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ARTICLES

CONCEPTS OF CULPABILITY AND DEATHWORTHINESS: DIFFERENTIATING BETWEEN GUILT AND PUNISHMENT IN DEATH PENALTY CASES

*Phyllis L. Crocker**

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INTRODUCTION

The punishment of death is supposed to be reserved for those defendants who commit the most grievous murders *and* deserve the most extreme punishment. It is constitutionally insufficient to conclude that because a defendant is guilty of committing murder, death is the only deserved punishment.[1] The judgment that a defendant is one of the few who will be sentenced to death requires an inquiry that looks beyond the defendant's guilt to consider whether the defendant is worthy of a death sentence. This article argues that the distinction between a defendant's guilt and deathworthiness is so often obscured that defendants who are not worthy of the death penalty are frequently sentenced to die in violation of the Eighth Amendment.[2]

Under the Eighth Amendment, the United States Supreme Court has held that the punishment of death is not mandatory;[3] the decision

1. *See infra* notes 3-10.

2. Many critiques of the death penalty system, and its constitutionality, exist. *See, e.g.*, Symposium, *The Death Penalty: Race, Poverty and Justice*, 35 Santa Clara L. Rev. 419 (1995); *Challenging the Death Penalty: A Colloquium*, 18 N.Y.U. Rev. L. & Soc. Change 245 (1990-1991); *Challenging the Death Penalty: A Colloquium Part Two*, 18 N.Y.U. Rev. L. & Soc. Change 537 (1990-1991). This article addresses a fundamental problem with the imposition of the death penalty that implicates its constitutionality as well as its implementation as a matter of policy. While this article seeks to find coherence in the jurisprudence of the death penalty, I am also aware of the numerous voices declaring this an impossible task. *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (concluding that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies"); Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 395 (concluding that as early as 1982, the "Supreme Court seem[ed] to have decided that it no longer want[ed] to use constitutional law to foster legal formulas for regulating moral choice at the penalty trial"). Nonetheless, given that the death penalty is currently a possible punishment in 38 states, as well as in the federal system, it remains important to discern when that punishment is improperly imposed.

3. Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that a mandatory death penalty does not comport with contemporary social values, does not avoid arbi-

to impose the death penalty must reflect a judgment about the appropriate punishment for the individual defendant.[4] Every death penalty statutory scheme seeks to effectuate the requirement of individualized sentencing through a bifurcated proceeding.[5] At the guilt phase[6] the jury determines whether the defendant is guilty of committing a murder[7] for which the death penalty may be an appropriate punish-

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trary jury decisions, and does not allow for individualized sentencing). This constitutional principle is based on the premise that the commission of the same crime, even first degree murder, does not necessarily deserve the same punishment. Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (noting that the move away from mandatory sentencing reflected the developing view that "individual culpability is not always measured by the category of the crime committed") (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)); Sumner v. Shuman, 483 U.S. 66, 75 (1987). *But see* Graham v. Collins, 506 U.S. 461, 486-88 (1993) (Thomas, J., concurring) (suggesting that mandatory punishments are a "reasonable legislative response" to concerns about unguided discretion and discriminatory treatment of defendants); Walton v. Arizona, 497 U.S. 639, 671-72 (1990) (Scalia, J., concurring) (contending that a mandatory death penalty is not unconstitutional for crimes traditionally punished by death because it is neither cruel nor unusual).

4. *See, e.g.*, *Woodson*, 428 U.S. at 303-05 ("A process that accords no significance to relevant facets of the character and records of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."); *see also* Gregg v. Georgia, 428 U.S. 153, 197 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (holding that the Georgia statute was constitutional in part because it required jury to consider "the circumstances of the crime and the criminal"); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976) (same); Jurek v. Texas, 428 U.S. 262, 271-74 (1976) (same); *Roberts*, 428 U.S. at 333 (holding that the Constitution requires "focus on the circumstances of the particular offense and the character and propensities of the offender").

5. All death penalty schemes provide for a bifurcated decisionmaking process. Steven Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 3 n.4 and app. at 1 (1980). In *Gregg*, a plurality of the Court recognized that concerns regarding arbitrary and capricious sentences, expressed in *Furman v. Georgia*, 408 U.S. 238 (1972), were "best met" by bifurcated proceedings. *Gregg*, 428 U.S. at 195. In a unitary system, guilt and punishment were one decision. *See, e.g.*, Winston v. United States, 172 U.S. 303, 312-13 (1899) (noting that a jury could return a verdict of guilty or guilty without capital punishment). The drawbacks of a unitary system included the admission of evidence related to sentencing but unrelated to, and possibly prejudicial to, guilt. *Gregg*, 428 U.S. at 190-95; *see also* Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1108-25 (1953); Weisberg, *supra* note 2, at 309-10. A bifurcated system promised what a unitary system could not: At the guilt phase the jury would hear evidence relevant to guilt; at the punishment phase the jury could hear additional evidence, from both sides, relevant to its sentencing decision, but appropriately excluded from the guilt phase. *See Gregg*, 428 U.S. at 190-92.

6. Throughout this article I will refer to this as the guilt phase. This does not presuppose that every defendant will be found guilty, but, since this article focuses on punishment, the first phase must have resulted in a finding of guilt.

7. The death penalty is a constitutional punishment for the crime of murder. *Gregg*, 428 U.S. at 176-78. With rare exception, it is not contemplated outside of the crime of murder. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality) (holding that the death penalty was an unconstitutional punishment for raping an adult woman); Bureau of Justice Statistics, U.S. Dept. of Justice, Capital Punishment 1995, at 3 tbl. 1 (1996) [hereinafter "Bureau of Justice Statistics"]. *But see* State v. Wilson, 685 So. 2d 1063 (La. 1996) (finding the death penalty to be a constitutionally permitted

ment.[8] If so, at the punishment phase the jury[9] must make an individ-

punishment for raping a child under twelve years old). Currently, all defendants on death row have been convicted of murder. Bureau of Justice Statistics, *supra* at 1.

Though designated differently depending on the jurisdiction, the relevant crime of murder is always the highest classification of homicide recognized in the state. *See, e.g,* "murder," Ga. Code Ann. § 16-5-1 (1996); "first degree murder," Pa. Const. Stat. Ann. tit. 18, § 2502(a) (West 1983); "aggravated murder with specifications," Ohio Rev. Code Ann. §§ 2903.01 (aggravated murder) and 2929.04(A) (specifications required in indictment for death penalty to be a possible punishment) (Anderson 1995); "capital murder," Tex. Penal Code Ann. § 19.03 (West 1994); *see also* James R. Acker & Charles S. Lanier, *Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 Crim. L. Bull. 291, 297-302 (1993) (describing murder statutes in death penalty jurisdictions). Throughout this article I will refer to "murder" in order to designate that which the jury decides at the guilt phase. The substantive difference between the designations given to the highest form of homicide is whether a circumstance that aggravates the murder, thus making the defendant "death-eligible," *see infra* note 8, is included in the statutory definition of the crime or whether the presence of an aggravating factor is determined at the punishment phase. This will affect whether the jury decides at the guilt or punishment phase that the defendant is eligible to be sentenced to death.

8. This is the doctrine of "death eligibility" under which the class of murders for which a defendant may be sentenced to death is circumscribed. Tuilaepa v. California, 512 U.S. 967, 971-72 (1994). For a death penalty statutory scheme to be constitutional, the United States Supreme Court requires that it distinguish between those eligible for death from those who are not by genuinely narrowing the class of murderers. *Id.*; Zant v. Stephens, 462 U.S. 862, 878 (1983) (stating that the Constitution requires aggravating circumstances to "circumscribe the class of persons eligible for the death penalty"); Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (holding that a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not") (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also* Maynard v. Cartwright, 486 U.S. 356, 363-65 (1988) (noting that the facts of the murder alone "however shocking they might be" are not enough to warrant the death penalty absent a narrowing principle). The existence of a statutory aggravating circumstance may be established at the guilt or punishment phase. Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988).

Some defendants are not "eligible" for the death penalty because the punishment is disproportionate to the crime, *see Coker*, 433 U.S. at 592 (holding that the death penalty is disproportionate for the crime of rape of an adult woman), because of the defendant's age, Thompson v. Oklahoma, 487 U.S. 815, 833-838 (1988) (Stevens, J., plurality) (stating that the death penalty is disproportionate for defendants under sixteen), or because of the defendant's degree of culpability, Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding the death penalty disproportionate for an accomplice who did not kill or intend to kill). *See infra* Part I.B.1. a. and c. The Supreme Court rejected the argument that the death penalty is a per se disproportionate punishment for mentally retarded defendants in Penry v. Lynaugh, 492 U.S. 302, 330-40 (1989). *But see* Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. Rev. L. & Soc. Change 59 (1996) (describing and analyzing statutes post-*Penry* that exclude the mentally retarded from eligibility for the death penalty).

9. The sentencing decision may be made by the judge or the jury. Spaziano v. Florida, 468 U.S. 447, 459 (1984) (holding that the Sixth Amendment does not require sentencing by a jury); *see also* Gillers, *supra* note 5, at 13-14 (describing the various types of state statutory schemes for who decides the appropriate sentence for the defendant in a death penalty case); James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 Crim. L.

ualized determination about whether the defendant should be sentenced to death or life imprisonment.[10]

Despite the constitutional command of individualized sentencing, the bifurcated decisionmaking process does not ensure that the punishment determination is separate from the guilt decision. This fails to occur because the conceptual differences between the determinations made at the two phases are often elusive. Confusingly, both determinations are described as judgments about the defendant's culpability. At the guilt phase, the jury must decide whether the defendant possessed the mental state, or "culpability," required to commit the murder.[11] Although jurors engage in a different inquiry at the punishment phase, courts frequently refer to the judgment jurors must make as whether the defendant's culpability warrants the imposition of the death penalty.[12]

Using the term "culpability" to describe the fulcrum on which the two distinct inquiries turn is not only confusing, but more importantly, it is inaccurate. The dual use of culpability is confusing because it suggests that the two determinations refer to the same issue: the defendant's culpability for the crime as decided at the guilt phase. This results in courts,[13] prosecutors,[14] and juries[15] combining the guilt and

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Bull. 19, 20-27 (1995) (analyzing the effect of the judge or the jury making the sentencing decision). Throughout this article I will refer to the sentencer as the jury.

10. States implement these constitutional requirements through a variety of statutory schemes. *See Spaziano*, 468 U.S. at 464 (noting that no "one right way" exists to design a death penalty statutory scheme). The Constitution requires only that the death sentence not be imposed arbitrarily or capriciously. *Gregg*, 428 U.S. at 188-89. This may be accomplished through any statutory scheme that narrows those eligible for the death penalty and allows for individualized consideration of the appropriate sentence. *Tuilaepa*, 512 U.S. at 971-75 (describing the two-step process of eligibility and selection); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355 (1995) (offering an insightful analysis of constitutional channeling and guiding requirements). The decisionmaking process usually follows one of three models: most states require the jury to "balance" mitigating and aggravating circumstances; some states instruct the jury to "consider" the mitigating and aggravating circumstances; and three states ask the jury to answer "special issue questions." Acker & Lanier, *supra* note 9, at 27-52 (analyzing how different sentencing formulas affect the sentencing decision).

Each jurisdiction also may decide which punishment options are statutorily authorized: death, life without the possibility of parole, or a term of years. *See id.* at 55-56. In sixteen states life without the possibility of parole is the exclusive alternate sentence to capital punishment; in twelve states the choice is between all three alternatives; and in twelve states the options are death and a specified term of years. *Id.*

11. *See infra* note 62.

12. *See infra* note 65.

13. *See infra* Part II.

14. *See infra* Part II.

15. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1089-90 (1995) (reporting that one third of jurors surveyed in seven states thought, prior to the start of the punishment phase, that the defendant should be sentenced to death); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death*

punishment phase determinations into one decision—whether the defendant is guilty of committing murder—instead of two decisions—one about the defendant's guilt and the second about his[16] deserved punishment. The repeated use of the term culpability at the punishment phase is inaccurate because the defendant's "culpability" for the crime does not encompass the scope of the punishment-phase inquiry. The punishment-phase determination is not a recapitulation of the guilt-phase decision, but both a reconceptualization of the defendant's guilt-phase culpability and the consideration of new factors relevant only to punishment. Equating guilt and punishment defeats the purpose of individualized sentencing in a bifurcated proceeding.

This article argues that the correct conceptualization of the punishment-phase determination is one that asks about the defendant's deathworthiness, not his culpability.[17] Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant's culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder. Deathworthiness appropriately refocuses the inquiry from whether the defendant is blameworthy—the question resolved at the

Penalty Cases, 15 Am. J. of Crim. Law 1, 41-47 (1987-88) (finding that 54% of jurors interviewed thought the death penalty was mandatory or the expected punishment for first degree murder); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds about the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L.J. 1183, 1191-95 (1995) (noting that the majority of jurors interviewed made guilt and punishment decisions simultaneously); *see also* Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1228 (1995) (observing that studies indicate that jury instructions often contribute to a narrow focus on the crime rather than the broader non-crime related factors); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters*, 18 Law & Hum. Behav. 411, 420-22 (1994) (stating that in a study on the comprehensibility of jury instructions, 45% of subjects focused exclusively on nature and circumstances of the crime rather than the character and background of defendant).

16. This article intentionally uses "he" to describe defendants. As of April 30, 1996, 98.40% of those on death row were men. NAACP Legal Defense Fund, Death Row, U.S.A. 949 (1996). Professor Elizabeth Rapaport explores the reasons for this discrepancy in *Some Questions about Gender and the Death Penalty*, 20 Golden Gate U. L. Rev. 501 (1990).

17. For a long time using the word "deathworthy" troubled me because it seemed to presume that death was the proper response for the jury to make. But I now understand "deathworthiness" in a different way. In many respects, the process of determining which murderers will be sentenced to death is based on the presumption of life, not death, as the punishment. First, only certain murders may be punished by death; all others are subject to a sentence of a term of years. Second, within the limited set of murders, the class of defendants is narrowed to those deemed death-eligible; all those who are not will be sentenced to a term of years. Finally, among those who are eligible for death, the jury must decide whether the individual defendant is worthy of death; if not he will be sentenced to a life sentence. Thus, determining that the defendant is among the most heinous of murderers should reflect an assessment that he is worthy of death as an extraordinary punishment. The death penalty is a punishment to be imposed in the rare case, at all other times, the presumed sentence is life imprisonment. I thank Professor Jeffrey J. Pokorak for contributing to this insight.

guilt phase—to whether the defendant is worthy of being sentenced to death—the judgment made at the punishment phase.[18]

This article explores the difference between assessing guilt and imposing punishment in death penalty cases by analyzing the concept of culpability and examining the ramifications of failing to distinguish between the determinations a jury must make at each stage. Part I identifies the meaning of culpability as it is differently used at the two trial phases. This part focuses on the United States Supreme Court's death penalty jurisprudence to demonstrate the distinction between the two inquiries. While the Supreme Court itself uses the same terminology, the proper scope of the punishment phase includes aspects of the crime and the defendant that are outside the scope of, and irrelevant to, his culpability as decided at the guilt phase as well as factors related to the defendant's culpability for the crime as decided in that first phase. Despite the ostensible recognition of the difference between a defendant's culpability for the crime and his deathworthiness, courts frequently act as though a finding of guilt is indistinguishable from a finding that the death penalty is the only appropriate punishment.

Part II analyzes three situations in which courts, including the Supreme Court, conflate the two inquiries. For example, courts frequently employ the guilt-phase insanity test as the standard by which to judge a defendant's punishment-phase mitigating evidence of mental illness. Not only does this unconstitutionally restrict the jury's consideration of mitigating evidence,[19] it effectively limits the jury's consideration of the proper punishment to factors that are indicia of guilt.

Part III considers why it is so difficult to separate the decision about a defendant's culpability at the guilt phase from his deathworthiness at the punishment phase, and offers suggestions for how to begin addressing this persistent problem. This part posits that society's moral outrage at convicted murderers is a principal reason that courts, prosecutors, and jurors collapse guilt and punishment. Nonetheless, the constitutional imperative of individualized sentencing means that the legal system must maintain the difference between guilt and punishment. To properly effectuate the distinction requires a new language—one focused on the defendant's deathworthiness rather than his culpability—and a new approach to the jury's decisionmaking process—one that includes instructions to the jury on the difference between its two determinations.

18. *See infra* notes 341-42 and accompanying text.
19. *See infra* notes 41-42 and accompanying text.

I. DISTINGUISHING BETWEEN THE GUILT AND PUNISHMENT PHASES

The move from the guilt phase to the punishment phase may be expressed superficially as a shift from "did he commit murder?" to "should he die for committing murder?" A finding that the defendant is guilty of murder establishes that he will be punished, but not that he will be sentenced to death. The determinations are related but distinct.

The differences between the determinations made at the two phases are apparent in the evidence that the jury may consider at each stage. Nonetheless, no coherent framework exists for distinguishing how the evidence informs the defendant's culpability for the murder charged from how it bears on his culpability for purposes of imposing death.[20] This part first examines the evidentiary differences between the two phases of a death penalty trial and then identifies and analyzes the distinctions between the concepts of culpability used at each phase. This analysis reveals both the relationship and the disjunction between finding a defendant guilty of murder and then determining whether to sentence him to life imprisonment or death.

A. *Evidentiary Differences Between the Guilt and Punishment Phases*

The types and scope of evidence the jury may consider at the guilt and punishment phases, as well as the qualitative difference between the two decisions, demonstrate that the punishment phase focuses on a new, albeit related, question from the guilt phase. The distinctions are also evident when one examines the aggravating and mitigating factors that are considered constitutionally and statutorily relevant to the sentencing decision.

At the guilt phase of a death penalty trial, the jury must decide whether the defendant is guilty of the highest degree of murder recognized in the jurisdiction. The defendant's guilt is determined by the congruence of mental state, act, causation,[21] and absence of de-

20. Throughout this part, I use "culpability" to refer to the scope of the inquiry about the defendant that the jury makes at each stage. As I argue in the Introduction and in Part II, culpability does not accurately describe the focus of the jury's inquiry. Rather, the punishment-phase inquiry should be cast as one about the defendant's deathworthiness. Because the Supreme Court uses "culpability" to describe what is, in fact, a different inquiry at the punishment phase, I use culpability for the sake of consistency with the Supreme Court.

21. *See* Joshua Dressler, Understanding Criminal Law 78 (2d ed. 1995) ("[T]he fully stated rule of criminal responsibility [is]: a person is not guilty of an offense unless her conduct, which must include a voluntary act, and which must be accompanied by a culpable state of mind (the *mens rea* of the offense), is the actual and proximate cause of the social harm, as proscribed by the offense." (footnotes omitted)); *see also* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 212 (2d ed. 1986) ("The basic premise that for criminal liability some *mens rea* is required is expressed by the

fenses.[22] The jury may consider evidence relevant only to the defendant's conduct and mental state at the time of the crime.[23] The prosecution may not present testimony about the defendant's prior criminal conduct unless it falls within a limited exception.[24] Nor may the prosecutor rely on evidence about the defendant's bad character as an indicia of guilt.[25] Similarly, the defendant may not present a defense based on evidence of his general good character.[26] Neither side may rely on hearsay, unless it falls within the normal set of exceptions.[27]

In contrast, at the punishment phase, the jury may consider a greater breadth of evidence than that allowed at the guilt phase.[28] This evidence may include information about the defendant at the time of the crime as well as prior to and after the crime, including his future conduct that either side considers relevant to the sentencing

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Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).").

22. Dressler, *supra* note 21, at 181-97 (discussing defenses based on justification and excuse); *see generally* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199 (1982) (classifying and analyzing defenses as failure of proof defenses, offense modification defenses, justifications and excuses, and nonexculpatory public policy defenses).

23. Williams v. New York, 337 U.S. 241, 247 (1949) (noting that the guilt phase is limited to evidence "strictly relevant" to the particular offense charged); Dressler, *supra* note 21, at 177.

24. *E.g.*, Fed. R. Evid. 404(b) (stating that other crimes may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); John William Strong, et. al., McCormick on Evidence, § 190 (4th ed. 1992) (explaining limited purposes for which prior criminal conduct may be relevant, e.g., to establish circumstances of the crime, conspiracy, similarity to current crime, motive).

25. McCormick, *supra* note 24, § 190; *see, e.g.*, Nobles v. State, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992) (en banc) (remarking that it is improper to try defendant for being a criminal generally); *see also* George Fletcher, Rethinking Criminal Law 491 (1978) ("[G]uilt, culpability and blameworthiness . . . do not raise questions of the actor's general moral worth or even of his moral wickedness in a particular situation. They pinpoint the specific inquiry into whether it is fair to hold the actor accountable for an act of legal wrongdoing.").

26. McCormick, *supra* note 24, § 191 (observing that character evidence may be relevant circumstantial evidence: the defendant charged with murder may show he is peaceable, but his honesty is not relevant).

27. Fed. R. Evid. 801-04; McCormick, *supra* note 24, §§ 245-53.

28. Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (noting that issues irrelevant at the guilt phase "step into the foreground and require consideration at the sentencing phase"); Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (rejecting argument that statute allowed too wide a scope of evidence at punishment phase); *see* Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (holding that the hearsay rule must sometimes yield to ensure the constitutional requirement of fairness and reliability at punishment phase); Acker & Lanier, *supra* note 7, at 310-11; Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 U.M.K.C. L. Rev. 411, 435-59 (1992) (showing that at the sentencing phase in a majority of states, rules of evidence are either not applied or selectively applied).

determination.[29] In many jurisdictions, the State may present evidence not only of prior convictions, but also prior unadjudicated offenses.[30] The defendant may present a wide range of evidence, for example, his age,[31] mental impairment,[32] or good character and deeds.[33] In states where the defendant may not present evidence of intoxication or diminished capacity as a defense to the charge of murder, he might be able to present it as relevant to the jury's punishment decision.[34] The jury considers this expanded evidence as it relates to the existence of aggravating or mitigating circumstances which form the basis of its sentencing decision.

Constitutionally, statutory aggravating circumstances are designed to narrow those who are eligible to be sentenced to death by separating those murderers for whom death may be warranted from those for whom it is not.[35] Based on evidence about the crime or the defend-

29. Tuilaepa v. California, 512 U.S. 967, 977 (1994) (recognizing that both backward and forward looking criteria are appropriate); *see infra* Part I.B.

30. *See* Williams v. Lynaugh, 484 U.S. 935 (1987) (Marshall, J., dissenting from denial of certiorari) (arguing that the introduction of unadjudicated offenses makes sentencing unreliable); Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249, 1267-82 (1993) (examining the divergent approaches of the state courts on the issue of unadjudicated offenses).

31. *E.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (holding that age was a constitutionally relevant mitigating factor).

32. *E.g.*, *id.* at 116 (holding court must consider evidence of mental disabilities as mitigating); Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989) (holding jury must be able to consider evidence of mental retardation, organic brain damage, and childhood abuse).

33. *E.g.*, Boyde v. California, 494 U.S. 370, 381-82 (1990) (examining how mitigating evidence of good character and deprived childhood are considered under California jury instructions); Skipper v. South Carolina, 476 U.S. 1, 8-9 (1986) (allowing defendant to present evidence of his good conduct in jail).

34. *E.g.*, Tex. Penal Code Ann. § 8.04 (West 1994) (permitting voluntary intoxication to be presented at the punishment phase as evidence of temporary insanity, though it is not allowed as a defense to the crime); State v. Osborn, 631 P.2d 187, 196 n.5 (Idaho 1981) (acknowledging that intoxication is not a defense but may be a mitigating factor); Johnson v. State, 439 A.2d 542, 549-56 (Md. 1982) (holding that diminished capacity to form requisite intent is not a defense at the guilt phase but is relevant as a mitigating circumstance); State v. Wilcox, 436 N.E.2d 523, 524-28 (Ohio 1982) (same).

35. Zant v. Stephens, 462 U.S. 862, 877-78 (1983). The Supreme Court has placed few constitutional restrictions on aggravating circumstances. McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) (noting that narrowing circumstances must be rational). Aggravating circumstances must not be unconstitutionally vague. Maynard v. Cartwright, 486 U.S. 356, 361-64 (1988). *But see* Walton v. Arizona, 497 U.S. 639, 653-55 (1990) (holding that if the sentencer is the trial court, appellate court decisions, rather than the statute itself, may limit the construction of aggravating circumstance). Certain conduct, such as constitutionally protected speech, may not be characterized as aggravating. Dawson v. Delaware, 503 U.S. 159, 166-67 (1992) (holding that the prosecution may not introduce evidence of defendant's abstract racist beliefs). Mitigating evidence may not be turned into aggravating. *See Zant*, 462 U.S. at 885. It is not constitutionally necessary, however, to designate evidence as aggravating or mitigating. Tuilaepa v. California, 512 U.S. 967, 981 (1994) (Stevens, J., concurring). Some

ant[36] presented by the prosecution,[37] the jury must find at least one statutory aggravating circumstance in order for the death penalty to be a possible punishment.[38] When the jury finds an aggravating circumstance it serves to separate that defendant from others who have committed murder by identifying the crime as one of the most egregious, the most heinous, or the most hateful.[39]

Mitigating circumstances are constitutionally defined as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[40] Mitigating evidence need not rise to the level of a defense to the crime.[41] Thus, even though evidence may not provide a

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cast doubt on this conclusion, noting that evidence of the defendant's mental illness, proffered as mitigating, may be especially prone to be viewed as aggravating unless the jury is properly instructed on its role in their deliberations. *See* James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 786-89, 817-21 (1978); Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 299-300 (1989).

36. *Tuilaepa*, 512 U.S. at 973 ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant . . . .").

37. Although the Supreme Court has never required a particular standard of proof, most states require the prosecution to prove the existence of the aggravating circumstance beyond a reasonable doubt. Acker & Lanier, *supra* note 7, at 309-10.

38. This is what makes him death-eligible. Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988). Some states list over fifteen statutory aggravating circumstances. *See, e.g.*, Cal. Penal Code § 190.2(a) (West 1988) (nineteen plus subparts); Mo. Ann. Stat. § 565.032(2) (West Supp. 1997) (seventeen); Pa. Stat. Ann. tit. 42, § 9711(d) (West Supp. 1997) (seventeen). Once a statutory aggravating factor makes the defendant death-eligible, the jury may consider non-statutory aggravating circumstances in deciding how to punish the defendant. Zant v. Stephens, 462 U.S. 862, 878-79 (1983).

39. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (holding that the facts did not show a state of mind more depraved than others guilty of murder); Tison v. Arizona, 481 U.S. 137, 157 (1987) (stating that it is necessary to distinguish the most culpable and dangerous of murderers). *Cf.* Gregg v. Georgia, 428 U.S. 153, 184 (1976) (recognizing that capital punishment represents "the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death"). Many scholars question the extent to which the enumeration of aggravating circumstances actually narrows the class of those eligible for the death penalty when numerous circumstances exist that may aggravate a first degree murder into a death eligible murder. *See* Steiker & Steiker, *supra* note 10, at 373-74 (observing that the Court has approved aggravating factors that encompass virtually every murder); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 Case W. Res. L. Rev. 1, 29-32 (1995) (arguing that there is a need to narrow rather than expand who we consider the most depraved killers); *cf. Tuilaepa*, 512 U.S. at 986 (Blackmun, J., dissenting) (contending that sentencing factors may be exploited to convince jurors anything is aggravating).

40. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, J. plurality)). *But see infra* note 344 (discussing how the limits on the way the jury is instructed effectively limits what the jury may consider).

41. *Eddings*, 455 U.S. at 113-14. The Court rejected the lower court's limitation on relevant mitigating evidence as that which provided a "legal excuse from criminal responsibility." *Id.* at 113. The Oklahoma Court of Criminal Appeals had rejected Eddings's evidence of emotional and mental disorders because he "knew the difference between right and wrong," and because the evidence of his family life was "use-

legal excuse from criminal responsibility at the guilt phase,[42] the same evidence may serve to mitigate a defendant's punishment by explaining his conduct in a way that shows he is not worthy of a death sentence.[43] For example, as an excuse defense, evidence regarding a defendant's mental disability may be presented to show that he was insane at the time of the crime.[44] Even if rejected by the jury as a defense to the crime of murder, the evidence may allow the jury to understand the defendant or his conduct in a way that affects its pun-

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ful in explaining his behavior, but it did not excuse the behavior." *Id.* (quoting Eddings v. State, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980)). The Court held that these limitations violated *Lockett. Id.; see also* Sumner v. Shuman, 483 U.S. 66, 78-79 (1987) (stating that whether death penalty is appropriate may depend on a "circumstance [that] existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge"). Some statutory definitions of mitigating circumstances reflect the distinction between a defense at guilt or punishment by explicitly stating that the factor need not rise to the level of a defense. *See infra* note 229.

42. Defenses based on a theory of excuse include insanity, intoxication, subnormality (mental retardation), and immaturity. Robinson, *supra* note 22, at 221. They seek to excuse a defendant by showing that he was not criminally responsible for his conduct. Dressler, *supra* note 21, at 183 ("[A]n *excuse* centers upon the *actor* . . . and tries to show that the actor is not morally culpable for his wrongful conduct."); Robinson, *supra* note 22, at 203 (remarking that an excused actor admits harm or evil but claims absence of personal culpability). Excuse defenses posit that the defendant did not, or could not, choose to engage in the blameworthy act and thus is not culpable. *See, e.g.*, Sanford H. Kadish, *Excusing Crime, in* Blame and Punishment 81, 85 (1987) ("The grounds for excuse are simply that this particular person could not have been expected to act otherwise than as he did, given his own inadequate capacities for making judgments and exercising choice.").

43. Welsh S. White, The Death Penalty in the Nineties 76 (1991) ("Defense counsel must . . . explain where the defendant has come from and why he has become the man he is now."); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 560 (1995) ("[M]itigating evidence . . . is *not* intended to excuse, justify, or diminish the significance of what [defendant has] done but to help explain it . . . ."); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 Law & Soc'y Rev. 19, 41 (1993) (observing that the penalty phase must explain but not excuse the defendant's actions); *see also* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 Harv.C.R.-C.L. L. Rev. 325, 346-49 (1996) (noting the difficulty and importance of distinguishing excuse from explanation).

44. *See, e.g.*, Dressler, *supra* note 21, at 183 (noting that the insanity defense excuses defendant because, "as result of his mental disease or defect, he lacks the moral blameworthiness ordinarily attached to wrongdoers"); Robinson, *supra* note 22, at 221-23 (arguing that insanity is an internal disability that causes conditions that excuse the defendant from criminal liability). Some scholars argue that insanity is not a defense based on excuse but rather one based on status. *See, e.g.*, Kadish, *supra* note 42, at 99 (maintaining that insanity represents "such a breakdown of the normal, human capacities of judgment and practical reason that the afflicted person cannot fairly be held liable"); Michael S. Moore, *Causation and the Excuses*, 73 Cal. L. Rev. 1091, 1137 (1985) ("It is not because crazy people are caused to do what they do that they are excused; rather crazy people are excused because they are crazy . . . . The insane, like young infants, lack one of the essential attributes of personhood—rationality."); Herbert L. Packer, The Limits of the Criminal Sanction 135 (1968) (arguing that the insanity defense is "concerned not with what the actor did or believed but with what kind of person he is").

ishment decision.[45] The purpose is not to free the defendant from blame or punishment for the murder, but to alter the manifested form the blame takes by sentencing him to life imprisonment instead of death.

Most aggravating and mitigating circumstances directly relate to the murder for which the jury convicted the defendant, for example, whether:[46] the defendant committed the murder in the course of another felony;[47] the murder was "heinous, atrocious, or cruel;"[48] the defendant was substantially impaired in his capacity to control his conduct at the time he committed the murder;[49] he was a minor participant in the murder.[50] Significantly, every state identifies factors apart from the murder itself as relevant to the sentencing decision.[51] Most notably, these factors include prior violent felony convictions[52]

45. *See supra* note 43 & *infra* note 342. The broader reach of mitigating evidence allows for the consideration of character that the excuse defenses do not. In this way mitigation responds to the concerns of some scholars that if excuse defenses are expanded to include explanations of character, no basis for criminal responsibility will exist. *E.g.*, Kadish, *supra* note 42, at 103 (rejecting evidence of social deprivation as excusing a defendant when it only explains his conduct because "there would be no basis for moral responsibility in any case where we knew enough about a person to understand him").

46. *See, e.g.*, Boyde v. California, 494 U.S. 370, 373 n.1 (1990) (listing California's sentencing factors as contained in 1979 jury instructions); James R. Acker & C. S. Lanier, *"Parsing This Lexicon of Death": Aggravating Factors in Capital Sentencing Statutes*, 30 Crim. L. Bull. 107 (1994) [hereinafter Acker & Lanier, *Parsing This Lexicon of Death*] (categorizing aggravating factors by the character of defendant, the manner of the crime, the defendant's motive, and the character of victim); James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 Crim. L. Bull. 299 (1994) [hereinafter Acker & Lanier, *In Fairness and Mercy*] (categorizing mitigating factors by defendant's responsibility and culpability, future dangerousness, and general deserts).

47. Acker & Lanier, *Parsing This Lexicon of Death*, *supra* note 46, at 121 ("All death penalty jurisdictions make the commission of a contemporaneous felony relevant to whether a murder is punishable by death.").

48. *Id.* at 124-30 (noting that the majority of jurisdictions use this or similar language).

49. Acker & Lanier, *In Fairness and Mercy*, *supra* note 46, at 327-30; *see infra* Part II.B.1.

50. Acker & Lanier, *supra* note 46, at 323-25.

51. *See, e.g.*, Acker & Lanier, *Parsing This Lexicon of Death*, *supra* note 46, at 111-21 (listing offender characteristics unrelated to the crime as aggravators); Acker & Lanier, *In Fairness and Mercy*, *supra* note 46, at 303-41 (analyzing how mitigating factors fulfill the standard established in *Lockett v. Ohio*, 438 U.S. 586 (1978)).

52. Acker & Lanier, *Parsing This Lexicon of Death*, *supra* note 46, at 112-16 (documenting that twenty-nine of thirty-seven death penalty statutes include an aggravating circumstance related to the defendant's prior history of murder or violent or assaultive felony convictions or violent criminal activity).

or future dangerousness[53] as aggravating circumstances; and age[54] or lack of prior criminal conduct[55] as mitigating circumstances. Thus, unlike evidence at the first phase, some mitigating and aggravating circumstances concern facts apart from the murder.

The evidentiary differences between the guilt and punishment phases are reflected in the qualitative character of the decision the jury makes at each phase.[56] At the guilt phase the jury engages in a fact-finding process: did the defendant commit the murder with the requisite state of mind.[57] While a conviction represents a finding of blameworthiness,[58] that is not part of the jury's deliberative process at the guilt phase. In contrast, at the punishment phase, the jury must do more than find facts that are relevant to the defendant's punishment,[59] it must consider the significance of those facts and make a judgment about whether the death penalty is the appropriate punishment for the defendant under the circumstances.[60] The jury is required to

53. *Id.* at 118-21 (observing that six statutes include an aggravating circumstance related to future dangerousness); *see, e.g., infra* note 107 (quoting the three factors of the Texas death penalty scheme. Tex. Code. Crim. P. Ann. art. 37.071(b) (Vernon 1981 and Supp. 1989)).

54. Acker & Lanier, *In Fairness and Mercy, supra* note 46, at 330-33 (noting that seventeen statutes identify age, while nine specifically list youth).

55. *Id.* at 313-17 (noting that twenty-nine of thirty-one jurisdictions that identify mitigating factors list absence of a significant criminal history).

56. *See* California v. Ramos, 463 U.S. 992, 1007-08 (1983) (observing that the nature of the guilt phase is fundamentally different from the nature of the penalty phase: the central issue in conviction is establishing the necessary elements of crime proved beyond a reasonable doubt, no such central issue exists at punishment where the jury considers a "myriad of factors to determine whether death is the appropriate punishment").

57. Williams v. New York, 337 U.S. 241, 246 (1949) (stating that "the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused").

58. *See infra* note 63.

59. *Ramos*, 463 U.S. at 1008.

60. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part) (contending that "capital punishment rests on not a legal but an ethical judgment"); Barclay v. Florida, 463 U.S. 939, 950 (1983) (acknowledging that "moral, factual, and legal judgments . . . play a meaningful role in sentencing"); Adams v. Texas, 448 U.S. 38, 46 (1980) (stating that jurors exhibit a range of judgment and discretion in making the sentencing decision); *Williams*, 337 U.S. at 247 (contrasting "narrow issue of guilt" to sentence based on "fullest information possible"). *But see* Blystone v. Pennsylvania, 494 U.S. 299 (1990) (holding that a statute that requires the death penalty to be imposed if the jury finds one aggravator and no mitigators was constitutional because the Eighth Amendment does not require the jury to consider whether the severity of an aggravator warrants the death penalty); 494 U.S. at 316-24 (Brennan, J., dissenting) (arguing that the statute should be unconstitutional because it does not allow for a moral judgment about the appropriateness of the death penalty); Stephen P. Garvey, *Politicizing Who Dies*, 101 Yale L.J. 187, 199-201 (1991) (arguing that quasi-mandatory statutes, like Pennsylvania's, move decisionmaking from the jury to the legislature).

make a "reasoned *moral* response" to the defendant and the crime in assessing how to punish him.[61]

The evidentiary differences between the guilt and punishment phases, in concert with the unique character of the two decisions, demonstrate that the two phases of a death penalty trial serve separate purposes. Despite these identifiable differences between the two phases, the conceptual distinctions are elusive. The next part explores the ways in which the guilt and punishment decisions are conceptually separate, and yet intimately related, by examining the significance and meaning of the defendant's culpability for the murder.

B. *The Role of Culpability at the Guilt and Punishment Phases*

The concept of culpability is used as a reference point to assess the defendant's guilt and punishment even though, in the two contexts, culpability denotes different aspects of the defendant and the murder. At the guilt phase, culpability is most often used to refer to the state of mind that the defendant must possess.[62] Also at the guilt phase, culpability may reflect a broader judgment about the defendant: when he is culpable for his conduct, it means that he is blameworthy[63] and deserves punishment.[64] At the punishment phase, the concept of

61. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

62. The Model Penal Code classifies states of mind as "kinds of culpability." Model Penal Code § 2.02 (1985). Murder requires that the act be committed "purposely or knowingly," *id.* at § 210.2(1)(a) (1980), or "recklessly under circumstances manifesting extreme indifference to the value of human life," *id.* at § 210.2(1)(b). Other state-of-mind designations for first degree or capital murder include "willful, deliberate or premeditated." James A. Acker & C. S. Lanier, *The Dimensions of Capital Murder*, 29 Crim. L. Bull. 379, 383-88 (1993). One striking exception is felony murder: in eighteen jurisdictions felony murder is a capital crime even though it does not require the intent to kill. *Id.* at 391. The fact that a person may be sentenced to death absent a finding of intent to kill is especially troubling. *See, e.g.*, Daniel J. Givelber, *The New Law of Murder*, 69 Ind. L.J. 375 (1994) (analyzing arbitrariness of death penalty by using felony-murder as example of how imposition of capital punishment relies not on state of mind of defendant but on state of mind of sentencer).

63. *See, e.g.*, Kadish, *supra* note 42, at 77 (stating that *mens rea* "functions to distinguish the responsible from the irresponsible, the blameworthy from the blameless"); Sanford H. Kadish, *Codifiers of the Criminal Law, in* Blame and Punishment 205, 238 (1987) (noting that the Model Penal Code is based on the principle that no punishment can be made without blameworthy conduct); Edward M. Wise, *The Concept of Desert*, 33 Wayne L. Rev. 1343, 1352 (1987) ("Culpability connotes moral fault, blameworthiness, guilt."); *cf.* Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. Rev. 1511, 1521 (1992) ("To be morally culpable for his criminal conduct, the individual must also qualify as a blameworthy moral agent.").

64. Dressler, *supra* note 21, at 3 ("[P]rinciples of criminal responsibility . . . seek to identify the point at which it is fair to go from the factual premise, D caused or assisted in causing X (a social harm) to occur, to the normative judgment, D should be punished for having caused or assisted in causing X to occur."); H.L.A. Hart, *Postscript: Responsibility and Retribution, in* Punishment and Responsibility 210, 210 (1968) (positing that in order to punish, a person should have had, at the time of the

culpability stands as the benchmark for when the death penalty is an appropriate punishment.[65] Using the same terminology to describe the foci of the two phases conceals critical differences between the determinations made at each. Without an explicit articulation of the different meanings of culpability, the distinctions between the two decisions in a bifurcated proceeding are lost.

This part explores the differences between the meaning of culpability at the guilt and punishment phases by examining the Supreme Court's death penalty jurisprudence. While many scholars suggest that the Court has not presented a coherent theory of culpability at the punishment phase,[66] it is apparent that the Court recognizes a dis-

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crime, "a certain knowledge or intention, or possessed certain powers of understanding and control"). That a person deserves punishment because he is culpable reflects a retributive conception of punishment: "We are justified in punishing because and only because offenders deserve it . . . . Moral culpability ('desert') is . . . both a sufficient as well as a necessary condition of liability to punitive sanctions." Michael S. Moore, *The Moral Worth of Retribution, in* Responsibility, Character, and the Emotions 179, 181-82 (Ferdinand Schoeman ed., 1987) (footnote omitted). Retribution and deterrence are recognized as the principles that support the punishment of death. Gregg v. Georgia, 428 U.S. 153, 183-87 (1976). The focus of this article is on the death penalty as retribution because that theory of punishment most directly implicates the individual defendant's culpability and the reasons that will affect whether he will be sentenced to death or to life imprisonment. *See, e.g.*, Wise, *supra* note 63, at 1343 (stating that retribution refers to the punishment a defendant deserves, "to the extent that he deserves it").

65. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 973 (1994) (stating that the decision whether to impose the death penalty must "assure an assessment of the defendant's culpability"); Payne v. Tennessee, 501 U.S. 808, 825 (1991) (holding that for the jury to "assess meaningfully the defendant's moral culpability and blameworthiness" it may consider harm caused); *Penry*, 492 U.S. at 319 ("Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant."); Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (Stevens, J., plurality) (reasoning that persons under sixteen are not capable of acting with the degree of culpability that justifies the ultimate punishment); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Enmund v. Florida, 458 U.S. 782, 800 (1982) (noting that the appropriateness of the death penalty "very much depends on the degree of [defendant's] culpability"); *Cf.* Saffle v. Parks, 494 U.S. 484, 492-93 (1990) ("It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." (alteration in original) (citation omitted) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

66. *See, e.g.*, Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 Cornell L. Rev. 989, 1023 (1996) (observing that the Supreme Court does not have a "well-defined theory of moral culpability" in its death penalty jurisprudence); Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 Ga. L. Rev. 323 (1992) (arguing that due to tension between ensuring individualized sentencing and limiting arbitrariness, the Court has not resolved whether a sentence should concern a defendant's culpability or general deserts). The Court's lack of clarity has resulted in scholars positing differing theories about what the punishment inquiry is, or should be, about. *Compare* Howe, *supra,* at 350-61 (contending that under the Eighth Amendment, sentencing

tinction between the two inquiries. At times the Court seems to differentiate between the two by casting the punishment-phase determination as one about the defendant's moral culpability,[67] as opposed to his purely legal culpability at the guilt phase. In this respect, a defendant's moral culpability for murder may be greater or lesser, depending on aggravating and mitigating circumstances, even though his legal culpability remains the same. The infusion of moral factors into the punishment-phase concept of culpability has a certain appeal because it coincides with the kind of judgment the jury must make—a "reasoned *moral* response."[68] The guilt-phase determination may be equally infused, however, with a judgment about the defendant's moral culpability.[69] The potential presence of a moral component to the defendant's culpability at both phases suggests that classifying one as "legal culpability" and the other as "moral culpability" is not a viable way to differentiate the two determinations. Moreover, the continued use of culpability retains a focus on the guilt issue rather than moving on to the distinct question of punishment.

This section posits a new way to understand the Court's jurisprudence on culpability in death penalty cases by examining how the Court constructs the scope of the punishment-phase inquiry. This section analyzes those factors the Court has identified as relevant to the jury's punishment-phase determination: the defendant's mental state; the circumstances of the offense, including the harm caused; the de-

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should encompass the defendant's deserts as well as his culpability) *with* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 Yale L.J. 835, 846 (1992) (book review) (maintaining that under the Supreme Court's jurisprudence, the core Eighth Amendment principle for individualized sentencing should be limited to defendant's reduced culpability: "evidence that suggests any impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences"). As this article demonstrates, analysis of the Supreme Court death penalty jurisprudence reveals that the sentencing decision must not be limited to a defendant's guilt-phase culpability for the crime.

67. *See, e.g.*, *Payne*, 501 U.S. at 825 (holding that a State may conclude that in order for jury to "assess meaningfully the defendant's moral culpability and blameworthiness" it may know about the harm he caused); *Penry*, 492 U.S. at 323 (noting that the jury could believe Penry's "retardation and background diminished [Penry's] moral culpability and made imposition of the death penalty unwarranted"); *Enmund*, 458 U.S. at 801 (stating that punishment should be based on "personal responsibility and moral guilt" of defendant). Scholars do the same. *See e.g.*, Wise, *supra* note 63, at 1352-53 (observing that culpability at punishment is "moral guilt").

68. *Penry*, 492 U.S. at 319 (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring)); *see also* South Carolina v. Gathers, 490 U.S. 805, 817 (1989) (O'Connor, J., dissenting) (observing that the punishment-phase decision in a capital case is a profoundly moral judgment reflecting the moral judgment of the community).

69. *See, e.g.*, Powell v. Texas, 392 U.S. 514, 535-36 (1968) (rejecting argument to constitutionalize an insanity test because states must be free to decide grounds for defendant's "moral accountability"). Scholars also speak of moral culpability as part of the guilt-phase determination. Dressler, *supra* note 21, at 183 (suggesting that insane defendants seek to avoid moral blameworthiness ordinarily attached to wrongdoers); Aranella, *supra* note 63, at 1513-24; Moore, *supra* note 64, at 181-82.

fendant's future dangerousness; and the defendant's character, record, and background. This analysis reveals that despite the use of the same terminology, the punishment-phase inquiry is not a recapitulation of the guilt-phase finding of culpability.[70] Rather, the punishment phase requires the jury to reconceptualize the defendant's culpability as well as consider new factors, none of which are relevant to the jury's guilt-phase decision but all of which are relevant to the jury's determination of whether the defendant is worthy of a death sentence.

1. Mental state

The concept of culpability at the punishment phase is closely related to, but more expansive than, culpability at the guilt phase. If the defendant committed the killing with the requisite mental state—degree of culpability[71]—he will be found guilty of murder. The question of culpability at the punishment phase also includes assessing the defendant's state of mind but in a more expansive way.[72] As the Court observed in *Tison v. Arizona*:[73]

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more seri-

70. *See* White, *supra* note 43, at 75-76 (noting that the guilt phase requires the determination of objective facts while the punishment phase requires the assessment of objective facts and "something more"—a subjective judgment based on evaluating aggravating and mitigating circumstances); Wise, *supra* note 63, at 1352-53 (observing that in assessing punishment, culpability denotes "different levels of awareness and organic capacity" and other factors ignored at the guilt phase, such as "underlying motives, desires, attitudes, dispositions, impulses, pressures, and temptations"); *see also* Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 n.101 (1983) (noting that at the punishment stage culpability refers to blameworthiness as well as "*anything* in defendant's life, character, or formative influences [that] mitigates the offense").

71. *See supra* note 62. The defendant's state of mind is also referred to as *mens rea*. Dressler, *supra* note 21, at 103 (explaining that the narrow view of *mens rea* is a mental state that is designated by statute); Packer, *supra* note 44, at 104 (observing that *mens rea* is "shorthand . . . for a cluster of concepts having to do with states of mind or their absence, experienced by people whose conduct is arguably criminal"). Thus, both culpability and *mens rea* may refer to mental state. Packer, *supra* note 44, at 76 (stating that the "orthodox" view of culpability is *mens rea*). Dressler contrasts the statutory definition of *mens rea* with a broader notion of *mens rea* meaning "culpability" or "moral blameworthiness" that is not dependent on the defendant's specific mental state. Dressler, *supra* note 21, at 102. He observes that this expansive view of *mens rea* was refined over time and now, as a legal matter, has been replaced by the mental state element. *Id.* The different meanings that the terms "*mens rea*" and "culpability" sustain at the guilt phase may suggest part of the difficulty in preserving the distinction between the assessment of guilt and the imposition of the appropriate punishment in death penalty cases.

72. *But see* Givelber, *supra* note 62, at 377 (arguing that aggravated murder no longer focuses on the defendant's state of mind but "'objective' external aggravating facts").

73. 481 U.S. 137 (1987).

> ous is the offense, and therefore, the more severely it ought to be punished.[74]

The punishment-phase determination of culpability is not resolved solely by reference to the mental state required for murder, however. Even though the defendant was convicted of possessing the "degree of culpability" required for the highest form of homicide recognized in the jurisdiction, the Supreme Court requires a closer, more finely honed examination of the defendant's state of mind and criminal responsibility before a death sentence may be imposed. This expanded scrutiny is most apparent from the cases that confer constitutional significance on those aspects of a defendant's state of mind that exceed the scope of the guilt-phase inquiry. In this sense, the Supreme Court has set standards for examining the defendant's mental state beyond that considered at the guilt phase in three ways: his capacity to make choices and judgments, his depravity of mind, and, if he be an accomplice, his degree of participation in the murder. By its analysis, the Court has demonstrated that even though a defendant was found to be culpable as that term is used at the guilt phase, that finding does not satisfy the punishment-phase inquiry.

a. *Impaired Judgment*

A defendant's mental capacity to reason, reflect, and make appropriate choices and judgments is considered in distinctly different ways at the guilt and punishment phases. At the guilt phase, a mental impairment will affect the defendant's culpability for the murder only if he establishes such a high level of disability that it constitutes a mental disease or defect such that he may be judged insane or, where recognized, as possessing diminished capacity.[75] Nonetheless, the Supreme Court has held that the death penalty is,[76] or may be,[77] an inappropriate punishment for certain defendants because of their inability to make mature and reflective choices and judgments. This determination relies not on the contention that the defendant lacks criminal responsibility but rather that he lacks what the Court refers to as the

74. *Id.* at 156. The Court explained that focusing on the defendant's mental state was appropriate because, historically, this was one of the earliest ways by which those who deserved death were distinguished from those who did not. *Id.; see* Winston v. United States, 172 U.S. 303, 310-12 (1899); William J. Bowers, Legal Homicide, 6-41 (1984) (analyzing the history of capital punishment in United States).

75. Robinson, *supra* note 22, at 206, 222.

76. *E.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (Stevens, J., plurality) (holding that the death penalty was a disproportionate sentence for defendants under the age of sixteen).

77. *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 319-35 (1989) (holding that while the death penalty was not a per se disproportionate penalty for mentally retarded defendants, the jury must be able to consider evidence of mental retardation as mitigating); *see also* Skipper v. South Carolina, 476 U.S. 1, 13 (1986) (Powell, J., concurring) ("[D]eath penalty has little deterrent force against defendants who have reduced capacity for considered choice.").

culpability required for the death penalty.[78] The Court has applied this concept to young age,[79] mental retardation,[80] and other mental disabilities.[81]

Defendants under the age of sixteen may not be sentenced to death because the punishment is unconstitutionally disproportionate to their "degree of culpability."[82] Underage defendants are considered less culpable than adults for the commission of comparable crimes[83] because they so lack the capacity to make rational judgments, to respond reasonably rather than emotionally, or to appropriately control their conduct, that the retributive and deterrent purposes underlying the death penalty are not served.[84] A fifteen-year-old may be responsible

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78. In *Penry* the Court reasoned,

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

492 U.S. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (holding that evidence of serious emotional problems in a young defendant "does not suggest an absence of responsibility for the crime of murder," but it may have great mitigating weight at sentencing).

79. *Thompson*, 487 U.S. at 833-38. *But see* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (finding that the death penalty was not disproportionate for defendants sixteen years or older).

80. *Penry*, 492 U.S. at 322-28.

81. *Id.* at 308-09, 322-28 (explaining the relevance of mental retardation as well as evidence that the defendant suffered from organic brain damage which may have resulted from a history of childhood abuse); *Eddings*, 455 U.S. at 116 (holding that defendant's emotional disturbance and mental underdevelopment was relevant mitigating evidence).

82. *Thompson*, 487 U.S. at 822-23. Justice O'Connor's concurrence provides an important caveat to the plurality decision in *Thompson*. She concurred in the judgment because the Oklahoma statute at issue did not specify a minimum age for imposing the death penalty. *Id.* at 857. She reasoned that, in light of evidence that a national consensus likely existed against executing persons under the age of sixteen, a statute that failed to specify a minimum age was "of very dubious constitutionality." *Id.* This suggests that if a statute specifies an age under sixteen, a younger teenager could be subject to the death penalty. *See* Christine M. Wiseman, *Representing the Condemned: A Critique of Capital Punishment*, 79 Marq. L. Rev. 731, 753-54 (1996).

83. *Thompson*, 487 U.S. at 835-38. Writing for a plurality, Justice Stevens opined:

> The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Id. at 835 (footnote omitted).

84. *Id.* at 835-38. The Court also found other relevant factors to include "the teenager's capacity for growth and society's fiduciary obligations to its children." *Id.* at 837. *But see Thompson*, 487 U.S. at 853 (O'Connor, J., concurring) (agreeing that adolescents are generally less blameworthy than adults when they commit the same

enough to be tried as an adult[85] and convicted of murder,[86] but he is not sufficiently "culpable" to be sentenced to death.[87]

Although this bar to a death sentence applies only to defendants under sixteen,[88] a defendant's age may serve as a mitigating factor for those sixteen years or older.[89] As the court recognized in *Eddings v. Oklahoma*:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.[90]

The Court found these concerns especially relevant to Eddings because, at the time of the murder,[91] he was only sixteen, had a "turbulent family history" that included physical beatings by his father, and was emotionally and mentally underdeveloped.[92] The Court acknowledged both that "the normal 16-year-old customarily lacks the maturity of an adult" and that Eddings was not a "normal 16-year-old: he had been deprived of the care, concern, and paternal attention that children deserve."[93] While Eddings's age and his mental and emo-

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crime, but disagreeing that this means *all* fifteen-year-olds are incapable of the degree of moral culpability necessary to be subject to the death penalty and that all fifteen-year-olds are immune from the deterrent effect of the death penalty); *id.* at 859 (Scalia, J., dissenting) (arguing that "no plausible basis" exists for finding a national consensus that no one under the age of sixteen possesses the maturity and responsibility needed to be punished by death).

85. *Id.* at 819-20 (stating that the trial court certified Thompson to stand trial as an adult).

86. *Id.* at 819 (noting that Thompson made no claim that his punishment would be excessive if committed by an adult).

87. *Id.* at 823 ("[I]ndicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."); *id.* at 834 (reasoning that fifteen-year-olds "deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults" (quoting *Eddings*, 455 U.S. at 115 n.11)).

88. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

89. *Eddings*, 455 U.S. at 115-16; Lockett v. Ohio, 438 U.S. 586, 608 (1978) (Burger, J., plurality).

90. *Eddings*, 455 U.S. at 115-16 (footnotes omitted) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)); *see also* Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting) ("Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible . . . .").

91. Eddings pleaded *nolo contendere* to first degree murder for shooting and killing a police officer who pulled him over for recklessly driving his car. *Eddings*, 455 U.S. at 106.

92. *Id.* at 115-16; *see also id.* at 107-10 (describing the mitigating evidence presented at trial).

93. *Id.* at 116.

tional problems did not mean he lacked criminal responsibility for killing the police officer, it meant the sentencer had to be allowed to consider the evidence as mitigating Eddings's punishment.[94]

The Court also has recognized that the behavioral and psychological effects of mental retardation may lessen a defendant's culpability as that is considered at the punishment phase.[95] In *Penry v. Lynaugh*, the Court held that the jury must be allowed to consider and give effect to the mitigating qualities of a defendant's mental retardation.[96] In an individual case, a defendant's mental retardation may mean he was less able than a normal adult to control his behavior, to evaluate the consequences of his conduct, or to learn from his mistakes.[97] Evidence of mental retardation may not change the defendant's criminal responsibility for murder, but it may signify that his culpability, reformulated as a punishment issue, is not sufficient to warrant a sentence of death.

The facts of *Penry* are instructive. Pamela Carpenter was "brutally raped, beaten and stabbed with a pair of scissors in her home."[98] Johnny Paul Penry confessed and was charged with capital murder.[99] He raised the insanity defense[100] at trial and presented both psychiatric and lay testimony in support. The psychiatrists testified that Penry suffered from organic brain damage and moderate retardation that resulted in poor impulse control and an inability to learn from his mistakes.[101] Penry's mother and sister testified to his slowness in school and frequent parental beatings as a child.[102] The prosecution experts testified that Penry was sane but "was a person of extremely limited mental ability."[103] The jury convicted Penry of capital murder.[104]

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94. *Id.*

95. Penry v. Lynaugh, 492 U.S. 302, 322-23 (1989).

96. *Id.* at 322-28. A plurality of the Court rejected the claim that the Eighth Amendment prohibited the execution of a mentally retarded defendant because, as Justice O'Connor reasoned, "I cannot conclude that all mentally retarded people . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.* at 338.

97. *Id.* at 322-23; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 427-32 (1985) (describing common characteristics of mentally retarded defendants).

98. *Penry*, 492 U.S. at 307.

99. *Id.*

100. *Id.* at 308. This defense required proof that Penry did not know his conduct was wrong and was incapable of conforming his conduct to the requirements of the law. *Id.* at 333 (citing Tex. Penal Code Ann. § 8.01(a) (West 1974 & Supp. 1989)).

101. *Id.* at 308.

102. *Id.* at 309.

103. *Id.* at 310.

104. *Id.* According to the Court, this meant "the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law." *Id.* at 333.

This verdict indicated that the jury found Penry criminally responsible, possessed of the intent required to commit capital murder,[105] and therefore worthy of blame. The fact that the jury did not find persuasive Penry's mental retardation and organic brain damage evidence at the guilt phase did not mean that it was irrelevant at the punishment phase, however. Quite the contrary; as the Court concluded, the evidence was essential to the jury's determination whether to sentence him to death or life imprisonment.[106]

The Court held that Penry's death sentence was unconstitutionally imposed because the jury could not consider and give mitigating effect to his evidence of mental retardation and childhood abuse. At the time of Penry's trial the Texas death penalty statutory scheme required the jury to answer three "special issues:"[107] was the defendant's conduct deliberate, was there a probability he would be dangerous in the future, and, if warranted, did he act unreasonably in response to provocation by the victim. The Court concluded that none of these questions allowed the jury to give mitigating effect to Penry's evidence. In answering the first special issue a juror could conclude Penry acted deliberately in committing the crime and still believe he was not sufficiently worthy of a death sentence.[108] The second special issue allowed the jury to consider the evidence only as an aggravating factor, suggesting that because he could not learn from his mistakes, he necessarily would be dangerous.[109] The third special issue, like the first, could result in the jury concluding that Penry's mental retardation did not diminish the unreasonableness of his con-

105. In Texas, capital murder requires that a defendant "intentionally or knowingly cause[ ] the death of an individual" while committing one of the enumerated felonies. Tex. Penal Code § 19.03(a) (West 1994) (incorporating § 19.02(a)(1)).

106. *Penry*, 492 U.S. at 327-28.

107. *Id.* at 310. The special issues were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. (quoting Tex. Code Crim. P. Ann. art. 37.071(b) (Vernon 1981 & Supp. 1989)).

108. *Id.* at 322-23. As the Court reasoned,

> Because Penry was mentally retarded, . . . and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Id. at 322-23 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

109. *Id.* at 323-24. In this respect Penry's evidence of mental retardation and childhood abuse acted as a "two-edged sword." *Id.* at 324.

duct, even though it made him less culpable than a normal adult.[110] Absent specific instructions telling the jury that it could consider Penry's evidence as mitigating, the jury did not have a way to form a "reasoned *moral* response" to that evidence in assessing a punishment.[111] The jury could only find such evidence aggravating.

The Court's concern in *Penry* was that the jury have a vehicle for assessing the mitigating nature of the evidence that reflected on the defendant's personal culpability. Even though the jury based its punishment-phase decision on the same evidence it had heard at the guilt phase in support of Penry's insanity defense, its consideration did not replicate the prior inquiry. Instead, it was imperative that the jury evaluate this evidence in a different and broader way as it informed the punishment concept of culpability to determine if a death sentence was warranted.[112]

A defendant's impaired judgment, whether due to age or mental disabilities such as mental retardation or brain damage, excuses a defendant from criminal responsibility in very limited circumstances. Yet, as a punishment matter in a death penalty case, a defendant's impaired mental capacity may wholly preclude a defendant's eligibility for the death sentence, or provide the basis for a jury to find that the defendant does not deserve to be sentenced to death.

b. *Depravity of Mind*

A defendant's mental state may be reevaluated at the punishment phase through the depravity-of-mind aggravating circumstance. This factor focuses on the defendant's mental state, but goes beyond it by evaluating the quality of his state of mind. What is relevant is "not [the defendant's] *mens rea* but his attitude toward his conduct and his

110. *Id.* at 324-25.

111. *Id.* at 328 (quoting *Brown*, 479 U.S. at 545). After *Penry*, the Texas legislature adopted a new death penalty statute which makes personal culpability an explicit factor in the jury's deliberations. If the jury finds that the defendant will be dangerous in the future, and if an accomplice possessed the requisite mental intent, the jury must then answer the following question:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. P. Ann. art. 37.071 sec. 2(e) (West 1991 & Supp. 1997). Mitigating evidence is defined as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.* at (f)(4).

112. *Penry* represents an articulation of "personal culpability" that encompasses what this article argues should be considered "deathworthiness." The Court's analysis of what it terms a defendant's "personal culpability" includes not only a reassessment of evidence relevant to his guilt-phase mental state but also his character, background, and the circumstances of the offense. *See infra* notes 341-42 and accompanying text.

victim."[113] This "attitude" is articulated in different, and at times, diametrically opposed ways. In Idaho, this aggravating factor, referred to as "utter disregard for human life,"[114] is evidenced when the defendant is a "cold-blooded, pitiless slayer,"[115] which the Court understood to mean the absence of feeling.[116] In Arizona, committing a crime in a depraved manner means "relishes the murder"[117] or "evidenc[es] a sense of pleasure."[118] Both the Idaho and Arizona constructions of depravity satisfy the constitutional mandate to narrow those eligible for death.[119] These holdings have been strongly criticized on the ground that the terms do not distinguish among murderers in any intelligible way.[120] Nevertheless, they demonstrate that one way to distinguish between those who may be sentenced to death from those who may not[121] is by looking to the quality of their state of mind, a factor that goes beyond the guilt-phase mental state.

c. *Accomplice State of Mind*

A defendant may be found guilty of murder if he killed a person or if he participated in a crime that resulted in the killing of a person.[122] When a defendant is an accomplice, and the killing is a foreseeable consequence of the underlying crime,[123] it is immaterial to his guilt whether he killed a person, attempted to kill a person, or even intended or knew that a killing would take place. As an accomplice, the

113. Arave v. Creech, 507 U.S. 463, 473 (1993); *see also* Lewis v. Jeffers, 497 U.S. 764, 782 (1990) (noting that in Arizona the aggravating factor "heinous," "atrocious," or "depraved" manner requires the jury to assess the defendant's mental state and attitude); State v. Ross, 646 A.2d 1318, 1361-62 (Conn. 1994) (recognizing that a "heinous or depraved" state of mind goes beyond that required for the commission of the murder).

114. *Arave*, 507 U.S. at 465 (quoting Idaho Code § 19-2515(g)(6) (1987)).

115. *Id.* at 468 (quoting State v. Osborn, 631 P.2d 187, 201 (Idaho 1981)).

116. *Id.* at 471-74.

117. *Id.* at 473 (quoting Walton v. Arizona, 497 U.S. 639, 655 (1990)).

118. *Id.*

119. *Id.* at 470-78; *Walton*, 497 U.S. at 652-56.

120. *Arave*, 507 U.S. at 479 (Blackmun, J., dissenting) (characterizing the majority opinion as "nonsense upon stilts") (quoting Jeremy Bentham, *Anarchial Fallacies, in* 2 Works of Jeremy Bentham 501 (1843)); *Walton*, 497 U.S. at 690-99 (Blackmun, J., dissenting) (arguing that Arizona's "heinous, cruel or depraved" aggravating factor does not sufficiently distinguish who may be sentenced to death from who may not).

121. *Arave*, 507 U.S. at 474-75; Godfrey v. Georgia, 446 U.S. 420, 427-33 (1980) (reversing death sentence because the depravity aggravating circumstance did not distinguish those who should be sentenced to death from those who should not).

122. LaFave & Scott, *supra* note 21, at 625-26. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 141-42 (1987) (noting that under felony-murder and accomplice liability statutes, defendants who participated in robbery and kidnaping were legally responsible for accomplice murders); Enmund v. Florida, 458 U.S. 782, 788 (1982) (deeming constructive aider and abettor to be a principal in first degree murder).

123. LaFave & Scott, *supra* note 21, at 581, 590-91, 625-26.

killer's state of mind is imputed to the defendant.[124] In a death penalty case, however, if the defendant was not the actual killer, his guilt-phase culpability does not resolve the punishment-phase culpability inquiry. Instead, the defendant's culpability must be reframed and reconsidered.

In *Enmund v. Florida*,[125] the Supreme Court held that the death penalty is a disproportionate punishment for a defendant who did not "kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed."[126] The trial record showed only that Enmund sat in a car about 200 yards from the farmhouse where his co-defendants shot and killed an elderly couple during a robbery.[127] This evidence was enough to support a conviction for murder because Enmund aided and abetted a felony during which a murder occurred,[128] but it was not enough to justify a death sentence. The Court reasoned that the propriety of the death penalty must be judged according to Enmund's "personal responsibility and moral guilt,"[129] not that of his co-defendants.[130] The death penalty was an excessive punishment in relation to his degree of participation because the evidence did not show that he killed, attempted to kill, or intended to kill.[131]

Five years later, in *Tison v. Arizona*,[132] the Court modified its *Enmund* holding when presented with facts demonstrating a significantly higher degree of participation by defendants who were accomplices to

124. *See id.* at 591, 625-26; Dressler, *supra* note 21, at 429 ("[O]nce a person is deemed to be an accomplice of another, his identity as a person subject to criminal punishment is subsumed in that of the primary party.").

125. 458 U.S. 782 (1982).

126. *Id.* at 797; *see also* Lockett v. Ohio, 438 U.S. 586, 608 (1978) (Burger, J., plurality) (stating that the jury must be able to consider the defendant's minor role as the getaway driver); *id.* at 616 (Blackmun, J., concurring) (noting that the jury should have discretion to consider the degree of the defendant's participation in acts leading to a homicide and the character of the defendant's *mens rea*).

127. *Enmund*, 458 U.S. at 786-88 (relying on the characterization of the record by the Florida Supreme Court).

128. *Id.* at 786.

129. *Id.* at 801. The Court observed that the death penalty served no deterrent or retributory purpose for someone like Enmund. *Id.* at 799-801. With respect to retribution the Court stated:

> [W]e think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to the "degree of [his] criminal culpability," and the court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.

Id. at 800 (alteration in original) (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).

130. *Id.* at 798.

131. *Id.* at 801.

132. 481 U.S. 137 (1987).

a murder.[133] In *Tison*, the defendants, two young brothers, assisted in their father's and his cellmate's armed escape from prison.[134] In the ensuing flight, their car broke down and one of the brothers flagged down a passing car.[135] Both brothers participated in detaining and robbing the family in the stopped car.[136] When the two defendants saw their father and his cellmate "brutally murder their four captives,"[137] they did not try to help the victims.[138] The defendants were convicted of capital murder under Arizona's accomplice liability and felony murder statutes.[139]

In accord with *Enmund*, the Supreme Court examined the defendants' degree of culpability for the victims' deaths. The Court concluded that even though the two defendants had not killed or intended to kill, the death penalty was properly imposed because "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[140]

The Court reasoned that "a narrow focus" on the intent to kill "is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers."[141] According to the Court, while some who intend to murder may not be criminally liable (because they acted in self defense, for example), others who do not act intentionally, but with reckless indifference, such as the Tison brothers, may be the most dangerous.[142] Thus, reckless indifference, even if not evincing an intent to kill, was a sufficient culpable mental state such that, when coupled with major participation, could warrant death. Under these circumstances, death was no longer a disproportionate punishment for a defendant who did not actually kill.[143]

The import of *Enmund* and *Tison* is that both necessitate a look beyond the mental state needed for the conviction to know whether

133. According to the Court, the Tison brothers fell between the poles of a defendant like Enmund and a defendant who actually killed, attempted to kill, or intended to kill. *Id.* at 149-50.

134. *Id.* at 139.

135. *Id.* at 139-40.

136. *Id.* at 140.

137. *Id.* at 141.

138. *Id. But see id.* at 165-67 (Brennan, J., dissenting) (contesting the majority's depiction of the facts, in particular, whether the defendants tried to help the victims or saw the shootings).

139. *Id.* at 141-42.

140. *Id.* at 158.

141. *Id.* at 157.

142. *Id.*

143. *Tison* has been extensively criticized. *See, e.g.*, Kills on Top v. State, 928 P.2d 182, 201-04 (Mont. 1996) (rejecting *Tison* and applying *Enmund* as a matter of state constitutional law and collecting and summarizing criticism of *Tison* by scholars and courts: "reckless" indifference applies to all felony-murder accomplices; failure to define terms results in arbitrary application; *Tison*'s formulation bears no relationship to retribution and deterrence).

the defendant's culpability supports the possible imposition of the death penalty. Under accomplice liability and felony murder statutes, a defendant who does not kill the victim may be found guilty of murder. Depending on the facts, that may or may not mean he is eligible to be sentenced to death. The jury must consider factors related to, but separate from, his guilt-phase culpability. These factors may include the defendant's own mental state and his degree of participation in the murder.

2. Circumstances of the Crime

Just as the punishment phase encompasses a reconceptualization of the defendant's mental state, the Court has held that it may include a more expansive consideration of the harm the defendant caused.[144] Under the Court's view, the particular evidence of harm may go beyond the facts of the murder in the form of "victim impact" evidence, i.e., information about the character of the victim and the effect of the victim's death on the victim's family.[145] Generally, victim impact evidence is not relevant to or admissible at the guilt phase in order to establish the facts of the murder.[146] In *Payne v. Tennessee*, however, the Court held that evidence of the impact of the victim's death was relevant to the jury's punishment-phase decision because it informed the defendant's "moral culpability and blameworthiness."[147] The Court reasoned that assessing the harm caused by the defendant always has been important in determining the crime the defendant has committed as well as the appropriate punishment.[148] In the death penalty context, testimony about the effect of the death on the victim's family allows the prosecution the "full moral force of its evidence" and provides the jury full information to decide the defendant's punishment.[149] In the Court's analysis the prosecution

144. Payne v. Tennessee, 501 U.S. 808, 825 (1991).

145. *Id.* at 817.

146. *Id.* at 823 (noting that, in many cases, evidence about the victim may have been introduced "at least in part" at guilt phase).

147. *Id.* at 825. *Payne* reversed *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) which excluded victim impact evidence because it bore no connection to the defendant's moral blameworthiness. *Payne* has been the subject of intense criticism. *See id.* at 844 (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking."); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 394-95 (1996) (arguing that *Payne* was wrongly decided because the introduction of victim impact statements deflects jury from its duty to consider the individual defendant's moral culpability); Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21, 65 (1992) (arguing that *Payne* "denigrates victims while falsely promising help to their mourners").

148. *Payne*, 501 U.S. at 819; *see* Wise, *supra* note 63, at 1352 ("Since blame attaches in part for results, culpability sometimes is used in a sense that includes harm. In that sense, culpability is a function both of the harm and of the extent to which an offender can be regarded as being at fault for having caused the harm." (footnote omitted)).

149. *See Payne*, 501 U.S. at 825.

could use victim impact evidence to present the victim as a unique human being[150] in order to "counteract"[151] the mitigating evidence presented to humanize the defendant.[152] With this additional evidence, the jury could consider the full extent of the harm caused by the defendant's actions, not merely the bare facts of the murder juxtaposed against the defendant's mitigating evidence.[153]

Thus, just as the defendant's state of mind is reconceptualized at the punishment phase, so too, the act of murder is reassessed to include its subsequent effects.[154] In both phases, the circumstances of the crime may play a central role in the jury's determination of the defendant's culpability, but the evidence at the punishment phase is more than that allowed at the guilt phase. Likewise, the purpose for which the new evidence is introduced differs as well. The new evidence serves not to revisit the guilt-phase decision but to reconsider the defendant's culpability for the crime in a new light as it informs the sentencing decision.

3. Future Dangerousness

Assessing whether a defendant may be dangerous in the future is not relevant to the guilt-phase inquiry; yet it may be an important factor at the punishment phase.[155] This distinction illuminates a central difference between the two inquiries. The guilt phase is limited to whether the defendant committed the crime with the requisite state of mind; the punishment phase considers a reconceptualized view of the defendant's culpability for the crime (as identified in the prior two parts) but it also considers factors unrelated to guilt. When these differences are properly understood, it is possible to see that factors related and unrelated to the crime are equally, but separately, germane

150. *Id.* at 823.

151. *Id.* at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

152. *Id.* at 826 ("[T]here is nothing unfair about allowing the jury to bear in mind that harm [that the defendant's killing caused] at the same time as it considers the mitigating evidence introduced by the defendant.").

153. Without this kind of evidence, the Court reasoned, the punishment phase was unfairly weighted in favor of the defendant: The jury could hear unlimited mitigating evidence about the defendant, but it could not hear about the impact of the defendant's action on the victim's family or the community. *Id.* at 822.

154. The aggravating factor of "heinous, atrocious, or cruel" also invokes a reevaluation of the circumstances of the murder. *See* Maynard v. Cartwright, 486 U.S. 356, 363-65 (1988). While the viciousness of the crime is not relevant to whether the defendant committed the murder, it may be deemed relevant to whether the defendant should face death because of it. *See id.*; Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (holding that the aggravating factor "outrageously or wantonly vile, horrible and inhuman" was unconstitutionally vague because every murder could be characterized as such).

155. Simmons v. South Carolina, 512 U.S. 154, 162 (1994); Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (holding that future dangerousness is a proper sentencing factor); *see also* Barefoot v. Estelle, 463 U.S. 880, 896-906 (1983) (finding that expert testimony on future dangerousness is appropriate at the sentencing phase).

to the punishment-phase inquiry. When the distinction is not maintained, the broader focus of the punishment phase is lost. This occurred in *Johnson v. Texas*,[156] where the Supreme Court held that the jury's assessment of a defendant's future dangerousness could encompass an evaluation of his personal moral culpability.

Dorsie Johnson was nineteen when he killed a store clerk during a robbery.[157] The jury convicted him of capital murder.[158] At the punishment phase the State presented several witnesses who testified to Johnson's violent behavior. Their testimony recounted that he had shot a store clerk during a separate robbery, causing her permanent disfigurement and brain damage; fired shots at another man outside a restaurant; threatened a girlfriend with an axe; and that he had been convicted of burglary.[159] Johnson's father testified in mitigation that nineteen was a

> foolish age . . . a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not—I can't say what is right or wrong, but the evaluation of it, how much, you know, that might be—well, he just don't—he just don't evaluate what is worth—what's worth and what's isn't like he should like a thirty or thirty-five year old man would . . . .[160]

The jury answered "yes" to the two Texas special issues regarding deliberateness and future dangerousness,[161] and the court sentenced Johnson to death.[162]

In the Supreme Court, Johnson argued that the Texas statutory scheme was unconstitutional because the mitigating qualities of his age could not be considered under the special issue of future dangerousness because that issue did not encompass his personal moral culpability. Rather than focus on his culpability for committing the crime, future dangerousness had only a forward-looking focus.[163] The Court rejected this argument, however, on grounds that "this forward-looking inquiry is not independent of an assessment of personal culpability."[164] The Court reasoned that the jury could assess future dangerousness in light of how the defendant's age influenced his conduct: "If any jurors believed that the transient qualities of petitioner's youth

156. 509 U.S. 350 (1993).
157. *Id.* at 353-54.
158. *Id.* at 354.
159. *Id.* at 355-56.
160. *Id.* at 356.
161. *See supra* note 107.
162. *Johnson*, 509 U.S. at 358.
163. *Id.* at 369.
164. *Id.*

made him less culpable for the murder,"[165] they could simply answer "no" to the question regarding his future dangerousness.[166]

The problem with the Court's formulation is that it collapses the qualities of youth present at the time of the murder into an assessment of his conduct in the future.[167] Both may be relevant to the punishment decision, but they are separate indicia of the deserved sentence. The defendant's limited abilities, because of his youth, to act at the time of the murder with the "experience, perspective, and judgment expected of adults"[168] certainly could affect the jury's reconceptualization of his mental state and thus his culpability for the crime. Separately, the fact that Johnson could, as he grew older, leave behind the immaturity associated with his youthfulness, might influence the jury's assessment of his future dangerousness. By combining the two, the Court diluted the importance of the defendant's responsibility for the crime and forced the jury to consider his culpability only as it represented something that he might outgrow. This conflation created the impression that the reassessment of culpability could be minimized or assimilated into other factors rather than treated as a central and separate component of the jury's determination to impose death.[169] Future dangerousness, rightly considered, should not incorporate the defendant's culpability for the murder. Instead, it should be considered unrelated to the defendant's culpability for the crime yet equally significant to whether he should be sentenced to death or life imprisonment.

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165. *Id.* at 370.

166. *Id.* "[I]ll effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as . . . mitigating . . . one's future dangerousness." *Id.* at 369. The Court concluded that because the jury could give *some* mitigating weight to his age, no constitutional violation existed. *Id.* at 372-73 (citing Saffle v. Parks, 494 U.S. 484, 490 (1990) (stating that the Constitution only governs *what* the jury must be allowed to consider, not *how* a state structures that consideration)).

167. As Justice O'Connor argued in dissent: "A violent and troubled young person may or may not grow up to be a violent and troubled adult, but what happens in the future is unrelated to the *culpability* of the defendant at the time he committed the crime." *Id.* at 376 (O'Connor, J., dissenting). Justice O'Connor also observed that she thought *Eddings* had made clear "that the vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime." *Id.*

168. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)).

169. The Court attempted to avoid this generalization about the relationship between culpability and future dangerousness by distinguishing the transient qualities of youth that could be considered within future dangerousness from the permanent character of mental disabilities that could not. Permanent disabilities could be given only aggravating effect with respect to future dangerousness because the negative effects of the condition will not change. *Johnson*, 509 U.S. at 369. Transient qualities like youth, however, may be given mitigating effect in *some* manner because they may change and mean the person will not be dangerous in the future. *Id.*

4. Character, Record, and Background

The Supreme Court consistently has recognized that the jury must be allowed to consider the defendant's character, background, and record.[170] These factors may aggravate or mitigate the defendant's guilt, thereby identifying him as highly blameworthy and deserving of death or less blameworthy, and deserving to be spared the ultimate sanction. They reflect on the appropriate sentence for the defendant even though they do not implicate his mental-state culpability for the murder.

Aggravating factors, as previously analyzed, serve the constitutional function of narrowing the class of defendants for whom the death penalty may be the appropriate punishment.[171] Although most aggravating circumstances relate directly to the circumstances of the crime, and as such focus on the defendant's culpability for the crime,[172] not all of them do so.[173] The aggravating factor of future dangerousness may influence the sentencing decision[174] even though it is unrelated to the crime. An aggravating circumstance concerning a defendant's prior criminal conduct is also unrelated to the murder but is commonly identified as a way to distinguish death-eligible murderers from all other murderers.[175] When present, these aggravating circumstances may represent a basis on which to conclude that a defendant belongs to that small group who should be considered death-eligible or worthy of death.[176]

Just as aggravating circumstances are not limited to the crime, neither are mitigating factors. Certainly, aspects of the crime may be

170. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 163 (1994) ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing the appropriate punishment."); Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (stating that because the imposition of death penalty is related to culpability, the jury must be able to consider defendant's character, background and record); Sumner v. Shuman, 483 U.S. 66, 78-82 (1987) (stating that the jury should also be allowed to consider the defendant's age, background, and influence of drugs or alcohol when deciding whether to impose the death penalty); *Eddings*, 455 U.S. at 110 (adopting the rule stated in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), that a sentencer may not be precluded from considering any aspect of a defendant's character or record as mitigating evidence); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (holding unconstitutional the North Carolina death penalty statute because it failed to allow particularized consideration of all relevant aspects of the defendant's character and record).

171. *See supra* note 35.

172. *See supra* note 46-48.

173. *See supra* note 51-52.

174. *Simmons*, 512 U.S. at 163.

175. *See supra* note 52. *See, e.g.*, *Shuman*, 483 U.S. at 81 (noting that a defendant's criminal record may be a valid aggravating factor).

176. Zant v. Stephens, 462 U.S. 862, 879, 887 (1983) (finding that the aggravating circumstance of prior criminal conduct may help determine that the defendant is death-eligible and affect the assessment of whether he will be sentenced to death).

mitigating.[177] But mitigating evidence is not limited to the crime or to the defendant's culpability for the crime—it includes the defendant's character, record, or background.[178] Character[179] may include positive traits such as "voluntary service, kindness to others, religious devotion,"[180] the fact that the defendant was a "fond and affectionate uncle,"[181] or the defendant's record of good behavior while in jail awaiting trial.[182]

Prior criminal conduct may also constitute mitigating character or record evidence. In *Sumner v. Shuman*,[183] the Court held unconstitutional a statute that mandated the death penalty for a defendant who committed a murder while serving a life sentence because the statute allowed for neither individualized consideration of the circumstances of crime for which he received the life sentence nor for those circumstances related to the present murder.[184] The Court reasoned that evidence about the defendant's degree of participation in the prior crime might be relevant to the defendant's record or character.[185] In addi-

177. *E.g.*, minor participation in the crime, Lockett v. Ohio, 438 U.S. 586, 597, 604 (1978) (Burger, J., plurality); *Shuman*, 483 U.S. at 79-80; or impaired judgment not rising to the level of a defense, Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry v. Lynaugh, 492 U.S. 302 (1989). *See* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment and the* Lockett *Doctrine*, 82 J. Crim. L. & Criminology 283, 303-05, & n.67 (1991).

178. *Penry*, 492 U.S. at 328; *Eddings*, 455 U.S. at 110; *Lockett*, 438 U.S. at 604; Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *see* Bilionis, *supra* note 177, at 304-05 (observing that *Lockett* encompasses circumstances of the defendant's formative years, adjustment to prison, and positive traits such as "remorse, general good character, hardworking nature, success in overcoming considerable hardships, service to the community or the military, or relatively minor criminal record" (footnotes omitted)).

179. The Court has not defined what constitutes "character." Franklin v. Lynaugh, 487 U.S. 164, 178 (1988).

180. *Id.* at 186 (O'Connor, J. concurring); *id.* at 190 (Stevens, J., dissenting) (arguing that evidence of honorable military service, kindness to others, and church attendance are related to the defendant's future conduct and personality). Justice Souter characterized similar qualities as possessing "virtually no bearing on one's culpability for crime in the way that immaturity or permanent damage due to events in childhood may." Graham v. Collins, 506 U.S. 461, 521 (1993) (Souter, J., dissenting).

181. Hitchcock v. Dugger, 481 U.S. 393, 397 (1987); South Carolina v. Gathers, 490 U.S. 805, 817-18 (1989) (O'Connor, J., dissenting) ("None of this evidence [that the defendant was an affectionate and caring uncle] was directly relevant to the events of September 13, 1986 [the day of the crime], but all of it was relevant to the jury's assessment of respondent himself and his moral blameworthiness.").

182. Skipper v. South Carolina, 476 U.S. 1 (1986). While unrelated "specifically to the petitioner's culpability for the crime he committed," the jury may draw mitigating inferences from such evidence regarding the defendant's character and future conduct. *Id.* at 4-5; *see also Franklin*, 487 U.S. at 178-79 (noting that character evidence of a clean disciplinary record in prison may be considered as a component of future dangerousness).

183. 483 U.S. 66 (1987).

184. *Id.* at 78.

185. *Id.* at 81 (noting that prior convictions might serve as an aggravating factor, but "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense"). For example, the Court

tion, the mandatory penalty did not allow for consideration of other mitigating factors,[186] including the defendant's behavior during his incarceration.[187] Viewed as a whole, the statute was unconstitutional because it did not permit the consideration of mitigating factors, whether unrelated or related to the murder for which he was just convicted, which could provide the basis for a sentence less than death.[188]

Background evidence about the defendant may also serve to explain who he is in a way that mitigates his punishment. In *Eddings v. Oklahoma*,[189] the Court recognized that a young defendant's impaired mental development and family background were as important as his age in determining the appropriate sentence.[190] Similarly, in *Penry v. Lynaugh*,[191] Penry's personal background—his history of childhood abuse—was as relevant to the jury's punishment-phase decision as were his mental retardation and organic brain damage.[192] In each case the mitigating background evidence was not relevant to the crime, but that same evidence was essential to the punishment decision.

Evidence of character, record, or background may serve to aggravate or mitigate the defendant's punishment. Unlike evidence regarding the defendant's state of mind or the circumstances of the crime, this evidence may not be related to the murder and thus does not inform the reconceptualization of the defendant's culpability as a punishment issue. Nevertheless, this evidence is relevant to the jury's determination that the defendant should be sentenced to death or life imprisonment.

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noted that Shuman previously had been convicted of murder, but was not the triggerman. *Id.* at 81 n.9.

186. *Id.* at 82 ("[C]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.") (quoting Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977)).

187. *Id.* (raising the question of whether the current crime was an "isolated" one, or merely the "most recent" crime committed during incarceration).

188. *See id.*

189. 455 U.S. 104 (1982).

190. *Id.* at 116.

191. 492 U.S. 302 (1989).

192. *Id.* at 322-28. The Court concluded that it is "precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Id.* at 327-28. While the Court spoke of these factors as related to the defendant's culpability, it is apparent from its reference to character, record, and background that the Court meant something other than the defendant's guilt-phase culpability, or even the reconceptualized punishment notion of culpability. This illustrates the confusion engendered by the use of "culpability" at the punishment phase and the need to recast the inquiry into one about the defendant's deathworthiness. *See infra* notes 341-42 and accompanying text.

C. *Conclusion*

The decisions made at the guilt and punishment phases of a death penalty case are distinct but related inquiries. The evidence the jury may consider at each phase is different, as is the character of each decision. Unfortunately, however, both decisions are framed as turning on the defendant's culpability. The foregoing analysis demonstrates that the use of the same language obscures recognized critical differences between the two processes. At the guilt phase, the assessment of the defendant's culpability for the murder is limited to his state of mind and conduct at the time of the crime. In contrast, when the Court speaks of the defendant's "degree of culpability" as the key question at the punishment phase, it means something both different in kind and broader in scope than the defendant's culpability for the crime as determined at the guilt phase. To ask whether the defendant possessed the "degree of culpability" sufficient to impose a death sentence invokes notions of guilt-phase culpability for the murder. The answer, however, is not defined by the guilty verdict. Assessing the appropriate punishment involves both reconceptualizing the defendant's state of mind and the circumstances of the crime as well as considering aggravating and mitigating factors unrelated to the crime. These may include the defendant's character, background, and record, his prior criminal conduct, and his future dangerousness.[193] Each of these factors is extraneous to the crime,[194] yet relevant to whether the defendant will be sentenced to life imprisonment or death. Accurately understood, these factors inform the defendant's deathworthiness, not his personal culpability.

Determining what punishment the defendant should receive requires the jury to reconceptualize and reframe its focus from conviction to sentence. By utilizing the guilt-phase language of culpability to refer to the related but separate question of punishment, the Court perpetuates confusion over the proper relationship of the guilt and punishment decisions. Without a coherent framework structuring the relationship between these two determinations, many courts, including the Supreme Court itself, conflate the two decisions into one: that one being the guilt-phase conclusion about the defendant's culpability for the murder. Unless the distinction between the two determinations is recognized and maintained, the purposes of a bifurcated trial

193. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 973 (1994) ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant .... The selection decision, on the other hand, ... must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability."); Simmons v. South Carolina, 512 U.S. 154, 163 (1994); *Penry*, 492 U.S. at 327-28.

194. South Carolina v. Gathers, 490 U.S. 805, 817-18 (1989) (O'Connor, J., dissenting) ("Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so, ... [because] it was relevant to the jury's assessment of respondent himself and his moral blameworthiness.").

and discretionary sentencing are dissipated,[195] rendering the decision to sentence the defendant to death both arbitrary and capricious.

II. The Distinctions Between Guilt and Punishment Run Amok

While courts facially recognize that the punishment phase requires a new inquiry that is not limited to the defendant's culpability for the crime,[196] the distinction between the two often becomes elusive. In a variety of ways, courts minimize the difference between the two phases by suggesting that the guilt-phase inquiry predetermines the punishment inquiry. The result is that the two decisions essentially are treated as one, the finding of guilt.

This part analyzes three situations in which the difference seems to elude courts. The first situation is represented by a United States Supreme Court decision that held constitutional a sentencing statute that required the jury to consider, as part of a sentencing factor regarding circumstances that reduced the seriousness of the crime, a defendant's mitigating evidence that was unrelated to the crime. The second situation is typified by lower court decisions that inject guilt-

195. Arguably, after Blystone v. Pennsylvania, 494 U.S. 299 (1990), the constitutional distinctions between the two phases may be minimized. The Pennsylvania statute upheld by the Court required the jury to impose the death penalty if it found one aggravating circumstance at the punishment phase—there, that the defendant committed the first degree murder in the course of a robbery—and no mitigating circumstances. Under *Blystone*, the Constitution does not require that the jury separately consider the appropriateness of the death penalty despite the absence of mitigating circumstances. *Id.* at 306-07. Incredibly, in this situation, the jury is required to do no more than is required in other states to decide that the defendant is guilty: find that the first degree murder occurred under aggravating circumstances. This contradicts the core principle of individualized sentencing, and, fortunately, is not followed in all jurisdictions. *See, e.g., State v. Holland*, 777 P.2d 1019, 1027 (Utah 1989) (recognizing that the punishment phase requires two steps: weighing the aggravating and mitigating circumstances and deciding whether the death penalty is the appropriate punishment); Acker & Lanier, *supra* note 9, at 27-33 (contrasting "automatic" statutes like Pennsylvania's with balancing statutes that require the jury to decide separately whether or not to sentence the defendant to death).

196. *See supra* Part I; *see also* Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995) (noting that the death penalty decision weighs "the worth of the [defendant's] life against his culpability"), *cert. denied*, 116 S. Ct. 1335 (1996); State v. Holloway, 527 N.E.2d 831, paragraph one of the syllabus (Ohio 1988) (holding that mitigating circumstances are not necessarily related to culpability but to whether the defendant should be sentenced to death); State v. Langley, 839 P.2d 692, 707-08 (Or. 1992) (en banc) (holding that the trial court must instruct the jury that it may consider mitigating evidence not causally related to the crime); State v. Wood, 648 P.2d 71, 77 (Utah 1982) (stating that because some murderers are less culpable, the jury must consider the circumstances of the crime as well as the defendant's background and personal characteristics). Decisions that find certain errors harmless at guilt but harmful at punishment also acknowledge the difference between the two phases. *E.g., Hendricks*, 70 F.3d at 1042-43 (finding ineffective assistance of counsel at the penalty phase but not at the guilt phase); State v. Thompson, 514 N.E.2d 407, 420-21 (Ohio 1987) (holding that the introduction of gruesome photographs was harmless at the guilt phase, but prejudicial at the punishment phase).

phase standards of criminal responsibility and insanity into the punishment phase. The third is a line of cases from the United States Court of Appeals for the Fifth Circuit that constructs a definition of "constitutionally relevant mitigating evidence" that restricts such evidence to that which has a nexus to the defendant's culpability for the murder. Each of these situations demonstrates the power as well as the danger of conflating the two decisions. The frequency with which they are treated as coextensive reveals the persistent elusiveness of their difference.

A. *Collapsing the Seriousness of the Crime into the Punishment*

The seriousness of murder is what makes the defendant eligible for the most severe punishment. Still, the gravity of the offense does not predetermine the punishment. While some may want to suggest that every defendant convicted of the most serious crime should receive the most serious punishment,[197] such a practice would violate the constitutional requirement of individualized sentencing.[198] Certainly every defendant convicted of murder deserves punishment, but the appropriate punishment is not always death.[199] The penalty of death is not presumed to be the appropriate punishment even for this most serious offense.

Espousing something of a contrary view, the Supreme Court, in *Boyde v. California*,[200] upheld the constitutionality of a sentencing factor that tied the jury's evaluation of mitigating evidence unrelated to the crime to its view of the seriousness of the crime. By tying the assessment of this mitigating evidence to the gravity of the offense, the statutory scheme not only jeopardized the distinction between the two inquiries, it jeopardized as well the constitutional imperative of discretionary sentencing.

Richard Boyde argued that the California sentencing factors contained in the jury instructions did not allow the jury to consider his background and character evidence that was unrelated to the crime.[201] All of the factors specifically focused on the circumstances of the

197. *See, e.g.*, Graham v. Collins, 506 U.S. 461, 486-88 (1993) (Thomas, J., concurring) (suggesting that a mandatory death penalty may be appropriate for certain crimes); Walton v. Arizona, 497 U.S. 639, 671-72 (1990) (Scalia, J., concurring) (same); Wiseman, *supra* note 82, at 741 n.38 (providing an example of a prosecutor arguing that discriminatory enforcement of the death penalty would disappear if every defendant convicted of intentional first degree homicide was executed); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923, 1931 (1994) (suggesting that the nature of the murder combined with "overwhelming evidence of guilt," is one reason courts reviewing ineffective assistance of counsel claims "are often unable to imagine that a jury would have imposed any sentence but death").

198. *See supra* note 4.

199. *See supra* notes 3-10 and accompanying text.

200. 494 U.S. 370 (1990).

201. *Id.* at 378, 381.

crime[202] or on the defendant's criminal history,[203] except for a final factor [hereinafter "factor (k)"] that allowed the jury to consider: "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[204] The trial court defined "extenuate" as "to lessen the seriousness of the crime as by giving an excuse."[205] Boyde argued that factor (k) did not permit the jury to consider his character and background evidence because the language "extenuates the gravity of the crime" limited relevant circumstances to those related only to the crime.[206] His were not. He presented testimony from psychologists, family, and friends about his deprived background, borderline intelligence, and positive character traits.[207]

The Court rejected Boyde's argument on the ground that "no reasonable likelihood" existed that a juror would apply factor (k) in a way that prevented her from considering this evidence;[208] a juror would understand that she could consider a defendant's mitigating evidence of character and background that was unrelated to the crime within this factor. The Court cited the language used in *Penry v. Lynaugh*[209] to support its conclusion: evidence of background and character is relevant because it may show the defendant is "less culpable than defendants who have no such excuse."[210] In this context, the Court reasoned that Boyde could argue that "his background and character 'extenuated' or 'excused' the seriousness of [his] crime."[211] According to the Court, factor (k) did not limit extenuation to "any other circumstance *of the crime*," but allowed the jury to consider "*any other circumstance*" which certainly included background and character.[212]

202. *Id.* at 373 n.1 (listing the relevant factors as: the circumstances of the crime; whether the crime was committed while the defendant was extremely emotionally or mentally disturbed; whether the victim was a participant in the homicidal conduct; whether the defendant believed he was morally justified; or was under extreme duress; or was able to appreciate the criminality of or conform his conduct to, the requirements of the law; the defendant's age; and whether the defendant was an accomplice).

203. *Id.* (listing the relevant factors as: the presence or absence of criminal activity involving the use or attempted use of force or violence; the presence or absence of prior felony convictions).

204. *Id.* at 373-74. This was a "catch-all" factor.

205. *Id.* at 381.

206. *Id.* at 378-79.

207. *Id.* at 382, 388 (Marshall, J., dissenting).

208. *Id.* at 381.

209. 492 U.S. 302 (1989).

210. *Boyde*, 494 U.S. at 382. Quoted in full at *supra* note 78.

211. *Id.* at 382.

212. *Id.* The court also reasoned that even if factor (k) was unclear, the fact that other factors refer to non-crime related evidence (e.g., age, the presence or absence of prior criminal activity or prior felony convictions) made it "improbable" that the jury would conclude it could not consider evidence that took four days to present, especially when the trial court instructed the jury to consider "all of the evidence." *Id.* at

Arguably, *Boyde* upheld the importance of mitigating evidence unrelated to the crime, and in so doing, affirmed the distinction between the two phases. The Court's analysis failed, however, to recognize that factor (k), by its very language, inexorably retained its focus on the crime itself, and specifically on the crime's gravity. To require the jury to consider background and character evidence in this context was wrong for two reasons. First, factor (k) did not allow the jury to consider the mitigating quality of Boyde's character and background evidence separate from the crime.[213] Second, factor (k) essentially required the jury to change its mind about the seriousness of the murder in order to give effect to the mitigating evidence. At the guilt phase, the jury convicted Boyde of the most serious crime, finding him guilty of the only crime eligible for death. Under the Court's holding, the only way the jury could consider Boyde's background or character evidence unrelated to the crime was, in essence, to denigrate the value of its own guilty verdict. If the jury wanted to consider "any other circumstance"[214] not previously covered by the other factors, it could do so only if it found the evidence "extenuate[d] the gravity of the crime."[215] In other words, the jury could effectively consider evidence unrelated to the murder only if the evidence made the murder less serious.

The burden on the defendant and the jury to place character and background evidence unrelated to the crime in the limited context of extenuating the crime itself is an unfair, if not impossible, task. It should not be constitutionally acceptable. The question at the punishment phase is not whether the murder was less serious. Rather, the essential inquiry is whether the defendant is less deserving of a death sentence because of his character or background, *in spite of*, or even *in the face of*, the seriousness of the murder.[216] As Justice Marshall argued in dissent, a defendant may be less culpable for the crime without the crime being less serious.[217] The seriousness of the murder cannot be undone; the death penalty is within the realm of possibility

383 (emphasis omitted). *But see id.* at 398 (Marshall, J., dissenting) ("Under any standard, . . . the instructions are inadequate to ensure that the jury considered *all* mitigating evidence.").

213. *See id.* at 398-99 (Marshall, J., dissenting) ("A 'circumstance which extenuates the gravity of the crime' unambiguously refers to the circumstances related to the crime. Jurors, relying on ordinary language and experience, would not view the seriousness of a crime as dependent upon the background or character of the offender."). This is in keeping with one of the basic distinctions between the two phases: Guilt may not be based on background or character, punishment may. *Id.* at 399 n.5.

214. *Id.* at 381.

215. *Id.*

216. *Id.* at 399 (Marshall, J., dissenting) ("[A]n offender's background and character unrelated to his crime should be considered by the sentencer because of society's deeply felt view that punishment should reflect *both* the seriousness of a crime *and* the nature of the offender.").

217. *Id.* at 400.

only because the crime is so serious. If the applicability of the death penalty hung on the seriousness of the crime alone, the role of the jury at sentencing would be greatly circumscribed. One of the few constitutional requirements of a statutory death penalty scheme, however, is that the scheme allow for the individualized consideration of the defendant: his character and background in addition to the circumstances of the crime. In light of this imperative, it is untenable to require the jury to find the crime less serious if it wants to accord mitigating weight to evidence unrelated to the crime. The jury must be allowed to respect the gravity of the crime and still find the defendant undeserving of death.

B. *Injecting Guilt-Phase Concepts into the Punishment Phase*

The tension between the seriousness of the crime of murder and whether the defendant should be sentenced to death for committing the crime also appears in cases where guilt-phase concepts of criminal responsibility are injected into the punishment-phase inquiry. What results is loss of the significance of the punishment-phase evidence—the punishment decision becomes a recapitulation of guilt rather than a reconceptualization of the defendant and the crime. This section examines two situations in which this phenomenon occurs: cases that inject the insanity test into the punishment phase to evaluate mitigating evidence of mental disabilities, and cases that conceptualize mitigating evidence as negating criminal responsibility.

1. Insanity Defense as a Mitigating Factor

The difference between the guilt-phase and punishment-phase inquiries is conflated by courts that inject the insanity test into the evaluation of a defendant's mental disability at punishment. Prosecutors exacerbate this error by arguing to juries that the consideration of the defendant's mental disability is effectively the same at each of the two phases.[218] Courts that fail to recognize the difference between in-

218. *E.g.*, Starr v. Lockhart, 23 F.3d 1280, 1293 (8th Cir. 1994) (discussing a trial in which, at the punishment phase, the prosecutor argued that the defendant's mild retardation did not prevent him from knowing right from wrong); Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989) (offering an example of a prosecutor arguing, at the punishment phase, "Don't you believe if he had a doctor that would say he was insane, which he is entitled to, that you would have had him on the stand here?"); Whalen v. State, 492 A.2d 552, 569 (Del. 1985) (holding that the prosecutor erred in arguing mitigating factors insufficient to "mitigate and *excuse*"); State v. English, 367 So. 2d 815, 819 (La. 1979) (reversing, in part, because prosecutor relied heavily on testimony about insanity and the guilt-phase decision in his closing argument at punishment); State v. Lawrence, 541 N.E.2d 451, 456 n.5 (Ohio 1989) (reversing, in part, because the prosecutor argued that considering defendant's mental state at punishment was "the deja vu" of considering his insanity defense); State v. Brett, 892 P.2d 29, 61 (Wash. 1995) (en banc) (offering an instance where the prosecutor argued that the defendant knew right from wrong when the proper standard was substantial impairment), *cert. denied*, 116 S. Ct. 931 (1996).

sanity as a defense and mental disability as a mitigating factor compound the error of collapsing the two phases into one.[219]

The insanity defense seeks to excuse the defendant from criminal responsibility by negating his culpability for the murder.[220] A defendant may present evidence demonstrating[221] that he should not be found guilty because he suffered from a mental disease or defect.[222] Depending on the jurisdiction, this mental disease or defect may impair his ability to know right from wrong or to know the nature or quality of his acts;[223] to appreciate the criminality of his conduct;[224] or to conform his conduct to the requirements of the law.[225] This is an intentionally exacting standard.[226] If the defendant is found insane, it means that he is not criminally responsible for his conduct and will not be punished.[227]

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219. *See supra* note 231 and accompanying text. This is further exacerbated by the possibility that mental disabilities may be turned into an aggravating factor. *See* Berkman, *supra* note 35, at 299-300, 305-08 (arguing that the sentencer should not be allowed to consider as aggravating factors any circumstances caused by the defendant's mental illness).

220. *See infra* notes 222-26 and accompanying text.

221. Jurisdictions vary in the burden of proof placed on the defendant to establish his insanity; in the federal system the burden is clear and convincing, but most states require proof by a preponderance of the evidence. Dressler, *supra* note 21, at 314.

222. This phrase is usually not defined. *Id.* at 317-18 (discussing medical and legal definitions of "mental disease or defect"). The ABA Criminal Justice Mental Health Standards propose the following definition: "(i) impairments of mind, whether enduring or transitory; or, (ii) mental retardation, either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense." ABA Criminal Justice Mental Health Standards, Standard 7-6.1(b) (1989); *id.*, Commentary at 345 (contrasting "broad" medical definition of "mental disorder" with types of psychopathy or disabilities that are required as thresholds for "mental nonresponsibility").

223. This is the classic *M'Naghten* test: "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." M'Naghten's Case, 8 Eng. Rep. 718 (1843) *quoted in* LaFave & Scott, *supra* note 21, at 311. This is the most common test for insanity. LaFave & Scott, *supra* note 21, at 312 (discussing the traditional tests for the insanity defense); *see generally id.* at 310-23; Dressler, *supra* note 21, at 319-22 (discussing the different legal formulations of the insanity defense).

224. "A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01(1) (1985) (alteration in original).

225. *Id.* This impairment is increasingly excluded as part of the insanity test. *See, e.g., infra* note 258. When the inability to control one's conduct is not part of the insanity test, it may form the basis of the verdict "guilty but mentally ill." *See, e.g.*, Sanders v. State, 585 A.2d 117, 124 (Del. 1990).

226. The insanity defense is rarely interposed, and even more rarely successful. *See* ABA Criminal Justice Mental Health Standards, *supra* note 222, at 323 (noting that the insanity defense is raised in less than one percent of felony cases, successful in less than one quarter).

227. Defendants found not guilty by reason of insanity are almost always committed to a mental institution. Dressler, *supra* note 21, at 324-25. This may result in a

A defendant's mental disease or defect may also be relevant as a mitigating factor at the punishment phase, regardless of whether it was presented as a defense at the guilt phase. As a basis for a sentence less than death, a defendant's disability may not need to constitute the same mental disease or defect required to invoke the insanity test,[228] or the disability may not need to result in the same high degree of impaired capacity.[229] These distinctions arise from the recognition that "[s]ome lesser impairment or incapacity may suffice to suggest that the death penalty should not be invoked."[230] A jury may find the defendant criminally responsible for murder but nevertheless too impaired to deserve a death sentence.

Whether courts, and ultimately juries, understand how the tests governing mental disabilities at the two phases are different, is questionable. Cases are replete with examples of prosecutors and trial courts who treat the standard by which the jury should judge the significance of the defendant's mental disability at the punishment phase as the same as the guilt-phase test.[231] Often, appellate courts attempt

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longer term of confinement than if he had been convicted, *id.*, but it still precludes other forms of punishment, like the death penalty; *cf. Sanders*, 585 A.2d at 144-49 (stating that the death penalty may be imposed on a defendant found guilty but mentally ill).

228. Indeed, according to Acker & Lanier, "most jurisdictions simply focus on the fact of an offender's impairment and have refrained from requiring that a mental disease or defect, intoxication, or other cause be identified for the impairment." Acker & Lanier, *In Fairness and Mercy*, *supra* note 46, at 328 (citing New Mexico as an example: "[T]he defendant's capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired.").

229. *Compare* Model Penal Code § 210.6(4)(g) (stating that as a mitigating circumstance, the mental disease or defect need only result in an impaired capacity) *with* § 4.01(1) (noting that insanity requires the defendant to lack substantial capacity); Louisiana, *infra* notes 238 & 239; Ohio, *infra* notes 256 & 257. Some jurisdictions specifically differentiate the two standards by adding a provision to the relevant mitigating factors stating "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, *but not so impaired as to constitute a defense to prosecution.*" Ariz. Rev. Stat. Ann. § 13-703(G)(1) (West 1989 & Supp. 1996 (emphasis added)); *see also* Colo. Rev. Stat. § 16-11-103(4)(b) (West 1986 & Supp. 1996); Conn. Gen. Stat. Ann. § 53a-46a(h)(2) (West 1994 & Supp. 1997); Ky. Rev. Stat. Ann. § 532.025(2)(b)(7) (Michie 1990 & Supp. 1996); N.Y. Crim. Proc. Law § 400.27(9)(b) (McKinney Supp. 1997); Tenn. Code Ann. § 39-13-204(j)(8) (West 1991 & Supp. 1996).

230. Model Penal Code § 210.6 cmt. at 138.

231. *See supra* note 218; *see also* Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994) (finding that the trial court erroneously rejected mitigating circumstances of extreme mental or emotional disturbance because it thought it was bound by the jury's rejection of the insanity defense); Brown v. State, 577 N.E.2d 221, 234 (Ind. 1991) (holding that the trial court did not err in finding that the defendant did not suffer from "extreme mental or emotional disturbance" even though this conclusion was based on the trial court's assessment that the defendant's impairment was not extreme enough to excuse his conduct because the trial court also relied on the correct punishment-phase standard when it found that the defendant possessed "substantial capacity to appreciate the criminality of her conduct" and control her conduct); Hunter v. Commonwealth, 869 S.W.2d 719, 726 (Ky. 1994) (holding that while the evidence did not warrant a guilt-phase instruction on extreme emotional or mental distress, the trial

to correct the error and place mitigating evidence of mental disability in its proper context at the punishment phase.[232] At other times, appellate courts perpetuate these errors made at the trial level.[233] Some-

court erred in not giving such an instruction at the punishment phase where the standard was lower); State v. Holloway, 527 N.E.2d 831, 839 (Ohio 1988) (finding that testimony about the defendant knowing right from wrong diminished the significance of a mitigating factor regarding substantial impairment); Berard v. State, 402 So. 2d 1044, 1049-51 (Ala. Crim. App. 1981) (affirming the trial court that characterized the defendant's mitigating evidence of emotional instability as not excusing or justifying criminal conduct and as showing he appreciated the consequences of his conduct); Lewis v. State, 380 So. 2d 970, 976-8 (Ala. Crim. App. 1980) (holding that the trial court did not sufficiently take into account the defendant's subnormal mental capacity as a mitigating factor, not equal to insanity); *cf.* Hendricks v. Calderon, 70 F.3d 1032, 1043-45 (9th Cir. 1995) (affirming grant of writ of habeas corpus and rejecting the State's argument that trial counsel was reasonable to limit his punishment-phase investigation of mitigating evidence based on the mental health evaluation conducted for the guilt phase); Clabourne v. Lewis, 64 F.3d 1373, 1384-87 (9th Cir. 1995) (affirming grant of writ of habeas corpus based on counsel's ineffectiveness at sentencing for limiting the relevance of mitigating evidence to insanity rather than significant impairment); Starr v. Lockhart, 23 F.3d 1280, 1290-93 (8th Cir. 1994) (holding that the trial attorney's failure to provide an expert on mental defect as a mitigating issue, separate from guilt-phase defense, was not harmless error); Kenley v. Armontrout, 937 F.2d 1298, 1307-09 (8th Cir. 1991) (reversing and remanding to the district court with instructions to grant the writ of habeas corpus based on ineffective assistance of counsel at sentencing phase because counsel was not justified in relying on an expert's report ruling out mental disease or defect but not considering lesser mental disorders as mitigating factors). Jurors may even make the mistake on their own. In *Felde v. Butler*, Mr. Felde told the jurors that they should sentence him to death. 817 F.2d 281, 282 (5th Cir. 1987). When the jury did so, it sent a note with its verdict which spoke of the regard the jurors had for Mr. Felde as a Viet Nam veteran, and also noted "we felt that Mr. Felde was aware of right and wrong when [the victim's] life was taken." *Id.* at 282 n.1.

232. *Morgan*, 639 So. 2d at 13-14; *Hunter*, 869 S.W.2d at 726-27; State v. English, 367 So. 2d 815, 819 (La. 1979) (setting aside death sentence because the jury was not instructed properly on the defendant's mental disability); Lawrence v. State, 541 N.E.2d 451, 460 (Ohio 1989) (vacating death sentence in part because the defendant's impaired mental state made the death penalty inappropriate); *Lewis*, 380 So. 2d at 976-78 (reversing death sentence due to the defendant's subnormal mental capacity). *Cf. Hendricks*, 70 F.3d at 1043-45 (finding counsel was ineffective at sentencing for not investigating or presenting relevant mental problems as mitigating sentence); *Starr*, 23 F.3d at 1290-93 (holding that the denial of psychiatric expert for sentencing was not harmless error); *Kenley*, 937 F.2d at 1307-08 (finding counsel provided ineffective assistance of counsel by not investigating or presenting mitigating evidence of mental impairment).

233. *Brown*, 577 N.E.2d at 234 (affirming death sentence where the trial court refused to find "extreme emotional or mental disturbance" because the defendant's conduct was not extreme enough to excuse his conduct, but the trial court also found the defendant possessed the "substantial capacity to appreciate the criminality of her conduct and to conform her conduct"); State v. Perry, 502 So. 2d 543, 561 (La. 1986) (affirming the death sentence because the jury chose to believe defendant was not insane or unable to control or understand actions); *Holloway*, 527 N.E.2d at 839 (affirming death sentence because testimony about the defendant knowing right from wrong diminished the significance of mitigating factor regarding substantial impairment); State v. Brett, 892 P.2d 29, 61 (Wash. 1995) (en banc) (holding that the prosecutor's argument that the defendant knew right from wrong was not error because the prosecutor did not mention insanity and the defendant could have argued evidence

what surprisingly, the same appellate courts may apply the tests accurately in one case, but not in the next case.[234] One commentator argues that this inconsistency across and within jurisdictions demonstrates an absence of "a principled consideration of reduced responsibility."[235] This erratic treatment of mental disabilities also may reflect a fundamental unwillingness to sustain the certain difference between the guilt and punishment determinations.

a. *Courts that Recognize the Difference Between Mental Disease or Defect as a Factor at the Guilt or Punishment Phases*

Courts that recognize the distinction between mental disabilities as they affect guilt and as they mitigate punishment, contribute to our understanding of the different purposes of the guilt and punishment phases. For example, in *State v. English*,[236] the Louisiana Supreme Court recognized that once a defendant has been found guilty, "another dimension of his mental condition comes into play as affecting whether the jury shall recommend that he be put to death."[237] In other words, a defendant's mental illness may or may not affect his guilt, but the jury must newly reconsider the defendant's mental illness because it informs whether the defendant is worthy of death.

In *English*, the Louisiana Supreme Court set aside English's death sentence and remanded for resentencing because the jury had not been permitted to consider English's psychiatric illness as a circumstance that could mitigate his punishment. The trial court properly instructed the jury on insanity at the guilt phase,[238] but refused the defendant's request to specially instruct the jury at the punishment phase on the meaning of the mitigating circumstance regarding mental disease or defect.[239] Thus, the only instruction the jury received with

justified a sentence less than death even if it did not reduce his moral culpability); *Berard*, 402 So. 2d at 1051 (holding that the trial court's characterization of the defendant's mitigating evidence of emotional instability as not excusing or justifying criminal conduct and as showing he appreciated the consequences of his conduct was "tantamount" to mitigating factors about mental disabilities).

234. *See, e.g., supra* Part II.B.1.b.

235. George E. Dix, *Psychological Abnormality and Capital Sentencing*, 7 Int'l. J.L. & Psychiatry 249, 259 (1984) (arguing that decisions claiming to turn on the presence of mental disabilities not properly considered at the trial level may actually turn on other issues in the case such as concern over a death sentence in a non-homicide case or a trial court overriding the jury's life sentence recommendation).

236. 367 So. 2d 815 (La. 1979).

237. *Id.* at 819.

238. *Id.* at 818 ("[A]n insane person is one who is incapable of distinguishing between right and wrong.").

239. *Id.* The mitigating circumstance was: "At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease of [sic] defect or intoxication." *Id.* The special instruction the defense requested was:

> [A] mental defect would be a defect or deficiency in the emotional, psychic, or intellectual function of a person which rendered the mind deficient for the

respect to how to evaluate English's mental disability was that given at the guilt phase.[240] At the punishment phase, two psychiatrists testified that English knew right from wrong and suffered from a "severe psychiatric illness."[241] The prosecutor, in his closing argument at the punishment phase, relied heavily on the psychiatrist's testimony that English "knew right from wrong" and reminded the jury that mental diseases or defects do not "affect the criminal responsibility of an individual."[242]

The Louisiana Supreme Court held that, under these circumstances, English was entitled to a special instruction explaining the difference between a mental disease or defect constituting insanity or a mitigating circumstance.[243] The prosecutor's emphasis on English's "criminal responsibility," coupled with the absence of an instruction on the mitigating factor, resulted in the jury being led to believe that the same test applied at both phases. According to the Court, the legislature intended the jury to be able to consider an "abnormal mental condition short of legal insanity"[244] that diminished the defendant's capacity for self control, capacity to form the intent to kill, or some other mental disease or defect "affecting the act"[245] that would cause the jury not to impose the death penalty. By failing to make this distinction clear, the trial court denied the jury the opportunity to consider the separate punishment question of how the defendant's mental disability affected whether the jury should sentence him to life imprisonment or death.[246]

In a related vein, the United States Court of Appeals for the Ninth Circuit recognized that the different legal tests for mental disabilities adhering at the guilt and punishment phases also require a different standard of investigation for defense counsel.[247] In *Hendricks v. Cal-*

> purpose for which the mind is to be used. Mental disease means a person is suffering from an illness which lessens his capacity to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations.... A mental disease or defect is not to be confused with insanity, as to which you have been previously instructed.

Id.

240. *Id.* at 819. The Louisiana Supreme Court concluded that the trial court "apparently accept[ed]" the state's argument that the insanity and mitigating circumstances tests were the same. *Id.* at 818-19.

241. *Id.* at 819.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Hendricks v. Calderon, 70 F.3d 1032, 1043-45 (9th Cir. 1995); Clabourne v. Lewis, 64 F.3d 1373, 1384-85 (9th Cir. 1995) (holding that counsel provided ineffective assistance of counsel at the sentencing hearing, in part because his cross-examination of the state's witnesses focused solely on Mr. Clabourne's sanity at the time of the crime, not on the mitigation standard).

deron,[248] the court found defense counsel ineffective for failing to investigate mitigating evidence related to Hendricks's mental problems,[249] despite the fact that the attorney's investigation for the guilt phase did not reveal a plausible defense based on mental illness.[250] The court rejected the prosecutor's argument that the investigation for both was the same: "The differing legal standards in the guilt and penalty phases render this argument a nonsequitur."[251] Citing California's mitigating factors,[252] the court explained that evidence of mental problems may be insufficient to provide a defense at the guilt phase, but proper as mitigation at the punishment phase.[253] Because the substantive standards were different, the court recognized that the investigation would be different as well.[254]

b. *Courts that Conflate the Difference Between Mental Disease or Defect as a Factor at the Guilt or Punishment Phases*

While many courts recognize the differences between the jury's consideration of mental disabilities at the guilt and punishment phases, others fail to appreciate the significance of the shift in focus from conviction to sentence.[255] A series of decisions in Ohio provide insight into this misperception.

Prior to 1990, the insanity test in Ohio was: "whether a defendant, . . . as a result of mental disease or defect, . . . *does not have the capacity* either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law."[256] As a mitigating factor, a mental disease or defect was relevant when "at the time of committing

248. 70 F.3d 1032 (9th Cir. 1995).

249. The Court held that even if the investigation into mental impairment had been sufficient, counsel's overall investigation would still have been deficient because he did not investigate Mr. Hendricks's hard childhood and drug problems, which were "independent of [his] psychiatric problems." *Hendricks*, 70 F.3d at 1044.

250. *Id.* at 1042. Defense counsel's own experts did not believe a mental disability defense existed. *Id.*

251. *Id.* at 1043.

252. *Id.* (citing Cal. Penal Code § 190.3 (d) (extreme mental or emotional disturbance) and (h) (impaired capacity due to mental disease or defect or intoxication)).

253. *Id.* at 1043-44.

254. The Court concluded that not only was counsel's performance deficient because he failed to conduct a proper investigation, but the "storehouse of information chronicling Hendricks' miserable life" sufficiently undermined confidence in the outcome of the punishment phase to satisfy the prejudice prong of the ineffective assistance of counsel test under Strickland v. Washington, 466 U.S. 668, 687-91 (1984). *Id.* at 1044-45.

255. *See, e.g.*, cases cited *supra* note 231 & *infra* note 271 and accompanying text.

256. State v. Claytor, 574 N.E.2d 472, 479 (Ohio 1991) (emphasis added) (quoting State v. Staten, 247 N.E.2d 293 paragraph one of the syllabus (Ohio 1969)). In Ohio, the syllabus is the official language of the Court. *See* Zacchini v. Scripps-Howard Broad., 433 U.S. 562, 566 n.3 (1977) (recognizing that one may consult text of opinion to understand syllabus); Ohio Sup. Ct. R. for the Reporting of Opinions 1(B) (West 1997) (syllabus states controlling points of law). In 1990 the definition changed: It now applies only to "one who did not know, as a result of a severe mental disease or

the offense, the offender, because of a mental disease or defect, *lacked substantial capacity* to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[257] Either as a mitigating factor or as insanity, the mental disease or defect could affect the defendant's cognitive or volitional capacities.[258] But the insanity test imposed a higher standard of disability than the mitigating test. Insanity required a complete lack of capacity while, if offered in mitigation, the defendant needed to exhibit only a substantial lack of capacity.[259] Despite the difference between the two tests, the case law demonstrates that prosecutors and courts, including the Ohio Supreme Court, often treat them as the same.

In *State v. Holloway*,[260] for example, the Ohio Supreme Court's independent review of the mitigating evidence appeared to collapse the insanity and mitigating tests into one. Although acknowledging the language of the mitigating factor, the Court relied on language more closely associated with the insanity test in weighing the defendant's mitigating evidence.

Holloway was convicted of two counts of aggravated murder with aggravating circumstances[261] and sentenced to death. He presented no evidence at the guilt phase but presented substantial evidence at the punishment phase regarding his mental disabilities, character, and background. Family members testified that Holloway was born physically deformed, was mildly retarded, and was physically abused as a child by his father.[262] Two clinical psychologists testified that Holloway was mildly retarded, had an antisocial personality disorder, and

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defect, the wrongfulness of his acts." Ohio Rev. Code Ann. § 2901.01(A)(14) (Anderson 1995) (enacted by 1990 Ohio Laws 340).

257. *Claytor*, 574 N.E.2d at 479-80 (emphasis added in part) (quoting Ohio Rev. Code Ann. § 2929.04(B)(3)). This factor did not change when the legislature modified the definition of insanity. Thus, today, a defendant could raise his incapacity to conform his conduct to the law as a mitigating factor, but not as a defense to the murder.

258. A mental disorder that does not constitute a mental disease or defect may be considered under the catch-all factor "any other factors that are relevant to the issue of whether the offender should be sentenced to death." State v. Cooey, 544 N.E.2d 895, 915 (Ohio 1989) (citing Ohio Rev. Code Ann. § 2929.04(B)(7)).

259. *See Cooey*, 544 N.E.2d at 918 ("The question [at the punishment phase] was not, as the trial court thought, whether Cooey completely lacked capacity" but whether he lacked "substantial capacity"). In *Cooey* the Ohio Supreme Court held that the trial court misapplied the punishment-phase test, but did not reverse because Cooey did not suffer from a mental disease or defect. *Id.*

260. 527 N.E.2d 831 (Ohio 1988).

261. In Ohio "aggravated murder" is the highest degree of murder. *See supra* note 7. For a defendant to be death eligible, the State must prove beyond a reasonable doubt at least one aggravating circumstance—called a "specification"—at the guilt phase. Ohio Rev. Code Ann. § 2929.04(A) (Anderson 1995). Here, the aggravating circumstances were that the offense was committed in the course of an aggravated robbery and an aggravated burglary. *Holloway*, 527 N.E.2d at 833.

262. *Id.*

suffered organic brain damage.[263] Both experts concluded that Holloway lacked the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law[264]—framed in the operative language of the mitigating factor.[265] Of greater importance to the Ohio Supreme Court in its independent weighing of the evidence was the psychologists' additional testimony that Holloway knew right from wrong and could control his behavior.[266] The court found that this testimony about "knowing right from wrong" diminished the significance of the evidence supporting the mitigating factor.[267] Indeed, the court concluded that Holloway's history, character, and background served to explain his character development rather than his substantial inability to appropriately think and behave. The court concluded that "despite all," his actions and the experts' testimony showed that "he was able to distinguish between right and wrong."[268]

Certainly, it is appropriate for a court to find that although a mitigating factor has been established, it is outweighed by the aggravating factors,[269] or even to find that the mitigating factor has not been established.[270] For a court to find that a mental disease or defect when used as a mitigating factor is diminished or negated by applying a guilt-phase test, however, is indefensible.[271] By doing so in *Holloway*, the court infused into the punishment-phase judgment a higher standard for mental disease or defect than was statutorily permitted. The question whether Holloway knew right from wrong was no longer an issue; he was convicted of aggravated murder with specifications.[272]

263. *Id.* at 833, 838.
264. *Id.* at 838.
265. *Id.* at 835 n.1.
266. *Id.* at 838. While not precisely the same language as the operative insanity test, *supra* note 256, it was virtually identical.
267. *Id.* at 839.
268. *Id.*
269. *See, e.g.*, State v. Hill, 595 N.E.2d 884, 901 (Ohio 1992) (finding that mitigating evidence of mental retardation, youth, and family life were outweighed by the aggravating circumstances of the brutal manner of killing).
270. *See* State v. Cooey, 544 N.E.2d 895, 918 (Ohio 1989).
271. The Court made this same analytic error in State v. Spisak. 521 N.E.2d 800, 803 (Ohio 1988) (noting that the defendant relied on mental disease or defect as a mitigating factor and testimony showed he had the "characteristics of borderline and schizotypal personality disorder" but testimony established that he was "sane at the time of the acts, he could have refrained from committing them, had he so chosen, and he understood the nature of his acts but elected to carry them out anyway"); *see also* State v. Hill, 595 N.Ed.2d 884, 901 (Ohio 1992) (weighing of aggravators and mitigators showed "very tenuous relationship" between murder and degree of mental retardation: the defendant was not psychotic and knew right from wrong); State v. Bedford, 529 N.E.2d 913, 924 (Ohio 1988) (weighing of aggravators and mitigators included little weight given to lack of substantial capacity mitigating factor because defendant knew right from wrong).
272. *Holloway*, 527 N.E. 2d at 833. In Holloway's case, whether he knew right from wrong was never an issue at the guilt phase because he did not present any evidence at this stage.

By employing the right-from-wrong test at the punishment phase the court in effect merely reaffirmed the conviction. It did not properly consider the existence of mitigating factors as a matter separate from Holloway's guilt.[273]

A year later, in *State v. Lawrence*,[274] the Ohio Supreme Court behaved in the opposite fashion. The court not only articulated the different tests, it also recognized the necessity, in some circumstances, of ensuring that the trial court does not mislead a jury into concluding that the tests are the same.[275] At the guilt phase of Lawrence's trial, a clinical psychologist testified that Lawrence suffered from four disorders[276] and that Lawrence could not distinguish right from wrong or control his behavior at the time he committed the murders.[277] Although the State's experts disagreed about Lawrence's ability to know right from wrong, they did agree that he suffered from post traumatic stress disorder, one of the four identified disorders.[278] The jury rejected the insanity defense and convicted Lawrence of two counts of aggravated murder with aggravating circumstances.[279] At the punishment phase, Lawrence presented no additional expert testimony regarding his mental state.[280] The prosecutor, in his closing argument at the punishment phase, argued that no difference existed between insanity and the related mitigating factor:

> And here is the big one. You know this is the deja vu. This is the one, go back and reconsider the fact whether at the time of committing the offense the offender, because of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law.

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273. This is especially troubling in *Holloway* because the first holding of the case was that mitigating factors are not related to a defendant's culpability but to his punishment. *Id.* at 835. Although casting its later discussion in terms of punishment, the court, wrongly by its own terms, retained a focus on culpability.

274. 541 N.E.2d 451 (Ohio 1989).

275. *Id.* at 456-57. One might speculate that this is an example of Professor Dix's observation, *supra* note 235, that factors other than the defendant's mental disease or defect may influence the court's treatment of that factor. Compare, for example, the victims in *Holloway* as opposed to *Lawrence*: In *Holloway*, where the court affirmed the conviction and sentence, the victim was an 84-year-old woman, previously a stranger to Mr. Holloway, whom he killed by strangulation and beating, 527 N.E.2d at 832-33, whereas in *Lawrence*, a case in which the court reversed the death sentence, the victims were Mr. Lawrence's neighbors whom he shot after a particularly intense and hostile argument, 541 N.E.2d at 453. It may be that the court perceived a qualitative difference in the murders based on whether the defendant knew the victim or not and that this difference may account for the otherwise seemingly inexplicable disparate handling of mental illness as a mitigating factor.

276. *Lawrence*, 541 N.E.2d at 453 (listing these disorders as: major depression, post traumatic stress disorder, dissociative disorder, and schizotypal personality disorder).

277. *Id.*

278. *Id.* at 454.

279. *See id.*

280. *Id.* at 457.

> Haven't you heard that before. Wasn't that the test we just went through? You already addressed this issue. You want to address it again, fine. Go back and address it again.[281]

Because this argument misstated the relevant tests and the trial court failed to instruct the jury to disregard the statement, the Ohio Supreme Court held that Lawrence was denied the opportunity to have the jury consider his mental condition as a mitigating factor. Instead of understanding that a different standard applied at punishment, the jury was left to believe it should consider his mental disability according to the same high standard the jury had considered and then rejected at the guilt phase.[282] The jury recommended that Lawrence should be sentenced to death.[283]

The Ohio Supreme Court found that the trial court committed the same error as the prosecutor in its own independent weighing of the aggravating and mitigating circumstances as required by Ohio law.[284] The trial court found that the post traumatic stress disorder did not impair Lawrence's reasoning sufficiently to preclude knowledge of right from wrong or to preclude behavior control.[285] The Ohio Supreme Court held that even though the trial court opinion later recited the correct mitigating standard, it applied the higher insanity test and thus failed to consider the mitigating value of the evidence.[286]

Subsequently, in the Ohio Supreme Court's own independent weighing of the mitigating and aggravating circumstances, it concluded that Lawrence "*did* lack *substantial* capacity."[287] The court emphasized that a mental disability need not rise to the level of insanity to be considered as mitigating. Although Lawrence's mental disorders did not "excuse his conduct, they [were] certainly relevant as mitigating factors."[288] Based on its conclusion that the aggravating circumstances did not outweigh the mitigating circumstances, the court vacated Lawrence's two death sentences.[289]

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281. *Id.* at 456 n.5.

282. *Id.* at 457. The Ohio Supreme Court found that the prosecutor's closing argument was exacerbated by an instruction that defined a mitigating circumstance as one "extenuating or reducing the degree of the defendant's blame or punishment." *Id.* While the court was clear that mitigation is not related to culpability but to whether the defendant should be sentenced to death, the combination of this instruction and the prosecutor's misstatement "improperly raise[d] the mitigating factor of appellant's mental state to the level of the defense of insanity." *Id.*

283. *Id.* at 454.

284. *Id.* at 457.

285. *Id.*

286. *Id.*

287. *Id.* at 460.

288. *Id.*

289. *Id.* at 460. Because the court vacated the two death sentences based on its own independent weighing, it considered moot the trial court errors. *Id.* at 456. It addressed the errors made by the prosecutor and the trial court to "prevent[ ] such error in the future." *Id.*

Despite prosecutors and lower courts repeatedly conflating the tests governing the relevance of a defendant's mental disease or defect,[290] the Ohio Supreme Court persists in holding that, as a general rule, trial courts need not explain the difference to jurors.[291] This apparent intransigence raises concerns about the court's commitment to honoring the distinction between the guilt and punishment phases. When lower courts and prosecutors continue to treat the punishment phase as an abridged version of the guilt phase by merging the tests regarding a defendant's mental disabilities, it should come as no surprise that juries might do this as well.[292] Higher courts should insist that trial courts address this error at its source rather than wait for appellate review. As a matter of course, trial courts should properly instruct the jury on the relationship between the two phases.[293] When relevant, as in *Holloway* and *Lawrence*, courts should also instruct juries on the difference between the tests governing the role of the defendant's mental disabilities.

Courts that correctly perceive the difference between the guilt and punishment decisions—exemplified here by the difference between mental disease or defect as insanity or as a mitigating factor—recognize where other courts err. The difference is not merely one of semantics but of substantively separate concepts that require their own

290. *E.g.*, State v. Claytor, 574 N.E.2d 472, 481 (Ohio 1991) (pointing out that trial and appellate courts "blended" insanity and mitigating tests); State v. Cooey, 544 N.E.2d 895, 918 (Ohio 1989) (stating that trial court applied insanity test to mitigating factor); *Lawrence*, 541 N.E.2d at 457 (finding that the prosecutor told the jury the tests were the same and the trial court failed to correct). The Ohio Supreme Court itself sometimes equates the two tests in its own independent weighing of aggravating circumstances and mitigating factors. *E.g.*, State v. Hill, 595 N.E.2d 884, 901 (Ohio 1992); State v. Holloway, 527 N.E.2d 831, 835 (Ohio 1988); State v. Bedford, 529 N.E.2d 913, 924 (Ohio 1988); State v. Spisak, 521 N.E.2d 800, 803 (Ohio 1988); *see also* Daniel D. Domozick, Note, *Fact or Fiction: Mitigating the Death Penalty in Ohio*, 32 Clev. St. L. Rev. 263, 268-78 (1983-84) (analyzing the problems created by the similarity between the two tests and proposing that if a jury finds the defendant substantially impaired, the death penalty should be precluded as a possible punishment).

291. State v. Rogers, 478 N.E.2d 984, paragraph five of the syllabus (Ohio 1985) (holding that the trial court was not obligated to explain the distinction). This conclusion apparently arose from the court's concern that any definition could be seen as restricting the jury's consideration of mitigating evidence. *Id.* at 993. As this analysis shows, defining and restricting are not necessarily the same. *See also* State v. Claytor, 574 N.E.2d 472, 480, 481-82 (Ohio 1991) (rejecting appellant's contention that jury instructions were required because the difference between insanity and the mitigating factor was "too subtle" for jurors to understand, but reversing because the trial and appellate courts "blended" the two standards, raising serious questions about whether either gave mitigating evidence appropriate weight).

292. *See, e.g.*, Felde v. Butler, 817 F.2d 281, 282 (5th Cir. 1987) (providing example of jurors using the right-from-wrong test in assessing death penalty); Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239 (1994) (challenging the assumption that jurors accurately apply law regarding mental disabilities as a mitigating factor).

293. *See infra* note 347 and accompanying text.

investigation, presentation, explanation, and evaluation. Even while focused on the defendant's mental state, the inquiry into his "degree of culpability" both transcends and transforms what was previously established at the guilt phase. The jury's consideration of the defendant's mental state takes on a different character as well as a new dimension. Restricting the punishment-phase standard for mental disabilities to that required for the guilt phase denies the jury an opportunity to fairly consider whether the defendant is worthy of a death sentence, and prevents the jury from fulfilling its obligation to do so.

2. Criminal Responsibility

Perhaps the most striking example of a court conflating the guilt and punishment decisions occurs when a court views a defendant's proffer of mitigating evidence as an attempt to avoid criminal responsibility for the offense. In two Texas cases, a federal district court found that each proffer of mitigating evidence was unavailing because, as the court characterized the defendants' arguments, "[the defendant's] circumstances were pitiful as a child; therefore he is not responsible for his acts."[294] But to the court's mind, "[f]reedom necessarily implies responsibility; [the defendant] abused his freedom. He must bear the consequences the State of Texas has prescribed . . . ."[295] This attitude, however, revealed a fundamental misunderstanding of the purpose of the mitigating evidence. The purpose of mitigating evidence is to influence the punishment decision, it is not to revoke or negate the guilty verdict.[296] The district court considered the mitigating evidence as disparaging the guilty verdict rather than as affecting whether the defendant should be sentenced to death or life imprisonment.[297] By importing guilt-phase concepts of criminal responsibility

294. *Quoted in* Motley v. Collins, 3 F.3d 781, 786 (5th Cir. 1993) [hereinafter "*Motley I*"] (*withdrawn by panel and substituted by* 18 F.3d 1223 (5th Cir.)), *cert. denied*, 115 S. Ct. 418 (1994)) [hereinafter "*Motley II*"]. The same judge made this identical analysis two years earlier in another Texas case. *See* Buxton v. Collins, No. H-91-494, slip op. at 6 (S.D. Tex. Feb. 23, 1991) (on file with author), *aff'd on other grounds*, 925 F.2d 816 (5th Cir. 1991). In each case the defendant claimed that the Texas death penalty statute prevented the jury from considering mitigating evidence of childhood abuse. *See Motley I*, 3 F.3d at 786 (noting that the defendant argued that the jury could not give mitigating weight to the evidence); *Buxton*, 925 F.2d at 822 (stating that the defendant argued that mitigating evidence was not presented to the jury because the statute prevented the jury from giving mitigating weight to the evidence).

295. *Motley II*, 18 F.3d at 1228; *Buxton*, slip op. at 6-7 (using identical language).

296. As the Fifth Circuit later reasoned, "[T]he district court's analysis confuses the definition of mitigating evidence, a term that is only relevant to the question of punishment, with the definition of justification or excuse, concepts that are relevant to a criminal defendant's guilt or innocence." *Motley* I, 3 F.3d at 787.

297. Indeed, the district court opined:

> Child abuse is tragic for anyone, but its ability to break the causal connection between the free will of the defendant and the fate of his victim has never been suggested. . . . Motley's position [that his abuse as a child justified murdering an innocent passer-by] is an insult to people everywhere who

into the punishment-phase analysis, the district court eviscerated the separate significance of the punishment-phase decision.

C. *Requiring A Nexus Between the Crime and Mitigating Evidence of Mental Disabilities*

A third way courts merge the guilt and punishment determinations is exemplified by cases that demand a nexus between mitigating evidence of mental disabilities and the crime. In a series of cases interpreting the application of *Penry v. Lynaugh*,[298] the United States Court of Appeals for the Fifth Circuit has devised a test that requires a causal link between the defendant's mitigating evidence of mental disabilities and the commission of the crime.[299] This requirement is erroneous and unconstitutional because it conflates the punishment inquiry into a defendant's deathworthiness with the guilt-phase inquiry into his culpability.

As discussed previously, *Penry* held that the Texas death penalty special-issue questions—concerning the defendant's deliberate commission of the crime and his future dangerousness—violated the Constitution by preventing the jury from considering and giving mitigating effect to Penry's evidence of mental retardation and the long-term psychological effects of childhood abuse.[300] Since *Penry* was an as-applied challenge and the Supreme Court did not provide specific guidance on how to remedy the constitutional violation, it was incumbent

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have overcome their injuries and deprivations to become successful contributing members of our community."

Motley II, 18 F.3d at 1228. The district court concluded, "[M]urders are committed by people who were not abused, contradicting the causal inference Motley wants the court to make." *Id.* This misconstrued Mr. Motley's argument, *see supra* note 294, as well as the difference between guilt and punishment.

298. 492 U.S. 302 (1989).

299. The Texas Court of Criminal Appeals has developed a similar test: To obtain relief under *Penry*, a defendant must establish "a nexus between [the mitigating] evidence and the circumstances of the offense which tends to excuse or explain the commission of the offense, suggesting that particular defendant is less deserving of a death sentence." Mines v. State, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992) (citations omitted), *vacated and remanded*, 510 U.S. 802 (1993), *aff'd on remand*, 888 S.W.2d 816 (Tex. Crim. App. 1994) (en banc). Since the Texas Court of Criminal Appeals adopted this narrow test it has granted relief only in cases where the defendant, like Mr. Penry, presented evidence of mental retardation. *See, e.g.*, *Ex parte McGee*, 817 S.W.2d 77, 80 (Tex. Crim. App. 1991) (en banc); Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 Am. J. Crim. L. 1 (1994) (critiquing *Penry* and the Texas court's nexus requirement); Peggy M. Tobolowsky, *What Hath* Penry *Wrought? Mitigating Circumstances and the Texas Death Penalty*, 19 Am. J. Crim. L. 345 (1992) (examining judicial and legislative responses to *Penry*). This section's analysis of the limitations of the Fifth Circuit test applies equally to the Texas court's decisions. Not all courts interpret *Penry* as restrictively as Texas and the Fifth Circuit, however. *See, e.g.*, State v. Wagner, 786 P.2d 93, 101 (Or. 1990) (en banc) (rejecting State's argument that mitigating evidence could be constitutionally limited to evidence causally related to the offense).

300. *See supra* notes 107-12 and accompanying text.

on the lower courts to articulate *Penry*'s parameters. The lower courts needed to resolve how *Penry*'s rationale applied to other kinds of mitigating evidence that a defendant argued could not be given mitigating weight under the two special issue questions.

The Fifth Circuit, in response, developed a two-part test: to constitute a *Penry* claim,[301] the evidence must be "constitutionally relevant mitigating evidence,"[302] and, if so, the evidence must be beyond the "effective reach of the jurors."[303] "Constitutionally relevant mitigating evidence" is evidence that demonstrates that the defendant is less culpable for the crime by showing: "(1) a 'uniquely severe permanent handicap[ ] with which the defendant was burdened through no fault of his own,' . . . and (2) that the criminal act was attributable to this severe permanent condition."[304] If mitigating evidence meets this

301. In other words, to answer the question, what mitigating evidence presented at trial could the jury not consider and give mitigating effect to under the two special-issue questions regarding deliberateness and future dangerousness. Arguably, this is a harmless error test, but the Fifth Circuit has never analyzed mitigating evidence as such under Brecht v. Abrahamson. 507 U.S. 619, 637 (1993) (holding that on federal habeas review constitutional error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Fifth Circuit has applied *Brecht* to other alleged punishment phase errors. *See, e.g.*, Woods v. Johnson, 75 F.3d 1017, 1026-33 (5th Cir.), *cert. denied*, 117 S. Ct. 150 (1996).

302. Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (emphasis omitted), *cert. denied*, 115 S. Ct. 1114 (1995).

303. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

304. Davis v. Scott, 51 F.3d 457, 460-61 (5th Cir.) (quoting Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993)), *cert. denied*, 116 S. Ct. 525 (1995). The Fifth Circuit has not granted relief in any case under this test. *See, e.g.*, Harris v. Johnson, 81 F.3d 535, 539 (5th Cir.) (assuming that borderline intelligence is a severe permanent handicap, no nexus was shown), *cert. denied*, 116 S. Ct. 1863 (1996); Allridge v. Scott, 41 F.3d 213, 223 (5th Cir. 1994) (holding that father's non-expert testimony about mental illness did not establish required linkage), *cert. denied*, 115 S. Ct. 1959 (1995); *Motley II*, 18 F.3d 1223, 1235 & n.10 (5th Cir.) (finding that child abuse, even if constitutionally mitigating, may be considered under future dangerousness), *cert. denied*, 115 S. Ct. 418 (1994); *Madden*, 18 F.3d at 308 (stating that mental illness, learning disabilities, and troubled childhood did not rise to level of constitutionally relevant mitigating evidence); Barnard v. Collins, 958 F.2d 634, 639 (5th Cir. 1992) (finding no evidence of psychological effects of troubled childhood), *cert. denied*, 506 U.S. 1057 (1993); *Graham*, 950 F.2d at 1030-32 (holding that youth is a transitory state that may be considered under future dangerousness).

The Fifth Circuit attributes the origin of this test to language in *Penry*, that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse." *Penry*, 494 U.S. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see, e.g.*, *Davis*, 51 F.3d at 460. This language cannot support the Fifth Circuit's narrow construction. First, the test is not limited to "uniquely severe permanent handicaps," but contemplates a much broader source of difficulties: disadvantaged background as well as emotional and mental problems, without any qualification. Second, although the Supreme Court has not elaborated on the meaning of this phrase, opinions by its author, Justice O'Connor, suggest it does not require the high level of causation the Fifth Circuit adopted. Justice O'Connor first used this language in California v. Brown to explain her understanding that the sentence in a death penalty case should reflect a reasoned moral response,

test, then the trial court should have given the jury additional instructions beyond the two special issue questions that would have allowed the jury to give mitigating effect to the evidence.

The Fifth Circuit's construction of relevant mitigating evidence is unduly restrictive. First, it limits the mitigating relevance of mental disabilities to the defendant's culpability for the crime.[305] This ignores the broader role mitigating evidence plays in informing the jury's determination of whether the defendant is worthy of a death sentence. Second, it effectively eviscerates a defendant's lesser culpability, even as reconceptualized as a sentencing concern.[306]

Evidence of a defendant's reduced culpability, under the Fifth Circuit's test, is limited, first, by the kind of mental disability deemed relevant to a defendant's culpability. The test requires that the mental disability be both "uniquely severe" and "permanent."[307] Apart from acknowledging that Penry's mental retardation constituted a severe, permanent handicap,[308] the Fifth Circuit has given little guidance as to

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rather that mere sympathy, to a defendant's background, character, and crime. 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). She again used it in her dissent in South Carolina v. Gathers to explain why evidence that the defendant was an affectionate and caring person was constitutionally relevant mitigating evidence: "Evidence *extraneous to the crime itself* is deemed relevant and indeed, constitutionally so," because of society's belief about defendants, as reflected in the significance of their background and problems described in the quotation. 490 U.S. 805, 817 (1989) (O'Connor, J., dissenting) (emphasis added). Although unrelated to the crime, she concluded, this evidence was relevant to the jury's assessment of respondent himself and his moral blameworthiness. *Penry*, 492 U.S. at 318. This is strong support for the claim that the punishment-phase connection between the defendant's problems and his culpability is not limited to the commission of the crime, but encompasses a broader inquiry about the defendant's moral blameworthiness as that informs the sentencing decision. It may be that mitigating evidence directly related to the defendant's culpability for the crime, that explains why he committed the crime, is most persuasive and compelling, *see* Hill v. Lockhart, 28 F.3d 832, 846 (8th Cir. 1994), but that does not make this direct relationship constitutionally necessary.

305. *See supra* Part I.B.4. In this respect, the Fifth Circuit reads *Penry* far too literally. *See supra* note 112. While a juror still may consider a defendant's mental disabilities in relation to the special-issue questions, neither of these necessarily allow the jury to consider the mitigating effect of the evidence. *See infra* notes 321-27 and accompanying text. Deliberateness remains focused on the crime, and future dangerousness, while independent of the crime, still does not fully address the defendant's deathworthiness.

306. *See supra* Part I.B.1.

307. Arguably this test is even more restrictive than that required for a mental disease or defect in the insanity test. If so, this runs counter to the admonition in Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982), that mitigating evidence need not rise to the level of a defense; *see also* Johnson v. Texas, 509 U.S. 350, 363 (1993) (stating that under the Texas death penalty statute, the jury "could also consider whether the defendant was under an extreme form of mental or emotional pressure, *something less, perhaps, than insanity*, but more than the emotions of the average man, however inflamed, could withstand") (emphasis added) (quoting Jurek v. State, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975) (en banc)).

308. *Graham*, 950 F.2d at 1029.

what else would qualify.[309] The court has suggested that some kind of brain damage[310] or adverse effects from childhood abuse[311] might satisfy this requirement, but either must still bear some causal relationship to the criminal act.[312]

Despite the high standard imposed on the type of mental disability, the second requirement is even more problematic. In this regard, the Fifth Circuit has required that the commission of the crime be "attributable" to this uniquely severe permanent handicap to be considered as reducing a defendant's culpability.[313] While the defendant's culpability reconceptualized as a punishment-phase issue is related to his culpability for the crime, the connection the Fifth Circuit imposes is so close to the guilt-phase notion of culpability as to make them indistinguishable. In *Madden v. Collins*,[314] for example, the Fifth Circuit held that evidence of a mental illness was not constitutionally relevant mitigating evidence, in large part because Madden could still understand the wrongfulness of his actions.[315] A clinical psychologist testified that Madden suffered from a personality avoidance disorder, a mental illness that impaired his ability "to think and react in a logical manner."[316] According to the expert, this personality disorder combined with Madden's long-term drug abuse caused him to suffer from diminished capacity. The expert defined diminished capacity as "a deterio-

309. *E.g.*, *Davis*, 51 F.3d at 461-62 (finding that the evidence did not establish sexually deviant behavior that was uniquely severe and permanent, but not discussing whether psychotic disorders constituted a handicap because they were not linked to the criminal act, discounting possible childhood abuse and neglect because the defendant did not point to evidence of traumatic psychological effects or linkage to the crime).

310. *See Madden*, 18 F.3d at 308 (stating that the requirement that a handicap be "uniquely severe" means not all organic brain damage will qualify, it is merely an example of what qualifies at a minimum: organic brain impairment in the form of a learning disorder does not qualify); *Harris*, 81 F.3d at 539 (assuming that borderline intelligence is a severe permanent handicap).

311. *See* Barnard v. Collins, 958 F.2d 634, 638-39 (5th Cir. 1992) (holding that no evidence was presented that showed psychological effects of troubled childhood). In the initial *Motley* opinion, the court held that the defendant's evidence of child abuse was constitutionally mitigating and could not be considered within the scope of the Texas special issues. *Motley I*, 3 F.3d at 790-94. In the substituted opinion, however, the court changed its analysis and merely assumed Motley's evidence of child abuse was constitutionally mitigating. *Motley II*, 18 F.3d at 1235 n.10.

312. *Harris*, 81 F.3d at 539; *Davis*, 51 F.3d at 462; *Allridge*, 41 F.3d at 223; *Madden*, 18 F.3d at 308; *Motley II*, 18 F.3d at 1235 n.10; *Barnard*, 958 F.2d at 638.

313. *Madden*, 18 F.3d at 307 (using "clear nexus" also); *Barnard*, 958 F.2d at 638; *see also Harris*, 81 F.3d at 539 (finding no nexus between the mitigating evidence and the murder); *Davis*, 51 F.3d at 461 (stating that the defendant "failed to link any psychiatric problems he may have suffered to the murder"); *Allridge*, 41 F.3d at 223 (holding that the defendant failed to show "linkage"); *Madden*, 18 F.3d at 307 (stating that the handicap must be "directly responsible for the instant crime").

314. 18 F.3d 304 (5th Cir. 1994).

315. *Id.* at 307. The court also found it relevant that testimony that the mental illness made the defendant more aggressive or violent was "conspicuously absent." *Id.*

316. *Id.*

ration or distortion of one's ability to make logical and rational decisions."[317] The Fifth Circuit found it significant that Madden did not present any evidence that he could not control his behavior or distinguish right from wrong.[318] In concert with an absence of evidence that the mental disorder made Madden more aggressive than others, there existed "insubstantial evidence" that committing the capital murder was "attributable" to his mental illness.[319] The court appears to have relied heavily on what is, in essence, a guilt-phase standard of insanity to decide whether the defendant's evidence constituted "constitutionally relevant *mitigating* evidence" for the sentencing decision.[320]

The Fifth Circuit's limitations on mental disabilities as mitigating evidence are compounded by the jury's inability to consider this evidence within the initial two special issue questions regarding deliberateness and future dangerousness. Certainly the question of whether the defendant committed the crime deliberately is related to the defendant's culpability for the crime. But, as *Penry* recognized, personal culpability is not solely a function of the capacity to act deliberately.[321] Without a jury instruction defining deliberateness in a way that directs the jury to consider the defendant's mitigating evidence in relation to his personal culpability, that evidence may not receive proper consideration.[322] Yet, under the Fifth Circuit's construction, a defendant is not entitled to this additional instruction unless he first satisfies the narrow nexus test. The result of the Fifth Circuit's test is that unless the mitigating evidence demonstrates a uniquely severe, permanent handicap that essentially rises to the level of a guilt-phase defense, the acknowledged limitations of "deliberateness" will be ignored.[323]

317. *Id.; see also supra* note 34.

318. *Id.* Indeed, the court noted that according to the psychologist's testimony, a person suffering from personality avoidance disorder would not be impaired in his ability to understand the wrongfulness of his actions. *Id.*

319. *Id.*

320. *Id.* at 310 (emphasis added); *see also Davis*, 51 F.3d at 461 (comparing Davis's failure to link his psychotic disorder to the crime to Madden's similar failure).

321. *Penry*, 492 U.S. at 322-23.

322. *See supra* note 108 and accompanying text.

323. The Fifth Circuit has recognized that, as in *Penry*, the mitigating effect of evidence of child abuse cannot be considered under the deliberateness special issue, especially when the term "deliberately" was not defined, and the state argued during voir dire and closing argument that it meant the same thing as "intentionally." *Motley II*, 18 F.3d at 1232 n.6 ("[E]vidence of child abuse does not 'logically' come into play in considering the deliberateness question." (quoting Penry v. Lynaugh, 832 F.2d 915, 925 (5th Cir. 1987)), *modified*, 492 U.S. 302 (1989)). In *Davis*, the court considered a definition of "deliberately" that it believed would have satisfied the *Penry* court: "a manner of doing an act characterized by or resulting from careful consideration: a conscious decision involving a thought process which embraces more than mere will to engage in the conduct." 51 F.3d at 462-63. Under the analysis set forth in this article, even this treatment of the deliberateness special issue question would be an invalid restriction on the jury's consideration of mitigating evidence.

Consideration of a defendant's mental disability fares no better under the future-dangerousness special issue. For "constitutionally relevant mitigating evidence" of a mental disability to be beyond the "effective reach"[324] of the jury as it considers the defendant's future dangerousness, the Fifth Circuit requires that the disability be permanent.[325] Under the Fifth Circuit's construction, if testimony establishes a possibility that the mental disability is treatable, it may be characterized as transient.[326] If the mental disability is transient, its mitigating qualities may be considered as an indicia of the *lack* of future dangerousness because it may not cause the defendant to exhibit the same violent conduct in the future.[327] Thus, if the mental disability is treatable, it must be considered in the context of a punishment factor that is unrelated to the crime even when the defendant has linked the evidence to his commission of the crime. This interpretation by the Fifth Circuit again denies the jury the opportunity to consider the defendant's mental disability as it informs his deathworthiness.

By restricting "constitutionally mitigating evidence" to that which lessens a defendant's culpability in the guilt-phase sense and by requiring a nexus between the evidence of mental disabilities and the commission of the crime, the Fifth Circuit turns the punishment phase into a process that too closely replicates the guilt phase. In response to *Penry*, the Fifth Circuit's test was designed to identify the kind of evidence that would require instruction to the jury beyond the two special-issue questions covering deliberateness and future dangerousness. Rather than allow the jury to reevaluate the defendant's commission of the crime under a broader, reconceptualized notion of culpability, or to consider mental disabilities as a punishment factor unrelated to the crime, the nexus test denies the jury the ability to consider punishment as a question separate from guilt.

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324. *Madden*, 18 F.3d at 308.

325. Requiring the handicap to be permanent seems to duplicate the test for constitutionally relevant mitigating evidence. The Fifth Circuit has addressed the question whether mitigating evidence is beyond the reach of the jurors in only two cases, *Motley* and *Graham*. In both cases the Court assumed the condition might constitute constitutionally mitigating evidence. *Graham*, 950 F.2d at 1030 (reasoning that the crime may or may not be not attributable to youth); *Motley II*, 18 F.3d at 1235 n.10 (assuming without deciding that the condition was constitutionally mitigating).

326. *Motley II*, 18 F.3d at 1234-35. The court found that the long term effects of Motley's child abuse were transient because "[a]lthough [the doctor who testified on Motley's behalf at punishment] would not specifically comment on the probability of Motley's being successfully treated, he stated that Motley had a *possibility* of successful treatment." *Id.*

327. Because Motley's mental disability was subject to change, the jury could consider this evidence within the context of future dangerousness. *Johnson v. Texas* supports this analysis. 509 U.S. 350, 369 (1993) (holding that, as a transient state, the qualities of youth that reduce a defendant's culpability may be considered under future dangerousness). *But see supra* Part I.B.3.

D. *Conclusion*

This part reveals the difficulty in effectuating the difference between the determinations made at the guilt and punishment phases. Rather than recognizing, explaining, and applying the different purposes of the two determinations, courts too often treat the punishment inquiry as a restatement of the guilty verdict. The California death penalty statute approved in *Boyde v. California*[328] did this by making the jury's consideration of mitigating evidence unrelated to the crime dependent on its view of the gravity of the offense. The only way that the jury could find the defendant deserved a life sentence rather than death, based on this evidence, was to find the murder less serious. The punishment phase was essentially reduced to a recapitulation of the guilt decision.

The same phenomenon occurs when courts utilize guilt-phase tests in the punishment phase. By suggesting that evidence offered in mitigation of punishment puts into question the defendant's criminal responsibility, or by requiring that the defendant's mental disability rise to the level of insanity in order to be given mitigating weight, the punishment determination becomes a replay of the guilt-phase decision. Requiring a nexus between the crime and mitigating evidence of mental disabilities in order to constitute "constitutionally relevant mitigating evidence" perpetuates the same mistake because it limits the punishment-phase consideration of this evidence to the defendant's guilt-phase culpability. In each instance, the courts ignore or eviscerate the import of the two phases in a death penalty trial. Instead of working within a legal framework that recognizes the two distinct decisions, these courts suggest that it is acceptable to treat the two as one, i.e., the guilt-phase determination. The frequency and persistence of this kind of flawed analysis makes it incumbent to ask why this occurs, and how it can be addressed in a way that brings coherence to the discrete determinations made at the guilt and punishment phases.

III. Confronting the Elusive Difference Between Guilt and Punishment

The decision to sentence a defendant to death represents both a legal and a moral judgment about the crime of murder and the defendant convicted of committing the murder. As such, it serves dual purposes. It must enforce a legally recognized punishment deemed proportionate to the crime and appropriate for the defendant, and it must express community moral outrage.[329] Yet, it also reveals a ten-

328. 494 U.S. 370 (1990).

329. Gregg v. Georgia 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, Stevens, JJ.) ("In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is

sion between wanting to avenge that sense of outrage[330] and society's belief that not all individuals are equally deserving of a death sentence.[331] The tendency to collapse the distinction between the finding of guilt and the decision about the appropriate punishment based on that finding exemplifies the discord between these purposes. It reveals the power of outrage and the necessity for a conscientious construction of the differences between guilt and punishment. This part analyzes how these factors elucidate the importance of distinguishing between culpability as a guilt-phase concept and deathworthiness as a punishment-phase concept.

A. *The Role of Moral Outrage*

The moral outrage prompted against a person who commits a murder is undeniable. As Judge Noonan of the United States Court of Appeals for the Ninth Circuit recognized in *Harris v. Vasquez*: "When monstrous deeds are done, such as the killing[s] . . . in this case, there is a natural desire to avenge the outrage and to eliminate [the] perpetrator."[332] The willingness to treat the punishment decision as a recapitulation of the guilt decision relies on the power of this outrage.

The conviction at the guilt phase represents a determination that the defendant is legally culpable and blameworthy. The jury must find that the legal requirements are satisfied—that the State proved beyond a reasonable doubt that the defendant killed a person with the requisite "degree of culpability"—but it has a significance beyond the legal facts. The jury determination of guilt is a judgment that the defendant is fully responsible for committing the highest degree of murder recognized in the jurisdiction. In this context, it is not difficult for a juror to believe that the conviction alone should resolve the punishment question.

When prosecutors rely on the guilty verdict or use guilt-phase language at the punishment phase, they invoke the power of the conviction and the moral opprobrium it represents to provide the answer to the punishment question.[333] This occurs, for example, when a prose-

essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." (footnote omitted)); *see also* Spaziano v. Florida, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part) (declaring that the judgment that the defendant should be sentenced to death is an "expression of the community's outrage—its sense that an individual has lost his moral entitlement to live . . . .").

330. *See Gregg*, 428 U.S. at 183.

331. Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976) (opinion of Stewart, Powell, Stevens, JJ.). This tension may be compounded by the jurisprudential focus on blameworthiness when the human inclination is to taint. *See* Fletcher, *supra* note 25, at 343-49.

332. 943 F.2d 930, 967 (9th Cir. 1990) (Noonan, J., concurring in part and dissenting in part).

333. Weisberg, *supra* note 2, at 361 (noting that prosecutors want to focus on the "most damning facts about the crime").

cutor argues at the punishment phase that the defendant's mitigating evidence does not excuse his conduct,[334] or when the prosecutor refers back to a guilt-phase argument that mental disease or defect does not affect a defendant's criminal responsibility.[335] In these instances, the prosecution is encouraging the jury to see the two decisions as one. In essence, the prosecution is seeking to have the weight of the jury's culpability finding at the guilt phase determine, or substitute for, the jury's separate decision of what punishment is appropriate.

The moral outrage that jurors, as representatives of society, feel toward the crime of murder and those who commit it, responds to this prompting.[336] But society is also called on to temper the human desire for revenge[337] and, as a matter of punishment, reconsider the murder in a new way and consider new, non-guilt-phase factors.[338] As Judge Noonan recognized about the desire to "eliminate the perpetrator," "[a]t the same time the suspicion, if not the certainty, must occur to reasonable persons that the person who performed such awful deeds is, if not insane, at least laboring under an infirmity of mind."[339] Despite the power of moral outrage, the jury must be guided by the fundamental principles that the death penalty is not a mandatory punishment and the decision of what punishment to apply to a murderer

334. *See, e.g.*, Trottie v. State, No. 71,793, slip op. at 25 (Tex. Crim. App. Sept. 20, 1995) (unpublished) ("[I]s there something in his background that means he doesn't deserve the death penalty, but he deserves a life sentence instead of the death penalty? [Defense counsel] brought you that evidence. That was one of the saddest stories I ever heard. What happened to [the defendant] was a horrible thing. No child should ever have to endure that. But that does not *excuse* what he did."); Whalen v. State, 492 A.2d 552, 569 (Del. 1985) (finding that the prosecutor erred by saying that mitigating factors offered were "insufficient 'to mitigate and excuse.' Mitigating factors are not offered to *excuse* the defendant's conduct. . . ."); *see also* State v. Perry, 502 So. 2d 543, 561 (La. 1986) (noting, in rebuttal, that the prosecutor told the jury that the law requires the death penalty for persons convicted of first degree murder, but finding this was not a basis for reversal because the defendant did not object and the instructions properly informed the jury of the need to weigh the evidence).

335. *See supra* note 218.

336. *See* Bowers, *supra* note 15, at 1089-92 (noting that almost one-third of jurors surveyed in seven states thought, prior to the start of the punishment phase, that the defendant should be sentenced to death and that between 21% and 33% thought the death penalty was required if the state proved the crime was heinous); Sandys, *supra* note 15, at 1191-95 (stating that 43% of jurors surveyed in Kentucky thought, prior to the start of the punishment phase, that the defendant should be sentenced to death).

337. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, Stevens, JJ.); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (emphasizing that the jury must make a "reasoned *moral* response" to the defendant and his crime) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see also* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 Cornell L. Rev. 655, 698-705 (1989) (arguing the importance of judges acknowledging and instructing juries on the role of both moral outrage and empathy, especially at the punishment phase of a death penalty case).

338. *See supra* notes 3-4, 28-61 and accompanying text.

339. Harris v. Vasquez, 943 F.2d 930, 967 (9th Cir. 1990) (Noonan, J., concurring in part and dissenting in part).

is purposefully made in a phase separate from, and critically different from, that in which his guilt is established.

B. *Honoring the Difference Between the Decisions Made at the Guilt and Punishment Phases*

The challenge is how to conceptualize the jury's decision at the punishment phase in a way that does not lessen the gravity of the guilty verdict yet acknowledges that death may or may not be the appropriate sentence.[340] The analysis in this article demonstrates that the equal importance of the two determinations may be maintained if their differences are properly articulated. Characterizing the punishment-phase inquiry as one about the defendant's deathworthiness, rather than his culpability, should accomplish this goal. This conceptualization builds on the insight of Judge Reavley of the United States Court of Appeals for the Fifth Circuit who stated, "'[C]ulpability' at the punishment phase is not simply a question of guilt or blameworthiness, but rather a question of 'deathworthiness.'"[341]

By focusing on the defendant's deathworthiness, instead of his culpability, the punishment-phase decision is put in proper perspective. The concept of culpability, whether considered as the guilt-phase finding of mental state, or the judgment of blameworthiness, remains focused on the murder. Even in its broader, reconceptualized dimension at punishment where the defendant's degree of participation in the crime, or the character of the murder, are relevant factors, the focus is still on the crime. In contrast, the question of what punishment should be imposed on the defendant for committing a murder

340. When I began working on this article I assumed my conclusion would address the question of whether a difference should be maintained. Ultimately, I concluded the answer to this question is too plain to merit extended discussion. For too long, our system of criminal justice has recognized the importance of individualized sentencing. *See, e.g.*, Williams v. New York, 337 U.S. 241 (1949) (upholding the practice of individualized punishment); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). While factors about the defendant and the crime are considered as a matter of policy rather than constitutionally required in non-capital cases, the same principle of individualized consideration applies. Lockett v. Ohio, 438 U.S. 586, 602-04 (1978) (Burger, J., plurality). To abandon in a death penalty case a kind of consideration ingrained in our system for less serious crimes, would be the epitome of injustice.

341. Graham v. Collins, 950 F.2d 1009, 1034 (5th Cir. 1992) (en banc) (Reavley, J., dissenting) (citing Lackey v. State, 819 S.W.2d 111, 129 (Tex. Crim. App. 1991) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993). Judge Reavley continued, "To say that evidence mitigates a defendant's culpability is not to say that he is any less guilty or deserving of blame, but that he is less deserving of death." *Id.* Professor Goodpaster frames the punishment phase question as being "about the convicted defendant's worthiness to live." Goodpaster, *supra* note 70, at 303. These two formulations are not necessarily inconsistent: Both focus on the worth of the individual defendant in assessing his appropriate punishment.

is more than a statement about his culpability for the crime; it is a judgment about his character, his record, his background, the circumstances and character of the murder, and the harm caused, not only to the victim, but to the victim's family. None of these features are relevant to the guilt-phase determination of culpability; they are all essential to the punishment decision about the defendant's deathworthiness.

The assessment of the defendant's deathworthiness, as distinct from his culpability, is necessary if the decision made at the punishment phase is to be truly different from the decision made at the guilt phase. This distinction does not discount the verdict of guilty. Indeed the jury would not be deciding between life imprisonment and death if the defendant had not been convicted of the most serious crime. At the punishment phase the defendant is not asking the jury to ignore the crime for which it just convicted him. Rather, he is seeking to explain himself or his conduct in a way that will cause the jury to impose a life sentence rather than a death sentence.[342] To fully realize the import of the punishment decision, the jury must be able to consider the defendant as fully responsible, culpable, and blameworthy, and in the face of that, consider whether he is worthy of death.

Effectuating and honoring this distinction requires a transformation in how the punishment phase is conceived and explained to the jury. It requires a new and distinct language—one that is based on the defendant's deathworthiness instead of his culpability. In this context, the prosecution and defense must present evidence and craft arguments about the appropriate punishment, not merely the crime.[343]

342. *See* Alfieri, *supra* note 43, at 346-49 (arguing that the key to jury voting for a life sentence is "to tell stories of moral agency highlighting defendants' acceptance of blame and confession of responsibility for lawbreaking"); William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. Rev. L. & Soc. Change 273, 286 (1990-91) (observing that it is critical to establish impairment traceable "directly and understandably to the crime"); Sarat, *supra* note 43, at 41 (stating that the defense must explain that the penalty phase "narrative does not undo, or diminish, the seriousness of the murder itself"); Weisberg, *supra* note 2, at 361 ("The overall goal of the defense is to present a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition, so the jury will be less inclined to cast him out of the human circle.").

343. This may be easier said than done. Many prosecutors rely on the crime itself as the key to the punishment decision. *See supra* notes 218 & 234. Nonetheless, the prosecution should be required to justify imposition of the death penalty based on more than the facts of the murder presented at the guilt phase. *See* White, *supra* note 43, at 120-21 (arguing that the prosecution should be required to make a dispassionate argument based on statutorily defined aggravating and mitigating circumstances). In this context, the defense effort to explain who the defendant is and explain—rather than excuse—his conduct could be better appreciated. *See supra* notes 43 & 342 and accompanying text. For example, the defense could argue along the following lines:

> There is no excuse for what William Brooks did. When you consider mitigating evidence it isn't to excuse or justify. He is responsible for what he did. That's why we are here, why we are at this point. That's been decided

Courts should differently instruct juries.[344] If the defendant presented an insanity defense, for example, the court should instruct the jury that it may consider the evidence of mental illness in a new way at the punishment phase: that the jury may consider the mental illness as mitigating even if it did not rise to the level of a defense to the murder itself.[345] In all cases the court should instruct the jury on the relationship between the two determinations; that the punishment phase is not a recapitulation of the guilt-phase decisions, but a new question about the punishment appropriate for the defendant—whether he deserves to die or to be sentenced to life imprisonment. For example, part of the instructions could include the following:

. . . . Mitigating evidence is offered to help you understand what he did and why, not to excuse or justify it.

Sarat, *supra* note 43, at 41 (quoting from the defense argument at the punishment phase).

344. The Supreme Court has recognized the importance of guiding jurors as they make their sentencing judgment. Gregg v. Georgia, 428 U.S. 153, 190-95 (1976); *see also* Liebman & Shepard, *supra* note 35, at 786-89 (arguing that constitutional imperative exists to instruct on mitigating factors). Nonetheless, a significant body of research suggests that jurors do not understand the instructions given at the punishment phase of a death penalty trial. *See, e.g.*, Geimer & Amsterdam, *supra* note 15, at 23-53 (arguing that statutory factors made little difference to jury decision); Haney & Lynch, *supra* note 15, at 420-24 (finding that jurors did not understand statutory aggravating and mitigating factors); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 Utah L. Rev. 1 (summarizing studies and anecdotal evidence regarding juror confusion); *see generally Symposium: The Capital Jury Project*, 70 Ind. L.J. 1033 (1995) (examining the exercise of capital sentencing discretion). While these problems are not unique to jury instructions in death penalty cases, in this context they have a special urgency. *See* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 Judicature 224, 224 (1996). Diamond and Levi's article reports the results of their recent study of revised jury instructions and suggests that carefully worded instructions may promote jurors' comprehension of their responsibility at the punishment phase. *Id.* at 230-31.

Although *how* the jury is instructed to consider the appropriate punishment is not now constitutionally mandated, Saffle v. Parks, 494 U.S. 484, 490 (1990), I submit that it should be, in order to effectuate the promise of individualized sentencing in a bifurcated system. *See* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 Iowa L. Rev. 989, 1048-51 (1994) (arguing that restrictions on how the jury considers mitigating evidence effectively eviscerate its ability to make an individualized sentencing decision).

345. Some statutory lists of mitigating factors specifically include language to this effect. *See supra* note 229. When this is relevant the judge should be required to draw the jury's attention to this, and explain its significance. *See, e.g.*, Diamond & Levi, *supra* note 344, at 227 (noting that in their study, to correct an "earlier source of confusion," jurors were "told specifically: In order to decide that something is a mitigating factor which would lessen the penalty, you do NOT have to believe that it excuses or justifies the crime itself."); Liebman & Shepard, *supra* note 35, at 818-19 (arguing that when a defendant presents mitigating evidence of mental disorder, the court should instruct the jury to consider whether: the defendant's suffering evokes expiation or compassion, his impairment affected his responsibility for his actions, the defendant was less deterred than normal offenders, and the value of capital punishment is attenuated).

> Your decision about the appropriate punishment for the defendant is not a question of whether you consider him culpable or blameworthy. By finding the defendant guilty of murder you told the defendant, and this court, that he is blameworthy and deserves to be punished. You must now turn your attention to a related question. You must now determine how the defendant should be punished: by a sentence of life imprisonment or by a sentence of death.
>
> Your judgment about how to punish the defendant will not change the seriousness of the murder of which you convicted him. If you conclude that the defendant should be sentenced to life imprisonment rather than death, it does not mean that you find him any less guilty or deserving of blame, but that you find he is not deserving of death. Likewise, if you conclude that he should be sentenced to death, it does not mean that he is any more guilty, or that the murder is any more serious. Both life imprisonment and death are authorized sentences for the murder of which you convicted the defendant.[346]

Without this kind of explicit framework and jury instructions, the Supreme Court's death penalty jurisprudence regarding the importance of individualized sentencing in a bifurcated proceeding is without effect.

CONCLUSION

The decision to sentence to death or life imprisonment a defendant convicted of committing murder is a profound judgment. The deci-

346. *See also* Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 Mich. L. Rev. 2590, 2598-99 (1996) (proposing, among other measures to limit the reach of death penalty, that courts instruct jurors that conviction does not create presumption that death penalty is the appropriate punishment and that in deciding whether defendant deserves death "the sentencer is required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime"); Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 Case W. Res. L. Rev. 1047, 1062 (1991) (suggesting that, where the defendant is an accomplice, the "jury should be told that its verdict of moral culpability may not rest on a level of culpability lower than the bare intent to kill—the floor of culpability under the Eighth Amendment"); Howe, *supra* note 66, at 358 (suggesting the judge pose two questions to the jury, one requiring assessment of the defendant's moral responsibility for the crime and the second regarding his general moral deserts).

Some courts approve of instructing the jury that it may consider evidence as mitigating if it reduces the defendant's culpability *or* otherwise provides a basis for a sentence less than death. *See, e.g.*, State v. Ross, 646 A.2d 1318, 1372 (Conn. 1994); State v. Brett, 892 P.2d 29, 61 (Wash. 1995) (en banc). This is insufficient because it does not adequately distinguish between culpability as a guilt-phase concept and deathworthiness. *See* State v. Lawrence, 541 N.E.2d 451, 457 (Ohio 1989) (noting that mitigating factors are related to punishment, not culpability for the crime). While the disjunctive is important, it expects too much of the jury to consider a mitigating factor specifically about the defendant's impaired mental capacity at the time of the murder as it informs not his reduced culpability for the crime but a separate reason to vote for a sentence less than death.

sion requires the jury to first find that the defendant possessed the degree of culpability required to commit the most serious of crimes. As a separate yet intimately related matter, the decision requires the jury to judge how the defendant should be punished. Contrary to the explicit and implicit views of many courts, prosecutors, and jurors, as reviewed in this Article, this determination is not a recapitulation of the guilty verdict but a reconceptualization of the defendant's culpability for the crime and consideration of new factors unrelated to his culpability. To decide whether the defendant is worthy of a death sentence, the jury must consider not only the crime and the defendant's responsibility for it, reconceived as relating to his deathworthiness rather than his guilt-phase culpability, but also evidence about the defendant's character, record, and background, both as it aggravates and mitigates the punishment. By using terminology and jury instructions to focus the jury on the distinction between its determinations at the two phases, the punishment decision will more accurately reflect the jury's judgment of the defendant's deathworthiness, rather than just his culpability for the crime. Identifying these distinctions will help insure that the jury's punishment decision is a "reasoned *moral* response,"[347] that the purpose of the bifurcated trial and the goals of individualized sentencing are carried out, and that the decision to sentence the defendant to life imprisonment or death is not merely a restatement of the decision finding him guilty of murder but an appropriate reflection of his deserved punishment.

347. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).