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I. INTRODUCTION

When I was asked to contribute to this *Propter Honoris Respectum* edition of the *Notre Dame Law Review*, which celebrates the work of Professor Kent Greenawalt, my first thought was how to choose a particular focus for my Essay within the enormous and fascinating corpus of Professor Greenawalt's work. Finally, I decided to choose the question that initially brought me to his work and on which I have found his work immensely instructive ever since: the question of the legitimacy of the use of nonrational or "conscience"-based decisionmaking as a part of law.

Throughout his career, Professor Greenawalt has explored the processes of intellectual inquiry used in the development and application of law. In particular, his work has explored whether "nonrational" judgments—that is, judgments that are based on reasons that cannot be articulated and/or that lack intersubjective validity[1]—are an appropriate basis for decisionmaking by citizens, legislators, judges, and others involved in the legal decisionmaking processes of a liberal democratic society.[2] Although Professor Greenawalt has most

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1 *See* Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1047 (1987).

2 *See, e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY (1992) [hereinafter GREENAWALT, LAW AND OBJECTIVITY]; KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) [hereinafter GREENAWALT, PRIVATE CONSCIENCES]; KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647 (1993) [hereinafter Greenawalt, *Grounds for Political Judgment*]; Kent Greenawalt, *supra* note 1; Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994); Kent Greenawalt, *Reason and Sympathetic Imagination*, 3 EMORY L.J. 9 (1980) [hereinafter Greenawalt, *Sympathetic Imagination*]; Kent Greenawalt, *Religious Liberty and Democratic Politics*, 23 N. KY. L. REV. 629 (1996) [hereinafter Greenawalt, *Religious Liberty*].

extensively addressed whether religious convictions[3] are an appropriate basis for legal discourse and legal decisionmaking,[4] his work powerfully illuminates the difficult questions that are involved in the use of *any* kind of nonrational ground in the development and application of law.

In this Essay, I shall draw upon Professor Greenawalt's rich insights to construct what I see as two competing models of law and legal decisionmaking. The first model, which I shall call the "agentic" model, is that which we ordinarily use in law. Under this model, law consists of societally established principles and the use of rational processes to interpret or supplement those principles. This model of law reflects the belief that law is a consensual enterprise, with its legitimacy rooted in societal acceptance of its norms and processes. The principles and processes that this model of law uses are ones that are societally articulated and societally understood; they are principles and processes to which we (as a society) have collectively agreed. Those who interpret and enforce law—such as judges, juries, and executive branch officials—are our agents: they interpret and enforce the law as we (a society) have established it.

Although the agentic model is the one that we generally assume should be used in law, there are times when this model of law fails. There are times, for instance, when the principles of articulated law are in irreconcilable conflict or when the matter is simply one about which the law, as articulated, has seemingly not spoken. In these cases, we are forced to resort to another model of law and legal decisionmaking. Under this model, which I shall call the "conscientic" model, the legal decisionmaker determines not what the law (as societally established) is but rather what the law (as a matter of personal belief or "conscience") should be. The costs that this model of law entails for the consensual basis of law and the rule of law that flows from it are obvious. As a result, this model of law may be used by judges, juries, and others charged with the enforcement and interpretation of law only when one or more premises of the agentic model of

3 Greenawalt defines "religious" bases for decision as those "connected to theistic belief or other belief about a realm of ultimate value beyond, or deeper than, ordinary human experience, or to forms of life or institutions understood to be religious, such as Buddhism or the Ethical Culture Society." GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 39.

4 As Greenawalt explains, although reasoned judgment plays an important part in what most people believe is religious, many people's religious convictions rest at least in part on elements "that are not fully subject to reasoned interpersonal evaluation." *Id.* at 87.

law fail and decisionmakers are forced, as a practical matter, to use this kind of decisionmaking.

This description of legal decisionmaking is quite congruent with the law as we know it; at least, it is (as Professor Greenawalt notes) what we think that law—as a general matter—should be. There is, however, a small but troubling group of cases for which this understanding fails to account. These are cases in which conscientic decisionmaking is not a default rule, to which we reluctantly make limited recourse when the agentic model fails, but is itself the model of law that judges, jurors, and others are specifically commanded to enforce. In these cases, legal decisionmakers are commanded by the law to determine what the result, as a matter of personal conscience, *should be*—a command and a process that are completely inconsistent with otherwise entrenched ideas about the content of law and the rule of law. In this Essay, I shall examine this phenomenon, using (as an example) the Supreme Court's requirement that conscience-based or "conscientic" decisionmaking be used as a part of the death-sentencing process. I shall argue that these cases are not in fact anomalous errors in our law, as some have argued; rather, they are situations in which the agentic model of law fails because of the *substantive nature* of the decisions involved. I shall further argue that although the explicit use of the conscientic model of law in these cases carries great dangers, it nonetheless serves an important purpose: it reminds us of the limits of agentic decisionmaking and of what the law—as an institution—must, in the end, require.

II. AGENTIC AND CONSCIENTIC DECISIONMAKING: CONFLICTING MODELS OF LAW

When we consider the kinds of decisionmaking that are properly used by a particular legal actor, we must first establish what the role of that person in the legal process is. For instance, the desirability of the use of particular grounds by those whose roles involve the creation or change of law (such as legislators or citizens acting in their civic capacities) may well differ from the desirability of the use of the same grounds by those whose roles do not.[5] In this Essay, I shall focus on

5 How readily we embrace the use of nonrational or "nonpublic" reasons will depend, in large part, on the individual's role in the lawmaking process. Greenawalt concludes that private citizens, in a civic capacity, should generally feel free to rely on private sources in both public discourse and private deliberations. Legislators should rely upon public reasons in public discourse, but may rely on private sources in the process of private decisionmaking. Judges "should strive hard to be guided by public reasons," and they may rely on personal sources of judgment (including religious beliefs) when public reasons provide no answer. *See* Greenawalt, *Religious Liberty,*

those decisionmakers whose roles involve—as an explicit matter—the interpretation and enforcement of law, such as judges, juries, and executive branch officials.

When we consider the grounds that are appropriately used by those who interpret and enforce the law, we begin with an awareness that law involves the coercive exercise of government power. Because these persons make decisions that affect human lives, they face tasks that are not present in other arenas. As Professor Greenawalt has written, "Judges, unlike literary interpreters, need to decide on a best approach. Legal cases involve claimants. Judges make practical decisions . . . . [J]udges cannot throw up their hands and declare that legal cases are ties."[6]

As a result of this particular nature of law, we begin with the premise that law is, fundamentally, a consensual enterprise; we agree to be bound by the coercive and potentially violent power of law, because we believe that law implements (in a general way, at least) those principles to which we have individually and collectively agreed.[7] Those principles are both substantive and procedural in nature; they entail notions about what values—as a substantive matter—the society holds,[8] and how—as a matter of process—we are to interpret and apply those values.

Legal analysis begins, then, with "widely shared assumption[s]" of substantive value, such as the belief that the government should treat

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supra note 2, at 637–41; *see also* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 143–50 (describing circumstances under which judges may rely on personal moral convictions); Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 210–22 (1981) (describing prosecutorial decisionmaking and claims of "extra legal" or moral right).

6 Kent Greenawalt, *Interpretation and Judgment*, 9 YALE J.L. & HUMAN. 415, 422–23 (1997). As Robert Cover has written, "[j]udges deal pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

7 *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 63 (1987) (discussing how traditional social contract theory "tries to answer . . . how a government can justly have coercive powers over free individuals . . . . This consent . . . involves acquiescence in actions of the government that are within the sphere of the authority conferred").

8 *See* GREENAWALT, LAW AND OBJECTIVITY, *supra* note 2, at 169 (stating that although we must sometimes deviate from existing community standards, "especially when existing standards are believed to offend higher moral principles," "[d]iscrepancies between law and dominant cultural morality are sources of tension and resentment" and tend "to threaten the effective functioning of legal norms"); Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 711–12 (arguing that principles that guide legal regulation must include societally determined moral judgments).

similarly situated people equally,[9] or that personal liberty should (if at all possible) be preserved.[10] These values, articulated in legal rules, are the premises from which the interpretation and enforcement of law begins. Using this body of basic rules and understandings, legal decisionmakers use "existing modes of expression" and "accepted patterns of reason"[11] to determine, in any particular situation, what the result should be.

Although "reason" could be understood to involve many different ways of knowing, in this context it is understood more narrowly. Professor Greenawalt writes that in legal analysis, "something can be established by reason if it can be demonstrated to any fair-minded and appropriately intelligent and trained observer."[12] By saying that something can be "demonstrated," we mean that "the observer would end up believing confidently in the proposition asserted and also believe that he had good grounds"[13] for that belief. Examples of accepted legal reasoning include the statement of a legal rule and the application of that rule to facts in ways that a fair-minded person must agree that the rule (by its letter or spirit) contemplates, or the statement of a legal rule and a deductive proposition that a fair-minded person must see as flowing from the original premise.[14]

The essential characteristics of this model of law can therefore be distilled as follows. Under this model of law, we (as a society) identify particular principles of value with which we generally agree; and from these principles we authorize the use of rational processes to establish subsidiary principles, or to make particular applications, that will answer questions posed by particular situations. Both the principles of value and the processes used to work with them are articulable and intersubjectively (demonstrably) valid.

As Professor Greenawalt notes, the use of legal rules or expressions of value in conjunction with reason in this sense "can often take us very far"[15] in law. Once the relevant facts are established, most applications of law can be determined through the use of deductive, comparative, and other kinds of ordinary reasoning. Indeed, even significant conclusions in contested constitutional cases can be reached using these methods. By illuminating various possibilities and the strengths and weaknesses of particular arguments, reason—in con-

9 *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 28.
10 *See id.* at 37.
11 Greenawalt, *Sympathetic Imagination*, *supra* note 2, at 10.
12 *Id.* at 13.
13 *Id.* at 14.
14 *See id.*
15 *Id.*

junction with previously established values—can be a powerful determinant in such cases.[16]

It is apparent, however, that this kind of decisionmaking cannot resolve all of the issues that the interpretation and enforcement of law involve; and it is in the probing of legal decisionmaking beyond this boundary that Professor Greenawalt's work has been most powerful. The situations in which this model of law will fail have been explored by Professor Greenawalt in a rich body of work. For instance, there are matters about which the law has seemingly not spoken, or about which it "cannot speak both universally and correctly"; in these cases, the law (as we have described it) is at best a set of "guiding criteria," with the decisionmaker to provide "supplementary, particularistic judgments" that the cases demand.[17] In other cases, the relevant variables may be so complex that they cannot be adequately captured by rational sources,[18] or there may be an undeniable need to consider changing social conditions and other values in the application of legal norms.[19] Reliance upon consensually established principles and rational arguments from those principles will also fail when decisionmaking involves an issue as to which no present consensus exists,[20] or

16 *See id.* at 14–15.

17 Greenawalt, *supra* note 5, at 187.

18 For instance, whether a candidate for naturalization is of "good moral character," whether a criminal defendant acted "reasonably," and whether a punishment is "cruel and unusual" are questions that few would argue can be determined "from the corpus of law itself, even if that corpus is taken to include the various principles and theories that help explain it." GREENAWALT, LAW AND OBJECTIVITY, *supra* note 2, at 188–90.

19 *See id.* at 190.

20 In such cases, the law may articulate no relevant values, or those values that are articulated may conflict. *See id.* at 214–15.

In an article that is most powerful and disturbing to our moral complacency, Greenawalt argues that legal questions founded on the moral status of animals and the environment present challenges such as these to the conventional, "explicitly consensual" model of lawmaking. For instance, "[t]he uniqueness of some human capacities and the superiority of others hardly seems adequate to justify according no moral significance to the interests of other animals." Greenawalt, *supra* note 1, at 1027. And "[u]nless one puts the justification in terms of psychological health or in terms of a needed corrective to present human ignorance of future possibilities, the claim that people should respect nature in its own right and should try to preserve species is not one that can be grounded successfully in rational argument." *Id.* at 1039. In these cases, "[p]eople have radically different reactions to what humans owe to nature in a larger sense, and neither analogies to ordinary moral constraints nor other forms of rational analysis provide much assistance in settling the issue." *Id.* Individuals are left, instead, to sources such as "visions that concern the 'ultimate meaning' of human life and the place of mankind in the universe." *Id.* at 1041; *see also* GREENAWALT, LAW AND OBJECTIVITY, *supra* note 2, at 181 (stating that there may be "sound criteria of correct-

when the decision—although enjoying, perhaps, some kind of actual consensus—is based upon arguments or factors that are incapable of demonstrated intersubjective validity or even interpersonal articulation.[21]

The prospect that this model of law may fail, and that those who interpret and enforce the law may be forced to consult other, more "personal" sources, leaves us with a sense of profound disquiet.[22] The reason for this disquiet is found in law's consensual foundation. If (as we stated above) law is a consensual enterprise, with its legitimacy rooted in societal acceptance of its processes and norms, the idea that those who enforce the law will sometimes rely on judgments whose bases have not been accepted by others—indeed, whose bases *have not even been articulated to others*—is deeply and inherently troubling. As Professor Greenawalt has written, we generally believe that "[j]udgments or feelings that . . . have no generalizability[ ] should not underlie political coercion."[23] Although such personal sources might be used by individuals whose roles involve the creation or change of law (for instance, legislators or citizens involved in the political process), the compatibility of this kind of decisionmaking with the roles of those who are charged with *enforcing* the law (for instance, judges, juries, or executive branch officials) is a very different matter. With personal decisionmaking comes the danger of arbitrariness, the use of prohibited factors, and the violation of the very values that the law (as a consensual matter) has established.[24]

Our reluctance to endorse the use of such grounds by those who interpret and enforce the law reveals an essential characteristic of

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ness that are neither purely objective nor wholly culture dependent, but which reach beyond what common reason can discover").

21 *See* Greenawalt, *supra* note 1, at 1049, 1051; *see also* Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 35 (1986) ("[T]here are many fundamental questions of morality that are critical for the appropriate boundaries of legal protection for which rational secular morality cannot provide any single persuasive answer . . . . [In such a case] every citizen must resolve [the question] on the basis of some nonrational judgment, a judgment that is not irrational or against reason, but which goes beyond what rationality can establish.") (footnote omitted).

22 For instance, Greenawalt concludes that those who are charged with the enforcement of law should use consensually established principles and rational arguments when those sources yield answers to the problems at hand; only when they do not are "personal," nonrational grounds a legitimate part of the decisionmaking process. *See* Greenawalt, *Grounds for Political Judgment*, *supra* note 2, at 669.

23 GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 36.

24 *See, e.g., id.* at 36 ("The inappropriateness of relying on . . . personalized judgments is most obvious for decisions within the law. Part of the ideal of the rule of law is uniform and nonarbitrary decision under legal standards.").

decisionmaking under the prevailing model of law which we have established: it is, at its core, *agentic* in nature. This model assumes that those who are charged with the enforcement of law will implement the law as societally cast and societally desired; that they will not, on the basis of "conscience"[25] or some similar notion, decide—of their own accord—what the law should be.[26] The prevailing or "agentic" model of law assumes that when officials confront uncertainty in articulated law, they should use rational processes to determine what the result—*from a societal point of view*—should be. In their interpretation and enforcement of law, such persons are constrained by the moorings of *societal* values and *societal* desires. For such persons to engage in "conscientic" decisionmaking—for them to decide what, *from their own points of view*, the law should be—is entirely contrary to the rule of law. Indeed, it is for this reason that reference to personal moral conviction is generally considered to be incompatible with the expected processes of judicial decisionmaking, even when the actual decisions reached are ones of which we would otherwise approve.[27] We do not generally see judges as roving, self-appointed "moral agents."

What cannot be explained by this model of law are those few cases found in law in which those charged with the interpretation and enforcement of law are specifically commanded to make personal, "moral" inquiry. In these cases, the law fails to establish the standards that those who interpret and enforce the law should use, and instead commits the decision to the decisionmaker's "conscience." To invite decisionmakers to determine, as a matter of conscience, what standards should be used or what decisions should be made seems to be strikingly at odds with law as we know it. It contradicts not only the agentic role that we expect, but also the very *idea* of law as something with substantive content which we—as a society—have agreed to en-

25 The core idea of conscience has been defined as "the idea of a capacity, commonly attributed to most human beings, to sense or immediately discern that what he or she has done, is doing, or is about to do (or not do) is wrong, bad, or worthy of disapproval." Thomas E. Hill, Jr., *Four Conceptions of Conscience, in* NOMOS XL: INTEGRITY and CONSCIENCE 13, 14 (Ian Shapiro & Robert Adams eds., 1998). Popular conceptions of conscience include those rooted in theological beliefs about human agency, those that see conscience as an unreflective response to societally instilled values, and those that see conscience as reflective decisionmaking that compares our proposed actions with our (independently determined) set of moral values. *See id.* at 14–17.

26 *Cf.* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 132–33 (1974) (contrasting agentic and autonomous decisionmaking in social organizations).

27 *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 142.

force. The notion that the content of law is something that decisionmakers must *themselves* determine seems to render the idea of law, the consensual basis of law, and the institution of law, internally—and radically—incoherent.

How can we explain these instances of commanded "conscientic" decisionmaking in law? Are they simply additional situations in which the agentic model of law fails for practical reasons and, thus, these conscientic commands simply direct the decisionmakers to do (on an authorized basis) what they would have had to have done (on an unauthorized basis) anyway? Or do they illuminate another, more critical way in which the agentic model of law may fail—something which we are forced to confront, "as a matter of conscience," by these cases?

To explore these questions, let us consider one of the most well-known examples of commanded conscientic decisionmaking found in law: the charge to a criminal jury to consider, "as a matter of conscience," the penalty of death.

III. To Kill, or Not to Kill: Conscientic Decisionmaking in Supreme Court Jurisprudence

The tension between the agentic model of law and a decisionmaker's use of personal conscience can be illustrated by a simple case. In 1978, an Oklahoma state court jury was deciding the fate of Robyn Leroy Parks. Parks had killed a man, and the jury was considering whether Parks should, in turn, be killed. In his closing argument, the prosecutor attempted to assure the jury:

> [Y]ou're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict—once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal justice system that says when this type of thing happens, that whoever does such a horrible, atrocious thing must suffer death. Now that's man's law . . . . [But] God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.[28]

In other words, the prosecutor told the jury: "Yours is strictly an agentic task. Your task is not to decide what the law *is* or *should be.* You are not to make some kind of personal moral inquiry. You are simply to apply the law—those principles that society, as a whole, has estab-

28 Saffle v. Parks, 494 U.S. 484, 512 n.13 (1990) (quoted by Brennan, J., dissenting).

lished—to the facts in this case, in a rational manner. Beyond that, the responsibility is not—and should not be—yours."

In fact, the law of capital sentencing is considerably more complex.[29] In a series of decisions, the Supreme Court has created a conceptually bifurcated procedure which must be followed by the sentencing authority in these cases. Although an agentic model of law is assumed in part, a conscientic model of law is also articulated and enforced in these cases.

Under the Court's Eighth Amendment jurisprudence, we begin with the principle that a state sentencing scheme must establish—through some kind of articulated criteria—those persons who, as a class, are potentially eligible for the penalty of death.[30] This class must be articulated more precisely than by a simple statement that all who commit a capital offense are eligible for death.[31] Permissible schemes include those that list both aggravating and mitigating circumstances, and require the sentencer to weigh them against each other;[32] those that list aggravating and mitigating circumstances, but give no guidance once an aggravating circumstance has been found;[33] and those that present special questions to the sentencer, with the eligibility for death turning—mandatorily—on the answers to those questions.[34]

The goal of these requirements is to eliminate what once had been completely unfettered discretion in capital sentencing and to bring the process into line with the idea of the rule of law. As one legal writer has summarized the motivating sentiment, "The rule of law requires some appreciable sense of consistency, predictability, and even-handedness when the state applies its coercive power, especially its ultimate power [to kill]."[35] Consistent with this objective, the Court has stated that the state sentencing scheme must "establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the

29 In Parks' case, the Supreme Court did not reach the merits of his claim, holding that habeas relief was barred by *Teague v. Lane*, 489 U.S. 288 (1989). *See Saffle*, 494 U.S. at 487–95.

30 *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 877 (1983) (stating that the state sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder") (footnote omitted).

31 *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

32 *See, e.g.*, Proffitt v. Georgia, 428 U.S. 242 (1976).

33 *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).

34 *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976).

35 Stephen P. Garvey, *"As the Gentle Rain From Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 997 (1996).

[required] threshold."[36] There must be a "principled way to distinguish [a case] . . . in which the death penalty was imposed, from the many cases in which it was not."[37]

The extent that societally articulated principles can determine such questions is, of course, necessarily limited; no list of factors, however detailed, can anticipate all of the facts and circumstances that capital crimes present. In determining whether a particular defendant is eligible for death, or is a member of the class for which death is possible, the sentencer will "unavoidably exercise a range of judgment and discretion."[38] This exercise is controlled, however, by "clear and objective standards";[39] the sentencing scheme must "guide[ ] and focus[ ] the . . . [sentencer's] objective consideration" of the facts and circumstances of the case.[40]

In making this first, "eligibility" decision,[41] sentencers are clearly agentic actors. The state, "representing organized society," directs and controls the sentencer's actions[42] through the articulation of substantive principles and the authorized use of rational processes.[43] Sentencers are to apply the law as given by others—they are not to determine what the law, as a matter of conscience or personal belief, should be.[44]

If a particular defendant is found to be a member of the class eligible for death, the sentencer must make the second or "selection" decision.[45] In this decision, the sentencer decides whether the de-

36 McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

37 Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion).

38 Adams v. Texas, 448 U.S. 38, 46 (1980).

39 Gregg v. Georgia, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell & Stevens, JJJ.) (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

40 Jurek v. Texas, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell & Stevens, JJJ.).

41 *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 973 (1994).

42 *See Gregg*, 428 U.S. at 192 (opinion of Stewart, Powell & Stevens, JJJ.).

43 The process to be used by the sentencer has been described as the application of "'reasoned judgment . . . in light of the totality of the circumstances present.'" Barclay v. Florida, 463 U.S. 939, 963 (1983) (Stevens, J., concurring) (quoting Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977)).

44 Occasionally, the Court lapses into articulations that are potentially inconsistent with this role; for instance, in discussing the death-eligibility decision, the Court has stated that "[i]t is entirely fitting for the *moral*, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950 (plurality opinion) (emphasis added). If this statement anticipates that the decisionmaker will consult *community* moral standards for guidance, it is compatible with an agentic role. If it anticipates that the decisionmaker will consult *personal* moral standards, it is not.

45 *See Tuilaepa*, 512 U.S. at 974.

fendant should be one of those within the eligible class who is actually selected for execution. As a part of this inquiry, a capital defendant is constitutionally entitled to present "any relevant circumstance"[46] that might cause the sentencer to decline to impose the penalty of death, and the sentencer's discretion in considering this evidence cannot be channeled.

Indeed, the sentencer may not be precluded from considering, nor may the sentencer refuse to consider, relevant mitigating evidence.[47] At this stage, whether the defendant "deserves" death, as an individual, is the critical question;[48] the sentencer must be able to consider, and must actually consider, "the individual circumstances of the defendant, his background, and his crime" in making that determination.[49]

Focus on the defendant "as a 'uniquely individual human being[ ]'"[50] in deciding whether he should live or die is deeply rooted in another principle: that the selection of an individual for death is based upon the "moral culpability" of that person.[51] The death penalty exists, in the words of Justice Stevens, "as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live."[52] As a consequence, "capital punishment rests on

46 McCleskey v. Kemp, 481 U.S. 279, 306 (1987). *But cf.* Buchanan v. Angelone, 118 S. Ct. 757, 761 (1998) ("[T]he State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.").

47 *See Buchanan*, 118 S. Ct. at 761; Hitchcock v. Dugger, 481 U.S. 393, 394 (1991).

48 *See, e.g.*, Turner v. Murray, 476 U.S. 28, 34 (1986) (opinion of White, Blackmun, Stevens & O'Connor, JJJ.); Spaziano v. Florida, 468 U.S. 447, 489 (1984) (Stevens, J., concurring in part and dissenting in part).

49 *Spaziano*, 468 U.S. at 460. Because of this Eighth Amendment requirement, so-called "mandatory statutes"—under which all defendants guilty of aggravated murder are condemned to death—are unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).

50 Booth v. Maryland, 482 U.S. 496, 504 (1987) (quoting *Woodson*, 428 U.S. at 304 (plurality opinion)).

51 *Id.*; *see also* Enmund v. Florida, 458 U.S. 782, 800 (1982) (stating that decision to execute a criminal defendant depends upon the "moral guilt" of the accused). Members of the Court have occasionally objected to this focus. However, they have generally argued that moral guilt should be considered with other factors, not that moral guilt is irrelevant to the selection decision. *See, e.g.*, *Booth*, 482 U.S. at 520 (Scalia, J., dissenting) ("[T]he principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined *solely* on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court . . . . [T]he human suffering the defendant has inflicted" should be considered, as well.) (emphasis added).

52 *Spaziano*, 468 U.S. at 469 (Stevens, J., concurring in part and dissenting in part) (footnote omitted); *see also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion

not a legal but an ethical judgment—an assessment of [the defendant's] . . . 'moral guilt.'"[53] In describing the process by which individuals are selected for this "awesome punishment,"[54] the Court reiterates, time and again, that an exercise of moral judgment is involved. Selection of individuals for death involves not "individualized inquiry" but "individualized *moral* inquiry";[55] the decision involves not "individualized judgment" but "individualized *moral* judgment";[56] the facts considered by the sentencer must have not "direct relevance" but "direct *moral* relevance";[57] the sentencer must determine not that the defendant is "deserving" of death but that he is "*morally* deserving" of death;[58] and so on.

The moral judgment that the sentencer must make is, moreover, a profoundly personal one. Although the Court has repeatedly stated that "it is the function of the sentencing jury to 'express the conscience of the community on the ultimate question of life or death,'"[59] it is clear that the members of the jury are not to determine, on some agentic basis, what the moral judgment of the community would be. Rather, the community's conscience in these cases is expressed through the exercise of conscience by each individual juror.[60] Indeed, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to

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of Stewart, Powell & Stevens, JJJ.) ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct.").

53 *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part). *Cf.* Saffle v. Parks, 494 U.S. 484, 506 (Brennan, J., dissenting) ("The decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding.").

54 Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., dissenting).

55 McCleskey v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) (emphasis added); *see also Saffle*, 494 U.S. at 492–93 (appropriateness of the death penalty is "'a moral inquiry into the culpability of the defendant'") (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) .

56 *McCleskey*, 481 U.S. at 337 (Brennan, J., dissenting) (emphasis added).

57 Payne v. Tennessee, 501 U.S. 808, 838 (1991) (Souter, J., concurring) (emphasis added).

58 *Saffle*, 494 U.S. at 495 (emphasis added).

59 Booth v. Maryland, 482 U.S. 496, 504 (1987) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)) (emphasis added).

60 *See* Garvey, *supra* note 35, at 1003 n.56 ("Capital sentencing juries are said to represent the 'conscience of the community.' However, they 'represent' the community only because they are members of the community, not because they discern and then apply community standards."); *see also* McGautha v. California, 402 U.S. 183, 302 (1971) (Brennan, J., dissenting) ("[U]nder California law it is error to charge that the jury's verdict should express the conscience of the community; the jury should be told, instead, that the verdict must 'express the individual conscience of each juror.'") (quoting People v. Harrison, 381 P. 2d 665, 671 (Cal. 1963)); Stanton D. Krauss, *Rep-*

believe that the responsibility for determining the appropriateness of the defendant's death [is not a personal one, and] rests elsewhere."[61] As the Court has explained:

> [T]his Court's . . . jurisprudence has [assumed] . . . that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State . . . . [It is assumed] "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision[s]" . . . .
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> . . . .
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> [Capital sentencing jurors are] called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another [human being] should die, and they are asked to decide that issue on behalf of the community.[62]

Death sentencers must be personally aware of "the gravity of their choice[s] and . . . the moral responsibility reposed in them as sentencers."[63]

The incompatibility of this kind of conscientic decisionmaking with the values that underlie the rule of law has been the subject of extensive controversy. Generally, the problem has been seen as a perceived inconsistency between the requirement that the sentencer's discretion be "channeled" or "controlled" in the "eligibility" phase and the requirement that the sentencer must be permitted to exercise—and must in fact exercise—the uncontrolled prerogatives of individual conscience in the "selection" phase of the proceedings. As Justice Scalia has written,

> The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve. [O]nce one says each sentencer must be able to answer "no" for whatever reason [he] deems morally sufficient (and indeed, for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality [in] . . . sentencing determinations . . . .[64]

Indeed, despite the efforts by some members of the Court to clothe these conscientic directives in agentic terms—for instance, by refer-

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resenting the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing, 64 IND. L.J. 617, 617–18 (1989).

61 Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985).

62 *Id.* at 329–30, 333 (quoting *McGautha*, 402 U.S. at 208 (1971)).

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

64 Walton v. Arizona, 497 U.S. 639, 664–65, 666 (1990) (Scalia, J., concurring in part and concurring in the judgment) (footnote omitted).

ring to the selection process as one involving a "reasoned moral judgment"[65] or a "reasoned moral response"[66]—it is apparent that the Court has decided, in these cases, that the benefits of the agentic model of law should be sacrificed for something else. All of the problems that the agentic model of law attempts to avoid—such as arbitrary, capricious, race-based, or similar kinds of decisionmaking—are recognized dangers in death penalty cases.[67] Yet, despite these dangers, and despite sharp criticism by colleagues and commentators,[68] a majority of Justices has persisted in this approach.

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65 *See, e.g.*, Blystone v. Pennsylvania, 494 U.S. 299, 316 (1990) (Brennan, J., dissenting).

66 *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 328 (1989). These efforts have been derided by Justice Scalia, who has written that under the Court's standard,

> the jury may decide without . . . guidance whether [the defendant] . . . "lacked the moral culpability to be sentenced to death," . . . "did not deserve to be sentenced to death," . . . or "was not sufficiently culpable to deserve the death penalty" . . . . The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response" . . . ,—but reason has nothing to do with it . . . . It is an unguided, emotional "moral response" that the Court demands be allowed . . .

Id. at 359 (Scalia, J., concurring in part and dissenting in part).

67 *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell & Stevens, JJJ.) (stating that discretion in sentencing involves "the risk of wholly arbitrary and capricious action"); Furman v. Georgia, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring) (observing that discretionary capital sentencing systems may operate, in practice, in a manner that discriminates against racial minorities and other unpopular groups). As Justice Douglas has written, "'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and the Loebs are given prison terms, not death." *Furman*, 408 U.S. at 251–52 (Douglas, J., concurring) (quoting RAMSEY CLARK, CRIME IN AMERICA 335 (1970)) (footnote omitted).

Occasionally the Court attempts to minimize these dangers, stating, for instance, that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg*, 428 U.S. at 203 (opinion of Stewart, Powell, & Stevens, JJJ.). The fact that such discretionary decisionmaking is limited to those who have been previously found (on other grounds) to be a part of the death-eligible class does not, however, make that arbitrariness less troubling.

68 *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 662–74 (1990) (Scalia, J., concurring in part and concurring in the judgment); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Ten Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 6–7, 53–54 (1988); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 859–66 (1992).

The Court has attempted to justify the use of conscientic decisionmaking in death cases on various grounds. For instance, the Court has argued that the selection decision involves factors that are too complex to be captured in articulated rules. "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and supplied by the sentencing authority, appear to be tasks which are beyond present human ability."[69] Although originally articulated in *McGautha v. California*, an opinion which upheld a completely standardless sentencing scheme,[70] the impossibility of capturing those circumstances that merit death in articulated rules has been echoed in more recent cases as the justification for using standardless, conscientic decisionmaking in the selection phase of the death-sentencing process.[71]

The difficulty that death cases present in this regard is, however, a difficulty that is routinely faced in law. It is obvious that whatever principles comprise the foundational rules of law, situations will arise in which simple recourse to those principles will not provide an answer. In such cases, the decisionmaker is authorized (under the agentic model of law) to use rational methods to determine what, all things considered, the law demands.[72] In those few cases where rational methods fail, nonrational methods might be employed;[73] however, even then, the decisionmaker must attempt to determine what is *societally cast* and *societally desired*, not what he—as a personal matter—believes the law should be. Simple inability of principles articulated by law to answer all questions or to capture all conceivable factors does not, of itself, cause us to jettison the agentic model of law and to adopt a conscientic one. Simply because we cannot specify, precisely,

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

70 In *McGautha*, the Court upheld a state sentencing scheme which provided no standards for the sentencing authority at any stage of the proceeding. *Id.* at 196–208. Such a scheme would, of course, no longer pass Eighth Amendment muster. Under later Eighth Amendment jurisprudence, standards of some sort must define the death-eligible class and must govern a defendant's inclusion in that class; only the selection of a particular, death-eligible defendant for execution is a standardless (conscientic) decision. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); *Furman*, 408 U.S. at 238 (per curiam).

71 *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (stating that discretion in capital sentencing is required in order to permit the sentencer to evaluate the unique factors involved in each case); *Gregg*, 428 U.S. at 222 (White, J., concurring) (claiming that mercy in capital cases involves "factors too intangible to write into a statute").

72 *See supra* notes 11–16 and accompanying text.

73 *See supra* notes 17–21 and accompanying text.

what "negligence" is, or what "due process" is, or what "pain and suffering" (as elements of damage) are worth, we do not throw up our hands and instruct the decisionmaker to "use her conscience" to decide. We assume that what is desired or best, from a collective point of view, can be reasonably determined; we assume that agentic decisionmaking in these cases is possible and will be done, despite the law's indeterminacy.

The Court has also located the reason for standardless decisionmaking in the selection stage of death penalty proceedings in the severity and finality of the penalty of death. "[T]he penalty of death," the Court has written, "is qualitatively different from a sentence of imprisonment, however long";[74] "[i]t is unique in its severity and irrevocability."[75] As a result of this uniqueness, it is particularly critical that the correct decision in each case be made, and correctness requires that all factors, circumstances, and aspects of the case be heard and weighed, without hindrance, by the sentencer.[76]

The fact that we, as a society, must be careful before taking someone's life is hardly subject to dispute; indeed, many would say that the severity of death, and the inevitability of decisionmakers' human errors, should preclude the use of the sentence of death altogether. The critical nature of this concern does not, however, *of itself* explain why decisionmakers should use a conscientic standard rather than an agentic one. The question here is not whether care should be taken when measuring the particular defendant and his crime against the criteria for death; the question is, rather, whether those criteria—used in the death decision—are the product of a societal standard or a personal one. Indeed, one might argue (as many critics have) that standards that are articulated, public, and universally applied are more

74 *Woodson*, 428 U.S. at 305 (plurality opinion).

75 *Gregg*, 428 U.S. at 187 (opinion of Stewart, Powell & Stevens, JJJ.).

76 As the Court has explained:

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases . . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (footnote omitted). Accordingly, "the sentencer, in all but the rarest kind of capital case, [may] not be . . . precluded from considering, *as a mitigating factor*, any aspect of the 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." *Id.* at 604 (footnotes omitted).

likely to yield "reliably" just results[77] than secret, personal, nonarticulated ones. The individualized determination, which the penalty of death concededly requires, could certainly be made on the basis of societal standards and societal desires; there is no reason why the desire to avoid error means that this decision must be a conscientic one.

It is my belief that the nature of the death decision does explain why this decision is, and must be, a conscientic one, but that explanation is different from those that the Court gives. It inheres in the *substantive* nature of the death decision and reveals another, latent failure that we may find in the agentic model of law.

IV. Death, and Other Cases: Why the Agentic Model of Law Fails

The reason that I shall postulate for the use of conscientic decisionmaking in death penalty cases is unarticulated, but latent, in every sentence and paragraph of the Court's opinions that enforce this approach. The reason is this: when someone is sentenced to death—when an individual is deliberately and purposefully killed by the state—we must, in the end, have an *individual* who is accountable for doing so.

The decision to kill another human being in a cool, deliberate, and dispassionate manner is abhorrent to our most basic instincts. There is a powerful natural disinclination to the taking of human life, an in-built taboo against intraspecies destruction.[78] Our instinctual aversion to killing is particularly strong when it is done under detached and controlled conditions, with no passion of the moment to justify the action. The truth of this fact is perhaps no more clear than when one considers how often those involved in state-ordered killing wish to dissociate themselves, personally, from the process. Prosecutors insist that they simply enforce the law, a law that is made by others.[79] Jurors claim that under the law, as given by the judge, they had no choice but to vote for death—despite clear instructions to the contrary.[80] Trial judges who impose death sentences claim determin-

77 *See, e.g., Lockett*, 438 U.S. at 604–05 (plurality opinion); *Woodson*, 428 U.S. at 305 (plurality opinion).

78 *See, e.g.*, Dave Grossman, On Killing: The Psychological Cost of Learning to Kill in Modern Society (1995).

79 *See, e.g.*, Michael Leonard & Robert Robertson, "Interviews: The Prosecutors," *in The Death Penalty: Personal Perspectives*, 22 Loy. U. Chi. L.J. 1, 14, 15, 18 (1990) [hereinafter *Death Penalty*] (describing prosecutors' views that enforcement of the death penalty was simply a "part of their duties"; whether the death penalty statute was "an appropriate statute" was a question properly left to the legislature).

80 As one investigating scholar reported:

istic powers for "the evidence" and "the law";[81] governors, who have powers of commutation leave the decisions "to the courts";[82] and corrections officials, who carry out the sentences, cite the fact that the

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> Although each [juror] had participated in a relatively open-ended weighing process, juror after juror told me that the judge's instructions required them to impose death. [One said that] "[t]he instructions that we received . . . . didn't leave any room for choices." The forewoman of a jury that returned a death verdict told me almost defiantly that "we were trying desperately to find something in his favor." Another told me three times that the death penalty was a "requirement" in the case in which he was the foreman . . . .
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> One juror reported, "I didn't want to do it, but I had to." Another explained, "You can feel sorry and sadness for what you have to do but you still have to do it. That is part of discipline." . . . These accounts confirm the hypothesis of social scientists that jurors who [have] imposed death would readily characterize the decision as one required by the applicable law in order to minimize their sense of personal responsibility.

Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1376–77 (footnotes omitted); *see also* Mark Costanzo & Sally Costanzo, *The Death Penalty: Public Opinions, Legal Decisions, and Juror Perceptions*, *in* VIOLENCE AND THE LAW 246, 264–65 (Mark Costanzo & Stuart Oskamp eds., 1994) (describing how many jurors who imposed death were able to discount their own sense of responsibility for the verdict). As one juror stated, "We weren't saying he'll get the death—we were just answering the questions. It was more comforting to focus on the questions." *Id.* at 265 (footnote omitted).

Jurors also often discount the importance of their decisions on the theory that later appeals will prevent any actual executions. *See, e.g.*, Geimer & Amsterdam, *supra* note 68, at 22 (quoting juror who voted for death: "I would have held out on the guilt phase if I had known he would be electrocuted. The word was he wouldn't be electrocuted."); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 213 n.3 (1987) (citing studies that suggest that many jurors do not believe that any death sentence rendered will actually be carried out).

81 *See, e.g.*, Seth Kaberon, "Interviews: Judges," *in Death Penalty*, *supra* note 79, at 34, 36, 38 (citing statements by judges that death cases are determined by the evidence and that the judge "[doesn't] have any control over the evidence," and "as a judge [is] sworn to uphold the law, . . . [he] must impose death in the proper circumstances").

82 *See, e.g.*, Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992) (reporting attitudes of state governors that executions are "the moral responsibility of Supreme Court justices"); *see also* HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES 169 (1993) (discussing statement by a member of the state pardon board that members of the board "hadn't made the law and . . . were not personally responsible for this man, or any man, dying in the electric chair").

decisions to kill are made, in fact, by others.[83] The result, in the end, is that someone dies, but "no one . . . appears to do the killing."[84]

Indeed, some have argued that it is precisely this ability to distance themselves from the results of their actions that enables many of these actors to be a part of the death penalty process.[85] Studies have shown that among those persons in the general population who express support for capital punishment and a readiness to convict (in a proper case), only a minority would be willing to personally pull the

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83 As one corrections official explained:

> I look at it this way. I've made peace with myself on this thing by knowing that the fellow that's being executed has had every chance of appeal. He's had his trials; the number of appeals the guy has had—the United States Supreme Court three times, Eighth Circuit three times, the local court of appeals three or four times. When you know that the case has been scrutinized that closely, then it makes you feel much easier. I believe in the laws of our country.

STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 113 (1992) (interview with Bill Armontrout, former warden of the Missouri State Penitentiary). As Trombly writes succinctly in the forward to his book, "All the principal real-life characters of this book have one thing in common: [t]hey have taken human life." *Id.* at viii.

84 Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 365 (1996).

85 *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 435 (1995) ("The diffusion of moral responsibility that occurs when a decision is perceived (correctly or not) to be divided among a number of participants . . . affects all participants in the decisionmaking process, which in the capital context includes everyone from law enforcement agents to the actual executioners.").

The extent to which death penalty actors actually succeed in this "distancing" is questionable. Studies of those who have served on capital juries have found that years later, many exhibit remorse, sorrow, nightmares, insomnia, and posttraumatic stress disorder. *See* Costanzo & Costanzo, *supra* note 80, at 268–69; Geimer & Amsterdam, *supra* note 68, at 35, 36, 46. One corrections official described his response to the supervision of an execution in the following terms:

> After it's all over, you feel like you want to go wallow in mud. Because although you didn't do it personally and even though you don't want to be perceived a total liberal or soft on crime, which everybody seems to think you are if you even say you believe there is another option, you feel like you sort of degraded yourself, and you feel sorry for the people who had to actually carry out the execution. At the same time you have concern and compassion for the victims of violent crime, but nobody said we had to *like* to kill people. There is nothing in the law says that you have to *like* killing somebody.

IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 115 (1989) (interview with William Leeke, retired head of the South Carolina Department of Corrections).

lethal injection lever or flip the switch for the electric chair.[86] As one juror who voted for death put it, "I don't think anyone would vote for the death penalty if [he] had to do it."[87] For those who must actually execute the condemned person, the achievement of distancing is undoubtedly difficult. In recognition of this fact, the opportunity for distancing is mechanically provided. In most methods of execution in use today, multiple actors are involved—most of whose actions (in fact) kill, but one of whose actions (in fact, and unknown) does not.[88]

Because of our instinctual aversion to the deliberate killing of a member of the human race, the judicial decision to kill requires an act of particular psychological power: it requires the breaking of our human identification with the condemned person,[89] a real and sym-

86 *See* Robert M. Bloom, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls, in* THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 122, 137–39 (Robert M. Bohm ed., 1991); Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Panel Study,* 21 J. CRIM. JUST. 29, 35 (1993).

87 Costanzo & Costanzo, *supra* note 80, at 269.

88 As the method of lethal injection used in North Carolina was recently described:

> Central Prison uses three people to carry out an execution by lethal injection.
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> Each one operates a plunger connected to an intravenous tube. They inject a sedative, which puts the condemned person to sleep, and a lethal dose of Pavulon, a muscle relaxant that paralyzes the heart and lungs. Two tubes go to the inmate, one leads to a hidden bag. This way no one knows who injected the lethal dose.

Joseph Neff, *Killer's Bizarre Execution Requst Denied,* RALEIGH NEWS & OBSERVER, Jan. 21, 1995, at A3; *see also* GRAY & STANLEY, *supra* note 85, at 23 (describing hanging arrangements in which "there are three men in a booth on the platform, each of whom cuts a string at the hangman's signal, [but] only one of [whom] . . . springs the trapdoor"); TROMBLEY, *supra* note 83, at 11, 74–75, 106 (describing the use of one blank by firing squads and dummy pulls as parts of lethal injection machines). The point of such systems is to leave uncertainty as to who killed, not only in the minds of spectators, but in the minds of executioners as well. As one former warden explained it, "'You have two manual pulls, and one is a dummy pull. Both have got the same size spring on them, so the person pulling doesn't feel anything different.'" *Id.* at 106 (interview with Bill Armontrout, former warden of the Missouri State Penitentiary).

89 As Justice Brennan writes:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident . . . . A prisoner remains a member of the human family . . . . As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chances elsewhere.'"

bolic "casting out."[90] When we think of a case that merits death, we do not think of the case as one that simply involves the having of rules and the breaking of rules; for if that is—truly—all that it involves, then the condemned person is not really so different from ourselves. In order to kill another human being in a cool, deliberate, and dispassionate manner, we cannot see him so simply. We must see him not as a person who *has done* evil, but as someone who *is possessed by* evil. We must break the tie of kinship. We must create a chasm between him and ourselves.

For this psychological tie to be successfully broken—for the break in kinship for which it strives to be complete—the decision to kill must be felt, in its great weight, by the one who makes it. The gravity involved in the act of killing must be matched by the gravity involved in the decision to kill. Conscience—that idea which captures and reminds us of our moral connection to others[91]—must now be used to sever the human tie. The decision to kill must be a decision of *personal* moral agency. It must leave someone with "blood on his hands."

It is in its struggle to account for this deep need in death decisions that the apparent incoherence in the Supreme Court's jurisprudence lies. What has been called a conflict between the presence of discretion and the absence of it,[92] or between the use of emotion and the prohibition of it,[93] is really something else. It is the conflict be-

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Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (quoting Stephen, *Capital Punishments*, 69 FRASER'S MAGAZINE 753, 763 (1864)). As Robert Cover noted, "Not even the facade of civility . . . can obscure the violence of a death sentence." Cover, *supra* note 6, at 1623.

90 *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 393 (describing the "inevitably unsystematic, irreducibly personal moral element of the choice to administer the death penalty"); Robin West, *Narrative, Responsibility and Death*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 170 (1990); *see also* STANLEY MILGRAM, THE INDIVIDUAL IN A SOCIAL WORLD: ESSAYS AND EXPERIMENTS (1992) (describing how the willingness of subjects to administer electric shocks to supposed "victims" depended upon the breaking of psychological identification between the two).

91 In most usages, conscience only has meaning—indeed, moral agency only has meaning—in the context of the consideration of the self with others. *See* DANIEL MAGUIRE, THE MORAL CHOICE 379 (1978) (stating that conscience "is not a center of moral judgment which is atomistically cut off from other centers"; it "lives in dialogue and mirrors our social nature"); Elizabeth Kiss, *Conscience and Moral Psychology: Reflections on Thomas Hill's "Four Conceptions of Conscience,"* *in* NOMOS XL: INTEGRITY AND CONSCIENCE, *supra* note 25, at 69, 72–73 (describing conscience as involving a "moral connection to," or an "emotional capacity to empathize with," others).

92 *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment).

93 *Compare* Saffle v. Parks, 494 U.S. 484, 493 (1990) (stating that sentences of death should turn on "a reasoned moral response, . . . rather than an emotional one")

tween agentic and conscientic models of law; it is the conflict between our belief in the rule of law, under whose authority decisionmakers detachedly enforce law made by others, and our fear (in these cases) that we must cross a moral boundary, that a human being must be personally and morally responsible for this act. Moral decisionmaking, of the kind that the Court instinctively perceives to be necessary in these cases, conflicts with our deepest beliefs about the nature, purpose, and function of law. The Court is caught in a place of twilight, in which the nature of the law—under whose authority an act is done—cannot be reconciled with the nature of the act.

Although the death penalty cases might be the most extreme examples of this conflict, they are not the only ones in law. There are other cases in which we feel that the bonds of human kinship have been betrayed or broken, and that the decisionmakers involved must be personally accountable for their acts. They are the cases whose decisions cause us instinctively to cry out, *who* did this? *Who* deported this person to torture or death? *Who* returned this child to abusive parents who killed her? *Who* is responsible for this decision?[94] These are cases in which the agentic nature of law fails; cases in which the answer that law was followed is not enough; cases in which justice, as we intuitively know it, requires another, more personal calculation.

Such cases are admittedly rare in law—as, indeed, they should be. Whether conscientic decisionmaking is an explicit part of law, or is something that we (as a society) require in spite of law, it carries a distinct cost for other values. With personal responsibility comes personal authority; with personal authority comes not only the possibility of justice, but the possibility of erratic judgments, standardless decisionmaking, and the use of factors that we—as a society—abhor.[95] The idea of law as agentic in nature is powerful, and deservedly so; it is only in rare cases that the magnitude of the act or its consequences for others cause us to abandon the agentic model and demand the conscientic one.

(quoting California v. Brown, 479 U.S. 538, 545 (1987)), *with id.* at 513 (Brennan, J., dissenting) (stating that "sympathy," and the emotions it involves, are "important ingredient[s] in the Eighth Amendment's requirement of an individualized sentencing determination").

94 We ask these questions today when confronting the enforcement of slave laws in our history. *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 197–256 (1975) (exploring the refusal of most antebellum judges to face the moral dimensions of their actions in slavery cases).

95 As Professor Greenawalt has written in a slightly different context, "juries may nullify for bad reasons as well as good, and no one has yet thought of a formula that would produce nullification only in deserving cases." Greenawalt, *supra* note 5, at 230.

But rare as these cases are, they serve a vital function. They remind us that we are, in the end, *personal* actors in law, as in life; and that justice cannot always be captured by the judgments of others. They remind us that when we deny the humanity of others, we should feel the prick of doubt, the sickness of conscience. They remind us of the existence of human frailty, and the certainty of human error. They are the times when we cannot comfort ourselves with murmurs of agentic roles. They are the small spaces left, in law, for personal moral inquiry.