

# Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb

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"Crime Of The Century!" So read headlines in the nation's press in 1924 shortly after Chicago police arrested Nathan Leopold, Jr. and Richard Loeb for murdering young Bobby Franks.<sup>1</sup> The defendants appeared destined to hang.<sup>2</sup> The evidence left no doubt that they had killed the child. They confessed repeatedly and in great detail and even led authorities to

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1. See Leslie Oelsner, Nathan F. Leopold of 1924 Murder Case is Dead, *N.Y. Times*, Aug. 31, 1971, at 36.

2. Clarence Darrow, *The Story of My Life* 232 (1932) (noting that the defendants found themselves "in the shadow of the gallows").

articles taken from the boy's body.<sup>3</sup> The deeds also were "of singular atrocity,"<sup>4</sup> and the remorseless defendants appeared unsympathetic.<sup>5</sup> It was a kidnapping and killing for "thrill"<sup>6</sup> that had been "carefully planned for six months" by sons of two of Chicago's wealthiest families.<sup>7</sup>

Clarence Darrow's defense, however, turned the "crime of the century" into the "trial of the century."<sup>8</sup> Darrow's strategy captured world-wide attention<sup>9</sup> and continues to engender interest and controversy.<sup>10</sup> It was

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3. See Maureen McKernan, *The Amazing Crime and Trial of Leopold and Loeb* 66-67 (1989).

4. *Id.* at 378 (discussing remarks of Chief Justice John Caverly of the Criminal Court of Chicago at sentencing).

5. See, e.g., Darrow, *supra* note 2, at 232 ("The act was a shocking and bizarre performance; the public and press were almost solidly against them."); see also McKernan, *supra* note 3, at 66 (stating that Leopold and Loeb "seemed almost proud of what they had done . . ."); *id.* at 73-75 (noting at several points that the defendants conveyed no remorse for what they had done).

6. *Condemned To Life, Time*, Apr. 7, 1958, at 102, 105 (reviewing Nathan F. Leopold, Jr., *Life Plus 99 Years* (1958)) (stating that "[t]he thrill murder of 14-year-old Bobby Franks looms over the whole book . . .").

7. See Oelsner, *supra* note 1, at 36.

8. Alan M. Dershowitz, *Introduction* to McKernan, *supra* note 3.

9. Symposium, *The Loeb-Leopold Murder Of Franks In Chicago*, May 21, 1924, 15 *J. Crim. L. & Criminology* 347, 347 (1924) ("The kidnapping and murder . . . aroused world-wide interest— at first because of the contrast between the social status of the murderers and the callous cruelty of the deed, but afterwards because of the psychiatric testimony offered by the defense at the hearing for a mitigated sentence.").

10. The case was the subject of a controversial film called *Swoon*, which first appeared in 1992. See Joseph P. Kahn, *Love, Murder & History*, *Boston Globe*, Oct. 25, 1992, at B7. Darrow's defense of Leopold and Loeb was also recounted in a mini-series, entitled *Darrow*, that first appeared in 1991 on public television. See John J. O'Connor, *Clarence Darrow, Standing to Face the World*, *N.Y. Times*, June 7, 1991, at C34. An account of the crime, the police investigation, the trial, and the subsequent fates of Leopold and Loeb appears in Hal Higdon, *The Crime of the Century* (1975). The case also was the subject of a 1948 film by Alfred Hitchcock, called *Rope*, and later a fictionalized book, entitled *Compulsion*. Meyer Levin, *Compulsion* (1956). *Compulsion* was also adapted into a film with the same name.

References to Darrow's strategies in the *Leopold-Loeb* case also continue to appear in judicial opinions. See, e.g., *McDougall v. Dixon*, 921 F.2d 518, 535-37 (4th Cir. 1990), *cert. denied* 501 U.S. 1223 (1991) (describing a defense lawyer's capital sentencing summation, which was based in part on Darrow's argument, as not "conventional" and "unusual and innovative"); *Resnover v. Pearson*, 754 F. Supp. 1374, 1386 (N.D. Ind. 1991), *aff'd* 965 F.2d 1453 (7th Cir. 1992) *cert. denied* 113 S. Ct. 2935 (1993) (noting Darrow's strategy of conceding guilt and contesting only the proper sentence); *United States v. Perez-Casillas*, 593 F. Supp. 794, 807 (D.P.R. 1984) (noting Darrow's argument against allowing public opinion to sway the court's judgment of the proper sanction); *Scott v. State*, 283 So. 2d 642, 646 (Ala. Crim. App. 1973) (noting Darrow's abolitionist summation); *State v. Battle*, 661 S.W.2d 487, 496 (Mo. 1983) (en banc), *cert. denied* 466 U.S. 933 (1984) (Blackmar, J., concurring in part and dissenting in part) (noting Darrow's "psychological arguments" against the death penalty); *State v. Joubert*, 455 N.W.2d 117, 129 (Neb. 1990) *cert. denied* 499 U.S. 931 (1991) (noting Darrow's decision to advise his clients to plead guilty although imposition of the death penalty was possible); *State v. Schaefer*, 599 A.2d 337, 352 (Vt. 1991) (Peck, J., dissenting) (same), *cert. denied*, 112 S. Ct. 982 (1992); *In re Rupe*, 798 P.2d 780, 796 (Wash. 1990) (Utter, J., dissenting) (noting Darrow's effort in closing argument to arouse the sentencer's emotions); *Witzel v. State*, 172 N.W.2d 692, 694 (Wis. 1969) (noting Darrow's representation of both defendants despite the potential conflict of interest).

"probably the first instance of the offer of elaborate psychiatric analysis as the basis for remitting the law's penalty for a calculated, cold-blooded murder, committed by persons not claiming to be . . . legally [ir]responsible."<sup>11</sup> Likewise, Darrow's twelve-hour plea constituted "one of the most remarkable legal arguments in the history of advocacy."<sup>12</sup>

Darrow's defense built on his belief in determinism.<sup>13</sup> He introduced psychosocial evidence to demonstrate the influences that helped lead Leopold and Loeb to kill Bobby Franks. He then urged that the capital sentencer's decision, if not based on mercy,<sup>14</sup> was merely one between conflicting perspectives on human conduct. One view assumed that those found guilty of crimes committed their criminal acts intentionally and were therefore morally responsible; the other assumed, based on acceptance of causal theories of human conduct, that capital offenders, indeed all criminals, lacked the culpability requisite to deserved punishment. Darrow endorsed the latter view and denied the existence of a middle ground. Thus, he aimed not so much at securing a rational calculation of the deserts of his clients as at eliciting compassion for "the human race as a whole."<sup>15</sup>

Darrow's defense in *Leopold-Loeb* raises a fundamental question about modern capital sentencing law: Why does the Eighth Amendment demand individualized consideration of capital offenders before the imposition of a death sentence? Since 1978, the Supreme Court repeatedly has held that the Eighth Amendment requires a capital sentencer to remain free to reject the death penalty based on any evidence the offender offers that relates to his character, record, or crime.<sup>16</sup> Defense lawyers generally believe that evidence of the offender's psychosocial constitution, like that offered by Darrow in *Leopold-Loeb*,<sup>17</sup> forms the core of the defense case protected by

In his concurring opinion in the *Furman* decision, Justice Douglas also cited the *Leopold-Loeb* case as exemplifying the disparities in capital sentences meted out between rich and poor. See *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972) (Douglas, J., concurring).

11. See Symposium, supra note 9, at 347.

12. Dershowitz, supra note 8.

13. See infra text accompanying notes 117-67.

14. On the notion of mercy as an act of extending undeserved leniency, see infra note 118.

15. Kevin Tierney, *Darrow: A Biography* 341 (1979).

16. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion):

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

See also *Skipper v. South Carolina*, 476 U.S. 1, 5-9 (1986) (reversing death sentence after trial judge excluded evidence that bore on defendant's likely ability to be well behaved in prison because jury was entitled to consider any inferences that might "serve 'as a basis for a sentence less than death.'" (quoting *Lockett*, 438 U.S. at 604).

17. Psychosocial evidence includes all information that might bear on the offender's "emotional and psychological makeup" at the time of the offense. Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 324 (1983).

The showing entails, among other things, evidence about the defendant's "childhood, upbringing, education, relationships, friendships, formative and traumatic experiences,

this mandate of individualized consideration.<sup>18</sup> Yet, if Darrow correctly identified the purpose behind such evidence, one should question why states must allow capital offenders to present it. If evidence about the offender tends only to show that human decisions to act are determined by forces beyond the actor's control, it reveals no basis for distinction in the treatment of capital offenders. At the same time, assuming Darrow erred about the relevance of such evidence, one should ask what theory explains how the sentencer should evaluate the evidence to distinguish among capital offenders.

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personal psychology, and present feelings." *Id.* See also Louis D. Bilonis, Moral Appropriateness, Capital Punishment, and the *Lockett* Doctrine, 82 *J. Crim. L. & Criminology* 283 (1991), stating:

Mitigating evidence might include, for instance, evidence that a death sentence would be unjust because the defendant's personal responsibility for the offense is lessened by youth, stunted intellectual and emotional growth, mental retardation or impaired capacity, mental or emotional disturbance, provocation by others, insanity, the influence of alcohol or drugs at the time of the offense, or shared or limited participation in the actual crime. *Lockett's* definition of mitigating evidence also would embrace evidence in support of a claim that the defendant suffered tragic or horrible circumstances in his or her formative years, such as abuse, neglect, poverty, or domestic turbulence . . . .

*Id.* at 302-03 (footnotes omitted).

18. Welsh White, *The Death Penalty in the Nineties* 76 (1991) ("According to defense attorneys who specialize in capital cases, the best way to be successful at the penalty stage is to present a dramatic psychohistory of the defendant to the jury."); see also Goodpaster, *supra* note 17, at 323-24 ("Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings.")

For Supreme Court decisions in which the Court has reversed death sentences based on the preclusion of effective consideration by the capital sentencer of evidence of the offender's psychosocial composition, see *McKoy v. North Carolina*, 494 U.S. 433, 439-44 (1990) (disapproving requirement that jury find mitigating circumstances unanimously before giving them consideration because such requirement precluded adequate consideration of, among other things, evidence of defendant's emotional disturbance and age); *Penry v. Lynaugh*, 492 U.S. 302, 320-28 (1989) (disapproving Texas statute limiting sentencer to inquiry of three special questions and thus preventing sentencer from considering evidence of defendant's mental retardation and background of abuse for what it said about his culpability); *Mills v. Maryland*, 486 U.S. 367, 371-85 (1988) (disapproving requirement that particular mitigating factors be found unanimously before being given consideration because such requirement precluded adequate consideration of, among other things, evidence of defendant's relative youth and mental infirmity); *Hitchcock v. Dugger*, 481 U.S. 393, 397-99 (1987) (disapproving trial judge's interpretation of list of mitigating factors as exclusive so as to preclude consideration of, among other things, evidence that defendant had suffered possible brain damage from sniffing glue during adolescent years and had been raised in conditions of gross social adversity); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (disapproving sentencing judge's interpretation of sentencing statute as not permitting consideration of evidence of defendant's emotional disturbance and troubled and violent upbringing); *Bell v. Ohio*, 438 U.S. 637, 641-43 (1978) (reversing because statutory questions failed to allow for consideration of evidence, among other things, of defendant's youth, low intelligence, emotional disturbance and drug use at the time of the offense); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion) (reversing because statutory questions failed to allow for consideration of evidence of, among other factors, defendant's youthful status).

The problem lies at the heart of the current controversy over capital sentencing doctrine.<sup>19</sup> The individualization mandate has assumed the center of a heated debate within the Supreme Court.<sup>20</sup> Dispute exists about the basic requirement—about whether the sentencer need consider *any* evidence before imposing a death sentence on a murderer.<sup>21</sup> Debate also continues about the sorts of evidence the sentencer must remain free to consider and the ways in which the sentencer must remain free to consider it.<sup>22</sup> The continuing controversy calls for reexamining the justification for the mandate, which is the purpose of this Article.

My project proceeds in four stages. Part I details Darrow's defense in *Leopold-Loeb*, demonstrating Darrow's view that the function of a capital sentencing trial is to resolve the truth of the theory that all human decisions to act are determined by forces beyond the control of the actor. Part II searches for an alternative rationale to explain the mandated capital sentencing inquiry. An alternative rationale must exist if only because Darrow's view that no middle ground exists between free will and determinism leaves unapparent the basis for disparate sentences among capital offenders, Part II demonstrates, however, that neither philosophers nor criminal-law theorists concur on how to distinguish among murderers regarding sentencing decisions, raising doubt that any consensus exists about the middle ground between the competing views posited by Darrow. As a prelude to examining why, under these circumstances, the Eighth Amendment should demand individualized consideration of capital offenders, Part III describes current individualization requirements and demonstrates the controversy among the Justices over the justification and proper boundaries of the individualization rule. Part IV then reconsiders the basis for the broad individualization rule that the Court generally has enforced since sanctioning the resumption of capital punishment in 1976.

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19. See Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 Ga. L. Rev. 323, 402-10 (1992) (describing debate between Justice Scalia and Justice Stevens over propriety of abandoning the individualization principle).

20. See *infra* notes 345-48 and accompanying text.

21. Justice Scalia has begun to advocate allowing states to impose the capital sanction automatically on such offenders, and Justice Thomas has signalled his readiness to go along. See, e.g., *Sochor v. Florida*, 112 S. Ct. 2114, 2130 (1992) (Scalia, J., concurring) ("It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence . . ."); *Walton v. Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in judgment) ("The mandatory imposition of death—without sentencing discretion—for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment . . ."); *Graham v. Collins*, 113 S. Ct. 892, 908 (1993) (Thomas, J., concurring) ("[W]e are not now confronted with a mandatory sentencing provision, and I have no occasion here to flesh out my disagreement with the Court's prohibition of such schemes.").

22. For example, a divided Court recently pruned the protections afforded by the individualization rule. In *Graham v. Collins*, 113 S. Ct. 892 (1993), and *Johnson v. Texas*, 113 S. Ct. 2658 (1993), a five-Justice majority concluded that states may effectively preclude sentencer consideration of certain aspects of an offender's disabilities for what they say about his deserts. See *infra* note 325 for a discussion of the old Texas statute and *infra* notes 359-68 and accompanying text for further discussion of *Graham* and *Johnson*.

I conclude that debates about individualization in the Justices' capital sentencing opinions have largely obscured the central questions raised by the requirement of individualized sentencing consideration. The mandate is best thought to build on a protection against retributive excess in the use of the death penalty, a protection plausibly seen in the Eighth Amendment. Nonetheless, even this explanation has problems. They stem from the inability to define a societal consensus about how to assess a murderer's deserts. Perhaps a complex, societal measure of deserts exists, one too complex to discern easily or to describe in objective terms. On this view, expansive consideration of a capital offender's background could produce results better tuned to the societal consensus than those that would result from using mandatory death penalties based on objective standards. Still, the existence of such a societal consensus about measuring deserts is uncertain, and if no such consensus exists, the Court lacks a basis to disallow legislatures from defining the boundaries of the sentencing inquiry as they deem appropriate.

### I. DARROW'S DEFENSE IN THE *LEOPOLD-LOEB* CASE

Darrow's arguments for sparing the lives of Leopold and Loeb raise fundamental questions about the nature of human responsibility. More importantly for purposes of this Article, Darrow's defense provides a valuable heuristic for examining a fundamental question about modern capital sentencing law: What is the justification in Eighth Amendment terms for mandating a capital sentencing hearing as a prerequisite to the imposition of a death sentence on a murderer?

#### A. *The Crime, the Police Investigation, and Darrow's Involvement*

The infamous killing underlying the *Leopold-Loeb* case was conceived as "the perfect murder." The plot came from the mind of eighteen-year-old Richard Loeb. His nineteen-year-old friend and lover,<sup>23</sup> Nathan Leopold, Jr., had not shared Loeb's fantasy, but because of his intense adulation of Loeb, had agreed to the plan. They would kidnap and kill a young boy from their wealthy Chicago neighborhood and dispose of the body in a remote area outside of the city. They would then secure a ransom from the child's family on the pretense that the child was still alive. The victim would never turn up, and the crime would go unsolved.<sup>24</sup>

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23. Many of the earlier sources concerning the case did not describe the sexual relationship between Leopold and Loeb. Some of the information regarding the sexual relationship was presented to the judge in camera and thus not easily discovered. See, e.g., Symposium, supra note 9, at 347. The authors of some works, however, also decided to excise other explicit information regarding the men's sexual activities. See, e.g., McKernan, supra note 3, at 82 (noting that the forensic psychiatric reports prepared in the case "contained unprintable matter concerning the sex life of the defendants"). More recent researchers, however, have noted that the court records and transcripts clearly revealed their homosexual relationship. See Higdon, supra note 10, at 149, 202, 214-15 (detailing some of the sexual activity between the defendants revealed in the psychiatric reports); Kahn, supra note 10, at B7 (reviewing recent movie about the case, which, based on review of the court records and transcripts, depicts the men's sexual relationship).

24. See Irving Stone, *Clarence Darrow: For the Defense* 388-91 (1941).

Given the backgrounds of Leopold and Loeb, the idea was especially bizarre. They were both sons of millionaires and intellectually gifted. Leopold's father was the retired head of a box manufacturing business; Loeb's father was a vice president of Sears Roebuck & Company.<sup>25</sup> Leopold was the youngest graduate in the history of the University of Chicago; Loeb was the youngest to be graduated from the University of Michigan.<sup>26</sup> They also were both set to attend law school—Leopold at Harvard, Loeb at the University of Chicago.<sup>27</sup>

Despite the horrific and irrational nature of the scheme, late in the afternoon on May 21, 1924, the two men set it irrevocably in motion. While driving a rented car around their Hyde Park neighborhood in search of a victim,<sup>28</sup> they spotted fourteen-year-old Bobby Franks walking near his home. A distant cousin of Loeb's, Franks was the son of a wealthy real estate speculator. Loeb coaxed Franks into the front seat of the car. Leopold stepped on the gas. Almost immediately, Loeb, sitting in the back seat, covered Franks's mouth and began striking him on the head with a chisel. He then stuffed a rag in Franks's mouth, pulled him into the back seat and continued to strike him. The child died quickly, and Loeb covered him with a robe the men had brought along for that purpose. Leopold headed out of Chicago toward Gary, Indiana. On the way, he stopped at a restaurant, and the two men ate dinner. Once darkness had fallen, they drove to a remote area where Leopold sometimes went birdwatching. The men disrobed the victim and poured hydrochloric acid over his face to hasten the disfigurement process. After some consideration, they decided to stuff the body in a culvert under railroad tracks located several hundred yards from a country road.<sup>29</sup>

Leopold and Loeb then set about to destroy evidence and to pursue their plans for the ransom. After disposing of Franks's clothing, Leopold telephoned the Franks home with a message that their boy had been kidnapped, but was safe, and that instructions would soon follow.<sup>30</sup> The men also addressed and mailed a letter to the Franks family that they had prepared on a typewriter in Leopold's home several days earlier. The letter instructed the Frankses to gather ten thousand dollars in small bills and to place it in a cigar box, which was to be wrapped in white paper.<sup>31</sup> Later that night, the men burned some of the victim's clothing in the Loeb's furnace, hid the robe, and cleaned the more obvious blood stains from the rented

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25. *See id.* at 384.

26. *See* Arthur Weinberg, *Attorney for the Damned* 17 (1957).

27. *See* McKernan, *supra* note 3, at 90, 113.

28. Leopold and Loeb pursued Franks only because other potential victims they had considered did not appear. *Id.* at 28. One of the victims reportedly considered was a boy named Armand Deutsch, the grandson of Julius Rosenwald, creator of the Sears, Roebuck empire. Michael Kilian, *Lucky Charm*, *Chi. Trib.*, June 19, 1991, at C1. Due to a dental appointment, Deutsch had not followed his usual routine of walking home from school on the day of the murder. *Id.* Deutsch later became a well-known patron of the arts and close friend of Ronald and Nancy Reagan. *Id.*

29. *See* Stone, *supra* note 24, at 396.

30. *See* McKernan, *supra* note 3, at 9.

31. *See id.* at 9-10.

auto.<sup>32</sup>

The following day, Leopold and Loeb set about to complete "the perfect murder." First, they parked the rented car in the Leopolds' garage and resumed cleaning the blood stains. Unfortunately for the men, the Leopolds' chauffeur noticed this activity.<sup>33</sup> By afternoon, the Frankses had received the letter mailed the previous night and had prepared the ransom money as instructed. From a Walgreen's store, Leopold telephoned Franks's father, instructing him to bring the ransom by cab to a designated drug store. The men intended to call the drug store and instruct Mr. Franks to board a certain train and to look in a telegram box for a note they had hidden. The note would tell Mr. Franks to toss the box of money off the train at a particular location near where the men would be waiting.<sup>34</sup>

Events, however, soon went awry. The men called the drug store several times, but Mr. Franks never appeared. He had not followed the instructions because he had received a second call from the police only moments after Leopold's. A body had been found, and the police suspected it was Bobby's.<sup>35</sup>

It was an accident that authorities discovered the body so quickly. The morning following the kidnapping, a railroad maintenance worker walking along the tracks noticed an unusual white form, apparently a human foot, at the mouth of a culvert. Upon investigation, the worker and his colleagues found the naked body of a small boy. Nearby, they also discovered a pair of horn-rimmed spectacles. Initially, the police thought that the glasses might belong to the victim. However, the authorities soon learned that the body was that of Bobby Franks and that he had not worn the glasses.<sup>36</sup>

Although the investigation required several days, the spectacles eventually led the police to Nathan Leopold, Jr.<sup>37</sup> Richard Loeb was with Leopold when the officers arrived at Leopold's home, and both men were taken in for questioning.<sup>38</sup> Having known from news accounts of the discovery of the body and the glasses, the two men had prepared an alibi in case suspicion focused on them. When confronted with the glasses, Leopold admitted that they were his, but pointed out that he sometimes ventured to the area where they were found for his ornithological studies. The men also initially feigned forgetfulness about their activities on May 21, but then

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32. *See id.* at 26-27.

33. *See* McKernan, *supra* note 3, at 41; Stone, *supra* note 24, at 397.

34. *See* McKernan, *supra* note 3, at 24-27.

35. *See id.* at 11.

36. *See* Stone, *supra* note 24, at 397; McKernan, *supra* note 3, at 11-12.

37. From a mark on the frame, police investigators traced the spectacles to a particular oculist in Chicago. The oculist's records showed that he had sold spectacles like those discovered to three people. One was a woman who still had her spectacles. Another was a man who had been in Europe at the time of the murder. The third was Nathan Leopold, Jr. *See* Stone, *supra* note 24, at 397.

38. Reportedly, Richard Loeb had been a voluble and interested participant in the investigations even before the authorities took him in for questioning. He apparently had gone out of his way to speak with reporters and detectives investigating the murder to provide them with his theories about who might have committed it. *See* McKernan, *supra* note 3, at 13-15. *See also* Darrow, *supra* note 2, at 239.



offered the prepared alibi. They contended that they had gone riding in the afternoon in Lincoln Park in Leopold's car looking for bird specimens. In the evening, they supposedly had met two women at a club, but later had found them disagreeable and had returned home.<sup>39</sup> When asked about his typewriter, Leopold said that he had always used a Hammond. The police previously had determined that the ransom note sent to the Frankses' home had been written on an Underwood portable.<sup>40</sup>

While the men's story initially appeared plausible, it was quickly undermined by police investigation. The authorities learned through several of Leopold's classmates at the University of Chicago that they once had prepared an outline on a typewriter at Leopold's home. Examination of copies revealed that they had come from the same typewriter used to prepare the ransom letter. When confronted with this information, Leopold again denied having such a typewriter, and the police could not find it in the Leopold home. However, a servant confirmed that Leopold had an Underwood portable and that it had been in the house as recently as two weeks earlier.<sup>41</sup> The police also discovered through the Leopolds' chauffeur that the alibi was false. The chauffeur recalled that Leopold's car had not been taken out of the garage until after 10:30 p.m. on the day of the murder. He remembered this because he had worked on the car that afternoon. Further, he recounted having seen the men on the following day cleaning stains off the seats of what appeared to be a rented auto.<sup>42</sup> Upon learning this information, the deference shown Leopold and Loeb because of their backgrounds quickly evaporated.

The authorities soon established overwhelming evidence of the two men's complicity.<sup>43</sup> The State's Attorney, Robert E. Crowe, advised Loeb of the case against them. Loeb quickly broke down and told the truth, except in claiming that Leopold, not he, had fatally struck the victim. When confronted with the fact of Loeb's confession and details of the scheme to which only he and Loeb had been privy, Leopold also confessed. The two men later confessed again in each other's presence and, further, assisted the police in locating items of evidentiary significance, including the victim's clothing and the Underwood typewriter.<sup>44</sup>

The public was in an uproar. News accounts detailed the incontrovertible evidence against Leopold and Loeb. State's Attorney Crowe also

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39. See McKernan, *supra* note 3, at 18.

40. See *id.* at 19.

41. See *id.* at 19-20.

42. See *id.* at 41; Stone, *supra* note 24, at 397.

43. See McKernan, *supra* note 3, at 21-23.

44. During the two days after they initially confessed, the men showed authorities where they had obtained items used in the crime and where they had hidden incriminating evidence. These events occurred before the men were allowed to speak with counsel. After confirming where they had dumped the victim's body, they showed the police where they had buried various items of his clothing. They also showed the police the location from a bridge in a park where they had dropped the typewriter into a lagoon and helped recover from the Loeb's home the remnants of the robe used to cover the victim's body. See McKernan, *supra* note 3, at 65-67.

reportedly declared, "I have a hanging case."<sup>45</sup> Indeed, Illinois law allowed, though it did not require, the death penalty for either kidnapping or murder.<sup>46</sup> The papers also reported the men's statements that they had committed the crime merely "for the sake of a thrill."<sup>47</sup> The public outcry for the capital sanction became "incessant."<sup>48</sup>

It was amidst this furor that Clarence Darrow, on June 2, 1924, agreed to serve as lead counsel for the two defendants.<sup>49</sup> In his late sixties at the time, Darrow did not readily accept the position.<sup>50</sup> He suffered from rheumatism and was weary from previous legal battles.<sup>51</sup> Darrow also feared that it would nearly kill him if a client were executed,<sup>52</sup> and the chances of that outcome for Leopold and Loeb could not be discounted. Further, he knew that the Bachrach brothers, cousins of Nathan Leopold, Jr., already had agreed to represent the defendants.<sup>53</sup> Still, Darrow was unable to turn down the plaintive requests of the defendants' families. He had been a friend of the Loeb's for many years.<sup>54</sup> Most importantly, among all the causes for which he had fought, "his great and permanent crusade had been against the death penalty."<sup>55</sup>

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45. See Arthur Weinberg & Lila Weinberg, *Clarence Darrow: A Sentimental Rebel* 298 (1980); see also McKernan, *supra* note 3, at 65-67.

46. See Symposium, *supra* note 9, at 393 (sentencing remarks of judge).

47. Weinberg, *supra* note 26, at 17.

48. Willard D. Hunsberger, *Clarence Darrow: A Bibliography* 151 (1981). Antisemitic and homophobic fervor probably heightened the clamor against the defendants. See, e.g., Kahn, *supra* note 10, at B7.

49. See Stone, *supra* note 24, at 380-84.

50. Many soon criticized Darrow for having taken the case and particularly for supposedly having "sold out" by accepting a "million dollar" fee. *Id.* at 398-99. Darrow had made no such fee demand and ultimately received only thirty thousand dollars for his many weeks of arduous work for Leopold and Loeb. *Id.* at 420.

51. These battles later contributed to Darrow's enduring fame as an advocate for the unpopular and downtrodden. See U. Mich. L. Sch. Bull., Mar. 24, 1976, at 8 (noting that Darrow "won immortality as a folk hero, being the most famous advocate of unpopular causes in American history").

Some have contended that the *Leopold-Loeb* case more than any other propelled Darrow to fame:

Before the Loeb-Leopold trial Clarence Darrow was modestly famous; through this trial he was to become immeasurably notorious. While his defense could be important for the furthering of the science of criminology, it could not have the far-reaching social implications of his important appeals for labor and civil rights; yet it was the case for which he was to receive the greatest amount of publicity and through which he was to become known in remote parts of the world. . . . Because of the weirdness of the crime, the wealth of the participants, the fascination with which people are drawn to the death appeal of a murder, he was to remain best known by the general public for the Loeb-Leopold case.

Stone, *supra* note 24, at 404.

52. Darrow, *supra* note 2, at 232.

53. See Stone, *supra* note 24, at 380.

54. See *id.*

55. *Id.* at 381.

The *Leopold-Loeb* case arose during a period of especially intense debate in the nation about the propriety of capital punishment. Between 1897 and 1917, ten states abolished the capital

Every indication was that Darrow's effort would focus on the question of sanity. State's Attorney Crowe had emphasized his resolve to see the defendants swing in the gallows, so a plea bargain seemed impossible. Given the state's overwhelming evidence, any effort to deny complicity in the murder also seemed hopeless. So sure were the prosecutors that the defendants' only hope was a claim of insanity that, within hours after the defendants' arrest, the state had retained the best forensic psychiatrists<sup>56</sup> in the city to examine them. Darrow himself soon declared publicly that there would be no effort to secure a normal acquittal. "The question of sanity alone is involved."<sup>57</sup> The defense also hired some of the most distinguished forensic psychiatrists in the nation to examine the defendants.<sup>58</sup> Interest in the insanity aspects of the case became so great that Chicago's two leading newspapers unsuccessfully sought to arrange for Sigmund Freud himself to travel to the United States to study the defendants.<sup>59</sup>

While Darrow was convinced that both defendants were mentally ill, he also believed that the insanity plea would fail.<sup>60</sup> The insanity defense was narrow. To succeed, the defendants would have to show they were so disturbed that they did not know what they were doing or that what they were doing was wrong.<sup>61</sup> The defendants' voluble natures and obvious intellects also would tend to mask the extent of their mental infirmities. The state also would probably prevail on its demand that the question be resolved by a jury, and the public hysteria about the case would weigh heavily on citizens called as jurors. Further, if the jury resolved the sanity question, it would also set the sentence, and a jury was likely to be as prejudiced about the sentencing question as about the question of guilt or

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sanction, but during the next two decades, eight of those ten states reinstated it. *See generally* John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 *J. Crim. L. & Criminology* 538 (1993).

56. During that era, forensic psychiatrists were known as "alienists." *See* Weinberg & Weinberg, *supra* note 45, at 407 n.3.

57. *Id.* at 301.

58. To secure expert psychiatric assistance, Walter Bachrach, one of the defense attorneys, had attended an annual convention for psychiatrists being held in Atlantic City. Bachrach retained numerous doctors to assist the defense. Among them, the three most important were: Dr. Bernard Glueck, chief psychiatrist at Sing Sing Prison in California; Dr. William Healy, a graduate of Harvard and the Rush Medical School and head of the Baker foundation in Boston; and Dr. William A. White, president of the American Psychiatric Association and superintendent of St. Elizabeth's Hospital, the well-known mental institution in Washington, D.C.. *See id.* at 300.

59. *See id.*

Freud was 68 and ill at the time. *See* Peter Gay, *Freud: A Life For Our Time* 4 (1988). However, Robert McCormick, the publisher of the Chicago Tribune, offered even to charter a steamer to bring the analyst to New York. Nonetheless, Freud rejected the proposal. *Id.* at 453-54.

60. *See* Darrow, *supra* note 2, at 234, 236-37.

61. This was the "right-wrong" test of sanity, which prevailed at the time of the *Leopold-Loeb* trial. *See* John F.W. Meagher, *Crime and Insanity: The Legal As Opposed To The Medical View, And The Most Commonly Asserted Plea*, 14 *J. Am. Inst. Crim. L. & Criminology*, 46, 49 (1923) ("[T]o prove irresponsibility, it must be shown that the accused was laboring under such a defect of reason from mental disease 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 that he was doing wrong.").

innocence.<sup>62</sup> Yet, if not insanity, what defense could Darrow offer? There appeared no alternative.<sup>63</sup>

Compounding Darrow's predicament was the speed with which the prosecution was proceeding. On June 6, 1924, only a week after their arrests, Leopold and Loeb were indicted for the murder and kidnapping by a grand jury. Five days later, they appeared before Judge John R. Caverly of the Criminal Court of Cook County to plead not guilty. A hearing was set for July 21, 1924, to resolve any preliminary motions. Apparently, the trial would commence only a few days later.<sup>64</sup>

### B. *The Evidentiary Proceedings*

When the case was called for the motions hearing on July 21, Darrow astonished nearly everyone by announcing that the defendants would plead guilty to the indictment.<sup>65</sup> In carefully prepared words, he described his concern over whether the defendants could obtain a fair trial from a jury. At the same time, he conceded his belief that, while the defendants should not be executed, they should be isolated from society.<sup>66</sup> The effect of the defense request would be to place the burden on Judge Caverly to decide the appropriate sentence. Although the prosecutors were caught off guard by Darrow's announcement, there seemed no basis to object to his request. Hence, Judge Caverly accepted guilty pleas to murder and kidnapping from each of the defendants.<sup>67</sup> As the prosecutors were required under Illinois law to prove the crimes, despite the guilty pleas, before the judge

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62. At the time, Illinois law provided for a unitary trial. Both sides presented all evidence. The jury then rendered a verdict on guilt-or-innocence. If the decision was guilty, the jury also rendered a decision on whether the penalty should be death or incarceration. *See, e.g.,* *People v. Heffernan*, 143 N.E. 411, 413-14 (Ill. 1924).

63. *See* Stone, *supra* note 24, at 400.

64. *See* McKernan, *supra* note 3, at 76.

65. Darrow later reported that additional considerations in the decision included the defense lawyers' favorable assessments of Judge Caverly and a fear that the prosecution would attempt to sever the charges of murder and kidnapping to have two chances at securing death sentences. Pleading guilty to the charges before any severance motion would foreclose this possibility.

We spent considerable time deliberating as to what we should do. The feeling was so tense and the trial was so near that we felt we could not save the boys' lives with a jury. It seemed out of the question to find a single man who had not read all about the case and formed a definite opinion. Judge Caverly had formerly been a judge of the Municipal Court and had helped form the Juvenile Court, and we believed that he was kindly and discerning in his views of life. After thorough consideration we concluded that the best chance was on a plea of guilty. Only a few knew what was to be done—the boys and their parents, two or three relatives, and the [defense] attorneys in the case. . . .

Of course the State and every one else were taken by surprise. The pleas were accepted and entered without objection or delay. What we most feared was that if the State had any conception of our plan they would bring up only one case at a time, saving a chance, if given a life-sentence [sic], to bring up the second case and, as it were, catch us on the rebound.

Darrow, *supra* note 2, at 236-37.

66. *See* Weinberg & Weinberg, *supra* note 45, at 302.

67. *See id.*

imposed sentences, the case was continued until July 23.<sup>68</sup>

At the evidentiary hearing, Darrow would try to demonstrate the defendants' abnormal mental conditions. He believed that any judge exercising sentencing discretion in a death penalty case would want to discover as much as possible about the crime and the defendants before passing judgment. Hence, he believed that Judge Caverly would allow the defense psychiatrists to testify. He was fortified in this view by a provision of Illinois law stating that on a plea of guilty the court should hear any witnesses presented "as to the aggravation or mitigation of the offense."<sup>69</sup>

On July 23, the hearing began. The state was represented by Mr. Crowe, who was a former judge, and by four assistant State's Attorneys. Darrow and brothers Benjamin and Walter Bachrach represented Leopold and Loeb.<sup>70</sup> Thousands of persons thronged the streets outside the courthouse in an effort to get in. However, besides the family members of the defendants, most of the spectators allowed in the courtroom were lawyers and judges. Some had traveled hundreds of miles to see Darrow and to hear what was expected to be "one of the most interesting and dramatic trials" of the era.<sup>71</sup>

After a few hours devoted to opening statements, the state began presenting its case, which included the testimony of some eighty witnesses. This testimony covered all the details of the murder and of the evidence indicating the defendants' complicity, including their confessions. While the defense lawyers argued that the defendants' guilty pleas made this evidence irrelevant, the prosecution successfully contended that the evidence bore on the condition of the defendants' minds and, hence, on the level of aggravation of the offenses.<sup>72</sup> Although the defense refrained almost entirely from cross examination, the state required a full week to complete its presentation.<sup>73</sup>

When the defense opened its case on July 30, it sought only to introduce evidence bearing on the defendants' alleged mental infirmities. The prosecution, however, had now anticipated the defense strategy and was prepared to oppose it. Shortly after the defense called its first psychiatrist, Crowe objected to any testimony concerning the mental condition of the defendants. He argued that the defendants were restricted to presenting evidence about the way they had committed the crime and their subsequent cooperation with the authorities.<sup>74</sup>

A lengthy battle ensued over whether the court should attempt to assess the level of the defendants' mental responsibility. Concededly, Judge Caverly had wide discretion in sentencing, and the statute required him to

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68. See McKernan, *supra* note 3, at 76.

69. Darrow, *supra* note 2, at 235; McKernan, *supra* note 3, at 78. Darrow recognized, however, that, despite the evidence, Judge Caverly might not be disposed in the defendants' favor. See Darrow, *supra* note 2, at 237 ("We were conscious of the risk we were taking . . .").

70. See McKernan, *supra* note 3, at 76.

71. Stone, *supra* note 24, at 406.

72. See Darrow, *supra* note 2, at 238.

73. See McKernan, *supra* note 3, at 77.

74. See *id.*

consider evidence in "mitigation."<sup>75</sup> The prosecution argued, however, that, absent a recognized defense, such as insanity or provocation and heat of passion, the criminal law did not recognize diminished mental capacity. "You are either entirely responsible for all the consequences of your act," Crowe urged, "or you are not responsible at all."<sup>76</sup> Because the defense allegedly was now trying to convince the court of the defendants' insanity, a defense they had forsaken by pleading guilty, Crowe argued that Judge Caverly should exclude the evidence. Defense counsel reiterated that they were not offering evidence to exonerate Leopold and Loeb and conceded again that the defendants had not met the standard for insanity. "But we still say that evidence falling short of a competent legal defense is a circumstance which this court may take into consideration and should, in determining the punishment to be meted out to these defendants in the exercise of the discretion conferred upon the court by the statute."<sup>77</sup> After three days of legal wrangling, Judge Caverly concluded that the statute required him to *hear* any evidence of mental abnormality that the defense wished to offer.<sup>78</sup>

A week's worth of testimony followed from the defense psychiatrists.<sup>79</sup> The gist of the evidence was that the killing of Bobby Franks resulted from a peculiar sexual union of two highly abnormal teenagers. Perhaps neither of the two defendants qualified as insane. Both, however, were mentally defective.<sup>80</sup> Also, neither of the defendants would have committed such an offense without the push provided by the other's involvement.<sup>81</sup> On these general points, the defense psychiatrists concurred.<sup>82</sup>

The defense experts found Leopold's mental infirmity undeniable. Though physically malproportioned and clumsy,<sup>83</sup> he possessed extreme

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75. Under Illinois law, the judge could have sentenced the defendants to imprisonment for any period from 14 years to life or to death. *See* Symposium, *supra* note 9, at 393 (sentencing remarks of judge reciting the statutes governing punishment for murder and kidnapping).

76. *See* McKernan, *supra* note 3, at 79.

77. *Id.* at 80.

78. *See id.*

79. In addition, the defense called acquaintances of the defendants to testify to the defendants' strange behaviors and the witnesses' beliefs in their abnormality. *See* Darrow, *supra* note 2, at 239.

80. *See, e.g.,* Stone, *supra* note 24, at 408 (citing expert testimony declaring the defendants' emotional make-up as abnormal).

81. *Id.* at 408-09.

82. Before trial, three of the four defense psychiatrists who later testified, along with another who did not testify, prepared a joint summary report on each of the defendants. Defense counsel previously had suggested that the experts for both parties conduct a joint examination of the defendants and attempt to prepare a joint report, but State's Attorney Crowe had rejected the proposal. *See* McKernan, *supra* note 3, at 81. The joint report prepared by the defense experts was not introduced in evidence but mirrored in general terms the defense experts' testimony. *See id.* The summary report has been reprinted in several places. *See, e.g., id.* at 141-63; Symposium, *supra* note 9, at 360-79 (discussing psychiatrists' report for the defense).

83. The defense experts also found that aspects of Leopold's upbringing heightened his sense of physical inferiority.

intelligence<sup>84</sup> and had taken a view of himself from early on as a superior intellectual being. He also had grown to think of himself as "set apart and not called on to be amenable to the social regulations or legal restrictions which govern the ordinary human being."<sup>85</sup> His enchantment with Nietzsche's "superman" theories had fueled this perception.<sup>86</sup> They also pointed to the death of his mother when he was very young as distorting his development. The experts described a pathological "ego" that admitted of only one motive—his own advantage.<sup>87</sup> They saw him as unfeeling towards others, experiencing the social world instead in a highly intellectual manner.<sup>88</sup> He also suffered from distorted thinking in some areas. For example, he repeatedly had experienced, beginning before age ten, a series of "King-Slave" fantasies.<sup>89</sup> He would see others in the role of kings or slaves and develop plots around those notions. For two or three years before the murder, he had played out this delusion with Loeb in the role of king and himself in the role of slave. The delusion had become so intense by the time of the murder that there was "an almost complete identification" with Loeb. "It was blind hero worship."<sup>90</sup> This picture, the defense experts concluded, was "of a special abnormal type, the paranoid psychopathic personality."<sup>91</sup>

As for Loeb, the defense experts described what psychiatrists today might label an "antisocial personality disorder."<sup>92</sup> They found that Loeb had felt estranged and unwanted in his home despite the cultured and virtuous setting.<sup>93</sup> He also had begun to exhibit plainly abnormal tendencies by age nine. At that stage, his mind already had been filled with deviant ideas and visions. He had imagined himself as a master criminal, and by age

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His inferior physical status, together with the fact that he attended for the first two years of his school life a girls' school, on account of which he was taunted by other boys, and also because he was regularly taken by a nurse to and from public schools until he was eleven years old, tended very clearly to give him a feeling, which he himself now remembers well, that he was a person apart from the ordinary and physically inferior.

Symposium, *supra* note 9, at 369.

84. *Id.* at 370.

85. *Id.* at 361-62.

86. *See* McKernan, *supra* note 3, at 270-76; Oelsner, *supra* note 1 (noting Leopold's enchantment with the "superman" theories).

87. Symposium, *supra* note 9, at 363.

88. *See id.* at 365.

89. *Id.* at 366.

90. *Id.* at 368.

91. *Id.* at 372.

The defense experts also noted indications of pathology in Leopold's nervous system. "Even in ordinary conversation is noted exaggerated use of facial muscles, nervous gestures, flushing and pallor of the face." *Id.* at 370. They also concluded that his endocrine system, including his thyroid, pituitary, and pineal glands, appeared to function in disordered fashion. *See* McKernan, *supra* note 3, at 137-38.

92. *See* American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders § 301.70 (3rd ed. rev. 1987) (setting forth the diagnostic criteria for antisocial personality disorder).

93. *See* Symposium, *supra* note 9, at 372.

eleven, had begun to play out these delusions in a variety of ways, including engaging in petty offenses. These criminalistic fantasies had grown as he had developed in his teenage years<sup>94</sup> and had culminated with his obsession to commit a murder.<sup>95</sup> Although affable, garrulous, and quite intelligent, Loeb also was notoriously unfeeling. His lack of emotional development was best demonstrated by "[t]he absence, all along, of normal remorse, revulsion, disgust, depression, fear or even apprehension, in any way concerning the . . . gruesome details of the kidnapping and murder, or in considering the outcome. . . ." Indeed, Loeb seemed to enjoy the role of infamous criminal.<sup>96</sup>

In response to the defense case, the state called four psychiatrists who denied that Leopold or Loeb suffered from mental disorders.<sup>97</sup> The state's experts noted that all persons regularly have fantasies. Such mental activity only reflected the "striving of certain longings or appetites for expression."<sup>98</sup> Nor was the paranoid label attached to Leopold indicative of mental illness. That characterization, which would apply to many in the courtroom, merely described someone who was "egocentric," a person "inclined to be suspicious of the motives and meanings of what others say and do around him."<sup>99</sup> Further, the defendants suffered none of the defects of sensation or thinking, such as hallucinations and delusions, or of emotion, such as mania and depression, or of motion, such as slow, resisting movements, that were outside the range of normalcy. Loeb may have had criminal tendencies, and both defendants surely lacked an "appreciation of the enormity of the deed which they had committed."<sup>100</sup> These facts were not, however, symptomatic of mental illness. To conclude otherwise implied "that every man who commits a deliberate, cold-blooded, planned murder must by that fact alone be mentally [defective]."<sup>101</sup>

### C. *The Summations*

The closing arguments began on August 21.<sup>102</sup> Assistant State's

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94. The doctors noted Loeb's unhealthy upbringing by a nanny as one of the "conditioning factors" in his pathological mental development.

Between the ages of four and a half and fourteen he was very largely in the company and under the domination and guidance of a peculiarly repressive and jealous governess. Through this he was very considerably deprived of the self-development that comes from free and healthy contacts with other children.

Id. at 377. Further, the doctors concluded that because the governess pushed Loeb too hard to proceed quickly in his formal education, "he was forced to fall back for his real satisfaction upon the abnormal features of his phantasy [sic] life." Id.

95. See id. at 372-78.

96. Id. at 376. As a young boy, Loeb reportedly had imagined himself as a prisoner. He had seen himself in a prison yard being "stripped of clothing, shoved around and being whipped," a fantasy that reportedly gave him great pleasure. Id. at 373.

97. See generally id. at 380-90.

98. Symposium, *supra* note 9, at 384 (testimony of Dr. Harold Douglas Singer).

99. Id. at 386.

100. Id. at 380-81 (testimony of Dr. Hugh T. Patrick).

101. Id. at 380.

102. See Weinberg & Weinberg, *supra* note 45, at 306-11, 408 n.18.



Attorneys Thomas Marshall and Joseph Savage offered brief summations seeking death sentences. Benjamin Bachrach then delivered a twenty-minute plea urging tolerance, followed by Clarence Darrow, who spoke for a significant part of two days. In a rebuttal that also lasted several hours, Mr. Crowe had the last word for the prosecution.<sup>103</sup>

The state theorized throughout that Leopold and Loeb had killed Franks in a sincere effort to gain a large ransom.<sup>104</sup> Marshall and Savage urged that only the death penalty would provide retribution proportionate to the defendants' heinous offenses. They also noted previous executions of men of nineteen, eighteen, and even seventeen.<sup>105</sup> Savage argued that the court would deny justice to those who previously had hung if these defendants did not follow. He also portrayed the defense case for mercy as preposterous. He urged the court to show the defendants the same mercy they had shown Bobby Franks. "Hang them! Hang these heartless supermen!" he implored Judge Caverly.<sup>106</sup>

State's Attorney Crowe was incensed not only by the crime but by the intensity of the defense effort and delivered an emotionally charged argument that reflected it. He portrayed the defense psychiatrists as quacks who had been fooled by the defendants and, thus, had produced nothing but "tommy-rot."<sup>107</sup> He argued that, while the defendants' moral sense was shocking, they suffered no mental infirmities. He urged that because the prime criminal age was between seventeen and twenty-four it would be wrongheaded to spare the defendants only because they were youthful.<sup>108</sup> He also contended that the defendants were "as much entitled to the sympathy and mercy of this court as a couple of rattlesnakes, flushed with venom, coiled and ready to strike."<sup>109</sup> He added that the defendants had only pled guilty because they believed Judge Caverly was a powder puff, much more likely than a jury to extend leniency.<sup>110</sup>

Crowe reserved some of his vitriol, however, for Darrow. The "real defense in this case" was Darrow's "dangerous philosophy of life."<sup>111</sup> Crowe pointed to a speech Darrow previously had given at the Cook County Jail

103. The text of Darrow's plea appears with few excisions in Frederick C. Hicks, *Famous American Jury Speeches* 992-1089 (1925), and McKernan, *supra* note 3, at 213-305. Large portions of the plea also appear in Weinberg, *supra* note 26, at 19-87. The text of State's Attorney Crowe's rebuttal appears with few excisions in McKernan, *supra* note 3, at 309-72.

104. *See, e.g.*, Stone, *supra* note 24, at 413; McKernan, *supra* note 3, at 347 (remarks of Mr. Crowe in rebuttal summation).

105. *See* Stone, *supra* note 24, at 412.

106. Weinberg & Weinberg, *supra* note 45, at 307.

107. McKernan, *supra* note 3, at 371.

108. *See id.* at 368.

109. *Id.* at 316.

110. *See id.* at 371 (quoting Crowe's comments implying Judge Caverly's easy nature). Judge Caverly rebuked Mr. Crowe for making this argument and ordered it stricken from the record. He characterized it as "a cowardly and dastardly assault upon the integrity of this court." *Id.* at 372. "The State's Attorney knew that would be heralded all through this country and all over this world, and he knows the court hasn't an opportunity except to do what he did." *Id.*

111. McKernan, *supra* note 3, at 370.

in which he had expressed the view that all crime results from causal forces beyond the actor's control.<sup>112</sup> Crowe condemned this idea and suggested that Darrow himself deserved blame for crimes like the defendants'.<sup>113</sup> As Crowe saw it, Darrow's philosophy meant "there ought not to be any law and there ought not to be any enforcement of the law."<sup>114</sup> Crowe implored Judge Caverly to hang the defendants and thereby reject Darrow's "anarchistic"<sup>115</sup> view: "[I]f a court such as this court should say that he believes in the doctrine of Darrow, that you ought not to hang when the law says you should, a greater blow has been struck to our institutions than by a hundred, yea, a thousand murders."<sup>116</sup>

Crowe's characterization of Darrow's defense had merit. Darrow's plea, indeed, reflected a determinist's view of human conduct.<sup>117</sup> The summation was not directed solely at convincing the judge of the validity of determinism. Darrow's deterministic arguments bore only on whether the defendants deserved death sentences. The relevant statute, however, did not require the court to find that the defendants deserved death as a prerequisite to the imposition of a capital sanction, and the Eighth Amendment did not then regulate capital sentencing. Thus, Judge Caverly seemingly could have imposed the death penalty, apart from the offenders' deserts, based on utilitarian considerations, such as the perceived benefits of deterring future offenses. Further, factors besides the defendants' psychosocial constitutions bore on what punishment they deserved, such as the degree of suffering by the victim or the extent of hateful purpose on the part of the killers. In reaching a desert assessment, the sentencer might also weigh the true suffering produced by the competing sanctions of execution and imprisonment. Also, whatever his judgment about the deserts of the offenders or the utilitarian benefits of death sentences, Judge Caverly could exercise mercy.<sup>118</sup> Darrow addressed all of these considerations and more.<sup>119</sup> Nonetheless, the notion that the defendants' heredity and past

112. *See id.* at 369-70.

113. *See id.*

114. *Id.* at 313.

115. McKernan, *supra* note 3, at 314.

116. *Id.* at 370.

117. *See White*, *supra* note 89, at 105 (noting the deterministic theme of Darrow's summation).

118. Mercy is generally understood as the deliberate reduction of a warranted sentence out of charity. *See, e.g.*, David Heyde, *Supererogation* 24 (1982) ("Acts of mercy are regarded as analogous to acts of . . . bestowing gifts"); Alwynne Smart, *Mercy*, in *The Philosophy of Punishment* 212, 218 (H.B. Acton ed., 1969) (explaining that an exercise of mercy amounts to a decision to impose a punishment less severe than that which is appropriate or just); *see also* James 2:13 (King James) ("For he shall have judgment without mercy, that hath shewed no mercy; and mercy rejoiceth against judgment."). Some have criticized the exercise of mercy in criminal sentencing. *See, e.g.*, Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 174 (1988) (urging that sentencers should "keep their sentimentality to themselves for use in their private lives with their families and pets"). One commentator, however, has sought to justify mercy as a moral virtue by emphasizing the reality of the judge's task in sentencing. *See Eric L. Muller, The Virtue of Mercy in Criminal Sentencing*, 24 *Seton Hall L. Rev.* 288 (1993).

119. In addition to confronting these issues, Darrow argued, for example, that execution would be more cold-blooded and torturous than the killing of Franks, *see McKernan*, *supra* note 3, at 219, and he portrayed the execution process in dramatic fashion, *see id.* at 240. He

experiences caused their conduct repeatedly surfaced as a reason for rejecting retribution.

Darrow's actual beliefs on the nature of human responsibility and the proper function of criminal sanctions were not difficult to discover. Two years before the *Leopold-Loeb* trial, he had written a 285-page book devoted to the subject.<sup>120</sup> In that work, Darrow had expounded a deterministic philosophy of crime. He had acknowledged the traditional view that "man not only knew good from evil, but was endowed with 'free will,' and had the power to choose between good and evil," making him responsible for his choices.<sup>121</sup> Under that view, it followed that an offender "should be punished or made to suffer, for he had purposely brought all the evil on himself."<sup>122</sup> Darrow also had acknowledged in his book that this traditional view was "still the foundation of the world's judgment of men, in court and out."<sup>123</sup> Yet, Darrow had argued that "the whole current conception of the individual and his responsibility is a gross error."<sup>124</sup> He had sought through the book to persuade "that the laws that control human behavior are as fixed and certain as those that control the physical world."<sup>125</sup> Humans often could not trace the origins of a crime to the hereditary and environmental factors that produced it. Yet, "man is the product of hereditary and environment and . . . he acts as his machine responds to outside stimuli and nothing else . . ."<sup>126</sup> Hence, the criminal sanction could not properly serve as retribution.<sup>127</sup>

Darrow offered these same themes in his plea on behalf of Leopold and Loeb. He acknowledged the competing views on the nature of human responsibility, but again argued that the progressive view aligned with determinism:

There are at least two theories of man's responsibility. There may be more. There is the old theory that if a man does something it is because he wilfully, purposely, maliciously and with a malignant heart sees fit to do it. And that goes back to the possession of man by devils. The old indictments used to read that man being possessed of a devil did so and so. . . . Very few half-civilized

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argued that execution was against Christian teachings. *See id.* He also argued that Judge Caverly could appropriately consider the suffering that executions would visit on the defendants' families. *See id.* at 303.

120. *See* Clarence Darrow, *Crime: Its Cause and Treatment* (1922).

121. *Id.* at 28.

122. *Id.* at 29.

123. *Id.*

124. Darrow, *supra* note 120, at 29.

125. *Id.* at vi.

126. *Id.* at 34.

127. As Crowe pointed out, *see supra* note 112 and accompanying text, Darrow also had given a speech two decades earlier to inmates at the Cook County Jail in which he had argued that the men were there for reasons beyond their control. That speech has been reprinted in Weinberg, *supra* note 26, at 3-15. Darrow was criticized even by his friends for having given the speech to the jail audience. *See id.* at 15. Moreover, even some of the inmates found Darrow's views difficult to accept. "Too radical" was the purported comment of one inmate when later asked by a guard for his opinion of Darrow's lecture. *See id.*

people believe that doctrine any more. Science has been at work, humanity has been at work, scholarship has been at work and intelligent people now know that every human being is the product of the endless heredity back of him and the infinite environment around him. He is made as he is and he is the sport of all that goes before him and is applied to him . . . ."<sup>128</sup>

These arguments closely paraphrased words from Darrow's book.<sup>129</sup>

Throughout his summation, moreover, Darrow weaved the notion that humans have no more capacity than that which they exercise to resist committing offenses. He repeatedly urged that for every crime a "cause" existed among the multitude of hereditary and environmental factors influencing the actor.<sup>130</sup> He argued that the work of schools and churches and the efforts of parents to train their children testified to the societal recognition of the causal nature of human behavior.<sup>131</sup> Further, Darrow argued that people exercised only a crude level of consciousness.<sup>132</sup> He repeatedly characterized the human as merely a "machine" or "mechanism."<sup>133</sup> He also argued that humans lacked responsibility for the creation of their emotions, which he asserted forged the most identifiable link to subsequent action.<sup>134</sup> In a variety of ways, he urged that the chain of causes that preceded human action made the actions inevitable.<sup>135</sup>

Darrow argued that Leopold and Loeb had "diseased" or "abnormal" makeups,<sup>136</sup> but one could not take this as a concession that some capital offenders deserved the death penalty. Darrow was attempting to underscore that a causal explanation distinguished those who could commit a heinous crime from those who could not do so. The Franks murder presented an obvious truth for Darrow: Leopold and Loeb necessarily

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128. McKernan, *supra* note 3, at 254.

129. *See supra* text accompanying notes 120-27.

130. *See, e.g.*, McKernan, *supra* note 3, at 234, 254, 259, 260, 275, 291-92.

131. *See, e.g.*, *id.* at 252-53, 268-69.

132. Darrow undoubtedly believed that all humans operated under the same laws of nature as Leopold and Loeb. At one point, he urged Judge Caverly not to react as a "human machine" to the prosecution's argument for retribution. *Id.* at 227. He also pleaded that the judge should not sway to the intense public pressure for a death sentence. One might take these kinds of arguments as contradicting Darrow's contention that humans never bore moral responsibility for their actions. Yet, Darrow effectively revealed his belief that the judge himself could not escape his own hereditary and social constitution. Darrow later conceded that in deciding to plead guilty the defense had noted Judge Caverly's reputation as a "kindly" jurist with a special solicitude for youthful offenders. *See* Darrow, *supra* note 2, at 236-37 ("Judge Caverly had formerly been a judge of the Municipal Court and had helped form the Juvenile Court, and we believed that he was kindly and discerning in his views of life.") Darrow surely sought to create an emotional reaction in the judge favoring a sentence based on charity and understanding over one based on retribution. Such efforts did not necessarily collide, however, with a view that causal forces would produce Judge Caverly's decision.

133. *See, e.g.*, McKernan, *supra* note 3, at 227, 240, 254, 258-59, 270.

134. *See id.* at 251. He also asserted that humans were unable to use their intellects to override strong emotional forces. *See id.* at 255.

135. *See, e.g.*, *id.* at 259 ("I know that there are no accidents in nature. I know that effect follows cause."); *id.* at 240 (casting doubt on the very notion of "justice"); *id.* at 234 (arguing that all humans "are helpless" to change their conduct).

136. *See, e.g.*, *id.* at 228, 232, 238, 244, 255, 258, 283-84.

possessed defective minds because necessarily something misfired in the biological or social construction of one who could do what they had done:

Take a normal boy, Your Honor. Do you suppose he could have taken a boy into an automobile without any reason and hit him over the head and killed him? I might just as well ask you whether you thought the sun could shine at midnight in this latitude. It is not a part of normality. Something was wrong.<sup>137</sup>

Thus, for Darrow, mental "disease" or "abnormality" in this context simply meant the combination of heredity and environmental factors that could cause his clients to commit such offenses.

Darrow made no pretense that his evidence had traced the many influences in the heredity and backgrounds of his clients that had caused the killing of Bobby Franks. Indeed, the psychiatric testimony that he had presented had not offered a clear account of the forces that had conspired to bring Leopold and Loeb to such heinous actions. Darrow sought to turn this to his advantage:

To hear young men talk glibly of justice. Well, it would make me smile if it did not make me sad. Who knows what it is. Does Mr. Savage know? Does Mr. Crowe know? Do I know? Does your Honor know? Is there any human machinery for finding it out? Is there any man can weigh me and say what I deserve? Can your Honor? Let us be honest. Can your Honor appraise yourself, and say what you deserve? Can your Honor appraise these two young men and say what they deserve? Justice must take account of infinite circumstances which a human being cannot understand.<sup>138</sup>

Repeatedly Darrow offered similar exhortations against efforts to judge deserts in a deterministic world.<sup>139</sup>

Darrow, however, tried to explain some of the factors behind the killing. He contended that Loeb's case demonstrated that it could be just as great a misfortune to be a child of wealth as one of poverty.<sup>140</sup> He noted that Loeb had begun developing an obsession about crime at a very early age through his interest in stories about gangsters and detectives. His overly strict supervision by his nanny, which had deprived him of normal interactions with other children, had fueled his escape into these fantasies.<sup>141</sup> Moreover, one could not blame Loeb for his early childhood

137. McKernan, *supra* note 3, at 255.

138. *Id.* at 240.

139. *See, e.g., id.* at 255 ("I do not know where to place it. I know it is somewhere in the infinite economy of nature, and if I were wise enough I could find it."); *id.* at 259 ("And we wish to find always, if possible, the reason why it is so. We may find it; we may not find it; because the unknown is infinitely wider and larger than the known, both as to the human mind and as to almost everything else in the Universe."); *id.* at 259-60 ("I know that something or some combination of things, is responsible for his mad act. . . . I know that if I were wise enough, and knew enough about this case, I could lay my finger on the cause."); *id.* at 275 ("I have not the infinite wisdom that can fathom it, neither has any other human brain.")

140. *Id.* at 260.

141. *See* McKernan, *supra* note 3, at 260-65.

development.<sup>142</sup> "What had this boy to do with it? He was not his own father; he was not his own mother; he was not his own grandparents. All of this was handed to him. . . . He did not make himself."<sup>143</sup> For Darrow, the conclusion to be drawn was clear: "If there is responsibility, it is back of him; somewhere in the infinite number of his ancestors, or in his surroundings, or both."<sup>144</sup>

Darrow also underscored the evidence concerning Leopold.<sup>145</sup> "Babe," as everyone called him, had always been "an intellectual machine."<sup>146</sup> His mother had died when he was very young and he had developed into a boy "without emotions, a boy obsessed of philosophy, a boy obsessed of learning, busy every minute of his life."<sup>147</sup> The rest of his family had not understood him, and he had retreated further into the world of abstract learning and fantasy. During his teenage years, he had become obsessed with the philosophy of Nietzsche, who taught "that the intelligent man is beyond good and evil; that the laws for good and the laws for evil do not apply to those who approach the superman."<sup>148</sup> Darrow read directly from Nietzsche's books and from scholarly interpretations of Nietzsche to underscore their inconsistency with conventional values.<sup>149</sup> He noted that Nietzsche himself had been "insane" for the last fifteen years of his life and argued that Nietzsche's "very doctrine is a species of insanity."<sup>150</sup> Yet, Leopold had discovered the philosophy during his middle teenage years, long before he was able properly to confront it, and had absorbed it as his creed.<sup>151</sup> Was Leopold to blame? Darrow was emphatic: "Your Honor, it is hardly fair to hang a nineteen-year-old boy for the philosophy that was taught him at the university."<sup>152</sup>

The first meeting, eventual union, and subsequent relationship of the defendants Darrow also urged as one of the influences of nature that had helped cause the crime.<sup>153</sup> Neither Leopold nor Loeb would have committed the crime "excepting by coming together."<sup>154</sup> Referring only obliquely to its sexual aspects, Darrow emphasized that the relationship was "weird, almost impossible." To underscore its bizarre nature, Darrow read several letters from Leopold to Loeb that suggested that the pair were immersed in a delusion that they were immune to all the laws but those applicable to the

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142. *See id.* at 264.

143. McKernan, *supra* note 3, at 266.

144. *Id.* at 268.

145. *See generally* McKernan, *supra* note 3, at 270-77 (discussing the life and influences of Nathan Leopold).

146. *Id.* at 270.

147. *Id.*

148. *Id.* at 271.

149. *See* McKernan, *supra* note 3, at 271-72.

150. *Id.* at 274.

151. *See id.* at 273.

152. *Id.* at 276.

153. McKernan, *supra* note 3, at 277-78.

154. *Id.* at 278.

superman.<sup>155</sup> Darrow argued that the mutual influence between Leopold and Loeb enhanced the already abnormal tendencies of each one of them: "I take it that no intelligent, thoughtful person could fail to realize what was the relation between them and how they had played upon each other to effect their downfall and their ruin."<sup>156</sup> Were the defendants blameworthy for this result? Darrow urged that it was like "an accident which is sealed up in the book of fate and which no human being can open."<sup>157</sup>

The defendants' youth and their pleas of guilty also received heavy emphasis in Darrow's argument. He noted that it was against Illinois precedent to hang defendants as young as Leopold and Loeb after a guilty plea. He conceded that juries had imposed death sentences on a few young offenders. He explained, however, that of the ninety men hanged under civil authority in Illinois no person under twenty-three had ever been executed after pleading guilty. Darrow cautioned that he did not want to suggest that some persons deserved hanging.<sup>158</sup> Yet, he urged that to fail to consider his clients' youth and guilty pleas as mitigating their deserts would be to "turn[] our faces backward toward the barbarism which once possessed the world."<sup>159</sup>

Darrow concluded his summation with a plea for mercy. He conceded that Judge Caverly could follow the easy and popular course by sending Leopold and Loeb to the gallows. Yet, he argued that "mercy is the highest attribute" of humans<sup>160</sup> and urged Judge Caverly to seek the higher ground:

I know your Honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and girls; for all of the young, and as far as possible, for all of the old. I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all.<sup>161</sup>

He ended with lines from the Persian poet, Omar Khayyam, reflecting an aspiration that Darrow said he wished was in his own heart and the hearts of all people:

So I be written in the Book of Love, I do not care about that Book above, Erase my name or write it as you will, So I be written in the Book of Love.<sup>162</sup>

Darrow was exhausted by the end of the plea,<sup>163</sup> but succeeded in

155. *See id.* at 280-84.

156. *Id.* at 280.

157. McKernan, *supra* note 3, at 278.

158. *See id.* at 297 ("I don't care who did it or how it was done, it was a shame and a disgrace that an eighteen year old boy should be hanged, in 1920, or a nineteen year old boy should be hanged, in 1920, and I am assuming it is all right to hang somebody, which it is not.").

159. *Id.* at 298.

160. *Id.* at 304.

161. McKernan, *supra* note 3, at 304.

162. *Id.* at 305.

163. *See* Darrow, *supra* note 2, at 242 ("When I closed I had exhausted all the strength I could summon. From that day I have never gone through so protracted a strain, and could

reaching his listeners' emotions. A Chicago newspaper reported that it was almost impossible to tell where Darrow stopped speaking and where the quiet began.<sup>164</sup> "Silence lasted a minute, two minutes. His own eyes, dimmed by years of serving the accused, the oppressed, the weak, were not the only ones that held tears."<sup>165</sup> Tears reportedly streamed down even the cheeks of Judge Caverly.<sup>166</sup> Darrow later characterized his creative efforts in modest terms: "I endeavored in my address to make a plain, straightforward statement of the facts in the case, and I meant to apply such knowledge as we have of the motives that move men."<sup>167</sup> More realistically, Darrow's strong commitment to determinism combined with his powerful forensic skills had produced the most eloquent oratory against the capital sanction, indeed against all criminal punishment, ever delivered.

## II. THE QUEST FOR THE LIMITED, PARTIAL EXCUSE

Despite its eloquence as a general attack on criminal punishment, Darrow's deterministic argument posed problems as a theory for replevying Leopold and Loeb from the death penalty. His argument suggested that no person warranted any punishment. That view conflicted with the controlling penal statute, which implied that among those found guilty of a capital crime all at least warranted imprisonment and some the death penalty.<sup>168</sup> Judge Caverly, could not, however, reject Darrow's defense entirely. To have allowed Darrow to introduce psychosocial evidence as bearing on the sentence was to have assumed that some capital offenders should be spared from a death sentence based on something potentially demonstrable through that sort of evidence. Hence, the challenge for Judge Caverly was to define the limited, partial excuse that rendered psychosocial evidence relevant. The excuse had to be limited in that it could only relieve some offenders. It had to be partial in that it could only justify reducing the punishment from death to imprisonment.

This Part explores when and why psychosocial information warrants replevying a capital offender from the death penalty and thus how a capital sentencer should evaluate such evidence. It concludes, however, that no easily discerned consensus exists about when and why psychosocial evidence mitigates. That no such consensus is apparent raises doubt, explored subsequently in the Article, about the Eighth Amendment basis for a mandated capital sentencing hearing.

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never do it again, even if I should try.").

164. See Stone, *supra* note 24, at 417 (quoting the Chicago Herald-Examiner newspaper).

165. *Id.*

166. See, e.g., Tierney, *supra* note 15, at 341; Weinberg & Weinberg, *supra* note 45, at 310; Freedom for Superman, *Time*, Mar. 3, 1958, at 14.

167. Darrow, *supra* note 2, at 242.

168. In this regard, see Ernest van den Haag, Book Review, 49 U. Pitt. L. Rev. 607, 616 (1988) ("It will not do to say that the background explains the crime. It always does, by definition, no matter how pleasant or horrifying, how usual or abnormal it was.").



A. *The Philosophical Quandary*

Darrow's argument in *Leopold-Loeb* implicated the effort to understand the connection between notions of free will and determinism in assessing an actor's deserts.<sup>169</sup> Although Darrow did not argue each of the premises explicitly, his basic claim rested on a theory about the necessary premises for punishment.<sup>170</sup> These premises are as follows:

- (1) All human action is causally necessitated by events and conditions that occurred or existed prior to the decision to act.<sup>171</sup>

169. For centuries, philosophers have debated whether these notions are compatible or need to be to produce a theory for assessing the moral blameworthiness of human conduct. See, e.g., William James, *Pragmatism* 78, 299-312 (1907); David Hume, *An Enquiry Concerning Human Understanding* 99-105 (L.A. SelbyBigge ed. 1902); Baruch Spinoza, *The Ethics* 57-63, 100 (SPR Charter ed. 4, 1981); Saint Augustine, *The City of God* 152-58 (Marcus Dods trans., 1950); Aristotle, 3 *Ethics* § 1 (A. Wardman & J. Creed trans., 1963); Plato, *The Republic* 250 (F.M. Cornford trans., 1945).

Modern thinkers continue to debate how to resolve the claim that a moral theory of punishment cannot accommodate a causally determinate conception of human action. For a sample of views representing the more current debate, see the following collections of essays by various philosophers: *Determinism and Freedom in the Age of Modern Science* (Sidney Hook ed., 1957) [hereinafter *Determinism and Freedom*]; *Free Will* (Gary Watson ed., 1982); *Free Will and Determinism* (Bernard Berofsky ed., 1966); *Moral Responsibility* (John M. Fischer ed., 1986). See also Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* 350-83 (1984) (arguing that, while determinism may exist, determinism is not incompatible with moral responsibility); Richard Swinburne, *Responsibility and Atonement* 51-63 (1989) (arguing that determinism is inconsistent with moral responsibility but that humans are morally accountable because their actions are not all causally necessitated in all their detail); Jennifer Trusted, *Free Will and Responsibility* (1984) (arguing that the solution to the problems surrounding free will and determinism are probably beyond our powers, but that consideration of the problems and the possible solutions may be of practical value when we attempt to assess ourselves or others); Peter Van Inwagen, *An Essay On Free Will* (1983) (arguing that free will and determinism are incompatible, but concluding that we should presently accept the free-will thesis).

170. Professor Arenella has set out the following descriptions of the basic positions of theorists regarding the notion of determinism and its relation to moral responsibility:

*Determinism* is the thesis that every event has a cause. *Incompatibilists* hold that if determinism is true, then no one is truly morally responsible for his actions. Incompatibilists who accept determinism and reject the existence of genuine moral responsibility are *hard determinists*; incompatibilists who accept the existence of moral responsibility and reject determinism are *libertarians*. By contrast, *compatibilists* hold that determinism is consistent with moral responsibility. Compatibilists who actually accept both are *soft determinists*. Most contemporary theorists are soft determinists. For a careful discussion of the many versions of these basic positions, see G. Strawson, *Freedom and Belief* 1-21 (1986).

Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal And Moral Accountability*, 39 *UCLA L. Rev.* 1511, 1611 n.116 (1992).

Peter Van Inwagen has argued that the labels "soft-determinism," "hard-determinism," and "libertarianism" are misleading in characterizing the debate over the relation between ideas of free will and determinism. He explained that these categories "lump together theses that should be discussed and analyzed separately." Van Inwagen, *supra* note 169, at 14. Van Inwagen referred here to the variety of reasons both among compatibilists and incompatibilists for believing in the moral accountability of human actors.

171. As recounted earlier, see *supra* notes 128-57 and accompanying text, Darrow's summation focused largely on the notion of universal causation—the idea that every human decision to act is preceded by a causal chain leading outside of the actor. Peter Van Inwagen has argued that the concept of causation does not entail the notion that a cause determines its

(2) An actor is not culpable, and, thus, not deserving of blame,<sup>172</sup> for actions based on decisions that are causally necessitated by prior events and conditions.<sup>173</sup>

(3) A finding of deserts and, thus, culpability, is required for punishment<sup>174</sup> of an actor.<sup>175</sup>

The claim was logical. As long as one agreed with the premises, one could not disagree with the conclusion opposing punishment for anyone, including Leopold and Loeb.

How could one define a limited, partial excuse that both rejected Darrow's deterministic argument and explained the relevance of psychosocial evidence? First, to avoid conceding that no person warrants punishment, one would have to identify a flaw in one or more of the three premises underlying Darrow's position. One would have to do more. The evidence was not admitted on whether to punish Leopold and Loeb but on whether to impose death or imprisonment.<sup>176</sup> Hence, to define the limited,

effect, so that arguing for universal causation need not necessarily be understood as arguing for determinism. See Van Inwagen, *supra* note 169, at 138-40. However, Van Inwagen also has conceded that "it may be that all causes do determine their effects," *id.* at 140, and that "many, perhaps most, philosophers believe that causes determine their effects." *Id.* at 138. It is worth reiterating, moreover, that Darrow at times explicitly urged his belief that causes determine their effects. See *supra* note 135 and accompanying text. Darrow, thus, believed in determinism, and his heavy focus on universal causation is best understood as indicating a belief that determinism entails universal causation.

172. For purposes of this paper, the phrase "not deserving of blame" could be replaced by phrases such as "not blameworthy," "not morally accountable," and "not morally responsible."

An actor's capacity to desist from conduct is, of course, not the only essential consideration involved in judging the propriety of attributions of moral blame.

Moral theorists have identified four principal conditions that must be satisfied under the liberal paradigm before someone deserves moral blame for their conduct. A (1) *moral agent* must be implicated in (2) *the breach of a moral norm* that (3) *fairly obligates the agent's compliance* under circumstances where that (4) *breach can be fairly attributed to the agent's conduct*.

Arenella, *supra* note 170, at 1518. The actor's capacities to desist from conduct is implicated most clearly in the consideration of the first of these factors but at times in the consideration of the fourth factor. See *id.* at 1524-25.

173. For examples of such arguments in Darrow's summation, see *supra* notes 144, 152 and accompanying text.

174. Moral responsibility for an action does not always connote legal responsibility for it. Conduct that satisfies the *actus reus* and *mens rea* requirements for such *mala in se* crimes as murder, however, does not implicate this divergence.

175. One can fairly infer this premise from Darrow's argument. Darrow spent the vast majority of his summation addressing the question of deserts. He also contended at times that the death penalty did not serve utilitarian interests, arguing, for example, that its use promoted rather than deterred murders. See, e.g., McKernan *supra* note 3, at 232-33. Yet, one should interpret such remarks as reflecting Darrow's view that both utilitarian and retributive justifications were required for the valid imposition of the death penalty. Darrow's extensive focus on the question of deserts indicated that he believed the death penalty was warranted only if deserved.

176. Leopold and Loeb conceded their guilt of murder. Guilt of a crime for which a statute requires punishment seemingly signifies that the offender warrants punishment. Execution and imprisonment, the options available to Judge Caverly in *Leopold-Loeb*, both constitute punishment. For a definition of legal punishment, see H.L.A. Hart, *Punishment and Responsibility* 4-5 (1968).

partial excuse that rendered Darrow's psychosocial evidence admissible, one would have to identify a theory about why such evidence bore on how severely to punish Leopold and Loeb.<sup>177</sup> Of course, resolution of the first level problem concerning which actors warrant punishment would remain important in resolving the second level problem of determining, based on psychosocial evidence, the proper severity of punishment. The reasons for rejecting the deterministic argument against all punishment would likely bear on what theory one would follow in resolving how much punishment to impose. Thus, the task of identifying a limited, partial excuse that justified a lengthy inquiry into the psychosocial backgrounds of Leopold and Loeb would require one to consider both levels of the punishment-distribution problem.

### 1. *The First Level: The Propriety of Punishment*

To establish the propriety of punishing Leopold and Loeb, one would have to show a flaw in one of the premises underlying Darrow's position. Which, if any, of the premises failed? Philosophers dispute the answer perhaps because no answer is very satisfying.

Some notable philosophers reject the first premise—the assertion of determinism.<sup>178</sup> Under one theory, human decisions to act, if not human actions, are undetermined. The actor, rather than environmental or heredity factors, causes them.<sup>179</sup> This argument turns out on reflection, however, to be at least as unpersuasive as determinism. First, unless actors always bear moral responsibility for all of their actions, something more than the absence of determinism must inhere in moral responsibility. Yet, a theory that views human decisions to act as undetermined<sup>180</sup> must then

177. This discussion does not focus on what a capital sentencer could do based on an assessment of the offender's psychosocial constitution. Of course, if a sentencer were persuaded by Darrow's evidence that Leopold and Loeb were not appropriate subjects of any punishment but that other capital offenders were, the sentencer might well opt for the less severe sanction of imprisonment. Likewise, if a capital sentencer were persuaded by a deterministic argument that punishment was never warranted, the sentencer could again resolve the sentencing decision in favor of the less severe sanction of imprisonment. These views, however, would conflict with the implication of the governing penal statute that all capital offenders are appropriately subjected to punishment and that some are appropriately subjected to the death penalty.

178. An incompatibilist who denies determinism is conventionally termed a "libertarian." This is not a commonly held view. See Arenella, *supra* note 170, at 1611 n.116.

179. See, e.g., Roderick M. Chisholm, *Human Freedom And The Self in Free Will*, *supra* note 169, at 24, 27-28 (arguing that ascription of responsibility conflicts with the deterministic view of human action but that human actions can be viewed as "caused" by "the agent—the man."); see also Charles Taylor, *Responsibility for Self, in Free Will*, *supra* note 169, at 111, 112 (arguing that through "deep reflection" humans are "capable of evaluating what they are" and can "shape themselves on this evaluation" and, hence, to the extent that particular persons are capable of such evaluation, they "are responsible for what they are"); cf. Richard Taylor, *Determinism and the Theory of Agency, in Determinism and Freedom*, *supra* note 169, at 211 (arguing that the only way to establish moral accountability in humans is to conclude that the actor originates the act).

180. Such a view would allow, however, that certain movements do not qualify as acts because they involve no decision on the part of the person who engages in them. Cf. *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944) (holding that conviction for public drunkenness was improper where law officers carried defendant, while in drunken condition, from inside

explain what more than the absence of causal necessity makes out the self-determination needed for moral responsibility. To pose the problem differently, having assumed that acts cannot be traced beyond the actors' decisions so to act, on what basis should we ever conclude that actors are not morally accountable for their acts? An agent-causation theory does not address this problem.

A more fundamental problem also arises.<sup>181</sup> While not itself fully explanatory, the idea of causality permeates our understanding of the nature of the universe, and one has difficulty comprehending that humans live outside of it.<sup>182</sup> "Is it not extraordinary to think that agents who can clearly cause changes to occur in the world are themselves uncaused? We are all quite literally Aquinas's uncaused causers—God—on such indeterminist views."<sup>183</sup> We do regularly praise and condemn human action, suggesting that we believe it subject to moral appraisal. Nonetheless, a characterization of the human agent as acting at the beginning of a causal chain seems an artificial exemption from the natural order,<sup>184</sup> no more plausible a picture of the human role in the world than the deterministic alternative.<sup>185</sup>

his home to a public highway).

181. "The compatibilist (or indeed the sceptic) suspects that the freedom demanded by the incompatibilist—a 'self-determination' that could not obtain in a deterministic world—obtains in no possible world." Gary Watson, *Introduction to Free Will*, supra note 169, at 1, 9.

182. See Michael S. Moore, *Causation and the Excuses*, 73 Cal. L. Rev. 1091, 1112 (1985) (arguing that "human choices and actions are caused and that those causes themselves have causes.").

183. *Id.*

184. One philosopher who has articulated such a theory as the basis for holding human actors morally accountable has conceded that to attempt to view the actor as originator of his acts is to conceptualize "a manner in which things in the physical world, so far as we know, are never done or brought about." (Richard) Taylor, supra note 179, at 216.

185. Aristotle contended that persons bear responsibility for their "character" because they create their own character. See Aristotle, supra note 169, at book III, ch. 5. Hence, because one forms one's character, he urged that one also is morally accountable for actions stemming from one's character.

Professor Dan-Cohen has explained the problem with Aristotle's theory.

The bridge that Aristotle proposes . . . is illusory. If character traits are necessary to make choice intelligible and human action possible, how do we account for the choices that lead to the formation of character? Those choices too must presuppose some preexisting character traits, either innate or the products of early education. If character traits are preexisting, however, a person's responsibility does rest not on his own choices, but rather on characteristics that are beyond (or rather prior to) his control. But if the person forces his character freely—*ex nihilo* as it were—then we lack an account for the actions and processes of character formation: they remain unintelligible.

Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 Harv. L. Rev. 959, 973-74 (1992) (footnote omitted). Indeed, Dan-Cohen has argued against all theories that attempt to ground self-responsibility on the notion that persons create or originate some aspect of their selves. "To assume the responsible stance toward my own self, I must detach myself from it in its entirety, objectify it, and consider myself as its author. I can succeed in transforming my self into an object of responsibility only at the cost of eliminating the 'author' from the scene." *Id.* at 976.

One might turn to a "dualistic" theory to reject the first premise, but this approach appears as problematic as the undiluted, agent causation theory. The dualist would argue both that human conduct typically follows autonomous decision making by the actor and that factors extraneous to the actor always determine human conduct.<sup>186</sup> Although these assertions collide, they are both true,<sup>187</sup> asserts the dualist, because their accuracy depends on the vantage point of the observer. The attitude of a participant in the social situation typically leads to one view while the perspective of one more distant from the situation can lead to the alternative view.<sup>188</sup> The central difficulty with the dualism view as a theory for defining excuses, however, stems from its descriptive rather than prescriptive focus. When *should* one perspective prevail over the other in punishment decisions?<sup>189</sup> The dualism approach offers no explanation for how to mediate between the two inconsistent but purportedly coexisting truths when deciding whether to impute moral accountability to an actor.<sup>190</sup>

One might consider attacking Darrow's first premise on another theory: that all human decisions to act lie on a continuum between freedom and determinism. This argument assumes that humans generally possess enough autonomy, despite external influences of varying causal force, to allow us to characterize most human decisions to act as free.<sup>191</sup> On this view, humans are morally answerable for most of their actions but sometimes are unaccountable based on a causal theory for otherwise blameworthy actions.<sup>192</sup> While superficially appealing, however, the problems with

For discussion of Dan-Cohen's effort to describe a theory of moral responsibility that evades the free will-determinism debate, see *infra* note 215.

186. See Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245, 2263-64, 2269 (1992) (discussing the theories reflected in P.F. Strawson, *Skepticism and Naturalism: Some Varieties* (1985), and P.F. Strawson, *Freedom and Resentment*, in *Freedom and Resentment* 1 (1974)).

187. Kant viewed the free will-determinism controversy as one of the "antinomies" of human understanding. By the term, "antinomies," Kant referred to "mutually contradictory or antithetic propositions each of which is difficult or impossible to refute." D.B. Klein, *A History of Scientific Psychology* 313 (1970).

188. See Boldt, *supra* note 186, at 2263.

189. Cf. Paul Edwards, *Hard and Soft Determinism*, in *Determinism and Freedom*, *supra* note 169, at 112-13 (rejecting the more reactive assessment on grounds that a judgment is "moral" only "if it was formulated in a calm and reflective mood, or at least if it is supported in a calm and reflective state of mind"); John Hospers, *What Means This Freedom?*, in *Determinism and Freedom*, *supra* note 169, at 122 ("Let us note that the more *thoroughly* and *in detail* we know the causal factors leading a person to behave as he does, the more we tend to exempt him from responsibility.").

190. See Moore, *supra* note 182, at 1128 (noting that to employ this theory for deciding when to excuse conduct, one "would need some principled way of choosing when to adopt one viewpoint and when to adopt the other").

191. This view has had several adherents among criminal law theorists. See, e.g., Sheldon Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* 12-13 (1962) (arguing the usefulness of imagining "a simple chart which shows the freedom/determinism proportions" of persons characterized, for example, as feeble-minded or psychotic or sociopathic); see also Norval Morris, *Madness and the Criminal Law* 61 (1982) (contending that "there are degrees of freedom of choice on a continuum").

192. Studies also have suggested in probabilistic terms that some influences bear more causal connection than others to subsequent human action. See Moore, *supra* note 182, at 1116

degree determinism may equal the problems with determinism. Ignoring the difficulty of viewing an action as partially determined,<sup>193</sup> trouble arises from the degree determinist's concession that some human actions are causally necessary.<sup>194</sup> Having allowed that point, degree determinists must confront Darrow's contention that multitudes of preceding factors come together to produce human action,<sup>195</sup> and that the human mind can neither identify them nor assess their combined forces.<sup>196</sup> Darrow would have said that degree determinists simply concede the causalist premise but choose selectively to deny it based only on a state of general ignorance about the causal forces that produce human conduct.<sup>197</sup> He would have urged that degree determinism in practice amounts to little more than "ignorance determinism."<sup>198</sup> Ignorance determinism, moreover, is manifestly difficult to defend. If we conclude that human action is determined and that determinism undermines responsibility, "it would be immoral to hold people responsible because *we* were ignorant of what caused them to act."<sup>199</sup>

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n.78 and authorities discussed therein.

193. See, e.g., *id.* at 1115-16 ("It makes sense to say that we are determined or that we are free, but to speak of being partly determined or partly free makes as much sense as to speak of being partly pregnant."); Peter Strawson, *Freedom and Resentment*, in *Free Will*, *supra* note 169, at 59, 75 ("Whatever sense of 'determined' is required for stating the thesis of determinism, it can scarcely be such as to allow of compromise, borderline-style answers to the question, 'Is this bit of behaviour determined or isn't it?'").

194. Cf. Dan-Cohen, *supra* note 185, at 960 ("Concessions to determinism are as inevitable as they are perilous: they are steps down a slope that, despite enormous philosophical effort, remains a slippery one.").

195. Darrow's contention is, of course, as presumptuous as that of the degree determinist's, for the determinism model has never been *proven* either by argument or experiment. See generally Klein, *supra* note 187, at 313-14 (explaining that the determinism model has not been proven).

196. See, e.g., *supra* text accompanying notes 138-39.

197. Even if its theoretical soundness could be assumed, a difficult line-drawing problem also arises under this approach:

There is also a normative difficulty with degree determinism, or for that matter, with any "spectrum" approach. If particular acts could be seen as mixtures of freedom and determinism, where is the "baseline" for responsibility drawn? At what point on the spectrum does one "become responsible?" While such a point could, in theory, be arbitrarily fixed, there is no good reason why one and not another point should be chosen.

John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 *Geo. L.J.* 2045, 2055 (1988) (footnote omitted).

198. Moore, *supra* note 182, at 1119.

199. *Id.* (original emphasis deleted).

One species of "ignorance determinism" might be called "selectively assumed determinism." William James, for example, declared that he could and would disbelieve determinism when it suited him, despite its allure, because it was not completely persuasive and, most importantly, because it conflicted with his conception of humans as morally accountable. See William James, *The Dilemma of Determinism*, in *The Will to Believe* 147 (1898); William James, *Principles of Psychology* 572-74 (1890).

Professor Packer has argued that the criminal law implements a similar view. See Herbert Packer, *The Limits of the Criminal Sanction* 74-75 (1968) (quoted *infra* at note 263).

Many philosophers who accept determinism but ascribe moral accountability to human actors have sought to undermine the second premise underlying Darrow's position. That premise asserts that an actor is not culpable and, thus, not blameworthy for action if it was causally necessitated so that he could not have acted otherwise. While these efforts have produced many elaborations, all of them can be identified with the basic argument of David Hume, the eighteenth-century philosopher. Hume concluded that moral accountability lies for conduct that proceeds from the actor's "character and disposition."<sup>200</sup> This view ignores as irrelevant to moral accountability claims that causes external to the actor determine an actor's "character" itself. The inquiry focuses only on whether an actor's choices can be attributed to the ongoing personality of the actor.<sup>201</sup>

This basic Human account of moral responsibility also creates problems. Its central shortcoming lies in its obvious failure to ask whether an actor truly could have acted otherwise than she acted<sup>202</sup>—particularly, whether she could have *chosen* to act otherwise than she acted.<sup>203</sup> Acceptance of the first premise obliges one to accept that causes external to the actor determine the actor's "character," however envisioned. Therefore, one must also accept that actions traceable to character are no less determined than other actions.<sup>204</sup> To claim that an actor can originate actions traceable to her character is to attack the first premise, implicating the kinds of difficulties connected with such claims.<sup>205</sup> Yet, to claim instead that the actor is "free" in some "relevant [moral] sense"<sup>206</sup> to act otherwise

200. Hume, *supra* note 169, at 98 (distinguishing actions that proceed "from some *cause* in the character and disposition of the person who performed them" and actions that cannot be so traced).

201. Boldt, *supra* note 186, at 2256.

202. Even incompatibilists who reject determinism could say that people are responsible for their actions on some occasions when they could not have acted otherwise. Hypotheticals that elucidate this point focus on situations in which the actor, though unaware of it, would find it necessary to do something if the actor had not "chosen" to do it. See Harry Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 *J. Phil.* 829, 836 (1969). Such an argument does not necessarily demonstrate, however, that the actor chose freely to act or that a lack of freedom of choice (determinism) comports with moral responsibility. See *infra* text accompanying notes 206-14. The rejection of determinism comports with an assumption that an actor creates an autonomous "self" that warrants moral evaluation even when the "self" is unaware of external constraints. Yet, a determinist, such as Darrow, can reject this notion of an autonomous self created by the actor.

203. See (Richard) Taylor, *supra* note 179, at 213.

204. See, e.g., Swinburne, *supra* note 169, at 55 ("In both cases the agent acts as he does because he is causally necessitated so to do."); Chisholm, *supra* note 179, at 25 (arguing that it makes no difference whether the act is traceable through the actor's character, because "if the cause was some state or event for which the man himself was not responsible, then he was not responsible for . . . his act"); Edwards, *supra* note 189, at 108 (noting that, if determinism is true, "[u]ltimately our desires and our whole character are derived from our inherited equipment and the environmental influences to which we were subjected at the beginning of our lives").

205. See *supra* notes 178-99 and accompanying text. Aristotle held the view that persons form their own character. For a discussion and refutation of this particular view, see *supra* note 185.

206. See, e.g., Bruce Aune, *Hypotheticals And 'Can': Another Look*, in *Free Will*, *supra* note 169, at 36, 38.

than she acted as long as her actions are traceable through her character, while conceding the determined nature of one's character, is to employ a hypothetical—false—definition of freedom. It is akin to a claim that my uncle is my aunt because my uncle would be my aunt, if he were a woman.<sup>207</sup> Use of this hypothetical condition also leads to the strange conclusion that an actor bears moral responsibility<sup>208</sup> for events that occurred in her early childhood and even before her birth.<sup>209</sup>

Elaborations on Hume's effort to avoid the second premise of Darrow's argument against punishment suffer from the same basic problem. One such elaboration, envisioned by Gary Watson, distinguishes the basic instinctive or motivational aspects of human decision making from the more reflective valuational aspects.<sup>210</sup> This approach characterizes an actor as unaccountable for conduct governed almost entirely by desire or emotion rather than the valuational system.<sup>211</sup> At the same time, if an act results from a chain of causal influences that has been filtered through the reflective, valuational processes that distinguish humans from animals and things, the actor remains morally accountable.<sup>212</sup> In general, the freedom required for moral accountability under this and other elaborations stems from one's ability to engage in self reflective activity about the propriety of an action.<sup>213</sup>

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207. See also (Richard) Taylor, *supra* note 179, at 213 ("Indeed, by this kind of argument, one could say that, though a man has died of decapitation, he did not *have* to die, that he *could* have lived on—meaning only that he *would* have lived had he somehow kept his head on! And this is hardly the sort of contingency we want."); John Searle, *Minds, Brains and Science* 89 (1984) ("Compatibilism . . . denies the substance of free will while maintaining its verbal shell.").

208. Several efforts to render determinism and free will compatible focus on the view that ascriptions of accountability actually are disguised conditionals. For a discussion and refutation of claims of compatibilism based on the use of various forms of disguised conditionals, see Van Inwagen, *supra* note 169, at 114-25.

209. See, e.g., Hospers, *supra* note 189, at 123 ("If he is not responsible for *A*, a series of events occurring in his babyhood, then neither is he responsible for *B*, a series of things he does in adulthood, provided that *B* inevitably—that is, unavoidably—follows upon the occurrence of *A*.").

210. See Gary Watson, *Free Agency*, in *Free Will*, *supra* note 169, at 96.

211.

*The valuation system* of an agent is that set of considerations which, when combined with his factual beliefs (and probability estimates), yields judgements of the form: the thing for me to do in these circumstances, all things considered, is *a*. To ascribe free agency to a being presupposes it to be a being that makes judgements of this sort. To be this sort of being, one must assign values to alternative states of affairs, that is, rank them in terms of worth.

*Id.* at 105.

212. *Id.* at 106 ("The possibility of unfree action consists in the fact that an agent's valuational system and motivational system may not completely coincide. Those systems harmonize to the extent that what determines the agent's all-things-considered judgements also determines his actions.").

213. For an earlier view that informed Watson's theory, see Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in *Free Will*, *supra* note 169, at 96.

For a concise but more thorough summary than that provided in the text of the reworkings of the Humean approach by Frankfurt and Watson, see Boldt, *supra* note 186, at 2256-62.



These elaborations build on the Humean framework without solving the uneasiness that arises from the determinist's argument. As with the Humean account, one cannot understand these elaborations as claims that human decision making originates human action; they purport to accept determinism and only to attack the second premise.<sup>214</sup> Because one must therefore assume that deterministic forces compel the actor's decision to act in a certain manner, the presence of self-reflective ability, however defined, does not change the conclusion that the actor could not truly have acted otherwise.<sup>215</sup> Hence, the substitution of a more complex, but nonetheless hypothetical, definition of freedom will continue to produce the unsettling conclusion that the actor deserves the events and conditions that existed even before her conception.<sup>216</sup>

Could one reject Darrow's third premise requiring the imposition of punishment to rest on a finding of deserts?<sup>217</sup> One could attempt to argue

214. See, e.g., Boldt, *supra* note 186, at 2256 (noting that these elaborations are designed "to provide a more detailed defense of attributing determined choices to the person of the agent when assigning praise and blame").

215. Professor Dan-Cohen has recently presented a theory denying that free will must exist for moral accountability. It is distinguishable from many efforts to undermine the second premise because Dan-Cohen avoids discussion about what kind of "freedom" one needs for moral accountability. See Dan-Cohen, *supra* note 185, at 975-76. Instead, Dan-Cohen contends that we are morally responsible for all actions that are traceable to the "constitutive elements" of the "self." See *id.* at 977. Moral responsibility becomes "a matter of what and who we are." *Id.* at 961. The boundaries of the self, moreover, embody much more than the idea of free will, he contends. See *id.* at 973. Such a theory, however, leads to the same conclusion as the Humean approach and its progeny; assuming the determinist account is true, people will be held morally responsible for behavior wholly beyond their control. If one finds such a conclusion disconcerting, one cannot simply ignore, as Dan-Cohen does, the debate over free will and determinism.

216. Professor Weinreb has described the basic conclusion of theorists in this group as follows:

When we speak of a person's deserts, they urge, we do not mean to imply anything about the ultimate desert of the person to be the person she is—whatever that might mean. We mean only that this person—as she is now—has done well or ill. We identify her as an actor and express our approval or disapproval of the act, nothing more. In Professor Nozick's apt phrase, desert does not have to go "all the way down."

Lloyd L. Weinreb, *Desert, Punishment and Criminal Responsibility*, 49 *Law & Contemp. Probs.* 47, 59 (1986) (quoting Robert Nozick, *Anarchy, State and Utopia* 225 (1974)).

217. The retributive theory of punishment entails this principle. The retributive theory asserts that punishment is warranted because the offender deserves it apart from any social benefit that may accrue. See, e.g., Joshua Dressler, *Understanding Criminal Law* 6-8 (1987); Kent Greenawalt, *Punishment*, in 4 *Encyclopedia of Crime and Justice* 1336, 1338-40 (Sanford H. Kadish ed., 1983).

One can view retributive systems as including theories of punishment that embody the principle of desert as a limitation on the use of punishment. Such a theory would not necessarily prevent elimination or reduction of a punishment based on utilitarian considerations. The pure retributivist would argue, however, that the decision whether to impose punishment and how much to impose should be guided solely by retributive ends. See, e.g., Immanuel Kant, *The Metaphysical Elements of Justice* 102 (1965). Hence, systems arguing for departures toward leniency from the pure retributivist position are often called "composite" or "mixed" rather than retributive systems. See, e.g., Dressler, *supra*, at 11-12; Greenawalt, *supra*, at 1342-45; Weinreb, *supra* note 216, at 48. The allure of the mixed theory stems from the problems posed by either the purely utilitarian theory or the purely retributive theory. For arguments against the purely utilitarian theory, see *infra* note 221. For the argument against

that punishment appropriately applies even when the subject does not deserve it as long as punishing him serves utilitarian ends. Utilitarianism, under any view,<sup>218</sup> comports with the notions embodied in Darrow's first two premises because punishment can influence persons, despite their "determined" characters, to avoid criminal conduct.<sup>219</sup> While not without purported adherents,<sup>220</sup> however, this view has had many more critics.<sup>221</sup>

the purely retributive theory, see, e.g., Hugo Bedau, *Retribution and the Theory of Punishment*, 75 *J. Phil.* 601, 616 (1978) ("Either [the retributivist] appeals to . . . some good end . . . that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a non-retributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.").

The mixed theories include two kinds. Under one view, utilitarian considerations justify punishment while offender deserts serve as a limitation on the distribution of punishment but not part of its justification. For slightly different versions of this view, see Packer, *supra* note 199, at 35-70 and Hart, *supra* note 176, at 77-83. The other version of the mixed theory holds that punishment is justified only if the actor deserves it, while calling for the elimination of punishment to the extent that it serves no social end. For a presentation of this view, see Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* 52-54 (1976).

For an argument against mixed theories in favor of a purely retributive one, see Moore, *supra* note 169, at 240-43.

218. "Utilitarianism" is often described in the criminal punishment context as covering any theory of punishment that aims "to deter[] the offender from reoffending, discourag[e] others from following his example, or put[] him where he cannot offend any longer." Nigel Walker, *Why Punish?* 6 (1991). However, I use "utilitarianism" to refer more generally to consequentialist theories of criminal punishment that aim to maximize social welfare rather than merely to gain the greatest reduction in the incidence of crime.

219. See, e.g., Greenawalt, *supra* note 217, at 1341 ("Whether or not human acts are completely determined by prior causes, punishment can be an efficacious prior cause. A determinist can support even the 'condemnation' component of punishment on utilitarian grounds, believing that condemnation and feelings of guilt are useful instruments in guiding human behavior.").

220. See, e.g., J.J.C. Smart & Bernard Williams, *Utilitarianism: For and Against* 67-73 (1973) (describing justifications by philosopher who supports the utilitarian position).

221. See, e.g., D.J.B. Hawkins, *Punishment and Moral Responsibility*, in *Theories of Punishment* 13, 15 (Stanley E. Grupp ed., 1971) ("The vice" of the utilitarian view is that "[t]he punishment of men then ceases to be essentially different from the training of animals, and the way is open for the totalitarian state to undertake the forcible improvement of its citizens without regard to whether their conduct has made them morally liable to social coercion or not."); Moore, *supra* note 169, at 239 (rejecting the theory "inasmuch as it commits one to admitting that one will punish an entirely innocent person"); Packer, *supra* note 199, at 66:

[A] purely preventive view, reinforced as that view is today by a scientific and deterministic attitude toward the possibilities for controlling human conduct, carries the danger that single-minded pursuit of the goal of crime prevention will slight and in the end defeat the ultimate goal of law in a free society, which is to liberate rather than to restrain.

Von Hirsch, *supra* note 217, at 50 (rejecting the utilitarian theory of punishment on grounds that "[a] free society, we believe, should recognize that an individual's rights—or at least his most important rights—are prima facie entitled to priority over collective interests."); see also John Rawls, *A Theory of Justice* 3-4 (1971):

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . [J]ustice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.

Even among supposed utilitarians, few want to give up on the notion that a decision to punish will rest on a finding of offender deserts.<sup>222</sup> The idea that punishment systems should treat persons in accordance with their deserts, indeed, coincides for most people with the very idea of justice.<sup>223</sup> Of course, one might feel pressure to compromise when real-world limitations seem to make the choice between punishing an individual or "punishing" the larger community.<sup>224</sup> At least as a general matter, however, it is difficult to muster enthusiasm for rejecting Darrow's third premise that deserts should precede punishment.<sup>225</sup>

Contemporary philosophy thus reveals no correct answer about the rationale for rejecting Darrow's position. A conclusion that humans never warrant punishment for their actions appears implausible if only because it collides with our normal blaming and praising practices. Nonetheless, efforts to find an alternative theory for distributing punishment reveals discord, not agreement, among moral theorists about how to separate

222.

[U]tilitarians proffer elaborate arguments to show the instrumental value of punishing the guilty and only them; but tacitly or even explicitly, the real proof of the correctness of their arguments is that the results are consistent with considerations of desert, which is enough to undermine the conclusion the arguments are intended to support.

Weinreb, *supra* note 216, at 47 (citing John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955)).

223. See, e.g., John Hospers, *Retribution: The Ethics of Punishment*, in *Assessing the Criminal* 181, 183 (Randy E. Barnett & John Hagel III eds., 1977) ("'[T]reatment in accord with desert' is probably the most frequently encountered definition of the term 'justice' itself."); see also Von Hirsch, *supra* note 217, at 45 ("In everyday thinking about punishment, the idea of desert figures prominently. Ask the person on the street why a wrongdoer should be punished, and he is likely to say that he 'deserves' it."); Greenawalt, *supra* note 217, at 1338 ("Why should wrongdoers be punished? Most people might respond simply that they deserve it or that they should suffer in return for the harm they have done.").

For a variety of views on the meaning of "justice" in its various applications, see *Justice and the Legal System* (Anthony D'Amato & Arthur J. Jacobson eds., 1992), and *What is Justice?* (Robert C. Solomon & Mark C. Murphy eds., 1990).

224. As regards the deleterious consequences to the larger community of failing to impose a severe criminal sanction on a dangerous offender because he does not deserve it, I use the term "punishing" loosely, for these consequences do not constitute a legal sanction of the same sort as those imposed on an offender. See Hart, *supra* note 176, at 4-5.

225. Legal doctrine unquestionably allows for exceptions to the desert requirement, perhaps most clearly through strict liability for typically minor offenses. There is dispute, however, as to whether the general excusing conditions in criminal law depart from the deserts standard. See *infra* notes 248-91 and accompanying text. I take up the question of how a departure from the deserts requirement bears on the limited capital sentencing excuse entailing psychosocial composition at *infra* notes 239-43 and accompanying text.

Utilitarians, including Jeremy Bentham, have frequently contended that an inquiry into the mental state of the actor finds justification even under a utilitarian theory on grounds that persons suffering from certain mental conditions are undeterrable, so that punishing them would not serve utilitarian ends. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 173-75 (J.H. Burns & H.L.A. Hart eds., 1970). Professor Hart has pointed out that, as a theoretical matter, this contention is a non sequitur. See Hart, *supra* note 176, at 19, 43. Professor Hart, of course, does not disprove Bentham's conclusion. Professor Hart's correct assertion does underscore, however, that benefits may accrue from inflicting punishment on persons who do not deserve them.

wrongdoers who are properly punished from those who should not be punished.<sup>226</sup>

## 2. *The Second Level: The Proper Degree of Punishment*

Even if one could decide how to distinguish properly punishable wrongdoers from those who should not be punished, explaining the relevance of Darrow's evidence requires providing a theory at the level of grading the severity of punishment due those deemed punishable. Philosophers who believe in punishment surely would not agree how to determine how much punishment an actor should receive. To begin to see the difficulty of the problem, one need only consider the implications at this second level of using different theories at the first level for rejecting Darrow's deterministic argument.

Suppose that one rejected the first premise, asserting determinism, on grounds that human actors originate the decisions that lie behind their actions. We saw that, under this view, difficulty arises in identifying what more than a decision to engage in an act establishes the freedom required for moral responsibility.<sup>227</sup> To make out the necessary partial excuse at the second level, one would also have to identify a basis potentially revealed in an actor's psychosocial history for distinguishing between actions that classify as originating in a free decision of the actor. Assuming one were to accept the other premises, one probably would conclude that offender deserts ought to govern the decision concerning the amount of punishment, like the decision whether to punish at all.<sup>228</sup> Yet, if an act has been deemed fully originated in the actor's free will, it is not apparent what an offender's psychosocial evidence could reveal that would properly bear on the offender's level of moral accountability. This approach would not explain the limited, partial excuse that could render the psychosocial evidence relevant.

How does pursuing the "dualism" theory<sup>229</sup> as the basis for rejecting Darrow's first premise and thus holding people punishable affect the second level decision regarding how severely to punish? The dualism view posits human conduct as both free and determined depending on the perspective of the observer. Under this approach, we saw that, as with an agent-causation theory, no apparent basis exists for deciding when to

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226. This conclusion should engender little controversy. One noted contemporary philosopher has concluded that "the problem of responsibility is insoluble, or at least unsolved." Thomas Nagel, *The View from Nowhere* 120 (1986).

227. See *supra* notes 180-81 and accompanying text.

228. See, e.g., Von Hirsch, *supra* note 217, at 66-94 (arguing that a principle of "commensurate-deserts" should predominate in decisions about how much to punish); Greenawalt, *supra* note 217, at 1342 (contending that deserts should govern the severity of the criminal sentence, while noting that in the absence of adequate civil-commitment systems to protect against the dangerous offender, many would support prison sentences that exceed in some cases what the offender deserves).

For some implications of departing from the deserts paradigm in resolving the severity-of-punishment question, see *infra* notes 239-43 and accompanying text.

229. See *supra* notes 186-90 and accompanying text.

provide an excuse from moral accountability.<sup>230</sup> Assuming, *arguendo*, that one could bridge the divide between the two inconsistent but purportedly coexisting truths, one could then specify a group of acts for which the actor is morally accountable. As with the agent-causation theory, however, it then is not apparent, if one accepts the other premises, why information about the offender's psychosocial makeup would bear on how much punishment to impose. The offending act already would have qualified as one stemming from a fully free decision. Hence, the dualism theory also provides no basis for defining the relevant partial excuse on the severity-of-punishment issue.

Assume that one rejected determinism on the alternative theory of degree determinism.<sup>231</sup> On this view, all human action lies along a continuum between freedom and determinism, with enough autonomy in the human self to allow most action to qualify as free, despite influences from external sources. Overlooking the conceptual problems with this view,<sup>232</sup> one must first define the minimum point specifying what combination of freedom and external causality renders one morally accountable and thus subject to punishment. Assuming one accepts the other premises and believes that the severity of punishment should accord with offender deserts, one ought then specify a second point beyond which capital murderers, based on their psychosocial constitutions, could never deserve the death penalty though they could deserve lengthy imprisonment.<sup>233</sup>

Degree determinism, however, also presents problems as a theory for defining a partial excuse at the sentencing stage. Perhaps we can theorize an offender's psychosocial constitution as bearing on where the offender's punishable act lies on a freedom-determinism continuum.<sup>234</sup> However, no obvious method appears by which to define either the minimum point for moral accountability or the second point defining those who, because of their psychosocial constitutions, would never deserve the death penalty. Further, even if one could specify these points by a nonarbitrary method, doubt arises that an investigator could accurately determine the mix of free choice versus external causation behind a given action.

Suppose that one rejects Darrow's second premise<sup>235</sup>—asserting that

230. See *supra* text accompanying note 190.

231. See *supra* notes 191-92 and accompanying text.

232. See *supra* note 193 and accompanying text.

233. It could be that no such minimal baseline exists unless we posit an "average" or even only "mildly aggravated" capital murder. Surely factors other than the psychosocial constitution of the murderer may be thought to affect his deserts and yet not be captured by the definition of the crime. On this view, a highly aggravated capital murder, conceived in terms, for example, of the suffering of the victim(s), might warrant a death sentence as long as the perpetrator is guilty and, thus, morally accountable for it.

Regarding considerations other than the actor's psychosocial composition that might be thought to bear on an assessment of his deserts and that the definition of the crime would not capture, see *supra* notes 118-19 and accompanying text and *infra* notes 342-44 and accompanying text.

234. For the difficulties with this notion, however, see *supra* notes 193-199 and accompanying text.

235. See *supra* text accompanying note 173.

culpability cannot attach to human decisions to act that are determined—on grounds that moral responsibility for an act requires less than the freedom truly to have acted otherwise. As under Gary Watson's approach, assume that a relative convergence between one's appetites or passions and one's valuational judgments about how one should act defines the relevant form of freedom.<sup>236</sup> One must first specify what convergence level renders a particular act free in this sense. Assuming that one accepts the other premises and believes deserts should control how much punishment to impose, one must then specify the second convergence level that separates, from among those who deserve some punishment, those who could sometimes deserve the death penalty.<sup>237</sup>

This approach presents the same kinds of implementation problems as degree determinism. Like degree determinism, this approach at least theorizes a continuum along which to chart levels of culpability. Further, some information embodied in the psychosocial history of an offender could bear on where the offender's act lies along this continuum. Nonetheless, problems again exist in justifying the theoretical points demarcated to identify when actors deserve punishment and when they deserve the death penalty. Likewise, doubts about an investigator's ability accurately to assess the level of convergence between an actor's motivational and valuational systems regarding an act raise doubts about the plausibility of accurately assessing the existence and degree of moral accountability.<sup>238</sup>

What implications arise regarding how severely to punish an actor if one views actors as punishable by rejecting Darrow's third premise? That premise asserted that assessments of offender deserts should govern punishment distribution problems.<sup>239</sup> The alternative is a utilitarian inquiry into the marginal societal costs and benefits of a death verdict.<sup>240</sup> A general

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236. See *supra* notes 210-13 and accompanying text.

237. The same kind of condition discussed *supra* in note 233, regarding the second level baseline under a degree-determinism theory, would also apply to the second level baseline under this kind of theory.

238. Many who might support an attack on the second premise would also surely disagree with Watson's own assessments of when actors are morally accountable. Watson believes that humans ought to be viewed as "unfree" in many circumstances.

But human beings are only more or less free agents, typically less. They are free agents only in some respects. With regard to the appetites and passions, it is plain that in some situations the motivational systems of human beings exhibit an independence from their values which is inconsistent with free agency; that is to say, people are sometimes moved by their appetites and passions in conflict with their practical judgments.

Watson, *supra* note 210, at 110.

239. Whether or not one concludes that compromises toward utilitarian goals sometimes are appropriate at the level of defining moral responsibility, one might conclude that the reality of scarce resources augurs for some consideration of utilitarian interests when the question is how much punishment to impose. Cf. Morris, *supra* note 191, at 172 (contending that it is appropriate to consider the dangerousness of an offender in arriving at a sanction within the general range of deserved punishment otherwise determined). I am discussing here, however, a more committed, utilitarian approach.

240. Some asserted, utilitarian benefits of choosing, in particular, a death sentence over imprisonment include "deterrence of misconduct by other persons ['general deterrence'], prevention of future misconduct by the convict ['incapacitation'], encouragement of guilty

utilitarian inquiry can perhaps provide a theory to justify admission of evidence concerning the offender's psychosocial constitution. Although it might generally aggravate rather than excuse, evidence about the defendant's psychosocial composition could bear on his future dangerousness and, thus, on the relative need to pursue incapacitation of him.<sup>241</sup> Still, one surely may question whether we should depart substantially from the deserts paradigm. Apart from questions about the propriety of imposing more punishment than the offender deserves, the utilitarian model would involve so many considerations that one could weigh so variably that it would provide, even in theory, little guidance to the decision maker. Evaluating the various utilitarian considerations in a sensible fashion also would require an enormous amount of unavailable data. To what extent would the more severe sanction marginally deter other potential offenders?<sup>242</sup> How much danger would the offender pose to others if imprisoned?<sup>243</sup> What economic benefits would accrue from choosing one sanction over the other? A decision maker can hardly reach intelligent answers to such questions without huge volumes of information.

In the end, then, philosophy about moral responsibility and punishment provides no obvious conclusions about why Darrow's evidence bore on the sentencing decision. One who believes in punishment resists accepting that the evidence supported the view Darrow urged from it. On the other hand, ethical theory provides no compelling alternative on which to base a limited, partial excuse that could rationalize admission of evidence of an offender's psychosocial constitution. We have seen some imperfect possibilities. Perhaps causal influences do not always fully determine human action;<sup>244</sup> perhaps determinism comports with moral responsibility;<sup>245</sup> or perhaps punishment need not accord with the exist-

pleas, eugenics, and economy." Daniel D. Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 Sup. Ct. Rev. 1, 21. One might also consider any special attributes of the defendant that suggest his potential to contribute positively to the community if allowed to live. See John Kaplan, *Evidence in Capital Cases*, 11 Fla. St. U. L. Rev. 369, 376-77 (1983) (discussing the capital trial of the Russian spy, Rudolph Abel, and the potential capital trial of Lee Harvey Oswald).

241. Such evidence would often work against the capital defendant because, to the extent that psychosocial evidence portrays the offender as dangerous, it calls for a more severe sanction to incapacitate him. To theorize in these terms a partial, limited excuse to which evidence of the offender's psychosocial attributes relates, the incapacitation issue would necessarily outweigh in some cases the more static benefits, such as general deterrence, believed to arise from the choice of the capital sanction.

242. As regards the marginal deterrence of homicides from use of the death penalty rather than only lengthy prison terms, see Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 Mich. L. Rev. 1177, 1196-224 (1981) (concluding that "there is now enough research that fails to reveal deterrence that for purposes of moral argument one must proceed as if the death penalty does not deter.").

243. On the difficulties of predicting dangerousness, see generally John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques* 21-67 (1981). See also *Barefoot v. Estelle*, 463 U.S. 880, 899 n.7 (1983) (noting that numerous studies indicate that psychiatric predictions of future dangerousness are often inaccurate).

244. See *supra* notes 231-33 and accompanying text.

245. See *supra* notes 235-37 and accompanying text.

ence and degree of an actor's moral accountability.<sup>246</sup> If the limited, partial excuse stems from one of these possibilities, however, the proper explanation remains unapparent, and as we have seen, the question requires resolution. The theory employed affects the definition of the limited, sentencing excuse, and the differing definitions affect the evaluation of the psychosocial evidence.<sup>247</sup>

### B. *A Theory of Excuse in Criminal Law?*

To try to discover a theory of the limited sentencing excuse that rationalized the admission of Darrow's evidence, one might look for a unifying theory among the various excuses recognized in the criminal law.<sup>248</sup> Excuses, unlike other grounds of exculpation, serve to distinguish between unjustified wrongdoers who are blameworthy and those who are not blameworthy.<sup>249</sup> Excusing defenses include, for example, involuntary

246. See *supra* notes 238-41 and accompanying text.

247. Note that no theory for a limited, partial excuse appears obvious when actors are held morally accountable on the ground that their "wrongdoing" was the result of their fully free decisions. See *supra* text after notes 228 & 230. Also, compare, for example, the evaluation of an offender's psychosocial evidence if the question is: (1) to what degree the action stemmed from the actor's free will as opposed to external sources, see *supra* notes 233-34 and accompanying text; (2) to what degree the actor satisfied various constructed definitions of freedom deemed to define what is necessary in the relevant moral sense, see *supra* notes 237-38 and accompanying text; and (3) to what degree the actor would be dangerous and, thus, should be incapacitated, see *supra* notes 241-43 and accompanying text.

248. One might also consider searching the broader contours of criminal law for a unifying theory that explains how it resolves the intentionalism-versus-determinism dispute, but the search would not appear fruitful. See generally Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 642-52 (1981).

I postpone until later discussion about whether post-*Furman* capital sentencing doctrine reveals the relevance of evidence of the offender's psychosocial constitution. When, as in the *Leopold-Loeb* case, the capital sentencer's choice between death and imprisonment is unfettered by decisional standards, the law's only help in suggesting the relevance at sentencing of evidence about the offender's psychosocial background would come through a unifying theory of criminal-law excuse.

249. In considering the rationales for criminal-law excuses, one must initially locate the excuses among the complex web of rules governing liability. Professor Kadish has offered a useful perspective of how excuses fit into the larger doctrinal terrain. See Sanford H. Kadish, *Excusing Crime*, 75 *Cal. L. Rev.* 257, 257-58 (1987). First, a criminal prohibition, "[r]oughly speaking, . . . is a description of certain actions in certain circumstances (the *actus reus*), the doing of which with designated mental states (the *mens rea*) is punishable." *Id.* at 258. Infrequently, a criminal offense will require no *mens rea*, imposing "strict liability." Strict-liability offenses are relatively few and, with some notable exceptions, involve only minor penalties. "[I]t is generally agreed that conviction for strict-liability offenses should be insulated 'from the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed.'" Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* 248 (2d ed. 1986) (quoting Model Penal Code § 2.05 cmt. (Tentative Draft No. 4, 1955)).

Various grounds for exculpation then exist. One ground, which we could call a "failure of the *prima facie* case", amounts to a claim that the defendant did not commit the prohibited act or did not possess certain mental states designated by the prohibition. Kadish, *supra*, at 258. (A defense claim that certain required mental states have not been satisfactorily proven constitutes an excuse rather than a "failure of the *prima facie* case." See *infra* note 250.) One can distinguish from these sorts of exculpatory claims others characterized as "defenses." Defenses divide into two general categories. The "extrinsic defenses" cover claims unrelated to



action, duress, mistake, and insanity.<sup>250</sup> The very existence of excuse doctrine reveals a belief that we should not punish all criminal wrongdoers. At the same time, the restrictive boundaries of collective excuse doctrine—the absence of a universal excuse—manifests a rejection of Darrow's determinist argument against punishment.<sup>251</sup> The question raised concerns

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moral guilt or innocence, such as those based on diplomatic immunity or on a statute of limitations. Dressler, *supra* note 217, at 178. The other category of defenses includes all recognized claims related to personal innocence. This second category itself divides into two groups of claims. One group includes all justifications. These constitute claims that, although one's conduct violated the limited terms of the criminal prohibition, narrow circumstances specified elsewhere in the criminal law apply that make the otherwise prohibited conduct not wrong and sometimes even socially desirable. *See* Kadish, *supra*, at 258. Self-defense and law enforcement exemplify justification defenses. The other group covers the excuses. An excuse relieves not because we believe the offender's violation of the criminal prohibition justified but because the wrongdoer experienced a disability at the time of the act that renders punishment inappropriate. *See* Dressler, *supra* note 217, at 177. Several scholars have emphasized the distinction between justifications and excuses. *See, e.g.*, Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts in the Literature*, 33 *Wayne L. Rev.* 1155 (1987); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984).

250. Professor Kadish has placed the excuses into three categories. *See* Kadish, *supra* note 249, at 258-63. The first group covers manifestly "involuntary" actions. *Id.* at 259. These involve situations in which the defendant obviously did not choose her physical movement as, for example, when someone other than the defendant caused a movement by the defendant essential to make out the violation. *Id.* The law also has recognized as involuntary some movements whose source might be characterized as internal, such as a reflex reaction, a sleep disorder, a seizure, and, in some jurisdictions, an hypnotically induced compulsion. *Id.* Lawyers sometimes call this kind of involuntariness claim an "automatism" defense. *See, e.g.*, Michael Corrado, *Automatism and the Theory of Action*, 39 *Emory L.J.* 1191 (1990).

The second group of excuses covers "deficient but reasonable actions." Kadish, *supra* note 249, at 259. This group includes claims of reasonable lack of knowledge, commonly called "mistake" or "accident" defenses when they do not claim the case is missing "essential elements in the definition of the wrong made criminal." *Id.* at 260. This second category also includes claims of duress, for which one "commits a crime under command of another backed by such threats of personal injury that even a person of reasonable fortitude would have done the same." *See generally* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 *S. Cal. L. Rev.* 1331 (1989). The defense of superior orders also falls within this second group of excuses. It has been called "an amalgam of several defenses: mistake of fact, mistake of law, and duress." Steven Duke, *Superior Orders*, in 2 *Encyclopedia of Crime and Justice* 745 (Sanford H. Kadish ed., 1983).

Finally, the third group involves neither patently involuntary action nor circumstances that would overcome a person of normal capacity but, instead, disabilities that impede the actor's decision-making capacity. Infancy and insanity exemplify this kind of excuse. Traditionally, the infancy defense entailed fixed age limits, though juvenile delinquency laws have largely supplanted its function. *See generally* Martin L. Levine, *Excuse: Infancy*, in 2 *Encyclopedia of Crime and Justice* 733 (Sanford H. Kadish ed., 1983). The test of insanity applicable in Illinois in Darrow's day remains rather widely employed today: whether at the time of the committing of 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, 722 (1843). For a historical overview of the insanity defense and a summary of the various standards currently employed, see Dressler, *supra* note 217, at 296-304; Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 *Geo. L.J.* 1371, 1372-89 (1986).

251. Evidence offered to show that one's genetic make-up and lifelong environment caused one to commit a crime certainly falls within no excuse recognized in the criminal law. *See, e.g.*, *State v. Sikora*, 210 A.2d 193, 198-99 (N.J. 1965) (holding that testimony from psychiatrist

whether the contours of the excuses reveal which of the premises underlying Darrow's position the criminal law rejects and why when it ascribes responsibility.

The theories that scholars have offered to explain the criminal law's acceptance of excuses cover all of the basic approaches used by philosophers to avoid the determinist's argument against punishment.<sup>252</sup> Professor Dressler has stated that no single rationale explains all the excuses, but that nonutilitarian theories provide the most plausible support.<sup>253</sup> Indeed, criminal-law theorists generally have justified the excuses in moral desert terms.<sup>254</sup> They usually have accepted the validity of Darrow's third premise and have focused on whether to reject his first or his second premise. Nonetheless, the theories offered to explain the excuses reveal no consensus about which of the premises underlying Darrow's claim falters or why.

The notion that excuses build on a rejection of the first premise, asserting determinism, has long attracted adherents among criminal law scholars. Disagreements exist, however, about why the excuses reveal a belief in the falsity of determinism. Professor Corrado has recently argued that certain excuses embodied under the rubric of involuntary action<sup>255</sup> can only find explanation in a theory that liability rests on the actor's self-determination.<sup>256</sup> Because movements carried out during seizures, sleep-walking, complex reflex reactions and hypnosis often appear rooted in purpose, he notes that one cannot feasibly deny that such movements constitute "actions" or that the actor "did not undertake to do what he did."<sup>257</sup> Accordingly, the only plausible explanation why the criminal law excuses such movements is that the actor "was *caused* to undertake them and had no say in the matter."<sup>258</sup> Professor Corrado therefore has concluded that, in addition to purposiveness, "[a]gent-causation is in fact what responsibility seems to require."<sup>259</sup> This means that we must distinguish between actions that "originate with the actor" and those that stem from "a causal chain that extends outside of him."<sup>260</sup> The difficulty with this view as a unifying theory for the excuses, however, is that much criminal conduct

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offered to show that humans are helpless victims of unconscious forces caused by their genes and their lifelong environment was properly excluded in first degree murder trial on the guilt-or-innocence question of whether defendant was capable of premeditation).

252. See *supra* notes 178-226 and accompanying text.

253. See Dressler, *supra* note 217, at 183.

254. See, e.g., Kadish, *supra* note 249, at 265 ("The three categories of legal excuses . . . suggest the common rationale behind excuses in both law and everyday moral judgments—namely, that justice requires the preclusion of blame where none is deserved.").

255. See *supra* note 250.

256. See Corrado, *supra* note 250, at 1191.

257. *Id.* at 1221.

258. *Id.*

259. *Id.* at 1227.

260. Corrado, *supra* note 250, at 1192.

One could interpret Professor Corrado's article at times as suggesting that a distinct difference exists between caused and uncaused actions. At one point, however, he noted "a continuity between them." *Id.* at 1228. It is uncertain, therefore, whether he would classify his view as falling more easily into the "agent-causation" camp as earlier described *supra* in notes 178-83 and accompanying text or into the degree-determinism camp.

appears to find explanation in a causal chain extending beyond the actor but, nonetheless, is not excused from the criminal sanction.<sup>261</sup>

Scholars also have used dualist-like theories to help explain the criminal law's simultaneous rejection of determinism and its acceptance of excuses. This view assumes that the criminal law properly favors the free-will paradigm over the determinist paradigm because either paradigm can be thought true, depending on one's perspective. A well-known statement by Professor Hall seems to assume this view:

Every science rests upon distinctive axioms or postulates that are accepted by the scientists as "given." . . . [Psychiatry's] view of human nature is expressed in terms of drives and dispositions which, like mechanical forces, operate in accordance with universal laws of causation.

On the other hand, criminal law, while it is also a science in a wide sense of the term, is not a theoretical science whose sole concern is to understand and describe what goes on. It is, instead, a practical, normative science which, while it draws upon the empirical sciences, is also concerned to pass judgment on human conduct. . . . Its view of human nature asserts the reality of a "significant" degree of free choice. . . . Given the scientific purpose [of psychiatry] to understand conduct, determinism is a . . . necessary postulate. Given the additional purpose [of criminal law] to evaluate conduct, some degree of autonomy is a necessary postulate.<sup>262</sup>

Professor Hall apparently has concluded that instances arise in which human action should be excused. The problem with the dualism view, however, is that it provides no explanation for when the criminal law should adopt one perspective rather than the other.<sup>263</sup>

Scholars have also used degree determinism to help explain how the criminal law both rejects determinism and justifies excuses. Professor Norval Morris, for example, has asserted that we can chart all human action on a spectrum between complete determinism and complete freedom.<sup>264</sup>

261. See *infra* note 270 and accompanying text.

262. Jerome Hall, *General Principles of Criminal Law* 455 (2d ed. 1960).

263. Professor Packer argued that the criminal law effectively implements a species of "ignorance determinism." He described the nature of the implementation of the nondeterminist paradigm as follows:

Neither philosophic concepts nor psychological realities are actually at issue in the criminal law. The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. The fallacy that legal values describe physical reality is a very common one. . . . [I]t is . . . a major impediment to rational thought about the criminal law. Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.

Packer, *supra* note 199, at 74-75. *But see* Moore, *supra* note 182, at 1122 ("The law demands more than that we *pretend* people are free and thus hold them responsible *as if* they were. A just legal system requires people to be truly responsible.").

264. See Morris, *supra* note 191, at 61.

This theory does not alone explain where to draw the baseline to distinguish between moral accountability and excuse. Morris seems to have concluded, however, that we ought to draw the line to render accountable "those persons raised in conditions of gross social adversity."<sup>265</sup> He did not clarify the basis for this conclusion, though a background of gross social adversity indeed provides no excuse under current doctrine. Applying this theory to the insanity excuse, however, reveals its flaws as a unifying, descriptive theory of excuses. Morris has concluded that we should abolish insanity as a defense. He has asserted that the insane, defined even under the strict *M'Naghten* test,<sup>266</sup> have as much freedom to resist the causal influences operating on them as the person raised in conditions of gross social adversity.<sup>267</sup>

Other scholars have concluded that explaining the excuses requires rejecting Darrow's second premise rather than his first premise. Professor Michael Moore most notably has urged this position.<sup>268</sup> He has concluded that determinism is more plausible than any of the alternatives posed for rejecting determinism.<sup>269</sup> He also has noted that current doctrine fails to provide an excuse in some instances when an action undoubtedly stems from a causal chain extending beyond the actor,<sup>270</sup> as with actions of some retarded or brain-damaged offenders. He then concluded that moral accountability cannot require the freedom truly to have acted otherwise than one acted. He has asserted that accountability demands only the freedom to "reason practically."<sup>271</sup> Professor Moore's criticisms of causal theories as unifying explanations for the excuses carry much force. Yet, other scholars have criticized Moore's theory as description for providing a standard too vague to explain meaningfully what currently constitutes an excuse.<sup>272</sup> Further, scholars who, like Moore, reject Darrow's second

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265. Moore, *supra* note 182, at 1114.

266. *See supra* note 250.

267. *See* Morris, *supra* note 191, at 61-63. Others urge the opposite method of reconciling the insanity defense with the absence of defenses based on one's adverse upbringing. *See, e.g.*, David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385, 394-95 (1976) (explaining the refusal of both doctors and judges to entertain a defense based on upbringing); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 *Law & Inequality* 9 (1985). *But see* Joshua Dressler, Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System, 63 *Minn. L. Rev.* 335, 354-60 (1979) (discussing philosophical problems raised by such a defense); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247, 1249-54 (1976) (challenging the view of responsibility embodied in Judge Bazelon's proposal).

268. *See generally* Moore, *supra* note 182.

269. *See id.* at 1112-28.

270. *See id.* at 1129-32 (noting that the existence of causation is not what defines the contours of excuses in the criminal law).

271. *See* Moore, *supra* note 169, at 363 ("To be compelled is to have one's normal capacities to reason practically interfered with, either by the constraint on means imposed by threats or natural necessity, or by the constraint on ends posed by internal cravings and emotions.").

272. *See, e.g.*, Corrado, *supra* note 250, at 1191 (arguing, for example, that a "disturbance" of "practical reasoning" ability does not exclude from excuse "the thief whose deliberations are disturbed by his desire for the enormous wealth he envisions having after the theft"); Weinreb, *supra* note 216, at 61 n.27 ("I am doubtful that [Moore] can unify our excuses by reference

premise have also criticized Moore's theory as prescription on grounds that it offers an unduly thin account of the essential attributes for moral agency.<sup>273</sup>

Some legal scholars also continue to contend that excuses build on consequentialist bases. These theories reject Darrow's third premise, which asserts that actors should be morally culpable for acts to be punished for them. Richard Posner recently has sought to show, for example,<sup>274</sup> that the presence of excuses, particularly mistake and accident doctrine and the *M'Naghten* version of the insanity defense,<sup>275</sup> finds support in a desire to promote economic efficiency.<sup>276</sup> Like other economic theorists, Posner has asserted that intent bears on punishment because it relates positively to the likelihood of harm and negatively to the likelihood of apprehension.<sup>277</sup> He also has justified a narrow insanity defense on the large cost and limited marginal value of punishing insane offenders.<sup>278</sup> Of course, such views warrant challenge, particularly as indicating the consequentialist basis of excuses generally. It is not at all apparent, for example, what deterrent effects accrue to narrow or broad definitions of insanity or that consideration of those effects predominate in discussions about how to limit insanity.<sup>279</sup>

only to practical reasoning capacities. The apparent ground of unification, surely is that some other, presumably causal, process has taken over and wiped out those capacities."); Hill, *supra* note 197, at 2059 (arguing that "the social conditions associated with growing up in a bad environment may undermine the very foundation of the practical reasoning which Moore relies upon as constitutive of moral autonomy"); *see also* Dressler, *supra* note 250, at 1384 (noting that the excuse of duress amounts to an "exception" to the idea that "people who possess normal, adult human reasoning skills are morally accountable for their intentional acts").

273. *See, e.g.*, Arenella, *supra* note 170, at 1524-25:

[A] threshold conception of moral agency—one suitable for moral norms implicated by *mala in se* crimes—must include the following character-based attributes: the capacity to care for the interests of other human beings; the internalization of others' normative expectations, including self-identification as a participant in the community's blaming practices; the ability to engage in moral evaluation of one's character and acts; the capacity to respond to moral norms as a motivation for one's choices; and the power to control those firmly entrenched aspects of character that impair one's ability to act in accordance with one's moral judgments.

274. Some utilitarians have argued that excuses, such as insanity, should be abandoned and that sentencing should focus primarily on the forward-looking question of how to address offender dangerousness. *See, e.g.*, Karl Menninger, *The Crime of Punishment* 254-68 (1968); Barbara Wootton, *Crime and Penal Policy* 220-39 (1978).

275. *See supra* note 61.

276. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193, 1221-24 (1985). For a critique of some of the ideas expressed in Posner's article and an alternative economic analysis of some basic features of criminal law, *see* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *Duke L.J.* 1.

277. *See* Posner, *supra* note 276, at 1221-23; *see also* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 *Colum. L. Rev.* 1232, 1248 (1985).

278. Posner, *supra* note 276, at 1223-25.

279. Utilitarian theories of criminal law always present problems. When such a theory is offered as a prescription, one is entitled to question why it has not already been adopted as positive law. When such a theory is offered as a mere description—suggesting that we have

Some have argued that only political rather than moral or economic theories can explain the excuses. Professor Seidman has posed the example of a desperately poor man who invades the property of a rich man only to be physically attacked and repelled by the rich man's use of nondeadly force.<sup>280</sup> The poor man commits a crime while the rich man acts justifiably. Professor Seidman first noted that this conclusion, like much of exculpation doctrine, rests on a theory of rights rather than on "free choice" or utility-maximizing ideas.<sup>281</sup> The rich man has the right to undisturbed possession of his accumulated property while the poor man has no right to take even a small part of it despite his much greater need. A right exists to avoid the coercive forces suffered by the rich man from the poor man's intrusion although no right exists to avoid the economic coercion suffered by the poor man. Politics helps explain these rights, Professor Seidman also has argued: Society allocates the costs of crime according to the outcome of a political struggle between groups aiming to secure results most favorable to themselves and their perceived allies. "Although the rhetoric of blame and choice is an important weapon in this struggle, it is exactly backwards to suppose that we impose costs on persons because they are blameworthy. Rather, declarations of blameworthiness are the way we announce the outcome of the struggle to distribute costs."<sup>282</sup>

One surely can question whether excuse doctrine reflects a unitary theory as to why we relieve some offenders. That scholars so greatly dispute the explanation for the excuses and their normative contours warrants doubt that excuse doctrine embodies an identifiable perspective.<sup>283</sup> This doubt finds further justification in the extent to which excuse doctrine changes. For example, definitions of the insanity defense—"determinism's most obvious domain in the criminal law"<sup>284</sup>—have fluctuated over time<sup>285</sup> and today vary among jurisdictions. In many states,

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approximated maximum utility—one is entitled to ask whether there truly exists general satisfaction with current crime levels. This troublesome aspect of utilitarianism, however, hardly shows the superiority of retributive theories. For many persons, deserts alone may carry a hollow ring as the explanation for punishment distribution decisions. See Bedau, *supra* note 217, at 616.

280. See Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315, 342 (1984). The exculpation doctrine that applies to the rich man, it should be noted, is classified as a justification rather than an excuse. See *supra* note 249 and accompanying text.

281. See Seidman, *supra* note 280. As Professor Seidman's argument reveals, however, the concept of "rights," while a useful tool in legal argument, lacks "an independent 'substance.'" See Alf Ross, *Tu-Tu*, 70 *Harv. L. Rev.* 812, 825 & n.8 (1957).

282. Seidman, *supra* note 280, at 343 (footnote omitted).

283. Indeed, the efforts of one noted scholar to explain the theory underlying the excuses reveal uncertainty even about whether they reflect a limited rejection of determinism (premise one), a rejection of the notion that culpability is inconsistent with determinism (premise two), or a rejection of the conclusion that culpability is a prerequisite to just punishment (premise three). See George Fletcher, *Rethinking Criminal Law* 800-02 (1978).

284. Kelman, *supra* note 248, at 648.

285. A prime example is the rise and fall of the "product test." This definition of insanity allowed the defendant to make out the excuse by showing merely that her wrongdoing was the product of a mental disease or defect. Although first employed in the late nineteenth century, see, e.g., *State v. Pike*, 49 N.H. 399 (1870), the test was made famous in the 1950s in the notable

defendants can make out insanity on a showing that, as a result of mental disease or defect, they lacked substantial capacity to appreciate the criminality of their conduct or to conform their conduct to the requirements of the law.<sup>286</sup> In some other states, the more restrictive *M'Naghten* test<sup>287</sup> controls.<sup>288</sup> A few states, moreover, have abolished the insanity defense altogether.<sup>289</sup> The persistence of the controversy about the proper boundaries of the defense, or whether even to retain it, along with the varying grounds of that debate,<sup>290</sup> casts doubt on the notion that a single principle or theory reveals when the criminal law will excuse one who has caused social harm.<sup>291</sup>

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opinion of Judge Bazelon in *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). The test subsequently fell into disfavor. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (overruling *Durham*).

286. Model Penal Code § 4.01(1) (1985).

287. See *supra* note 61.

288. Several jurisdictions stake out a middle ground between the two definitions mentioned in the text. See generally Dressler, *supra* note 217, at 299-304 (discussing the various insanity tests); Sendor, *supra* note 250, at 1380-89.

289. Abolition of the insanity defense does not necessarily foreclose the defendant from introducing evidence of his mental disease or defect to prove that he lacked a required mental state. See Idaho Code § 18-207 (Supp. 1986); Mont. Code Ann. § 46-14-102 (1985); Utah Code Ann. § 76-2-305(1) (Supp. 1986). Use of evidence in this way has been called the "mens rea" variant of the diminished-capacity defense and should be distinguished from the entirely different "partial responsibility" variant of the diminished-capacity defense discussed *infra* note 291. See Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 1 (1984).

Several states, while maintaining an insanity defense, have allowed the jury to render a verdict of "guilty but mentally ill." See generally Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 Geo. Wash. L. Rev. 494 (1985). Typically, this verdict results in the offender's imprisonment with no necessary difference in his treatment from that which would have occurred had he been found guilty. It is not implausible to think that because jurors typically are unaware that an insanity acquittal will subject the defendant to civil confinement, generally of lengthy duration, they may find some insane offenders guilty but mentally ill. While that result would effectively nullify the insanity excuse, it may not be widely recurrent. See Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. Mich. J.L. Ref. 77 (1982) (concluding that the "guilty but mentally ill" verdict was generally applied by Michigan juries to a class of offenders who would otherwise have been found guilty).

290. On the question of abolition, see generally Dressler, *supra* note 217, at 309-13 and authorities cited therein.

291. Some states have adopted a partial-responsibility variant of the diminished-capacity defense. See Morse, *supra* note 289, at 1. Typically it allows reduction of murder to manslaughter. This defense is embodied in the "extreme emotional disturbance" doctrine promulgated in the Model Penal Code. See Model Penal Code § 210.3(1)(b) (1985). In some states, a similar defense has been judicially authorized to reduce first-degree murder to second-degree murder or murder to manslaughter, though there has been retrenchment in recent years. See *id.* § 210.3 cmt.

The controversy over the rationale and propriety of this defense also suggests that it does not build on a consensus about the nature of a limited, partial excuse that could justify consideration of Darrow's evidence at the *Leopold-Loeb* sentencing trial. The failure of many states to adopt it and its restriction to cases of murder reflects substantial doubt about its propriety. Wide criticism of the defense also appears in the scholarly literature. For the view that the defense ought to be abolished on the nonconsequentialist ground that all offenders who qualify as morally accountable (presumably under the *M'Naghten* test of sanity and all other typical excuse doctrines) are much more alike than different regarding their ability to

Criminal law doctrine, thus, raises as many questions as it answers about the nature of the limited, partial excuse that could support the admission of Darrow's evidence at sentencing. If no consensus exists about the normative function served by excuses at the guilt-or-innocence proceeding, we can draw no persuasive conclusions regarding the function of receiving defense evidence at sentencing about the offender's psychosocial constitution. Any theory of excuses positing that capital defendants who lack an excuse are fully accountable does not explain how to distinguish the punishments distributed among the guilty. Yet, any rationale that suggests an axis for distinguishing among capital offenders raises questions about where to draw the line between those who merit death and those who merit imprisonment and whether an investigator can reach an accurate determination of the sort the particular theory demands.<sup>292</sup> Moreover, the method of even attempting to distinguish based on psychosocial evidence among those deemed guilty remains unapparent. Does a relevant continuum of freedom from deterministic forces exist along which we can chart them? Is there some continuum reflecting an array of "practical reasoning" skills along which we can place them? Should we conduct a utilitarian analysis of the effects of applying the competing sanctions to them?<sup>293</sup> The standard by which the sentencer should attempt to evaluate evidence about the offender remains uncertain. Perhaps Darrow was right that no rational ground exists by which to judge capital offenders. In that case, his evidence in *Leopold-Loeb* was admissible, if at all, simply because the sentencer was entitled to resolve doubt in favor of the deterministic argument against punishment.

### C. *The Leopold-Loeb Sentencing Verdict*

Judge Caverly surely pondered how Darrow's evidence might partially excuse Leopold and Loeb during the six weeks that he considered the sentencing verdict. In the end, he spared both men from the gallows, sentencing them, instead, to incarceration for life plus ninety-nine years, with a recommendation to the parole board that they should die in prison. Before announcing the sentence, he explained the reasons for his decision.<sup>294</sup>

Judge Caverly revealed that he had disregarded all of the defense's psychosocial evidence and most of Darrow's argument.

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meet the law's demands, see Morse, *supra* note 289, at 28-36. For the nonconsequentialist view that it is impossible to distinguish "between the fully culpable sane offender who did not resist his anti-social impulse but could have done so easily, and the less culpable sane offender who would have had extreme difficulty resisting such an impulse," see Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 858 (1977). For the consequentialist argument building on the point that "the scope of [the defense's] subjective inquiry into the degree of voluntary choice exercised by each sane defendant at the time of the crime cannot logically be confined within realistic limits," see *id.* at 858-60.

292. See *supra* notes 233-34 & 237-38 and accompanying text.

293. As noted earlier, however, if the sentencing inquiry is utilitarian, such psychosocial evidence seems as much inclined to aggravate as to excuse. See *supra* note 241 and accompanying text.

294. See generally McKernan, *supra* note 3, at 375-80.



The court . . . feels impelled to dwell briefly on the mass of data produced as to the physical, mental and moral condition of the two defendants. They have been shown in essential respects to be abnormal; had they been normal they would not have committed the crime. It is beyond the province of this court, as it is beyond the capacity of human kind in its present state of development, to predicate ultimate responsibility for human acts. At the same time, the court is willing to recognize that the careful analysis made of the life history of the defendants and of their present mental, emotional and ethical condition has been of extreme interest and is a valuable contribution to criminology. And yet the court feels strongly that similar analyses made of other persons accused of crime will probably reveal similar or different abnormalities. The value of such tests seems to lie in their applicability to crime and criminals in general.

Since they concern the broad question of human responsibility and legal punishment and are in no wise peculiar to the individual defendants, they may be deserving of legislative but not of judicial consideration. For this reason the court is satisfied that his judgment in the present case cannot be affected thereby.<sup>295</sup>

These remarks suggested that Judge Caverly believed the notion of determinism plausible, if not forceful, but one the law simply required him to ignore. By emphasizing the potential value of the evidence to the legislature, Judge Caverly disclosed that he found the implications of the evidence troubling. His remarks also hinted that he agreed with Darrow that no rational middle ground existed between determinism and moral accountability. This suggestion arose from his disclaimer about the ability of humans to judge "ultimate responsibility" and his failure to identify any basis by which to gauge when psychosocial evidence mitigates.<sup>296</sup>

In light of Judge Caverly's comments about the psychosocial evidence, however, he offered a perplexing rationale for relieving the defendants. Judge Caverly reported that he was "moved chiefly by the consideration of the age of the defendants."<sup>297</sup> To decline to impose death sentences on persons "not of full age," he asserted, "appear[ed] to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity."<sup>298</sup> The state of Illinois had previously executed only two persons under twenty-one, and Judge Caverly declared that he did not "feel inclined to make an addition."<sup>299</sup> Yet, if the defendants' psychosocial evidence did not bear on the sentence, their youthful status seemingly lacked mitigating force. Youthfulness appeared relevant only for what it

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295. *Id.* at 378.

296. *See id.*

297. *Id.* at 379.

298. McKernan, *supra* note 3.

299. *Id.* at 379. Although his point was not entirely clear, Judge Caverly also added that the many years of prolonged suffering from a sentence of life imprisonment imposed on offenders such as Leopold and Loeb would result in perhaps the "severest form of retribution and expiation." *See id.* at 379-80.

said about mental and emotional development. Unless, contrary to his declaration, the evidence of the defendants' mental constitutions had influenced Judge Caverly, the sentences seemed most charitably described as an exercise of undeserved leniency, an act of mercy.<sup>300</sup>

A few weeks after announcement of the sentences, the Journal of Criminal Law, Criminology and Police Science at Northwestern University Law School sponsored a symposium on the *Leopold-Loeb* case.<sup>301</sup> A panel of respected lawyers commented on Judge Caverly's sentencing decision. The panelists included Harry Olson, then the Chief Judge of the Chicago Municipal Court, Homer Cummings, a prosecutor from Connecticut who previously had tried death penalty cases, and Professor John Henry Wigmore, the noted evidence and criminal law scholar at Northwestern.<sup>302</sup>

The panelists disagreed about the propriety of the sentencing decision but not about the absence of any limited, partial excuse to explain the relevance of the psychosocial evidence on the sentencing question. Judge Olson and Mr. Cummings found the reprieve from the death penalty justified. Judge Olson, however, saw the issue not as one of mitigation but as one of guilt or innocence. In his view, the evidence had demonstrated that the offense had sprung from the defendants' emotional disabilities, rendering them insane and, thus, not guilty of any crime.<sup>303</sup> Mr. Cummings, by contrast, believed the defendants guilty but agreed with the grounds for the reprieve as stated by Judge Caverly. He also found impertinent the defense presentation on the sentencing issue not because he was convinced that determinism was false but simply because to adopt the defense view "would overthrow our entire system of administering justice."<sup>304</sup> Professor Wigmore thought that the defendants were guilty of murder and should have hung. He contended that the overriding issue at

300. See *supra* note 118 and accompanying text (discussing the concept of mercy).

301. See Symposium, *supra* note 9, at 347-405.

Eleven days after the sentencing verdict, Darrow gave a speech at the dedication of a new neuropathic hospital in New York City, in which he reiterated his views on the causal forces behind all crime. Alfred J. Talley, a New York judge, publicly challenged Darrow's views, arguing that it was Darrow, not the criminal element, who needed examination in the new hospital. The directors of the New York League for Public Discussion concluded that a debate between Darrow and Talley on the propriety of capital punishment would spark public controversy. Both parties agreed, and a noted debate was subsequently held. For a summary of the events leading to the debate and an analysis of the arguments presented, see James E. Sayer, Clarence Darrow: Public Advocate 21-38 (1978).

302. For their remarks, see Symposium, *supra* note 9, at 395-405.

303. See *id.* at 396-97:

It is quite true these defendants knew the difference between right and wrong, but I doubt whether such knowledge was sentient, or that they had the power to choose, in view of their mental condition, as disclosed at the trial, and thus might have been successfully defended as insane under the law of Illinois as it now stands.

Judge Olsen also seemed to argue that to the extent that the existing law would not allow a finding of insanity on such evidence, the definition should be amended. See *id.* at 396. He conceded that Judge Caverly properly considered the evidence of the offenders' mental compositions, but found this acceptable because "it will be only a few years until such grave mental aberration will be adequate defense in the courts against the charge of the crime itself, if it is not so already." *Id.* at 397.

304. *Id.* at 399.

sentencing was not what the defendants deserved but whether a death sentence could deter future homicides by others,<sup>305</sup> which he contended it would without regard to whether causal forces explained the offenders' actions.<sup>306</sup> In the final analysis, then, despite their disagreements, the three experts seemed to agree on one point: No limited, partial excuse explained the relevance at sentencing of evidence about the defendants' psychosocial constitutions.

These perspectives on the *Leopold-Loeb* trial raise an important question about modern capital sentencing practice. If Darrow was correct that psychosocial evidence only supports determinism, the purpose of considering the evidence as part of the capital sentencing decision is not clear since it would provide no basis for distinguishing among capital offenders. Yet, assuming he was wrong and such evidence rationally relates to the capital sentencer's inquiry, it is not clear that any consensus exists about how the sentencer should evaluate it. On either view, one should question why the Eighth Amendment requires the capital sentencer to consider such a presentation before imposing a death sentence. Part IV takes up this problem. First, however, Part III summarizes the Supreme Court's decisions regarding the need for consideration of such evidence and the implications of those decisions for modern capital sentencing systems.

### III. CURRENT INDIVIDUALIZATION DOCTRINE AS APPLIED TO LEOPOLD AND LOEB

If Leopold and Loeb were tried for capital murder today,<sup>307</sup> their lawyers undoubtedly would want to offer a causalist defense similar to the one Darrow presented in 1924.<sup>308</sup> Current Illinois law<sup>309</sup> would enable the defense to present the evidence and to have the sentencer free to act on it.<sup>310</sup> Defense counsel probably could also urge in summation the same

305. See *id.* at 401-02 ("So the main question here really was: Would the remission of the extreme penalty in the Loeb-Leopold case lessen the restraints on the *outside class of potential homiciders*? The answer is *yes* emphatically.").

306. See Symposium, *supra* note 9, at 405 ("Society's right to eliminate its human weeds is not affected by the predetermined character of the weeds.").

307. Absent an excuse, like insanity, Leopold and Loeb would unquestionably satisfy the requirements for guilt of capital murder under the modern Illinois penal code. See Ill. Comp. Stat. ch. 720, para. 5/9-1 (Supp. 1993) (discussed *infra* notes 338-40 and accompanying text). However, because the current statute, unlike the statute applicable in Darrow's time, allows counsel to elect either jury or judge as the sentencer at the separate sentencing hearing even when a jury served as factfinder at the guilt phase, see *id.* § 9-1, and because of the greater possibility today for reversible error to occur in the guilt phase, counsel would want to discourage a defendant from pleading guilty to a capital charge. See *generally* Goodpaster, *supra* note 17, at 328-34 (discussing how defense counsel should represent the capital defendant at the guilt phase where the evidence appears overwhelming).

308. See, e.g., Goodpaster, *supra* note 17, at 335 ("[T]he defense must attempt to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development . . .").

309. See Ill. Comp. Stat. ch. 720, para. 5/9-1 (Supp. 1993).

310. For further discussion of the operation of the Illinois capital sentencing system, see *infra* notes 338-41 and accompanying text.

deterministic themes that Darrow urged on Judge Caverly.<sup>311</sup> Nonetheless, recent Supreme Court decisions suggest that the Illinois legislature could, should it so choose, begin thwarting the mitigating force of this evidence and argument by channelling the sentencer's focus away from a broad assessment of offender deserts.<sup>312</sup>

The current Illinois system, which would allow the modern sentencer to reject the death penalty based on the kind of defense Darrow offered, stems in some sense from the Supreme Court's regulation of the capital sentencing process. The Court has struggled to ensure both the rule of law and individualized consideration in the sentencing of capital offenders. In *Furman v. Georgia*,<sup>313</sup> the Court struck down standardless capital sentencing under the Eighth Amendment and seemed to demand that states distribute the death penalty according to rules or not at all. Death penalty states quickly responded by enacting new capital punishment schemes that either rendered the death penalty mandatory on conviction or allowed a judge or jury to impose the death penalty after a separate inquiry influenced by sentencing guidelines.<sup>314</sup> In a famous quintet of decisions rendered in 1976,<sup>315</sup> a three-Justice plurality resolved that the rule-of-law concerns underlying *Furman* did not override the need to consider individually the propriety of a death sentence. Thus, the plurality concluded, in *Woodson v. North Carolina*,<sup>316</sup> that mandatory death statutes violated the Eighth Amendment.<sup>317</sup> At the same time, the plurality upheld various systems that

311. Whether such an explicit appeal to determinism must be allowed is less than certain. See *infra* notes 423-26 and accompanying text. However, these kinds of arguments typically have been permitted. See White, *supra* note 18, at 105 ("Presenting the argument that defendant's actions are a product of deterministic forces beyond his control is now perhaps the most common rhetorical strategy."). Neither the Supreme Court nor apparently any of the federal courts of appeals has addressed a claim that a trial court erroneously prevented defense counsel in a capital sentencing hearing from making such arguments.

312. See *infra* notes 354-58 and accompanying text.

313. 408 U.S. 238 (1972) (per curiam).

314. Thirty-five states enacted new death penalty statutes between the date of the *Furman* decision and the date, four years later, when the Supreme Court decided the validity of five legislative responses to *Furman*. See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 *Ariz. L. Rev.* 143, 226 (1986). Twenty-two of these states opted for mandatory statutes, see *id.* at 227, though the definitions of the capital offenses to which the mandatory penalty applied varied substantially from state to state. See *id.* at 200-26.

315. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). The decision in each of these cases was rendered on July 2, 1976.

316. 428 U.S. 280 (1976).

317. See, e.g., *id.* at 286-306 (plurality opinion of Stewart, J., Powell, J., and Stevens, J.). The same plurality rejected Louisiana's mandatory death penalty scheme in [Stanislaus] *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.).

There remained some doubt whether the invalidation of the mandatory death penalty statutes in *Woodson* and [Stanislaus] *Roberts* meant that the death penalty could never be mandated upon conviction no matter how narrowly defined the capital offense. The Court's later decisions invalidating mandatory death penalties implied that such statutes are always improper because they do not allow for adequate consideration of information about the offender's character, record, and crime. See *Sumner v. Shuman*, 483 U.S. 66 (1987)

provided a penalty hearing with sentencing standards.<sup>318</sup>

The Court approved two basic kinds of capital sentencing systems in 1976. The Georgia and Florida schemes represented one kind, which one could call the "open-ended, aggravator" system.<sup>319</sup> At its most basic, as in Georgia, this sort of system requires the sentencer merely to find the presence of at least one aggravating circumstance from a statutorily specified list before imposing a death sentence.<sup>320</sup> Upon finding an aggravator, the sentencer's discretion becomes, as in the pre-*Furman* era, "unbridled."<sup>321</sup> Florida's system refines the inquiry only slightly. The Florida statute provides lists of both aggravators and mitigators. The sentencer must first find at least one aggravator from the statutory list to impose a death sentence.<sup>322</sup> Unlike Georgia's system, the Florida scheme also requires the sentencer to find that all aggravators outweigh all mitigators before opting for the death sentence.<sup>323</sup> However, because the lists of both aggravators and mitigators are nonexclusive on the balancing decision, and because the sentencer decides how much weight to accord each factor, this additional balancing requirement provides no meaningful limitation on sentencer discretion.<sup>324</sup>

One might appropriately call the second kind of system approved in 1976 the "closed, special-question" system. The Texas scheme exemplified this approach. At the conclusion of the sentencing hearing, a jury must answer three questions: (1) whether the defendant acted deliberately, (2) whether the defendant poses a likelihood of committing future acts of criminal violence, and (3) whether the defendant acted unreasonably in

(invalidating mandatory death penalty statute applicable to life-term inmate who commits murder); [*Harry*] *Roberts v. Louisiana*, 431 U.S. 633 (1977) (invalidating mandatory death penalty for murder of police officer); *Washington v. Louisiana*, 428 U.S. 906 (1976) (invalidating mandatory death penalty for murder of a peace officer). This conclusion also would seem to follow from the *Lockett* line of decisions discussed *infra* notes 326-37 and accompanying text.

318. See *Gregg v. Georgia*, 428 U.S. 153, 170-88 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.); *Proffitt v. Florida*, 428 U.S. 242, 248-61 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.); *Jurek v. Texas*, 428 U.S. 262, 269-77 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.).

319. I use the term "open-ended" in a relative sense to cover a variety of schemes that pose only very minor restrictions on sentencer discretion beyond the requirement that the sentencer identify an aggravating circumstance from a statutory list before imposing a death sentence.

320. See Ga. Code Ann. § 17-10-30 (1990). For the list of aggravating factors contained in the original post-*Furman* statute, see *Gregg v. Georgia*, 428 U.S. 153, 165 & n.9 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.).

321. *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (describing the Georgia system).

322. Fla. Stat. ch. 921.141(6)(f) (1993). For the lists of aggravating and mitigating circumstances as they appeared in the original post-*Furman* legislation, see *Proffitt v. Florida*, 428 U.S. 242, 248-49 n.6 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.).

323. Fla. Stat. ch. 921.141(6)(f) (1993).

324. These open-ended, aggravator systems were based on the approach reflected in a "model" statute prepared by the drafters of the Model Penal Code to standardize capital sentencing decisions. See Model Penal Code § 210.6 (Proposed Official Draft 1962). For a recent decision of the Supreme Court upholding the open-ended, aggravator system of California against a variety of challenges, see *Tuilaepa v. California*, 114 S. Ct. 2630 (1994).

response to any victim provocation.<sup>325</sup> If the jury answers the three questions affirmatively, the trial court must sentence the offender to death. Otherwise, the offender receives a life sentence.

Soon after 1976, the Court addressed what kind of information the capital offender can present and for what purposes the sentencer must remain free to act on it. The bare-bones individualization requirement articulated in *Woodson* indicated only that the states must allow a separate penalty decision; it did not reveal what evidence to admit or in substantive terms what the inquiry should concern. However, without clarifying the normative nature of the inquiry in substantive terms, the Court ruled broadly, in *Lockett v. Ohio*,<sup>326</sup> that the sentencer must remain free to reject the death penalty based on any evidence that the capital offender chooses to offer about his character, record, or crime.<sup>327</sup> On this basis, the Court struck down a closed, special-question statute enacted in Ohio<sup>328</sup> Despite

325. The Texas statute, which recently has been amended, posed the following specific questions to the sentencer:

(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.

Tex. Code Crim. Proc. Ann. art. 37.071(2)(b) (West 1981). The statute was amended in 1991 because of the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 320-28 (1989), which held the statute unconstitutional when applied to a retarded offender with a background of abuse. For further discussion of the statute, the Court's decision in *Penry*, and its subsequent rulings regarding the constitutionality of the old statute when applied in other circumstances, see *infra* notes 359-68 and accompanying text.

The current Texas scheme includes two questions that are similar to the first two questions in the old system and then requires the sentencer, as a prerequisite to a death sentence, to answer negatively an inquiry that effectively creates an "open-ended, special-question" system. The jury must now decide:

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. Proc. Ann. art. 37.071(2)(e) (West Supp. 1994).

326. 438 U.S. 586 (1978).

327. *Id.* at 604, 620-21 (plurality opinion of Burger, C.J., joined by Stewart, J., Powell, J., and Stevens, J., and Marshall, J., concurring).

Although *Lockett* was decided by a four-Justice plurality with Justice Marshall in concurrence, the plurality opinion carries the force of precedent. Justice Marshall clearly agreed that the Ohio statute had foreclosed adequate consideration of mitigating factors, but wrote separately because he concluded that the case should be decided on the broader ground that the death penalty always violated the Eighth Amendment. *Id.* at 621.

328. The Ohio statute required the death penalty unless,

considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following [was] established by a preponderance [sic] of the evidence:

the approval only two years earlier of Texas' closed, special-question system, the Court declared the Ohio questions too confining. They did not allow the capital sentencer to give mitigating weight to such evidence as an offender's youth or minor participation in the capital offense.<sup>329</sup>

Between the 1978 *Lockett* decision and 1989, the Court repeatedly upheld the *Lockett* mandate. It reversed death sentences whenever trial judges excluded or precluded consideration for mitigating purposes of defense evidence about the offender.<sup>330</sup> The evidence implicated in these decisions also bore on a variety of substantive issues; some bore on the offender's culpability for the capital crime,<sup>331</sup> some on the offender's good acts unrelated to the capital offense,<sup>332</sup> and some on his lack of future dangerousness.<sup>333</sup> One of the Court's decisions also implied that when evidence potentially related to more than one mitigating purpose, the offender could decide in what ways to urge the sentencer to consider it.<sup>334</sup>

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

*Lockett*, 438 U.S. at 612-13 (quoting Ohio Rev. Code Ann. § 2929.04(B) (Baldwin 1975)).

329. See also *Bell v. Ohio*, 438 U.S. 637, 641-43 (1978) (reversing death sentence because the same statute failed to allow sentencer to reject the death penalty based on evidence, among other things, of defendant's youth, low intelligence, emotional disturbance, and troubled and violent upbringing).

330. See, e.g., *Hitchcock v. Dugger*, 481 U.S. 393, 397-99 (1987) (concluding that a list of mitigating factors in Florida statute, when interpreted by trial judge as exclusive, prevented consideration of, among other things, evidence that defendant had suffered possible brain damage from inhaling gasoline fumes during adolescent years, had been raised in conditions of gross social adversity, and had been a "fond and affectionate uncle"); *Skipper v. South Carolina*, 476 U.S. 1, 5-6 (1986) (assigning error by trial judge for excluding evidence that defendant had been well behaved in jail when offered to show, not merely a positive aspect of defendant's character, but that he would pose no undue danger to others in prison and could lead a useful life behind bars if sentenced to life imprisonment); *Eddings v. Oklahoma*, 455 U.S. 104, 108-09 (1982) (concluding that interpretation of sentencing statute by sentencing judge did not permit consideration of evidence of defendant's emotional disturbance and troubled and violent upbringing); see also *McKoy v. North Carolina*, 494 U.S. 433, 439-44 (1990) (finding that the statutory requirement that jury unanimously find mitigating circumstances before giving them consideration precluded adequate consideration of, among other things, evidence of defendant's emotional disturbance and age); *Mills v. Maryland*, 486 U.S. 367, 370-84 (1988) (explaining how the statutory requirement that a jury unanimously find particular mitigating factors before considering them precluded adequate consideration of, among other things, evidence of defendant's relative youth and mental infirmity).

331. See authorities cited *supra* note 18.

332. See *Dugger*, 481 U.S. at 397-99 (evidence that, among other things, defendant had been a "fond and affectionate uncle").

333. See *Skipper*, 476 U.S. at 5-6 (evidence that defendant had been well behaved in jail which was offered to show defendant's likely positive adjustment in prison if sentenced to life imprisonment).

334. Justice White's opinion for the Court in *Skipper* conveyed this notion:

As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination. . . . Assuming, however, that the

In 1989, in *Penry v. Lynaugh*,<sup>335</sup> the Court even struck down, as applied to a retarded and abused offender, the closed, special-question system from Texas that it had upheld in 1976. The Court found that, although the evidence of retardation and abuse bore on the offender's culpability, the statutory questions did not allow the sentencer to consider it as mitigating.<sup>336</sup> The *Penry* decision served to reconfirm that the capital sentencer had to remain free to reject the death penalty based on almost any evidence the defendant offered about himself for any traditional penological purpose for which the defendant sought to have it considered.<sup>337</sup>

The Illinois system that would apply to Leopold and Loeb today typically allows this kind of expansive consideration of individuating circumstances. The general contours of the Illinois scheme coincide with those of the Florida system. To find an offender eligible for death, the sentencer must identify an aggravating factor from a statutory list.<sup>338</sup> To

[state's rule] would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*.

Id. at 7.

335. 492 U.S. 302 (1989).

336. Id. at 320-28.

337. See generally Bilonis, *supra* note 17, at 300-13 (noting that this expansive view of the individualization doctrine prevailed).

Some doubt perhaps arose regarding the Court's commitment when *Penry* produced only a five-Justice majority. Because the case came before the Court on federal habeas, however, it was plausible to think that a Justice could dissent in *Penry* but view the same case differently if it came before the Court on direct appeal. See *infra* note 360 (discussing the *Teague* doctrine's limitation on cognizability of claims on federal habeas appeal).

338. The statute contains twelve aggravating factors, a sample of which follows:

(1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

....

(4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

(5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

(6) the murdered individual was killed in the course of another felony if:

(a) the murdered individual:

(i) was actually killed by the defendant, or

(ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally accountable . . . and the physical injuries inflicted . . . caused the death of the murdered individual; and



sentence an eligible offender to death, the sentencer must then consider the sum of all aggravators and all mitigators with the aid of nonexclusive statutory lists<sup>339</sup> and conclude "that there are no mitigators sufficient to preclude the imposition of a death sentence."<sup>340</sup> Most death-penalty states currently employ this general approach for distributing death sentences among capital offenders.<sup>341</sup>

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual . . . , the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, aggravated criminal sexual assault, aggravated kidnapping, forcible detention, arson, aggravated arson, burglary, home invasion, calculated criminal drug conspiracy . . . or the attempt to commit any of the felonies listed . . . ; or

(7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

....

(9) the defendant, while committing [certain drug-related offenses], or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

....

(11) the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom . . . .

Ill. Comp. Stat. ch. 720, para. 5/9-1(b) (Supp. 1993).

339. For purposes of this secondary decision, the nonexclusive list of aggravators is the same as the exclusive list used in the first decision, *see supra* note 339, and the nonexclusive list of mitigators is as follows:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.

Ill. Comp. Stat. ch. 720, para. 5/9-1(c) (Supp. 1993).

340. *Id.* para. 5/9-1(g) & (h).

341. For a recent summary of capital sentencing systems focusing on the nature of states' efforts to delineate mitigating circumstances, see Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 *Yale L.J.* 835, 848-50 (1992).

Because they do not clarify the nature of the sentencing decision,<sup>342</sup> aggravator systems like the one used in Illinois allow capital offenders to urge their evidence on the sentencer for a variety of substantive purposes. If tried today, for example, Leopold and Loeb might argue the utilitarian significance of their psychosocial evidence; they might point to parts of it as grounds to believe they would not pose a danger of violence and could make a contribution to others if imprisoned rather than executed. They would surely also argue, as Darrow did, that the evidence bears on their culpability for the murder. Furthermore, if they had engaged in acts of valor or personal sacrifice, they could offer evidence of those acts as bearing on their "general deserts," a broad view of their overall deserts which encompasses their culpability for the murder.<sup>343</sup> At the same time, the prosecution could also offer evidence bearing on any of these issues.<sup>344</sup> The sentencer would then decide for itself what substantive standard to apply in resolving whether they should receive death sentences.

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342. As noted earlier, even systems like Florida's and Illinois' actually only narrow the pool of death-eligible candidates since the secondary balancing of aggravators and mitigators involves merely an illusion that the sentencer has been guided. See *supra* note 324 and accompanying text.

343. As discussed earlier, the *Lockett* standard has long been understood to allow the capital offender to present sentencing evidence about himself that relates to each of the three kinds of assessments noted in the text. See *supra* notes 330-37 and accompanying text.

344. In *Zant v. Stephens*, 462 U.S. 862, 891 (1983), the Court held that the prosecution could introduce at a capital sentencing trial evidence of the offender's record of assault convictions unrelated to the capital crime. A defendant's prior convictions do not increase his culpability for the capital offense. See *Howe*, *supra* note 19, at 352 n.114, and authorities cited therein; cf. Michael Davis, *Just Deserts for Recidivists*, 4 *Crim. Just. Ethics* 29 (1985) (contending that if we could assume each person were allocated a "fair share" of crime, retributive theory could justify charging criminals a "surcharge" for previous offenses in assessing the price to be paid for current offenses). *But see* U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, § 4A intro. commentary (1992) ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

The Supreme Court also has held that the Eighth Amendment does not prevent the prosecution from offering evidence on the utilitarian question of whether the defendant could be dangerous if sentenced to prison. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). The future dangerousness issue is, of course, explicitly a part of the sentencer's inquiry in some states. See *supra* note 325 (discussing the Texas system).

The boundaries of the prosecutor's authority to introduce evidence of the harm caused by the offender's capital crime as bearing on the offender's deserts has been much disputed. The controversy has focused on the introduction by the prosecutor of evidence of the victim's positive personal qualities and the loss and suffering experienced by others because of the victim's death. The Supreme Court first concluded in closely divided decisions that this kind of evidence was not relevant to the capital sentencing decision. See *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987). A five-Justice majority then overruled those decisions, holding that such evidence bears on the offender's culpability. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). For critical analysis of the reasoning employed by the *Payne* majority, see David R. Dow, *When Law Bows to Politics: Explaining Payne v. Tennessee*, 26 *U.C. Davis L. Rev.* 157 (1992); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 *Buff. L. Rev.* 85, 123-49 (1993). See also Steven G. Gey, *Justice Scalia's Death Penalty*, 20 *Fla. St. U. L. Rev.* 67, 120-32 (1992) (criticizing Justice Scalia's view that articulation of the victims' harm serves a legitimate role independent from moral guilt in determining the appropriate punishment).

Although the Illinois system would currently allow the sentencer of Leopold and Loeb to reject the death penalty based on their causal theory of excuse, some doubt exists about whether the Supreme Court will hold Illinois to that course in the future. Two Justices recently have concluded that the Court should rescind the individualization requirement. Justice Scalia adopted that view in 1990,<sup>345</sup> and he has continued to reiterate it in subsequent decisions.<sup>346</sup> Justice Thomas signalled his agreement during the Court's 1992 term.<sup>347</sup> Justice Scalia has alleged that the *Woodson/Lockett* mandate undermines *Furman's* command that states distribute death sentences nonarbitrarily.<sup>348</sup> He also has contended that the individualization mandate lacks an Eighth Amendment grounding.<sup>349</sup> Yet, it is the conflict with *Furman*, he has argued, that demands that he ignore the Court's numerous earlier decisions enforcing individualization.<sup>350</sup>

Justice Scalia's argument fails to the extent that it builds on asserting a conflict between *Furman* and *Woodson/Lockett*. The alleged conflict<sup>351</sup>

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345. See *Walton v. Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in judgment).

346. See, e.g., *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Scalia, J., concurring in denial of certiorari) (arguing that *Lockett-Eddings* principle violates command of *Furman*); *Johnson v. Texas*, 113 S. Ct. 2672 (1993) (Scalia, J., concurring) (same); *Sochor v. Florida*, 112 S. Ct. 2114, 2130 (1992) (Scalia, J., concurring) ("It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence . . .").

347. See *Graham v. Collins*, 113 S. Ct. 892, 914 (1993) (Thomas, J., concurring) ("[W]e are not now confronted with a mandatory sentencing provision, and I have no occasion here to flesh out my disagreement with the Court's prohibition of such schemes.").

348. See *Walton*, 497 U.S. at 672-73 (Scalia, J., concurring in part and concurring in judgment) ("My . . . fundamental problem . . . is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*."); *Johnson*, 113 S. Ct. at 2672 (Scalia, J., concurring) ("In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled.").

349. See *Walton*, 497 U.S. at 671 (Scalia, J., concurring in part and concurring in judgment). For more on the argument for demanding individualization under the Eighth Amendment, see *infra* notes 438-40 and accompanying text.

350. *Id.* at 673 (Scalia, J., concurring in part and concurring in judgment) ("*Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seems to me incompatible principles, I must reject the one that is plainly in error.").

351. Justice Scalia was not the first Justice to allege a "conflict" between the *Furman* and *Woodson/Lockett* decisions. The dissenting opinions in *Lockett* first articulated the notion that a "tension" existed between *Furman* and *Woodson/Lockett*. 438 U.S. at 630-31 (Rehnquist, J., dissenting); *id.* at 622-23 (White, J., dissenting). Justice O'Connor also has perceived a tension. See *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring). Other Justices have asserted more recently that such a tension exists. See *Callins v. Collins*, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting from denial of certiorari), and authorities cited therein.

There has been some recognition, however, that the idea of such a conflict builds on an ascription of meaning to *Furman* that the Court rejected when it upheld the Georgia and Florida systems in 1976—one that it has never since followed. See, e.g., *Howe*, *supra* note 19, at 413-17 (stating that the requirements of individualized consideration and the notion of guided discretion were created simultaneously); *Steiker & Steiker*, *supra* note 341, at 860-61 (stating the logical conclusion of Scalia's argument is that if *Woodson/Lockett* violate a principle compelled by the Constitution, then individualized sentencing must be banned); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147, 1188 (1991) (recognizing that overruling *Lockett* requires invalidating the Georgia statute approved in *Gregg*).

arises only if one ascribes a meaning to *Furman* that the Court has never followed. The Court abandoned in 1976 the notion that *Furman* forecloses expansive individualized consideration. This conclusion is supported as much by the Court's approval of the open-ended systems of Georgia and Florida as by its rejection of mandatory death penalties in *Woodson*. The Georgia and Florida systems posed no constraints, after identification of an aggravator, on the sentencer's ability to consider individuating circumstances based on any evidence presented by the parties.<sup>352</sup> Hence, to declare that *Furman* and the *Woodson/Lockett* doctrine collide is to ascribe a meaning to *Furman* that would logically compel the Court to invalidate all systems like those of Georgia and Florida. Justice Scalia does not want that outcome, though he has not offered a principled explanation by which he could avoid it.<sup>353</sup>

The Court's recent decisions, nonetheless, continue to raise questions about the Eighth Amendment explanation for the individualization doctrine. Several of the Court's decisions after *Penry* have opened the door to states to begin neutralizing the *Lockett* mandate. The Court has approved antisympathy instructions,<sup>354</sup> for example, through which states can suggest to sentencing jurors the irrelevance of a defendant's mitigating evidence.<sup>355</sup> The Court also has approved instructions to sentencers not to

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Of course, if the Court were to require states both to individualize capital sentencing as it has under *Lockett* and to distribute the death penalty in truly consistent fashion (as some believe the Constitution requires in a normative sense), the Court would have to declare the death penalty unconstitutional. See, e.g., *Callins*, 114 S. Ct. at 1138 (Blackmun, J., dissenting from denial of certiorari) (concluding on this basis that the death penalty is unconstitutional); *Steiker & Steiker*, supra note 341, at 866-68 (same).

I have argued elsewhere that a conflict exists in the Court's capital sentencing cases. It is not, however, a conflict between *Furman* and the *Woodson/Lockett* doctrine. It is, instead, a conflict between the basis for the individualization requirement (to ensure an assessment of offender deserts) and the Court's failure to require capital sentencers to assess offender deserts as a prerequisite to a death sentence. See generally *Howe*, supra note 19; see also infra notes 379-82 and accompanying text.

352. See Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 Alb. L. Rev. 225, 231-33 (1992) (noting that subsequent cases reveal *Furman's* command of "consistency" means nothing more than that the sentencer must identify a single aggravating circumstance as a prerequisite to a death sentence).

353. Justice Scalia recently has clarified that he recognizes the logical import of his contention. Nonetheless, that recognition has not stopped him from continuing to assert the "conflict" between *Furman* and *Woodson/Lockett* as a basis for rejecting the latter holdings. Instead, he has simply declared that he would not follow the implication of his argument to its logical conclusion:

In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider "all relevant mitigating evidence" is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled. That will continue to be true unless and until the sort of "channeling" of mitigating discretion that Texas has engaged in here is not merely permitted . . . , but positively required—a further elaboration of our intricate Eighth Amendment jurisprudence that I neither look forward to nor would support.

*Johnson v. Texas*, 113 S. Ct. 2658, 2672 (Scalia, J., concurring) (citation omitted).

354. See *Saffle v. Parks*, 494 U.S. 484 (1990).

355. An antisympathy instruction that is, as in *Saffle v. Parks*, unaccompanied by an instruction advising jurors that they can consider mitigating evidence for what it says

weigh a mitigating factor unless they find it established by a preponderance of the evidence.<sup>356</sup> The Court also has approved instructions in Florida-like systems that sentencers must return a death sentence after the balancing stage if they find aggravators to outweigh mitigators.<sup>357</sup> These recent decisions imply that states may substantially constrain how a sentencer considers the offender's evidence even if *Lockett* limits their ability to control what evidence the offender can offer. As Professor Sundby has noted, these decisions amount to a rearguard action aimed at giving states procedural controls through which to dilute the mitigating effect of evidence within *Lockett's* substantive protection.<sup>358</sup>

Two decisions from the 1992 Term concerning the Texas statute addressed in 1989 in *Penry* reflect an even more frontal assault on the *Lockett* mandate. In *Graham v. Collins*,<sup>359</sup> a federal habeas case, the petitioner had offered evidence that he had experienced a turbulent upbringing and that he had committed his crime when only seventeen.<sup>360</sup> In *Johnson v. Texas*,<sup>361</sup> the petitioner had offered evidence that he had committed his offense when only nineteen. In both cases, the petitioners argued that the evidence demonstrated reduced culpability for their crimes. The old Texas statute, however, as the Court had noted upon invalidating it on an

regarding a legitimate concern, such as offender culpability, may lead jurors to believe they should altogether ignore the mitigating evidence. See *id.* at 508 (Brennan, J., dissenting) (arguing that jury understood antisympathy instruction as a command to ignore mitigating evidence regarding defendant's background) (citing *California v. Brown*, 479 U.S. 538, 544-46 (1987) (O'Connor, J., concurring)).

356. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 650 (1990) (declining to adopt rule requiring state to negate evidence of mitigating circumstances by preponderance of evidence).

For an argument that capital sentencers should be required to reach the ultimate decision that death is the appropriate sentence or that aggravators outweigh mitigators by a high standard of proof, see Linda E. Carter, A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness, 52 Ohio St. L.J. 195 (1991) (arguing that due process should require proof beyond a reasonable doubt).

357. See, e.g., *Boyd v. California*, 494 U.S. 370, 374 (1990) (approving mandatory aspect of Pennsylvania death-penalty statute); see also *Blystone v. Pennsylvania*, 494 U.S. 299, 302-03 (1990) (approving mandatory aspect of Pennsylvania death-penalty statute).

358. See Sundby, *supra* note 351, at 1190-1206.

359. 113 S. Ct. 892 (1993).

360. Because *Graham* came to the Court on federal habeas, the Court applied the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), against enforcing a "new rule" to overturn a conviction or sentence that previously had become final. The majority concluded that *Graham's* claim was, on this basis, not cognizable to the extent that it relied on *Penry*. See *Graham*, 113 S. Ct. at 903. Nonetheless, the majority also did not accept the view that the *Lockett* and *Eddings* decisions, upon which *Penry* had rested and which had been announced before *Graham's* sentence had become final, warranted a holding for the defendant in *Graham*.

For critical analysis of *Teague* and its progeny, see David R. Dow, *Teague* and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants, 19 Hastings Const. L.Q. 23 (1991); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991); James S. Liebman, More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 537 (1990); Robert Weisberg, A Great Writ While It Lasted, 81 J. Crim. L. & Criminology 9 (1990).

361. 113 S. Ct. 2658, 2661 (1993).

as-applied basis in *Penry*,<sup>362</sup> did not include a question that allowed a sentencer to assess an offender's overall culpability.<sup>363</sup> The Court in *Graham* and *Johnson*, nonetheless, rejected the petitioners' claims that their juries' inability to consider their evidence of youth as bearing on their culpability required reversal. The same five-Justice majority<sup>364</sup> in each case noted that youth is transient, unlike the disabilities suffered by *Penry*.<sup>365</sup> Because the offenders would age if allowed to live, jurors could consider this evidence as mitigating under the second question on future dangerousness, since the evidence would tend to show that the petitioners would grow less dangerous.<sup>366</sup> Although the sentencer could not effectively consider the evidence regarding the offender's deserts, the majority asserted that the individualization decisions only required that the sentencer have the opportunity to consider a defendant's evidence for some mitigating purpose.<sup>367</sup> Further, the majority essentially ignored *Graham's* evidence regarding his turbulent upbringing, which the sentencer could not plausibly consider mitigating in any respect under the statutory questions.<sup>368</sup>

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362. *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989) ("[I]f a juror concluded that *Penry* acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence.").

363. For the questions presented to the jury under the old Texas statute, see *supra* note 325.

364. The Justices in the majority in each case were Rehnquist, White, Scalia, Kennedy, and Thomas.

365. See *Graham v. Collins*, 113 S. Ct. 892, 902 (1993); *Johnson v. Texas*, 113 S. Ct. 2658, 2669-70 (1993).

366. See *Graham*, 113 S. Ct. at 902; *Johnson*, 113 S. Ct. at 2670. *But see Graham*, 113 S. Ct. at 925 (Souter, J., dissenting) ("It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered under the second issue as aggravating, not mitigating.").

367. See *Graham*, 113 S. Ct. at 902; *Johnson*, 113 S. Ct. at 2666-68. *But see Graham*, 113 S. Ct. at 920, 925 (Souter, J., dissenting) ("The point under *Lockett*, *Eddings* and *Penry* is that sentencing schemes must allow the sentencer to give full mitigating effect to evidence . . ."; "The Eighth Amendment requires more than some consideration of mitigating evidence.")

[T]he Court squarely addressed [in *Penry*] the constitutionality of limiting the effect a Texas jury could give to relevant mitigating evidence, and, contrary to the majority opinion today, we plainly held that the Texas special issues violated the Eighth Amendment to the extent they prevented the jury from giving full consideration and effect to a defendant's relevant mitigating evidence.

*Johnson*, 113 S. Ct. at 2678 (O'Connor, J., dissenting).

368. On this point, the majority offered merely an *ipse dixit*: "Graham's evidence of transient upbringing . . . more closely resembles Jurek's evidence of age, employment history and familial ties than it does *Penry's* evidence of mental retardation and harsh physical abuse." *Graham*, 113 S. Ct. at 902. *But see id.* at 920 n.2 (Souter, J., dissenting) ("[D]espite their mitigating force, *Penry's* evidence of an abused childhood and *Graham's* evidence of an unfortunate background both have the same tendency to support only an affirmative answer to the future dangerousness special issue.").

The Texas Court of Criminal Appeals, the highest Texas court in capital cases, has concluded that most psychosocial evidence need not be considered regarding offender deserts. See, e.g., *Gunter v. State*, 858 S.W.2d 430 (Tex. Ct. App.) (concluding that since evidence of child abuse, disruptive family life, and emotional disturbance was held to be unrelated to propriety of death penalty, sentencer's inability to consider it regarding culpability did not violate Eighth Amendment), *cert. denied*, 114 S. Ct. 318 (1993); *Mines v. State*, 852 S.W.2d 941,

The Court's ambivalence about the *Lockett* mandate calls into question the constitutional function of evaluating capital offenders individually. Why, for example, should Illinois, were Leopold and Loeb tried today, require the sentencer to consider a presentation like Darrow's in deciding on the propriety of death sentences?<sup>369</sup> Particularly given the disagreement noted in Part II about when and why evidence of psychosocial composition bears on the sentencing decision, what is the Eighth Amendment explanation for such a mandate? I now turn to this problem.

#### IV. REEVALUATING INDIVIDUALIZATION AS AN EIGHTH AMENDMENT MANDATE

It is not obvious why the Eighth Amendment requires capital sentencer consideration of evidence the offender offers about himself as a prerequisite to a death sentence. To justify such a mandate, one must articulate a goal for the sentencing inquiry that encompasses consideration of such evidence and, of course, explains why pursuit of that goal coincides with the Supreme Court's proper role in interpreting the Eighth Amendment. This Part concludes that even the best constitutional rationale for such a mandate rests more on faith than on reason about the benefits of individualized consideration.

##### A. *The Goal of an Individualization Mandate*

Explaining the individualization mandate requires articulating a substantive issue to be resolved in a capital sentencing hearing. Unless the inquiry helps to resolve some question more specific than whether to sentence the offender to imprisonment or death, there appears no Eighth Amendment justification to demand it. Hence, explaining the individualization mandate requires one to define initially what the Constitution demands a capital sentencer to decide regarding a convicted capital offender as a prerequisite to imposing a death sentence.

The individualization mandate finds justification, if at all, in the need to avoid retributive excess in the use of the death penalty. The mandate

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951 (Tex. Ct. App. 1992) (finding "bipolar" or "manic-depressive" condition could be adequately considered under old statute although no opportunity afforded to consider it regarding overall culpability), *rev'd and remanded*, 114 S. Ct. 42 (1993).

369. Although the current Illinois statute seems to allow such a presentation, the question is not merely academic. The problem could arise even under the current statute. Assume that, as in 1924, a judge served as sentencer and, after hearing the defense evidence, ruled in the same words as Judge Caverly that the evidence was not entitled to consideration on the sentencing issue. See *supra* text accompanying note 295. Assume also, however, that the judge imposed a death sentence instead of granting a reprieve. During the heyday of the *Lockett* era, the defendants could have offered a respectable argument that the death sentences were improper. The judge's remarks could be understood as a declaration that he did not believe as a matter of law that he could consider the kind of evidence offered in reaching a sentencing decision, which would require reversal under *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (holding reversal of death sentence required where capital sentencing judge, referring to evidence of offender's turbulent upbringing and corporal discipline by father, stated: "Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background."). After *Graham* and *Johnson*, could the Illinois Supreme Court simply ignore such a statement, however, and affirm the death sentence?

must serve as assurance that only those who actually deserve the death penalty receive it. To relate this view to earlier discussion, the mandate must entail a conclusion that, in the death-penalty arena, the third premise underlying Darrow's position is true. Both moral blameworthiness and a level of blame commensurate with the capital sanction must precede a death sentence.<sup>370</sup> Further, the mandate must entail a conclusion that conviction of the capital offense does not alone establish the prerequisite level of deserts.<sup>371</sup>

A process of elimination alone can lead to the conclusion that assessing offender deserts must explain a mandate of individualized sentencing inquiry. First, individualized consideration by itself lacks any value. A punishment otherwise inappropriate does not become less so simply because the sentencer heard details about the offender and his offense. No capital sentencer that found a death sentence otherwise unwarranted would say that a death verdict becomes acceptable only because she listened to evidence about the offender and his crime. Individualization must find justification, if at all, as a means to some further end.

Individualized consideration also lacks significance except as a means for reaching a decision definable in a substantive way about which capital offenders are to be executed. One confronts difficulty, to say the least, explaining in other terms a value derivable from individualization. Could the Court properly declare individualization essential simply to ensure that the sentencer "appreciate[s] the humanity of the defendant and . . . recognize[s] . . . the gravity of the decision to impose the death penalty . . . ?"<sup>372</sup> Surely not. The Court could not appropriately assume that legislators devising mandatory death-penalty statutes do not comprehend that those statutes will apply to humans and that humans will die under them. Such a view of legislators is implausible. Furthermore, reference to this theory

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370. See *supra* notes 174-75, 217-25, 239-43 and accompanying text.

371. This means that, if individualization is required under the Eighth Amendment, courts in capital sentencing trials should ensure that the sentencer reaches this deserts assessment before imposing a death sentence. Trial courts should admit evidence only to the extent that it bears on the offender's deserts. Trial courts also should direct the capital sentencer to consider the evidence for what it says about offender deserts and not for other purposes, such as assessing the offender's future dangerousness.

The Eighth Amendment should, however, permit states to structure the capital sentencing inquiry to allow reprieves on nondesert grounds. On how states might do so, see *infra* note 378.

I have argued elsewhere that this goal of avoiding retributive excess explains the individualization mandate. See Howe, *supra* note 19, at 337-61.

Of course, defining what evidence bears on deserts is not necessarily easy. There is some doubt about whether the Court can identify even in general terms what evidence bears on a desert assessment and thus whether it should mandate individualization. See *infra* notes 410-21 and accompanying text. Assuming that individualization is justified, however, the Court apparently must define whether the broad desert inquiry focuses on the offender's culpability for the crime, on his general deserts based on all of his life works, or on both of these general measures. See *infra* note 442.

372. Steiker & Steiker, *supra* note 341, at 845 n.50 (noting, but not endorsing, this contention).



would not explain the sort of consideration due a capital offender.<sup>373</sup> How can the Court ascertain what evidence the sentencer should consider and in what ways except through a theory about the substantive nature of the inquiry? In the end, individualized consideration appears important, if at all, only as a means to reaching a decision definable in substantive terms about which capital offenders warrant execution.<sup>374</sup>

The question becomes what substantive purpose explains the need for a capital sentencing inquiry. The Court could not sensibly mandate a sentencing inquiry to resolve utilitarian issues. In general, utilitarian inquiries, such as whether a death sentence would save resources or marginally deter potential offenders,<sup>375</sup> call for judgments about how to draw categorical lines.<sup>376</sup> Resolving how to use the death penalty to maximize utilitarian ends would not necessarily require an expansive examination of facts surrounding the individual crime or offender. The individual case would demand consideration only to the extent of determining whether it would fall within the category defined as warranting a death sentence. Moreover, a legislature might incorporate the categorical lines in the definition of the capital crime, thus eliminating the need for a separate sentencing inquiry. Hence, if utilitarian purposes could justify a death sentence, the mandatory nature of the penalty would pose no difficulty. The Court might disagree with a legislature's judgment about how to define the mandatory category. A remedy, however, would call for new lines for the category, not for a sentencer to decide on the lines in each case after individualized inquiry.

The only sensible substantive purpose to attribute to an individualization mandate centers on assessing the offender's deserts. This view assumes that a finding of guilt even of capital murder does not clarify that the offender deserves the death penalty. The definition of a capital offense, it

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373. The sentencer need not consider everything about an offender or his offense in every possible way. We do not care, for example, about the color of the offender's hair. *Cf.* *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) ("[W]e have no quarrel with the statement of the Supreme Court of South Carolina that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination."). The Supreme Court also has concluded that the capital sentencer need not act with mercy or sympathy. *Cf.* *California v. Brown*, 479 U.S. 538, 542 (1987) (upholding trial court's instruction to sentencing jury "not to be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'"). *See* supra note 118 for a discussion of the concept of mercy as an extension of unwarranted leniency. Once one concedes these points, it becomes necessary to define how much and what kind of consideration the Eighth Amendment guarantees the offender.

374. For more on the basis for a broad inquiry into the offender's background as part of the individualized sentencing inquiry, see *infra* text accompanying notes 436-37.

375. *See* supra note 240 for other utilitarian issues that might be considered regarding the use of the death penalty.

376. This does not hold true for every utilitarian issue when considered separately. For example, determining the future danger posed by the offender requires an individualized look at the offender and his crime. Nonetheless, a legislature pursuing utilitarian ends could well conclude that the more static benefits of imposing death sentences, such as financial savings and deterrence of other potential offenders, warrant imposition of the capital sanction on all members of a certain category even though some of them might pose only negligible dangers of future violence. It is unapparent, moreover, why the Court should reject these conclusions unless it were simply to reject utilitarianism as a measure of the propriety of death sentences.

assumes, sweeps in offenders for whom the capital sanction might exceed just retribution. Despite guilt even of murder, particular circumstances about the crime and the offender might mitigate the offender's culpability. An inquiry into the offender's background and crime could, therefore, facilitate a judgment about warranted retribution. One could also conclude that a desert judgment requires consideration of enough variables to render it unincorporable in the definition of the crime.<sup>377</sup> On this view, a sentencing inquiry governed by a broad deserts standard becomes essential.<sup>378</sup>

The Court has not clarified the practical function that it perceives for the individualization mandate. In recent years, it has several times acknowledged that the deserts theory explains the mandate.<sup>379</sup> The Court, however, has not consistently followed that view. It has never held that the capital sentencer must find that an offender deserves death as a prerequisite to a death sentence, only that this course must remain open to the sentencer.<sup>380</sup> On one occasion, the Court also has required that the capital sentencer remain free to relieve the capital offender on nondesert as well as desert rationales.<sup>381</sup> Recent opinions by the Court even have approved practices that force the sentencer to render a death sentence without a desert judgment.<sup>382</sup> These decisions, however, reflect a failure to pursue a principled theory of individualization rather than the existence of a normative theory of individualization superior to the deserts paradigm.<sup>383</sup>

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377. That an offender, for example, was listening to antipolice rap music just before he shot and killed a highway patrolman might merit minor consideration. *See, e.g.*, *Killing of Police Officer Brings Death Sentence*, N.Y. Times, July 15, 1993, at A18 (noting that Texas jury sentenced to death 19-year-old Ronald Ray Howard, who claimed that such music had swayed him to shoot a state trooper to death). We might also want to know, however, the degree to which the offender was intoxicated, intellectually limited, emotionally disturbed, or upset by any conceivable victim provocation. Whether to spare the offender might depend on a myriad of complex and interrelated factors.

378. The proper approach, on this view, is to employ a special-question system that poses one or more required questions about the offender's deserts. Additional questions could cover other matters deemed appropriate by the particular state as bases for a reprieve from the capital sanction. *See* Howe, *supra* note 19, at 358-59, 394.

379. *See, e.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) ("[I]t 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.") (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

380. Decisions of the Court approving capital sentencing schemes that impose no boundaries on the exercise of sentencer discretion once the sentencer identifies an aggravating circumstance conflict with the notion that the sentencer must consider only what sentence the offender deserves. For a discussion of some of those decisions, see *supra* text accompanying notes 318-24.

381. *See* *Skipper v. South Carolina*, 476 U.S. 1, 5-7 (1986) (holding that evidence is admissible to show defendant's likely good adjustment in prison if incarcerated rather than executed).

382. *See* *supra* notes 359-68 and accompanying text (discussing the *Graham* and *Johnson* decisions).

383. For an argument, however, that the Court's capital sentencing decisions, including those defining the *Lockett* principle, can be thought to rest on a legitimate balancing methodology, see Louis D. Bilionis, *Legitimizing Death*, 91 Mich. L. Rev. 1643, 1658-60

The Court also has sometimes pointed to rationales other than the desert theory to explain the function of individualization, but those rationales are unpersuasive. The Court has sometimes cited an "equality" rationale, contending that failure to individualize capital sentencing would treat all capital offenders alike when significant differences exist among them.<sup>384</sup> An equality contention alone is no explanation for individualization, however, because it does not contain the substantive component by which to judge which differences among convicted, capital offenders matter. Unless one can specify a normative standard for distinguishing among offenders, one cannot legitimately complain of inequality in their uniform treatment. The Court also has contended that failure to individualize capital sentencing would produce "arbitrariness" in the distribution of death sentences, in violation of *Furman*, because juries frequently would acquit guilty defendants of capital charges.<sup>385</sup> This argument fails, however, principally because such speculations about "arbitrariness" pale compared to the "arbitrariness" that the Court began sanctioning when it authorized the open-ended, capital sentencing schemes in 1976.<sup>386</sup> Some language in the Justices' opinions also perhaps implies that individualized consideration produces a benefit in the nature of underscoring the offender's humanity.<sup>387</sup> Yet, the Court has not elaborated on this idea, and as already noted, such a benefit appears far too ethereal to justify overriding legislative judgments favoring mandatory systems.<sup>388</sup>

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(1992).

384. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.).

385. See *id.* at 302-03.

386. See, e.g., *Woodson*, 428 U.S. at 314-16 (Rehnquist, J., dissenting); see also *supra* notes 319-24 and accompanying text (discussing the Georgia and Florida systems that the Court approved in the 1976 cases).

"Arbitrariness" as an operative term in the Court's capital sentencing jurisprudence appears to mean only the failure to impose any limits whatsoever on the sentencer's discretion to impose a capital sanction. The Court's decisions imply that imposing even a minimal narrowing of the group subject to standardless, capital sentencing, renders the process sufficiently nonarbitrary to pass constitutional muster. See *supra* notes 319-21 and accompanying text. If this approach solves the "arbitrariness" problem, however, it is unapparent why the possibility that some jurors might acquit some guilty offenders under a mandatory system would qualify as undue "arbitrariness." Of course, the more commonly understood definition of "arbitrariness" would connote the risk that selection of a group to be executed "will not be based on any consistent normative criteria—that those chosen for execution will be indistinguishable from the rest on any legally appropriate basis." Samuel R. Gross & Robert Mauro, *Death and Discrimination* 4-5 (1989). Under this view, the occurrence of reprieves through nullifications could produce arbitrariness. Yet, even more obvious arbitrariness would seem to result from the use of a sentencing system, like those approved by the Court, that lacked any legal standards to guide the sentencer to a final decision. *But see* Sundby, *supra* note 351, at 1173-74 (suggesting that there may be something "even more arbitrary" about decisions that involve defiance of the law than decisions made in a system without legal standards).

387. See *Woodson*, 428 U.S. at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

388. See *supra* notes 372-74 and accompanying text.

In the end, the desire to avoid retributive excess is essential to explain the individualization mandate. Unless the sentencing inquiry focuses on whether the offender deserves death, there appears no reason for the Court to require it. Of course, the deserts theory does not clarify when evidence about the offender weighs against a death sentence.<sup>389</sup> The point is, however, that the individualization mandate could not sensibly build on any other rationale.

### B. *The Role of the Court in Mandating Individualization*

Before endorsing a mandate of individualized capital sentencing, one should address a second problem: that the inquiry could be thought helpful in assessing offender deserts does not mean the Court should require it. One must also consider whether the Eighth Amendment warrants the Court's demand of individualization. The argument that the Eighth Amendment so requires is more difficult than proponents of individualization have let on.

The Court's proper role in regulating capital sentencing procedure under the Eighth Amendment<sup>390</sup> has been disputed since *Furman*.<sup>391</sup> Over dissent,<sup>392</sup> the Court has concluded that the amendment conveys the authority to proscribe excessive punishments, not merely punishments barbaric in form.<sup>393</sup> The Court's excessiveness analysis in the noncapital context reflects extreme deference toward governmental pursuit of non-retributive goals.<sup>394</sup> A death sentence infringes this protection, however,

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Recent commentary has suggested the possibility of viewing an individualization mandate as something other than a means for pursuing a substantive standard defining which capital offenders should receive a death sentence. See Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 *Hous. L. Rev.* 493 (1992) (contending that the Court has viewed individualized consideration as something our society would accord anyone worthy of humane treatment and, for that reason, required by the Eighth Amendment).

389. See *supra* note 344.

390. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

391. See generally Phillip E. Johnson, *Cruel and Unusual Punishment*, in 2 *Encyclopedia of Crime and Justice* 575, 575 (Sanford H. Kadish ed., 1983) ("The history of the clause provides no conclusive answer to the recurring question of whether its American authors meant only to bar certain barbarous punishments altogether or whether they also meant to ban penalties, not unlawful *per se*, that are disproportionate to the crime.")

392. Justice Thomas, for example, has only recently asserted that "the better view is that the Cruel and Unusual Punishment Clause was intended to place only substantive limitations on punishments, not procedural requirements on sentencing." *Graham v. Collins*, 113 S. Ct. 892, 909 (1993) (Thomas, J., concurring). This view has had other proponents both among the Justices and in the academic community. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 371 (Rehnquist, J., dissenting) (stating that the prohibition of the Eighth Amendment relates to the character of the punishment and not to the process by which it is imposed); Raoul Berger, *Death Penalties: The Supreme Court's Obstacle Course* 44-49 (1982).

393. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (death as a sanction for rape constitutes retributive excess and therefore violates Eighth Amendment).

394. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence without parole for possession of slightly more than 650 grams of cocaine).

whenever it amounts to clearly excessive retribution.<sup>395</sup> The distinction drawn builds on the view that death differs qualitatively from all other punishments.<sup>396</sup> This excessiveness analysis also suggests how possibly to justify the individualization mandate. A death penalty deemed undeserved when measured not simply against the definition of the crime but against particular features of the offender and the offense could violate the Eighth Amendment. On that view, a sentencing inquiry that allows consideration of the defendant's background, character, and crime could perhaps help to avoid retributive excess.

One can still question, however, whether a mandate of individualized inquiry coincides with the Court's proper role in interpreting the Eighth Amendment. The Court has concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>397</sup> While this statement surely would "make an originalist's skin crawl,"<sup>398</sup> the Court generally has followed an interpretive approach that closely confines its role in reviewing punishments, including capital sentences, under the amendment. Other than fleeting pursuit of what was arguably an antidiscrimination ideal in *Furman*,<sup>399</sup> the Court has largely restricted itself in the death-penalty context (apart from mandating individualization) to enforcing only certain humanitarian norms so evident as to find support in an enduring societal consensus.<sup>400</sup> The Justices have

395. See Dressler, *supra* note 217, at 39-40 (noting that the Court's decision to outlaw the death penalty for rape in *Coker* was based on a theory of excessive retribution).

396. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion).

397. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

398. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. Rev. 1, 10 (1991).

399. After *Furman*, the Court ostensibly pursued a "nonarbitrariness" theory in decisions requiring that states articulate individual aggravating circumstances that narrow the group of persons eligible for the death penalty. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Given the Court's failure to require that a state's combination of aggravating circumstances substantially narrow the death eligible population, however, these holdings do little to respond to inequality. See, e.g., David C. Baldus et al., *Equal Justice and the Death Penalty* 102 (1990) (a monumental study concluding that 90% of Georgia cases involving death sentences in pre-*Furman* Georgia system would include at least one of the aggravating factors in the post-*Furman* Georgia system). Cf. *Walton v. Arizona*, 497 U.S. 639, 665 n.\* (1990) (noting that the Court's post-*Furman* jurisprudence does not indicate how much narrowing the aggravating circumstances in a system must achieve). One can also doubt that standards that narrow the group eligible for the death penalty foster equality. See, e.g., Ronald J. Allen, *Foreword: Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. Crim. L. & Criminology 727, 736-37 (1991) (noting that, even assuming one could understand what is an "arbitrary" decision, while the absolute number of "arbitrary" death sentences in the overall system might be reduced depending on the number of cases processed, the number of "arbitrary" life sentences could increase and the proportion of "arbitrary" decisions by sentencers could remain the same).

400. Some have criticized the societal-consensus approach as a methodology for constitutional interpretation. See, e.g., John H. Ely, *Democracy and Distrust* 63-69 (1980) (arguing that, as between courts and legislatures, "the latter are better situated to reflect consensus"). However, if understood as a requirement that judges, in interpreting the more open-ended provisions of the Constitution, attempt to discern and pursue the community's deeper values, this approach appears the most appropriate for the Court to follow in its necessary task of articulating moral values. See, e.g., Richard H. Fallon, Jr., *Of Speakable Ethics and Constitu-*

articulated widely disparate versions of how to measure societal consensus and of what depth of moral principle to search for it.<sup>401</sup> The showings made in cases in which the Court has proscribed use of the death penalty, however, have included evidence from the legislative and judicial processes that societal members generally oppose the capital sanction in the relevant circumstances.<sup>402</sup>

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tional Law: A Review Essay, 56 U. Chi. L. Rev. 1523, 1543 (1989).

401. At one extreme within the Court, Justices Brennan and Marshall advocated abolishing the death penalty altogether on a societal-standards rationale despite evidence of much legislative and popular support for the death penalty. They believed that legislatures and the citizenry could sometimes fail accurately to apprehend society's morality. See *Furman*, 408 U.S. at 257-306 (Brennan, J., concurring) (arguing that legislatures and citizenry were mistaken in support of death penalty as measured by society's deeper moral principles rather than then-prevailing expressions of morality); *id.* at 314-74 (Marshall, J., concurring) (arguing that citizenry's support for death penalty reflected largely uninformed view about its use and that adequately informed public would oppose the sanction). At the other extreme, some Justices have argued that the Court should only find a societal consensus when revealed by legislation and actions of sentencers. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 378-79 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.) (arguing that society's disapproval of death penalty must be reflected by objective examination of laws and sentencer determinations and, on that view, death penalty not proscribed for those whose offenses occurred when they were 16 or 17).

402. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (death penalty impermissible for one guilty of felony murder who neither intended to, attempted to, nor actually killed); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion) (death as a sanction for rape violates societal consensus and thus Eighth Amendment); *cf. Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989) (execution of mentally retarded persons does not violate a sufficiently clear societal consensus to infringe Eighth Amendment); *Stanford v. Kentucky*, 492 U.S. 361, 370-74 (1989) (concluding that because no societal consensus exists against it, imposition of the death penalty on 16-year-old offenders does not violate Eighth Amendment); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (death penalty permissible for one guilty of felony murder who neither intended to, attempted to, nor actually killed, as long as defendant was major participant in felony and exhibited reckless indifference to human life).

Although a four-Justice plurality has concluded that objective evidence of a societal consensus against the death penalty based on legislative and judicial actions is essential to proscribe the penalty, see, e.g., *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White, J., and Kennedy, J.); *Stanford*, 492 U.S. at 369-70 (plurality opinion); a majority of the Justices has never taken that position. Other Justices have also considered whether the death penalty violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" or because it is "grossly out of proportion to the severity of the crime." *Penry*, 492 U.S. at 335 (opinion of O'Connor, J.) (quoting *Coker*, 433 U.S. at 592); *id.* at 343 (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.); *id.* at 350 (Stevens, J., concurring in part and dissenting in part, joined by Blackmun, J.). Nonetheless, at least for one Justice among this latter group, Justice O'Connor, a finding of disproportionality under these tests appears highly unlikely without a finding that public attitudes are opposed to the death penalty in the relevant context. Justice O'Connor has contended that resolution of these inquiries should take heavy account of the search for objective evidence of societal consensus. See *id.* at 335 (noting that the second inquiry also depends "largely on objective evidence such as the judgments of legislatures and juries"). Further, given that "the 'objective' public attitudes relied on . . . are comprised of opinions tempered by institutional deliberation and debate and often expressed publicly, they are especially likely to be based on reasoned justification" in retributive terms. 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, 817-18 (1978).

A mandate of some individualized consideration for those for whom the death penalty is not outlawed—those guilty of murder<sup>403</sup>—arguably rests on a principle embodied in societal consensus. The existence of a societal view favoring some individualization finds support in the historical evidence of states' capital sentencing practices. As the 1976 plurality noted when it struck down mandatory death sentences, death-penalty states consistently moved away from mandatory death statutes, even for murder, beginning in the early nineteenth century.<sup>404</sup> This trend apparently stemmed both from humanitarian concerns and from concern over the problem of jury nullifications—jury acquittals of obviously guilty capital offenders to spare them from the death penalty.<sup>405</sup> The movement did not necessarily establish that mandatory death penalties always violated societal values, no matter how narrowly defined the capital crime. However, at least for simple murder, one could plausibly conclude that the trend reflected a general view that sentencers ought to assess more particularities of the case before imposing a death sentence.<sup>406</sup>

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403. Some qualification is necessary as revealed in the preceding footnote. The Court's decision in *Tison*, 481 U.S. at 152, did not entirely overrule the holding in *Enmund*, 458 U.S. at 782, 798, which stated that a few offenders on the fringe of the felony-murder category are not subject to the death penalty. The Court's decision in *Coker*, 433 U.S. at 584, also implied that the death penalty was impermissible except for a crime involving a loss of human life but did not clearly foreclose the use of the death penalty for certain nonmurder offenses, such as treason with the enemy during war.

404. See *Woodson v. North Carolina*, 428 U.S. 280, 292-301 (1976).

405. For an argument that the nullification problem was part of the motivation for the movement in some jurisdictions, see Philip E. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. Rev. 32 (1974). *But see* Poulos, *supra* note 314, at 150 n.73 (noting lack of evidence that concern over nullification was part of the motivation for the legislature of Tennessee, the first state to make the death penalty discretionary for first-degree murder).

406. At common law, murder was the unlawful killing of another human with "malice aforethought." The term, "malice aforethought," conveyed several mental states: (1) an intent to kill, (2) an intent to grievously injure, (3) knowledge and possibly imputed knowledge that an act or omission would probably cause death or grievous injury to another, or (4) an intent to commit a felony. See LaFave & Scott, *supra* note 249, at 605-07, 611-42. To establish "malice aforethought," the prosecution also had to prove, when there was some evidence to the contrary, the absence of circumstances that would reduce the crime to voluntary manslaughter, namely a heat of passion in the defendant caused by provocation from the victim. See Phillip Johnson, *Criminal Law* 159 (4th ed. 1990).

Shortly after the founding, states began dividing murder into degrees. The first to do so was Pennsylvania in 1794 with the following statute.

[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate an arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.

*Schad v. Arizona*, 111 S. Ct. 2491, 2502 n.8 (1991) (quoting 1794 Pa. Laws, ch. 1766 § 2). See generally Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759 (1949). Most American jurisdictions that later divided murder into degrees included two of the three general kinds of murder defined as first-degree murder in the original Pennsylvania statute as first-degree murder in their statutes—premeditated, deliberated murder and felony murder based on enumerated felonies. See LaFave & Scott, *supra* note 249 at 642.

One might feasibly go further by asserting a societal consensus that the mandated inquiry should focus on offender deserts. The idea that only those who deserve the death penalty should receive it conforms with oft-cited principles of justice.<sup>407</sup> On this basis, one perhaps could conclude that the trend toward discretionary capital sentencing stemmed from a sense of need to distinguish the deserts of capital offenders. This amounts to a conclusion that a consensus exists that the third premise underlying Darrow's position is true in the capital context, so that moral blameworthiness and a level of blame commensurate with the capital sanction should precede a death sentence.<sup>408</sup>

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By 1972, many death-penalty states also came to apply the death penalty to murders only of the first degree, though not a sufficiently large proportion to reveal a consensus against imposing a death sentence on one convicted of simple murder. *See, e.g.*, Poulos, *supra* note 314, at 203, 215, 216 (revealing that of the 22 states adopting mandatory death penalty after *Furman*, 14 had divided murder into degrees in the pre-*Furman* era).

The Court has clarified that mandatory death penalties even for aggravated, first-degree murder violate the Eighth Amendment. *See, e.g.*, *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating mandatory death penalty statute applicable to life-term inmate who murders). The question whether prohibition of a mandatory death penalty in such cases finds justification in the Eighth Amendment coincides with the question I later address about whether the Court has been justified in defining broad evidentiary boundaries for the individualization inquiry. *See infra* notes 409-410 and accompanying text.

407. *See, e.g.*, authorities cited *supra* note 223.

408. *See supra* text accompanying notes 174-75, 217-25, 239-43.

Chief Justice Burger viewed this as the best interpretation of the movement toward discretionary capital sentencing. *See Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting) ("[T]he 19th century movement away from mandatory death sentences . . . recognized that individual culpability is not always measured by the category of the crime committed."); *Lockett v. Ohio*, 438 U.S. 586, 600 (1978) (plurality opinion of Burger, C.J.) (describing the pre-*Furman* effort as one of "individually assessing the culpability of each individual defendant convicted of a capital offense"). *See also* Joel F. Handler, *Background Evidence in Murder Cases*, 51 J. Crim. L., Criminology & Pol. Sci. 317, 326 (1960) ("[The discretionary systems] were designed to prevent jury nullification and were an expression on the part of the legislature that different degrees of moral turpitude deserved different punishments.") (citation omitted).

The Justices dissenting from the Court's rejection of the mandatory statutes in 1976 doubted that the historical evidence revealed even a societal consensus against mandatory statutes. The dissenters argued that, because states uniformly required unanimity among jurors for conviction, the decision to make the death penalty discretionary may only have reflected a response necessary because of some maverick jurors. *See Woodson v. North Carolina*, 428 U.S. 280, 312-13 (1976) (Rehnquist, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 362 (1976) (White, J., dissenting). As the *Woodson* plurality pointed out in 1976, however, acquittals also required unanimity, and states typically excluded from juries in capital cases persons with strong reservations about capital punishment. *See Woodson*, 428 U.S. at 302 n.36. Hence, it was not easy to attribute the nullification problem to a few, extreme jurors.

For an interpretation that differs from either of these, see Poulos, *supra* note 314, at 154, contending that the discretionary systems could at first have been viewed as merely a means for providing "a benefit, mercy," to persons actually thought to deserve the death penalty but that the view of them changed by the 1960s when so few capital offenders received death sentences and executions halted. The petitioners in *McGautha v. California*, 402 U.S. 183 (1971), put forward this view in arguing that the unfettered discretion conferred on capital sentencers amounted to an arbitrariness that violated the Due Process Clause of the Fourteenth Amendment. *See Poulos, supra* note 314, at 204-05.



At some point too soon for proponents of the individualization mandate,<sup>409</sup> however, pursuing the societal-consensus approach causes problems. The trouble stems from the argument that the societal consensus ought to go "all the way down."<sup>410</sup> That is, if a societal consensus must support the mandate of a separate, sentencing inquiry in murder cases and the focus on deserts, it should also undergird any mandate about the evidence and arguments states must allow murderers to present and capital sentencers to consider as a basis for reprieve. Does a societal consensus support the need for broad inquiry into the murderer's background, character, and crime and consideration of a deterministic argument like Darrow's? Likewise, if the capital offense has been defined narrowly to include only certain forms of aggravated murder, does a societal consensus support the need for consideration of more particularities of the offender and offense?<sup>411</sup>

The pre-*Furman* trend toward discretionary capital sentencing does not necessarily reveal a consensus about the mitigating value of a broad sphere of evidence.<sup>412</sup> First, the statutes implementing discretionary sentencing rarely stated what evidence legislatures intended capital sentencers to consider.<sup>413</sup> Further, the jury nullification problem itself, which allegedly helped spur the trend, did not expose the nature of proper inquiry. Indeed, it is not even possible to know how often nullification reflected juror objections "1) to the [death penalty] itself, or 2) to the use of the punishment for the particular crime proved, or 3) to the use of that punishment for the particular offender."<sup>414</sup> Hence, the evidence surround-

409. See *supra* notes 326-27 and accompanying text.

410. Nozick, *supra* note 216, at 225.

411. It is essential to establish a need for broad inquiry to explain the Court's failure to defer to legislative judgments on how to determine deserts. See *supra* notes 326-27 and accompanying text.

412. Practices from the post-*Furman* era cannot provide a guide as to what evidence was necessarily admissible and for what purposes, because states were attempting to comply with Supreme Court dictates. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting) ("Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems 'cruel and unusual' to look solely to what legislatures have *refrained* from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment?").

413. See, e.g., Robert E. Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1108 (1953) (noting that the statutes were not useful on this issue). Some statutes enacted before *Furman* provided very general guidance. See, e.g., Tex. Penal Code Ann. § 1257a (Vernon 1936) (allowing defendant in capital case to introduce as bearing on punishment all relevant facts bearing on "condition of mind" of defendant "at the time of the homicide") (quoted in Handler, *supra* note 408, at 321 n.41).

A few states, between 1957 and 1972, enacted statutes mandating bifurcated hearing procedures to determine guilt and punishment in capital cases. See *infra* note 415. These statutes included general references to the evidence relevant to punishment, though often in extremely vague terms. See Note, California and Pennsylvania Courts Divide on Question of Admissibility of Details of Prior Unrelated Offenses at Hearing on Sentencing Under Split Verdict Statutes, 110 U. Pa. L. Rev. 1036, 1038-39 (1962) (noting differences in relevant language in two statutes).

414. Poulos, *supra* note 314, at 149.

ing the legislative movement did not clarify what evidence, if any, was thought relevant to the punishment question.

Sentencing practices in capital cases before *Furman* also fail to reveal a societal consensus demonstrating the mitigating value of a broad sphere of evidence about the offender and his crime. Up to the time of *Furman*, despite a developing trend toward bifurcated proceedings allowing broad inquiry, most states still employed unitary capital trials at which both parties submitted all of their evidence before the jury decided the guilt-or-innocence question.<sup>415</sup> At one extreme, several states, emphasizing that the question was only whether to exercise mercy, disallowed evidence by the defendant that related solely to punishment, which effectively foreclosed most evidence about the offender's psychosocial constitution unless it was admitted on a defense to the capital charge.<sup>416</sup> At the other extreme, one state supreme court authorized the offender to present even a full psychosocial summary of his life to support the kind of deterministic thesis that Darrow had urged in *Leopold-Loeb*.<sup>417</sup> In the middle, appellate-court opinions in several states began affirming the relevance to punishment of particular forms of evidence regarding the defendant's psychosocial composition although it did not establish a defense to the capital charge, such as motive, provocation, mental defect, or drug use.<sup>418</sup> However, even in these states, generally few appellate opinions appeared on the topic by the time of *Furman*, leaving the relevance rules regarding mitigation evidence

415. The unitary trial often presented problems for defendants who wanted to present for punishment purposes psychosocial evidence explaining their crimes but who did not want such evidence considered in deciding their guilt. *See infra* note 420. Problems also arose when the prosecution wanted to introduce the defendant's criminal record as bearing on punishment, because this evidence generally would unduly prejudice the jury's decision on guilt. *See Handler, supra* note 408, at 327.

The bifurcation movement began with California in 1957, followed by Pennsylvania in 1959. *See Note, supra* note 413, at 1038-39. By 1969, Connecticut, New York, and Texas also had adopted bifurcated systems. *See Project, A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 *Stan. L. Rev.* 1297, 1307 & n.10, 1432-38 (1969). Georgia, in 1970, established a separate penalty hearing at which the prosecutor could introduce evidence of the defendant's criminal record. *See Baldus et al., supra* note 399, at 8 n.\* (1990). Shortly before *Furman*, Florida also adopted a bifurcated scheme under which both parties could introduce evidence relevant to punishment at a separate hearing. *See Ashley v. State*, 265 So. 2d 685, 692 (Fla. 1972) (noting the passage of the new statute).

416. *See, e.g., State v. Kruchten*, 417 P.2d 510, 52425 (Ariz. 1966), *cert. denied*, 385 U.S. 1043 (1967); *Foster v. State*, 52 N.E.2d 358, 359 (Ind. 1944); *Ashbrook v. State*, 197 N.E. 214, 216 (Ohio Ct. App. 1935); *State v. Schlaps*, 254 P. 858, 862-63 (Mont. 1927); *Goosby v. State*, 112 S.E. 467, 467 (Ga. 1922).

This also appeared to be the rule followed in Massachusetts, *see Commonwealth v. McNeil*, 104 N.E.2d 153, 156-57 (Mass. 1952), though dicta in a footnote in a later case called for some exception regarding testimony by psychiatrists about mental illness. *See Commonwealth v. McHoul*, 226 N.E.2d 556, 560 n.6 (Mass. 1967).

417. *See State v. Sikora*, 210 A.2d 193, 198, 203 (1965) (declaring admissible for capital sentencing purposes evidence from psychiatrist aimed at showing that defendant was "a helpless victim of his genes and his lifelong environment; that unconscious forces from within dictate the individual's behavior without his being able to alter it"). *See also Handler, supra* note 408, at 319-20 n.31, and authorities cited therein (discussing decisions from Pennsylvania authorizing capital defendant to introduce mitigating evidence on punishment).

418. *See Knowlton, supra* note 413, at 1116-17 nn.105-10, and authorities cited therein; *Liebman & Shepard, supra* note 402, at 801-805 nn.192-212 and authorities cited therein.

somewhat uncertain.<sup>419</sup> Furthermore, in several death-penalty jurisdictions, judicial opinions revealed no relevance rules regarding mitigation evidence, emphasizing only that the question for the sentencer was whether to exercise mercy.<sup>420</sup> Thus, the nature of the capital sentencing inquiry before 1972, while expanding, remained too unsettled to establish a clear societal consensus about the need to conduct a broad deserts inquiry.<sup>421</sup>

The discussion in Part II also suggested the absence of an obvious, societal consensus about what evidence bears on the capital sentencing decision. The individualization mandate requires a conclusion that, in the death-penalty context, a consensus exists that the third premise underlying

419. Cf. Handler, *supra* note 408, at 323-24 (noting that the appellate court decisions indicating the relevance of "background" evidence were unusually vague, justifying exercise of discretion by trial courts to exclude parts of defense evidence "where the probative value of the evidence is outweighed by the cost of undue consumption of time or the threat of confusion of issues, prejudice, or surprise").

420. Examples include Mississippi and South Carolina, in which the death penalty was widely employed in the pre-*Furman* era. See, e.g., *Capler v. State*, 237 So. 2d 445, 450 (Miss. 1970), *vacated* 408 U.S. 937 (1972); *Thomas v. Leeke*, 186 S.E.2d 516, 518 (S.C. 1970), *rev'd* 403 U.S. 948 (1971).

The unitary trial procedure may have caused many capital defendants to avoid presenting psychosocial evidence that helped explain their crimes but that would not make out a defense to the capital charge. This contention formed part of a challenge to the unitary systems brought in the Supreme Court shortly before *Furman*. See Brief for Petitioner at 66-78, *Maxwell v. Bishop*, 398 U.S. 262 (1970) *overruled by* *Valle v. State*, 474 So. 2d 796 (Fla. 1985); see also *McGautha v. California*, 402 U.S. 183, 211-23 (1971). In any event, the question of what evidence offered by the defense beyond that relevant to guilt or innocence bore on the capital sentencing decision produced relatively few appellate decisions.

In some states, courts may have expanded the scope of the sentencing hearing when the defendant pled guilty. Judge Caverly seemingly took this view initially in the *Leopold-Loeb* case. See *supra* notes 294-95 and accompanying text. If death-penalty states had followed that practice widely, one might plausibly contend that the restrictions in contested-guilt cases would not indicate the deeper societal consensus about what evidence bore on the punishment decision. One might plausibly argue that the restriction only arose as a concomitant to a restriction placed on the prosecution against introducing prior-crimes evidence at the unitary proceeding.

421. As previously noted, see *supra* note 401, differing views exist about how to gauge public attitudes. However, as for the relevance of views concerning the importance of mental disorder in noncapital sentencing, it is worth noting that the federal sentencing guidelines presently do not account for mental disorder in noncapital sentencing except in restrictive circumstances involving nonviolent offenders. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, § 5K2.13 (1992):

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public."

See also *United States v. Adonis*, 891 F.2d 300, 303 (D.C. Cir. 1989) (reversing downward departure by sentencing judge based in part on defendant's "somewhat limited mental capacity," noting that downward departure requires much more than this). Further, evidence that state executives sometimes cite mental defects short of insanity as a basis for commutation decisions in capital cases is as consistent with societal discord as with societal consensus about the relevance of evidence of mental disorder to capital sentencing.

On clemency and pardon practices generally and in capital cases particularly, see *Clemency and Pardons Symposium*, 27 U. Rich. L. Rev. 177 (1993).

Darrow's position is true, so that both moral blameworthiness and a level of blame commensurate with the capital sanction must precede a death sentence. Nonetheless, the discussion in Part II revealed discord, not agreement, among theorists about whether or why we should reject one of the first two premises underlying Darrow's argument. That discord implied disagreement about how we separate blameworthy from nonblameworthy wrongdoers and how to scale the blame of those we deem blameworthy.<sup>422</sup> The problem of identifying a satisfying theory to explain how to judge the deserts of wrongdoers raises questions about the existence of a consensus regarding what evidence bears on the deserts of a murderer.

Addressing the propriety of defense counsel's use in summation of the deterministic argument against punishment further underscores the difficulty of supporting a broad, individualization mandate on a societal consensus rationale. Defense lawyers continue to use deterministic arguments in capital sentencing trials,<sup>423</sup> and Professor Welsh White has argued that states should allow them.<sup>424</sup> He has contended that they are a concomitant of the right to present and to have the sentencer free to reject the death penalty based on psychosocial evidence.<sup>425</sup> The individualization proponent need not think hard to anticipate the problem raised by this contention. Of course, the individualization proponent might consider rejecting Professor White's conclusion by distinguishing a rule that protects sentencer consideration of psychosocial evidence from one that protects sentencer consideration of a deterministic argument against punishment. Declaring the deterministic argument unprotected, however, logically raises the question of what sort of argument from psychosocial evidence the Eighth Amendment guarantees. Answering this question essentially involves explaining, consistent with societal consensus, when and why psychosocial evidence weighs against a capital sanction. The answer appears indiscernible or, at least, undiscerned. Yet, the individualization proponent cannot sensibly declare the deterministic argument improper but declare proper any other reprieving argument based on the psychosocial evidence that posits some limited, partial excuse. The combination of those reprieving arguments would cover all murderers, because a limited, partial excuse can always be asserted to cover the individual defendant. This only suggests, however, that Professor White may be right that *Lockett* should be interpreted to allow the deterministic argument. The problem for the individualization proponent then materializes—the undoubted lack of societal consensus that determinism is true and that it undermines the imposition of punishment.<sup>426</sup>

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422. See *supra* notes 169-293 and accompanying text.

423. See White, *supra* note 18, at 105-06.

424. See *id.* at 107-08 (stating that "counsel should be permitted to adopt a deterministic view of human behavior").

425. See *id.* at 107 (contending that they are authorized by the *Lockett* decision).

426. Some have suggested that such arguments are inappropriate. See, e.g., Knowlton, *supra* note 413, at 1118-19 ("Counsel may not . . . condemn the use of capital punishment in all cases, . . . because such arguments tend to discourage the jury from carrying out their duty and thereby tend to negate the policy of the statute.").

One might consider concluding that the Court need not follow a societal-consensus analysis after all and, free of that constraint, could justify a broad, individualization requirement. A broad mandate could then rest, for example, on a view that we are unsure about the terms of human accountability. This view would suggest why the Court should foreclose state legislatures from requiring the death penalty for one found guilty of an aggravated form of murder or from defining narrow boundaries for the capital sentencing inquiry. It would urge that capital offenders should remain free to offer a wide range of argument and evidence both to ensure continued debate about the nature of human accountability and to allow sentencers the evidence needed to pursue various standards they might deem appropriate. The theory, however, suffers severe difficulties. First, the theory would seemingly conflict with the Court's refusal to proscribe the death penalty altogether. If the lack of definitive solution to the problem of human responsibility counsels against legislative solutions, why should the Court allow states to credit sentencers' resolutions of the problem? More fundamentally, the theory requires ignoring the language of the Eighth Amendment. The theory itself posits that no consensus exists among the citizenry on how to measure the deserts of murderers.<sup>427</sup> It therefore remains unapparent what objection lies against death sentences imposed after only a restricted inquiry since, according to the theory, they would qualify neither as unusual nor as cruel, in the sense of being undeserved, except according to the judge's personal values. As this discussion underscores, the societal consensus approach adheres not simply as an effort to impose limits where the relevant constitutional language provides none, but as an effort to follow the language of the Eighth Amendment.<sup>428</sup>

Efforts to restate the operative prohibition as, for example, a proscription on punishments violative of "human dignity"<sup>429</sup> also call for criticism to the extent that they abandon ties to the actual language.<sup>430</sup> To say merely

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427. For an argument that the Court can construe the relevant constitutional language apart from societal values, see Ronald Dworkin, *Taking Rights Seriously* 135-36 (1978). Cf. Sanford Levinson, *Constitutional Faith* 191 (1988) ("There is nothing that is unsayable in the language of the Constitution."). As noted, however, assuming the propriety of such an approach, it would warrant, as Dworkin proposes, the abolition of the death penalty, not individualized capital sentencing.

428. Although, I have proceeded on the assumption that a punishment may violate the clause when it is deemed undeserved according to societal values, one could argue that the punishment must actually be rare to the point of "freakish[ness]" in the circumstances to meet the "unusual[ness]" requirement and that a punishment must be both cruel and unusual to warrant proscription. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 671 (1990) (Scalia, concurring in part and concurring in judgment).

429. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (stating "death stands condemned as fatally offensive to human dignity" and "therefore 'cruel and unusual'").

430. On the difficulties of the view that the judge, in enforcing the Constitution, should pursue personal values in reviewing the actions of political branches of government, see Ely, *supra* note 400, at 44-48.

The same criticism would apply to efforts to construe a term like "excessiveness" to allow the judge to pursue personal values. The Court has articulated a test of "excessiveness" that could be understood to allow for judgments rendered without conscious regard to the moral values attributable to the community. See *supra* note 402. However, a majority of the Court has never

that "human dignity" warrants a broad mandate of individualized, desert consideration fails to explain why a capital sanction imposed after only narrow inquiry becomes cruel and unusual. If based on a general sense of humanitarianism, however, the approach indeed eschews an effort to find limits in the words of the amendment and opens the door to federal judges to act with a "roving commission" to assess punishments according to their personal values.<sup>431</sup> While one judge might find in the need to protect "human dignity"<sup>432</sup> a proscription on death sentences except after broad, individualized, inquiry,<sup>433</sup> another could find the death penalty appropriate in all cases of murder to underscore the human dignity of both the victim<sup>434</sup> and the offender.<sup>435</sup> Hence, this approach to justifying individualized consideration also should not engender enthusiasm.

In the end, the broad, individualization mandate could only build on the notion that staking out expansive boundaries for the sentencing inquiry provides a margin of error to allow voice to public attitudes about appropriate retribution. Perhaps a societal perspective exists about the measure of the deserts of murderers. At the same time, perhaps it remains impossible, in Justice Harlan's words, "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators" that reveal when to impose the capital sanction.<sup>436</sup> On this view, legislatures cannot settle on objective standards that truly represent the views of the citizenry on what constitutes appropriate retribution. Instead, a broad, individualized inquiry into the offender's background, character, and crime becomes essential to expose all factors that might bear on the deserts assessment. There need not exist, moreover, a societal consensus as to the relevance to

followed that notion to the extent of rejecting the death penalty in some circumstance, and the test need not be understood in that fashion. *See also* supra note 401 (noting differing views on appropriate methods for identifying relevant societal consensus).

431. William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 698 (1976). I do not mean to suggest, however, that the Court should define cruel and unusual punishment based solely on what legislatures have done, for that would eliminate the basis under the provision for judicial review of legislative branches. *See, e.g.*, Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 *Harv. L. Rev.* 80, 108 (1992).

432. Regarding the vagueness of "human dignity" so conceived, Professor Polsby's comments are instructive: "All punishment affronts human dignity." Polsby, *supra* note 240, at 19.

433. One might consider whether a theory for broad individualization could rest on the need to protect capital sentencers against being required to express approval for a death sentence that they personally find inappropriate. Yet, this theory appears implausible, among other reasons, because the Court has allowed states to exclude potential jurors who reveal that they would be unable faithfully to apply the state's capital sentencing provisions. *See Wainwright v. Witt*, 469 U.S. 412, 425-26 (1985), *cert. denied* 470 U.S. 1039 (1985).

434. *See* Robert H. Bork, *The Tempting of America* 220-21 (1990) (noting that, under this view, a Justice "could as easily dwell upon the human dignity of the murderer's victim as upon the dignity of the murderer"); *cf.* Berger, *supra* note 392, at 147 ("'Respect for humanity' is little furthered by erecting ramparts for those who gun down policemen."); Ernest van den Haag, *Punishing Criminals* 213 (1975) ("When murder no longer forfeits the murderer's life . . . respect for life itself is diminished, as the price for taking it is.").

435. *See, e.g.*, Ernest van den Haag & John P. Conrad, *The Death Penalty: A Debate* 276 (1983) (noting the argument of Kant and other philosophers that "not to execute a murderer is to deny him his human dignity as a rational and responsible person").

436. *McGautha v. California*, 402 U.S. 183, 204 (1971).

deserts of all evidence the defendant (or the prosecution) can offer. This view assumes some capacity on the part of capital sentencers to ignore evidence and argument that does not coincide with the sense they have derived from living in society of how deserts ought to be measured.<sup>437</sup>

Although this last theory best explains a broad, individualization mandate, it also remains vulnerable. The theory's principal weakness stems from the uncertainty underscored earlier that a consensus exists, even in general terms, about when a murderer deserves the death penalty.<sup>438</sup> One can conclude from this uncertainty that states ought to be allowed to define the scope of the deserts inquiry as they deem appropriate, either by mandating the death penalty for certain forms of murder or by allowing after a murder conviction a sentencing hearing focused only on narrow issues.<sup>439</sup> The individualization proponent can respond that the large number of potential variables bearing on deserts suggests why the consensus might be indiscernible but nonetheless exist at a sufficiently specific level such that some death sentences imposed without broad, individualized inquiry would be "cruel" and "unusual." Although different sentencers might employ different methodologies for assessing deserts, the results of their application might sometimes converge to justify a reprieve of the capital offender. Hence, while a consensus surely does not exist at a level specific enough to lead to answers in all cases, it might support reprieves for some defendants. Still, the notion that any such societal consensus exists rests more on faith than on reason. Further, the mandate is not cost free. An individualization requirement potentially demands some marginal expenditures of state resources, though the cost is difficult to estimate.<sup>440</sup> In

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437. Some studies have suggested that capital sentencing decisions by jurors to some extent follow arguably rational patterns. See, e.g., Baldus et al., *supra* note 399; Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. Davis L. Rev. 1327 (1985). These studies have been conducted in systems in which the sentencer was not required to render a judgment based on deserts, however, and given the distorting forces of the litigation process where the boundaries of inquiry are uncertain, the results would not necessarily tend to reflect a societal view on what constitutes retributive excess.

438. Other arguments could be lodged against the societal consensus rationale for a mandate of broad deserts consideration. The individualization proponent has little choice but to concede a lack of certainty about the existence of a societal consensus on assessing deserts and particularly one specific enough to lead to answers in all cases. Hence, one willing logically to pursue the contention—by outlawing all systems that allow a broad deserts inquiry—could contend that a rationale conceding the possibility of wide disagreement over how to measure deserts also admits the possibility of improper arbitrariness. Similar arguments against any system allowing broad desert judgments can rest on concerns about the likelihood of discrimination on odious grounds in reaching desert assessments. Cf. Ely, *supra* note 400, at 174 (It is by *reducing*, hardly by *increasing*, the discretion of juries, and thus to some extent removing the buffers that ensure that people like us will never be executed, that we move to protect those who are not so insulated from the sort of "unusual" enforcement regime it is the point of the Eighth Amendment to preclude (and in the process to provide political safeguards against excessive penalties).). *But see* *supra* notes 348-50 and accompanying text (discussing the argument of Justice Scalia).

439. Under this view, states should be allowed to specify objective, aggravating circumstances that, if present, will subject a murderer to a mandatory death sentence.

440. The costs may not be very substantial. One might be tempted to contend that costs would be increased because the legislative view of how to measure deserts would be thwarted by the requirement that the sentencing decision be delegated to jurors or judges representing

the end, then, the force of the theory depends on one's view of the propriety of imposing on states the expense of broad, individualized inquiry on the possibility that it would help elicit an unproven societal measure of human responsibility.

Of course, the Court has come a long way with individualization to abandon it altogether. Even a Justice who doubts the force of the theory behind an expansive individualization mandate could decide to support the basic prohibition on mandatory death penalties for simple murder.<sup>441</sup> Yet, it is worth understanding the grounds for unease about interpreting the Eighth Amendment to demand broad deserts assessments.<sup>442</sup>

## V. CONCLUSION

Clarence Darrow's defense in *Leopold-Loeb* provides a valuable context for examining why the Eighth Amendment should require a broad capital sentencing inquiry. Darrow offered evidence of the psychosocial constitutions of Leopold and Loeb to elucidate some of the factors that influenced them to kill Bobby Franks. He then used his summation openly to urge the deterministic argument against all punishment. Darrow's defense pursued an extreme view—that people have no more capacity than they exercise to avoid committing crimes. Nonetheless, under virtually all capital sentencing systems presently employed, defense lawyers could offer the same kind of evidence and probably the same openly deterministic arguments on behalf of their clients. Modern capital sentencing statutes grow out of Supreme Court decisions after *Furman* that seemed to require that the capital sentencer remain free to reject the death penalty based on such presentations. Yet, the Court retreated recently in *Graham v. Collins*<sup>443</sup> and *Johnson v. Texas*.<sup>444</sup> This retreat underscores continuing uncertainty over

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unusually lenient views within the community. This contention, however, is mitigated somewhat by the fact that states may choose any capital sentencer that is not constitutionally biased. The Supreme Court has concluded that the Constitution allows states to use either judges or juries. *See, e.g.,* *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990). The Court probably would also authorize states to employ special sentencing commissions with members appointed by the political branches.

One might also be tempted to contend that, assuming societal views about how to judge murderers' deserts exist, the legislated standards are not appropriately assumed to deviate from those views. To the extent that they would coincide, however, the individualization mandate does not foreclose implementation of those views. This is true at least if capital sentencers can ignore evidence and argument that does not conform with their sense—presumed on this argument to correspond to the legislature's—of how deserts should be measured.

441. *See supra* notes 403-06 and accompanying text.

442. A conclusion favoring a broad, individualized inquiry concerning offender deserts, moreover, does not fully solve the problem of limning the capital sentencing inquiry. For example, the Court should clarify whether the broad desert inquiry focuses on the offender's culpability for the crime, his general deserts based on all of his life works, or both of these general measures. This is not an easy question. *Compare* Steiker & Steiker, *supra* note 341, at 854-59 (arguing deserts should be defined as culpability for the capital crime) *with* Howe, *supra* note 19, at 350-61 (arguing that it may be appropriate to include assessments of more general deserts as well as culpability for the murder).

443. 113 S. Ct. 892 (1993) (discussed *supra* notes 360-69 and accompanying text).

444. 113 S. Ct. 2658 (1993) (discussed *supra* notes 362-68 and accompanying text).



the basis for a mandate of broad inquiry into all facets of the capital offender's background and crime.

The Court has never provided a good rationale for the individualization requirement. Justifying the mandate involves articulating a function for the capital sentencing hearing by which one can understand not only the necessity for inquiry but the kind of consideration due the offender. It also involves explaining why that function coincides with a prohibition on cruel and unusual punishments.

This Article asserts that the Eighth Amendment function of the sentencing inquiry could only be to provide for desert assessments to help avoid imposition of the death penalty when it would constitute retributive excess—when it would be undeserved.<sup>445</sup> Under this view, the sentencer should not base a death verdict solely on assessments of its utilitarian benefits, such as incapacitation of the defendant or deterrence of other potential criminals. One might argue against a focus on utilitarian issues simply because of the difficulty of resolving them accurately. Who could have predicted in 1924, for example, the future adjustment of Leopold and Loeb? Loeb was slashed to death with a razor in a prison shower after purportedly attacking another inmate.<sup>446</sup> Leopold became a model prisoner who set up education programs and volunteered for dangerous medical experiments during his thirty-four years of incarceration and who pursued humanitarian causes after his release.<sup>447</sup> The disparity between these life accounts underscores the problems of resolving the cost-benefit inquiry accurately. Yet, one could level similar criticism at efforts to judge deserts.<sup>448</sup> Perhaps the potential inaccuracy of either kind of judgment renders the value of either one questionable. Putting that problem aside temporarily, however, I have argued that a conclusion that any mandated inquiry should focus on deserts rests on a recognition that the Court might find that a deserts assessment, unlike utilitarian analysis, necessarily requires a broad, individualized inquiry not incorporable in the definition of the capital crime.<sup>449</sup>

The Article also asks, however, whether the broad individualization mandate coincides with the Court's proper role in interpreting the Eighth Amendment. A capital sentencing inquiry focusing on offender deserts seems to comport with a prohibition on excessive retribution in the use of

445. See *supra* notes 370-89 and accompanying text.

446. See *Convict Kills Loeb, Franks Boy Slayer*, N.Y. Times, Jan. 29, 1936, at 1; see also *Loeb Slayer Acquitted*, N.Y. Times, June 5, 1936, at 44 (noting that the inmate who killed Loeb, James Day, was tried for murder, but alleged self defense and was acquitted by jurors after less than an hour of deliberations).

447. See Higdon, *supra* note 10, at 334-35; Oelsner, *supra* note 1, at 36; cf. Nathan F. Leopold, Jr., *Life Plus 99 Years* (1958) (Leopold's book about his prison experience); Oelsner, *supra* note 1, at 36.

448. See, e.g., *Callins v. Collins*, 114 S. Ct. 1127, 1130, 1135 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting that question, "[W]hich defendants 'deserve' to die?", is "so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution").

449. See *supra* notes 375-78 and accompanying text.

the death penalty, a prohibition which one may plausibly see in the language of the Eighth Amendment. A quandary nonetheless arises from the uncertainty that any societal view exists about how to assess the blame due a capital offender.<sup>450</sup> Would people generally agree today, for example, on how to judge the deserts of Leopold and Loeb? The views of philosophers and criminal law theorists certainly do not reveal a consensus about how to judge murderers' deserts.<sup>451</sup> Current and pre-*Furman* sentencing practices in capital cases also do not reveal such a consensus.<sup>452</sup> Yet, if no societal view exists about how to judge a murderer's deserts, one faces difficulty justifying a conclusion that legislatures cannot define the boundaries of the inquiry as they deem appropriate. The Court's intrusion under those circumstances appears incompatible with the relevant Eighth Amendment language, since a mandatory death penalty imposed on murderers according to narrow objective standards would not necessarily be "unusual" and could not even be thought "cruel," in the sense of being undeserved, except according to the judge's own values.<sup>453</sup>

In light of these problems, the Eighth Amendment rationale for an expansive individualization mandate could only stem from a notion that requiring a sentencing inquiry with broad boundaries helps to ensure an unfettered voice for a possible societal consensus about deserts. This theory assumes that a societal view about measuring deserts could exist, but that, because of its complexity, it would be impossible to express in objective standards or even to discern precisely. While all sentencers' methodologies for measuring deserts surely would not always coincide, pursuit of those various methodologies could nonetheless converge in some cases to justify a reprieve of the murderer.

Although the best justification for the Eighth Amendment individualization mandate, this theory remains vulnerable. One may doubt that a societal view exists, even in general terms, about when murderers deserve the capital sanction. Doubt about the existence of such a consensus provides grounds to reject a mandate forcing states to bear the marginal costs of individualized sentencing inquiry.

Of course, states might well allow broad inquiry into the influences that led the murderer to kill even if the Supreme Court altogether abandoned the individualization mandate. Ironically, the theory offered here for individualization suggests that legislatures typically would continue to allow for broad inquiry. Seemingly, a legislature would incline toward an open-ended system because that approach would best enable the societal consensus about measuring appropriate retribution to emerge. Even if one doubted that such a consensus existed, moreover, one could

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450. I have assumed, as the Court has concluded, that one plausibly can view the Eighth Amendment language as proscribing excessive punishment in the death penalty context, not simply punishments that are barbarous in form. See *supra* notes 390-93 and accompanying text.

451. See *supra* notes 169-293 and accompanying text.

452. See *supra* notes 412-21 and accompanying text.

453. Crediting the judge's values as an appropriate basis for adjudication, moreover, would authorize the judge to assess death sentences as acceptable or improper on the merits rather than simply to require individualized sentencer consideration.

conclude that states should continue to allow the broad inquiry. One could believe that, as Darrow concluded, we can expect nothing more from the capital sentencer than a choice between conflicting visions of human responsibility. On that view, broad inquiry at least would allow for evidence in support of the deterministic argument against the death penalty.

The perspective on capital sentencing that one adopts, however, bears on whether the Court should require states to allow for broad, individualized inquiry. Under the Eighth Amendment, the view that a complex societal consensus exists that some murderers do not deserve death can support the individualization mandate. A view that the sentencer only chooses between freedom and determinism cannot. If a societal consensus exists that some murderers do not deserve death, individualized inquiry under a broad desert standard may help protect against death sentences that deviate from the societal view. If we are generally in conflict about whether human actors are morally accountable, individualized inquiry represents only a compromise between calls for mandatory death penalties and calls for abolition.