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THE DIGNITY OF THE CONDEMNED

*By Richard J. Bonnie**

BECAUSE contending moral intuitions about the death penalty are so strongly felt, practices regarded as unproblematic elsewhere in the administration of criminal justice inevitably become controversial in capital cases. In some contexts, disputes about particular features of the law merely echo the overarching controversy regarding the legitimacy of the death penalty itself.[1] In most contexts, however, the arguments center on the implications of the assertion, endorsed even by those who believe the death penalty to be legitimate, that "the penalty of death is qualitatively different" from other forms of criminal punishment.[2] From this premise, courts and commentators have

* John S. Battle Professor of Law, University of Virginia. I gratefully acknowledge the helpful suggestions of my colleague William J. Stuntz and of Professor Michael S. Radelet of the University of Florida and the research assistance of Jeffrey S. Lanning, a second-year student at the University of Virginia School of Law.

[1] A good example is the controversy regarding the execution of juveniles. Assuming that juvenile murderers have been determined to be sufficiently mature to be held criminally responsible for their conduct and that claims of diminished responsibility have been fully considered in the sentencing proceeding, the arguments against the execution of juveniles replicate, for a subset of capital murderers, the arguments against the death penalty itself. See, e.g., Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

[2] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). The supposition that the death penalty represents a stark discontinuity in the range of criminal punishments establishes the moral foundation for all abolitionist arguments. While some retentionists seem to accept this supposition, others seem to discount the asserted differences between death and other punishments. Compare W. Berns, For Capital Punishment: Crime and the Morality of the Death Penalty 8-9 (1979) (arguing

deduced an unending series of rules and obligations uniquely applicable to capital cases. In this Article, I reflect on whether unique obligations should fall on courts and attorneys when capital defendants or condemned prisoners express a preference for execution.[3]

I.

I should begin by declaring my own biases. I have grave doubts about the moral legitimacy of the death penalty. Were I a legislator, I would vote to abolish it. These same moral doubts lead me to believe that many legal arrangements governing the administration of justice in noncapital cases should be modified in capital cases. I recognize, however, that plausible arguments purporting to show why the rules in death cases should be different can be raised in connection with every feature of the process and that wholesale acceptance of these arguments could make implementation of the death penalty a practical impossibility.[4]

Although virtually every Supreme Court justice in the modern era

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that the death penalty is morally justifiable even though it is a "terrible punishment") with Van den Haag, The Collapse of the Case Against Capital Punishment, 30 Nat'l Rev. 395 (1978) (arguing that capital punishment is simply a greater degree of punishment commensurate with more serious crimes).

[3] This problem is discussed in Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology 860 (1983); Urofsky, The Right to Die: Termination of Appeal for Condemned Prisoners, 75 J. Crim L. & Criminology 553 (1984); White, Defendants Who Elect Execution, 48 U. Pitt. L. Rev. 853 (1987); see also Note, The Death Row Right to Die: Suicide or Intimate Decision?, 54 S. Cal. L. Rev. 575 (1981) (arguing that capital defendants' rights of individual autonomy, privacy, and free exercise of religion require the recognition of a right for these defendants to waive automatic direct appeal and the establishment of limitations on the ability of third parties to bring appeals on their behalf).

[4] This became evident in California between 1977 and 1987 when a majority of the California Supreme Court reversed virtually every death sentence, often on constitutional grounds and often on the basis of reasoning that took the logic of the United States Supreme Court well beyond the views of a majority of that Court. See, e.g., California v. Brown, 479 U.S. 538 (1987) (reversing a decision of California Supreme Court that held that the standard "no sympathy" instruction gave too much discretion to the sentencer and compromised the defendant's interest in a reliable and reasoned judgment that death was appropriate punishment in his case). It is also evident in the pattern of opinions of Justices Marshall and Brennan dissenting from decisions denying certiorari in death cases, which typically repeat their standard assertion that the death penalty is unconstitutional per se but nonetheless develop arguments purporting to show that the proceedings in the petitioner's case were constitutionally defective. See, e.g., Jacobs v. Wainwright, 450 So. 2d 200 (Fla. 1984), cert. denied, 469 U.S. 1062 (1984) (Marshall, J., dissenting); Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), cert. denied, 469 U.S. 1043 (1984) (Brennan, J., dissenting).

has at one time or another endorsed the "death is different" notion,[5] the Court's rulings on specific issues have been uneven, to say the least, in developing the implications of this proposition. The Court has been closely divided in virtually every ruling on capital punishment, and its shifting majorities have left eighth amendment jurisprudence in total disarray.[6] No coherent principles have yet emerged to explain why the rules are sometimes modified in capital cases, and sometimes not. When different rules are announced for capital cases, the Court's opinion typically repeats the assertion that "death is different" and explicitly disclaims any intention to extend the ruling to noncapital cases.[7] On the other hand, when a majority of the Court refuses to accept an argument that would invalidate a death sentence, the Court's opinion typically declares that the argument being pressed on behalf of the condemned prisoner would have unacceptable implications if it were extended to noncapital cases.[8] In these cases, the "qualitative difference" between death and other forms of criminal punishment—a difference that might warrant different rules in the two contexts—is either summarily dismissed or nowhere mentioned.

Perhaps we should not expect the Court to do any better. Perhaps the contending moral intuitions about the death penalty are so strongly felt that rational argument is, in the end, impossible, even for

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[5] See, e.g., Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("In the 12 years since *Furman v. Georgia*, 408 U.S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment . . . ." (footnote omitted)); Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (O'Connor, J., concurring) ("[S]entences of death are 'qualitatively different' from prison sentences . . . ." (citation omitted)); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (majority opinion authored by Stevens, J., and joined by Burger, C.J., and Brennan, Stewart, Blackmun, and Powell, JJ.) ("As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments . . . ."); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (majority opinion authored by Rehnquist, J., and joined by Burger, C.J., and Stewart, White, and Blackmun, JJ.) ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions." (citations omitted)); see also Thompson v. Oklahoma, 108 S. Ct. 2687, 2721 (1988) (Scalia, J., dissenting) (referring to the "death is different" theme as a "motto").

[6] For a penetrating critique of the Court's "unremitting internal conflict" and its divided, and divisive, approach in death penalty cases, see Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1742 (1987).

[7] See, e.g., Booth v. Maryland, 107 S. Ct. 2529, 2536 n.12 (1987); Beck v. Alabama, 447 U.S. 625, 637-38, 638 n.14 (1980).

[8] See, e.g., McCleskey v. Kemp, 107 S. Ct. 1756, 1779-80 (1987); Barefoot v. Estelle, 463 U.S. 880, 896-905 (1983).

judges who take seriously the effort to suppress their own predilections in favor of a search for principle. Perhaps one's judgment on specific questions regarding the administration of the death penalty inevitably turns on one's intuitions about the legitimacy of the penalty itself. Perhaps it is not possible to discipline the "death is different" argument in a way that can differentiate convincingly between those features of the process that should be modified and those that should not.

My speculations about this problem took on a vivid dimension in the course of representing four condemned prisoners over the last decade. I was repeatedly required to decide not only whether "death is different" arguments should be raised—as I have noted, colorable arguments of this sort can be raised on virtually every point—but also whether my obligations to my client and to the legal system, as they are ordinarily defined, were modified in this unique setting. The underlying problem was posed most starkly when I had to grapple with the dilemmas posed by a client who wished to terminate my efforts to invalidate his death sentence.

I came to represent this client several days before his scheduled execution. His death sentence had been affirmed by the Supreme Court of Virginia, and he had directed his former attorney to do nothing further to challenge his sentence. Although the client initially authorized me to seek a stay of execution to permit a petition for certiorari to be filed in the United States Supreme Court, he vacillated on a daily basis as to whether to permit such a petition to be filed (it was not), as to whether a habeas corpus petition should be filed in the state courts (it was, after a "next-friend petition" was filed, and then withdrawn, by his mother),[9] as to whether federal habeas proceedings should be initiated (they were), and as to whether the federal habeas petition should be withdrawn (although he withdrew it, it was subsequently revived).

During the course of these collateral proceedings (which have now spanned about nine years), several disturbing, and illuminating, facts

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[9] Habeas corpus petitions filed "on behalf of" condemned prisoners who are unable or unwilling to file for themselves are commonly called "next friend" petitions. This practice has long been recognized in state and federal courts and is explicitly authorized for federal courts in 28 U.S.C. § 2242 (1982): "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" (emphasis added).

became known about my client: he had declined a plea agreement offered by the prosecution that would have precluded a death sentence; he had actively obstructed his trial attorney's efforts to represent him; he had written the trial judge requesting a death sentence; he had sought to prevent his attorney from filing a direct appeal; he had tried to commit suicide while in jail; he had not cooperated with the staff of the psychiatric hospital to which he had been committed for pretrial evaluation; and he had not disclosed to anyone extensive material concerning his background that was demonstrably relevant to the appropriateness of a death sentence.

This prisoner's case is still in litigation, and he has apparently resolved, without further ambivalence, to try to invalidate the sentence that he did so much to invite. Until his preferences stabilized, I did my best to try to persuade him to keep his case—and himself—alive, struggling all the while with my own conscience to decide whether I was bound to respect his decisions when he refused to sign or attempted to withdraw the habeas petitions.

Many lawyers who specialize in capital defense apparently take the position that their paramount obligation is to fight the executioner, regardless of their clients' wishes.[10] This is not my view. In the course of my dealings with this client, I resolved not to act in defiance of his wishes unless I had a serious doubt about his competence to make an informed and rational decision about his fate. In his case, I did have such a doubt, and therefore I was prepared to act against my client's wishes on several occasions. I have refused, however, to become involved in other cases in which a prisoner whose competence was not in doubt similarly expressed a preference for execution.

In taking the position that I would honor a competent prisoner's wishes, I was conforming to the traditional conception of the attorney's role, a role that remains unquestioned in noncapital cases.[11] Nonetheless, it has been argued that the attorney's role should be modified in capital cases to take account of the unique societal inter-

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[10] See White, supra note 3, at 855-61.

[11] See Model Code of Professional Responsibility EC 7-8 (1980) ("In the final analysis, . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."); Model Rules of Professional Conduct Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.").

ests at stake in the administration of the death penalty.[12] Specifically, some argue that attorneys should ignore the wishes of clients who prefer execution so as not to frustrate the judicial obligation to assure that death sentences are valid before they are carried out.[13] In its strongest version, this argument would obligate an attorney to defy his or her client's wishes by undertaking the litigation directly or by requesting the court to appoint an amicus curiae to do so. Thus, this line of argument is fundamentally incompatible not only with traditional conceptions of an attorney's duty to respect the autonomy of a competent client, but also with prevailing preferences for judicial restraint.

Despite the problems presented by this argument, courts in virtually every state have abandoned the traditional rules on direct appeal of death sentences. In recognition of the "qualitative difference" between death and other forms of criminal punishment, most state courts have found direct review of death sentences to be obligatory, holding that attorneys are bound to lodge the appeal even in the face of a condemned client's objections.[14] (It was on the theory that direct appeal was required by state law that my client's trial attorney filed the appeal over the client's objection. The court was apparently unaware that the appellant was really the attorney, rather than the client.)

In contrast, to my knowledge no court has departed from the traditional rules in collateral proceedings. But, it must be asked, why not? If the condemned prisoner is not legally entitled to insist on execution

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[12] See, e.g., Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 Tenn. L. Rev. 95 (1987).

[13] See, e.g., Strafer, supra note 3, at 895-908 (arguing that a condemned inmate's decision to waive or forgo appeals should not be honored because the inmate's right to personal autonomy is outweighed by the state's interest in preserving life, safeguarding the integrity of the proceedings and the legal profession, and protecting the interests of the inmate's family).

[14] See, e.g., People v. Stanworth, 71 Cal. 2d 820, 832-34, 457 P.2d 889, 898, 80 Cal. Rptr. 49, 58 (1969); Hamblen v. State, 527 So. 2d 800, 802 (Fla. 1988); People v. Silagy, 101 Ill. 2d 147, 179, 461 N.E.2d 415, 430-31, cert. denied, 469 U.S. 873 (1984); Judy v. State, 275 Ind. 145, 148-49, 157-58, 416 N.E.2d 95, 96-97, 102 (1981); Commonwealth v. McKenna, 476 Pa. 428, 437-41, 383 A.2d 174, 179-81 (1978). But see Franz v. State, 296 Ark 181, 754 S.W.2d 839 (1988) (defendant may waive appeal, but state supreme court must review the waiver to determine whether it was "knowing and intelligent"). Many state courts in so ruling are following state "mandatory appeal" statutes. For a list and summary of the state statutes, see Carter, supra note 12, at 114.

of a possibly defective death sentence by foregoing a direct appeal, why should his[15] wishes be binding thereafter, especially if an officer of the court believes that the sentence is reversible on grounds not previously considered? In the next Part of this Article I explore this question. In so doing, I focus on cases involving prisoners who, having already been sentenced to death, want to abandon efforts to have their sentences set aside. Then, in the third Part, I turn to the difficult questions raised by capital defendants who, over the course of the trial and sentencing proceedings, refuse to assist their lawyers' efforts to evade death sentences.

II.

When a court reviews a death sentence over a condemned prisoner's objections, it does so on the ground that society has an interest, independent of the prisoner's own interest, in the integrity of its institutions of criminal punishment and in the dignity of the processes through which these punishments are carried out. Because these same societal interests are implicated in noncapital as well as capital cases, we should start by asking whether there are any situations outside of the death penalty context where protection of societal interests is not contingent on the individual's efforts to protect his own interests.

There are at least two such situations. First, by requiring a trial court to assure that a guilty plea rests on a factual foundation, the legal system precludes conviction for phantom crimes, despite the fact that a defendant may believe he is guilty or may prefer to accept a favorable plea bargain rather than contest his guilt at trial.[16] Although this requirement serves primarily as a check, on the defendant's behalf, against misunderstanding and inadequate representation, in theory it also serves to protect the integrity of the legal process by avoiding judicial complicity in the infliction of punishment for an

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[15] I have used the male pronoun to refer to capital defendants and condemned prisoners whenever rewriting the sentence to eliminate singular pronouns would be unusually awkward. I have chosen the male pronoun for empirical reasons: the overwhelming majority of capital defendants and condemned prisoners are male, and in every reported case with which I am familiar involving the issues raised in this Article, the condemned prisoner has been male.

[16] Although it remains unclear whether the constitution requires courts to find that a guilty plea rests on a factual foundation, this practice appears to be commonly followed in state courts, see 3 Standards for Criminal Justice, Standard 14-1.6 (1979), and is required in federal courts by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 11(f).

offense that was not committed.[17] Concern about the integrity of guilty pleas is demonstrably heightened in capital cases, where the punishment, if carried out, is irrevocable. Thus, conditioning the capital defendant's right to plead guilty on a satisfactory demonstration of the elements of the capital offense is an uncontroversial application of a settled judicial practice.[18]

This traditional concern for the integrity of guilty pleas also partially explains the unique procedures used in the sentencing phase of capital cases. Under the current generation of capital sentencing statutes, the prosecution must establish one or more "aggravating circumstances," in addition to the elements of murder, to provide a substantive predicate for a death sentence.[19] The findings that establish this "predicate" are functionally equivalent to the elements of the offense. Thus, assuming that the integrity of the legal system is compromised by executing a person for conduct not legally punishable by death, it is sensible to insist that all necessary factual predicates for the sentence be established at trial and that the legal sufficiency of this

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[17] This is evident in North Carolina v. Alford, 400 U.S. 25 (1970). In *Alford*, the Court held that "[i]n view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." Id. at 38.

[18] The prevailing judicial practice in some states is to develop the full evidentiary basis for the guilty plea in capital cases, far exceeding the scope of the judicial inquiry made in noncapital cases. See, e.g., Commonwealth v. Appel, 517 Pa. 529, 533, 539 A.2d 780, 781 (1988) (state trial court, before accepting guilty plea to capital crime, required the state to present extensive evidence and testimony over a three-day period). Moreover, in California a defendant is not permitted to plead guilty to a capital offense without the consent of his lawyer. See Cal. Penal Code § 1018 (West 1985) (discussed and applied in People v. Chadd, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798, cert. denied, 452 U.S. 931 (1981)). Section 1018 represents a unique exception to the traditional understanding that decisions about what plea to enter are reserved exclusively to the client, see 1 Standards for Criminal Justice, Standard 4-5.2 (1979), and is also arguably incompatible with Faretta v. California, 422 U.S. 806 (1975) (holding that a defendant is constitutionally entitled to represent himself if he competently waives assistance of counsel). See infra notes 58-59 and accompanying text.

[19] For an overview of the statutory predicates for a death sentence under the current generation of capital sentencing statutes, see P. Low, J. Jeffries & R. Bonnie, Criminal Law: Cases and Materials 824-27 (1986). The specification of such additional factual predicates, whether as part of the definition of the capital offense or as aggravating circumstances that must be proven at the sentencing phase of the trial, serves the "constitutionally necessary function" of narrowing the class of offenders eligible for punishment by death. Zant v. Stephens, 462 U.S. 862, 878 (1983); see also Lowenfield v. Phelps, 108 S. Ct. 546 (1988) (holding that the "narrowing function" can be achieved by jury findings of aggravating circumstances either during the guilt phase (if the substantive definition of the crime includes such factors) or at the penalty phase).

evidence be reviewed on appeal, regardless of the defendant's desire to plead guilty, stipulate the existence of aggravating circumstances, or forgo appellate review. In this context, such integrity-protecting procedures actually do serve in practice to prevent defendants from "tricking" the legal system into executing them for conduct not legally punishable by death. In short, although this "aggravating circumstances" requirement is uniquely applicable to death cases, it builds on a foundation already established in existing law.

There is a second context, not confined to capital cases, in which a societal interest in adherence to legal norms is probably understood to be independent of the prisoner's own interests: a prisoner is probably not permitted to consent to the imposition of a punishment not authorized by law, and persons other than the prisoner would probably have standing to enforce the norm, notwithstanding the prisoner's willinguess to submit to the unauthorized punishment. The validity of this assertion is best illustrated in the context of a punishment prohibited by the constitutional ban against unnecessary cruelty.[20] Although a Muslim prisoner might believe that his hand should be cut off in retribution for his crime, it is clear that he may not waive the constitutional ban and thus empower the state to impose a punishment that it is otherwise forbidden to inflict. Similarly, although it is easy to understand why a rational prisoner might prefer castration to a lengthy penitentiary sentence, it is unlikely that the state would be permitted to offer such a choice. In the context of the death penalty, a condemned prisoner would not be permitted to choose to be electrocuted if this method of execution were held to be banned by the eighth amendment.

This societal interest in preventing unauthorized punishment may itself justify judicial review, over the condemned prisoner's objection, of some claims of error in the imposition of the death penalty. A claim that a prisoner's death sentence is constitutionally disproportionate to the seriousness of the offense is conceptually equivalent to a contention that the state has not demonstrated a legally sufficient foundation for the conviction or death sentence. For example, a finding that the defendant at least manifested "reckless disregard for human life" by "knowingly engaging in criminal activities known to

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

carry a grave risk of death" appears to be a constitutionally required predicate for a death sentence.[21] Thus, if it is alleged that not even this minimum degree of culpability was proven, the judicial obligation to prevent unauthorized punishment, as it has traditionally been understood, probably justifies review of this claim by both state and federal courts, notwithstanding the unwillingness of the condemned prisoner to raise it.

The practice of requiring automatic appeal of death sentences over a competent defendant's objection would not represent a significant expansion of integrity-protecting procedures if it were limited to a review of the sufficiency of the substantive predicates for the sentence under state and federal law. The actual scope of appellate review, however, appears to be seldom so restricted.[22] Rather, the prevailing practice appears to be to review all claims of error in automatic appeals in the same manner as they would have been reviewed had the appeal been brought at the defendant's own request.[23] Thus, the interest being protected by current judicial practice in capital cases goes well beyond that suggested by the analogy to guilty pleas or to the ban on punishments not authorized by law. In death cases—and only in death cases—state appellate courts have assumed the responsi-

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[21] Tison v. Arizona, 107 S. Ct. 1676, 1688 (1987).

[22] For rare decisions restricting the scope of review, see Cole v. State, 101 Nev. 585, 707 P.2d 545 (1985); *Appel*, 517 Pa. 529, 539 A.2d 780 (both limiting mandatory review over the defendant's waiver to several statutorily-required inquiries: whether the evidence supports the finding of a valid aggravating circumstance; whether the death sentence is the product of "passion, prejudice or any other arbitrary factor"; and whether the sentence is comparatively excessive or disproportionate; and further, in *Appel*, the court also manditorily reviewed the evidentiary basis for the plea and the conviction beeause the defendant had pleaded guilty to a capital offense. See *Appel*, 517 Pa. at 533-34, 539 A.2d at 781-82).

[23] See, e.g., Evans v. State, 361 So. 2d 654 (Ala. Crim. App. 1977), aff'd in part, rev'd in part, 361 So. 2d 666 (Ala. 1978) (reviewing all issues raised by appointed attorneys in appeal filed over defendant's objection); Goode v. State, 365 So. 2d 381, 384 (Fla.), cert, denied, 441 U.S. 967 (1979) (holding that "[e]ven though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts"); People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415 cert denied 419 U.S. 873 (1984) (reviewing all allegations of error raised by counsel appointed, over defendant's objection, to represent him on appeal); Vandiver v. State, 480 N.E.2d 910 (Ind. 1985) (reviewing penalty trial proceedings for any procedural or substantive errors); see also State v. Osborn, 102 Idaho 405, 410-11, 631 P.2d 187, 192-93 (1981) (noting that the applicable statute "mandates that we examine not only the sentence but [also] the procedure followed in imposing [a death] sentence regardless of whether an appeal is even taken").

bility of assuring that the death sentence is not tainted by any legal error, notwithstanding the defendant's desire to submit to the decree.[24] Such an aggressive judicial posture must rest on the intuition that death sentences should be carried out only if the highest state court has determined that the process by which they were imposed adhered carefully and fully to all applicable norms.[25]

If this is the premise for aggressive judicial review on direct appeal, it is difficult to understand why a condemned prisoner can by his inaction or waiver elicit an altogether passive judicial posture in collateral proceedings. The normative significance of possible defects in the proceeding does not vary according to whether the claims are presented on direct appeal or in collateral proceedings. Nor is there any reason, a priori, to suppose that claims raised for the first time in collateral proceedings are qualitatively less significant than those first presented on direct appeal. Courts commonly set aside death sentences on the basis of claims raised for the first time in collateral proceedings.[26]

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[24] Judy v. State, 275 Ind. 145, 416 N.E.2d 95 (1981), and *Cole*, 101 Nev. 585, 707 P.2d 545, both reflect an inherent contradiction produced by this practice and the "death is different" logic. Both courts applied traditional principles in refusing to review alleged errors relating to the conviction, yet departed from these principles in undertaking a review of the legality of the death sentence. Some claims of error in the conviction phase, however, can directly reflect on the integrity of the death sentence; among these are claims that the defendant's guilty plea was not supported by an adequate factual foundation or that the prosecution's evidence was insufficient to prove an element of the capital offense. In these situations, the line between conviction and sentence fails to assure the integrity of the death sentence.

[25] The Supreme Court of Indiana expressed the intuition as follows:

> Although we feel Steven Judy can waive and has waived review of any issue that might be raised with reference to his convictions, we believe that the death sentence cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of our state and federal constitutions. . . . [I]t is our province here to review and assess the validity of our statutes, and their application in this case . . . .

Judy, 275 Ind. at 157-58, 416 N.E.2d at 102.

[26] In most of these cases, the claims in question were not raised prior to the collateral proceedings because trial counsel inadvertently failed to raise or preserve them or because the claims had not yet achieved judicial recognition. See generally Batey, Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F," 36 U. Fla. L. Rev. 252 (1984) (reviewing procedural doctrines that normally limit the use of federal habeas corpus relief and arguing that they should not apply in capital cases); Catz, Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception, 18 U.C. Davis L. Rev. 1177 (1985) (criticizing the existing strict preclusion rules governing federal habeas corpus relief of claims of constitutional error not raised at the state trial or appellate levels).

Traditional restrictions on judicial review of claims defaulted at trial or on direct appeal serve to effectuate the state's interest in finality of judgment in criminal cases. Not surprisingly, however, the judicial intuition that "death is different" has been compelling enough to override this interest in capital cases. Most state courts have been willing in capital cases to entertain defaulted claims on direct appeal, ignoring or loosening contemporaneous objection rules customarily applied in noncapital cases.[27] Similarly, courts seem to be less rigid in invoking procedural bars in habeas corpus proceedings involving condemned prisoners who are seeking to set aside their death sentences.[28] As these practices indicate, the distinction between direct and collateral review does not rest on any bedrock principle. Thus, state courts could choose to entertain collateral attacks on death sentences over the objections of a condemned prisoner without breaching any fundamental limitation on judicial power.

There are good reasons to close the door at some point, of course. Finality is desirable even in death cases. But the need for finality obviously must be, and is, balanced against the need to preserve the integrity of the law. A comprehensive review of the case on direct

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[27] The Supreme Court of Pennsylvania recently endorsed this practice explicitly:

> Ordinarily the failure of trial counsel to timely raise these objections would constitute a waiver and therefore preclude a consideration of these issues on the merits. It would then be incumbent upon appellant to show that those omissions constituted ineffective assistance of counsel. However, in capital cases we have relaxed the traditional waiver concepts because of the uniqueness of the penalty involved . . . .

Commonwealth v. Nelson, 514 Pa. 262, 277, 523 A.2d 728, 736, cert. denied, 108 S. Ct. 293 (1987) (citations omitted); see also *Osborn*, 102 Idaho at 410-11, 631 P.2d at 192-93 ("[The state automatic appeal statute] mandates that we examine not only the [death] sentence but [also] the procedure followed in imposing that sentence regardless of whether an appeal is even taken. . . . [W]e may not ignore unchallenged errors."); State v. Patterson, 278 S.C. 319, 320, 295 S.E.2d 264, 264-65 (1982) ("On appeal from a murder conviction in which the death penalty is imposed, this court reviews the entire record for prejudicial error *in favorem vitae*, regardless of whether the error was properly preserved for review." (citations omitted)).

State procedural rules also often suggest a loosening, in the capital context, of the normal rules concerning appellate review. See, e.g., Ala. R. App. P. 39(k) ("In all cases in which the death penalty has been imposed, . . . the Supreme Court may notice any plain error or defect in the proceeding under review, . . . whenever such error has or probably has adversely affected the substantial rights of the petitioner.").

[28] See, e.g., Stynchcombe v. Floyd, 252 Ga. 113, 115, 311 S.E.2d 828, 830-31 (1984) ("Failure to object to a sentencing phase jury charge in a death penalty case where the jury was not informed that a life sentence could be recommended in spite of the presence of aggravating circumstances does not preclude review of that charge on habeas corpus."); Ex parte Bravo, 702 S.W.2d 189 (Tex. Crim. App. 1982) (en banc).

appeal, including claims defaulted at trial, might vindicate the societal interest in a substantial majority of cases. No state has yet come so far, however, as then to foreclose collateral review after such comprehensive direct review when the prisoner is seeking to set aside his death sentence. It is difficult to see why the societal interest in integrity, recognized to be of such paramount importance at the time of direct appeal, should thereafter be devalued altogether in cases in which the condemned prisoner prefers to die.

Thus, the argument that courts have an affirmative obligation to prevent execution of legally defective death sentences leads, almost inevitably, to the conclusion that otherwise reviewable claims[29] concerning the legality of a death sentence should be reviewed at any time before execution regardless of the objections of the condemned prisoner. If there is a principled basis for rejecting this conclusion, it must rest either on the view that death is not different after all or on the view that this difference is not compelling enough to override the prisoner's right to control his own fate.

The prisoner's interest in controlling his own fate is often denigrated by proponents of aggressive judicial review as amounting to nothing more than "state-administered suicide."[30] This is hyperbole, of course; only if execution of a lawfully imposed death sentence amounts to homicide is the state an agent of suicide when it executes a competent prisoner who has declined to contest his death sentence.[31]

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[29] By "otherwise reviewable" I mean those claims that would be reviewed on their merits if they were raised by prisoners seeking to set aside their death sentences. Specifically, in the context of collateral proceedings, this phrase would include any previously defaulted claims that the state courts would consider if the prisoner were challenging the legality of his sentence.

[30] Hammet v. Texas, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting from decision permitting condemned prisoner to withdraw his petition for certiorari); see also Lenhard ex rel. Bishop v. Wolff, 444 U.S. 807, 811-12 (1979) (Marshall, J., dissenting from decision denying stay of execution) ("By refusing to pursue his Eighth Amendment claim, Bishop has, in effect, sought the State's assistance in committing suicide." (footnote omitted)).

[31] Although the courts should take aggressive steps to assure that the prisoner is competent to make such a decision, see infra notes 67-69 and accompanying text, I reject the view that prisoners facing execution are categorically unable to make rational decisions regarding their fates or that they are categorically unable to exercise "voluntary" choice. Cf. Strafer, supra note 3 (arguing that the mental and emotional phenomena that surround the death penalty and the conditions on death row mandate a significant heightening of the standards for "competence" and "voluntariness," but stopping short of suggesting a categorical bar). The view that the decisions of death penalty defendants or death-row inmates are never competent or voluntary undermines respect for the prisoner's autonomy while pretending to honor it.

Hyperbole aside, however, what does it mean to say that a condemned prisoner has a right to control his own fate? The prisoner's destiny hardly lies in his own hands; indeed, his right to live is contingent upon the state's willingness to allow him to do so. What *can* be said is that a condemned prisoner has a right to control his own fate *within the constraints established by the law.*

A convicted prisoner does not become a pawn of the state. Even a prisoner sentenced to death retains a constitutionally protected sphere of autonomy—of belief, expression, and, to a limited extent, action. The state is bound to respect a convicted prisoner's inalienable freedom of conscience. He is free to admit his guilt and to repent, just as he is free to proclaim his innocence in defiance of the verdict under which he stands convicted. He is free to resign himself to the social decree, acknowledging the justice of the punishment, just as he is free to decry it.

A condemned prisoner may believe that the sentence of death is justly deserved and should be carried out, notwithstanding the existence of doubts about its validity. A condemned prisoner may prefer the unknowable fate of execution to the known pains of imprisonment, the only option likely to be available. As long as the prisoner is competent to make an informed and rational choice, the argument for respecting this choice would appear to be a powerful one.[32]

The counterargument, as I described it earlier,[33] rests on the proposition that the state is not bound to punish a convicted prisoner as he wishes. Our law bans certain forms of punishment, however much the prisoner may believe they are justly deserved. Even though the death penalty is not a banned punishment, it is one that should be imposed sparingly and with unerring adherence to all legal requirements. Accordingly, the argument concludes, the condemned prisoner may not choose to be executed if there exists any doubt as to the legality of his sentence, however much the prisoner may prefer to die rather than serve out any alternative sentence.

We are left with competing moral intuitions. Is it "wrong" to carry out a death sentence in the face of unresolved doubts about its valid-

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[32] To ignore the prisoner's interest would be, in Judge Sneed's words, "to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison." Lenhard ex rel. Bishop v. Wolff, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J., concurring in denial of stay of execution).

[33] See supra notes 10-13 and accompanying text.

ity? Is it "wrong" to ignore the wishes of the condemned prisoner who wants the state to carry out its promises? The prisoner's dignity stands against the dignity of the law. Should the choice of whether or not to terminate the process of judicial review be left to the prisoner, or should this decision be taken out of his hands?

I do not want to question the shared intuition that "death is different," and I recognize the force of the argument, flowing from this premise, that the courts have an affirmative obligation to prevent the execution of a legally defective death sentence. I believe, however, that the prisoner's interest in controlling his own fate is also deserving of respect and that this interest offsets, or at least qualifies, the otherwise powerful societal interest in preserving the moral integrity of the law. The prevailing legal regime aims to accommodate these two powerful moral claims, but the compromise, which ignores the prisoner's preference at the time of direct appeal but honors it fully thereafter, is awkward and unsatisfying. A more sensible resolution of the problem would focus on the nature of the claim being pressed rather than its timing.

On the one hand, the courts should review the legality of a death sentence over the objection of a competent prisoner if the claim is grounded in an argument that the prosecution failed to prove a legally sufficient predicate for a death sentence under state or federal law.[34] No distinction should be drawn for this purpose between direct and collateral review or between state and federal review.[35] Claims of this

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[34] By this formulation, I mean to encompass all of the following claims: that the evidence was insufficient to prove the elements of the capital offense or, if the defendant pleaded guilty, that the factual basis for the plea was insufficient; that any evidence offered by the defense to defeat liability or reduce the grade of the offense was sufficient, as a matter of law, to do so; that the prosecution's evidence was insufficient to establish an adequate predicate for a death sentence under state law; and that the evidence was insufficient to establish a constitutionally adequate basis for a death sentence.

Ordinarily, it would not be necessary under this formulation for state courts to determine, as they are typically required to do on mandatory direct appeal, whether the death sentence "was imposed under the influence of passion, prejudice or other arbitrary factor," nor whether the defendant's death sentence was "excessive" when compared with decisions in "similar" cases. See supra note 22. The exercise of comparative review would be required under the analysis recommended in the text only if such review were necessary to determine whether the statutory circumstances upon which the defendant's death sentence is based have, in practice, "genuinely narrowed the class" of offenses punishable by death.

[35] Although I have focused the discussion in the text on the obligations of state courts, the analysis has direct implications for the role of federal courts in cases in which habeas petitions are filed on behalf of condemned prisoners who have not authorized the proceedings or who

kind strongly implicate the state's legal authority to impose a death sentence. To allow a condemned prisoner to preclude review in such cases would be to confer upon the prisoner the authority to decide that he should be executed for a crime not legally punishable by death. On the other hand, procedural claims and those relating to the discretionary features of the sentencing process, neither of which call into question the substantive predicates for a death sentence, should be reviewed only at the insistence of the condemned prisoner or, if the prisoner is incompetent, by a "next friend."[36]

It will be necessary, of course, to draw boundaries between these two categories of claims. The traditional distinction between substantive and procedural claims would not be difficult to apply in this context. Claims that unlawfully obtained evidence was erroneously admitted or that some scrupled jurors were unlawfully excluded for cause do not implicate the fundamental justice of execution[37] and

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have sought to terminate them. To the extent that the eighth amendment precludes imposition of the death penalty when it is disproportionate to the seriousness of the offense or when the state law that purports to authorize it has not sufficiently narrowed the class of offenses punishable by death, the federal judiciary has a compelling interest in protecting the integrity of the constitutional order. If these claims have not been reviewed by the state courts, the federal courts should be willing to bend the normal rules governing the exercise of habeas jurisdiction, including those pertaining to "standing" and procedural default. If these federal claims have been reviewed, and rejected, by the state courts, it could be argued that sufficient steps have been taken to vindicate the societal interest in the integrity of the legal order. However, in light of the experience in federal habeas review over the last decade and the continuing evolution of eighth amendment jurisprudence, definitive reliance on state courts to review federal claims would be premature in my judgment. See generally Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128 (1986) (recommending the development of a body of federal common law to guard against the forfeiture of federal rights caused by adherence to state procedural rules).

Regardless of the strength of the arguments that might be made for federal review in these cases, it seems unlikely that the Supreme Court, as presently constituted, would accept them. See Gilmore v. Utah, 429 U.S. 1012 (1976) (terminating a stay of execution on the ground that Utah's determination that Gilmore was competent and had knowingly and intelligently waived any and all asserted federal rights was firmly grounded); cf. Smith v. Murray, 477 U.S. 527 (1986) (adopting a restrictive approach to federal habeas review of federal claims defaulted in state courts, even in capital cases); Cabana v. Bullock, 474 U.S. 376 (1986) (permitting state courts maximum flexibility in making the culpability finding required by the eighth amendment and directing federal courts to presume the correctness of such findings).

[36] See supra note 9 and accompanying text.

[37] Cf. Engle v. Isaac, 456 U.S. 107, 135 (1982) (holding that although the rules regarding federal habeas review of defaulted claims should be set aside in "appropriate" cases, meaning those in which such action is necessary to correct "a fundamentally unjust incarceration," the rules should not be set aside where the prisoner failed to challenge a jury instruction at trial).

should therefore be waivable by the condemned prisoner. The suggested distinction between the "definitional" and "discretionary" features of the capital sentencing process,[38] however, might be more problematic.

Some claims relating to the "discretionary" features of the sentencing process admittedly implicate the substantive justice of the prisoner's execution. Such claims include assertions that the sentencer failed to consider the defendant's traumatic upbringing or history of psychiatric disturbance[39] or that mitigating evidence of this kind was sufficiently substantial to call for leniency as a matter of law.[40] If, however, the scope of judicial review of death sentences over a condemned prisoner's objection is to turn, as I have proposed, on the nature of the claim, the critical question is whether all claims pertaining to the substantive justice of the death penalty must be reviewed[41] or whether the judicial obligation should be confined instead to a determination that the prosecution has proven the "definitional" predicates for the death sentence under state and federal law. I suggest the latter.[42]

To explain why I have concluded that obligatory review should be confined to the definitional features of state and federal capital sentencing law, I want to shift the focus to the stages of the proceedings that precede the imposition of the death sentence. To this point, I have assumed that the prisoner who is seeking to abandon post-conviction proceedings resisted the death sentence at trial. In many

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[38] This distinction is used in the Court's analysis in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), drawing on Justice Stevens's opinion in Zant v. Stephens, 462 U.S. 862 (1983).

[39] See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982).

[40] See, e.g., Haynes v. State, 739 P.2d 497 (Nev. 1987).

[41] The claims mentioned in the text pose the issue most clearly. If these claims require judicial scrutiny despite the defendant's objection, many other defects in the sentencing process would also arguably require review. For example, the following claims, one could well argue, also implicate the substantive justice of the defendant's execution: that the sentencer may not have been informed about the potentially mitigating evidence due to a restrictive evidentiary ruling or counsel's negligent failure to develop and present the evidence; or that the sentencer was influenced by evidence or by prosecutorial comment that was not relevant to the sentencing judgment under the governing substantive law.

[42] Indeed, it is not entirely clear that state courts are constitutionally required to review every claim that implicates the "substantive justice" of the death penalty even if the prisoner seeks such review. Compare Maynard v. Cartwright, 108 S. Ct. 1853 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980) (indicating that state courts are required to review the *definitional predicates* for a death sentence) with Pulley v. Harris, 465 U.S. 37 (1984) (holding that state courts need not conduct comparative review or case-by-case proportionality review).

cases, however, these prisoners have sought death sentences since the beginning of the process. In so doing, they may have curtailed the sentencer's access to relevant mitigating evidence and may even have invited the sentencer's consideration of factors defined as irrelevant under the governing law. If the integrity of the legal system requires careful appellate scrutiny, in the face of the condemned prisoner's objection, of the sentencer's judgment regarding the suitability of a death sentence, it would also require preventive efforts to promote reliable judgments when the defendant attempts to subvert the sentencing process.

III.

Although I am not aware of any systematic empirical investigation on the subject, anecdotal evidence indicates that a significant proportion of defendants charged with capital murder express a preference for a death sentence at some point during the course of interactions with their attorneys.[43] Although skillful attorneys usually are able to persuade recalcitrant defendants to fight the executioner, some of these defendants adamantly refuse to cooperate with their lawyers, and in some cases (such as the case I described earlier), they actively obstruct their attorneys' efforts. Not infrequently, these defendants attempt suicide, reject proffered plea agreements that would yield life sentences, plead guilty contrary to their attorneys' advice, refuse to disclose potentially mitigating evidence or to identify potentially helpful witnesses, refuse to cooperate with mental health experts retained or appointed to evaluate them, direct their lawyers not to introduce any mitigating evidence that might have been assembled or to argue for leniency, and, in some cases, explicitly invite the judge or jury to impose a death sentence.[44]

One of the more common and troublesome ways in which these defendants have attempted to "volunteer for execution" is by failing to assist their attorneys in the development and presentation of a case in mitigation.[45] There is no doubt that this failure tends to undermine the integrity of the sentencing process. A "reliable" decision regard-

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[43] See White, supra note 3, at 854-55.

[44] For a detailed look at a few reported cases in which capital defendants took these kinds of steps, see Urofsky, supra note 3, at 554-62.

[45] For a summary of the reported cases involving this problem, and a suggested solution to it, see Carter, supra note 12.

ing the suitability of a death sentence requires attention to all factors that may call for leniency, including relevant features of the defendant's character and record and the circumstances of the offense.[46] If the potentially mitigating evidence was not presented to the sentencer due to the application of a restrictive evidentiary ruling[47] or due to counsel's own incompetent failure to develop and present it,[48] the defendant's death sentence would be set aside on the ground that the defendant had been denied the "individualized" determination regarding the suitability of a death sentence to which the eighth amendment entitles him.

For present purposes, however, the question is whether the defendant may waive his constitutionally protected interest in an individualized determination. Does the legal system have an interest, independent of the defendant's, in the reliability of the decision to impose a death sentence when the definitional predicate for such a sentence has been properly established under applicable state and federal law, that is, when the state has proven the elements of the offense and the necessary "aggravating factors?" If so, some corrective action would have to be taken when the defendant declines the opportunity to develop and present a case in mitigation. If not, counsel would be bound to defer to a competent client's preferences.[49]

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[46] See, e.g., Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

[47] See, e.g., *Skipper*, 476 U.S. 1.

[48] See, e.g., Blake v. Kemp, 758 F.2d 523, 534-35 (11th Cir. 1985).

[49] The courts have disagreed in the handful of reported cases addressing this issue. Compare People v. Deere, 41 Cal. 3d 353, 364, 710 P.2d 925, 931, 222 Cal. Rptr. 13, 20 (1985) (holding that mitigating evidence must be presented over the defendant's objection, due to "the state's interest in a reliable penalty determination . . ."); Trimble v. State, 693 S.W.2d 267 (Mo. App. 1985) (expressing view that if it is to operate within the requirements of the eighth amendment, Missouri's capital sentencing statute *requires* the introduction of available mitigating evidence, but holding, in light of prior Missouri Supreme Court decisions, that counsel was not "ineffective" under the sixth amendment when he followed his client's instructions by not offering evidence or arguing for mitigating factors) and People v. Koedatich, No. 23,404, 1988 N.J. LEXIS 83 (N.J. August 3, 1988) (holding that the attorney is obligated to introduce available mitigating evidence, notwithstanding the client's contrary instructions, and endorsing the reasoning of State v. Hightower, 214 N.J. Super. 43, 518 A.2d 482 (App. Div. 1986)) with Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) (holding, over the dissent of two justices, that trial judge did not err in refusing to appoint counsel against the defendant's wishes "to seek out and to present mitigating evidence and to argue against the death sentence"); People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415, cert. denied, 469 U.S. 873 (1984) (holding that a defendant who is exercising his sixth amendment right to represent himself in the sentencing phase is also entitled to preelude appointed counsel from introducing

Some courts and commentators have taken the position that society does have an interest, independent of the defendant's, in assuring that the death penalty is "reliably" administered and that this interest requires introduction of available mitigating evidence, overriding the defendant's interest in controlling his own fate. The Supreme Court of California recently put the point this way:

> To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.[50]

What does it mean to say that the state has an independent interest in a "reliable" sentencing decision? The state's interest in assuring that the death penalty is imposed in cases in which it is warranted is not at stake. The state's interest in avoiding death sentences not authorized by law is vindicated by assuring that the definitional predicates for a death sentence have been proven. The interest to which the California Supreme Court must be alluding, then, is the interest in assuring that the death penalty is *not* imposed in cases in which it is permissible but in which it might not have been imposed by a fully informed sentencer. Thus, the asserted interest is in enhancing the sentencer's opportunity to find capital punishment unsuitable even if the defendant does not seek leniency.

This asserted societal interest is not rooted in the Constitution. It is, of course, well established that "the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitu-

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mitigating evidence); State v. Felde, 422 So. 2d 370, 393-95 (La. 1982), cert. denied, 461 U.S. 918 (1983) (holding that counsel was not constitutionally ineffective in adhering to the defendant's instructions not to seek any verdict other than "not guilty by reason of insanity" or "guilty with the death penalty" and, once guilt was determined, in assisting the defendant in persuading the sentencing jury to impose the death penalty) and Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979) (holding over a dissent that the defendant who is exercising his sixth amendment right to represent himself is also constitutionally entitled to forbid standby counsel from introducing mitigating evidence). Most of these cases are summarized and discussed at length in Carter, supra note 12, at 116-129.

[50] *Deere*, 41 Cal. 3d at 364, 710 P.2d at 931, 222 Cal. Rptr. at 20; see also Carter, supra note 12, at 96 ("[S]ociety's interest in the integrity of the process of imposing death outweighs an individual defendant's interest in free choice. . . .").

tionally indispensable part of the process of inflicting the penalty of death."[51] This "individualization" theme, however, is unlike the "legality" theme of the Court's eighth amendment jurisprudence in that the latter clearly promotes a systemic goal—reducing the risk of arbitrariness to a constitutionally tolerable level[52]—while the former is rooted solely in a desire to protect the defendant's interests.[53] The "constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures"[54] derives from the right of the defendant to be treated with dignity as a human being—the foundational value of the eighth amendment. Thus, the value being protected in the "individualization" decisions is not a societal interest in promoting leniency or in reducing the

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[51] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted).

[52] The legality theme first emerged, of course, in Furman v. Georgia, 408 U.S. 238 (1972). Since *Furman*, the Court has made it clear that capital sentencing statutes, facially or as applied, must assure that there is a "meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not." Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting *Furman*, 446 U.S. at 313 (White, J., concurring)); see also Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In *Godfrey* and *Maynard*, the Court invalidated death sentences that had been predicated, in whole or in part, on a vague aggravating circumstance that failed adequately to channel the exercise of sentencing discretion. That these decisions promote systemic goals is especially evident in *Maynard* where it was clear that a constitutionally adequate predicate for the death sentence was established by another aggravating circumstance. See Maynard, 108 S. Ct. at 1860.

The systemic interest in reducing the risk of arbitrariness is also explicitly addressed in the various opinions in McClesky v. Kemp, 107 S. Ct. 1756 (1987). In *McClesky*, Justice Powell wrote for a five-to-four Court, which held that a statistical study of the administration of Georgia's post-*Furman* capital sentencing law failed to "demonstrate a constitutionally significant risk of racial bias." Id. at 1778. Justice Brennan's dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens, concluded that the data before the Court "demonstrated precisely the type of risk of irrationality in sentencing that [the Court has] consistently condemned in [its] Eighth Amendment jurisprudence." Id. at 1782 (Brennan, J., dissenting).

[53] Despite occasional assertions to the contrary, see, e.g., *Trimble*, 693 S.W.2d at 277-78, the introduction of mitigating evidence is not necessary to assure that the risk of arbitrariness in administration of the death penalty is reduced to a constitutionally tolerable level. It has become clear that this objective is effectuated, to the Court's satisfaction, by the requirement that the statutory predicates for a death sentence "genuinely narrow the class of persons eligible for the death penalty [and] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). The "individualization" theme of the Court's decisions actually tugs against the legality theme. Thus, if there is any constitutional value at stake in the context of cases in which mitigating evidence is withheld by the defendant, it is the reliability of the sentencer's judgment that death is the appropriate sentence in the defendant's case.

[54] Sumner v. Shuman, 107 S. Ct. 2716, 2727 (1987).

number of death sentences, but rather the defendant's interest in having an *opportunity* to seek leniency in his own case.[55]

Even if a capital defendant may waive *his* eighth amendment interest in individualized capital sentencing, an equivalent societal interest may be independently established by state capital sentencing statutes. Under most of these statutes, the sentencer is directed to weigh, balance, or measure aggravating and mitigating evidence according to some prescribed normative criteria in deciding whether to impose a death sentence.[56] In some states, the prescribed criteria reflect an implicit legislative desire to reserve death sentences for the most extreme cases—a societal preference for leniency.[57] Thus, a plausible argument can be made, at least in these jurisdictions, that the state has an independent interest in assuring that death sentences are imposed only in cases in which the prescribed criteria are met and that those charged with the task of applying these criteria are unable to do so in the absence of the mitigating evidence that the defendant wishes to withhold. In order to vindicate the state's interest in reliable sentencing, such an argument would conclude, mitigating evidence must be introduced even in the face of a defendant's competent objection.

This line of argument, which devalues the defendant's interest in controlling his own fate in favor of the overriding societal interest in a

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[55] Actually, it is not even clear that the defendant has a constitutionally protected interest in seeking "leniency" per se. The Court has held that the defendant is entitled to introduce and have the sentencer consider mitigating evidence concerning his character and record and the circumstances of the offense. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986). The Court has not held, however, that the sentencer is constitutionally required to retain the discretion to be lenient if the defense has failed to offer or prove any mitigating circumstances. This issue is raised by the so-called "quasi-mandatory" capital sentencing statutes that *require* the death sentence if the jury finds one or more aggravating circumstances in the absence of any mitigating circumstances, or if it finds that the aggravating circumstances outweigh the mitigating circumstances. See, e.g., Md. Code Ann. art. 27, § 413; 42 Pa. Cons. Stat. Ann. § 9711 (1982). For further discussion of this issue, see Ledewitz, The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute, 21 Duq. L. Rev. 103 (1982).

[56] See, e.g., Ala. Code § 13A-5-47(e) (1982); Fla. Stat. Ann. §§ 921.141(2)-.141(3) (West 1981). In some states, by contrast, the sentencing judgment is wholly discretionary and is not constrained by any normative criteria. See, e.g., Ga. Code Ann. § 17-10-31 (Harrison 1982); Va. Code Ann. § 19.2-264.2 (1983). In these states, the argument developed in the text would not be available, since the sentencer's obligation is to consider whatever evidence has been introduced and then to impose an appropriate sentence.

[57] See, e.g., Ark. Stat. Ann. §§ 5-4-603 to -604 (1987); Ill. Ann. Stat. ch. 38, para. 9-1 (Smith-Hurd 1979).

"reliable" sentencing decision, has sweeping implications for the roles and responsibilities of defense attorneys and trial judges in cases involving death-preferring defendants. In the first place, self-representation would have to be precluded in capital cases. Courts that have required introduction of mitigating evidence have tried to distinguish *Faretta v. California*,[58] but it is difficult to see how the postulated societal interest in "reliable" decisions could be effectively protected without barring self-representation by capital defendants, especially those who are known to prefer execution.[59] Moreover, responsibility for deciding whether or not to plead guilty[60] and whether or not to testify,[61] which is ordinarily committed unreserv-

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[58] 422 U.S. 806 (1975) (holding that a defendant is constitutionally entitled to represent himself, notwithstanding the danger that this choice would undermine the fairness of trial).

[59] The view that the state may require introduction of mitigating evidence over the defendant's objection is obviously incompatible with *Faretta*. As Justice Stewart noted:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that . . . no accused can be convicted . . . unless he has been accorded the right to . . . counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.

Id. at 832-33 (citation omitted). He responded, however, that "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " Id. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

Faretta has not gone unnoticed by the courts and commentators who have endorsed the view that available mitigating evidence must be introduced over the defendant's objection. As might be expected, however, the state's unique interest in the reliability of capital sentencing proceedings derived—incorrectly in my view—from the eighth amendment is said to override the defendant's sixth amendment right to control his own defense. See, e.g., People v. Deere, 41 Cal. 3d 353, 363, 710 P.2d 925, 930, 222 Cal. Rptr. 13, 19 (1985); Hamblen v. State, 527 So. 2d 800, 809 (Fla. 1988) (Barkett, J., dissenting as to penalty); State v. Hightower, 214 N.J. Super. 43, 45, 518 A.2d 482, 483 (App. Div. 1986); Carter, supra note 12, at 107-11. The Supreme Court of Louisiana appears to have precluded self-representation in capital cases. See State v. Shank, 410 So. 2d 232 (La. 1982).

[60] As noted above, capital defendants in California are not permitted to plead guilty over counsel's objection. See supra note 18; see also People v. Chadd, 28 Cal. 3d 739, 751, 621 P.2d 837, 844, 170 Cal. Rptr. 798, 805, cert. denied, 452 U.S. 931 (1981) ("Nothing in *Faretta* . . . deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent.").

[61] By appealing to the fears and anger of the jury, the defendant can be a persuasive advocate for his own execution. See, e.g., Judy v. State, 275 Ind. 145, 155, 416 N.E.2d 95, 100 (1981) ("Judy stated to the jury in open court at the sentencing hearing that he would advise them to give him the death sentence, because he . . . would kill again . . . , and some of the people he might kill . . . might be members of the jury [and the judge]."). Although I am not

edly to the defendant, would have to be yielded to counsel. More generally, counsel's role would be fundamentally transformed. The defendant's counsel, ordinarily the representative and advocate of the defendant, would become a friend of the court,[62] obligated to vindicate society's interest in a reliable decision.[63] In short, if the societal interest in a reliable outcome were paramount, remedial arrangements would require a wholesale departure from the norms governing the adversary process in noncapital cases.[64]

Perhaps such a drastic transformation of the process would be justified if it could effectively vindicate society's interest in the integrity of capital sentencing. In most cases, however, this is not possible. By refusing to disclose pertinent information about his background and

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aware of any case in which the defendant has been precluded from testifying, the "reliability" argument leads inexorably to the conclusion that counsel should be authorized to forbid such testimony.

[62] For example, counsel would be obligated to call to the court's attention any deficiencies in the factual foundation for a client's guilty plea or any plausible claims that could have been raised in defense if the defendant had been willing to cooperate. A similar sort of "duty" has already been recognized in *Deere*, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 and People v. Koedatich, No. 23,404, 1988 N.J. LEXIS 83 (N.J. August 3, 1988) (both holding that the defendant's attorney *must* present all available evidence in mitigation, even over the defendant's objection). This latter duty would also seem to entail an obligation to try to persuade the sentencer to forgo a death sentence, notwithstanding the contrary preferences of the client.

[63] Some judges and commentators have sought to avoid or minimize the intrusion into the attorney-client relationship by relying on a "public counsel" or "amicus attorney" to represent the societal interest. See, e.g., *Deere*, 41 Cal. 3d at 369, 710 P.2d at 935, 222 Cal. Rptr. at 24 (Broussard, J., concurring); Cole v. State, 101 Nev. 585, 707 P.2d 545 (1985); Carter, supra note 12, at 149-51. Although this approach would help preserve the integrity of the attorney-client relationship, it would do so only by assigning the attorney's normal prerogatives and responsibilities to someone owing no duty to the client—a fundamental alteration of roles. In addition, because the societal interest is implicated by the entire range of decisions made by the client in the course of the proceedings, even the defendant's lawyer inevitably would be required to serve two masters.

[64] Single-minded pursuit of "reliability" could produce other distortions in the process. For example, if a defendant is offered a life sentence in return for a guilty plea, the implicit prosecutorial judgment is that the death penalty is not necessary to vindicate society's interests in retribution, deterrence, or incapacitation. Thus, the defendant's rejection of the proffered plea agreement (in a case in which guilt is undisputed) undermines the "reliability" of any eventual decision to impose a death sentence. Such "unreliable" outcomes could be avoided only by permitting the "defense attorney" to enter the guilty plea on the defendant's behalf, in defiance of the traditional understanding that the plea decision is exclusively committed to the defendant, or by precluding the prosecution from seeking a death sentence in any case in which an offer of leniency had been made and rejected. Either of these approaches would have a profound impact on plea bargaining in capital cases.

character and by refusing to identify potentially helpful witnesses or evidence, a recalcitrant defendant could still effectively preclude the development and presentation of evidence essential to a "reliable" decision regarding the suitability of a death sentence. Unless all obstructive capital defendants are to be regarded as "incompetent," an unthinkable proposition,[65] capital defendants will continue to have de facto authority to control their own fates even if their attorneys are not legally or ethically obligated to adhere to their instructions.

All of this suggests that arrangements designed to vindicate society's supposedly independent interest in the integrity and reliability of capital sentencing determinations could not be sensibly or effectively implemented. In the trial context, no less than on appeal, the competent defendant's interest in controlling his own fate, within the constraints imposed by law, should not be completely subordinated to an evanescent societal interest in the integrity of the capital sentencing process. Defense attorneys and trial attorneys should take appropriate steps, regardless of the defendant's wishes, to assure that the definitional predicates for the death sentence are established. Beyond that, however, the competent defendant should be entitled to decide not to avail himself of the opportunity either to develop and present a case in mitigation or to try to persuade the sentencer that this evidence has sufficient weight to call for leniency.[66]

This is not to say, however, that defense attorneys should yield silently and passively to the wishes of clients who profess a preference

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[65] If uncooperative capital defendants were categorically regarded as too "incompetent" to be sentenced to death, the only defendants who could be sentenced to death would be those who wanted to live. It is distressing even to contemplate the moral suppositions upon which such a position would have to rest and the possibilities for strategic behavior that it would entail.

[66] This does not mean that the defendant is entitled to insist on a death sentence or to stipulate that all statutory criteria for such a sentence exist. As I have emphasized, the defendant may not invite the state to impose a death sentence if the "definitional predicates" for such a sentence have not been established. See supra notes 34-42 and accompanying text. Even if the necessary predicates for a death sentence have been established, however, a failure to offer any mitigating evidence would "require" a death sentence only in the few states that direct the sentencer to impose a death sentence in the absence of any mitigating factors. See, e.g., 42 Pa. Cons. Stat. Ann. § 9711 (1982). As noted above, many states do not give explicit normative significance to mitigating evidence, leaving the sentencing decision more to the unfettered discretion of the judge or jury. See supra note 56. Thus, in these states, the sentencer is authorized to be lenient on a variety of grounds having nothing to do with mitigating evidence, including the possibility that the case in aggravation is not powerful enough to warrant a death sentence.

for a death sentence. Many capital defendants are ambivalent about their preferences and vacillate as the trial process unfolds. In most cases, however, stable preferences against execution eventually emerge. In the meantime, the attorney should take appropriate steps to counsel the defendant regarding the risks and benefits of the available options and should proceed to do whatever he or she can do independently to develop a case in mitigation. To the extent that the defendant's assistance is needed, the attorney should provide ongoing counseling regarding the need to preserve options while the defendant continues to struggle with a decision. The attorney's paramount obligation as the defendant's counselor is to emphasize to the recalcitrant client how difficult it will be, after he has been sentenced to death, to undo the consequences of his noncooperation during the sentencing phase.

If, despite counseling, the defendant remains recalcitrant and refuses to assist the attorney's effort to develop a case in mitigation or declines an "obviously" advantageous plea agreement, the attorney should bring the problem to the court's attention for the purpose of assuring that an adequate assessment of the defendant's competency is undertaken.[67] In dealing with these cases, courts must recognize that a defendant who understands the charges and is able to communicate with counsel, and who is therefore "competent to proceed" (or to "stand trial") in the customary sense, may not be competent to provide meaningful assistance in connection with the sentencing process in a capital case and may not be competent to make rational decisions regarding the conduct of the case, such as whether proffered plea agreements should be accepted.[68] The trial court should recognize that the consequences of noncooperation are almost irreversible; a defendant who does not present a case in mitigation and receives a death sentence is not likely to be given the opportunity somehow to replay the sentencing phase and to introduce the mitigating evidence when he later changes his mind. Because of these consequences, the trial court should make every effort to assure itself that the defend-

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[67] Counsel's failure to do so should be grounds for a finding of ineffective assistance. See, e.g., Felde v. Blackburn, 795 F.2d 400, 403 & n.2 (5th Cir. 1986).

[68] The Arkansas Supreme Court recently held that, although a capital defendant could waive appeal, the standard to be used to determine whether the waiver was "knowing and intelligent" should be higher than that used to determine competency to stand trial. See Franz v. State, 296 Ark. 181, 188-89, 754 S.W.2d 839, 843 (1988) (citing White, supra note 3, at 867).

ant's preference for death is stable and that it is not attributable to acute emotional factors. The court should also be willing to order clinical evaluation and even counseling in appropriate cases.

If the trial court determines, after a suitable hearing, that the recalcitrant defendant has expressed a rational and stable preference for a death sentence, the attorney should be directed to comply with the defendant's wishes regarding the presentation of mitigating evidence.[69] This contemporaneous assessment of competency should be binding in future litigation even if the defendant changes his mind. If it is not, the incentive for strategic behavior would be too high. As explained in the previous Part, however, the attorney should be obligated, notwithstanding the client's objections, to call the sentencer's attention to any weaknesses in the evidence offered by the prosecution to prove the necessary definitional predicates for the imposition of a death sentence.

IV.

I have struggled in this Article with a conflict between the dignity of the individual and the dignity of the law. This conflict, which is both inescapable and inescapably grounded in moral intuition, is not uncommon. In recent years, for example, it has been especially pronounced in cases involving dying patients who prefer to forgo or discontinue medical procedures designed to prolong their lives. Respect for individual dignity is ascendant in this context, notwithstanding a profound respect for the sanctity of life that is deeply embedded in

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[69] Until it becomes common practice for attorneys to seek competency assessments in these situations, cases will continue to arise in which the problem has not been brought to the court's attention prior to the sentencing proceeding, at which time the defense simply fails to offer any mitigating evidence. In these situations, the court should act sua sponte and hold an in-chambers colloquy with the defendant and his lawyer to ascertain the reason for the defense strategy. In some cases, the decision may be based on a tactical judgment that the risks of introducing the available evidence outweigh its mitigating value, in which case the in-chambers procedure will have the salutary effect of establishing a contemporaneous record of the basis for the decision and of the defendant's understanding, thereby promoting finality. In other cases, this procedure will reveal that the failure to introduce mitigating evidence rests not on a tactical judgment but on the defendant's preference for a death sentence. In these cases, the procedure will provide the court with the opportunity to assess the defendant's competence and to take appropriate action if the defendant's competence is in doubt.

For appellate suggestions that such a procedure be employed, see Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987), cert. denied, 108 S. Ct. 2833 (1988); Commonwealth v. Crawley, 514 Pa. 539, 550 n.1, 526 A.2d 334, 340 n.1 (1987).

our nation's culture and its law. A similar conflict is evident in cases involving criminal defendants who decline to invoke a (presumably meritorious) insanity defense. Until recent years, the predominant position seems to have been that the court is obligated to interpose the insanity defense in such cases in order to preserve the moral integrity of the penal law.[70] Now, however, the prevailing view seems to be that the decision of a competent defendant to forgo a (presumably meritorious) insanity defense should be honored.[71] The defendant's dignity supersedes the dignity of the law in this context as well.

Although respect for individual dignity prevails in these two contexts, the case for overriding the wishes of a death-preferring capital defendant or condemned prisoner would seem comparatively stronger. The death penalty is generally regarded as "qualitatively different" from other forms of criminal punishment at least in part because it tugs against the otherwise powerful intuition that preservation of an "identifiable life" has a paramount place in the hierarchy of social values. Thus, the integrity of the legal system is more clearly at stake when an offender's life is taken in society's name than when the courts decline to order hospitals to retard the forces of nature, or even when they direct hospitals to refrain from doing so. Similarly, the integrity of the legal system is more deeply implicated by the execution of a "defective" death sentence—one that would not have been imposed if all relevant evidence had been considered or one that would have been set aside if it had been judicially scrutinized—than by conviction and imprisonment of a defendant who would have been acquitted, hospitalized, or both, on grounds of insanity if the issue had been litigated.

The contexts are distinguishable, and I readily concede that a society willing to prescribe the penalty of death in the face of an otherwise pervasive respect for the value of life might justifiably choose to carry out the penalty only if the legal validity of the sentence is unerringly established, regardless of the preferences of the condemned prisoner. As I have indicated, however, I believe that the prisoner's interest in

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[70] See United States v. Wright, 627 F.2d 1300 (D.C. Cir. 1980); Whalem v. United States, 346 F.2d 812 (D.C. Cir.), cert. denied, 382 U.S. 862 (1965).

[71] See Frendak v. United States, 408 A.2d 364 (D.C. 1979); see also 2 Standards for Criminal Justice, Standard 7-6.3(b) (1984) ("Neither the court nor the prosecution should assert a defense based on abnormal mental condition over the objection of a defendant who is competent to make a decision about raising the defense.").

controlling his own fate should be subordinated to a societal interest in the integrity of the legal process *only* in situations in which it is necessary to assure that the prisoner has committed an offense for which the death penalty has been prescribed. Indeed, I believe that the law's duty to respect individual dignity is heightened, not diminished, when choices are made in the shadow of death.