of “individual consideration” was first articulated by the Supreme Court in *Woodson v. North Carolina*,¹⁰¹ the requirement follows, indeed constitutionalizes, the path trod by Wechsler and Michael and adopted in the Model Penal Code, permitting all evidence “as to any

97. An additional consequence of the adoption of the MPC model, and one that is logically concomitant to offender-based sentencing, and the use of the weighing paradigm, is the Court’s acceptance of the bifurcated sentencing procedures recommended by the MPC as a presumed constitutional requisite.

98. *Gregg*, 428 U.S. at 189 (citing, inter alia, MODEL PENAL CODE § 7.07, cmt. 1 (Tentative Draft No. 2, 1954) (recognizing that as a constitutional matter, the sentencer must consider not only the offense but also “*the character and propensities of the offender*”) (emphasis added)); see also *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (sentencing determination requires sentencer to “focus on the circumstances of the crime and the character of the individual defendant”); cf. Wechsler & Michael II, *supra* note 14 (advancing the view that consideration of the character of the individual is required).

99. *Gregg*, 428 U.S. at 189.

100. *Id.* at 204; see also *Jurek v. Texas*, 428 U.S. 262, 275-76 (“What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.”).

101. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition" to be considered by the sentencer.¹⁰² The principle undergirded the Court's conclusion that mandatory death penalty schemes, which otherwise appeared to address the concerns expressed in many of the *Furman* opinions that the death penalty was being applied inconsistently and arbitrarily,¹⁰³ were unconstitutional. The Court reasoned that mandatory schemes that prohibit an individualized sentencing procedure:

accord[] no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense [and] exclude[] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.¹⁰⁴

This famous language unmistakably echoes Wechsler and Michael, endowing with constitutional stature their observation that what is needed in making the extraordinarily elusive judgment as to whether a sentence of death is appropriate is

that large understanding of the diversities that are possible in human character and conduct, for that familiarity with the actual range of the qualities of men who commit crimes and of the characteristics of their behavior, and for that insight into the individuality and motivation of particular offenders, which are such essential conditions of making wisely those relative judgments of good and evil which the determination of modes of treatment demands.¹⁰⁵

Two years after *Woodson* was decided, the Court further refined the individual consideration requirement in *Lockett v. Ohio*,¹⁰⁶ wherein it struck down an Ohio death-penalty statute that limited the

102. MODEL PENAL CODE § 210.6 (Tentative Draft No. 9, 1959); see also MODEL PENAL CODE § 210.6 (Official Draft and Revised Commentaries, Part II 1980).

103. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (concluding that the constitutional defect in unguided discretionary sentencing was located in the structure of "legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").

104. *Woodson*, 428 U.S. at 304.

105. Wechsler & Michael II, *supra* note 14, at 1310. Interestingly, Wechsler and Michael make this observation in the context of arguing that juries are ill-equipped to make the necessary judgments of character required to reach fair and consistent sentencing outcomes. The authors, rather, preferred referral of the issue of treatment to "a permanent agency experienced in deciding such questions." *Id.* at 1311.

106. 438 U.S. 586 (1978).

mitigating evidence available to a jury to evidence falling into three defined categories. With *Lockett*, the Court established that the principle of individual consideration required

that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor, any aspect* of a defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.¹⁰⁷

The Court subsequently clarified that not only are states forbidden from precluding introduction of mitigating evidence, but they also must ensure that the sentencer is "able to consider and give effect to that evidence in imposing sentence."¹⁰⁸ The Court has interpreted that principle broadly. In *Eddings v. Oklahoma*, the Court illustratively stated that relevant mitigating evidence includes "evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance"¹⁰⁹ The unfettered mitigation inquiry has been defended on grounds that it preserves the defendant's right, and the jury's prerogative, to mercy. By freeing mitigation evidence from any strict requirement of legal relevance, the *Lockett* principle reinforces the absolute entitlement of the sentencer in a death penalty proceeding to exercise "discretion to grant mercy in a particular case."¹¹⁰

As a result of *Woodson*, *Lockett*, *Eddings*, and their progeny, states must permit defendants to introduce a range of mitigating evidence unconstrained by traditional notions of legal relevance to prove that their crime was not consistent with, or a manifestation of, a morally defective or dangerous character. The individual consideration principle established in the *Woodson-Lockett* line of cases provides that "the sentencer must retain *unbridled* discretion to

107. *Id.* at 604 (emphasis added).

108. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

109. 455 U.S. 104, 115 (1982); *see also* *Boyde v. California*, 494 U.S. 370, 381-82 (1990) (discussing right to present mitigating evidence of good character and deprived childhood); American Bar Association, *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1061 (2003) (discussing obligation of counsel in capital cases to investigate and develop broad range of mitigation evidence, including emphasis on "the impact of an execution on the client's family, the client's prior positive contributions to the community, or other factors unconnected to the crime which militate against his execution[,] and that "it is critically important to construct a persuasive narrative" providing the jury with "an understanding of the client's extended, multi-generational history...from before conception to the present").

110. *Callins v. Collins*, 510 U.S. 1141, 1144 (1993) (Blackmun, J., dissenting from denial of certiorari) (expanding on views of the central role of mercy).

afford mercy.”¹¹¹ The concept of mitigating evidence appears to embrace virtually *any* fact the defendant proffers as a basis for a sentence less than death, with the one, hardly limiting, stipulation that it must relate either to the offense or the offender.¹¹² Evidence of good character, of course, falls in the heartland of mitigation evidence,¹¹³ and the defendant is entitled to proffer such evidence to the jury in mitigation, even where it is admittedly irrelevant to the defendant’s “culpability for the crime he committed”¹¹⁴

2. *The Admissibility of Evidence of the Defendant’s Future Dangerousness*

For capital defendants, however, there is a darker side to the lack of evidentiary restraints at sentencing. Following Wechsler’s view that character is best defined as the sum of the defendant’s “potentialities for good and evil,” the Court has “deregulated”¹¹⁵ the sentencing hearing to allow a virtually unchecked range of aggravating evidence to be used to prove that the defendant has a morally defective or dangerous character.¹¹⁶ Just as defendants can introduce a wide range of evidence that purportedly “mitigates” their guilt, under a capital sentencing rubric that attempts to evaluate the

111. *Id.* at 1150 (emphasis added).

112. Of course, there is a distinction between what evidence a defendant is entitled to offer and what his counsel is constitutionally compelled to offer. As Judge Posner has observed, “[p]resumably, the lawyer is not required to investigate the defendant’s past with the thoroughness of a biographer.” *Stewart v. Gramley*, 74 F.3d 132, 135-37 (7th Cir. 1996). That counsel is not constitutionally ineffective for failing to proffer such biographically thorough mitigating evidence, however, does not thereby mean that a defendant is not entitled to present such evidence to a jury if he wishes. Indeed, the *Lockett* definition would seem expressly to protect the right to do just that.

113. *See, e.g., Graham v. Collins*, 506 U.S. 461, 463 (1993) ([D]efendant introduces evidence in mitigation, inter alia, of upbringing and positive character traits, regular church attendance, and that “[h]e loved the Lord.”); *Franklin v. Lynaugh*, 487 U.S. 164, 177 (1988) (discussing the introduction of the defendant’s clean prison disciplinary record); *Harris v. Alabama*, 513 U.S. 504, 507 (1995) (discussing the introduction of evidence that the defendant was a mother of seven children, held three jobs, and was an active participant in her church).

114. *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (reversing sentence due to exclusion of testimony regarding defendant’s good behavior in prison).

115. *See generally* Weisberg, *supra* note 9.

116. For example, the Court has stated:

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument We think it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg v. Georgia, 428 U.S. 153, 203-04 (1976).

dangerousness of the defendant's character, the state is equally entitled to proffer *aggravating* evidence to the jury related to a "myriad of factors"¹¹⁷ and "literally countless subjects."¹¹⁸ Of particular note, it has permitted sentencing proceedings to focus not only on what the defendant has done, but also, and perhaps more importantly, on what he may likely do.¹¹⁹ Aside from race, religion, and political affiliation, few factors have ever been deemed constitutionally irrelevant to this inquiry.¹²⁰

Although the emphasis on character has provided the basis for a capital defendant's right to introduce a broad range of mitigating evidence to prove "good character," the Wechslerian offender-based sentencing model also justified, and perhaps logically mandated, a laissez-faire attitude toward aggravating evidence to prove the offender's "bad character." Indeed, the permissibility of using "bad character" evidence directly follows Wechsler's vision of sentencing as an individualized appraisal of the character of the defendant.¹²¹ Because of the acceptance of the Model Penal Code sentencing model as authoritative, capital penalty trials are ubiquitous, and juries are permitted to consider a vast array of character evidence, such as prior crimes¹²² or subsequent conduct,¹²³ that would otherwise be

117. See *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (observing that unlike the guilt phase, "[i]n fixing a penalty, . . . there is no similar 'central issue' from which the jury's attention may be diverted." Once eligibility is established, "the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment.") (quoting *California v. Ramos*, 463 U.S. 992, 1008 (1983)).

118. *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). Indeed, the Court's embrace of offender-based sentencing focusing on character elevates future dangerousness to a high rank in sentencing concerns, since, as the Court recently conceded, evidence of dangerous character is also logically demonstrative of "'characteristic' future dangerousness." *Kelly v. South Carolina*, 534 U.S. 246, 254 (2002).

119. See *Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (plurality opinion) (rejecting claim that the Texas death penalty statute provided an inadequate vehicle for jury consideration of evidence of the defendant's mitigating evidence as a reflection of his "character," because "the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character' – that is, his 'character' as measured by his likely future behavior").

120. *Zant*, 462 U.S. at 885.

121. See, e.g., *Cunningham v. Thompson*, 62 P.3d 823, 841 (Or. Ct. App. 2003) (noting that sentencing inquiry into future dangerousness

makes relevant a broad range of evidence that is probative of whether a defendant is likely to engage in dangerous criminal conduct in the future, including evidence of a defendant's entire previous criminal history (including nonviolent crimes); evidence of the defendant's unadjudicated prior bad acts; and, most pertinent here, evidence of the defendant's previous 'bad character').

122. *Zant*, 462 U.S. at 887. Of course, states are permitted to, and do, restrict the scope of aggravating evidence that may be heard by the sentencer. See, e.g., *Barclay v. Florida*,

precluded under traditional rules of evidence for criminal trials.¹²⁴

a. *Jurek* and the Prioritization of Incapacitation

Not coincidentally, the state's right to focus on the dangerousness of the defendant's character was affirmed the same day the Court first articulated the principle of individual consideration in *Woodson*.¹²⁵ In *Jurek v. Texas*,¹²⁶ the Court dispensed with a challenge to the constitutionality of a death penalty procedure that allows death sentences to turn on predicted future dangerousness. Writing for the plurality, Justice Stevens defended Texas's death penalty scheme, which places special emphasis on the question of future dangerousness.¹²⁷ According to Stevens, the future dangerousness inquiry mandated by the Texas death penalty statute was unremarkable. Stevens reasoned that juror evaluations of future dangerousness in capital sentencing were not distinguishable from a judge's prediction of the defendant's future conduct at a bail hearing, that future conduct was at issue at any sentencing determination, and that such predictions undergirded the parole system. Thus, Stevens concluded, there was no constitutional bar to future dangerousness in a capital sentencing procedure.¹²⁸

The logic of the arguments made by Stevens in *Jurek*, and reaffirmed in later cases,¹²⁹ reflects the Court's early embrace of MPC-style rehabilitative and incapacitative goals in its procedural approach

463 U.S. 939, 956 (1983) (finding no constitutional error where trial court allows consideration of aggravating evidence of prior non-violent crimes deemed impermissible by state law).

123. *Skipper v. S. Carolina*, 476 U.S. 1, 4-5 (1986).

124. See CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190 (Edward W. Cleary ed., 2d ed. 1972) (detailing specific instances of misconduct not usually admissible to prove bad character); FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

125. 428 U.S. 280, 304 (1976).

126. 428 U.S. at 275.

127. Texas's capital sentencing scheme requires the jury to determine, before a death sentence is permitted, that (1) the killing was deliberate, and (2) that it is probable that the defendant "would commit criminal acts of violence that would constitute a continuing threat to society." See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (Vernon Supp. 2004).

128. *Jurek*, 428 U.S. at 274-276.

129. See *Barefoot v. Estelle*, 463 U.S. 880 (1983); *California v. Ramos*, 463 U.S. 992, 1002-03 (1983); cf. *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (holding that instruction on future dangerousness based on probability of violence allowed adequate consideration of defendant's youth as mitigating factor).

to capital sentencing. After all, the sole purpose of a bail hearing is to determine whether incapacitation is necessary to protect society from the predicted dangerousness, or predicted flight risk, of the defendant. A bail hearing, however, does not purport to resolve the underlying merits: what, if any, punishment the defendant deserves for his conduct. Yet a capital sentencing procedure that turns, in whole or in part, on predictions of future dangerousness necessarily privileges the incapacitative function over other penal purposes.¹³⁰

b. The Pervasive Influence of Dangerous Character

With the Court placing its *imprimatur* on future dangerousness as a basis to impose capital punishment, most states, as well as the federal government followed suit.¹³¹ At present, a defendant's future dangerousness is a statutory component in the majority of death penalty jurisdictions. Of the thirty-eight jurisdictions that maintain the death penalty, twenty-one make "future dangerousness" a statutory aggravating factor.¹³² Three states expressly predicate death sentences on the future dangerousness of the defendant.¹³³ In Texas, the jury must expressly find that the defendant poses a risk of future

130. Stevens's other examples provide no greater logical support for the continued justification of allowing sentencing determinations to focus on future dangerousness. They do, however, demonstrate the extent to which Wechslerian ideals permeated the Court's reasoning in the aftermath of *Furman*. First, Wechsler was a great advocate of indeterminate sentencing, which he believed to be the only civilized method to deal with convicted persons. The basic ideals animating such a system, however, have increasingly been rejected in the three decades following *Jurek*. Congress's institution of the Federal Sentencing Guidelines provides the most visible symbol of that rejection. Indeterminate sentencing has fallen into disfavor, in part, because of the widely held perception that it fails to satisfy the retributive purposes of criminal justice. See MODEL PENAL CODE: SENTENCING REPORT 45 (Apr. 11, 2003), available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf (noting increasing disfavor of sentencing regimes that rely on indeterminate sentences with substantial authority over actual release dates vested in corrections officials and parole boards: "[t]here are few spokespersons for the view that indeterminacy ought to be the preferred institutional arrangement for 21st-century sentencing structures").

131. A few do not. Mississippi, for example, precludes admission of evidence regarding future dangerousness. See *Balfour v. State*, 598 So. 2d 731, 748 (Miss. 1992).

132. See Jonathan R. Sorensen & Rocky L. Pilgrim, *Criminology: An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1252 (2000). See, e.g., OKLA. STAT. tit. 21, § 701.12(7) (2004) (recognizing a statutory aggravator if sentencer finds "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

133. The states are Texas, Virginia, and Oregon. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1); VA. CODE ANN. § 19.2-264.2 (Michie 2004); OR. REV. STAT. § 163.150(1)(b)(B) (2004).

dangerousness before it may impose a death sentence.¹³⁴ In Oregon, jurors may not sentence a defendant to death unless they expressly find that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”¹³⁵ In Virginia, jurors are instructed that they may not impose a sentence of death unless they find either that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society” or that the defendant’s conduct was “outrageously or wantonly vile.”¹³⁶ Not surprisingly, researchers report that in these jurisdictions, the fate of capital defendants “is determined almost entirely by juries’ deliberations on, and emotional responses to,” the future dangerousness inquiry.¹³⁷ Even in jurisdictions where the defendant’s future dangerousness is neither the central question nor a statutory aggravating fact, future dangerousness is routinely argued anyway,¹³⁸ and if challenged, is usually held admissible under other statutory provisions, such as a jurisdiction’s catch-all sentencing provision.¹³⁹ Death sentences based on such findings have been affirmed as constitutionally proper.¹⁴⁰

The decision to allow the issue of future dangerousness into the

134. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)-(c).

135. OR. REV. STAT. § 163.150(1)(b)(B).

136. VA. CODE ANN. § 19.2-264.2.

137. Sorenson & Pilgrim, *supra* note 132, at 1252 n.8-9 (citing James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC’Y REV. 449, 463 (1989); Sally Constanzo & Mark Constanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151 (1994)).

138. See, e.g., *Calderon v. Coleman*, 525 U.S. 141, 149 n.2 (1998) (reversing the ninth circuit’s affirmation of a grant of habeas corpus and remanding case to trial court where in sentencing phase of California murder trial, prosecutor told jury that defendant “has already demonstrated what he is capable of doing on numerous occasions to each and every one of us He is manipulative, he is dangerous to all of us.”). California permits a prosecutor to comment on dangerousness, but prohibits expert testimony to establish it. See *People v. Bell*, 778 P.2d 129, 156-57 (Cal. 1989); *People v. Murtishaw*, 631 P.2d 446, 466 (Cal. 1981) (barring expert testimony).

139. See, e.g., *State v. Arguelles*, 63 P.3d 731, 758-59 (Utah 2003) (holding that evidence related to defendant’s probability of future violence was legitimately considered under death penalty scheme that directed jury to consider “any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence”).

140. In *Proffitt v. Florida*, 428 U.S. 242, 246 (1976), for example, one of the aggravating factors upon which defendant’s death sentence was based was that “the petitioner has the propensity to commit murder.” Future dangerousness is not a statutory aggravating circumstance in Florida. See *Barclay v. Florida*, 463 U.S. 939, 957 (1983) (citing *Proffitt*, 428 U.S. at 246).

sentencing proceeding has been enormously consequential. A review of the cases confirms that the state's ability to present character evidence collateral to the circumstances of the crime for which the defendant is being sentenced is virtually unlimited. Although a finding of future dangerousness may be based solely on the criminal acts committed,¹⁴¹ it also may be drawn from a broad search of the defendant's history, background, character, and pre- and post-crime conduct. Evidence used to obtain death sentences, without objection by the Supreme Court, includes the defendant's criminal record,¹⁴² juvenile criminal record,¹⁴³ past aggressive conduct,¹⁴⁴ unproved prior bad acts,¹⁴⁵ requests for psychiatric treatment,¹⁴⁶ bad reputation,¹⁴⁷ prison behavior,¹⁴⁸ prison escapes,¹⁴⁹ probation violations,¹⁵⁰ alleged "propensity" to commit murder,¹⁵¹ lack of remorse,¹⁵² and "general moral character."¹⁵³

Based on such evidence, jurors are often asked to make strained inferences about the dangerousness posed by the defendant. In *Skipper v. South Carolina*, for instance, the prosecutor placed special

141. See, e.g., *Smith v. State*, 74 S.W.3d 868, 870 (Tex. Crim. App. 2002) (holding that circumstances of murder alone may warrant affirmative answer to future dangerousness special issue, thereby supporting imposition of death penalty).

142. *Shafer v. South Carolina*, 532 U.S. 36, 41 (2001); *Proffitt*, 428 U.S. at 244 (considering a prior conviction for breaking and entering); *Barclay*, 463 U.S. 939 at 956 (considering a nonviolent criminal record); *Zant v. Stephens*, 462 U.S. 862, 887 (1982) (considering prior criminal record highly relevant to individual background and character).

143. *Baldwin v. Alabama*, 472 U.S. 372, 376 (1985).

144. *Shafer*, 532 U.S. at 41.

145. *Ramdass v. Angelone*, 530 U.S. 156, 161 (2000) (introducing evidence at sentencing of numerous alleged crimes committed as part of crime spree culminating in crime of murder, for which he was convicted).

146. *Proffitt*, 428 U.S. at 246 (detailing defendant's confession to doctor that he had an uncontrollable desire to kill and also his request for treatment to overcome such desire).

147. *Jurek*, 428 U.S. at 266; *Barefoot*, 463 U.S. at 918-919 (Blackmun, J., dissenting).

148. *Kelly v. South Carolina*, 534 U.S. 246, 248-49 (2002); *Shafer*, 532 U.S. at 41. Evidence of good prison conduct, of course, is also relevant as a mitigating factor and the cannot be precluded at trial. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

149. *Kelly*, 534 U.S. at 248; *Barefoot*, 463 U.S. at 918-19 (Blackmun, J., dissenting).

150. *Shafer*, 532 U.S. at 41.

151. *Proffitt*, 428 U.S. at 246 (holding that admission as aggravating factor that defendant allegedly had a "propensity to commit murder," though not consistent with Florida law, was not constitutional error).

152. *Estelle v. Smith*, 451 U.S. 454, 464 (1981); *Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003).

153. *Zant v. Stephens*, 462 U.S. 862, 886 n.22 (1983) (citing *Fair v. State*, 268 S.E.2d 316, 323 (Ga. 1980)).

emphasis in his closing argument that the defendant “had kicked the bars of his cell following his arrest.”¹⁵⁴ In *Johnson v. Texas*, the state introduced evidence showing, *inter alia*, that the 19-year-old defendant had, in seventh grade, cut a schoolmate with a piece of glass and stabbed another with a pencil.¹⁵⁵ Some character-related evidence consists of hearsay or other types of evidence that are markedly less reliable than evidence allowed at the guilt phase.¹⁵⁶ In *Gray v. Netherland*, the prosecutor used hearsay statements made by the defendant to, *inter alia*, fellow inmates regarding other uncharged offenses.¹⁵⁷

Not only is this evidence often unreliable, it can be highly inflammatory.¹⁵⁸ In *Gray*, the trial court allowed the prosecutor to introduce graphic photographs, including the burned bodies of victims, autopsy reports and photographs, and the testimony of the state medical examiner who performed the autopsies, all related to a separate and unrelated crime for which defendant had not been, and never was, charged.¹⁵⁹

Prominent critics of the Court’s rigorous protection of defendants’ right to introduce mitigation evidence have not distributed their critiques with an even hand. Justice Scalia, for example, has been highly critical of the Court’s rigorous restrictions on State attempts to regulate or circumscribe mitigating evidence proffered by defendants. In *Penry v. Lynaugh*, he complained bitterly that:

The Court today demands . . . a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant’s background and character, and the circumstances

154. 476 U.S. 1, 9-10 (1986) (Powell, J., concurring). Although the Court reversed because of the trial court’s exclusion of corresponding evidence of good prison behavior, no one suggested that the State’s reliance on this testimony was in any way improper.

155. 509 U.S. 350, 356 (1993).

156. *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (noting cases permitting introduction at capital sentencing hearing of hearsay evidence that would be inadmissible at trial).

157. 518 U.S. 152, 156-58 (1996) (noting that this evidence was introduced “as evidence of petitioner’s future dangerousness”).

158. Of course, the admission of hearsay evidence (as mitigating evidence) might also be constitutionally required, under the *Lockett* principle, in which its admission may benefit the defendant. *See, e.g., Green v. Georgia*, 442 U.S. 95 (1979) (reversing death sentence where trial judge refused to admit hearsay statement of co-participant in murder admitting responsibility for the murder). Justice Rehnquist decried the admission of mitigating hearsay evidence as “another step toward embalming the law of evidence in the Due Process Clause.” *Id.* at 98 (Rehnquist, J., dissenting).

159. 518 U.S. at 174 (Ginsburg, J., dissenting).

of the offense The Court seeks to dignify this by calling it a process that calls for a ‘reasoned moral response,’ – but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional ‘moral response’ that the Court demands to be allowed – an outpouring of personal reaction to all the circumstances of a defendant’s life and personality, an unfocused sympathy.¹⁶⁰

But Scalia fails to note that the same critique can be levied at the unfettered aggravation inquiry. In giving free rein to the state to prove, not only that the defendant is dangerous, but that his character is so “defective” that only the most vengeful response is warranted, the entire nature of the prosecutor’s role at the sentencing proceeding is geared toward stirring an unfocused emotional response in the sentencer: the thirst for vengeance.

c. Diagnosis or Damnation?

The impact of the evidence of a defendant’s dangerous character is greatly accentuated by the additional practice of admitting expert testimony to prove it. Expert testimony on future dangerousness figures largest, of course, in states where a finding of future dangerousness is a prerequisite to a death sentence, but even where future dangerousness is merely one of a number of statutory aggravating factors,¹⁶¹ expert testimony is frequently relied upon.

Plainly, expert testimony regarding future dangerousness is an extremely potent prosecutorial tool. When a defendant is confronted with a well-credentialed medical professional willing to testify, to a “scientific certitude,” that defendant will kill again if given the chance, the prospect for countering such testimony through cross-examination or by putting on dissenting experts is slight.¹⁶² The Fifth Circuit noted that one psychiatrist, Dr. Clay Griffith, has appeared in twenty-two cases with published opinions, and testified in each that the defendant posed a risk of future dangerousness.¹⁶³ Another well-

160. 492 U.S. at 359 (Scalia, J., concurring in part and dissenting in part), *quoted in* Callins v. Collins, 510 U.S. 1141, 1150-51 (1993).

161. See Shafer v. South Carolina, 532 U.S. 36 (2001).

162. Predictions by experts at this purported level of accuracy are common. See, e.g., *Tumblin v. State*, No. 74097, 2003 WL 1821467, at *2 (Tex. Crim. App. Mar. 19, 2003) (unpublished opinion) (“State’s expert testified that it was ninety to one hundred per cent probable that appellant would commit other acts of violence.”); *Gardner v. Johnson*, 247 F.3d 551, 554 (5th Cir. 2001) (noting that State’s expert, a Dr. Clay Griffith, testified “with ‘one hundred percent certainty’ that, in his professional opinion,” the defendant “would ‘commit violent acts in the future,’ he was ‘super dangerous, and [he would] kill [again] given any chance at all.’”).

163. *Flores v. Johnson*, 210 F.3d 456, 461 n.6 (5th Cir. 2000) (Garza, J., concurring).

known forensic psychologist, James P. Grigson, has testified in hundreds of death penalty proceedings, and routinely makes such predictive claims.¹⁶⁴ Indeed, because of his great effectiveness as a testifying witness, Dr. Grigson has earned the titles “Dr. Death” and “the hanging psychiatrist.”¹⁶⁵ A prediction from Dr. Grigson that defendant is likely to hurt or kill again in the future is a virtual death sentence in itself.¹⁶⁶ Moreover, often not one but several witnesses will take the stand to testify concerning the defendant’s future dangerousness. In *Penry v. Johnson*, for example, three psychiatrists, along with four additional prison officials, testified that the mentally-retarded defendant Penry was dangerous.¹⁶⁷ On the basis of such testimony, Penry was twice sentenced by a Texas jury to death.

The use of expert testimony at trial to establish the dangerousness of the defendant’s character, however, is in one sense consistent with Wechsler’s hope that criminal sentencing might be founded on “scientific principles.”¹⁶⁸ Although Wechsler was far from naive about the abilities of psychologists and psychiatrists to correctly predict and diagnose future dangerousness, he nonetheless was a firm believer that mental health professionals could provide important insight into the character determinations relevant to sentencing decisions.¹⁶⁹ In another sense, however, and as numerous commentators have observed, the admission of expert testimony to “prove” future dangerous is anything but scientific in a more rigorous, *Daubert*-like¹⁷⁰ sense of the term.¹⁷¹

164. See *id.* at 467 n.16 (noting “hundreds” of cases in which Grigson testified, and discussing Grigson’s testimony in case of “Randall Dale Adams, where Grigson testified that he was *one hundred percent* certain Adams would kill again, and after it was revealed that the evidence against Adams was falsified by the police, Adams was released as innocent.”).

165. See *Gardner v. Johnson*, 247 F.3d 551, 556 n.6 (5th Cir. 2001) (observing that “Dr. Grigson’s extensive participation in capital punishment cases has earned him notoriety, including the titles ‘Dr. Death’ and ‘the hanging psychiatrist.’”).

166. Dr. Grigson’s methods were famously discussed by journalist Ron Rosenbaum in an article published in *Vanity Fair*. See Ron Rosenbaum, *Travels With Dr. Death*, VANITY FAIR, May 1990, at 140.

167. 532 U.S. 782, 795-96 (2001).

168. Wechsler, *supra* note 22, at 1103 (criticizing common law for posing “questions that a scientist can neither regard as meaningful or relevant nor answer on his own scientific terms . . .”).

169. *Id.* (arguing that “though the law purports to be concerned with the control of specified behavior, it rejects or does not fully use the aid that modern science can afford.”).

170. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (for admission of expert scientific testimony, court must determine whether proposed expert’s testimony

B. Weighing Character Evidence to Evaluate the Offender

Not only does the MPC's offender-based approach require that all character-related aggravating and mitigating factors sought to be introduced by either party be presented to the sentencer, it also requires that they be weighed, and weighed against each other, in some systematic or rational manner to produce fair sentencing results.¹⁷² Although most death penalty states follow the MPC's prescriptions, more or less, for enumerating statutory aggravators and mitigators and providing the jury the final discretion to reach a disposition after considering the evidence, not all states adhere to that model.¹⁷³ Some states expressly require sentencers to weigh aggravating and mitigating circumstances against each other.¹⁷⁴ Others require the sentencer to find at least one statutory aggravator, and then allow the jury to consider all of the evidence (including statutory and non-statutory aggravating evidence, and all mitigating evidence) to reach a sentence.¹⁷⁵ Nonetheless, the Court's individual consideration cases and its approval of future dangerousness evidence assures, in fact, that no death sentence is imposed unless the sentencer has weighed the mitigating evidence against whatever evidence of future dangerousness is adduced by the state, in some fashion.¹⁷⁶

reflects valid "scientific knowledge," and if so, whether testimony "will assist the trier of fact to understand or determine a fact in issue.").

171. See, e.g., MODEL PENAL CODE: SENTENCING REPORT 32 (Apr. 11, 2003), available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf (noting substantial body of research performed since 1962 strongly underscoring that "it is difficult to predict future serious criminal behavior with acceptable levels of accuracy.").

172. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

173. Texas, for example, has required jurors to answer two or three "special issues" which solely determine whether a death sentence will be imposed. See TEX. CODE CRIM. PROC. ANN. art. 37.071.

174. The "weighing" states include Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, and Tennessee. See Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 448 n.38 (1994).

175. The "non-weighing" states include Arizona, Georgia, Illinois, Kentucky, Louisiana, Missouri, Montana, New Mexico, South Carolina, Utah, Virginia, Washington, and Wyoming. See Hornbuckle, *supra* note 174 at 447 n.35.

176. See *California v. Ramos*, 463 U.S. 992, 1009 n.23 (1983) (quoting MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) in support of holding that California statute requiring jury be informed that the governor retains authority to commute sentence of life imprisonment without possibility of parole to term of imprisonment with possibility of parole); *id.* at 1008-09 n.22 (all information, including speculative information regarding the "desirability of the defendant's release into society is simply one matter that enters

As a result, in a typical sentencing proceeding the sentencer will engage in an extremely broad inquiry in which an almost limitless variety of “good” and “bad” character evidence along with the circumstances of the crime, its impact upon the victim, and expert testimony about the defendant’s propensities are considered.¹⁷⁷ Although the sentencer is then directed to weigh the evidence in some fashion, the guidance given to the jury about how to weigh the evidence is extremely limited, and indeed, may constitutionally be absent altogether.¹⁷⁸

Although the weighing paradigm assists the capital sentencer to conduct a broad evaluation of the defendant’s “character,” it is far from clear that it ensures that, as a result of that inquiry, the least *culpable* offenders are spared execution.¹⁷⁹ Indeed, as I will discuss below, the tradeoff practically ensures that persons with diminished culpability will regularly be sentenced to death despite the fact that others who are more culpable are not.¹⁸⁰

In short, the MPC-based sentencing procedures the Supreme Court has approved, which require the sentencer to consider a virtually limitless assortment of aggravating and mitigating circumstances, and to “weigh” them against each other, are deeply infused with Wechsler’s non-retributive, character-focused, sentencing philosophy. As the prominence of retributive theory grows, however, the non-retributive aspects of the MPC capital-sentencing model look increasingly dated and in need of change. What the drafters of the current ALI Plan for Revision have said with respect to the Code’s general sentencing theory is equally true of the

into the weighing process.”).

177. See Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 357 (2003) (describing capital penalty trials as “an evidentiary free-for-all”).

178. The Court has rejected the argument that the sentencer must be given specific guidance on how to weigh aggravating factors. See *Tuilaepa v. California*, 512 U.S. 967, 978-80 (1994) (holding that sentencer may be given “unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.” (quoting *Zant v. Stevens*, 462 U.S. 862, 875 (1988)) (internal quote omitted).

179. Researchers for the multi-state Capital Juror Project have found that “topics related to the defendant’s dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury’s penalty phase deliberations.” See John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397, 404 (2001).

180. This is entirely consistent with the approach advocated by Wechsler and Michael. See Wechsler & Michael II, *supra* note 15, at 1301-02.

death penalty: the "supposition that retributive considerations should not play any important role" in the structure of capital sentencing procedures is simply "unworkable."¹⁸¹

III. Retribution as the Primary Justification for the Death Penalty

The ALI's ongoing effort to revise the MPC's sentencing provisions to more fully reflect retributivist principles is, with respect to capital sentencing, in some senses a game of "catch-up." While the Court has developed a death-penalty jurisprudence that follows the MPC's offender-based model as to the acceptable form of sentencing procedures,¹⁸² it never has embraced the non-retributivist assumptions underlying the MPC as a matter of capital penal theory.¹⁸³ In *Gregg v. Georgia*, the plurality pointedly rejected the idea that retributive principles should, or could, be excised from capital punishment. As the plurality observed: "It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."¹⁸⁴

The Court consistently has acknowledged the importance of retributive justifications for capital punishment.¹⁸⁵ As the plurality noted in *Gregg*, "the instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal

181. Reitz, *supra* note 7, at 549.

182. See Zimring & Hawkins, *supra* note 92, at 119 (noting that MPC commentators now assert that MPC approach to capital sentencing establishes "a 'paradigm of constitutional permissibility'" (quoting MODEL PENAL CODE § 210.6 cmt. at 171 (Official Draft and Revised Commentaries, Part II 1980))).

183. To say that the basic orientation of the MPC is utilitarian is not to say that the retributive ideals did not, to some extent, find their way into the Code. As Professor Dressler has observed, the MPC's "drafters were enamored of utilitarian goals, but they were also cognizant of the need for retributive limits to them." Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L. J. 671, 692 (1987). This is entirely consistent with Wechsler and Michael's views on the appropriate interplay of utilitarian ideals and persistent retributive influences. See Wechsler & Michael II, *supra* note 14, at 1266-68 (noting "sound reasons for limiting the extent to which actual offenders may be sacrificed for the purpose of deterring potential offenders.").

184. 428 U.S. 153, 184 n.30 (1976) (plurality opinion) (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, December 1, 1949, 207 (1950)).

185. *Id.* at 183-84 (Capital sentence represents "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

justice serves an important purpose in promoting the stability of society governed by law.”¹⁸⁶

To be sure, the Court professes agnosticism as to the ultimate justification or purpose of capital punishment.¹⁸⁷ Nonetheless, the Court’s language in its death penalty cases reflects an acute recognition of the distinctively moral nature of the death penalty determination.¹⁸⁸ Indeed, if anything, since *Furman* and *Gregg*, the Court has shown an increasing preference in its capital jurisprudence¹⁸⁹ for retribution-based approaches over others.¹⁹⁰ Although the Court consistently has also acknowledged the deterrence function of capital punishment,¹⁹¹ because of the lack of empirical evidence that the death penalty actually works as a deterrent,¹⁹² many on the Court have expressed skepticism that the

186. *Id.* at 183 (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)); *id.* at 184 n.30 (“Punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.”).

187. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 510 (1995) (“What purpose is served by capital punishment and how a State should implement its capital punishment scheme – to the extent that those questions involve only policy issues – are matters over which we, as judges, have no jurisdiction.”).

188. *See, e.g.*, *Buchanan v. Angelone*, 522 U.S. 269, 280 (1998) (Breyer, J., concurring) (“The imposition of a penalty of death must be ‘directly related to the personal culpability of the criminal defendant,’ and ‘reflect a reasoned *moral* response to the defendant’s background, character, and crime.’” (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (emphasis in original))).

189. In non-capital cases, the Court has pointedly rejected applying the same retributive principles. For instance, in reviewing the constitutional proportionality of California’s three-strikes laws, the Court refused to hold that a fifty-year sentence for stealing \$150 worth of golf clubs violated the Eighth Amendment. In reaching that conclusion, the Court expressly acknowledged the legitimacy of the state’s purpose of incapacitating dangerous recidivists. *See Ewing v. California*, 538 U.S. 11, 25 (2003) (“Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory.’ A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.” (internal citation omitted)).

190. *Harris*, 513 U.S. at 517-18 (Stevens, J., dissenting) (quoting *Gregg*, 428 U.S. at 183-84 (plurality opinion)); *Gregg*, 428 U.S. at 184 (plurality opinion).

191. In *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), the Court, quoting *Gregg*, 428 U.S. at 183, “identified ‘retribution and deterrence of capital crimes by prospective offenders’ as the social purposes served by the death penalty.”

192. In fact, such doubts about the deterrent value of the death penalty date back to the dawn of the contemporary era of capital punishment. In *Furman*, Justice White accepted the theoretical underpinnings of the deterrence argument, but argued that the penalty was enforced too rarely to work as a deterrent. 408 U.S. at 312. “[T]he death penalty, unless imposed with sufficient frequency, will make little contribution to deterring

death penalty can be justified based on deterrence arguments alone.¹⁹³ Although not every Justice has accepted retribution as the best, or even as a permissible, justification for executing criminals,¹⁹⁴ several Justices have expressly acknowledged that retribution is the only supportable basis for the death penalty.¹⁹⁵

As will be discussed below,¹⁹⁶ in several important capital cases, the Court has given preference to basic retributive norms in favor of deterrence and incapacitation justifications of capital punishment.¹⁹⁷

those crimes for which it may be exacted.” *Id.*; *Gregg*, 428 U.S. at 184-85 (characterizing the results of statistical attempts to evaluate the deterrent effect of the death penalty as “inconclusive”).

193. See *Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring) (arguing that “retribution provides the main justification for capital punishment” in light of inconclusive evidence that death penalty furthers any deterrent purpose, and obvious inapplicability of rehabilitation arguments); *Spaziano v. Florida*, 468 U.S. 447, 480 (1984) (Stevens, J., dissenting) (deterrence rationale provides weak support for capital punishment); *Lockett v. Ohio*, 438 U.S. 586, 624-28 (1978) (White, J., concurring in judgment) (deterrence argument unavailable for one who neither kills nor intends to kill); *Furman*, 408 U.S. at 301-02 (Brennan, J., concurring) (unverifiable that the death penalty deters more effectively than life imprisonment); *id.* at 345-55, & nn.124-25 (Marshall, J., concurring) (deterrence rationale unsupported by the evidence).

194. Justice Brennan, for one, rejected retribution. Indeed, Brennan’s views regarding retribution were closely aligned with Wechsler’s and the MPC drafters’. See, e.g., *Furman*, 408 U.S. at 305 (“[O]ur society wishes to prevent crime; we have no desire to kill criminals simply to get even with them”). Justice Marshall also concluded that “retribution for its own sake is improper.” *Id.* at 345 (Marshall, J., concurring).

195. See, e.g., *Schiro v. Summerlin*, 124 S. Ct. 2519, 2527 (2004) (Breyer, J., dissenting) (“[T]he Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution.”); *Graham v. Collins*, 506 U.S. 461, 498 (1993) (Thomas, J., concurring) (“We have recognized that ‘capital punishment is an expression of society’s moral outrage at particularly offensive conduct’ and that a process for ‘channeling th[e] instinct [for retribution] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.” (quoting *Gregg*, 428 U.S. at 183 (plurality opinion))); *Spaziano*, 468 U.S. at 480 (Stevens, J., concurring in part and dissenting in part) (“In the context of capital felony cases, . . . the question whether the death sentence is an appropriate, nonexcessive response to the particular facts of the case will depend on the retribution justification.”).

196. See *infra* section III.B.

197. The prioritization of retribution over deterrence is nowhere better exemplified than in the Court’s cases rejecting mandatory death penalty schemes. Despite the fact that mandatory schemes most plainly obviate the risk of racial or other bias in jury sentencing, the Court consistently has rejected mandatory death sentences because of their failure to accord sufficient individualized respect for individuals, and this despite the fact that mandatory schemes would seem to provide a stronger and surer deterrent than discretionary schemes. See, e.g., *Spaziano*, 468 U.S. at 480 (Stevens, J., concurring in part and dissenting in part) (noting that mandatory sentences have been rejected as unconstitutional despite fact that “a legislature may rationally conclude that mandatory capital punishment will have a deterrent effect for a given class of aggravated crimes

First, however, it will be useful to more fully develop the contours of the theory that underlies those norms.

A. Retribution and the Death Penalty

Broadly speaking, retributive theory justifies imposition of punishment in terms of the offender's moral desert.¹⁹⁸ The Supreme Court has characterized retribution as "the interest in seeing that the offender gets his 'just deserts.'"¹⁹⁹ A retributive approach to punishment seeks to proportion the punitive response to the gravity of the offense, with gravity, from a retributive viewpoint, measured by the injury caused by the offender (or that the actor subjectively believed would be caused),²⁰⁰ plus the culpability²⁰¹ of the offender in causing the injury.²⁰²

significantly greater than would discretionary capital sentencing."'). Indeed, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court rejected a mandatory death penalty even where the deterrence argument was at its peak: where the defendant already was serving a life sentence. Even in these circumstances, the Court reasoned, "a departure from the individualized capital-sentencing doctrine is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments." 483 U.S. at 78.

198. See, e.g., *Furman*, 408 U.S. at 304 (Brennan, J., concurring) (observing that in the context of the death penalty, retribution "means that criminals are put to death because they deserve it"); MICHAEL S. MOORE, A TAXONOMY OF PURPOSES OF PUNISHMENT, IN LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 235 (Cambridge Univ. Press 1984) (defining retributivism as "the view that punishment is justified by the desert of the offender").

199. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

200. Different approaches to retributivism assign different emphases to actual harm. Some posit that retribution's function as a form of "payback" must be calibrated to the harm actually resulting from the offender's acts. Others place more emphasis on the blameworthiness of the actor's intentions, and thus argue that punishment should be proportioned to the harm intended alone. Every version of retributivism, however, makes either intended or actual harm one of the essential determinants of moral blameworthiness.

201. Culpability – the blameworthiness of the offender's conduct – is measured by evaluating the actor's "intentions, expectations, and actions." *Cabana v. Bullock*, 474 U.S. 376, 407-08 (1986) (Stevens, J., dissenting).

202. See *In re Stanford*, 537 U.S. 968, 969 (2002) (noting that "the gravity of the offense," should be "understood to include not only the injury caused, but also the defendant's culpability" (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)), *reh'g denied*, 537 U.S. 1097 (2003)); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 216-17 (2d ed. 1960) (noting that gravity of criminal offenses may vary depending on the extent of harm to individual and community and the degree of moral culpability of the offender). "Harm" can be subdivided into two separate components, actual and intended harm, both of which have some independent conceptual standing. See, e.g., Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 662 (1989) (arguing that there are three basic components to deserved punishment: "harm, motive-intentionality and autonomy").

Because retributive punishment is based on the belief that punishment is imposed on persons as a response that has been “earned,” it is fundamentally backward-looking in nature, unlike utilitarian theories.²⁰³ This backward-looking orientation places important limits on the types of considerations that properly may be invoked in determining what punishment is “deserved.”²⁰⁴ As the Court has observed, where a defendant is incapacitated because he is deemed to be dangerous, the law or sentence on which that incapacitative treatment is based is not retributive, because “it does not affix culpability for prior criminal conduct.”²⁰⁵

1. *Evaluating Harm in Capital Sentencing*

A basic assumption underlying fair sentencing is that the amount of harm caused by an offender is central to the degree of punishment that is deserved.²⁰⁶ There are two ways to view the harm inquiry in capital cases from the perspective of retribution. First, one might seek to establish a minimum quantum of harm that must have been caused or intended as a precondition to the conclusion that death is “justly deserved.” Such an approach cleaves to the literal sense of *lex talionis*. Death is not a proportionate penalty, under such view, for any crime that does not inflict an “equivalent” amount of harm on its victim or victims, however such equivalence is measured.²⁰⁷ Alternatively, one might attempt to rank or order the harmfulness of an actor’s conduct and intentions in comparison with other categories of crimes or other particular instances of crimes within the same category, and apply the “ultimate punishment” only to those responsible for crimes falling into the highest category, or falling at the most harmful end of the range within a particular category.²⁰⁸ In

203. See Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 999 (1985).

204. See, e.g., LEO KATZ ET AL., *FOUNDATIONS OF CRIMINAL LAW* 63 (Oxford Univ. Press 1999) (“Retributive desert is based on what the offender has done, and with what culpability.”).

205. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (providing for civil commitment of persons who, due to mental abnormality or personality disorder, are likely to commit sexually predatory acts).

206. See CESARE BECCARIA, *supra* note 16, at 24 (“[T]he true measure of crimes is, namely, *harm to society* . . .”).

207. As Blackstone approvingly observed, “[t]he Mosaical law reads, that ‘whoso sheddeth man’s blood, by man shall his blood be shed.’” WILLIAM BLACKSTONE, *BLACKSTONE’S COMMENTARIES ON LAW* 832 (Bernard C. Gavit ed., Washington Law Book Co. 1941) (1769).

208. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 37 (1984) (identifying two types of

either case, measurement of the harmfulness of conduct is essential to determine the gravity of the offense.

In fact, extraordinarily harmful conduct is recognized as relevant to the penalty decision in the MPC capital sentencing provisions and in virtually all death penalty schemes. Homicidal conduct that creates a risk of or actually causes the death of more than one person,²⁰⁹ that involves physical torture of the victim,²¹⁰ that is accompanied by other criminal acts such as rape, robbery, or arson,²¹¹ or that is committed in an “especially heinous, atrocious or cruel” manner²¹² all describe criminal conduct that causes extraordinary harm. Empirical research also suggests that particularly “vile” killings that involve multiple victims, sexual abuse, or torture are among the most frequent types of killings to be punished by death.²¹³ Aggravating circumstances that measure gravity by identifying such circumstances properly distinguish critical aspects of more and less grave offenses. The admission of victim impact statements and testimony is predicated on a broad definition of harm, one that measures the secondary impact of the actor’s conduct as well as its immediate results.²¹⁴

2. *Evaluating Culpability*

Of course, whether the defendant’s offense is sufficiently grave to justify the death penalty, and if so, whether it is sufficiently grave to place it among the worst offenses is not solely limited to the quantum of harm caused or intended by the defendant’s acts. Inextricably bound up with that estimation is an evaluation of the defendant’s culpability for engaging in the conduct or bringing about the harm. Even great harms may not deserve severe punishment if, in causing them to occur, the actor was not truly blameworthy for his

proportionality review: review for inherent disproportionality and comparative analysis for “unequal” sentencing outcomes).

209. See, e.g., MODEL PENAL CODE § 210.6(3)(b)-(d) (Proposed Official Draft 1962).

210. See, e.g., S.C. CODE ANN. § 16-3-20(C)(1)(h) (Law. Co-op 2001).

211. See, e.g., MODEL PENAL CODE § 210.6(3)(e).

212. See, e.g., *id.* § 210.6(3)(h).

213. Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1341 (1985).

214. The extent to which a defendant is culpable for the harms caused to family and friends of the victim, however, depends on the foreseeability of their occurrence. The tendency to view murders involving the dismemberment or desecration of the body as especially abhorrent also might be understood as a reflection of the community’s evaluation of the harm caused to the community’s moral standards or notions of decency and respect.

conduct.²¹⁵ Accordingly, under a retributive sentencing theory, only those offenses in which both the greatest harms are caused and in which the offender deliberately intended to cause them deserve the severest punishment.²¹⁶ Thus, the question of what constitutes an actor's "just deserts" requires consideration of the actor's culpability in causing the injury.²¹⁷

Culpability, of course, has long been recognized as an essential attribute of criminal liability, and one that guided the common law treatment of homicide. As Blackstone's commentary on murder suggests, "consciousness of doing wrong" and "discernment between good and evil" are necessary predicates of guilt.²¹⁸ The common law and statutory law concepts of malice aforethought, premeditation, and deliberation all represent an attempt to discern the degree of the actor's "consciousness of doing wrong."²¹⁹ Indeed, at least as far back as the seventeenth century, "malice in fact" was understood to signify "a *deliberate intention* of doing some corporal harm to the person of another."²²⁰

The central feature of the retributive conception of culpability is the opportunity or capacity to exercise choice.²²¹ Because culpability

215. See, e.g., Stephen P. Garvey, "As the Gentle Rain From Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1022 (1996) ("The more culpable a capital defendant is for his conduct, the more deserving he is of death.").

216. For example, deliberate mercy killings are less grave because they cause less harm, given the victim's impaired condition. Provoked killings, on the other hand, are less grave because defendants are less culpable, as will be discussed below. Arnold Loewy argues that a third consideration, which he calls "dangerousness," should also be weighed in determining the true gravity of criminal conduct. By dangerousness, Loewy is referring not to the actor's character or "future dangerousness," as the term is discussed in this Article. Rather, he is referring to the potential for harm implicit, or foreseeable, in the offending act. See Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988).

217. *Atkins v. Virginia*, 536 U.S. 304, 319 (2001) ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender.").

218. Thus, Blackstone explained, both the mentally infirm ("lunatics") and the morally immature ("infants") presumptively are assumed to lack the necessary capacity, but the presumption was rebuttable. See BLACKSTONE, *supra* note 207, at 832.

219. As Blackstone explained, malice aforethought is "any evil design in general, the dictate of a wicked heart." *Id.* at 834. An actual killing must accompany the mental state. Without a killing, there is no crime. *Id.* at 832.

220. 1 HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 451 (1st ed. 1736) (quoted in Walter E. Oberer, *The Deadly Weapon Doctrine: Common Law Origin*, 75 HARV. L. REV. 1565, 1568 (1962)) (emphasis in original).

221. See, e.g., Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987); Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 722 (1992) ("When we call punishment

only exists where an individual has acted in a morally blameworthy fashion, and because no act can be deemed blameworthy if it was not, in some sense, the product of a free choice, retributive theories of criminal responsibility impose responsibility only where the choice to violate the law was made “freely,” or “voluntarily.”²²² Where the contrary is true, and the criminal act is not the product of the offender’s free choice, the offender is relieved of responsibility.

This principle is reflected in the basic excuses recognized in the substantive criminal law – insanity, infancy, duress, provocation, mistake, and involuntary intoxication,²²³ each of which evidences that the offending act was not, in some meaningful sense, the product of the “free and voluntary choice” of the actor,²²⁴ or in Blackstone’s words, as a result of “the want or defect of will.”²²⁵ Where facts supporting an affirmative defense are present, but not in such degree as to relieve the defendant of legal responsibility, retributivism suggests that the diminishment of choice nonetheless is relevant to the severity of punishment. As the Court recognized in *Penry v. Lynaugh*, any evidence that shows that the defendant had a diminished ability to “control his impulses or to evaluate the consequences of his conduct” reduces a defendant’s moral culpability, and counsels for a less severe sentence.²²⁶

The concept of choice can be broken down into three components. As Joshua Dressler notes: “Free choice’ exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct violates society’s moral or legal norms; and (3) conform his conduct to the law.”²²⁷

In other words, before criminal responsibility can fairly be ascribed to an individual, we must be able to conclude three things:

deserved, we mean that punishment depends on the person’s choice to do wrong and not on the consequences that flow from punishment.”).

222. Of course, the concept of free choice or free will is, as a philosophical matter, highly contested. See, e.g., Pillsbury, *supra* note 221 (“[T]he first and perhaps hardest question for any modern theory of deserved punishment is whether free choice is possible.”).

223. See generally, WAYNE R. LAFAVE, CRIMINAL LAW 447-448 (4th ed. 2003).

224. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 174 (Oxford Univ. Press 1968) (arguing that the excuses reflect the “fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.”).

225. 4 WILLIAM BLACKSTONE, COMMENTARIES *20 (arguing that “[a]ll the several pleas and excuses . . . may be reduced to this single consideration . . .”).

226. 492 U.S. 302, 322 (1989) (mental retardation and childhood abuse).

227. Dressler, *supra* note 183, at 701.

(1) the actor understood what she was doing; (2) the actor understood that what she was doing was wrong; and (3) the actor could have acted otherwise. All three conditions must be present before a wrongdoer can be held blameworthy for her criminal conduct.²²⁸

Most mitigating circumstances enumerated in modern death penalty statutes track the recognized bases for excusing, justifying or mitigating criminal conduct: provocation, extreme emotional disturbance, justification defenses such as self-defense or defense of others, duress, insanity, and intoxication.²²⁹ Such factors all relate to the basic preconditions of choice: the degree to which the actor understood the pertinent facts relating to her conduct, appreciated the moral and legal implications of her conduct, and had the capacity to conform her conduct to the law.²³⁰

In sum, in order to evaluate the defendant's culpability, it is not

228. The analysis called for in the sentencing phase by these retributive principles is familiar, since each of the three conditions of "choice" is widely understood as a basic precondition of criminal responsibility. For instance, with respect to the first factor, it is a longstanding principle of criminal liability that a mistake of fact that negates an element of a specific-intent offense excuses criminal liability. See LAFAVE, *supra* note 223, at 281-300. Similarly, the offender who commits his offense in the mistaken belief that his conduct was justified has usually been treated under the common law as deserving of less punishment – and often no punishment at all – where his mistake was "reasonable." JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 214-15 (3d ed. 2001) (noting that reasonable use of force in self-defense is justified, even if the belief that such use of force was necessary proves to have been mistaken in fact). The second and third components of the choice inquiry are equally familiar to the criminal law. Indeed, the defendant's ability to appreciate the wrongfulness of his conduct, or to conform his conduct to the law, merely restates the basic test of criminal responsibility set forth in the *M'Naghten* and "irresistible impulse" tests. It is the same test that was adopted by the MPC to determine an offender's legal responsibility for his criminal conduct. LAFAVE, *supra* note 223, at 375-92. Defenses such as provocation and "extreme emotional disturbance" reflect the third aspect of choice, where those defenses turn on a judgment that, where the defendant's homicidal act was reasonably provoked by the victim's conduct, and thus that the volitional component of conduct was undermined, less severe punishment is deserved.

229. The MPC, for instance, recognizes that mitigation of sentence is appropriate where the murder was committed in the following circumstances: (1) while the defendant was under the influence of extreme mental or emotional disturbance, (2) under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct, (3) where the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor, (4) where the defendant acted under duress or under the domination of another person, and (5) where, 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. See MODEL PENAL CODE § 210.6(4) (Proposed Official Draft 1962). The MPC, as well as most state jurisdictions, also recognizes that defendant's youth at the time of the crime is a mitigating factor.

230. Dressler, *supra* note 183, at 701.

enough to determine the nature and scope of the harm caused or intended by the defendant. The sentencer also must evaluate the degree of “free choice” accompanying the defendant’s conduct. Only then can the sentencer make a meaningful judgment about the gravity of the offense. As the Court observed in *Tison v. Arizona*, “the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”²³¹ Importantly, what is pertinent to the issue of culpability is the moral quality of the choice, not the moral character of the offender.²³²

3. *A Word About Character and Retribution*

This is not to say that all retributivists would agree that character is irrelevant to punishment.²³³ In contradistinction to the “choice” theory of retributivism described above, an alternative type of retributive theory attempts to avoid the problematic aspects of a pure choice theory raised by determinists and other critics of the concept of “free will” by mediating or interpreting the action of the individual through the “character” of the person who engaged in the offensive act.²³⁴ If choice theories posit “an offender responsible for his act if and only if it was the product of his free will,”²³⁵ character theories posit that people may not be responsible for acts which flow from their “character,” but that they are responsible for creating or shaping their character. Character theories view criminal acts as evidence of the bad character of the offender, and the purpose of punishment as primarily the reform of or retribution for one’s bad character, rather than merely retribution for one’s bad choices.

231. 481 U.S. 137, 156 (1987).

232. The distinction, at times, may be a fine one. Offender-based arguments are relevant in a choice model to the extent that they relate to the issue of capacity. The offender who lacks the capacity to make a free and informed choice necessarily cannot be held to have made such a choice. The route is thus indirect, but the underlying issue remains the quality of choice rather than the worthiness of the chooser.

233. Some, like George Fletcher, argue that retribution should be understood to require the sentencer to proportion punishment to his or her evaluation of the defendant’s character. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 800 (Little, Brown & Co. 1978) (arguing that under retributive theory of punishment, “the desert of an offender is gauged by his character – i.e., the kind of person he is . . .”).

234. On character theory, see, e.g., Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 *SOC. PHIL. & POL’Y* 59 (1990); Pillsbury, *supra* note 221; Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 *WAYNE L. REV.* 905 (1973); George Vucos, Note, *Background, Responsibility and Excuse*, 96 *YALE L.J.* 1661 (1987). For a good summary of the debate between choice and character theories, see Garvey, *supra* note 215.

235. Garvey, *supra* note 215, at 1023.

To make matters more complex, scholars posit several different types of character theories. One commentator has identified three main groups of character theories: causal models, moral capacity models, and representative action models.²³⁶ Causal models, common in contemporary sentencing hearings, focus on the causal influences that predispose certain people to criminal behavior.²³⁷ Common influences highlighted include socioeconomic background, racial discrimination, and the defendant's own history of childhood abuse. Causal character theory holds that because individuals are not responsible for the conditions in which their moral character was formed, to the extent that those conditions are particularly responsible for the formation of bad character tending towards criminal behavior, that individual is less blameworthy than others whose characters cannot be attributed to such conditions.²³⁸

Moral capacity models represent a second type of character theory.²³⁹ Adherents to the moral capacity approach emphasize that true choice can only exist where the actor has the capacity to make reasoned moral decisions. Where the character of the individual is such as to preclude the exercise of moral choice, the offender cannot be held fully blameworthy for her bad moral choices.

Representative action models provide a third approach to character theory.²⁴⁰ In contrast to causal and capacity models, representative action models posit that by studying the circumstances of the offense and the offender, one can reach judgment as to whether the offense was consistent or inconsistent with the individual's basic character. Writing for the Seventh Circuit, Judge Posner expressed a simple version of the representative action model of character theory.

236. Pillsbury, *supra* note 221, at 732-35.

237. See, e.g., Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9 (1985).

238. For example, Justice O'Connor is expressing a type of causal character theory when she asserts "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For a scholarly example of a type of causal character theory, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 355-56 (1996) (arguing that individuals ought to be evaluated "not only for making good choices but also for having good character, which consists in experiencing appropriate rather than inappropriate passions.").

239. See, e.g., Arenella, *supra* note 234.

240. Probably the most prominent spokesperson for the representative action model of character theory is George Fletcher. See FLETCHER, *supra* note 233, at 799 (arguing that "[t]he distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character").

At the sentencing hearing of a capital trial, Posner claimed:

What is brought out that will help him is what goes to show that he is not as 'bad' a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime.²⁴¹

In accepting the representative action model of character theory, Judge Posner expressly rejected the causal character model, not because it is logically "absurd," but rather because an overtly deterministic view of "free will" is "inconsistent" with the very premise of capital sentencing.²⁴²

Neither causal nor capacity character theories, however, are inconsistent with the choice theory set forth above.²⁴³ Both focus on the issue of the actor's ability to make a "free choice" at the time the offensive act was committed. Causal theories attempt to expand the range of inputs recognized as relevant to the question of whether the act was "freely chosen," and are thus entirely consistent with a focus on choice. Capacity models shift the emphasis of the inquiry from the specific circumstances of the choice, to the broader issue of the actor's capacity to choose. But, if the actor lacks a capacity to freely choose, obviously, there is no logical basis to conclude that the choice was freely made. Accordingly, capacity theories too are consistent with the choice model.

The representative action model, however, is different, in that it posits that the purpose of retribution is not to proportion the punishment to the evil of the act, but rather to proportion the punishment to the evil of the character to whom the act is attributed on the theory that even if one cannot be held responsible for one's acts, which are determined, one can nonetheless be held responsible for the formation of one's character. To the extent the representative model of retribution would focus the punishment inquiry on the quality of the defendant's character, it is not substantially different, in effect if not in metaphysical origin, from Wechsler's own offender-

241. *Stewart v. Gramley*, 74 F.3d 132, 136 (7th Cir. 1996).

242. *Id.*

243. See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 973 (1992) ("[V]olition and character appear as complimentary rather than as hostile or mutually exclusive sources of responsibility"); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 378 (1993) (suggesting that "there is something spurious about the general controversy between 'choice' and 'character' theorists.").

based theory.²⁴⁴ The main difference is that whereas Wechsler would incapacitate a defendant with a bad character because of the danger he presented to society, the representative action retributivist would do so because the defendant deserved it for poor cultivation of his character. In any event, the representative action model is not cognizable as a theory of retribution in the sense in which I here employ the term.

B. Retribution and Deterrence

Of course, the Court has never relied solely on retribution to justify the death penalty. Rather, it has repeatedly invoked both retribution and deterrence as the twin justificatory bases on which capital punishment rests.²⁴⁵ But the linkage between retribution and deterrence is tight. Although deterrence is a forward-looking justification, and retribution backward-looking, both ultimately turn on the same criteria. Deterrent punishment makes no sense where the conduct sought to be deterred is non-deterrable. Retributive punishment, as we have seen, is unwarranted where conduct is not the product of free choice. Because deterrence can only be effective where the actor can consider the consequences of her acts and make a rational choice to refrain from the act because of the threat of punishment, the only truly deterrable acts are ones that are also freely chosen.²⁴⁶ Accordingly, a sentencing outcome based entirely on principles of deterrence will, happily, overlap almost entirely with one

244. The representative-action model, like Wechsler's offender-based sentencing model, is unsatisfactory for another reason: it fails to provide a practical basis to properly assign blame. Although it may be a plausible hypothesis that persons are, more or less, responsible for their character, it is difficult, if not impossible, to judge the extent to which attributions of responsibility are warranted. If one person was "made bad" by the terrible circumstances of his youth or upbringing, does his "badness," reflected in his tendency to engage in criminal acts, deserve more or less blame than a person who commits a criminal act, but otherwise exhibits a "good" character? If a person exhibits a "bad" character, but was not the subject of terrible abuse, poverty, or neglect as a child, is it necessarily fair to infer that such person is therefore responsible, or more responsible, for his bad character than others? What if that person was genetically or biologically predisposed to such "badness" of character? Is he any more or less blameworthy for his character than the person whose environment, rather than genes, provided the root cause? To what extent do we, or can we, ever know what causes character to form as it does? And even if scientists might posit theories or devise methods of investigation, capital courtrooms and jury deliberation rooms are surely not the proper forum to resolve that debate.

245. See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (identifying retribution and deterrence as the "social purposes served by the death penalty"); *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976).

246. See, e.g., Moore, *supra* note 221, at 33 (arguing that punishing choices allows actors to "maximally predict what will follow" upon their decisions).

based on principles of retribution.²⁴⁷

But Wechsler and Michael's contention that the aims of incapacitation are equally consistent with those of deterrence was founded on a supposition that, on reflection, proves the inapplicability of their approach to capital punishment.²⁴⁸ If dangerousness, rather than blameworthiness, is the critical factor in determining "treatment," whether the conduct is deterrable is beside the point. For those who can be deterred, the threat of severe "treatment" is likely to be effective. For those who cannot, incapacitory treatment – in civil or penal institutions, with appropriate rehabilitative care where possible – is still necessary. Either way, the state's interest in protecting its citizens from dangerous individuals justifies the "punitive" treatment of offenders.

But, of course, most if not all of the state's incapacitative goals can be achieved through "treatment options" – such as life sentences without possibility of parole – that are less draconian than capital punishment. Once it is conceded that capital punishment as an incapacitatory mechanism is (no pun intended) a form of overkill, it is hard to escape the conclusion that incapacitation goals and deterrence goals are at odds. To be sure, Wechsler and Michael recognized as much, conceding that "there is less justification for execution to incapacitate than for the death penalty to deter."²⁴⁹ But if that is conceded, then it is precisely the traditional rules that govern the defendant's "responsibility" – i.e., traditional indicia of culpability, rather than dangerousness – that must separate the class of offenders whose conduct logically could be altered through deterrent means.²⁵⁰

247. Wechsler and Michael make much the same point, arguing that "[t]he common law rules prescribing the limits of legal 'responsibility' may properly be understood as an effort to define this class of [non-deterrable] persons." Wechsler & Michael I, *supra* note 14, at 752.

248. At times, Wechsler and Michael argue that dangerousness alone can justify the most "thorough" form of incapacitation: "execution." See Wechsler & Michael II, *supra* note 14, at 1315 (arguing that "the offenders who ought to be incapacitated most thoroughly are the most dangerous and the least corrigible," and the "ordering of the thoroughness of incapacitation . . . accomplished through execution or life imprisonment . . . is strictly comparable to that ordering of the severity of treatment in accordance with the characters of offenders which is employed in order to mitigate deterrent penalties.").

249. Wechsler & Michael II, *supra* note 14, at 1316.

250. I do not mean to suggest that these implications were not fully apparent to Wechsler and Michael. They were. See Wechsler & Michael I, *supra* note 14, at 728 (noting that "the function of the rules governing responsibility, like the distinction between murder and manslaughter, is to determine the type of treatment.").

C. The Court's Recognition of Retributive Principles in Capital Sentencing

Notwithstanding the Court's adherence to the MPC procedural sentencing model, its evolving preference for viewing capital punishment through the lens of retributivism has emerged in several decisional lines. The best example is provided by the proportionality cases that established hard floors prohibiting the execution of persons whose offenses either caused an insufficiently substantial harm to warrant imposition of the ultimate sanction, or whose conduct in causing a sufficient harm was insufficiently culpable.

In *Coker v. Georgia*, the Court applied the proportionality principle to conclude that death was an unconstitutionally disproportionate response to the crime of the rape of an adult woman.²⁵¹ In so ruling, the Court announced a *de facto* presumption that the death penalty is only available to punish harms involving the death of other human beings, or crimes of similar or greater magnitude.²⁵² The Court was at pains to acknowledge the magnitude of the offense of rape, and the compelling state interest in deterring such crimes. The Court also acknowledged the state's strong interest in incapacitating convicted rapists to prevent them from causing additional harms to society. However, it concluded, the limiting principle of desert trumped these concerns. Punishment must be proportionate to the offense, and the penalty of death was simply too extreme a response.²⁵³

The Court also has limited capital punishment where the offender lacked sufficient culpability to warrant the ultimate sanction.²⁵⁴ The first case establishing that principle was *Enmund v. Florida*.²⁵⁵ In *Enmund*, the defendant had been convicted of felony

251. 433 U.S. 584, 592 (1977).

252. For instance, the crime of treason remains punishable by death, even where the treasonous conduct does not result in the death of any person. See 18 U.S.C. § 2381 (1994) ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.").

253. *Coker*, 433 U.S. at 592.

254. See *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Several jurisdictions also require proof that defendant was directly responsible for the killing before a defendant may be considered eligible for the death penalty. See, e.g., MD. ANN. CODE, art. 27, § 413 (1996).

255. 458 U.S. 782 (1982).

murder and had been sentenced to death.²⁵⁶ The evidence at trial supported at most the inference that defendant was in the vehicle present at the scene where the crime occurred.²⁵⁷ There was no evidence that Enmund intended the death of any person.²⁵⁸ In the absence of intention, the Court reasoned, it is impermissible to attribute the resulting harm to the free or voluntary conduct of the offender, and thus it found a sentence of death to be disproportionate to the gravity of the offense.²⁵⁹ Again, the Court concluded that retributive principles of proportionality – or just desert – precluded imposition of the punishment.²⁶⁰

In *Thompson v. Oklahoma*, a plurality established a similar minimum culpability floor for offenders under the age of sixteen.²⁶¹ As the plurality reasoned, given “the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children, [retributive justifications are] simply inapplicable to the execution of a fifteen-year-old offender.”²⁶² The Court reaffirmed its commitment to the minimum culpability principle most recently in *Atkins v. Virginia*,²⁶³ when it barred execution of mentally-retarded defendants. In so holding, the Court reaffirmed that persons whose offenses were committed below a minimum threshold of culpability are not subject to capital punishment.

In *Atkins*, the Court expanded on the minimum harm and culpability rules announced in *Coker* and *Enmund* when it concluded that even “mere” murder is an insufficient harm to justify a sentence of death.²⁶⁴ Of course, such reasoning diverges from a strict

256. *Id.* at 784.

257. *Id.* at 788.

258. *Id.*

259. *Id.* at 798. The Court further clarified, in *Tison*, 481 U.S. at 137, that the Eighth Amendment’s proportionality requirement was satisfied only when the defendant’s mental state was comparably culpable.

260. *Enmund*, 458 U.S. at 801 (“For purposes of imposing the death penalty, Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”).

261. 487 U.S. 815, 838 (1988). But the concurring opinion rejects any absolute bar on executing persons under sixteen. *See id.* at 848-59 (O’Connor, J., concurring).

262. *Id.* at 836-37.

263. 536 U.S. 304 (2002).

264. *Id.* at 319 (explaining that “the culpability of the average murderer is insufficient

application of the *lex talionis*, which by its literal terms would authorize capital punishment for any homicide offense. In light of “evolving standards of decency,”²⁶⁵ the figurative “eye for an eye and a tooth for a tooth,” reasoned the Court, now means a figurative eye for an eye, *and* a tooth. Nonetheless, these decisions all reflect the basic retributive principle of minimum proportionality, judged in terms of harm inflicted or culpability attending the causative acts.

In another line of cases, the Court has suggested a preference for a comparative approach, and has stated that the death penalty ought to be limited to the “the worst criminals or the criminals who commit the worst crimes.”²⁶⁶ Indeed, if one principle emerged from *Furman*, it was that capital sentencing procedures must, at least, provide a more rational method to select the few who would die from the many who are eligible. In the famous words of Justice Stewart, where only a few are capriciously selected to die from among many committing crimes just as reprehensible, the imposition of the death sentence is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”²⁶⁷ The Court has thus reiterated time and again the constitutional requirement that death penalty schemes effectively “narrow” the class of capital offenders. The attempt to do so requires sentences to be based on comparative principles.²⁶⁸

These cases demonstrate that, despite the Court’s acceptance of the MPC procedural rubric, its substantive approach to the death penalty has consistently reflected the basic insights of retributive theory. That is, capital punishment is “justly deserved,” if it is ever deserved,²⁶⁹ if and only if two criteria exist. First, the harm caused or

to justify the most extreme sanction available to the State”). *See also* *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (holding that not only need the crime be a murder in which the defendant actually intended the death of his victim, but the circumstances of the offense must “have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder”). These decisions were foreshadowed in the plurality’s opinion in *Woodson v. North Carolina*, 428 U.S. 280, 295-96 (1976) (“The actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.”)

265. *Woodson*, 428 U.S. at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

266. *Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983) (quoting *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring)) (holding that to be constitutional, a death penalty scheme “must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”).

267. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

268. *See, e.g., Zant*, 462 U.S. at 885 (1983) (explaining that narrowing of class of persons eligible to be put to death is a necessary attribute of any constitutional death penalty scheme).

269. Many would argue that death is never “justly deserved,” regardless of the amount

intended must have been sufficiently great so that, under the principle of *lex talionis*, it can reasonably be said that death constitutes a proportionate response. Second, the actor's choice to engage in harmful conduct must have been the product of the actor's "free choice," that is, sufficiently free of external interference to justify holding the actor fully responsible as a moral agent for that harm.

IV. Exorcising Wechsler's Ghost: Restructuring Capital Sentencing by Disaggregating Aggravation, Mitigation, Vengeance, and Mercy

If, as I have argued, there is a disconnect between the procedural mechanisms sanctioned by the Court and the philosophical justifications it has recognized for the death penalty, the question remains: does it matter? Would an express commitment to retributive principles require a different, and better, set of capital sentencing procedures? If so, what would they be? In attempting to answer that question, let me begin by turning to the current work being conducted by the ALI to revise the MPC's sentencing provisions in light of more contemporary notions of the proper place of retributive principles in sentencing practice.²⁷⁰

A. Revising the Model Penal Code: "Limiting" or "Determining" Retributivism

In updating the Model Penal Code's sentencing provisions, the ALI has indicated an intent to develop a new "framework of purposes for a revised Code."²⁷¹ Concluding that the Code's rehabilitative and incapacitative orientation is no longer theoretically, empirically, or morally sound, nor politically defensible, the ALI Plan for Revision of the MPC's sentencing provisions proposes a reformulation based on what Norval Morris described as "limiting retributivism."²⁷² The

of harm caused by the actor or his degree of culpability. Although I am sympathetic to those arguments, as a matter of constitutional law, those arguments have not prevailed. Rather, the Supreme Court has proceeded on the assumption that death remains a morally justifiable response to certain especially noisome conduct. *See* HUGO A. BEDAU, *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 47-49 (Austin Sarat ed., Oxford Univ. Press 1999) (arguing that life imprisonment imposes a fully proportionate response to even the most heinous killing sunder retributive principles). The analysis in this Article assumes that conclusion, *arguendo*.

270. *See* Reitz, *supra* note 7.

271. *See* Reitz, *supra* note 7, at 545 n.23.

272. *See id.* at 555 & nn.37-38, 556 (citing NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (Norval Morris et al. eds., Univ. of Chi. Press 1974); NORVAL MORRIS,

proposed retributive framework is “limiting” in the sense that the retributive principles are not called to produce certain and fixed sentences in each case, but rather limit the discretion of the sentencer to a range of punishment outcomes that is generally proportionate to the gravity of the underlying offenses.²⁷³ To this end, the Plan for Revision envisions retribution to serve two main purposes. First, retribution can “at least insist that offenses and offenders be compared with one another in an organized way when assigning levels of punishment.”²⁷⁴ By scaling punishment to the gravity of the offense, without need to explore the deterrence benefits or the incapacitative pay-offs (both of which are extraordinarily difficult to calculate), retribution “can supply a default algorithm for punishment decisions.”²⁷⁵

Second, retribution can “operate as an important limitation upon utilitarian goals.” Taking its cue in large part from Morris’s work, the Plan for Revision suggests developing a sentencing framework that sets penal ranges based on retributive principles, but that leaves room for play to allow rehabilitative or incapacitative aims to be pursued.²⁷⁶ Although moral judgments are necessarily “imprecise,” they nonetheless can “tell us that a certain level of punishment is clearly too high and, at a different point, that it would clearly be too low.”²⁷⁷ Where insufficient information is available to make reliable utilitarian judgments about the proper course of punishment, the sentence would be based solely on a retributive conception of proportionality.²⁷⁸

The Plan for Revision does not specifically address capital sentencing, and it is hard to see how the principles set forth therein might meaningfully alter current capital sentencing practices. In fact, limiting retributivism fairly accurately describes the capital sentencing

MADNESS AND THE CRIMINAL LAW (Franklin E. Zimring et al. ed., Univ. of Chi. Press 1982); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (Oxford Univ. Press 1990).

273. See NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (Norval Morris et al. eds., Univ. of Chi. Press 1974) (discussing limiting retributive sentencing principles).

274. See MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION (Jan. 24, 2002), 6 BUFF. CRIM. L. REV. 525, 555-56 & nn.39-40, 556 (2002), available at <http://wings.buffalo.edu/law/bclc/bclarticles/6/1/reitz.pdf>.

275. *Id.*

276. *Id.*

277. *Id.*

278. See *id.* at 556-57 nn.40-41.

philosophy that already has been embraced by the Court in its post-*Furman* capital jurisprudence. For instance, the Court's insistence that the death penalty not be imposed "wantonly or freakishly,"²⁷⁹ but rather be reserved only for the worst offenses and the worst offenders, represents an attempt to ensure that death sentences are imposed with rough comparative proportionality. And the Court's minimum harm and minimum culpability cases, likewise, enforce a substantive proportionality by establishing that some offenses are simply not sufficiently grave to warrant a sentence of death. The current framework, however, defines the lower reaches, but after circumscribing the "death-eligible" class, leaves room for other, non-retributive factors, to determine the actual sentence.

Limiting retributivism may well represent an appropriate framework around which to reconstruct general sentencing principles, but it does not go far enough in the peculiar context of capital punishment. Whereas the full mix of retributive and utilitarian penal concerns are present when the options available to the sentencer are imprisonment for a determinate or indeterminate term, or supervised or unsupervised release to the community, utilitarian considerations should play a negligible role in the binary context of case-specific capital punishment dispositions, where the choice facing the sentencer is almost always death or life imprisonment (or its functional equivalent).²⁸⁰ Certainly, as members of the Court have observed, the choice between life or death cannot turn on issues of rehabilitation and incapacitation, nor can it coherently turn on the issue of deterrence. Although deterrence is an appropriate consideration in devising a capital punishment regime, it makes little sense at the level of individual case disposition. Deterrent purposes are served by the announcement, *ex ante*, that offenders will be sentenced to death when they engage in certain proscribed conduct. Where the death penalty is imposed based on considerations that only become apparent to the fact-finder after the offensive conduct is complete, the resulting sentence simply cannot serve a deterrent purpose in that case.

If retribution is the only theoretically-sound basis on which to

279. See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

280. Although Texas does not currently offer sentencers the option of sentencing the offender to life imprisonment without possibility of parole, it requires that persons sentenced to life serve a minimum term of forty years. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(2)(e)(2)(B). The average offender, thus, will not be returned to society until he is over the age of sixty.

select a sentence of death rather than a sentence of life imprisonment, then the kind of retributive framework called for in the context of capital punishment must be less “limiting” and more “determining” than is reflected in the ALI’s announced approach to revision of the MPC’s non-capital sentencing provisions. The retributive framework necessary to that goal must begin by establishing minimum standards of proportionality. But sentencing procedures must do more than simply identify a set of defendants whose crimes are sufficiently grave to satisfy minimum proportionality concerns and then allow the actual sentencing disposition to turn on utilitarian justifications like the offender’s dangerous character. Although the Court has embraced the retributive principle that only the most deserving offenders should be subject to the most severe sanction, the original MPC sentencing procedures simply do not, and are not designed to, identify those offenders, and the principle of limiting retributivism is inadequate to fully rectify the problem.

In the remaining portion of this Article, I will spell out some of the structural implications suggested by a retribution-determined sentencing system that goes beyond the ALI’s current scope of revision.

B. Restructuring the Penalty Phase

Given the extraordinary degree to which Wechsler’s ideas pervade contemporary death penalty law, it is not easy to visualize how the landscape would look shorn of his influence. But the preceding analysis makes one thing certain. If retribution were given more prominence in capital sentencing procedure, evaluations of the offender’s character – either in aggravation or mitigation – would no longer play the dominant – or even a permissible – role at sentencing. Instead, eligibility would be determined based on extraordinary harm, and culpability (defined in terms of choice) would replace character as the other main determinant of sentence. To achieve that goal, the open-ended and virtually unregulated sentencing trial now the norm in almost every jurisdiction²⁸¹ would be substituted with a two-part serial inquiry: first, was the harm caused sufficiently extraordinary to

281. Texas, in structuring the death penalty determination around its “special issues,” is in some respects again an outlier. See Penny J. White, *A Response and Retort*, 33 CONN. L. REV. 899, 906 (2001) (describing Texas death penalty scheme approved by the court in *Jurek v. Texas* as “categorically different”). But even in Texas, the centrality of the future dangerousness issue, combined with the constitutional requirement that all relevant mitigating evidence be permitted, permits virtually any matter to be presented to the sentencing jury.

warrant eligibility for a sentence of death; second, was the defendant fully culpable for her conduct?

Of course, if post-guilt proceedings were circumscribed in the manner I suggest, the scope of issues that could permissibly be raised by either side at sentencing would be reduced. Such presumptive limits, I would argue, would help defendants who can effectively prove that their culpability was actually diminished at the time they committed the offense for which they are being sentenced.²⁸² This limitation would ensure that evidence of diminished culpability is not lost or negated by the State's non-culpability-related aggravating evidence. Still, any such scheme must preserve the defendant's time-honored privilege to plead for the mercy of the Court. Character evidence, however, should only be heard if the defendant puts the issue in play, because issues of "character" and future dangerousness are relevant to the sentencer's determination only with respect to whether the individual should be shown mercy.²⁸³ Reworking the focus of the penalty phase would thus give the defendant the opportunity to decide if a plea of mercy is appropriate.

1. *Extraordinary Harm*

Only those persons who commit the worst crimes ought to be eligible for a death sentence. It has long been settled that "mere murder" is insufficient to justify a death sentence. The narrowing function recognized as essential to any constitutionally-permissible death penalty scheme reflects this fact.²⁸⁴ Every death penalty statute requires the fact-finder to find the existence of some aggravating

282. To the extent that capital sentencing really turns on comparative principles (e.g., executing the "worst" offenders and offenses), it is a zero sum game. In theory, relying on culpability to provide the primary ordering principle merely has the effect of changing the line-up of individuals deemed best-suited for execution – i.e., the list of the "worst." In practice, however, because juries and courts do not actually engage in a comparative exercise, but rather make decisions in individual cases about individual desert, changing the evaluative criteria would have an effect on how many are selected for execution, as well as who.

283. As Jeffrie Murphy has convincingly argued, when a jury – or any institution acting in a representative capacity – imposes a sentence less severe than that warranted by the gravity of the offense, its actions are not consistent with "justice," even if the sentiment motivating the sentence was otherwise commendable. See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 167 (Cambridge Univ. Press 1988) ("What business does [the sentencing judge] have, then, ignoring his obligations to justice while he pursues some private, idiosyncratic, and not publicly accountable virtue of love or compassion?").

284. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

factor before a defendant can be sentenced to death.²⁸⁵ But there is no requirement that the requisite aggravating factor reflect a finding that the defendant's acts caused extraordinary harm. An express finding to that effect, however, is essential to both the minimum and comparative approaches to retributive sentencing. The universe of capitally-punishable acts should be circumscribed by findings that the harms caused by the defendant set this particular defendant's conduct into a separate category worthy of proportionally more severe punishment. Findings that the defendant caused multiple deaths, tortured his victim before killing, or was engaged in additional criminal conduct in the course of the killing all might satisfy an extraordinary harm finding. A finding of mere "coldbloodedness,"²⁸⁶ of a particular motive,²⁸⁷ or that the killing occurred in the course of other felonious conduct²⁸⁸ (which goes to culpability rather than harm) would be insufficient to satisfy the requirement. Once the fact-finder has found, beyond reasonable doubt, that the defendant caused extraordinary harm, and only once this has been found, the inquiry then should turn to the issue of culpability.

2. *Replacing Character with Culpability*

As we have seen, retributive theory suggests that the individuals who deserve the severest punishment must not only cause the most harm, but must act with the highest degree of culpability. To comport with those retributive aims, sentencing proceedings must direct the fact-finder to focus on culpability. To do so, the universe of evidence admissible at the penalty phase must be circumscribed much more tightly. As discussed above, the Court's *laissez faire*²⁸⁹ has

285. See *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase.").

286. *Arave v. Creech*, 507 U.S. 463, 472 (1993) (upholding death sentence based on jury finding of aggravating fact that defendant was a "cold-blooded, pitiless slayer").

287. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 595 (2002) (defendant sentenced to death based on finding statutory aggravating circumstance that the killing was committed in expectation of receipt of something of "pecuniary value"; sentence overturned not because such aggravating factor was inappropriate, but because it was found by judge rather than jury in violation of Ring's Sixth Amendment right to jury trial).

288. See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101, 104 (2003) (affirming death sentence imposed where state presented evidence of one statutory aggravating circumstance: commission of the murder while in the perpetration of a felony).

289. The Court has denied that there is any one central issue at stake at the penalty phase. See *Barclay v. Florida*, 463 U.S. 939, 950 (1982) (observing that unlike the guilt phase, "[i]n fixing a penalty, . . . there is no similar 'central issue' from which the jury's

transformed the sentencing proceeding into a speculative inquest into the defendant's past conduct and present disposition²⁹⁰ which privileges the emotional responses of the sentencer over the rational.²⁹¹

A retributive approach to capital sentencing would dispense with the offender-based inquiry championed by Wechsler and the MPC and instead focus more systematically on the culpability which accompanied the defendant's particularly harmful acts.²⁹² As Dressler has urged, "whether, and the extent to which, blame and punishment are deserved" should not turn on "the nature of the offender's character" but rather "the narrower issue of whether the offender, at the time of the offense, possessed and had a fair chance" to exercise his or her "free choice."²⁹³ Replacing character evaluation with culpability assessment would ensure that the sentence imposed rests "on the "moral guilt" of the defendant" that flows directly from his or her volitional conduct.

Attempting to evaluate the dangerousness or defect of the offender's character distorts that inquiry in four ways. First, the dangerousness evidenced by the offender's character is irrelevant to the capital sentencing decision, because sentences of death and life imprisonment both effectively incapacitate the offender. Second, sentencing proceedings that focus on the perceived propensities of defendants to cause future harms are speculative, and provide substantial room for stereotypical and discriminatory assumptions to

attention may be diverted." Once eligibility is established, "the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." (Quoting *California v. Ramos*, 463 U.S. 992, 1008 (1982)).

290. Researchers for the multi-state Capital Juror Project have found that "topics related to the defendant's dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury's penalty phase deliberations." See Blume et al., *supra* note 179, at 404.

291. See, e.g., Pillsbury, *supra* note 202, at 657 (arguing that sentencing should turn on competing claims of empathy for the defendant and outrage at his or her criminal acts); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (Harvard Univ. Press 1997) (arguing that disgust sentiment has appropriate place in sentencing deliberations)); Elizabeth T. Bangs, *Disgust and Drownings in Texas: The Law Must Tackle Emotion When Women Kill Their Children*, 12 UCLA WOMEN'S L.J. 87 (2001) (reviewing SUSAN A. BANDES, *THE PASSIONS OF LAW* (N.Y. Univ. Press 1999) (arguing that disgust is an inappropriate consideration in sentencing determinations)). Such emotional responses are, I would contend, obviously irrelevant to the issue of principal concern to retributivism: the defendant's moral desert with regard to a particular offense.

292. *Spaziano v. Florida*, 468 U.S. 447, 481 (1984) (Stevens, J., dissenting in part).

293. Dressler, *supra* note 183, at 674-75.

operate. Third, because many offender characteristics that suggest a real or perceived threat of future danger also indicate diminished culpability, any proceeding in which sentencers are required to balance such factors is unworkable. Finally, even if “accuracy” in capital sentencing is conceded to be a coherent value, the component of judgment that must be accurate is a moral rather than a factual one. The judgmental function of the jury is effectively usurped to the extent that juries defer to expert testimony on the crucial determinants of sentence.

a. The Irrelevance of Dangerous Character to the Death Penalty Decision

The issue of dangerous or defective character is fundamentally irrelevant to the choice presented in the ordinary capital sentencing proceeding: death or life imprisonment.²⁹⁴ Under any retributivist framework, the Court’s willingness to allow sentencers to consider dangerous character must be reconsidered. In permitting the consideration of future dangerousness in *Jurek v. Texas*,²⁹⁵ the plurality reasoned that because sentencing determinations typically rest at least in part on considerations of future conduct, the defendant’s future conduct must be an appropriate consideration in all contexts. But it is precisely the irrelevance of the defendant’s future conduct in the *capital context* that was disputed by the plaintiff in *Jurek*. As the author of the plurality opinion in *Jurek* subsequently observed,²⁹⁶ even if incapacitative goals are among the mix of proper sentencing considerations in choosing a term of imprisonment, they play a quite marginal role in the capital sentencing decision, especially where the jury is deciding between life imprisonment without possibility of parole and death.²⁹⁷ In such circumstances, the question

294. This was far less true when Wechsler and Michael wrote in the 1930s, and those authors argued that life imprisonment, in any event, was not a realistic administrative option, because building sufficient prison capacity to house life prisoners in large numbers was prohibitively expensive, and as “the utter destitution of men without hope makes their government in prisons in large numbers an exceedingly difficult if not an impossible task.” Wechsler & Michael I, *supra* note 14, at 1267. The prevalence of true life sentences are a much more recent phenomena.

295. 428 U.S. 262, 275 (1976).

296. See *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting) (“In capital sentencing decisions . . . rehabilitation plays no role[, and] incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available.”).

297. The Texas scheme is made more unique because Texas is one of the few states that does not provide the option of a life sentence without possibility of parole. Texas

of future dangerousness is only logically relevant to the extent the offender poses a threat to persons imprisoned in the same facility or in the event that the prisoner escapes from custody. The former plays little actual role in jury decisionmaking, and the latter rarely occurs.²⁹⁸ In practical terms, then, incapacitation and rehabilitation justifications should be irrelevant to the decision between sentences of death and life without the possibility of parole.²⁹⁹ The Court's quick assumption in *Jurek* that future dangerousness is an appropriate basis to choose death over life imprisonment therefore evinces a failure to recognize not only that, but how, "death is different."

Not only is the dangerousness inquiry problematic, but so is the evidence typically introduced during penalty-phase proceedings to prove it. Certainly, prior bad acts, bad reputation, post-conviction prison misbehavior, and other evidence introduced with the principal objective of proving bad character should presumptively be barred. As a subset of prior bad acts, prior criminal convictions also should not receive special consideration by the sentencer in determining whether the defendant's offense was mitigated. After all, even more than an unproved prior bad act, a prior conviction represents a transaction that already has been "paid for," and for which the offender previously, and presumptively, got his "just deserts."³⁰⁰

does, however, require that a defendant sentenced to life imprisonment may not be released "until the actual time served by the defendant equals 40 years." TEX. CRIM. PROC. CODE ANN. art. 37.071, § 2(2)(e)(2)(B).

298. In 1999, 1047 inmates escaped from prison. See Milo Miller, *Electrified Prison Fencing: A Lethal Blow to the Eighth Amendment*, 38 CAL. W. L. REV. 63, 85 (2001) (citing THE CORRECTIONS PROFESSIONAL (LRP Publ'ns.), April 16, 2001, Vol. 6, No. 14). That same year, there were approximately 1.9 million persons incarcerated in the nation's jails and prisons. See Press Release, Bureau of Justice Statistics (April 19, 2000), at <http://www.ojp.gov/bjs/pub/press/pjim99.pr> (last visited Jul. 19, 2004).

299. *Harris*, 513 U.S. at 517. Although the Court has recognized the importance of the principle that the most severe punishment be limited to the "worst" offenses and offenders, unfortunately, it has never been clear about just what attributes of the offense or the offender are relevant to that inquiry. Wechsler's answer – that the worst offender is the most dangerous one – has thus continued to figure large in the equation.

300. Limiting the use of prior bad acts to prove bad character, however, does not require barring any use of prior convictions in determining sentence. There remains room within the broad contours of retributive theory for prior convictions to factor in the sentencing equation. Although the sentencer should not consider the criminal record of the offender, at the penalty phase as an aggravating fact, nothing bars the legislature from establishing, as an element of aggravated, or capital murder, the fact of a prior criminal record. There are plausible retributive reasons to accord significance to prior convictions (as opposed to prior bad acts). First, the fact that an individual has chosen to recidivate demonstrates, at least in some cases, a purposeful and deliberate flouting of the law. Repeat criminal behavior may thus represent a more deliberate, and hence more culpable, type of conduct than first-time offenses. See, e.g., Louis Kaplow & Steven Shavell,

At the same time, just as a retributive sentencing focus limits the aggravating character evidence relevant to determining a just sentence, so too does it impose limits on the mitigating evidence that a defendant may properly put before the sentencer to justify a lesser sanction. Evidence introduced merely to “humanize” the defendant, by showing the defendant’s difficult childhood, history of abuse, economic deprivation, or sympathetic demeanor is no more relevant to a meaningful evaluation of the defendant’s culpability than is evidence of his dangerous character. An expressly retributive approach to capital sentencing, therefore, would suggest a presumptive clarification of the principle of individual consideration to protect only the defendant’s constitutional right to proffer mitigating evidence that is relevant to his or her culpability, that is, the extent to which her conduct was “freely chosen.”³⁰¹

Fairness Versus Welfare, 114 HARV. L. REV. 961, 1303-04 (2001) (arguing that career criminal statutes “seem to be fueled by concerns about retribution, which are particularly sharp, many believe, because multiple recidivists have so clearly rejected society’s norms and institutions.”).

Second, because the offender already has been exposed, and educated, by her prior confrontation with the legal system, her new offense might presumably have been accompanied by a more educated understanding of the harms caused by the offense, of the moral prohibitions against the conduct, and perhaps even of the facts and circumstances surrounding the offensive activity. Assuming that to be the case, then the presumption that her recidivist act represents a graver offense than the comparable offense committed by a person without a criminal record is not unreasonable.

It is important, however, to cabin the role of prior convictions to a definitional function. The difference between the notice provided by an *ex ante* warning, and a notice-less *ex post* consideration at the penalty phase, is substantial. First, the onus for defining the types of prior convictions relevant to the sentencing consideration rests with the legislature. The legislature may decide that only prior violent crimes establish the necessary aggravating element; it may decide that crimes committed by juveniles do not count. It may decide whether multiple prior convictions act as enhanced aggravators, or that prior convictions must be proved in combination with one or more other statutory aggravators before the defendant becomes eligible for a capital sentence. In contrast, the mere fact of prior criminal convictions in determining culpability, apart from these considerations, is minimal. Indeed, the very aspects of the defendant’s character that suggest diminished culpability, such as mental retardation or youth, might explain both the presence of the criminal record and mitigate the gravity of the present offense. Accordingly, prior criminal record cannot meaningfully be “balanced” against the mitigating evidence by the sentencer in assessing the defendant’s culpability. In any case, whether a prior conviction properly serves a statutory function in establishing an element of a capital offense, to the extent that it is used to show “bad character” or dangerousness, it has no place in the sentencing determination.

301. Other commentators assaying the state of capital punishment law have reiterated the narrower interpretation of mitigating evidence advocated here. *See, e.g.*, Steiker & Steiker, *supra* note 10, at 840 (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (Alfred A. Knopf 1992) (concluding that “the individualization requirement mandates consideration only of evidence regarding individual culpability.”).

b. Offender-Based Sentencing and Discrimination

The Wechslerian focus on the dangerousness of the offender's character, rather than the culpability of his or her acts, also greatly increases the odds that sentencing outcomes will turn on impermissible criteria. Factors that should have no significance in the sentencing decision, such as the race or status of the victim, in fact play a large role because, in letting everything in and letting the jury assign "weights" as it pleases, there is no way to prevent the sentencer from acting on impermissible factors.³⁰² Consider the following propositions:

(i) Blacks and other minorities commit crimes of violence at significantly higher per capita rates than whites;³⁰³

(ii) Young people commit the vast majority of criminal offenses, with crime rates falling dramatically among persons 35 and older,³⁰⁴

(iii) Men commit crimes of violence at significantly higher rates than women;³⁰⁵ and

(iv) The mentally retarded and the insane have less capacity to control their conduct and to conform their actions to the law.³⁰⁶

302. In Professor Baldus' study of judge sentencing in Nebraska, data indicated that the socioeconomic status of victims had a strong effect on the likelihood that the offender would receive a death sentence. See Richard L. Wiener, *Death Penalty Research in Nebraska: How do Judges and Juries Reach Death Penalty Decisions?*, 81 NEB. L. REV. 757, 772 (2002) (discussing the Baldus Nebraska study; see David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience: (1973-1999)*, 81 NEB. L. REV. 486, 608-616 (2002)).

303. U.S. DOJ statistics indicate that, in 1997, 41% of all persons charged with violent crimes, and 57% of all persons charged with murder and non-negligent manslaughter, were black. Only 57% of those charged with violent crimes, and 40% of those charged with murder or non-negligent manslaughter, were white. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998 342-44 (Kathleen Maguire & Ann Pastore eds., USGPO 1999). Blacks account for approximately 12% of the U.S. population.

304. See *id.* (showing that young persons commit crimes at significantly greater rates than older persons, and that persons aged between eighteen to twenty commit homicide at a rate five times higher than persons aged thirty-five to forty); Robinson, *supra* note 66, at 1451.

305. Statistics suggest that men commit violent crimes at roughly five times the rate of women, and murder at approximately nine times the rate. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 303, at 341.

306. According to the American Association on Mental Retardation (AAMR), among the mentally retarded, "reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation." *Penry v. Lynaugh*, 492 U.S. 302, 345 (1989) (Brennan, J., concurring in part and dissenting in part) (quoting the AAMR brief); *cf.*

Each of the above statements is true either as a statistical matter, in the case of propositions (i), (ii), and (iii), or if not borne out by statistical evidence, is consonant with anecdotal observation and common perceptions, as in the case of proposition (iv).³⁰⁷ Indeed, empirical research suggests that most capital jurors believe in the truth of all four propositions.³⁰⁸ If the statistical likelihood that a defendant will commit future criminal acts is at issue, in a character-oriented sentencing regime that tries to predict dangerousness, all of the above propositions provide a seemingly logical basis for a juror to favor a sentence of death. Moreover, where dangerousness underlies the sentencing decision, persons convicted of murder while engaged in other types of criminal behavior will be particularly likely to receive a death sentence.³⁰⁹

These suppositions are greatly accentuated by the nature of the dangerousness inquiry. A jury does not merely ask, in the abstract, whether the defendant poses a future threat to some other person. Empirical research shows that jurors give little thought or consideration to whether the defendant might pose a threat to other prisoners.³¹⁰ Rather, capital sentencers appear to focus on the more

Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors' Personal Conceptions Of Insanity And Their Relationship To Case Judgments*, 7 PSYCHOL. PUB. POL'Y & L. 561, 581 (2001) (summarizing result of their research as "consistent with past findings that jurors' conceptions of insanity involve multiple mental state constructs," including irrationality and "lack of control over thoughts, emotions, or actions").

307. See Jonathan L. Bing, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 84 (1996) ("The stereotype that the mentally retarded are more likely to commit crimes remains despite extensive evidence to the contrary." (citing empirical studies)).

308. See, e.g., Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2090 (2003) (discussing factors considered by capital jurors); see also *Pulley v. Harris*, 465 U.S. 37, 67 (1984) (Brennan, J., dissenting) (citing scholarly studies demonstrating that death sentences are influenced by, inter alia, "racial discrimination," and "discrimination by gender").

309. In South Carolina, for example, an empirical study showed that of 153 persons sentenced to death after 1976, 102 of them were engaged in armed robbery, fifty-seven in kidnapping, and thirty-nine in burglary. See John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 292 n.37 (2002).

310. Empirical evidence shows that the safety of other inmates has never figured large in jurors' deliberations. See, e.g., Garvey & Marcus, *supra* note 308, at 2090 (showing that among thirty-seven factors rated by capital jurors regarding significance in sentencing decision, only two factors were ranked lower than defendant's dangerousness to others in prison). Moreover, there is no evidence that inmate-on-inmate violence is disproportionately attributable to such offenders. See SORENSEN & PILGRIM, *supra* note 132, at 1256 (noting that empirical studies demonstrate that "murderers are generally

concrete (but counterfactual) question: does this defendant pose a risk to me, my family, or my community?³¹¹ Jurors, judges, and the prosecutors that control the charging decision plainly answer that question more often in the affirmative when the victim of the crime is like them (meaning, usually, that he or she is white).³¹² Accordingly, as numerous researchers have documented, capital-sentencing selection processes regularly impose death sentences in a racially-biased manner.³¹³ This result may be the direct product of the nature of an offender-based sentencing theory that asks the sentencer to focus on the perceived future dangerousness the offender presents.

Regardless of whether statistical evidence showing higher crime rates among certain groups defined by race, sex, age, or mental ability could lawfully be introduced at a sentencing hearing, there is ample evidence that juries in capital cases do routinely incorporate such information into their death penalty deliberations based on their own stereotypes, biases, and impressions.³¹⁴ What is more, empirical data suggests that juror concerns about the defendant's future dangerousness routinely eclipse issues concerning the defendant's culpability.³¹⁵ Unfortunately, current law does little to encourage an

among the most docile and trustworthy inmates" with remarkably low incidence of violent rule infractions). Murderers, not without reason, are commonly described as "model prisoners." See, e.g., *Furman v. Georgia*, 408 U.S. 238, 363 (1972) (Marshall, J., concurring); VICTOR STREIB, *DEATH PENALTY FOR JUVENILES* 37 (1987) (quoted in Joseph L. Hoffmann, *On The Perils Of Line-Drawing: Juveniles And The Death Penalty*, 40 *HASTINGS L.J.* 229, 283 n.262 (1989) ("[J]uvenile murderers tend to be model prisoners and have a very low rate of recidivism when released."); Blume et al., *supra* note 179, at 404.

311. See, e.g., Barnett, *supra* note 213, at 1327 (speculating based on analysis of empirical data that where "jurors can imagine themselves or their loved ones as victims, death penalties are more likely to be imposed"). This assumption is further buttressed by evidence demonstrating an urban-rural racial divide, where in predominantly white rural areas sentence black defendants to death at higher rates than whites, but in urban areas with larger percentages of blacks on juries, whites are sentenced to death at higher rates than blacks. See David Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 *U.C. DAVIS L. REV.* 1375, 1405-06 (1985).

312. In 126 of the 153 cases in the South Carolina study, the victim was (or victims were) white. See Blume, *supra* note 309, at 292 n.38.

313. See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 *SANTA CLARA L. REV.* 519, 519-23 (1995) (citing studies, including the now-famous study by David Baldus, David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 *J. CRIM. L. & CRIMINOLOGY* 661 (1983), showing that an African-American who kills a white is several times more likely to be sentenced to death than an African-American who kills another African-American).

314. See generally, Blume et al., *supra* note 179.

315. See e.g., *Miller v. State*, 373 So. 2d 882, 882 (Fla. 1979) (observing that based on

alternative result. In fact, by permitting character to play such a large role, jurors are now essentially instructed to take factors like race or sex into account. By shifting the focus of sentencing away from the offender's character and to the offender's culpability, it is far less likely that these factors would influence sentencing outcomes.

c. The Ambiguity of Offender-Based Sentencing

Not only are some indicia, such as the defendant's or victim's race, irrelevant to the issue of desert, other factors suggesting dangerousness, such as youth or mental disability, are actually inversely related to personal culpability. Although both youth and mental disability, because they indicate diminished culpability,³¹⁶ are recognized as important mitigating factors by the Court and most statutory schemes,³¹⁷ commentators have frequently noted that such indicia often have the practical effect of enhancing the perceived "deathworthiness" of the defendant because they appear as facets of dangerous character.³¹⁸ Where future dangerousness is a recognized basis for capital punishment, as it almost everywhere is, the current offender-based sentencing construct requires sentencers to assign both aggravating and mitigating weight to the same fact, as incoherent as that mental calculation may be.³¹⁹ As a result, factors that counsel

statutory aggravating circumstance of future dangerousness, the trial judge sentenced to death a defendant who introduced extensive medical evidence showing that he was a schizophrenic and suffered from hallucinations), *discussed in* Ellen Fels Berkman, *Mental Illness As an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-98 (1989). *See also* Blume et al., *supra* note 179, at 404 ("[F]uture dangerousness overshadows evidence presented in mitigation (such as the defendant's intelligence, remorse, alcoholism, mental illness) . . .").

316. *See, e.g.,* Skipper v. South Carolina, 476 U.S. 1, 12 (Powell, J., concurring) (noting that fact of defendant's youth at time of crime "tended to diminish the defendant's responsibility for his acts," because "youths 'are less mature and responsible than adults,'" and "deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116, 115 n.11 (1982))).

317. *See, e.g.,* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance"); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1987) (plurality opinion) (noting that "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). At least thirty states expressly recognize the age of the defendant as a mitigating factor. *See Johnson*, 509 U.S. at 376 n.* (collecting state statutes).

318. Jordan Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590 (1996); Joshua N. Sondheim, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409 (1990).

319. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

for mitigation sometimes provide the very basis upon which a sentencer chooses a death sentence. Thus, tolerance or encouragement of sentencing based on dangerous character directly threatens core retributive values by endowing markers of diminished culpability with an aggravating significance.³²⁰

This phenomenon was well-illustrated in *Johnson v. Texas*, where the defendant was nineteen-years-old at the time the capital offense was committed.³²¹ At the penalty phase, Johnson's lawyers presented evidence that the offense was attributable in large part to his immaturity. Notwithstanding his youth, the jury sentenced Johnson to death, finding as Texas law requires, that Johnson constituted "a continuing threat to society."³²² The appeals courts then rejected Johnson's claim that Texas's capital sentencing scheme – which directed the jury's sentencing deliberations solely to whether the killing was deliberate and whether Johnson posed a risk of future dangerousness – did not allow the jury to give adequate consideration to his youth as a mitigating factor. When the case came before the Supreme Court, the majority acknowledged that Johnson's youth might have been considered as an aggravating, rather than a mitigating, factor, but refused to overturn Johnson's death sentence, reasoning that the jury had not been precluded altogether from considering the mitigating aspects of the evidence.³²³

Virtually the identical problem arose in the *Penry* cases, except that instead of youth, the mitigating factor defendant sought to raise was mental retardation.³²⁴ Like youth, mental retardation is a widely accepted mitigating factor, precisely because it indicates that the offender's capacity to make morally informed choices is diminished. Unlike in *Johnson*, the Court concluded that absent specific instructions, Texas's future dangerousness-oriented death penalty scheme precluded the jury from giving effect to this mitigating factor. As a result, it twice overturned a death sentence imposed on *Penry*.³²⁵

320. As the Court has observed, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

321. 509 U.S. 350 (1993).

322. *Id.* at 358.

323. *Id.* at 368 (concluding that there was "no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth.").

324. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

325. *Id.*

For clinically-provable cases of mental retardation, the Court has resolved the problem posed by the Texas statute. In *Atkins v. Virginia*, the Court held that a mentally retarded defendant is insufficiently culpable as a matter of law to warrant execution.³²⁶ *Atkins* thus ameliorates the impact that dangerous character plays in the most extreme cases of mental retardation. But the *Atkins* rule provides no help to persons whose intelligence is markedly below average, but not far enough below the norm to justify a clinical diagnosis of mental retardation.

Circumstances such as youth and mental illness unambiguously reduce a defendant's culpability and counsel for a less severe sentence. However, under the MPC-influenced offender-based sentencing regimes, there often is no logical method to ensure that evidence of diminished culpability is given mitigating effect by the jury. As the dissenters observed in *Johnson*, the inquiry into whether defendant has a dangerous character is incompatible with an inquiry into his culpability: "A violent and troubled young person may or may not grow up to be a violent and troubled adult, but what happens in the future is unrelated to the *culpability* of the defendant at the time he committed the crime."³²⁷

Sentencing procedures that focus on culpability, rather than future dangerousness, would ensure that sentencing determinations are freed from the undue risk that personal characteristics that diminish culpability (like youth and mental disability) will be relied upon by the sentencer to justify a *more* severe sentence. In addition, sentencing proceedings that focus on defendant's personal culpability would be less likely to incorporate stereotyped perceptions that males and minorities, as well as young people and the mentally ill, are more dangerous than others into sentencing outcomes.³²⁸ Although it may well be impossible entirely to root out systematic racial, ethnic, gender, and disability-based biases under any set of procedures, where the perceived dangerousness of the defendant's character is not at issue, such improper considerations would have less room for play. In short, by refocusing capital sentencing on culpability, and precluding consideration of evidence of bad character and future

326. 536 U.S. 304 (2002).

327. *Johnson v. Texas*, 509 U.S. 350, 376 (1993) (O'Connor, J., dissenting).

328. Texas's death penalty statute directs that sentencers are not permitted to consider race or ethnicity in determining future dangerousness. See TEX. CRIM. PROC. CODE ANN. art. 37.071. That directive, however, does little to reduce the risk that such considerations will come into play as background and context.

dangerousness, the risk that persons might be sentenced because they belong to groups either actually correlated, or perceived as correlated, with greater rates of criminality would be diminished.

d. Moral, Not Factual, Accuracy

The backward-looking character of the retributive approach to sentencing has an additional, substantial advantage over the future-oriented offender-based model. To the extent that “accuracy” is an important – or even a coherent – value in capital sentencing, a retributive approach that focuses on the nature and quality of the act already done is a far firmer foundation on which to assign punishment than is counter-factual speculation about what the offender might do in the future, were he released back into society.³²⁹

Unlike the question of whether the defendant poses a risk of future dangerousness, the inquiry into culpability falls squarely within traditional notions of jury competence. Jurors are regularly called upon to make judgments, however hard, about the degree to which particular choices were sufficiently free of apparent external influences to deserve moral condemnation and blame. These judgments necessarily are bound up with conventional notions of responsibility, based on life experience rather than science or philosophy. But then, capital punishment is supposedly an expression of the community’s shared moral values. Emphasizing culpability thus plays to the strengths of the jury system. Emphasizing character plays to its weaknesses.

It is possible to imagine that moral judgments about culpability might be more or less correct and thus more or less “accurate.” It is much harder to imagine that the jury will be competent at any time soon to reliably sort dangerous and non-dangerous offenders.³³⁰ Empirical evidence suggests that such predictions are wrong more often than they are right, and the American Psychiatric Association has disclaimed the validity of such predictions.³³¹

329. Because the sentencing choice before the sentencer typically is between death and life without parole, the “future dangerousness” inquiry is particularly counterfactual. After all, regardless of the sentence selected, the offender is highly unlikely ever to reenter society.

330. To the extent that future dangerousness can be predicted at all, many researchers believe that actuarial methods are better than clinical methods, and that past violent conduct is the best predictor of future violent conduct. *See, e.g.,* Gordon C.N. Hall, *Prediction of Sexual Aggression*, 10 *CLINICAL PSYCHOL. REV.* 229, 239 (1990).

331. The APA and the Texas Society of Psychiatric Physicians both decertified Dr. Grigson in 1995. *See Gardner v. Johnson*, 247 F.3d 551, 556 n.6 (5th Cir. 2001). Dr.

If the accuracy of the death penalty decision relates to the question of moral desert, then the information relevant to that judgment is not informed by behavioral science, but rather is limited to factors relevant to the culpability of the defendant's conduct and the harm caused by such culpable conduct. A culpability-centered sentencing focus would preclude the use of experts to testify regarding a defendant's predicted future conduct, a development that alone would substantially enhance the "moral reliability" of sentencing outcomes. Not only is such testimony untrustworthy as a matter of science, it is irrelevant to what should be the primary focus of a retributive sentencing process.

Even if future dangerousness could be predicted with some accuracy, jury deference to medical or scientific authority in selecting appropriate sentences would still be troubling. According privileged status to expert testimony in sentencing is flatly inconsistent with the idea that the decision to sentence an individual to death is a moral, rather than a clinical, one. The jury's role requires that the sentencing decision turn on the individual juror's conception of proportionate punishment and moral culpability for the injuries the jury has found defendant responsible. That decision is lodged with the jury under most capital sentencing schemes precisely because the jury is thought to best represent the conscience of the community.³³² Deference to "professional" diagnoses regarding questions of moral desert undermines that basic function.³³³

For all these reasons, culpability must replace character as the central focus of capital sentencing proceedings.

3. *Abandoning the Aggravator/Mitigator Weighing Paradigm*

If the focus of the sentencing decision were reoriented to more explicitly retributive grounds, the procedural mechanism currently employed in service of the goal of predicting future dangerousness –

Grigson, however, continues to testify in death penalty proceedings to this day. *See, e.g., Sterling v. Cockrell*, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632, at *20 (N.D. Tex., Apr. 23, 2003) (noting that state offered to make Dr. Grigson available as forensic psychiatric expert).

332. *Gregg v. Georgia*, 428 U.S. 153, 190 (sentencing juries "maintain a link between contemporary community values and the penal system"); *Harris v. Alabama*, 513 U.S. 504, 518-19 (Stevens, J., dissenting) ("A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community.").

333. Refocusing the sentencing phase of a capital trial by de-emphasizing character in favor of culpability would have an additional beneficial consequence. It would ensure that the decision to impose the death penalty is not based on the sentencer's disapproval of life choices or moral commitments made by the defendant that were lawful, but unpopular.

the weighing or balancing of aggravators and mitigators – would also have to be jettisoned for at least three reasons. First, the weighing paradigm encourages jurors to balance incomparable factors. As a result, it has failed to ameliorate the deficiencies inherent in the pre-*Furman* era of unguided jury discretion, which, despite the elaborate development of penalty-phase doctrine, continue to persist. Second, it greatly enhances the chances that a defendant with diminished culpability will be sentenced to death based on aggravating factors irrelevant to retributive indicia of gravity. Third, it clothes the death penalty decision in the false dress of legality and distracts jurors from the gravity of their task.³³⁴

a. Aggravators and Mitigators are Incomparable

As an analytical matter, the weighing paradigm is fundamentally incoherent, because aggravators and mitigators are simply not comparable.³³⁵ Some aggravators concern the quantum of harm caused by the defendant,³³⁶ some the defendant's mental state or motive,³³⁷ and some the attendant circumstances of the crime.³³⁸ Some have no bearing on the crime committed, but rather concern the offender's past history or record.³³⁹ Mitigating factors, in contrast, relate almost uniformly to the defendant's culpability.³⁴⁰ Notwithstanding their disparate nature, the Supreme Court has

334. In addition, in light of the Court's recent decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), retributive concerns aside, the weighing paradigm is now subject to significant constitutional doubt.

335. See, e.g., Zimring & Hawkins, *supra* note 91, at 120 (noting that weighing aggravators and mitigators against each other, as the MPC advocates, requires juries to compare "incommensurable[s]"); Weisberg, *supra* note 9, at 394 ("[A] rational formula for comparatively 'weighing' values is impossible, because we cannot devise a mechanical, verifiable process for 'weighting' the values – that is, assigning them valences in the first place." (citing ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 294 (Harv. Univ. Press 1981))).

336. See, e.g., MODEL PENAL CODE § 210.6(3)(c) (Proposed Official Draft 1962) (defendant also committed another murder).

337. See, e.g., MODEL PENAL CODE § 210.6(3)(g) (Proposed Official Draft 1962) (listing murder committed for pecuniary gain as an aggravating circumstance).

338. See, e.g., MODEL PENAL CODE § 210.6(3)(e) (Proposed Official Draft 1962) (listing murder committed in course of dangerous felony as an aggravating circumstance).

339. See, e.g., MODEL PENAL CODE § 210.6(3)(c) (Proposed Official Draft 1962) (listing previous convictions for murder or felony involving use or threat of violence as an aggravating circumstance). And, of course, most jurisdictions also recognize the defendant's perceived dangerousness as an aggravating factor. See *supra* discussion accompanying notes 130-40.

340. See *supra* discussion accompanying notes 73-74.

pointedly refused to require states to inform juries how to weigh diverse aggravating and mitigating facts,³⁴¹ or what weights should be ascribed to particular factors.³⁴² Accordingly, most fact-finders are merely instructed to use their judgment to weigh the relevant factors as they see fit.³⁴³

It is hardly surprising that the Court has provided so little guidance: no plausible method for weighing widely diverse kinds of aggravating and mitigating factors has ever been suggested.³⁴⁴ The predictable result is systemic arbitrariness. After all, where a jury is told to weigh aggravating and mitigating evidence, with no instruction as to the weight to be accorded to that evidence, nor even guidance as to the ultimate values to be vindicated, it can do little more than make a “gut” call as to whether a defendant should live or die.³⁴⁵ This

341. See, e.g., *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988). As one commentator has explained:

The Supreme Court has stated that states need not provide any specific method for balancing aggravating and mitigating factors nor give any specific weight to any of those factors. In effect, sentencers are basically told they may consider aggravators, they may consider mitigators, but they are given no further instruction as to how to go about weighing them. If they choose to find that aggravators outweigh mitigators, by whatever reasoning process, they may impose a sentence of death.

Conference, *supra* note 61, at 251.

342. *Harris v. Alabama*, 513 U.S. 504, 512 (1995).

343. This California court’s instruction is typical:

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you 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.

People v. Griffin, 93 P.3d 344, 381 (2004) (finding no error in instruction).

344. In *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985), for instance, the defendant was eighteen years old when he was involved in a sordid assault that culminated in the brutal murder of a sixteen year old girl. Alabama’s death sentencing scheme required the judge to weigh aggravating and mitigating factors. *Id.* at 380. But how was the sentencer to weigh the mitigating fact of defendant’s youth against the definitional aggravating circumstance – the fact that homicide took place during the commission of a robbery, and the other nonstatutory aggravators it found? *Id.* The Court did not suggest any practical approach, and none is readily apparent. *Id.* at 380-81.

345. For instance, Alabama’s statute provides that:

The process . . . of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshaled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all

incoherence is further exacerbated in jurisdictions that allow juries to consider both statutory and non-statutory aggravators.³⁴⁶

Because the jury lacks an objective means to weigh or “balance” aggravators and mitigators against each other, it must rely on its own intuitions, and different sentencing juries inevitably apply different criteria to similar factors. As commentators have observed, the exercise advocated by the MPC, and adopted as the “paradigm” of constitutional capital decision-making,

provide[s] no principles by which to make sentencing judgments, no standards to regulate the decision to kill. Because the absence of any established weighing process requires each sentencing authority to devise its own scheme for deciding whether to impose death, the [MPC approach] actually increase[s] the dangers of uncontrolled discretion; a different standard for deciding who shall die is used in every capital case.³⁴⁷

The empirical evidence amply confirms that there is no consistent pattern or hierarchy of harm or culpability that results from death penalty deliberations.³⁴⁸ Even more disturbing, empirical evidence continues to demonstrate that the most significant indicators

the relevant circumstances in an individual case is life imprisonment without parole or death.

ALA. CODE 2004 § 13A-5-48 (2004).

346. The Supreme Court has held that there is no constitutional defect in a death sentence based at least in part on nonstatutory aggravating circumstances. *See* *Barclay v. Florida*, 463 U.S. 939, 956 (1983). Moreover, the weighing paradigm works serious mischief on the proper allocation of burdens of persuasion. Although aggravating factors often must be proved by the State beyond a reasonable doubt, the Court long has recognized that mitigating factors are not subject to the same proof standards. *Cf. Jones v. United States*, 527 U.S. 373, 377 (1998) (explaining that the Federal Death Penalty Act of 1994 requires:

More exacting proof of aggravating factors than mitigating ones – although a jury must unanimously agree that the Government established the existence of an aggravating factor beyond a reasonable doubt, section 3593(c), the jury may consider a mitigating factor in its weighing process so long as one juror finds that the defendant established its existence by preponderance of the evidence, sections 3593(c), (d).

18 U.S.C. §§ 3591-93 (West 2000 and West Supp. 2004)). It is quite problematic to require the jury to keep these burden requirements separate while performing the weighing calculus demanded of them. The exercise is somewhat akin to asking the jury to “weigh” its finding, by a preponderance of the evidence, that defendant was insane against its finding, beyond a reasonable doubt, that the homicidal act was premeditated. The balancing mechanism fails to provide the sentencer with any useful analytical tool to resolve the conundrum.

347. *Zimring & Hawkins*, *supra* note 91, at 128.

348. *See, e.g., Chemerinsky*, *supra* note 313, at 519-523 (citing studies that indicate racial discrimination in the application of the death penalty).

of a death sentence are the race of the victim and the race of the defendant.³⁴⁹ Despite living under *Furman* for more than 30 years, it would appear that the system is little better off, in terms of eliminating racial discrimination from the administration of the death penalty, than it was in 1971.³⁵⁰

b. The Weighing Paradigm Discounts Diminished Culpability

The second problem with the weighing paradigm is that it encourages morally inappropriate “set-offs.” In so doing, the weighing paradigm ensures that less-culpable offenders are frequently sentenced to death because of distracting factors, prior bad acts, uncivil character traits, or other marks of “defective” character that should not offset evidence of reduced culpability.

Most significantly, consideration of the perceived dangerousness of the defendant’s character or his criminal propensities distracts sentencers from the function they should play in choosing an appropriate sentence, and thereby undermines the reliability of sentencing decisions.³⁵¹ Given the lack of guidance about how aggravating and mitigating factors are to be weighed, research suggests that sentencing decisions often turn on little more than the number of statutory aggravating factors established: The more aggravators found, the more likely the defendant will receive a death sentence, regardless of the number or degree of mitigating factors presented.³⁵²

349. See, e.g., DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 149-156 (Northeastern Univ. Press 1990); see also *supra* text accompanying notes 311-15 and discussion *infra* Part IV.B.2.b-c.

350. *Zant v. Stephens*, 462 U.S. 862, 910 (1983) (Marshall, J., dissenting) (arguing that a lack of guidance in the weighing process results in unchecked juror discretion once single aggravating circumstance is found); see also Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998) (arguing that the development of weighing and balancing schemes have failed to impose any real constraints on sentencer discretion).

351. For example, by asking the jury to weigh, say, evidence that the defendant is less able than others to control his or her violent impulses against, say, evidence that defendant’s I.Q. just exceeds clinical definitions of mental retardation, the jury has no basis to arrive at any rational conclusion as to the appropriate sentencing disposition. However, to the extent that the defendant’s low intelligence in fact diminishes his ability to understand the moral and practical consequences of his conduct, both factors point in the same direction and indicate that the defendant plainly is less culpable than others.

352. See, e.g., Wiener, *supra* note 302, at 769 (discussing data showing that “as the number of aggravating factors grow in number the death penalty is more and more likely to be imposed regardless of the mitigation considered individually, considered as the total number of mitigating factors, or considered as the totality of the circumstances”) (citing

Where distractors like dangerousness are “weighed” against relevant retributive considerations, even the least culpable defendant risks being sentenced to death.³⁵³ However, if the weighing paradigm were jettisoned, states no longer could rely on aggravators reflecting aspects of the defendant’s character or incidents from his or her past to outweigh evidence indicating that the defendant was not wholly culpable for his or her conduct.

c. The Weighing Paradigm Clothes the Death Penalty Decision in the False Dress of Legality

Third, use of the weighing paradigm bestows upon capital decision-making a false aura of “legality,” and thereby diminishes each juror’s sense of personal moral responsibility. The Court itself has noted the importance of ensuring that jurors “approach their sentencing decision with [full] appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.”³⁵⁴ However, the mechanistic process of identifying enumerated aggravators and mitigators all too easily misleads jurors into thinking that the hard choice has already been made by others.³⁵⁵ And it may, perversely, encourage jurors to select the death penalty more frequently than if the decision to kill were not clothed in the finery of legal dress.³⁵⁶

The apparently precise and legalistic framework provided by the aggravating and mitigating paradigm may provide “a significant ‘anxiety-alleviating’ effect on capital sentencers,”³⁵⁷ but in so doing it gives the jury a false sense of disengagement from the core moral judgment at issue: Did this defendant commit a crime of

the Baldus Nebraska study, *supra* note 302).

353. Even the MPC’s drafters recognized the conflict. See Model Penal Code § 210.3 cmt. 5(b) at 71-72 (Official Draft and Revised Commentaries, Part II 1980) (recognizing that defense of diminished responsibility “brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control”).

354. *California v. Ramos*, 463 U.S. 992, 1011 (1983).

355. As Robert Weisberg has pointed out, the complex legal doctrine surrounding the death penalty, and particularly the weighing mechanism approved in *Gregg*, “has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual.” Weisberg, *supra* note 9, at 393.

356. Steiker & Steiker, *supra* note 10, at 433-434 (noting that empirical evidence suggests that incidence of death penalty increased in Georgia following the post-*Gregg* affirmation of Georgia’s MPC-based death penalty scheme).

357. *Id.* at 413.

extraordinary harmfulness, and if so, was he fully blameworthy for his conduct?

In sum, the use of the weighing paradigm fails effectively to structure the decision-making process, provides no real guidance to juries, and leaves sentencing discretion subject to no greater actual oversight than in the pre-*Furman* era of unapologetic unguided discretion, while encouraging sentencers to take their weighty moral responsibility less, rather than more, seriously. The weighing paradigm is not merely inconsistent with, but is antithetical to, basic retributive principles. The Court could make great strides in rationalizing the administration of the death penalty by honestly admitting that the weighing paradigm provides no real restraint or guidance to death penalty decision-making, and thus under *Furman*, is unconstitutional.

4. *Circumscribing the Role of Mercy and Vengeance in a Retribution-Oriented Capital Sentencing Scheme*

Finally, in rethinking the penalty phase, we must consider what, if any, role mercy and vengeance should play in the sentencing decision.³⁵⁸ Mercy and vengeance can be conceptualized in the following way. When, based on evidence that elicits sympathy for the defendant or shows his or her “good” character, a less severe sentence is imposed on a defendant than others who commit comparably grave crimes, that sentence is the product of mercy.³⁵⁹ When death sentences are imposed based on evidence that stirs emotions of disgust, hate, or fear, or that shows his or her “bad” character,³⁶⁰ while others committing comparably grave crimes are

358. The debate on both sides is heated. See, e.g., Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993) (arguing for greater role for mercy); MURPHY & HAMPTON, *supra* note 283, at 174 (arguing that mercy is an improper sentencing consideration that detracts from justice).

359. The Supreme Court has recognized the importance of preserving the juries' discretion to afford mercy. Admissible mitigating facts or circumstances have never been limited to those which reduce the defendant's culpability, but instead extend to any facts or circumstances that evoke in the sentencer a willingness to be merciful. Mitigating facts, thus understood, are facts that have the effect of inducing feelings of sympathy or pity in the sentencer. See, e.g., *California v. Brown*, 479 U.S. 538, 562-63 (1987) (Blackmun, J., dissenting).

360. More than one commentator has noted the manner in which certain aggravating factors, just like mitigating factors, play upon the sentencer's emotions. For instance, as Dan Kahan has argued, the “heinous, vile or depraved” aggravating factor applies particularly to those aspects of an offense that stir an emotional response in the sentencer of disgust. Kahan, *supra* note 291, at 1646. “[C]ourts recognize the role of disgust sensibilities in revealing to us the most singular acts of wickedness and depravity, the ones

spared, the sentence is the product of vengeance.³⁶¹

In a retributive sentencing framework, mercy and vengeance should be distinguished from mitigation and aggravation. Evidence that mitigates culpability, or that shows reduced harm, demonstrates that the offense was comparatively less grave than others, and thus deserves a less severe punishment. Likewise, aggravating evidence that demonstrates heightened culpability or harm supports a more severe sanction. As I have argued here, much of the evidence in penalty phase proceedings, however, is not relevant to either determination, but rather concerns the “good” or “bad” character of the defendant, or seeks to provoke an emotional rather than a rational response. Although such evidence is relevant to the competing emotive claims of mercy and vengeance, it appears to be incompatible with the aims of retributive justice. As Jeffrie Murphy and Jean Hampton have argued, where just punishment is strictly proportioned to the desert of the offender, any deviation from that punishment constitutes, in a sense, an injustice.³⁶²

Mercy and vengeance lead to unjust punishment in two ways. First, they may upset the principle of comparative desert: the jury may be moved to show mercy to some of the worst offenders while holding the least bad fully responsible for the harms they cause, and vice versa with regard to vengeance. Second, to the extent that anyone “deserves” a sentence of death, both mercy and vengeance prevent justice from being done. Ironically, to the extent that mercy is a virtue that derives its value from forgiveness for wrongful, or sinful, behavior, it may be that the virtue is all the greater when the act or the actor is that much worse. When a sentence is based on merciful or vengeful emotions, rather than a rational evaluation of moral desert, sentencing outcomes are not, at least in theory, “morally accurate.”

From a retributive perspective, an “emotive” construction of the penalty trial is problematic.³⁶³ Penalty phase proceedings that are

we are obliged to strike back against in the most emphatic form of action that our conventions and laws make available to us. And the power that disgust gives us to discern and remark such atrocities is indeed insusceptible of being captured by – reduced to – a precise verbal formula.” *Id.*

361. See Kahan, *supra* note 291, at 1621.

362. See, e.g., MURPHY & HAMPTON, *supra* note 283, at 167 (“If mercy requires a tempering of justice then there is a sense in which mercy may require a departure from justice.”).

363. See Kahan & Nussbaum, *supra* note 238, at 355-56 (noting that desert-based retributive theories are inconsistent with judgments of faults based on emotions: “What

dominated by a rhetorical battle between the prosecution and defense, where the prosecution attempts to demonize the defendant by depicting him as a violent, remorseless monster who will threaten society unless executed, and the defense seeks to elicit sympathy by depicting a poor, abused, or disadvantaged individual who succumbed to some temptation in a moment of weakness, are hardly consistent with a sentencing model that prizes accuracy and comparatively fair outcomes.³⁶⁴ After all, the crucial moments in such a proceeding inevitably are not the product of a rational analysis of the offender's moral desert, but rather are idiosyncratic, elusive, and dependent on the skills of the advocates and the prejudices and biases of the jury.

Although the emotive contest model of sentencing is doubtless far from what Herbert Wechsler envisioned, a penalty phase that focuses on the defendant's character, rather than his culpability necessarily gives ample space for these factors to work. But if character-related considerations not strictly relevant to the offender's moral desert are not a proper foundation upon which to make sentencing decisions, what role, if any, is there for mercy and vengeance?

Even in a capital sentencing regime that prioritizes retributive values, we probably must permit mercy to play a limited role – if only because there probably is no other choice – despite the necessary capriciousness it injects into the process. Although considerations of comparative and absolute justice should be the central concern of appropriate penalty phase procedures, any scheme that precluded the exercise of mercy altogether would seem heartless and alien indeed. As Justice Blackmun explained, the sentencer's opportunity to express mercy represents a “distinctive feature of our society that we deeply value.”³⁶⁵ Thus, no matter what procedures are chosen, the jury must retain discretion to render a sentence less than death regardless of what factors are balanced, or whether it finds any substantial mitigating facts. And if the defendant is entitled to ask for mercy, principles of balance suggest that the state is entitled to argue

matters is choice, and since emotions are unwilling they figure in moral assessment only to the extent that they displace choice . . .”).

364. *But see* Pillsbury, *supra* note 203, at 657 (arguing that “the determination of deserved punishment should be reconceived as a moral-emotive dynamic involving outrage at the offender's acts of disrespect (moral outrage); [sic] and caring for the offender's positive moral qualities (empathy)”).

365. *Callins, v. Collins*, 510 U.S. 1141, 1151 (1993) (Blackmun, J., dissenting from denial of certiorari) (quoting his dissenting opinion in *California v. Brown*, 479 U.S. 538, 563 (1987)).

that a vengeful response is more appropriate than a merciful one.³⁶⁶

To preserve the sentencer's right to act mercifully while protecting less culpable offenders from state-sanctioned vengeance, mercy and vengeance must be disaggregated from the broader mitigation and aggravation inquiry. This could be accomplished simply by allowing the defendant to make an express plea for mercy once a verdict of guilt has been entered, but prior to sentencing. If the defendant does not enter such plea, then evidence admissible at the penalty phase would be limited to whatever is relevant to show that the defendant acted with full, or diminished, culpability. The defendant then would be sentenced based solely on retributive criteria: the harm caused or intended and the culpability attending the causative acts.

If, on the other hand, the defendant does enter a plea for mercy, the entire range of character-related evidence now routinely considered by juries would be opened to both sides to pursue. In such case, the emotive or rhetorical battle between the prosecution and the defense could take over. The defendant could attempt to show that, despite responsibility for the crime, there are aspects of his or her character that deserve the sympathy and mercy of the jury. At the same time, the state could introduce evidence to rebut that claim, by showing that the defendant's character is defective or flawed, that defendant does pose a danger to society if treated mercifully, and that his acts deserve a vengeful, not merciful, response. Precisely because such arguments are based on considerations unrelated to the defendant's culpability for causing the particular harm in the case at bar, and because the very concept of "just deserts" inherently protects each person's entitlement to a sentence not exceeding that which is proportionate to the gravity of her offense, mercy and vengeance should only be available to the state where the defendant has signaled her willingness to move the inquiry to that battleground.

At the same time, because the defendant would be free to decline to make a plea for mercy, the defendant would have greater control over the nature of the sentencing proceeding. Evidence of an aggravating nature that currently routinely goes before juries at the sentencing phase pertaining to defendant's bad character, prior bad acts, or future dangerousness would, under such a framework, be admissible only to rebut the defendant's claim of good character or

366. Other commentators have arrived at the same conclusion. *See, e.g.,* Garvey, *supra* note 215, at 1033 (arguing that future dangerousness evidence is only relevant to "resist the defendant's plea for mercy").

redeeming qualities that entitle him to a show of mercy. By barring such evidence in all other cases, the less-culpable defendant is better protected from execution by a jury enraged to vengeance at the penalty phase by inflammatory evidence or highly prejudicial expert testimony.

Conclusion

Herbert Wechsler's project was to impose order on the chaos of the common criminal law, and he was magnificently successful. The states and the Supreme Court both relied on Wechsler's work, and the Model Penal Code, to build the modern capital punishment edifice. However, the fundamental assumptions underlying Wechsler's work and the "unrevised" MPC – the embrace of utilitarianism and rejection of retributivism – are, as the ALI has acknowledged, no longer widely shared foundations of the criminal justice system. With respect to capital punishment, these assumptions have even less currency. Abolition of the death penalty is likely the only sure way to root out the myriad sources of discrimination and arbitrariness that currently plague administration of the death penalty. Short of that, rationalization of sentencing procedures so as to make them more consistent with the most commonly recognized justification for keeping the system in place – retributivism – might help ensure that only those fully culpable for the worst crimes are subject to its reach.