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Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparitive Justice

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RECONCILING "IRRECONCILABLE" CAPITAL PUNISHMENT DOCTRINE AS COMPARATIVE AND NONCOMPARATIVE JUSTICE

Robert F. Schopp[*]

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I. INTRODUCTION

During the past decade, two Justices of the Supreme Court have explicitly announced that they would refuse to apply established Supreme Court precedent regarding capital punishment. Although they differed from one another on important matters, they both premised their decisions on their mutual contention that two lines of Court authority are irreconcilable. The first of these lines of authority has its roots in *Furman v. Georgia*[1] and mandates guided discretion in capital sentencing. The second line of authority has roots in *Woodson v. North Carolina*[2] and requires individualized assessment of each offender and offense in capital sentencing.

Justice Scalia contends in *Walton v. Arizona*[3] that these two lines of authority are irreconcilable, and he repudiates the requirement of individualized assessment.[4] He justifies this decision by reasoning that the guided discretion doctrine reflects an arguable basis in constitutional text and history, but the individualized assessment line of authority lacks such a foundation.[5] Justice Blackmun, in contrast, contends in *Callins v. Collins*[6] that both lines of authority are necessary to constitutional application of capital punishment but that the two are irreconcilable.[7] He concludes, therefore, that constitutional administration of capital punishment is impossible.[8]

Other Justices have refrained from drawing the conclusion that these lines of authority are irreconcilable, but they have explicitly recognized a tension between them. These Justices address this tension in the Court's capital punishment doctrine as they would approach similar difficulties created by the need to administer other areas of law in a manner that satisfies competing principles or policies. They interpret precedent and decide cases in a manner that seeks to balance concern for both lines of precedent.[9] Some commentators contend that these attempts to

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1. 408 U.S. 238, 239-40 (1972); *see also* discussion *infra* Part II.A.
2. 428 U.S. 280, 303-05 (1976); *see also* discussion *infra* Part II.B.
3. 497 U.S. 639 (1990).
4. *Id.* at 656-57, 664; *see also* discussion *infra* Part II.C.
5. *Walton*, 497 U.S. at 670-71.
6. 510 U.S. 1141 (1994).
7. *Id.* at 1144-45; *see also* discussion *infra* Part II.C.
8. *Callins*, 510 U.S. at 1145.
9. *See* Tuilaepa v. California, 512 U.S. 967, 971-73 (1994) (Kennedy, J.); Romano v. Oklahoma, 512 U.S. 1, 6-7 (1994) (Rehnquist, C.J.); Graham v. Collins, 506 U.S. 461, 484-92 (1993) (Thomas, J., concurring); Franklin v. Lynaugh, 487 U.S. 164, 182 (1988) (White, J., plurality opinion); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring); *see*

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accommodate both lines of precedent have generated an illusory body of doctrine in which apparently complex doctrinal constraints on capital sentencing mask essentially unrestricted discretion for sentencers in capital cases.[10]

This series of developments is particularly perplexing because the two lines of authority in question apparently pursue two purposes ordinarily understood as central to fairness in the application of any punishment. Stated intuitively, the opinions requiring individualized assessment call for careful consideration of the evidence relevant to selecting the most justifiable punishment for a particular offender and offense, and the opinions requiring guided discretion call for consistent application of the criteria of capital punishment such that relevantly similar offenders receive comparable punishment for comparable offenses. At first glance, these two requirements appear compatible and foundational to fairness in capital sentencing specifically, and in criminal sentencing more generally.

In this Article, I examine the putative contradiction or tension between these two lines of Supreme Court authority. This analysis clarifies the reasoning in the opinions that generate these doctrines and identifies the penal purposes, formal principles of justice, and conceptual ambiguities that generate this controversy. I argue that these lines of precedent are compatible in principle and that the putative contradiction between them results from the failure to fully articulate these requirements and their functions in satisfying the formal principles of justice as applied to punishment. This explanation also reveals fundamental defects in contemporary capital punishment doctrine and practice, however, in that the apparent contradiction between these two lines of precedent masks the need to address underlying questions regarding the substantive justification of capital punishment and the proper roles of formal and informal community standards in the administration of capital punishment in legal institutions representing liberal principles of political morality.

Contemporary debates regarding capital punishment address at least three distinct but related sets of concerns. The first addresses the moral justification of capital punishment. It involves a dispute regarding which, if any, defensible moral principles justify an institution of capital punishment or the application of that institution to specific individuals for specific offenses.[11] The second addresses legal doctrine. This debate

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also discussion *infra* Part II.C.

10. 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, 360-91 (1998); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357, 371-403 (1995).

11. *See, e.g.*, LOUIS P. POJMAN & JEFFREY REIMAN, THE DEATH PENALTY: FOR AND AGAINST (1998); ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE (1983).

concerns the best interpretation and justification of legal doctrine regarding capital punishment. It is particularly concerned with questions regarding the coherence of this doctrine and its consistency with broader principles embedded in the legal system, including the relevant constitutional provisions. This second level of analysis resembles the first in that it appeals to principles of political morality, but it differs from the first in that it represents an appeal to the principles represented by the legal institutions of a particular society. These principles provide a systemic justification in that they justify rules or practices as consistent with the broader legal system. The first level of analysis, in contrast, represents a critical moral analysis by appeal to defensible moral principles.[12] The third set of concerns dominating contemporary debate addresses practical considerations raised by capital punishment as applied. The third set includes, for example, the ability of jurors to comprehend and apply jury instructions, the effectiveness of instructions or procedures designed to reduce discriminatory application, and the degree of pain or terror caused by various means of execution.[13]

These three types of debate interact. The significance of practical considerations, for example, depends partially on the systemic and critical justifications of capital punishment. Similarly, the practical significance of the moral justifications depends partially on our ability to construct and apply practices that conform to those justifications. A comprehensive justification of capital punishment must demonstrate that it is: (1) systemically justified by principles embodied in the legal institutions, (2) critically justified by defensible moral principles, and (3) applied through practices that conform to these justifications.

This Article does not purport to resolve the dispute regarding the moral justification of capital punishment. Rather, I directly address concerns of the second type. I set aside questions regarding the justification of capital punishment in principle and those that address practical considerations, such as juror comprehension of instructions. This Article examines the putative contradiction or tension that arises between two components of Supreme Court doctrine, and it addresses that issue in the context of the relationship between an institution of capital punishment and the principles of political morality represented by the legal institutions of a liberal society. The analysis supports the following theses. First, these two lines of Supreme Court authority are compatible in principle. Second, interpretation of these two lines of authority requires clarification of three central ambiguities in the opinions. Third, clarification of the two lines of

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12. JOEL FEINBERG, HARMLESS WRONGDOING 124-26 (1988) (distinguishing between conventional and critical morality).

13. *See, e.g.*, MARK COTANZO, JUST REVENGE 33-37 (jury instructions), 42-47 (methods of execution), 79-84 (discrimination in application) (1997).

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authority and of these ambiguities requires interpretation in context of comparative and noncomparative justice as principles of political morality embedded in the legal institutions of a liberal society. Fourth, these principles partially define limits on the institutional structures through which capital sentencing decisions are made. Fifth, the analysis that demonstrates the compatibility of these two lines of authority raises serious questions about the adequacy of the current practices of capital sentencing. Perhaps most importantly, however, this analysis demonstrates that differentiating the three levels of analysis and examining the relationships among them can clarify some aspects of the ongoing debate. Although, this Article directly addresses the second level of analysis, a fully satisfactory approach must ultimately integrate the three levels of analysis.

Part II summarizes and clarifies some central components of contemporary Supreme Court doctrine. Part III provides a brief exposition of the principles of comparative and noncomparative justice, and Part IV interprets the doctrines discussed in Part II as applications of the principles discussed in Part III. Part V identifies three central ambiguities that lie at the core of the apparent contradiction or tension created by the Court's capital punishment doctrine. Part VI advances an integrated interpretation of these three ambiguities that produces coherence in the doctrine as well as consistency between the doctrine and the underlying principles of comparative and noncomparative justice. Part VII identifies a distinct source of tension between capital sentencing practice and the integrated body of doctrine, and Part VIII discusses one potential alternative sentencing structure designed to address this source of tension. Part IX concludes the paper with a discussion of the relationships among these levels of analysis in the ongoing debate regarding capital punishment.

II. CENTRAL SUPREME COURT DOCTRINE

A. *Guided Discretion*

Some judicial opinions and commentary discuss a contradiction or tension between the two lines of Supreme Court authority that establish the requirements of guided discretion and individualized assessment in the administration of capital punishment. The principle of guided discretion has its roots in the concurring opinions in *Furman*.[14] Although this case provides a critical component in the foundation of modern Supreme Court capital punishment doctrine, a precise interpretation of its significance and limits remains elusive because the Justices who formed the majority for the judgment provided five different concurring opinions.

14. Furman v. Georgia, 408 U.S. 238, 240-371 (1972).

Two Justices contended that capital punishment generally violates the Eighth Amendment of the Constitution. These two Justices included the potential for arbitrary and discriminatory application among the grounds they advanced for this conclusion.[15] Three other Justices concurred in the judgment overturning the sentences in the cases at issue on narrower grounds involving arbitrary or discriminatory application or the potential for such application under the discretionary provisions in force at that time.[16] Thus, only the narrower conclusion regarding arbitrary or discriminatory application of capital punishment under discretionary provisions elicited majority support.

The potential for arbitrary or discriminatory application arose at least partially because the statutes under which these capital sentences had been administered allowed unbounded sentencer discretion in the capital sentencing decision. These jurisdictions authorized capital punishment for a variety of offenses committed by a large number of offenders, but relatively few offenders were actually sentenced to death and executed. Furthermore, the statutes provided the sentencers with little or no guidance regarding the bases on which they should select some offenders for capital punishment and others for lesser sentences. In short, many convicted offenders were eligible for capital punishment but few were selected, and the capital sentencing provisions provided little or no guidance regarding that selection process.[17]

Several Justices concluded that these provisions produced arbitrary or discriminatory patterns of sentencing. At least two Justices emphasized the arbitrary nature of sentencing under these provisions, citing an apparent lack of any consistent or defensible bases for the selection of some convicted offenders for capital punishment and others for less severe sentences.[18] Other Justices emphasized discriminatory sentencing on the basis of illegitimate factors, including race and poverty.[19] In summary, the five Justices who concurred in the judgments that overturned the capital sentences at issue differed significantly regarding the scope of their conclusions and regarding their rationales for those conclusions. The relatively narrow reasoning on which all five Justices converged addressed the lack of guidance that authorized sentencers to exercise unguided discretion in a manner generating arbitrary or discriminatory sentences or the potential for such sentences.

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15. *Id.* at 257-306 (Brennan, J., concurring); *id.* at 314-73 (Marshall, J., concurring).

16. *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

17. *Id.* at 291-300 (Brennan, J., concurring); *id.* at 253 (Douglas, J., concurring); *id.* at 311-14 (White, J., concurring).

18. *Id.* at 309-10 (Stewart, J., concurring); *id.* at 311-14 (White, J., concurring).

19. *Id.* at 249-57 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

Following *Furman*, a number of states revised their capital sentencing provisions, generating a series of cases decided by the Court in 1976. The Court reviewed several of these revised capital punishment provisions, upholding some as satisfactorily addressing the concerns raised in *Furman* and overturning others as failing to satisfy these concerns. Although the opinions do not provide clear rules or guidelines for states that adopt and apply capital punishment statutes, they contain a few general lines of thought reflecting the Justices' interpretations of the principles revealed in *Furman*. These principles require guided discretion of sentencing decisions in a manner that renders them consistent with evolving societal standards, legitimate penal purposes, the circumstances of the offenses, and the characters of the offenders.[20]

These decisions approved provisions that employed some statutory device that narrows the class of offenders eligible for capital punishment. These provisions establish necessary but not sufficient conditions for the application of capital punishment to particular offenders. They exclude some offenders as ineligible for capital punishment and identify others as eligible for further consideration during which some of those identified as eligible may be selected for capital punishment. Some statutes narrow the class of capital defendants by defining a fixed and relatively limited set of capital offenses, generally limited to a certain subset of homicides and perhaps a few additional offenses.[21] Other statutes narrow the class of capital offenders by requiring that the sentencer find an enumerated aggravating factor in order to render eligible for capital punishment a particular offender who has committed one of the offenses for which capital punishment is available. Under these provisions, capital punishment eligibility requires two successive filters. First the trial court must convict the defendant of a capital crime, and then the sentencer must find an enumerated aggravating factor.[22] By narrowing the definition of capital crimes or by requiring an enumerated aggravating factor, these procedures identify a relatively narrow set of offenders as eligible for further consideration during which they may be selected for capital punishment.

Although the term "narrowing" might be read to suggest that these provisions merely reduce the number of offenders eligible for capital punishment, a more plausible reading reveals a justificatory function. The Court approved these provisions at least partially because they addressed

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20. *See* Gregg v. Georgia, 428 U.S. 153, 189, 206-07 (1976) (Stewart, J., plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 288-97, 303-04 (1976) (Stewart, J., plurality opinion).

21. *Gregg*, 428 U.S. at 162-63 (Stewart, J., plurality opinion); Jurek v. Texas, 428 U.S. 262, 268 (1976) (Stevens, J., plurality opinion). The Court may have limited capital punishment to homicide in *Coker v. Georgia*, 433 U.S. 584, 591-600 (1977).

22. *Gregg*, 428 U.S. at 164-66, 196-98 (Stewart, J., plurality opinion); Proffitt v. Florida, 428 U.S. 242, 247-60 (1976) (Powell, J., plurality opinion).

the problem of arbitrary or discriminatory sentencing under previous statutes. Arbitrary or discriminatory sentencing involves similarities or differences among sentences that do not reflect legitimate sentencing considerations. The plurality opinion in *Gregg v. Georgia*[23] explained the importance of administering capital punishment in a manner that serves legitimate penal purposes and avoids the gratuitous infliction of suffering.[24] Statutes that narrow the set of death-eligible offenders by selecting only those who qualify as more culpable, more likely to recidivate, or more appropriate for capital punishment according to some other legitimate systemic criterion serve to reduce the number of death-eligible offenders in a manner that justifies the more severe punishment of those selected.[25]

The Court further narrowed the class of offenders eligible for capital punishment by excluding certain offenses from those that may carry a penalty of death. The Court rejected capital punishment as disproportionate for those convicted of only the rape of an adult woman. The plurality opinion remains somewhat ambiguous in that some passages suggest a narrow reading that addresses only rape of an adult woman but others suggest that the plurality considers capital punishment excessive for any crime that does not involve homicide.[26] Read narrowly, the opinion establishes at least that the states do not have discretion to define capital crimes as broadly as they choose and that rape of an adult woman falls beyond the limits of this discretion.

Although the plurality opinion in *Thompson v. Oklahoma*[27] suggests that offenders who are below the age of sixteen when they commit capital crimes are not eligible for capital punishment, the concurring opinion rejects this categorical narrowing rule.[28] Thus, the case provides a majority for the judgment overturning the specific sentence at issue, but it does not provide a categorical narrowing rule that precludes capital punishment for those who commit capital crimes before they reach the age of sixteen. Similarly, the Court has refrained from establishing a categorical rule precluding capital punishment for mentally retarded offenders.[29] Thus, the Court has applied this categorical approach to narrowing in a very limited manner to date.[30]

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23. 428 U.S. 153 (1976).
24. *Id.* at 182-87 (Stewart, J., plurality opinion).
25. *See* Zant v. Stephens, 462 U.S. 862, 877 (1983).
26. *Coker*, 433 U.S. at 592-98 (rape of adult woman); *id.* at 597-600 (non-homicide) (White, J., plurality opinion). For a recent discussion by a state supreme court of the state statute applying capital punishment for aggravated rape of a child, see *State v. Wilson*, 685 So. 2d 1063, 1067-68 (La. 1996).
27. 487 U.S. 815 (1988).
28. *Id.* at 838 (Stevens, J., plurality opinion); *id.* at 848-59 (O'Connor, J., concurring).
29. *See* Penry v. Lynaugh, 492 U.S. 302, 337-39 (1989).
30. Steiker & Steiker, *supra* note 10, at 373-79.

While the narrowing function limits the categories of offenses and offenders eligible for capital punishment, the channeling function guides and limits sentencer discretion in selecting some offenders for capital punishment from among the eligible set. The Texas statute reviewed in *Jurek v. Texas*,[31] for example, narrowed the set of offenders who were eligible for capital punishment by defining five specific conditions under which conviction for murder rendered the offender eligible for capital punishment.[32] It then selected certain offenders for capital punishment from among this eligible set by addressing three questions to the sentencer.[33] Other statutes guide the selection of certain offenders for capital punishment from the set of death-eligible offenders by listing aggravating and mitigating factors and instructing sentencers that they are to select those appropriate for capital punishment by evaluating offenders according to these factors and perhaps in light of other relevant factors.[34] Although the Court's opinions in the 1976 cases emphasized narrowing and channeling, a later opinion suggests that a sentencing statute that provides satisfactory narrowing of the death-eligible category can dispense with channeling in selection, allowing the sentencer unbounded discretion in that process.[35]

In addition to providing sentencers with such narrowing and channeling mechanisms, capital sentencing provisions provide for mandatory review by state appellate courts. These reviews seek to promote consistent application of capital punishment by overturning sentences that are disproportionate or that reveal a pattern of arbitrary or discriminatory sentencing in the context of the state's broader set of capital cases.[36] Thus, these statutes combine various approaches to narrowing, channeling, and appellate review in order to avoid or ameliorate the defects in capital sentencing forbidden in *Furman*. Through these practices, they seek to render the state's sentencing practices consistent with defensible social values and legitimate penal purposes.

31. 428 U.S. 262 (1976).

32. *Id.* at 268-69 (Stevens, J., plurality opinion).

33. *Id.*

34. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 164-65, 196-98 (1976) (Stewart, J., plurality opinion); Proffitt v. Florida, 428 U.S. 242, 246-58 (1976) (Powell, J., plurality opinion).

35. *See* Zant v. Stephens, 462 U.S. 862, 874-80 (1983); Steiker & Steiker, *supra* note 10, at 379-81.

36. *Gregg*, 428 U.S. at 167, 198-207 (Stewart, J., plurality opinion); *Proffitt*, 428 U.S. at 250-52, 259-60 (Powell, J., plurality opinion).

B. *Individualized Assessment*

The 1976 opinions provided the foundation for a series of Supreme Court cases requiring individualized assessment of offenders who are eligible for capital punishment. These cases establish the principle that the conception of human dignity protected by the Eighth Amendment requires that sentencers consider all evidence regarding the circumstances of the offense and the character of the offender in order to sentence each individual in a manner consistent with the legitimate penal purposes of capital punishment.[37] These opinions discuss deterrence and retribution as the primary legitimate purposes of capital punishment, emphasizing the individualized assessment of the offender's culpability as central to the selection of the proper punishment for a specific offender and offense.[38]

The Court rejected mandatory approaches to capital sentencing as precluding individualized assessment and therefore as failing to sentence each offender in a manner appropriate to his culpability for his offense.[39] The Court also rejected mandatory capital sentencing as inconsistent with societal values and as failing to fulfill the requirement of guided discretion.[40] The Court upheld approaches to capital punishment that provide for case-by-case assessment of each offender and offense in light of the legitimate purposes of deterrence and retribution. The Court upheld the Texas system partially because it interpreted the special questions addressing dangerousness and deliberateness as allowing individualized assessment of the factors relevant to deterrence and retribution manifested by the specific offender and offense.[41] The Court upheld statutes listing aggravating and mitigating factors partially because these factors provide the sentencer with the opportunity to consider the characteristics of the offender and the offense that are relevant to the identified penal purposes of capital punishment.[42] These and later cases made it clear that this function requires that the trial court must admit and the sentencer must consider all mitigating evidence.[43]

Unfortunately, the Court has not been entirely clear regarding the relationship between the requirements of guided discretion and individual

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37. *Gregg*, 428 U.S. at 182-87 (Stewart, J., plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (Stewart, J., plurality opinion).

38. *Gregg*, 428 U.S. at 183-87 (Stewart, J., plurality opinion); *Woodson*, 428 U.S. at 303-05.

39. *Woodson*, 428 U.S. at 303-05 (Stewart, J., plurality opinion).

40. *Id.* at 288 (societal values) (Stewart, J., plurality opinion); *id.* at 302-03 (guided discretion) (Stewart, J., plurality opinion).

41. Jurek v. Texas, 428 U.S. 262, 272-76 (1976) (Stevens, J., plurality opinion).

42. *Gregg*, 428 U.S. at 182-98 (1976) (Stewart, J., plurality opinion); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976) (Powell, J., plurality opinion).

43. Eddings v. Oklahoma, 455 U.S. 104, 110-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604-08 (1978); *Woodson*, 428 U.S. at 303-05 (Stewart, J., plurality opinion).

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assessment. This relationship appears amenable to at least two distinctly different interpretations. First, individualized assessment may represent a component of the channeling function of guided discretion in that it can be understood as requiring that the sentencer fully evaluate the offender and the offense according to the criteria of culpability that the Court often emphasizes as grounds for selecting those who are appropriate subjects of capital punishment. Second, individualized assessment may represent an independent requirement of capital sentencing that limits the manner in which the state may direct the sentencer's decision. According to this interpretation, individualized assessment requires that the trial court admit and the sentencer consider any evidence the offender offers as mitigating. This interpretation precludes sentencing provisions that limit the range of evidence the offender can admit or that constrain the manner in which the sentencer attributes mitigating effect. If one adopts the latter interpretation, one must address concerns regarding compatibility between the individualized assessment and guided discretion requirements and regarding the proper manner in which to address potential conflicts between them. Some later opinions and some commentators adopt this latter interpretation and discuss a contradiction or tension arising between the requirements of guided discretion and individualized assessment.

C. *The Contradiction or Tension*

Some judicial opinions explicitly recognize a tension between these two components of Supreme Court doctrine, and others claim that the two constitute irreconcilable lines of authority. Consider first those who interpret the two lines of authority as irreconcilable. Justice Scalia contends that these components of doctrine generate a contradiction such that no statute or sentencer can satisfy both.[44] He interprets the guided discretion and individualized assessment doctrines as requiring sentencer discretion that is both limited and unlimited.[45] He interprets a series of cases beginning with *Furman* as requiring guided discretion in the form of clear, objective standards that prevent arbitrary and discriminatory sentencing by limiting sentencing discretion and by rendering sentencer decisions subject to appellate review.[46] He interprets the individualized assessment cases as requiring unlimited defendant discretion to enter as mitigating any evidence the defendant wishes and unbounded sentencer discretion to give any mitigating effect to that evidence that the sentencer chooses.[47]

44. Walton v. Arizona, 497 U.S. 639, 657-64 (1990) (Scalia, J., concurring).
45. *Id.* (Scalia, J., concurring).
46. *Id.* at 657-61 (Scalia, J., concurring).
47. *Id.* at 661-64 (Scalia, J., concurring).

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Scalia understands these two requirements as irreconcilable and contends that sentencers cannot have unbounded discretion to withhold capital punishment for any reason or no reason and limited discretion to sentence offenders to capital punishment. Sentencers do not make distinct decisions regarding the imposition of capital punishment and the withholding of capital punishment such that they can make the first with limited discretion and the second with unbounded discretion. Rather they make a single sentencing decision to either apply or withhold capital punishment. Thus, they must make this single decision with limited discretion that meets the guided discretion requirement or with unlimited discretion mandated by the individualized assessment requirement.[48] This interpretation leads Scalia to conclude that it is impossible to apply both lines of doctrine. He interprets the guided discretion line of authority as reflecting arguable support in the Constitution because unbridled discretion generates wanton or freakish application of capital sentences, implicating the "unusual" provision of the prohibition against cruel and unusual punishment. He contends, in contrast, that the individualized assessment line of authority lacks any constitutional basis. He therefore announces that he will apply the guided discretion doctrine but that he will not attempt to apply the individualized assessment doctrine.[49]

Justice Blackmun's position resembles that of Justice Scalia in that he understands the two lines of doctrine as irreconcilable. Although he asserts that the two requirements are compatible in principle, he contends that the Court's experience since *Furman* demonstrates that attempts to develop substantive rules and procedures that satisfy both requirements have failed and resulted in arbitrary and discriminatory capital punishment.[50] He rejects the notion that the Court can address this conflict by limiting the requirement of guided discretion to the eligibility determination and allowing full discretion in selection because this approach merely reduces the number of individuals subject to arbitrary sentencing.[51] This assessment leads Blackmun to a different conclusion than Scalia's, however, because Blackmun understands both requirements as necessary to a constitutional institution of capital punishment. If a constitutional institution of capital punishment must satisfy both requirements and the two are irreconcilable, then no institution of capital punishment can meet constitutional standards. Blackmun therefore rejects capital punishment as impossible to implement in a manner that satisfies constitutional requirements.[52]

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48. *Id.* at 665-67 (Scalia, J., concurring).
49. *Id.* at 670-73 (Scalia, J., concurring).
50. Callins v. Collins, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting).
51. *Id.* at 1152-53 (Blackmun, J., dissenting).
52. *Id.* at 1155-57 (Blackmun, J., dissenting).

Other Justices recognize that the Court has had difficulty articulating and applying these requirements and that the states have found it difficult to craft and apply provisions that satisfy them. These Justices, however, discuss these concerns as reflecting tension between the two doctrines rather than as demonstrating that they are irreconcilable. They address this tension as reflecting the difficulty that arises when legislatures and courts must design and apply sentencing provisions intended to satisfy a complex set of principles, policy considerations, and factual circumstances.[53] Understood in this manner, the tension requires neither that the Court selects one of two contradictory doctrines nor that the Court abandons the project of administering capital punishment consistent with the requirements of the Constitution. Rather, it requires that the Court interpret and evaluate statutes and applications of those statutes in a manner that best accommodates the underlying principles and purposes, recognizing that this may require a complex balancing process.

Some commentators contend that the Court's attempts to reconcile the requirements of guided discretion and individualized assessment have led the Court to effectively abandon the channeling function independent of narrowing. According to this interpretation, the Court's cases effectively require that capital punishment statutes narrow the class of offenders eligible for capital punishment but abandon the channeling function in the selection process. In doing so, the Court has given sentencers full latitude to consider all potential mitigating evidence for each individual offender in the selection process, but it has done so at the cost of allowing unlimited discretion in that process and, thus, of exacerbating the opportunity for arbitrary or discriminatory sentencing that the *Furman* decision repudiated. These commentators contend that doctrinal complexity obscures the degree to which apparently complex doctrinal requirements actually allow completely unguided discretion leading to arbitrary or discriminatory sentences.[54]

The data suggesting sentencing discrimination by race of victim in close cases appears consistent with this interpretation in that it may reveal discriminatory variations in sentencing obscured by, and perhaps generated by, the complex and confusing doctrine and the associated jury instructions.[55] Insofar as discriminatory sentencing is the product of

53. *See* Tuilaepa v. California, 512 U.S. 967, 971-73 (1994) (Kennedy, J.); Romano v. Oklahoma, 512 U.S. 1, 6-7 (1994) (Rehnquist, C.J.) (The Eighth Amendment requires two "somewhat contradictory" inquiries before imposing the death penalty.); Johnson v. Texas, 509 U.S. 350, 360, 373 (1993) (Kennedy, J.); Graham v. Collins, 506 U.S. 461, 484-92 (1993) (Thomas, J., concurring); Frankin v. Lynaugh, 487 U.S. 164, 182 (1988) (White, J., plurality opinion); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring).

54. Kirchmeier, *supra* note 10, at 360-91; Steiker & Steiker, *supra* note 10, at 371-403.

55. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND

unintentional bias, it is reasonable to expect that it would manifest primarily when the case is close by legitimate factors and legal guidance is vague or ambiguous. These circumstances create vulnerability to the influence of unarticulated impressions or intuitions, and unintentional bias may shape these impressions. Thus, the complex body of Supreme Court doctrine developed for the purpose of preventing arbitrary or discriminatory sentencing may actively contribute to these concerns because the complexity masks the degree to which the lack of clear or precise limits renders decisionmaking vulnerable to unintended bias.

III. COMPARATIVE AND NONCOMPARATIVE JUSTICE

Justice Blackmun contends that the goals of individual fairness, reasonable consistency, and absence of error appear mutually attainable on their face, but he also contends that the Court has virtually conceded that both fairness and rationality cannot be attained.[56] As ordinarily understood, fairness, consistency, and rationality seem not only compatible but mutually reinforcing. Decisions or practices are fair when they are in accord with applicable rules or standards,[57] and they are rational when they are "based on reason or reasoning."[58] Thus, consistent application of standards that provide good reasons for decisions would produce decisions that were fair, because they were in accord with the standards, and rational, because those standards provide good reasons for the decisions. At first glance, it seems puzzling that Justice Blackmun and the other members of the Court would find incompatibility or tension among lines of authority designed to achieve these apparently compatible goals of consistency, fairness, and rationality in the application of capital punishment.

Justice requires that a person receive the treatment that he or she is due. It is applied in comparative and noncomparative formulations.[59] The formal principle of noncomparative justice requires that each individual receive treatment appropriate to that individual's merit or desert. Application of that formal principle requires some substantive standards of justice for a particular purpose. These substantive standards identify the specific bases in rights or desert that serve as the criteria of justice for that purpose.[60] Retributive justice addresses the justification of punishment as an institution and as application of that institution to particular offenders for particular offenses. Retributive justice in this broad sense includes all

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EMPIRICAL ANALYSIS 149-60 (1990).

56. *Callins*, 510 U.S. at 1144-45 (Blackmun, J., dissenting).

57. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 907 (4th ed. 1993).

58. *Id.* at 2482.

59. THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 395 (2nd ed. 1999); *see also* JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 265-306 (1980).

60. *See* FEINBERG, *supra* note 59, at 268.

theories of the justification of punishment, including but not limited to those that justify punishment by guilt, desert, or culpability. Theories of the latter type are ordinarily understood as retributive theories of punishment and are included within the broader field of retributive justice.[61]

For the purpose of retributive justice, noncomparative justice requires that the individual offender receive the punishment appropriate to that offender's merit as defined by the applicable criteria of justified punishment. Legal punishment requires justification as an institution and as an application of that institution.[62] Specific applications of legal punishment occur when a particular individual receives punishment for a particular offense according to the standards of the institution. A systemic justification of a specific instance of punishment would defend that punishment as consistent with the systemic criteria of retributive justice adopted within that criminal justice system. A systemic justification provides a necessary but not sufficient condition for the comprehensive justification of specific instances of punishment. Unjust systemic criteria of punishment might produce instances of punishment that meet these criteria but remain unjust. Thus, a satisfactory justification of a particular instance of criminal punishment must justify that application of punishment by systemic criteria, and it must justify these systemic criteria.

Systemic criteria of punishment are subject to evaluation by broader systemic standards and by standards of critical morality.[63] A broader systemic justification of the systemic criteria of punishment would justify those criteria as consistent with the principles of political morality underlying the comprehensive set of legal institutions of that society. A critical justification for systemic criteria of justified punishment would defend those criteria as morally justifiable according to defensible moral principles. As applied to capital sentencing within a particular criminal justice system, noncomparative justice by systemic standards requires that each individual offender receives capital punishment if and only if that offender satisfies the criteria of capital punishment in that legal system. The criteria of capital punishment applied by that institution remain subject to systemic evaluation by the broader principles underlying the legal system for that society and to critical moral evaluation. Thus, a comprehensive noncomparative justification for a particular application of capital punishment would involve three steps. The first would justify this

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61. THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 59, at 395; *see also* FEINBERG, *supra* note 59, at 267-68; Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179-85 (Ferdinand Schoeman ed., 1987).

62. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8-13 (1968).

63. FEINBERG, *supra* note 12, at 124-26 (distinguishing critical and conventional morality).

instance of capital punishment by systemic standards. The second would justify those standards by the principles of political morality represented by the broader legal system. The third would justify those standards by defensible moral principles.

Comparative justice requires comparable treatment for members of a class where that class is defined by some criteria of justice for a particular purpose. Evaluation of comparative justice requires two comparisons. The first involves comparison of the individuals on the applicable criteria of justice for the purpose in question, and the second involves comparison of treatment. Dissimilar treatment of those who do not differ in a corresponding manner on the applicable criteria of justice constitutes comparative injustice. Alternately, similar treatment of those who differ on the applicable criteria constitutes comparative injustice.[64] Analogous to noncomparative justice, a comprehensive comparative justification of capital punishment by a criminal justice system would involve three steps. The first would demonstrate that offenders who received capital punishment resemble one another according to systemic sentencing standards and that they differ according to these sentencing standards from those who did not receive capital punishment. The second step would justify the systemic standards of similarity and difference by the principles of political morality represented by the legal system, and the third step would justify these systemic standards according to defensible moral principles.

Although comparative and noncomparative justice are subject to evaluation from critical or systemic perspectives, I emphasize the systemic perspective because the immediate purpose of this Article involves clarification of the purported conflicts within constitutional doctrine. Systemic standards of noncomparative and comparative justice in capital sentencing converge in the following manner. A specific capital offender receives noncomparative justice by systemic standards if that offender receives either capital punishment or an alternative as justified by systemic sentencing criteria that identify those who merit capital punishment and those who do not. A capital sentencing decision that does not correspond to systemic criteria constitutes noncomparative injustice by systemic standards.

Comparative justice by systemic standards requires that all offenders who are similar according to systemic sentencing criteria receive similar sentences. Arbitrary or discriminatory departures from consistent application of systemic sentencing criteria constitute comparative injustice by systemic standards. That is, departures from consistent sentencing without corresponding justificatory differences as measured by systemic

64. *See* FEINBERG, *supra* note 59, at 267-71.

criteria of noncomparative justice represent comparative injustice. Thus, comparative and noncomparative justice are conceptually related as applied to retributive justice generally and capital punishment specifically. The applicable criteria of noncomparative justice provide the standards by which individuals are compared for the purpose of comparative justice.[65] In short, comparative and noncomparative justice in capital sentencing are not only compatible, but consistent application of the latter constitutes the former. Any criminal justice system that consistently applies its criteria of noncomparative justice does comparative justice by systemic standards, and any failure of comparative justice represents a departure from the standards of noncomparative justice in at least some cases.[66] The capital sentencing criteria remain subject to systemic evaluation by principles embedded in the broader set of legal institutions and to critical evaluation by defensible moral principles.

IV. Supreme Court Doctrines as Noncomparative and Comparative Justice

The requirement of individualized assessment in capital cases represents an application of the principle of noncomparative justice mandating that each person receives the treatment he deserves according to systemic criteria for capital punishment. By requiring that the sentencer consider all characteristics of the offender and of the offense that are relevant to the criteria of noncomparative justice, the Court pursues comprehensive and fine-grained evaluation of the offender according to the applicable criteria of noncomparative justice for capital sentencing.

Although the Court's discussions of the retributive purpose of punishment and of human dignity and respect for humanity associated with the Eighth Amendment have been vague and ambiguous across Justices and cases, several opinions indicate that these two notions are related.[67] These opinions indicate that the concern for human dignity often addressed by the Court reflects the retributive requirement that the sentencer treat

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65. *See id.* at 281.

66. Some theorists would argue that this pattern applies to comparative and noncomparative justice generally. These theorists contend that noncomparative justice addresses the just treatment of individuals according to the applicable standards of individual merit or desert. Comparative justice represents an attribute of institutions that consistently treat individuals as required by the applicable criteria on noncomparative justice. Phillip Montague, *Comparative and Non-Comparative Justice*, 30 PHIL. Q. 131, 131-32 (1980). I take no position here on this broad question because this Article addresses only retributive justice as applied to capital sentencing.

67. Graham v. Collins, 506 U.S. 461, 513-15 (1993) (Souter, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 369-75 (1989) (Scalia, J., plurality opinion); *id.* at 382 (O'Connor, J., concurring); Enmund v. Florida, 458 U.S. 782, 798-801 (1982); Penry v. Lynaugh, 492 U.S. 302, 319-23, 335-38 (1982); Gregg v. Georgia, 428 U.S. 153, 173, 181-82 (1976) (Stewart, J., plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (Stewart, J., plurality opinion).

each defendant as a responsible moral agent and, thus, that the sentencer sentence each defendant in a manner consistent with that individual's culpability.[68] The precise conceptions of human dignity, retribution, and culpability lack clarity in those opinions. "Culpability" in a narrow sense can refer to the mental state required as an element of the offense. To say that an individual is culpable in this sense is to say that the individual engaged in the criminal conduct with a mental state such as knowledge or recklessness as required by the offense definition.[69]

In a broader sense, however, an individual is culpable if the person is blameworthy or deserves punishment for the criminal conduct.[70] Factors relevant to culpability in this broader sense include but are not limited to the mental states that render offenders culpable in the narrower sense. The opinions sometimes discuss moral or personal culpability as opposed to strictly legal guilt, and they identify considerations of character, record, circumstances, background, impairment, duress, emotional pressure, and provocation as relevant to these judgments of culpability.[71] Thus, these opinions apparently contemplate a relatively broad notion of culpability as blameworthiness or desert, and they address culpability in this sense as an important criterion of retributive justice in capital sentencing.

Reasonable legislatures and sentencers can certainly differ in their understanding of the range of factors relevant to culpability in this sense. They might also differ regarding the significance they vest in any particular evidence offered as relevant to culpability. The general principle that individual culpability represents an important consideration in capital sentencing is reasonably well-established, however, and thus evidence of decreased culpability qualifies as relevant mitigating evidence. Similarly, the requirement that the offender must be allowed to present and the sentencer must consider all evidence that falls within some suitably defined range of mitigating evidence is well-established.[72] This requirement of individualized assessment is designed to promote sentencer consideration of all evidence relevant to the accurate assessment of the offender by the systemic criteria of noncomparative retributive justice in capital sentencing. Thus, this requirement represents the application of the principle of noncomparative justice to capital sentencing.

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68. *See* cases cited *supra* note 67.

69. MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985).

70. BLACK'S LAW DICTIONARY 385 (7th ed. 1999); THE NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 57, at 568.

71. *Graham*, 506 U.S. at 513-17 (Souter, J., dissenting); *Penry*, 492 U.S. at 319-28, 335-40; Eddings v. Oklahoma, 455 U.S. 104, 107-12 (1982); *Woodson*, 428 U.S. at 303-04 (Stewart, J., plurality opinion).

72. *Penry*, 492 U.S. at 315-28; *Eddings*, 455 U.S. at 110-15; Lockett v. Ohio, 438 U.S. 586, 602-08 (1978); *Woodson*, 428 U.S. at 303-05 (Stewart, J., plurality opinion).

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The Court's doctrine of guided discretion, including both narrowing of the set of death-eligible offenders and channeling of sentencer discretion in selecting from among that set, represents the requirement of comparative justice that similar cases receive similar treatment. Fully stated, however, the Aristotelian formal principle of comparative justice requires that similar cases receive similar treatment and that morally dissimilar cases receive treatment that differs in proportion to their morally relevant differences.[73]

As applied to retributive justice, the formal principle of comparative justice requires that sentencers consistently apply the principles and criteria of retributive justice to each convicted perpetrator. Insofar as the Court has held that the conception of human dignity applicable to the Eighth Amendment requires that each individual is sentenced according to that person's culpability as informed by all relevant evidence regarding his character and the circumstances of the offense, comparative justice requires that the sentencer consistently apply these criteria to all convicted perpetrators. Thus, convicted individuals who demonstrate similar culpability according to systemic criteria should receive similar sentences, and those who differ significantly from each other according to these criteria should receive sentences that differ in a manner that reflects these differences. Similarly, insofar as sentences are understood as addressing additional criteria of justified punishment such as crime prevention in addition to culpability, the formal principle of comparative justice requires that sentencing authorities consistently apply the full set of applicable principles and criteria of justified punishment to convicted perpetrators.

In short, comparative justice by systemic standards in capital sentencing simply requires consistent application of the systemic principles and criteria of retributive justice to all capital defendants. Thus, the two requirements of guided discretion to promote comparative justice and of individualized assessment of all evidence relevant to retributive justice are not only consistent with each other, consistent application of the latter constitutes the former. As applied in the context of capital punishment, sentencers fulfill the requirements of noncomparative justice by systemic standards when they engage in individualized assessment of each offender by considering all evidence relevant to the systemic principles and criteria of capital sentencing. Guided discretion promotes consistent application of these same principles and criteria across cases in order to pursue

73. FEINBERG, *supra* note 59, at 278.

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comparative justice.[74] No contradiction or tension arises between the requirements of individualized assessment and guided discretion.

V. RELOCATING THE TENSION: THREE CENTRAL AMBIGUITIES

Some Supreme Court opinions and some commentators interpret the line of cases addressing individualized assessment as granting the sentencer unconstrained discretion to withhold capital punishment.[75] Interpreted in this manner, individualized assessment undermines both noncomparative and comparative justice because it authorizes each sentencer to withhold capital punishment for any reason or for no reason at all.[76] It undermines noncomparative justice because it abandons the obligation to sentence each offender according to culpability or other identifiable principles or criteria of retributive justice. The absence of sentencer obligation to sentence according to articulated principles or criteria of noncomparative justice that identify this offender as one who qualifies for capital punishment or for exemption from capital punishment also undermines comparative justice. Insofar as the Court allows approaches to sentencing that place no limits on the reasons for which a sentencer can choose to withhold capital punishment, each sentencer has the authority to apply idiosyncratic grounds for withholding capital punishment in a particular case. This authority precludes consistent articulation and application of a stable set of principles or criteria across cases, undermining comparative justice. This failure to articulate such principles or criteria for consistent application across cases promotes the probability of arbitrary or discriminatory differences among cases as sentencers apply idiosyncratic bases for sentencing.

It is important to recognize that this problem does not arise only for sentencers who fail to understand instructions or who distort the sentencing process with bias. Rather, this problem arises from this interpretation of the individualized assessment doctrine. Conscientious, well-intentioned sentencers who accurately understand their responsibilities under this interpretation of the doctrine will undermine comparative justice and noncomparative justice by systemic standards. They will do so by

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74. *Id.* at 278-81; Graham v. Collins, 506 U.S. 461, 484-92 (1993) (Thomas, J., concurring). Justice Thomas presents this notion in a limited form when he addresses the individualized assessment line of authority as intended to reduce arbitrary or discriminatory sentencing by focusing jury attention on relevant factors. He rejects the notion that the jury is authorized to express a reasoned moral response, however, because he interprets such a response as unbounded. *Id.* at 492-97. *Contra id.* at 515 n.9 (Souter, J., dissenting).

75. *Graham*, 506 U.S. at 492-97 (Thomas, J., concurring); Walton v. Arizona, 497 U.S. 639, 715-19 (1990) (Stevens, J., dissenting) (complete discretion); Zant v. Stephens, 462 U.S. 862, 870-72 (1983) (absolute discretion); Steiker & Steiker, *supra* note 10, at 378-82.

76. Steiker & Steiker, *supra* note 10, at 381-82.

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conscientiously applying reasons to refrain from sentencing to capital punishment that differ across sentencers and that depart from the principles of retributive justice underlying the criminal justice system. In short, if one interprets individualized assessment as including unlimited discretion to withhold capital punishment, the problematic tension does not occur between guided discretion for the purpose of comparative justice and individualized assessment for the purpose of noncomparative justice. Rather, the tension arises between individualized assessment and both comparative and noncomparative justice by systemic standards.

Three central ambiguities contribute to this state of affairs that arguably undermines comparative justice by preventing consistency of sentencing standards across cases and undermines noncomparative justice by rendering individual sentencing decisions increasingly subject to unintended distortion by idiosyncratic standards, bias, or confusion. These ambiguities permeate the discussion of individualized assessment and render it difficult to interpret or assess this requirement.

A. *Mitigating Evidence*

The first ambiguity involves the range of mitigating evidence addressed. A series of cases establish the requirement of individualized assessment in capital sentencing by requiring that courts admit and sentencers consider all evidence that might support the rejection of capital punishment for a particular offender. These cases articulate this requirement in an ambiguous fashion, however, as some passages refer to relevant mitigating evidence while other passages in the same opinions refer to all evidence the offender proffers as mitigating.[77] Formulations of the first type address a body of evidence that qualifies as mitigating or potentially mitigating as defined by some standard of relevance to some identifiable principles or criteria of mitigation. Formulations of the second type, in contrast, apparently cede to the convicted offender the authority to define the body of evidence to be considered. The proper interpretation of this ambiguity depends partially on the justifiable range of sentencer discretion, and this range depends partially on the applicable principles and criteria of noncomparative justice. That is, noncomparative justice requires that sentencers have access to information relevant to the selection of the proper sentence according to the applicable principles and criteria of retributive justice. Thus, these principles and criteria partially define the proper range of evidence admitted. For this reason, resolution of this ambiguity requires consideration of the third ambiguity discussed below.

77. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (proffers, relevant mitigating evidence); *Eddings*, 455 U.S. at 110 (proffers), 115, 117 (relevant mitigating evidence); *Lockett*, 438 U.S. at 604 (proffers), 608 (relevant mitigating factors).

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B. *Justice and Mercy*

The second ambiguity involves the proper range of sentencer authority to sentence according to principles and criteria of justice or of mercy. It is not entirely clear whether the cases authorize sentencers to exercise mercy in addition to considering the relevant reasons for exercising leniency in justice. Although some opinions tend to discuss either or both without drawing a clear distinction between the two, mercy is ordinarily understood as involving treatment better than the individual can demand in justice.[78] Thus, decisions to withhold capital punishment based on mercy would involve departures from sentences based strictly on the applicable principles and criteria of retributive justice. If sentencers have authority to depart from justice in order to exercise mercy, one must ask whether this authority extends only to the application of systemic principles or criteria of mercy, or whether it includes complete discretion to exercise mercy on any basis the sentencer considers appropriate. The Court opinions apparently contemplate sentencer consideration of all evidence that might provide good reason to refrain from applying capital punishment, but the proper nature and range of these reasons remains obscure.[79]

C. *Community Values*

The third ambiguity occurs in references to the sentencing jury as the source of community values. These passages require clarification and integration with the concern regarding the proper range of mitigating evidence previously discussed as the first ambiguity. Various Supreme Court opinions include a variety of phrases such as "contemporary community values,"[80] "conscience of the community,"[81] "social values,"[82] "societal values,"[83] "societal acceptance,"[84] "public attitudes,"[85] or "standards of our citizens."[86] It is not clear whether the values these

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78. Gregg v. Georgia, 428 U.S. 153, 203 (1976) (Stewart, J., plurality opinion) (mercy); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (Stewart, J., plurality opinion) (compassionate or mitigating factors); ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS § 6.3.5, at 180-83 (1998).

79. *See Skipper*, 476 U.S. at 4-5; *Eddings*, 455 U.S. at 112-17; *Lockett*, 438 U.S. at 599-605; *Gregg*, 428 U.S. at 182-87 (Stewart, J., plurality opinion); *Woodson*, 428 U.S. at 303-05 (Stewart, J., plurality opinion).

80. *Gregg*, 428 U.S. at 190 (Stewart, J., plurality opinion).

81. McClesky v. Kemp, 481 U.S. 279, 310 (1987).

82. *Woodson*, 428 U.S. at 297 (Stewart, J., plurality opinion).

83. *Id.* at 298.

84. *Id.*

85. *Gregg*, 428 U.S. at 173 (Stewart, J., plurality opinion).

86. Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J., plurality opinion).

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references authorize the jury to apply consist of the jurors' personal values as representatives of the community, their understanding of the generally accepted informal community view, or the values the community has institutionalized through the legal institutions that provide officially enacted standards of that community. Clarification of this ambiguity requires integration with the first identified ambiguity (regarding the range of evidence as all relevant mitigating evidence or as all evidence the offender proffers as mitigating) because the proper range of evidence depends partially on the range of considerations the jury legitimately reviews in its role as the conscience of the community.

D. *The Ambiguities and the Principles of Comparative and Noncomparative Justice*

The first ambiguity seriously undermines the pursuit of comparative justice if it is understood as requiring that offenders may admit and sentencers must consider any evidence the offender proffers as mitigating. On this interpretation, offenders can enter any evidence that they consider mitigating, and each sentencer can and must evaluate the mitigating effect of the evidence entered according to that sentencer's understanding of statutory factors and of community standards. Thus, capital punishment decisions may turn on types of evidence and interpretations of unarticulated community standards that vary substantially from case to case, reducing the probability of principled consistency across cases. It is important to recognize here that if the sentencer must consider any evidence that the offender proffers as mitigating, the category of mitigating evidence is idiosyncratic not merely in the sense that it might include factual circumstances that are specific to the case, but also in the sense that the principles and criteria of mitigation might be idiosyncratic to a particular offender and sentencer. If various offenders offer evidence regarding idiosyncratic claims of mitigation and various sentencers apply idiosyncratic principles or criteria of mitigation, they alter the systemic principles and criteria of retributive justice. By varying these principles and criteria from case to case, sentencers undermine comparative justice, and they deviate from noncomparative justice by systemic standards.

The second ambiguity interacts with the first in that one who exercises mercy treats another better than justice demands. Thus, acts of mercy constitute departures from strict justice.[87] If sentencers are authorized to depart from justice in order to exercise mercy, and they are authorized to do so on their evaluation of any evidence that offenders proffer as mitigating, there seem to be no legal limitations on the potential grounds for withholding capital punishment and no explicit guidelines for the

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87. SCHOPP, *supra* note 78, § 6.3.5, at 180-83.

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exercise of this unlimited discretion. Understood in this manner, the Court's doctrine allows departures from noncomparative justice by systemic standards, and it provides no basis to expect the principled consistency across cases that would meet the requirements of comparative justice.

Regarding the third ambiguity, the Court's vague references to a variety of phrases addressing community or societal values, conscience, or acceptance exacerbate the previously discussed concerns regarding comparative and noncomparative justice. Juries may violate the requirement of consistent application of the criteria of retributive justice if they apply different community values to the evidence proffered as mitigating in different cases. This might occur either because they represent different communities with different values, because values vary significantly within communities, or because different jurors have different views regarding these values. These sources of variation can undermine comparative and noncomparative justice because they can cause sentencers to apply principles and criteria of justice or mercy that depart from one another and from systemic standards of retributive justice.

In summary, these three ambiguities create serious concerns regarding the ability of current Court doctrine to promote comparative or noncomparative justice. The unbounded scope of evidence that can be admitted as mitigating in justice or in mercy under some interpretations of individualized assessment, in combination with the lack of clear criteria or guidelines for evaluating the mitigating effect of that evidence, generates the potential for broad variability in the standards sentencers use to measure noncomparative justice. By allowing the standards of noncomparative justice to vary from case to case, these conditions allow departures from noncomparative justice by systemic standards. Similarly, they undermine comparative justice by promoting the probability of unprincipled variation from case to case, generating the arbitrary or discriminatory sentencing variations that were the object of the Court's concern in *Furman*.

VI. AN INTEGRATED INTERPRETATION

A. *All Mitigating Evidence*

The Court's language regarding the range of evidence that the trial court must admit and the sentencer must consider is ambiguous between and within cases. Some passages in some opinions require admission and consideration of all evidence the offender proffers as mitigating.[88] Some

88. Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104,

passages in some opinions require admission and consideration of all relevant mitigating evidence or of "constitutionally relevant evidence."[89] Taken literally, the "proffers" formulation allocates the authority to define the parameters of mitigation to the convicted offender who can present any evidence he considers appropriate for mitigation and to the sentencer who may or may not find mitigating effect as it sees fit. The sentencer may not be prevented as a matter of law from considering the proffered evidence, nor may the sentencer refuse to consider that evidence. The sentencer may, however, interpret the significance of that evidence.[90] That is, according to this interpretation, law places no boundaries on the conditions that may or may not mitigate.

Justice Scalia interprets the line of authority mandating individualized assessment in this manner, and this interpretation contributes to his conclusion that these cases are irreconcilable with guided discretion.[91] He contends that sentencers cannot have limited discretion in the decision to apply capital punishment but unlimited discretion to withhold it because sentencers do not make separate decisions whether to apply and whether to withhold capital punishment.[92] Rather, they make a single sentencing decision in which they either apply capital punishment or they do not, and each sentencer's discretion in making that single decision either is limited or it is not.[93] Others have rejected the contention that these requirements are irreconcilable by applying the guided discretion and individualized assessment principles to the eligibility and selection decisions respectively.[94] According to this interpretation, there is no contradiction in limiting the sentencer's discretion through a variety of statutory mechanisms during the eligibility phase in order to discipline the process through which the sentencer identifies those who are eligible for capital punishment but then allowing the sentencer unbounded discretion to exercise mercy in withholding capital punishment during the selection phase.[95]

On the face of the dispute, the critics are correct. Consider, for example, a statute that guides discretion in the eligibility phase by requiring that a sentencer find an enumerated aggravating factor in order to render the offender eligible for capital punishment but allows unbounded discretion

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110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

89. Johnson v. Texas, 509 U.S. 350, 367 (1993); *Skipper*, 476 U.S. at 4; *Eddings*, 455 U.S. at 111-12, 115, 117; *Lockett*, 438 U.S. at 608.

90. *Johnson*, 509 U.S. at 368; *Eddings*, 455 U.S. at 114-15.

91. Walton v. Arizona, 497 U.S. 639, 662-67 (1990) (Scalia, J., concurring).

92. *Id.*

93. *Id.*

94. *Walton*, 497 U.S. at 715-18 (Stevens, J., dissenting); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 116-17 (1993).

95. *Walton*, 497 U.S. at 715-18 (Stevens, J., dissenting); Nussbaum, *supra* note 94, at 116-17.

in withholding capital punishment from some of those who are eligible. Such a provision articulates a necessary but not a sufficient condition for capital punishment. That is, sentencers may not apply capital punishment unless they meet the necessary condition of finding an enumerated aggravating factor, but having done so, they are authorized but not required to apply it. Other circumstances in which decision makers must meet necessary conditions in order to decide or act in a certain manner but are then allowed to exercise discretion in deciding not to so act are not unusual. Bartenders, for example, may not serve alcohol unless the customer fulfills the necessary condition of meeting the legal age requirement, but bartenders can then exercise discretion in refusing for a variety of reasons to serve alcohol to some of those who meet this necessary condition. Similarly, police officers may not legitimately cite or arrest individuals unless they fulfill the necessary condition of meeting the probable cause standard. Yet, they may exercise discretion in refraining from citing or arresting some of those who meet this standard.[96]

These responses demonstrate that provisions limiting discretion in the application of capital punishment but allowing unlimited discretion to refrain from doing so are coherent, but they do not address the substantive force of the objection. The substantive concerns involve the principles of comparative and noncomparative justice that underlie the guided discretion and individualized assessment requirements. If one assumes that the eligibility requirements narrow the field of death-eligible offenders to those who qualify for capital punishment according to noncomparative principles and criteria of retributive justice by systemic standards, unbounded discretion to refrain from applying capital punishment will result in some of these death-eligible offenders receiving less severe punishment than they merit. On this assumption, however, it appears that such discretion will not result in any offenders receiving more severe punishment than they merit. Thus, some might argue that unbounded discretion to exercise mercy is acceptable because it does not result in any offender receiving worse treatment than deserved.

This argument fails to address two concerns regarding this interpretation of the relationship between the two principles. First, the claim that no one receives more severe punishment than merited by systemic standards rests upon the premise that the eligibility process identifies only those who merit capital punishment by systemic standards of retributive justice. The minimal narrowing requirements of the eligibility process, such as the identification of an enumerated aggravating factor, do not preclude the possibility that the full set of aggravating and

96. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 3.03, at 75-77 (3d ed. 1993) (probable cause); *id.* § 1.03, at 9-11 (discretion).

mitigating circumstances undermine the justification of capital punishment by systemic standards. Thus, some individuals who qualify as death-eligible may not merit capital punishment when all relevant factors are considered. For these individuals, unbounded discretion in the selection process might produce capital sentences in circumstances in which guided discretion in the selection process would prevent a sentence of capital punishment.

Second, even if one accepts the premise that such a process precludes any offender from receiving punishment more severe than he merits by systemic standards of retributive justice, unbounded discretion allows departures from comparative justice and from noncomparative justice in the form of leniency. Such discretion in the selection phase allows departures from systemic standards of noncomparative justice in that it allows some offenders who merit capital punishment by systemic standards to escape that merited punishment. Such departures from systemic standards of noncomparative justice also constitute comparative injustice because those who benefit from these departures receive punishment that differs from that received by others without findings of corresponding differences in the properties that provide the basis for judgments of merit by systemic standards of retributive justice. These differences constitute comparative injustice in the form of arbitrary or discriminatory differences among relevantly similar offenders. In order to understand the force of Justice Scalia's claim of irreconcilability in its strongest form, we must ask whether unbounded discretion to withhold capital punishment is reconcilable with the principles of noncomparative and comparative justice that underlie the legal doctrine. Should we care about departures from comparative justice only if they involve some individuals receiving more severe punishment than they merit, or should we care about comparative injustice even when those departures from comparative justice consistently violate the principles of noncomparative justice in the direction of leniency?

The proffers formulation of the individualized assessment requirement undermines the pursuit of comparative justice by increasing the risk of arbitrary or discriminatory variations among cases in violation of the *Furman* principle of guided discretion. Furthermore, absent legal articulation of a relatively clear conception of mitigation, it does so at two levels of abstraction. At the more concrete level, it authorizes the sentencer to decide whether the specific condition or circumstance presented by the offender should mitigate according to identified principles of mitigation such as culpability. One sentencer might decide, for example, that certain psychological traits should mitigate because they reduce individual culpability. Another sentencer might decide that those traits should not mitigate because they are insufficient to reduce culpability, and a third might interpret the same conditions as supporting the application of capital

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punishment because they enhance culpability. At the more abstract level, this approach authorizes sentencers to decide the relevant principles and criteria of mitigation such that one sentencer might decide that mitigation requires a showing of decreased desert while another might decide that mitigation requires a showing of decreased risk of future harmful conduct, and a third might require a demonstration of remorse. That is, various sentencers might diverge not only on their evaluation of the mitigating force of certain evidence but also on the appropriate principles and criteria of mitigation by which they evaluate this evidence.

Divergence at the more concrete level of interpretation involves differential evaluation of the specific evidence presented and may be unavoidable to some degree in a system that requires weighing of evidence regarding unique circumstances by case-specific sentencers. Divergence at the more abstract level, however, arguably involves abandonment of the core of the comparative justice project by authorizing application of different substantive principles and standards to different offenders ostensibly subject to the same law. Finally, insofar as legal institutions seek noncomparative justice by systemic standards embodied in law, divergence among sentencers at the more abstract level undermines noncomparative justice because at least some of those sentencers apply principles and criteria of noncomparative justice that diverge from systemic standards.

Review of the Supreme Court opinions supports interpretation of these opinions as requiring admission and consideration of all relevant mitigating evidence as defined by systemic standards of relevance regarding the principles and criteria of retributive justice applicable to sentencing decisions in a particular legal system. The *Eddings* decision provides one of the seminal opinions in the line of authority establishing this requirement, and that opinion reviews and explains the mitigating relevance of the disputed evidence regarding the defendant's age, family background, and emotional disturbance.[97] If this line of authority required admission and consideration of any evidence the offender proffered as mitigating, the Court's evaluation of relevance would carry no weight and serve no purpose. That is, the only question regarding admissibility would involve the offenders intent in proffering it. A determination that the offender proffered it as mitigating would decide the matter regardless of the Court's evaluation of relevance. Thus, the Court's review of relevance repudiates the interpretation of the case as establishing that courts must admit all evidence proffered. Rather, the Court's discussion of the relevance of the proffered evidence regarding the offender's responsibility and blameworthiness supports the interpretation of individualized assessment as requiring consideration of all evidence that is relevant to the

97. *Eddings*, 455 U.S. at 115-17.

systemic justification of capital punishment as established in applicable statutes and in prior cases. Other cases reveal a similar pattern in that the opinions review the relevance of the disputed evidence to the culpability of the offender.[98]

In addition to providing an interpretation of individualized assessment that is consistent with the manner in which these opinions applied it, this approach renders this requirement consistent with the broader body of Supreme Court capital punishment law. It supports an interpretation of the individualized assessment requirement that enables sentencers to meet that requirement through a process that is consistent with the principle of guided discretion. That principle mandates sentencing practices designed to reduce arbitrariness or discrimination in sentencing. The *Woodson* plurality provided an early articulation of the individualized assessment requirement as necessary to reduce the probability of arbitrary differences in sentencing associated with unguided jury nullification of mandatory capital punishment statutes and to reduce the probability of arbitrary consistency in the form of similar sentencing of relevantly dissimilar offenders.[99]

The *Lockett* Court presented the requirement of individualized assessment as rooted in the principle of guided discretion from *Furman*, *Gregg*, and *Woodson*, rather than as a contrary or competing requirement.[100] The *Lockett* Court interprets the *Furman* opinions as rejecting the arbitrary selection of a few offenders for capital punishment from among a large number of capital offenders.[101] The *Lockett* Court interprets the *Gregg* and *Woodson* decisions as addressing this problem of arbitrary sentencing by establishing a process of guided discretion through which sentencers apply statutory sentencing standards to each offender with due consideration of that offender's character and record.[102] In this manner, the Court presented individualized assessment as promoting the purpose of guided discretion by providing sentencers with the information about the offender and the offense that sentencers need in order to accurately apply sentencing guidelines or criteria supplied under the requirement of guided discretion.[103] Furthermore, this interpretation renders individualized assessment consistent with the Court's recognition

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98. Johnson v. Texas, 509 U.S. 350, 385-86 (1993) (O'Connor, J., dissenting); Graham v. Collins, 506 U.S. 461, 512-21 (1993) (Souter, J., dissenting); Penry v. Lynaugh, 492 U.S. 302, 322-28 (1989).

99. Woodson v. North Carolina, 428 U.S. 280, 302-05 (1976) (Stewart, J., plurality).

100. Lockett v. Ohio, 438 U.S. 586, 599-606 (1978). *But see Graham*, 506 U.S. at 484-92 (Thomas, J., concurring).

101. *Lockett*, 438 U.S. at 598-99.

102. *Id.* at 600-02.

103. *See id.* at 601-05.

of the State's authority to guide sentencer evaluation of mitigating evidence.[104]

In short, an interpretation of individualized assessment as requiring consideration of all relevant mitigating evidence according to systemic standards of mitigation renders that requirement consistent with the Court's reasoning in the early cases and with the principle of guided discretion. In doing so, this interpretation renders consistent the comparative and noncomparative justice projects as manifested in Supreme Court capital punishment doctrine. That is, the requirement of guided discretion calls upon legislatures and courts to promote comparative justice by providing criteria or guidelines of retributive justice applicable to capital sentencing for all capital offenders in a jurisdiction. Individualized assessment involving all mitigating evidence relevant to these criteria or guidelines promotes noncomparative justice through accurate application in each case. Thus, the articulated criteria or guidelines provide the common foundation in principles of retributive justice that links comparative and noncomparative justice. The claim here is not that the Justices who wrote these opinions had this interpretation in mind. I have no reason to think that they had any fully articulated interpretation in mind. Rather, this interpretation renders the Court's requirements coherent with each other and with the underlying principles of comparative and noncomparative justice.

Finally, the Court articulated the requirement of individualized assessment in the proffers and relevant mitigating evidence formulations in the same cases with no indication that these phrases were intended to represent different standards or applications. Thus, a reasonable reading would render the two formulations consistent. Reading the language of the proffers formulation on its face can generate at least three distinct interpretations. First, one could interpret it as mandating admission of all evidence the offender offers as mitigating, without regard to ordinary considerations of relevance, prejudicial effect, or the rules of evidence. This reading undermines comparative and noncomparative justice by promoting sentencing unrelated to systemic principles and criteria of retributive justice. Furthermore, it requires that the trial court suspend its usual functions regarding the admission of evidence, and it generates absurd results.

Consider, for example, an offender who proffers testimony by biblical authorities who will testify that only those who have been baptized in Christ are among the chosen people of God. This offender could contend that this testimony demonstrates that capital punishment would be disproportionate to his crime because "I am a baptized Christian, and the

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104. *See* Johnson v. Texas, 509 U.S. 350, 362-66 (1993).

people I killed were only Jews, so executing me would be excessive punishment."[105] Interpreting the line of cases requiring individualized assessment as addressing all evidence the offender chooses to admit as mitigating apparently requires that the trial court admit this testimony and instruct the sentencers that they must consider it, although they may determine its significance.[106] In addition to generating absurd results, this interpretation renders the two formulations inconsistent because the testimony would not qualify as relevant mitigating evidence according to any recognized principles or criteria of mitigation.

The second and third interpretations recognize that according to ordinary usage, one proffers when one makes an offer of proof.[107] A party makes an offer of proof when that party explains to the trial judge the content of the testimony offered, the relevance of that testimony to the questions at issue, the evidence rule under which it is admissible, and the prejudice created by failure to admit that evidence. This proffer informs the trial judge's ruling on admissibility and preserves the matter for appeal if the trial judge precludes the testimony.[108] The second interpretation would require admission and consideration of any evidence regarding which the offender makes an offer of proof, regardless of the court's evaluation of that offer. This interpretation resembles the first in that it generates absurd results and renders the two formulations inconsistent because the mere requirement that the offender makes an offer of proof with no standard of adequacy reduces the second interpretation to the first interpretation insofar as it grants the offender authority to admit any evidence he chooses. Furthermore, the requirement is incoherent because a putative "offer of proof" that is not subject to evaluation for adequacy is not an offer of proof. To say that a party makes an offer of proof is to say that the party presents the appropriate information for evaluation of its adequacy in providing reasons why the court should admit the evidence. Thus, a putative "offer of proof" that is not subject to evaluation by standards of adequacy is no offer of proof at all.

The third interpretation shares with the second the understanding of a proffer as involving an offer of proof. It interprets the proffers formulation in the Court's cases as requiring admission and consideration of evidence the offender proffers as mitigating with an offer of proof that is adequate to demonstrate relevance to some recognized purpose or justification of

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105. *Cf.* Coker v. Georgia, 433 U.S. 584 (1977) (precluding capital punishment as disproportionate to the crime of rape, at least in the case of an adult woman).

106. *See* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); *Johnson*, 509 U.S. at 368.

107. McCORMICK ON EVIDENCE § 51, at 82-83 (John W. Strong ed., 5th ed. 1999).

108. *Id.*; ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 68-70 (1998).

punishment.[109] This interpretation avoids the absurd results generated by the first two interpretations, and it renders the "proffers" formulation coherent as well as consistent with the "relevant mitigating evidence" formulation in that both require that the trial court admit and the sentencer consider any evidence that the offender offers with a showing of its relevance as mitigating evidence. Understood in this manner, the cases are each internally consistent as well as consistent with each other in that each requires that trial courts admit and sentencers consider any evidence that the offender offers with a showing that it arguably carries mitigating significance according to systemic principles or criteria of mitigation. In contrast, the first two interpretations of the proffers formulation generate absurd results, conflict with the principle of guided discretion, render cases internally incoherent and inconsistent with other cases, and undermine comparative and noncomparative justice.

B. *Justice and Mercy*

This interpretation of the first ambiguity also accommodates a plausible and defensible approach to the second ambiguity regarding the authority to withhold capital punishment in justice or in mercy. Decisions based on the standards of justice contained in sentencing law are consistent with the requirements of comparative and noncomparative justice in that each decision pursues noncomparative justice by sentencing the offender according to the principles and criteria of retributive justice contained in the law as applied to the offender for his or her offense, and these decisions collectively pursue comparative justice by consistently sentencing offenders according to these same legal standards. The claim is not that all sentencers will interpret and apply specific evidence in the same manner. Rather, variation among sentencers will occur due to the differences in the evidence presented and due to differences of interpretation at the relatively concrete level of evaluation at which sentencers attempt to apply legal principles and criteria to specific evidence. One judge or jury, for example, might attribute more mitigating significance to a certain degree of psychological impairment than would a different judge or jury. Variations such as these occur despite common principles and criteria of retributive justice at the relatively abstract level. Despite these variations, however,

109. Zant v. Stephens, 462 U.S. 862, 876-77 (1983) (aggravating circumstance must "reasonably justify" imposition of a more severe sentence); Lockett v. Ohio, 438 U.S. 586, 599-605 (1978); Gregg v. Georgia, 428 U.S. 153, 182-87 (1976) (Stewart, J., plurality opinion). This interpretation is consistent with the *Lockett* Court's presentation of the requirement as arising from the guided discretion requirement found in the earlier cases and with the *Gregg* Court's emphasis on applying capital punishment in a manner that serves legitimate penal purposes.

sentencers pursue comparative justice insofar as they apply common principles and criteria of retributive justice.

Mercy involves departure from justice in that it involves more lenient treatment than an individual can claim as his due in justice.[110] Some bodies of sentencing law might authorize such departures but others might not. Insofar as a particular sentencing scheme authorizes sentencers in making such departures and provides guidance regarding the considerations that support such departures, that scheme remains consistent with the requirement of consistent treatment embodied in the principle of guided discretion and in the comparative justice project.[111] An approach that allows such departures from justice in order to exercise mercy but provides no criteria or guidelines regarding the appropriate bases for the exercise of mercy would conflict with the principle of guided discretion and with comparative justice. One might argue that arbitrary departures from justice in the form of mercy are acceptable because they do not treat any offender worse than that offender deserves. Such departures violate the principle of equal treatment and the requirement of reason at the core of comparative justice, however, in that they allow differential treatment of relevantly similar offenders.

By requiring similar treatment of relevantly similar offenders and proportionately dissimilar treatment of relevantly dissimilar offenders, the formal principle of comparative justice represents the disciplined application of reason to the distribution of punishment. Although the arbitrary exercise of mercy toward a particular offender does not treat that offender worse than he or she deserves, it violates the responsibility of legal institutions generally and of capital sentencers specifically to exercise coercive force according to reason.[112] Departures from the discipline of reason for no reason at all constitute arbitrary exercises of government authority, and departures for illegitimate reasons such as race, ethnicity, gender, or social class constitute discriminatory exercises of such authority. Both types of departure violate the constraints of reason that discipline the exercise of coercive force, and both violate the principle of respect for persons as reasoning beings that explains and justifies the significance of

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110. SCHOPP, *supra* note 78, § 6.3.5, at 180-83.

111. Strictly speaking, systemic principles or criteria for the exercise of mercy do not provide for comparative justice; rather, they provide a consistent bases for departures from justice. That is, they contribute to comparative justice in a broad sense in which that notion includes principles of justice and defensible moral bases for departing from justice in the exercise of mercy.

112. Graham v. Collins, 506 U.S. 461, 515 n.9 (1993) (Souter, J., dissenting) (defining "reasoned moral response" as addressing offender culpability for the crime); Penry v. Lynaugh, 492 U.S. 302, 319, 327-28 (1989) (requiring a reasoned moral response regarding the mitigating evidence and offender culpability); Gregg v. Georgia, 428 U.S. 153, 182-87 (1976) (Stewart, J., plurality opinion) (stating that capital punishment must not be gratuitous; it must have some legitimate penal justification); FEINBERG, *supra* note 59, at 283-96.

culpability in capital sentencing specifically and in matters of retributive justice generally.

In short, the interpretation of individualized assessment as requiring the admission and consideration of all evidence relevant to legal principles and criteria of mitigation is consistent with the reasoning in the Court's opinions, and it renders coherent the apparently conflicting requirements of guided discretion and individualized assessment in Supreme Court doctrine. This approach can accommodate sentencing standards that authorize mercy as well as justice, provided that these statutes articulate some principles or criteria for the exercise of mercy. Furthermore, it renders the Court's doctrine a plausible attempt to conform to the complimentary underlying principles of comparative and noncomparative justice.

C. *Community Standards*

1. Three Interpretations

Courts and commentators often discuss the jury's role as providing a link between the legal system and community standards. The interpretation of the first and second ambiguities advanced here may appear to conflict with this role because it defines the sentencer's role as the application of legal standards rather than as a source of extra-legal standards. Discussions of community standards sometimes employ a variety of similar but different phrases including "conscience of the community,"[113] "community values,"[114] "social values,"[115] "societal values,"[116] "public attitudes,"[117] "societal acceptance,"[118] or "standards of our citizens."[119] These phrases and passages suggest that an important function of the jury involves interpretation and application of the sentencing criteria in a manner consistent with the moral views of the citizenry. The precise nature of this responsibility remains vague, however, particularly regarding the proper relationship between these community standards and legal standards.

Although these phrases are often used interchangeably, the language suggests a number of significantly different interpretations. These include

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113. McClesky v. Kemp, 481 U.S. 279, 310 (1987) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

114. *Gregg*, 428 U.S. at 190 (Stewart, J., plurality opinion) (quoting *Witherspoon*, 391 U.S. at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

115. Woodson v. North Carolina, 428 U.S. 280, 297 (1976) (Stewart, J., plurality opinion).

116. *Id.* at 298 (Stewart, J., plurality opinion).

117. *Gregg*, 428 U.S. at 173 (Stewart, J., plurality opinion).

118. *Woodson*, 428 U.S. at 298 (Stewart, J., plurality opinion).

119. Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J., plurality opinion).

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at least the following three. First, these phrases may refer to the values and standards of the jurors as a sample of the community. Understood in this manner, jurors represent community values by exercising their personal values. Second, these phrases may refer to an informal social consensus among the population of the community, and the jury may be expected to be aware of and apply the standards of this informal consensus. Understood in this manner, jurors represent community values by applying what they believe to be the values generally accepted in the community, regardless of whether or not the jurors share these values. Third, particularly when phrased as "societal values," "societal acceptance," "public attitudes," or "standards of our citizens," these terms may refer to the moral values the community has officially adopted as societal standards through the legal process. That is, these phrases may refer to the moral standards the citizens of a society have collectively adopted by institutionalizing them in the law of the community.[120] Clarification of this ambiguity requires integrated analysis of this question and of the previously discussed ambiguity regarding the range of evidence as all relevant mitigating evidence or as all evidence the offender proffers as mitigating. A coherent institution of capital punishment must define the proper range of evidence in a manner that provides the jury with the information it needs to fulfill its legitimate functions, including its properly defined role as the conscience of the community.

The Court's vague references to these various phrases raise an important concern regarding the likelihood that juries will violate the requirement of consistent application of the principles or criteria of retributive justice if they apply different community standards in different cases. This might occur either because they represent different communities with different values, because values vary significantly within communities, because different jurors have different views regarding these values, or because jurors vary regarding their personal values.

At an abstract level, juries would apply the same principle if each jury applied the standards applicable in the community at issue. That is, all juries would fulfill the responsibility to apply community standards if each applied the principles of retributive justice accepted in the community in which the crime and trial took place.[121] Within this abstract level of consistency, however, criteria could vary across juries in a number of ways. First, standards could differ across communities. Some communities might emphasize culpability, for example, while others might emphasize remorse or risk of future criminal behavior. Second, different communities could apply different interpretations of the same principles such that similar

120. SCHOPP, *supra* note 78, § 6.3.3, at 175.

121. This proposition presumes no changes of venue.

conditions could carry different weight under a single principle as applied in two different communities. Regarding the principle that punishment should be in proportion to culpability, for example, economic or emotional hardship might significantly decrease culpability according to some community standards but not according to others.

Third, any particular community might lack a single community interpretation of a principle such as that requiring sentencing according to culpability, either because various subsets of that community endorse different interpretations of that principle or because no reasonably clear or specific interpretation has developed within that community. In either of these circumstances, the community would lack consensus regarding the appropriate measure of culpability and regarding the significance of various circumstances or conditions for culpability.[122] Fourth, some or all juries may fail to represent the community standard because the specific compositions of those juries do not reflect the communities. Given the size of juries and the manner in which they are selected, it would not be surprising to discover that few juries fully represent the communities from which they are drawn.[123]

These concerns illustrate the inadequacy of the Court's vague reference to community values, but they do not create a contradiction or a tension in principle between noncomparative justice and comparative justice understood as consistent application of the principles and criteria of noncomparative justice. That is, consistent application of the criteria of noncomparative justice at the appropriate level of abstraction remains possible, although consistent application requires at least that one specifies the principles that constitute the community values and the level of abstraction at which the sentencer should apply them.

If one interprets community values as addressing the values held by the jury as a sample of the community, then comparative justice in the abstract requires that each jury apply the principles and criteria of noncomparative justice held by the members of that jury. This interpretation would allow marked inconsistency at the more concrete level of application, however, because specific jurors and juries might vary substantially in the values that they endorse as relevant to sentencing as well as in their understanding, interpretation, and endorsement of the standards of retributive justice contained in sentencing statutes. Thus, according to this interpretation, several juries from the same community might represent community values, yet apply markedly different sentencing standards.

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122. If one defines a community as a jurisdiction with a coherent community standard, then all communities must have a standard, but this merely rephrases the point; some jurisdictions will have no community standard because these jurisdictions do not constitute communities.

123. SCHOPP, *supra* note 78, § 6.3.3, at 175.

Consider, for example, a statute that lists as an aggravating factor that the murder was committed in an attempt to commit deviant sexual interaction and that lists as a mitigating factor that the murder was committed under extreme mental or emotional disturbance.[124] Suppose that expert testimony supports the offender's contention that he committed the murder for which he has been convicted while engaging in sexual conduct motivated by his paraphilic disorder of pedophilia which involves intense, intrusive, and recurring sexually arousing fantasies, urges, and behavior involving prepubescent children.[125] Some juries might interpret this evidence as revealing emotional disturbance in the form of intrusive and intense fantasies and urges that mitigate culpability because they undermine the capacity for reasoned reflection and control of impulses. Other juries might consider these fantasies and urges insufficient to mitigate. Yet other juries might interpret the same expert testimony as supporting the state's contention that the offender fulfilled the listed aggravating factor regarding deviant sexual interaction and as establishing a pattern of habitual criminal activity and attitudes that further aggravate culpability. According to the interpretation of the jurors' responsibility to represent community values as their responsibility to apply their own values as a sample of the community, these three sets of jurors would all fulfill their responsibility to represent community values while attributing markedly discrepant significance to the evidence and applying markedly different sentences to similar offenders. Thus, insofar as comparative justice requires consistent application of the principles and criteria of retributive justice at the level of concrete application involving the tangible interests of those involved, this interpretation of community values undermines the pursuit of comparative justice.

If one interprets the jury's responsibility as the application of community values understood as the informal social consensus in the community in which the crime and trial take place, then comparative justice requires that each jury applies the principles and criteria of noncomparative justice endorsed by the informal social consensus in their jurisdiction. This interpretation can also undermine comparative justice. First, community standards may well vary substantially across communities within a single legal jurisdiction, generating dissimilar treatment of similar cases ostensibly subject to a single statute. Second, even if a broad consensus occurs within a specific jurisdiction, different

124. MODEL PENAL CODE § 210.6(3)(e), .6(4)(b) (1999).

125. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 527-28 (4th ed. 1994) (pedophilia as a specific disorder of the paraphilic type); *see also* State v. Bishop, 753 P.2d 439, 467 (Utah 1988) (Defendant contended that "homosexual pedophilia with narcissistic overtones" constituted extreme mental or emotional distress reducing murder to manslaughter.).

jurors or juries may have different impressions of that standard because juries may not consist of representative samples of the jurisdiction. Third, particularly with regard to controversial issues such as capital punishment, no consensus may occur either across the jurisdiction or within any subdivision of it. Thus, in some cases, no jury can apply a community consensus because none occurs. All of these circumstances can generate dissimilar treatment of similar cases.

In summary, each of the first two interpretations raises serious concerns regarding comparative justice. Furthermore, both encounter an additional common objection. According to either interpretation, community values can directly conflict with enacted law. Thus, if juries' responsibilities under law include the responsibilities to apply the law as instructed and to represent community values, juries may have an incoherent set of responsibilities that include the obligation to apply the legal standard and the obligation to depart from that same standard.

Alternately, if one interprets "community values" as referring to the principles and criteria of political morality the community has collectively adopted by establishing law embodying those values, then community values neither vary within a jurisdiction nor conflict with enacted law. According to this interpretation, sentencers can satisfy the requirements of comparative justice by consistently applying the legal criteria of retributive justice to all convicted perpetrators. Insofar as these contain general notions, sentencers must exercise judgment in interpreting and applying them, but the task of various sentencers involves the interpretation and application of standards of retributive justice instantiated in law rather than the application of personal or community standards that may vary across sentencers. This interpretation avoids the serious concerns raised by both alternative interpretations, and it provides for consistent application of the standards of retributive justice represented by law.

This interpretation promotes comparative justice at the level of principle in the sense that various juries are charged with the responsibility to apply common standards to each offender. This charge does not prevent variations among juries resulting from different interpretations of legal instructions or from application of those instructions to different circumstances. Furthermore, this interpretation of the responsibilities of juries raises serious questions regarding the capacities of juries to understand and apply the applicable societal standards as instantiated in law. Thus, this interpretation is defensible in principle but raises serious concerns about the abilities of juries to fulfill their responsibilities in practice. Parts VII and VIII return to these concerns. Throughout the remainder of this Article, I use "societal standards" to refer to community standards interpreted as those standards adopted by the society collectively through its legal institutions.

2. Community Values as Societal Standards

The interpretation of community values applied to capital sentencing as the societal standards collectively adopted through legal institutions is more consistent than either of the other interpretations with the reasoning in the Supreme Court's capital punishment cases, the concurrent pursuit of noncomparative and comparative justice, and the principles of political morality underlying the criminal justice system of a liberal society. As interpreted here, the Court's opinions establishing the requirements of individualized assessment and guided discretion pursue noncomparative and comparative justice respectively. As applied to retributive justice, systemic noncomparative justice requires that the sentencer prescribe the sentence due the offender for the offense according to the principles that justify punishment in that criminal justice system.

Although the opinions of various Justices differ regarding these principles, the opinions generally endorse deterrence and retribution as legitimate penal purposes that justify punishment.[126] These opinions do not provide precise conceptions of deterrence or retribution, but the ongoing emphasis in several opinions on the culpability of the offender for the offense is consistent with a retributive justification of punishment.[127]

Later cases addressing the application of capital punishment to juveniles and to mentally retarded offenders reflect the significance of personal culpability as an important criterion of justified capital punishment. Although the various opinions differ regarding the proper approach to capital sentencing with juvenile or mentally retarded offenders, they share the common premise that these conditions are important to capital sentencing because they are relevant to the culpability of the offenders as individuals or as a class.[128] These cases emphasize noncomparative justice as the principle requiring punishment of each offender in the manner appropriate to that individual's merits according to the systemic criteria of sentencing, and they emphasize culpability as an important criterion for the justification of capital punishment under the Eighth Amendment. Some critics might contest the Court's identification of individual culpability as an appropriate criterion for capital punishment under the Eighth Amendment.[129] For the purpose of the immediate

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126. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., plurality); Roberts v. Louisiana, 428 U.S. 325, 355 (1976) (White, J., dissenting).

127. *See* cases cited *supra* note 67 (addressing culpability); Moore, *supra* note 61, at 181-82.

128. Graham v. Collins, 506 U.S. 461, 516-17 (1993) (Souter, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 374-75 (1989) (Scalia, J., plurality opinion); Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); Thompson v. Oklahoma, 487 U.S. 815, 833-37 (1988) (Stevens, J., plurality opinion).

129. *Gregg*, 428 U.S. at 236-37 (Marshall, J., dissenting) (objecting to retribution as a legitimate penal purpose of punishment).

analysis, however, the important point is that the Court has identified culpability as an important societal criterion and that each sentencer acts consistently with the requirements of noncomparative justice by systemic standards when that sentencer sentences a defendant in a manner consistent with the societal values represented by systemic criteria.

As argued previously, consistent application of the criteria of noncomparative justice constitutes comparative justice by systemic standards. Thus, by establishing legal criteria of noncomparative justice that remain constant across cases within a jurisdiction, the criminal justice system would facilitate comparative justice. Although the community conscience as represented by the personal values of the jurors as a sample of the community or by the informal social consensus as understood by the jury might vary considerably from case to case, the societal values instantiated in law remain relatively constant across cases, absent fundamental changes in the relevant body of law. Thus, by interpreting "community values" as the societal values that the members of a society adopt collectively by enacting them as law as well as the underlying principles of political morality represented by that body of law, the criminal justice system adopts principles and criteria of noncomparative justice that remain relatively constant across cases and facilitate comparative justice.

This interpretation coheres with the principles of political morality underlying the legal institutions of a liberal society because it sentences offenders according to the principles and criteria adopted through the legal and political institutions that order the public jurisdiction through processes that provide competent adults with notice and with the opportunity to participate. Theorists who advance variants of liberal political theory differ regarding both their precise theoretical formulations and the structure of political institutions they endorse.[130] For the purpose of this Article, I only sketch an outline of structural political liberalism in order to provide the minimal foundation necessary to discuss the Court's capital punishment doctrine in the context of the criminal justice system of a liberal society.[131]

Structural political liberalism describes and defends basic institutions of political justice that provide a structure for a fair system of social cooperation among individuals who endorse a variety of comprehensive moral doctrines. Those who endorse various comprehensive moral doctrines can differ with one another regarding a number of important moral issues, principles, and obligations, yet converge on certain principles of political morality such that they can support mutually compatible liberal

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130. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 9 (1989).

131. *See* SCHOPP, *supra* note 78, § 3.3, at 64-75 (providing a more detailed discussion of this normative structure).

political institutions.[132] These institutions establish and protect public and nonpublic domains of jurisdiction. Citizens participate in and influence the public domain through democratic political institutions that embody the shared principles of political morality and protect the individual's discretion to pursue a broad range of life plans within the nonpublic domain.[133]

The rule of law is central to this political philosophy in that law in a liberal society defines and protects the boundaries of the public and nonpublic domains and regulates the conduct of individuals and of the government in the public jurisdiction. Criminal law represents important components of the societal standards of public morality by prohibiting some types of conduct as wrongful and by establishing societal standards of criminal responsibility that qualify persons as accountable participants in the public jurisdiction. In this manner, the criminal law protects individual standing by proscribing, preventing, and punishing culpable actions by some citizens that violate the rights and interests of others.[134] When a liberal state enforces the core rules of the criminal law, it maintains the public order and safety through deterrence and restraint, and it vindicates the standing of the victim by punishing and condemning criminal conduct that violates that person's rights or interests.

Criminal conviction and punishment for a specific offense condemns the defendant as one who has violated the societal standards of public morality represented by the criminal law under conditions of culpability by systemic standards.[135] This expression of condemnation is retributivist in the sense that it condemns the offender as one who committed the crime with the capacities required for culpability, and the severity of the condemnation reflects the degree of culpability. This punishment and condemnation reaffirms the standing of the defendant as one who qualifies for equal standing in the public domain insofar as the requirements of criminal responsibility limit criminal liability to those who violate the criminal law while possessing the capacities necessary to direct their conduct in compliance with a rule-based legal system through a process of competent practical reasoning. This expression of condemnation in proportion to culpability converges with the Court's discussion of retribution and culpability in capital cases.[136] The emphasis the Court's

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132. JOHN RAWLS, POLITICAL LIBERALISM §§ 1-3, at 4-22 (1996). Rawls refers to religious, moral, or philosophical comprehensive doctrines. *Id.* § 1, at 10. I refer to all of these as moral doctrines in order to include those systems or aspects of systems that people rely on to address moral questions regarding how we ought to live.

133. *Id.* at § 6, at 38.

134. SCHOPP, *supra* note 78, § 3.3.2, at 71.

135. *Id.* § 2.3.1, at 22 (discussing the five types of condemnation).

136. *See supra* notes 68-71 and accompanying text.

opinions place on sentencing in accord with offender culpability reflects the importance of the capacities needed to participate in the public jurisdiction as a responsible subject of the criminal law. These capacities enable the offender to act with the culpability that justifies the condemnation inherent in criminal punishment generally and in capital punishment specifically.

Authorizing the jury to sentence offenders by appeal to the community conscience understood either as moral principles endorsed by the jury as a sample of the community or as the informal social consensus as understood by the jury would violate the fundamental boundary between the public and nonpublic domains of a liberal society. It would do so by subjecting the offender to sentencing according to standards regarding which he had no notice and no opportunity to participate in establishing. Furthermore, such a practice undermines the equal standing of citizens under law in the public jurisdiction. By sentencing according to principles or criteria other than those established as societal standards embodied in law, sentencers subject individual offenders to standards that do not apply to citizens generally, including the sentencers. That is, these sentencers subject specific offenders to certain standards of capital sentencing, but they do not subject themselves or others to those same standards because those standards have no precedential force beyond the immediate case nor are they explicitly articulated or recorded.[137]

The adverse affects of this departure from the rule of law that orders the public jurisdiction extend beyond the offenders to the victims and to the law itself. Insofar as the expressive function of criminal punishment includes vindication of the law and of the standing of the victim, sentencing according to informal social standards denigrates the law and the standing of the victim. It denigrates the law by recognizing the authority of unelected individuals or small groups to depart from or to vary the interpretation of the law in particular situations. Sentencing according to informal social standards denigrates the standing of victims because it addresses violations of their interests and standing in the public jurisdiction through application of standards regarding which they had no notice and no opportunity to participate in establishing. Furthermore, the sentencers who apply these informal standards do not subject themselves or anyone else to those standards. Thus, they deny victims the respect represented by equal treatment under law.[138] This denial of equal respect constitutes the core of the comparative injustice suggested by the data indicating that

137. SCHOPP, *supra* note 78, § 6.3.3, at 175.
138. *Id.* §§ 6.3.3-6.3.6, at 176-85.

capital sentencing decisions in some jurisdictions differ by race of victim.[139]

In summary, the interpretation of "community values" as the societal standards adopted by the society collectively in the form of law and the principles of political morality underlying that body of law renders that notion consistent with the interpretation of the first ambiguity as requiring that the trial court admit and the sentencer consider all legally relevant mitigating evidence. Furthermore, these two interpretations render consistent the Supreme Court's requirements of guided discretion and individualized assessment, the underlying principles of comparative and noncomparative justice, and the relationship between the Court's capital punishment cases and the principles of political morality underlying a liberal society. Finally, these interpretations are consistent with allowing mitigation in justice or in mercy, providing that sentencing law provides guidelines for the systemic standards of justice or of mercy.

VII. TENSION IN PRACTICE: THE INSTITUTIONAL STRUCTURE OF CAPITAL SENTENCING

Although this interpretation of the relevant ambiguities renders the doctrine and the underlying principles consistent in principle, it raises serious questions regarding the ability of juries, and to a lesser extent the abilities of trial judges, to fulfill the role of capital sentencer. Juries are not well-suited for understanding the law at a level of complexity and generality that would enable them to understand and apply the societal standards represented by legal institutions. Empirical studies indicate that jurors or jury-eligible individuals have difficulty understanding jury instructions in general, those regarding capital punishment specifically, and those regarding aggravating and mitigating circumstances more specifically.[140] Thus, they encounter serious impediments to discharging their responsibility to apply the directly relevant law.

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139. BALDUS ET AL., *supra* note 55, at 149-60; David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 385, 393-404 (James R. Acker et al. eds., 1998) [hereinafter AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT].

140. William J. Bowers & Benjamin D. Steiner, *Choosing Life or Death: Sentencing Dynamics in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 139, at 309, 321-28 (indicating jurors' difficulty in understanding jury instruction in capital punishment cases regarding aggravating and mitigating factors); Craig Haney, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 139, at 351, 356-60 (indicating jurors' difficulty in understanding jury instruction in capital punishment cases regarding aggravating and mitigating factors). *See generally* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (indicating jurors' difficulty in understanding jury instructions generally).

Insofar as societal standards are understood as referring to the principles of political morality represented by the law of that jurisdiction, concern regarding comprehension is significantly exacerbated. Few jurors are familiar with the broader body of criminal law that provides the context for interpreting these principles and applying them to sentencing, or with the process of interpretation required by that task. Finally, jurors lack access to information regarding the pattern of capital sentencing in the jurisdiction, preventing them from making any serious effort to pursue comparative justice by sentencing a particular offender in a manner similar to other offenders who are similarly culpable by systemic standards. Thus, jurors frequently lack sufficient information, comprehension of specific jury instructions, and the basis for deriving broad underlying principles that represent societal values.

The same concerns apply, although to a lesser extent, to trial judges. Although trial judges are better prepared than jurors to comprehend sentencing standards specifically and the criminal law generally, most criminal trial judges spend much of their time applying specific provisions of the criminal law to specific offenses in the context of appellate court rulings. Thus, trial judges ordinarily concentrate on the application of specific provisions to particular factual situations rather than interpreting the principles underlying an integrated body of law. Similarly, few trial judges preside at a sufficient variety of capital trials to acquire familiarity with the broad range of circumstances that characterize the offenses and the offenders. Thus, they lack the comprehensive experience that would facilitate comparative justice in sentencing.

At first glance, one might interpret these practical problems as good reasons to seek alternative interpretations of the three ambiguities discussed previously. Unfortunately, the alternative interpretations of these ambiguities raise similarly serious concerns regarding implementation. To the extent that jurors must make moral assessments, for the purpose of sentencing, by applying community standards other than the societal standards represented by law to the circumstances of the offense and the character of the offender, they must do so on the basis of their own personal moral standards or perhaps by applying what they understand to be the widely shared informal moral standards in the limited and nonrepresentative subset of their community with which they are familiar. When juries apply these informal community standards, they encounter the difficulties previously discussed, and these generate the potential for particularly troubling injustice in the context of capital sentencing.

Different juries hear each capital case. If these juries apply personal moral standards or perceptions of the informal community consensus, these standards or perceptions can reasonably be expected to overlap to some degree, but they can also be expected to vary significantly across jurors and juries. The empirical data suggest that juries and mock jurors tend to

converge on verdicts in extreme cases and that discrimination by the race of the victim is minimal. They tend to diverge regarding verdicts and demonstrate more evidence of discrimination when presented with cases with moderate degrees of aggravation and mitigation.[141] This evidence suggests that by assigning juries the responsibility to select sentences in light of the informal community standards, the criminal justice system would undermine the comparative justice ideal regarding cases with moderate degrees of aggravation and mitigation. Sentencers apply standards of culpability and desert that are sufficiently vague that they enhance the risk of contamination by bias that can generate significantly divergent decisions in these relatively close cases.

Although these differences may reflect deliberate discrimination in some cases, the institutional structure within which sentencing juries must function elicits inconsistency apart from deliberate bias. This inconsistency can arise either because jurors have different conceptions of the applicable standards or because they lack the ability to consistently apply common standards across cases. Thus, juries can fulfill their responsibilities at the relatively abstract level of conscientiously applying their personal moral standards or their perceptions of informal community standards of culpability yet fail to fulfill the comparative justice principle that calls for similar treatment of similar cases and differential treatment of dissimilar cases in a manner that reflects their morally relevant differences. These factors can generate either arbitrary or discriminatory sentencing disparities. In short, conscientious juries are likely to undermine the comparative justice principle in relatively close cases by applying different personal moral standards, different interpretations of the informal moral consensus, or both. In application, informal community values vary from case to case.

Although variations across juries constitute departures from comparative justice, they do not represent a conflict or tension between comparative and noncomparative justice. Rather, they reflect the inadequacy of capital sentencing by case-specific sentencers for both comparative and noncomparative justice. Each responsible adult participates in the public domain of a liberal society as a subject of the legal and political institutions regarding which all have notice and an opportunity to participate in developing. Insofar as sentencers apply societal standards represented by law, they sentence offenders by the principles and criteria that legitimately order the public domain of the liberal society.[142] Insofar as specific sentencers undermine comparative justice by applying personal or informal community standards that vary

141. BALDUS ET AL., *supra* note 55, at 149-55, 318-23; Baldus & Woodworth, *supra* note 139, at 401.

142. *See supra* notes 131-38 and accompanying text.

across cases, at least some of these standards depart from the societal standards embedded in law. In these cases, the sentencers depart from noncomparative justice as well as from comparative justice because they sentence offenders according to standards other than the societal standards of retributive justice that legitimately order the public jurisdiction of a liberal society. In short, when sentencers rely on personal or informal community standards rather than on the societal standards embedded in law, they undermine both comparative and noncomparative justice. Furthermore, they violate the boundary between the public and nonpublic domains of the liberal society. The central tension does not occur between the comparative and noncomparative justice projects. Rather, it occurs between both of these projects and an institutional practice that relies on case-specific sentencers.

VIII. AN ALTERNATIVE SENTENCING STRUCTURE

Consider the possibility that a sentencing procedure relying on judicial panels might bring certain advantages for the purpose of promoting comparative and noncomparative justice. I do not purport to present a fully developed proposal here. I sketch the outline of one such approach in order to consider the potential relationships among alternative approaches to sentencing, the current doctrinal "tension," and the underlying principles of comparative and noncomparative justice. By assigning the responsibility for sentencing to a judicial panel, perhaps including the trial court judge and two other criminal court judges selected from a pool of qualified capital sentencing judges, a jurisdiction might promote the comparative justice function in several ways. The jurisdiction could systematically collect and analyze a broad range of information regarding relevant factors such as aggravating and mitigating circumstances and regarding irrelevant factors that might influence sentencing. The jurisdiction could analyze that data in order to identify correlations between capital sentences and those relevant and irrelevant factors. In this manner the jurisdiction could build a body of information regarding legitimate sentencing considerations in order to promote consistency and regarding illegitimate sentencing considerations in order to identify and correct distortions in the process.

A limited number of otherwise qualified judges could study this data and participate in sentencing panels that serve as sentencers in capital trials in the jurisdiction. By participating in a significant number of capital trials and studying the data from all such trials, the members of this pool of capital sentencing judges could become familiar with the circumstances and verdicts in the range of capital trials that occur in the jurisdiction. The panels could be required to write opinions articulating the aggravating and mitigating factors that justify their decisions, identifying the evidence that supports the findings that these factors apply, and explaining why these

factors support the sentence given. Thus, they could gradually develop a caselaw of sentencing that guides the decisionmaking of later panels and promotes increased consistency over time.[143]

Finally, the members of the pool of qualified capital sentencing judges could develop a broad understanding of the sentencing law governing the jurisdiction in which they preside, enabling them to understand, articulate, and apply the principles of political morality represented by that body of law. The claim here is not that members of a judicial sentencing pool would function as legal philosophers who develop a comprehensive political theory of a particular legal system.[144] Rather, they would pursue a more limited project in that they would develop a command of the law relevant to capital sentencing in that jurisdiction that would allow them to draw reasonable inferences about the principles of political morality represented by that particular body of law and about the manner in which these have been interpreted and applied in prior cases by trial and appellate courts. As they articulate these principles in sentencing opinions, the principles would become part of the recorded case law of capital sentencing, promoting consistency of interpretation across pool members and panels.

The emphasis on principles of sentencing reflects an important concern. Justice Harlan may well have been correct when he contended in *McGautha v. California*[145] that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[146] Some commentators contend that attempts to formulate aggravating and mitigating factors that accommodate all such circumstances have produced capital sentencing provisions that are so broad and vague as to provide no substantive limits or guidance.[147] Arguably, this situation reflects the interaction of three

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143. In the category of capital trials, I include all trials on charges that could result in a capital sentence. Thus, the panels would write opinions explaining the bases for decisions to apply capital punishment and for decisions to refrain from doing so. This case law of capital sentencing would enable the pool members and others to articulate the grounds that differentiate capital offenders and offenses that receive capital sentences and those that do not. One of many serious practical questions regarding such an approach involves the level of stress it would generate for pool members. In order to critically evaluate the force of practical concerns, one needs some clear understanding of the justification (or lack thereof) for the institution in principle.

144. Contrast the role of Dworkin's Hercules in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-30 (1977).

145. 402 U.S. 183 (1971).

146. *Id.* at 204.

147. *See, e.g.*, Kirchmeier, *supra* note 10, at 360-91; Steiker & Steiker, *supra* note 10, at 371-403.

factors: the attempt to articulate aggravating and mitigating circumstances rather than principles; the broad and unpredictable range of such circumstances; and application by case-specific sentencers. The interaction of the first two factors places legislatures in a dilemma. They can articulate the aggravating and mitigating circumstances in specific terms or in broad general terms. If they take the former approach, the unpredictable circumstances raised by some cases will generate intuitively unjust results. Alternately, if they take the latter approach, they produce lists of aggravating and mitigating circumstances that are broadly inclusive and stated in general terms, rendering them susceptible to many interpretations. Application of such provisions by case-specific sentencers renders it extremely difficult, if not impossible, to develop consistent sentencing.

Legislatures could articulate aggravating considerations in terms of general principles of sentencing involving, for example, desert, blameworthiness, culpability, capacities of accountability, risk, or others. Aggravating and mitigating factors stated in this fashion could accommodate the broad and unpredictable variety of circumstances referred to by Justice Harlan in *McGautha*. When applied by case-specific sentencers, however, they produce a problem with consistency in interpretation similar to that produced by broad general descriptions of aggravating and mitigating circumstances. The introduction of sentencing pools and panels provides an opportunity to improve the level of consistency in the interpretation and application of these principles through the processes of data collection and analysis, written case law of sentencing, and comparative analysis across cases by repeat sentencers.

Furthermore, the articulation and application of sentencing provisions in terms of principles renders the sentencing process more consistent with the normative framework provided by the criminal justice system in a liberal society. Recall that variations in sentences across juries attempting to apply community standards can occur at the relatively concrete level of interpretation of circumstances or at the more abstract level of principle.[148] Either type of variation can generate inconsistency across cases, but variation at the level of principle undermines the normative framework that supports the legal institutions of a liberal society. The distinction between the public and nonpublic domains is critical to a liberal society. Such a society orders the public domain through legal institutions representing principles and rules established through political processes in which all competent adults have the opportunity to participate.[149] Inconsistency in sentencing due to variations in the principles applied by different sentencers violates the fundamental distinction between the public and

148. *See supra* Parts V.D., VI.A.
149. *See supra* Part VI.C.

nonpublic domains and the equal standing of defendants, victims, and survivors as subject only to the principles and rules established through the political processes of the public domain.

Sentencing pools and panels provide the opportunity to improve consistency regarding both circumstances and principles. The broad and unpredictable range of circumstances that arise in different cases would limit the degree of consistency realistically achievable regarding circumstances. Consistency regarding the principles of sentencing applied is the critical concern in a liberal society, however, and sentencing pools and panels provide the opportunity to improve consistency in the interpretation and application of principle through mechanisms such as those described previously. Various alternative approaches using repeat sentencers might have advantages or disadvantages as compared to the pool and panel approach outlined here. I advance this approach only as an example of a type of sentencing institution that might reasonably be expected to improve convergence of sentencing practices with the principles of comparative and noncomparative justice represented by the guided discretion and individualized assessment doctrines as well as with the broader principles of political morality underlying the legal institutions of a liberal society.

The jury might continue to fulfill a substantive role in such a system. First, the jury would retain its current function in rendering a verdict at the guilt phase of capital trials. Second, insofar as jury participation is valuable for the purpose of maintaining citizen monitoring and constraint of state actors as those officials exercise lethal authority, a jurisdiction might require jury determinations regarding certain factual matters. The guilt phase jury could be authorized to hear the sentencing phase evidence and arguments and make findings of fact regarding matters relevant to aggravating or mitigating circumstances.[150] Depending on the specific questions at issue, for example, they might make findings that the defendant committed the murder for pecuniary gain, that the victim provoked the defendant, that the defendant suffers from mild mental retardation, or other relevant factual findings.

A jurisdiction might authorize juries to make recommendations to the judicial panel regarding nonspecified aggravating or mitigating circumstances presented by the evidence. Thus, the jury might recommend that the judicial panel consider, for example, the potential mitigating force of the defendant's social disadvantages or the potential aggravating force of the specific motives for this crime. The judicial panel would review these findings and recommendations in the context of the available

150. Walton v. Arizona, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting) (referring to traditional practices involving findings of facts regarding capital sentencing by juries).

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information regarding the sentencing decisions in other capital cases in the jurisdiction and as informed by the panel's understanding of the principles of capital sentencing and of the broader societal standards represented by the law. The precise range of jury findings and recommendations authorized would depend upon the principles of capital sentencing articulated in the jurisdiction's capital sentencing provision and upon the related responsibilities of the jury and of the judicial panel. The scope of the jury's authority would not allow, for example, jury findings or recommendations regarding matters decided during the guilt phase or requiring legal interpretation.[151]

No plausible approach to capital sentencing can produce complete consistency while allowing consideration of a full array of circumstances arising in capital cases. It seems reasonable to hypothesize, however, that some system of the general type outlined here could gradually articulate and apply with reasonable consistency the societal standards of retributive justice applicable to capital sentencing. By explicitly articulating such standards and applying them to the circumstances of each case, this process would advance the function of the Court's individualized assessment doctrine and promote noncomparative justice by systemic standards as applied to each offender. By continuing this process and developing a more explicit and comprehensive case law of capital sentencing, such a system would advance the function of the Court's guided discretion doctrine and promote comparative justice.

IX. CONCLUSION

I do not contend that this brief outline of one possible alternative approach to capital sentencing represents a fully developed solution to the search for comparative and noncomparative justice in capital sentencing. Rather, I present this sketch in order to illustrate the importance of clearly articulating the relationships among capital sentencing doctrine, applied sentencing practices, and the principles of comparative and noncomparative justice embedded in the broader set of legal institutions in which sentencing occurs. This process requires clarification and justification of specific interpretations of the central ambiguities in the case opinions and appeal to the principles of political morality embedded in the legal system. It seems reasonable to contend, for example, that judicial panels roughly of the type proposed could surpass juries or ordinary trial judges in providing deeper and broader understanding of the societal standards represented by the law. It also seems reasonable to expect that

151. I make no effort here to develop detailed parameters of jury fact finding. A fully articulated proposal would define a complimentary set of responsibilities for judicial panels and for juries.

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the extended practice of sentencing by such judicial panels could develop an official record of judicial reasoning that could promote comparative justice by increasing consistency in the interpretation and application of the systemic principles and criteria of retributive justice applied across cases.

These advantages of capital sentencing by judicial panels occur within the context of a conception of community standards as the societal standards represented by the legal system. In contrast, there is no obvious reason to believe that judicial panels would exceed juries in the ability to accurately represent or perceive the informal social consensus or that such panels would make more defensible judgments of personal morality. Thus, the most defensible sentencing practices might vary across legal systems in a manner that reflects differences in the principles of retributive justice represented by the criminal law in those systems.

Recall the distinctions drawn in Part I among the moral justification of capital punishment, doctrinal analysis, and problems of practical application. This Article directly addresses a matter of doctrinal analysis involving the purported contradiction or tension between guided discretion and individualized assessment. I take no position here regarding the moral justification (or lack thereof) for capital punishment or regarding the myriad practical problems that arise in attempting to apply any institution of capital punishment. The analysis advanced in this Article demonstrates, however, that these three levels of analysis interact such that satisfactory resolution of issues arising at any of these three levels can rest on clarification of issues at the other levels. The resolution proposed here of the purported contradiction or tension arising in Supreme Court doctrine, for example, rests in part upon the premise that the justification of capital punishment in a liberal society must address noncomparative and comparative justice as defined by the principles of political morality embedded in the legal institutions regulating the public jurisdiction of that society. An institution of capital punishment that fulfills the requirements of noncomparative and comparative justice by these standards qualifies as justified by the conventional public morality of that society. Such justification does not exhaust the moral inquiry, however, because the conventional morality embedded in society's legal institutions remains subject to critical moral evaluation.

Similarly, legal practices such as the alternative approach to capital sentencing by judicial panels sketched in Part VIII must be evaluated in terms of their effectiveness in applying the legal doctrine in a manner that renders capital punishment in practice consistent with the principles of political morality embedded in the legal system that orders the public domain of that society. An analysis demonstrating that the conventional principles of political morality justifying capital punishment in a particular society required application of community standards in the form of the

informal social consensus, for example, would undermine the argument advanced here for sentencing by judicial panels.

In summary, a comprehensive justification of an institution of capital punishment for a particular legal system would integrate three levels of analysis. First, it would provide a systemic justification in that it would interpret the relevant legal doctrine in a manner that rendered that doctrine internally coherent and consistent with the broad principles of political morality embedded in the larger legal system that orders the public domain of that society. This Article represents an initial attempt to address this level of analysis in that it advances an interpretation of the Court's requirements of guided discretion and individualized assessment that renders these components of legal doctrine internally coherent as well as consistent with each other, with systemic principles of retributive justice, with pursuit of comparative and noncomparative justice, and with the principles of political morality underlying the legal institutions of a liberal society. Second, a comprehensive justification would provide a critical moral justification for capital punishment by appeal to defensible moral principles. In order to comprehensively justify a particular institution of capital punishment, this critical moral justification must cohere with the principles of political morality embedded in the legal institutions of that society such that an integration of the systemic and critical levels of analysis would justify the institution of capital punishment by appeal to the principles embedded in the legal system and to compatible principles of critical morality. Third, the comprehensive analysis would defend the practical application of capital punishment in a particular institutional structure as consistent with the integrated systemic and critical justification.[152]

One significant component of the continuing debate regarding capital punishment involves the failure to clearly distinguish these three levels of dispute or the failure to clearly interpret and defend each in the context of the relationships among the three. The judgment that the doctrines of guided discretion and individualized assessment are irreconcilable reflects the acceptance of the proffers formulation of the ambiguity regarding the range of evidence the trial court must admit and the sentencer must consider, and this interpretation reflects the failure to address the issue in the context of the underlying principles of noncomparative and comparative justice.[153] The Court's opinions provide no analysis supporting this formulation. Indeed, they provide no evidence that the

152. By identifying three levels of analysis, I do not suggest that these must be addressed sequentially. Rather, the need for an integration of the three suggests a process of analysis that addresses the levels separately and in combination.

153. Callins v. Collins, 510 U.S. 1141, 1152-59 (1994) (Blackmun, J., dissenting); *Walton*, 497 U.S. at 661-67 (Scalia, J., concurring).

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Court recognized the ambiguity between the two formulations. The analysis advanced in Part VI of this Article provides good reason to reject the proffers formulation. This analysis rests partially upon the interpretation of community values as societal standards and upon the recognition that in order to carry justificatory force in the public jurisdiction of a liberal society, those societal standards must pursue noncomparative and comparative justice by appeal to the principles of political morality embedded in law.

The analysis advanced here neither establishes nor undermines the claim that capital punishment is justified in principle. Neither does it establish or refute the claim that any particular institution of capital punishment currently in place provides justifiable practices of capital punishment. Rather, it demonstrates substantive and methodological points about current doctrine. Substantively, it refutes the purported contradiction or tension between the requirements of guided discretion and individualized assessment. Methodologically, it demonstrates that clarification of specific doctrine requires interpretation in context of broader systemic standards, including the systemic principles and criteria of retributive justice. These systemic standards are subject to further evaluation regarding coherence with the broader political morality embodied in that society's legal institutions and with critical moral argument. A comprehensive justification of a particular institution of capital punishment would integrate all three levels of analysis.

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