ARTICLES

REASONABLE MORAL DOUBT

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Sentencing outcomes turn on moral and evaluative determinations. For example, a finding of "irreparable corruption" is generally a precondition for juvenile life without parole. A finding that the "aggravating factors outweigh the mitigating factors" determines whether a defendant receives the death penalty. Should such moral determinations that expose defendants to extraordinary penalties be subject to a standard of proof? A broad range of federal and state courts have purported to decide this issue "in the abstract and without reference to our sentencing case law," as the Supreme Court recently put it in Kansas v. Carr. *According to these courts, "it would mean nothing" to ask whether the defendant "deserves mercy beyond a reasonable doubt" or "more-likely-than-not deserves it" because moral questions are not "factual." Instead, moral determinations are highly subjective "value calls" to which concepts of doubt and certainty do not intelligibly apply.*

Implicit in these rulings is a controversial view of the nature of moral judgment. This Article traces the contours of the view and argues that it is out of step with the way the broader public thinks about morality and fails to address the issues defendants have raised. Courts should avoid wading into such controversial waters for two reasons. First, the judiciary has historically maintained neutrality on issues of significant public concern. Second, even if moral determinations are not factual, applying a standard of proof to at least some moral decisions at sentencing would change the outcome of the sentencer's deliberations and improve the legitimacy of the legal system. For the reasonableness of doubt depends on context, and moral questions—"Are you certain the defendant deserves death?"—make salient the stakes relative to which a person should decide what to believe about ordinary empirical matters. On the resulting view, reasonable doubt in the final moral analysis is not just intelligible, but essential for correcting a bias in the structure of the bifurcated criminal trial that systematically disadvantages defendants: the tendency for de-contextualized "factual findings" in the guilt phase to control outcomes at sentencing.

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INTRODUCTION

Sentencing outcomes turn on moral and evaluative determinations. For example, life sentences without parole for juvenile defendants are often limited to those deemed "irreparably corrupt."[1] A capital sentence involves determinations concerning whether facts about the defendant's background and crime have mitigating weight, and whether the "aggravating factors outweigh the mitigating factors."[2] Should such key moral determinations in the penalty phase be subject to a standard of proof?

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[1] *See, e.g.*, People v. Skinner, 917 N.W.2d 292, 305 (Mich. 2018) ("[A] trial court's decision to impose life without parole after considering the mitigating and aggravating circumstances is not a factual finding, but a moral judgment."); *see also* Landrum v. State, 192 So. 3d 459, 469 (Fla. 2016) (holding that a juvenile offender sentenced to life without parole was entitled to resentencing because the sentencing court did not consider whether the crime reflected irreparable corruption; Montgomery v. Louisiana, 577 U.S. 190, 195 (2016) (observing that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption" (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005))). Moral determinations are not limited to the penalty phase of the criminal trial; they are often necessary in the guilt phase. *See generally* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255 (2018) (arguing that criminal juries routinely decide "both questions about what happened and questions about the evaluative significance of what happened").

[2] Capital sentencing follows a standard formula in most states based, ultimately, on the principles articulated in *Gregg v. Georgia*, 428 U.S. 153 (1976), and companion cases. *See generally* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 153 (2004). *See also* Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("The sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing [a] sentence . . . [that] 'reflect[s] a *reasoned moral response* to the defendant's

The question is not just theoretical.[3] Defendants have demanded a standard of proof for moral determinations that expose them to extraordinary penalties for several reasons. One reason is that requiring the sentencer to be sufficiently certain about the moral basis for an extraordinary penalty would render sentencing decisions fairer and less arbitrary.[4] Another reason is that specifying a standard of proof for moral determinations would increase the likelihood that the sentencer gives full consideration to constitutionally relevant mitigating evidence.[5] Additionally, defendants have suggested that consequential moral findings fall within the scope of the Supreme Court's ruling in *Apprendi v. New Jersey* that all "factual findings," other than findings concerning prior convictions, that increase the defendant's sentencing exposure in substantial ways must be based on the standard of beyond-a-reasonable-doubt (the reasonable doubt standard).[6] There has been no scholarly commentary, as far as I am aware, on how courts have reasoned about these issues. However, there are insights to be gleaned from how the overarching legal question has been litigated.

In *Kansas v. Carr*, the Supreme Court purported to decide the question "in the abstract, and without reference to our capital-sentencing case law."[7] The Court observed that "[w]hether mitigation

background, character, and crime.'" (emphasis added) (quoting California v. Brown, 479 U.S. 538, 545 (1987))).

[3] Some theoretical scholarship has analyzed a related question: whether there ought to be a standard of proof for the "moral elements" in the definition of a crime (e.g., "reckless endangerment"; "depraved indifference"). *See, e.g.*, Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY 1, 5 (2015) (noting "[t]he lack of attention to doubts about norms"). Lee assesses the pros and cons of applying the reasonable doubt standard to the moral elements and argues, ultimately, that the costs may outweigh the benefits. *Id.* at 2; *see also* Lee, *supra* note 1, at 1262. However, courts have analyzed the issue—albeit about moral determinations at sentencing rather than the guilt phase—quite differently. The judiciary has refused to debate the pros and cons, sidestepping the normative analysis by questioning whether "reasonable doubt" about moral matters is even intelligible.

[4] On arbitrariness in death sentencing, see e.g., Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does It Matter If It Is?)*, 2019 WIS. L. REV. 55 (2019). *See also* State v. Rizzo, 833 A.2d 363, 408 n.37 (Conn. 2003) ("[I]t makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment.").

[5] *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (holding that sentencing procedures must empower the jury to properly consider and give effect to mitigating evidence); *see also* Boyde v. California, 494 U.S. 370, 380 (1990) (holding that the standard for evaluating jury instructions turns on "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

[6] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[7] 136 S. Ct. 633, 642 (2016). *Carr* involved the question of whether the jury should be instructed that the existence of sufficient mitigation does not need to be proven beyond a

exists" is not a "factual determination" but a "judgment call (or perhaps a value call)," and since there is no fact of the matter regarding whether the defendant deserves mercy, "[*it*] *would mean nothing* . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it."[8]

Carr is not an exceptional case. A broad range of federal and state courts have made virtually identical observations about the nature of moral questions and the unintelligibility of moral standards of proof, and not just in the context of the death penalty. Similar explanations have been offered for not specifying a standard of proof for the "irreparable corruption" determination that is a precondition for juvenile life without parole.[9] Courts have described moral judgments as "highly subjective," "deeply personal," "non-factual" "decisions" that are more "like saying that Beethoven was a better composer than Brahms" than "finding a fact."[10] And, as in *Carr*,

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reasonable doubt—or, in other words, that a lower standard of proof suffices for the judgment that factors militate against the death penalty. The Kansas Supreme Court had previously determined that the jury instructions, which neglected to mention any standard of proof for mitigating factors, created a reasonable likelihood of juror confusion. *See* State v. Gleason, 329 P.3d 1102, 1144–48 (Kan. 2014), *rev'd and remanded sub nom*. Kansas v. Carr, 577 U.S. 108 (2016).

[8] *Carr*, 136 S. Ct. at 642 (emphasis added). Justice Sotomayor, the sole dissenter, accused the majority of using "th[e] Court's considerable influence to call into question the logic of specifying *any* burden of proof as to mitigating circumstances" and of "denigrat[ing] the many States that *do* specify a burden of proof . . . as a matter of state law, presumably under the belief that it is, in fact, 'possible' to do so." *Id.* at 648 (Sotomayor, J., dissenting). Justice Sotomayor was prescient since several courts have cited *Carr* approvingly regarding the nature of moral questions, and even on state-law issues. *See, e.g.*, People v. McDaniel, 493 P.3d 815, 850 (Cal. 2021). For a detailed analysis of *Carr* and its impact, see *infra* Section I.A.

[9] *See, e.g.*, People v. Skinner, 917 N.W.2d 292, 306 (Mich. 2018) (holding that "irreparable corruption" is not a determination of fact but a moral judgment to which the reasonable doubt standard does not apply). Professor Kyron Huigens notes that judges sometimes dismiss value judgments with which they disagree as "subjective" and "mere opinion." Kyron J. Huigens, *Majestic Law and the Subjective Stop*, 51 SETON HALL L. REV. 669 (2021). This practice is quite different from that of judges defending their legal rulings based on a broad claim that all moral judgments are subjective and non-factual. Such broad and legally consequential claims invite special scrutiny.

[10] *See infra* notes 75–87 and accompanying text; *see, e.g.*, United States v. Con-Ui, No. 3:13-CR-123, 2017 WL 1393485, at *5 (M.D. Pa. Apr. 18, 2017) ("[T]he FDPA's weighing process is not a 'fact' to be 'found' by the jury but a deeply personal decision based on private beliefs, values, and experiences whereby juries, guided by mercy, make a reasoned and subjective moral judgment about the appropriate sentence."); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found. The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party."); United States v. Fields, 483 F.3d 313, 346 (5th Cir. 2007) ("Moreover, the *Apprendi/Ring* rule should not apply here because the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves[.]'" (quoting

judges seem to be appealing to general intuition, rather than legislative or precedential reasoning.[11] For example, the California Supreme Court in a case decided just this past year treated as self-evident that whether the defendant deserves the death penalty is not a "factual determination," citing *Carr* approvingly, even though the question at issue was one of state law.[12] The court rejected an opposing view, defended by several amici curiae including myself and other scholars along with the Governor of California, that was based on legislative and common-law history.[13]

Implicit in this emerging body of case law is a theory of morality that warrants close examination. This Article makes three main contributions. First, it introduces a framework for understanding the judiciary's claims, since it is not obvious what it means to say "in the abstract" that moral questions are non-factual and that moral standards of proof are unintelligible. Second, it compares the judiciary's view on morality to the general public's, parlaying the results of this comparison into an argument for greater neutrality from the courts on

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Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985))); United States v. Williams, 18 F. Supp. 3d 1065, 1076–77 (D. Haw. 2014) (noting that a jury weighing determination "is not a finding of fact"); Saffle v. Parks, 494 U.S. 484, 506 (1990) (Brennan, J., dissenting) ("The decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding."); United States v. Lawrence, 735 F.3d 385, 428 (6th Cir. 2013) ("We concluded that the weighing process prescribed by the FDPA, 18 U.S.C. § 3593(e), requires 'not a finding of fact, but a moral judgment.'" (quoting United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) (en banc))); *id.* ("The weighing process, we held, called on the jury to decide whether a sentence of death was 'just,' a moral judgment on which 'the jury did not need to be instructed as if it were making a finding of fact.'" (quoting United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) (en banc))); *see also* United States v. Gabrion, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc); United States v. Tsarnaev, 968 F.3d 24, 89 (1st Cir. 2020); United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993–94 (9th Cir. 2007); United States v. Purkey, 428 F.3d 738, 749–50 (8th Cir. 2005). For discussion and other examples, see *infra* Section I.A.

[11] The Sixth Circuit put things most vividly, holding that "Section 3593(e) . . . requires the jury to 'consider' whether one type of 'factor' 'sufficiently outweigh[s]' another so as to 'justify' a particular sentence." Consequently, "[t]he result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral," and "§ 3593(e) requires . . . not a finding of fact, but a moral judgment." United States v. Gabrion, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc). *See also id.* at 533 ("At that point the jury did not need to find any additional facts in order to recommend that Gabrion be sentenced to death. It only needed to decide . . . that such a sentence was 'just[].' 18 U.S.C. §§ 3591(a), 3593(e). And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact."); State v. Brown, 607 P.2d 261, 275 (Utah 1980) (Stewart, J., concurring) (suggesting that a preponderance of the evidence standard is "meaningless" when applied to moral questions which are not "factual").

[12] People v. McDaniel, 493 P.3d 815, 849–50 (Cal. 2021). For a discussion of the case, see *infra* Section I.A.

[13] *See* Brief for Proposed Amici Curiae Janet C. Hoeffel, Rory K. Little, Emad H. Atiq, and James Q. Whitman, *McDaniel*, 493 P.3d 815 (No. S171393), 2020 WL 10055418.

the objectivity of moral judgment. And third, it offers a reason for applying a standard of proof to moral determinations at sentencing that sidesteps the contested issue of whether moral questions are factual, filling a gap in the arguments that defendants have made.

Part I clarifies the view of morality implicit in the case law and begins by cataloging relevant cases. What stands out from these cases is that courts have singled out *moral* questions for special treatment, since they've applied standards of proof to ordinary empirical questions as well as questions of law, as when courts—including the Supreme Court—refuse to invalidate a statute unless it is "unconstitutional beyond a reasonable doubt."[14] And the judiciary's reasons for rejecting defendants' demands for a moral standard of proof are "metaethical"—they concern not what is morally right or wrong, but what it is to make a moral judgment.[15] The cited reasons include, for example, the idea that moral determinations are not factual. After

[14] *See e.g.*, Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 90–91 (1958) ("If we take as our starting point . . . the Sinking-Fund Cases, 99 U.S. 700, 718, 25 L. Ed. 496 (1879)—'*Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt*'—we do not see how . . . the 1954 Act is unconstitutional as applied.") (emphasis added); Holzman v. City of Spokane, 91 Wash. 418, 420 (1916) (applying "[t]he doctrine that all reasonable doubts as to the constitutionality of an act of the Legislature should be resolved in favor of upholding the act"); *see also* Hugh Spitzer, *"Unconstitutional Beyond a Reasonable Doubt" – A Misleading Mantra That Should Be Gone for Good*, 96 WASH. L. REV. ONLINE 1, 11 (2021) (noting that since 2000 "high court opinions in thirty-six states included a statement that the relevant court has applied (or said it applied) a version of unconstitutional-beyond-a-reasonable-doubt"); *id.* at 11 n.67 (collecting cases). Note that questions of law are regularly distinguished from questions of fact. *See generally* Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of* Ring, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 47 (2018). For an analysis of the unique issues raised by standards of proof for legal questions, see Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859, 860 (1992), who argues that standards of proof can intelligibly apply to legal questions. Thanks to Michael Dorf, Alex Reinert, and Kevin Clermont for discussion on these points.

[15] For a general introduction to systematic metaethics, see Geoff Sayre-McCord, *Metaethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014), https://plato.stanford.edu/archives/sum2014/entries/metaethics [https://perma.cc/2UZY-5YMA]. For an introduction aimed at legal audiences, see Lawrence B. Solum, *Legal Theory Lexicon 041: Metaethics*, LEGAL THEORY BLOG (Nov. 21, 2021), https://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le.html [https://perma.cc/GQ9H-QVKB]. The judiciary's metaethical claims undercut the need for a detailed analysis of the legal issues in at least two ways. If concepts like "reasonable doubt" do not intelligibly apply to moral questions, a court need not consider whether the reasonable doubt standard applied to moral questions might make sentencing more just and less arbitrary. *See generally* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (noting the Court's capital jurisprudence requires that the death penalty "not be imposed in an arbitrary or capricious manner"). Likewise, if moral questions are self-evidently non-factual, it would seem to rule out the relevance of the Supreme Court's holding in *Apprendi*, that all "factual findings" that increase the defendant's sentencing exposure, other than findings concerning the defendant's prior criminal record, must be determined beyond a reasonable doubt by the jury. For further discussion, see *infra* Section I.A.

documenting the judiciary's claims, this Part summarizes a framework developed by moral philosophers and social psychologists for interpreting such claims. Based on this framework, it argues that the judiciary is best interpreted as defending "moral non-cognitivism," the view that moral judgments are not beliefs which can be true or false, but expressions of an agent's desires, intentions, and other practical attitudes. A non-cognitivist interpretation best explains why courts have claimed both that moral judgments are not factual and that "reasonable doubt" in a moral judgment—as distinguished from ordinary empirical judgments—is unintelligible.[16]

Part II suggests that non-cognitivist adjudication raises concerns about judicial neutrality. It begins by observing that the judiciary's views on morality are surprisingly unrepresentative of the general public's. A wealth of empirical research over the past two decades suggests that the folk tend to be much more pluralistic in their metaethical commitments, endorsing a range of competing views about the objectivity of moral judgment.[17] Moreover, there is reason to believe that such matters are of significant public concern.[18] In addition to being contested and significant, metaethical claims are "supra-constitutional"—they define a framework through which all of

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[16] *Cf.* Michael Smith, *Evaluation, Uncertainty and Motivation*, 5 ETHICAL THEORY & MORAL PRAC. 305 (2002) (arguing that non-cognitivists cannot make sense of varying degrees of moral confidence). For further discussion of the parallels between debates in moral philosophy and in the courts, see *infra* Section III.A. It is worth noting that the judiciary's skepticism about moral doubt appears to be a relatively recent development. *See, e.g.*, Victor v. Nebraska, 511 U.S. 1, 22 (1994) (holding that a reference to "moral certainty" did not cause California instruction defining reasonable doubt to violate due process); Commonwealth v. Webster, 59 Mass. (1 Cush.) 295, 320 (1850) (defining "reasonable doubt" in terms of "moral certainty"). *See generally* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT (2008) (arguing that the reasonable doubt standard was originally designed based on an ideal of "moral comfort" with one's decision to impose a severe sentence). For a defense of the idea that reasonable doubt is related to moral or practical certainty, see *infra* Section III.B.

[17] *See generally* Geoffrey P. Goodwin & John M. Darley, *The Psychology of Meta-Ethics: Exploring Objectivism*, 106 COGNITION 1339 (2008); Thomas Pölzler & Jennifer Cole Wright, *Empirical Research on Folk Moral Objectivism*, PHIL. COMPASS, May 2019 [hereinafter Pölzler & Wright, *Folk Moral Objectivism*]; Thomas Pölzler & Jennifer Cole Wright, *Anti-Realist Pluralism: A New Approach to Folk Metaethics*, 11 REV. PHIL. & PSYCH. 53 (2020) [hereinafter Pölzler & Wright, *Anti-Realist Pluralism*]; Lieuwe Zijlstra, *Folk Moral Objectivism and Its Measurement*, J. EXPERIMENTAL SOC. PSYCH., Sept. 2019. For discussion, see *infra* Section II.A.

[18] A First Amendment case from the Eleventh Circuit illustrates how the state risks alienating large segments of the public by endorsing controversial metaethical views. *See* Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (reversing a district court that found a school's use of home economics, history, and social studies textbooks violated the Establishment Clause by promoting subjectivist views on the foundations of ethics). For a discussion, see *infra* note 134 and accompanying text.

the Constitution's claims about justice are to be understood.[19] Based on these observations, this Part concludes that there are reasons for courts to avoid, as far as possible, justifying legal rulings based on controversial metaethical claims. This avoidance doctrine can be modeled after the sensible judicial practice of avoiding hard constitutional and jurisprudential questions when deciding ordinary cases.[20]

Part III argues that there are good and ecumenical reasons for applying a standard of proof to at least some moral determinations at sentencing. Defendants have maintained that the reasonable doubt standard in the final analysis is necessary to reinforce in the minds of the jury the unique certainty that is required before imposing an extraordinary penalty. But defendants have not explained how asking jurors about their doubts about a *moral* determination at sentencing—namely, that the defendant deserves the severest penalty—helps elicit the appropriate degree of certainty. The necessary explanation begins with a key observation that the reasonableness of doubt depends on context.[21] Moral questions make salient the stakes in a given context relative to which a person should be deciding what to believe about ordinary factual matters. For example, a jury invited to determine whether the defendant deserves death beyond a reasonable doubt must ensure that all the facts concerning the defendant's crime and background have been established based on a standard of reasonable doubt that is sensitive to the stakes at sentencing: death or life for

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[19] The term "supra-constitutional" has been used in different ways. *See e.g.*, Eivind Smith, *Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway*, 44 ISR. L. REV. 369, 374 (2011) (discussing an interpretation on which supra-constitutional principles are legal norms that override the constitution). In my usage, the term refers to extra-constitutional assumptions that inform the correct reading of the constitution. The Constitution's content depends on these framework principles.

[20] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (describing seven rules under which the Court avoids "passing upon a large part of all the constitutional questions pressed upon it for decision" including that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). *See generally* Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 J. CONST. L. 594 (2021) (summarizing the Court's current approach to constitutional avoidance and proposing an alternative).

[21] "Epistemic contextualism" has been defended by several epistemologists based on the systematic sensitivity of agents' beliefs to contextual factors, and in particular, the practical stakes. *See generally* Brian Weatherson, *Can We Do Without Pragmatic Encroachment?*, 19 PHIL. PERSPS. 417 (2005); Dorit Ganson, *Evidentialism and Pragmatic Constraints on Outright Belief*, 139 PHIL. STUD. 441 (2008); Daniel Greco, *How I Learned to Stop Worrying and Love Probability 1*, 29 PHIL. PERSPS. 179 (2015); Dylan Dodd, *Belief and Certainty*, 194 SYNTHESE 4597 (2017); Patrick Rysiew, *Epistemic Contextualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021), https://plato.stanford.edu/archives/spr2021/entries/contextualism-epistemology [https://perma.cc/Y7GF-EUAV]. For a discussion, see *infra* Section III.B.

the defendant. On the resulting view, the reasonable doubt standard is not just intelligible when applied to the final moral question at sentencing; it proves essential for correcting a bias in the structure of the bifurcated criminal trial. In a bifurcated trial, jurors first determine questions of liability or guilt in a conviction phase, and only after conviction in the penalty phase does the jury treat questions related to the appropriate sentence. The jury often makes "findings" during the conviction phase, when the practical stakes are lower, that become relevant at sentencing. When the sentencer has no meaningful opportunity to reassess the reasonableness of all findings relative to the raised stakes in the penalty phase, de-contextualized factual findings in the guilt phase end up controlling outcomes at sentencing in ways that systematically disadvantage defendants. This overlooked bias is exacerbated by the Supreme Court's willingness to repeatedly sidestep the question of whether defendants have a constitutional right to argue that "residual doubt" at conviction is a mitigating factor at sentencing.[22]

Admittedly, the analysis in Part III is not meant to be exhaustive: There may be countervailing reasons against applying a standard of proof to moral determinations or additional reasons for applying one.[23] The point of the argument is not to decisively settle the question that defendants have raised, but to show that courts cannot evade it based on their unique metaethical commitments. The question's resolution should turn not on metaethics, but on an individualized assessment of a moral determination's role at sentencing, and whether, in

[22] *See e.g.*, Oregon v. Guzek, 546 U.S. 517, 525 (2006). "Residual doubt" refers to the jury's remaining doubts about the defendant's guilt despite being willing to convict. Such doubts are presumably "unreasonable" relative to the practical stakes at conviction so long as the jury has properly applied the beyond a reasonable doubt standard in the guilt phase. On the present analysis, there is a further phenomenon of "renewed" or "recontextualized" doubt at sentencing that might be based on residual doubt at conviction but has the status of being reasonable given the raised stakes. Judicial commentary on residual doubt has ignored these contextualist dynamics inherent in the concept of reasonable doubt. *See* discussion *infra* Section III.B.

[23] For example, Youngjae Lee raises doubts about applying the reasonable doubt standard to the "moral elements" of a crime, suggesting that the costs may outweigh the benefits. *See* Lee, *Reasonable Doubt and Moral Elements*, *supra* note 3. Lee's thoughtful consideration of the issue is not entirely relevant to the argument in Part III, which is exclusively concerned with the final moral determination in the penalty phase. The benefits of the reasonable doubt standard in that context have been overlooked. Moreover, the main point of Part III is that the non-factual nature of moral determinations does not render the normative analysis moot. On the contrary, the legal system's failure to consider the benefits of a standard of proof for moral determinations at sentencing on a case-by-case basis, and even if such determinations are "non-factual," amounts to a serious oversight.

light of that role, applying a burden of proof will facilitate conscientious decisionmaking by the factfinder.

I conclude by leveraging the discussion to make a general point about the value in bringing law and legal theory into conversation with ethics and epistemology. The philosophical literature promises to clarify positions that courts seem intuitively drawn to as well as positions that they may not have considered but perhaps ought to. Meanwhile, moral philosophers have something to learn from legal problems and legal reasoning. The case law reveals the intuitive appeal of certain metaethical positions outside of the seminar room, in a context where questions concerning the nature of value are profoundly consequential. And the reasons defendants have offered in defense of a standard of proof for moral determinations at sentencing point towards a novel account of what it means to express doubt in a moral claim—an account that the philosophical literature has surprisingly overlooked.[24]

I
Do Judges Believe in Moral Facts?

Moral judgments, broadly defined, involve judgments of right or wrong, good or bad, and what ought or ought not to be done. In sentencing, such judgments take the form of evaluations regarding how a convicted defendant ought to be punished in light of the nature of their crime, background, and other circumstances. This Part investigates how judges have reasoned about whether the sentencer's moral judgments should be subject to a standard of proof.

Section I.A closely examines judicial commentary in key sentencing cases. The aim here is to rule out several interpretations of the case law, including that the judicial observations about morality do no legal work and that the commentary concerning the non-factual status of moral determinations is based on a distinctly legal concept of a fact (for example, a legislative notion) as opposed to the ordinary or intuitive notion. Section I.B introduces a framework developed by moral philosophers for distinguishing competing views on the nature of morality. Section I.C applies this framework to the case law to argue, ultimately, that the courts are best interpreted as non-cognitivists.

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[24] On the puzzle of moral doubt for non-cognitivists, see Smith, *supra* note 16; Krister Bykvist & Jonas Olson, *Expressivism and Moral Certitude*, 59 Phil. Q. 202 (2009); Michael Ridge, *Normative Certitude for Expressivists*, 197 Synthese 3325 (2020). For further discussion, see *infra* Part III.

A. *Judges on Moral Reasoning:* Carr*,* Gabrion*, and Related Cases*

Judges have analyzed the nature of moral and evaluative questions in several different legal domains.[25] But capital cases cast the issue and its importance into sharp relief. One reason is that modern capital sentencing schemes explicitly highlight the moral aspects of sentencing decisions. As a general rule, the capital sentencer is required to make findings regarding the aggravating and mitigating factors in the defendant's case and to determine, ultimately, whether the aggravating factors outweigh the mitigating ones.[26] Aggravating factors may concern the nature of the crime, the defendant's prior criminal record, their lack of remorse, and related issues. Mitigating factors often concern facts about the defendant's cognitive abilities, their state of mind during the commission of the crime, their socially disadvantaged background, and any other factors that might militate in favor of mercy.[27] While the sentencer is generally permitted to consider any potential mitigating circumstances, the finding of at least one statutorily defined aggravating factor is necessary for a death sentence.[28] Meanwhile, the weight of aggravating and mitigating factors represents the degree to which a factor militates in favor of or against the death penalty. The final outweighing determination is described in explicitly moral terms: "The sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing a sentence[,]" so that the sentence imposed "reflect[s] a *reasoned moral response* to the defendant's background, character, and crime."[29]

In recent years, the issue of whether to apply a standard of proof to moral determinations has come up in at least two different guises.

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[25] *See, e.g.*, People v. Skinner, 917 N.W.2d 292, 310 (Mich. 2018) (deeming a moral finding that the defendant was "irreparably corrupt" non-factual); *see also* Membreno v. City of Hialeah, 188 So. 3d 13, 27 (Fla. Dist. Ct. App. 2016) (holding that legislative policy determinations are value judgments and not like fact-finding, but "choices").

[26] The current capital sentencing scheme in most states has emerged from the requirements articulated in *Gregg v. Georgia*, 428 U.S. 153, 189–95 (1976), and companion cases; *see also* Abramson, *supra* note 2, at 153 (describing the three factual findings required to impose the death penalty).

[27] *See generally* Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 Am. J. Crim. L. 167 (2018) (discussing the constitutional principles that govern the evaluation of mitigating evidence).

[28] *See* Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L. L. Rev. 223, 223 (2011).

[29] Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (some emphasis added) (first citing Hitchcock v. Dugger, 481 U.S. 393 (1987); and then quoting California v. Brown, 479 U.S. 538, 545 (1987)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

One question courts have faced is whether the final outweighing or "death-deservingness" determination should be made based on the reasonable doubt standard. This question arises because: (a) the Eighth Amendment calls on states to minimize arbitrariness in the implementation of the death penalty;[30] and (b) the Supreme Court's ruling in *Apprendi v. New Jersey* calls for any factual findings, other than findings concerning prior convictions, that increase the defendant's sentencing exposure in extraordinary ways—for instance, beyond a statutory maximum—to be made beyond a reasonable doubt by the jury.[31] A different question that courts have faced is whether the jury needs to be specifically instructed that the reasonable doubt standard (or a heightened standard of proof) does not apply to mitigating factors—that is, to the finding that facts about the defendant's background, character, or crime militate in favor of mercy. The concern, here, is making sure that the jury is able to "consider and give effect to" mitigating evidence properly, as the Constitution requires.[32]

In *Carr*, the Supreme Court addressed the second question: whether the jury ought to be instructed regarding a standard of proof for mitigating factors. It held that the Eighth Amendment does not require any specific instruction.[33] The Court overruled the Kansas Supreme Court, which felt that the lack of guidance would result in juror confusion, preventing the jury from giving legal effect to constitutionally relevant mitigating evidence.[34] Justice Scalia's observations in the majority opinion are worth quoting in full:

> Approaching the question *in the abstract*, *and without reference to our capital-sentencing case law*, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination . . . . It is possible to do so for the aggravating-factor determination . . . because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not

[30] *See* discussion in *Gregg*, 428 U.S. at 194–95; *see also* Abramson, *supra* note 2, at 153 (describing the three factual findings required to impose the death penalty).

[31] 530 U.S. 466, 489–90 (2000); *see also* Ring v. Arizona, 536 U.S. 584 (2002) (applying *Apprendi* to capital sentencing schemes and holding that the Sixth Amendment entails that all factual findings necessary to impose the death penalty, apart from those concerning prior criminal history, must be found by the jury).

[32] *Eddings*, 455 U.S. at 113–14 (holding that sentencing procedures must empower the jury to consider properly and give effect to mitigating evidence); *see also* Boyde v. California, 494 U.S. 370, 380 (1990) (holding that the standard for evaluating jury instructions turns on "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

[33] Kansas v. Carr, 136 S. Ct. 633, 642 (2016).

[34] *Id.* at 643–44.

> exist—and one can require the finding that they did exist to be made beyond a reasonable doubt.[35]

Note that the statutory aggravating factors that the Court is referring to here were defined in non-moral (or purely empirical) terms, which is why Justice Scalia calls the "aggravating-factor determination . . . purely factual."[36] The legislature generally limits in precise empirical terms what kinds of circumstances can be regarded as aggravating (e.g., was there a risk of death to more than one person; was there a financial motive to the murder; was the victim a minor?), so the jury is often, though not always,[37] limited to making a purely empirical determination on the question of whether aggravating factors exist.[38] However, the question of whether mitigating factors exist is much more open-ended, with jurors assigned greater moral discretion. Jurors assess both whether and to what extent the circumstances surrounding the defendant's crime and background militate in favor of mercy and against the death penalty. In light of these distinctions, the Court continued:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question *whether mitigating circumstances outweigh aggravating circumstances* is mostly a question of mercy—the quality of which, as we know, is not strained. *It would mean nothing*, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof.[39]

Several aspects of this discussion stand out. First, the Court's primary rationale for the holding is an abstract observation, drawn not from case law but the Court's own substantive view concerning the

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[35] *Id.* at 642 (emphasis added).

[36] *Id.*

[37] *See, e.g.*, FLA. STAT. ANN. § 921.141(6) (West 2016) (listing potential aggravating factors, including the "heinous[ness]" of the crime). Of course, the judgment regarding what weight to assign an aggravating factor like the victim's age is a moral one, left to the jury's discretion.

[38] One way to make sense of this moral division of labor is that the legislature has already made the threshold moral determination that the victim's youth tends to justify the death penalty. Put differently, the legislature has already determined that the fact that the victim was a minor is an aggravating factor. The jury has discretion, only, with respect to the question of weight.

[39] *Carr*, 136 S. Ct. at 642 (emphasis added).

nature of moral reasoning and standards of proof. The idea that it is meaningless to apply a standard of proof to moral questions precludes any discussion about whether it might make capital sentencing less arbitrary and more just. The alleged meaninglessness of asserting that a defendant is entitled to mercy if they "more-likely-than-not deserve it" is the only rationale the Court provides for not instructing the jury, besides noting that it has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence,"[40] and dismissing the Kansas Supreme Court's concerns about juror confusion.[41] The Court's metaethical claims do important legal work, and their significance is reflected in Justice Sotomayor's dissent. The majority's abstract observation is the only substantive point with which Justice Sotomayor engages, apart from her procedural concerns about whether the Court should have ruled on the issue in the first place.[42] She observes that by questioning "whether it is even possible" to apply a standard of proof to moral questions, "the majority denigrates the many States that *do* specify a burden of proof for the existence of mitigating factors as a matter of state law, presumably under the belief that it is, in fact, 'possible' to do so."[43]

There are several other notable features of the Court's discussion. The majority expressly distinguishes the underlying "facts establishing mitigating circumstances" from the moral judgment that the empirical facts have mitigating force. The judgment that a factor is mitigating, or that it outweighs the aggravating factors, is described as a "value call." Moreover, the Court distinguishes the "factual component" of a judgment of mitigation—for example, empirical determinations concerning the defendant's socio-economic background—from the "judgmental component" which involves assigning mitigating value. Additionally, there is no indication that in deeming moral judgments non-factual, the Court is invoking a distinctly legal concept of factuality. Instead, the non-factual nature of moral questions is presented as decidable "in the abstract and without reference to our . . . case law." In short, the Court appears to be invoking the ordinary concept of factuality, on which a question is factual just in case it admits of a true or false answer based on an objective assessment. Note that this formal observation seems to have united all of the traditionally conservative Justices and all except one of the liberal Justices.

Carr is not an exceptional case. Even prior to the ruling, a majority of circuit courts had made similar observations about moral

[40] *Id.* at 642.
[41] *Id.* at 643 ("A meager 'possibility' of [juror] confusion is not enough.").
[42] *Id.* at 648 (Sotomayor, J., dissenting).
[43] *Id.*

questions at sentencing, specifically in the context of deciding the first of the two questions described earlier: whether the reasonable doubt standard should apply to the final outweighing determination. In *United States v. Gabrion*, the Sixth Circuit offered perhaps the clearest statement of a metaethical justification for a legal ruling, observing:

> [I]n *Apprendi v. New Jersey* . . . the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Gabrion says that the jury's "outweighs" determination is a "fact" that increases his maximum sentence from life to death, and thus must be proved beyond a reasonable doubt. The problem with this argument is that *Apprendi* does not apply to every "determination" that increases a defendant's maximum sentence. Instead, it applies only to findings of "fact" that have that effect.[44]

The court goes on to distinguish findings it regards as factual from moral findings:

> These sorts of findings—that a particular statement might influence its recipient, or that the defendant acted with a particular state of mind, or possessed a particular quantity of drugs, or was himself the triggerman, rather than just an accomplice—are different in kind from the "outweighs" determination required by § 3593(e). *Apprendi* findings are binary—whether a particular fact existed or not. Section 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment. . . . And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact.[45]

Crucially, there is no suggestion in the opinion that the court's view of what makes a question factual is informed by legislative history or precedential reasoning. Rather, the court treats as self-evident that questions concerning what is just do not admit of a true or false answer.

The likelihood that the court was relying on its own view of morality is reinforced by the case's procedural history. *Gabrion* was

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[44] 719 F.3d 511, 532 (6th Cir. 2013) (en banc) (internal citations omitted).

[45] *Id.* at 532–33.

decided on rehearing en banc, with the majority reversing a prior panel determination that there is precedent for treating normative questions as factual. The panel below had previously observed:

> The refusal of some of our sister circuits in death cases to impose the ordinary measure of persuasion applicable to criminal cases on the weighing of aggravators and mitigators is based on their *theory* that this weighing does not resolve a question of fact, but is instead a "process" designed to arrive at a moral, as opposed to factual, judgment.[46]

The panel criticized this view, noting that "in both civil and criminal cases at common law" many questions with a "legal or moral" basis have traditionally been regarded as factual questions, including:

> questions of negligence (where the jury is invited to "weigh[] interests" in evaluating whether a defendant's conduct meets that of a "reasonable man"), punitive damages (where the jury is invited to weigh factors such as the character and intent of the defendant's act, the extent of the harm, and the wealth of the defendant in making the basically moral determination of whether his conduct was "outrageous"), insanity (where the jury is asked whether a defendant could appreciate the moral wrongfulness of his conduct at the time of his alleged offense), [and] tortious interference with contract (where the jury is tasked with weighing factors such as the defendant's intent in determining whether an alleged interference is "improper").[47]

The fact that the Sixth Circuit sitting en banc did not engage with such precedential considerations reinforces the conclusion that a majority of the Sixth Circuit deemed it substantively incorrect to view moral questions as factual. The non-factual nature of moral determinations was presented as self-evident, together with the notion that moral determinations are like judging that "Beethoven is a better composer than Brahms."

Six other circuit courts have offered identical reasons for refusing to apply the reasonable doubt standard to the death deservingness question.[48] For example, the First Circuit held that "the requisite

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[46] United States v. Gabrion, 648 F.3d 307, 327 (6th Cir. 2011) (emphasis added), *vacated on reh'g en banc*, 719 F.3d 511 (6th Cir. 2013).

[47] *Id.* at 328 (alteration in original) (internal citations omitted). For a related argument, based on common law history, that a broad set of normative questions are "questions of fact," see Atiq, *supra* note 14.

[48] *See* United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993–94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345–46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005); *see also* United States v. Tsarnaev, 968 F.3d 24, 89 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1683 (2021) ("[I]f the Supreme Court . . . intended to impose the reasonable-

weighing constitutes a process, not a fact to be found" and that "[t]he outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party."[49] The Fifth Circuit observed that the outweighing determination is "not a finding of fact" but a "highly subjective, largely moral judgment regarding the punishment that a particular person deserves."[50] When the Sixth Circuit was invited to reconsider its holding in *Gabrion*, it declined, reiterating that the "outweighing" judgment is "not a finding of fact, but a moral judgment," which "call[s] on the jury to decide whether a sentence of death was 'just' " and that "the jury did not need to be instructed as if it were making a finding of fact."[51] Other examples of courts indicating that there can be no "objective truth" concerning moral questions can easily be multiplied.[52]

Justice Sotomayor was prescient in *Carr* in predicting that the Court's reasoning and considerable influence would cause state courts to start questioning the practical logic of applying standards of proof to moral determinations. Indeed, many state courts have cited *Carr* approvingly for the proposition that moral determinations are not factual, even when the question at issue is one of state law and in noncapital cases.[53] For example, in *People v. Skinner*, the Michigan Supreme Court held that "a trial court's decision to impose life without parole after considering the mitigating and aggravating cir-

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doubt standard . . . the Court in *Carr* would not have said . . . that telling the jury to use that standard 'would mean nothing.' And . . . '[t]he outcome of the weighing process is not an objective truth . . . susceptible to (further) proof by either party.' ").

[49] *Sampson*, 486 F.3d at 32.

[50] *Fields*, 483 F.3d at 346.

[51] United States v. Lawrence, 735 F.3d 385, 428 (6th Cir. 2013).

[52] *See, e.g.*, United States v. Williams, 18 F. Supp. 3d 1065, 1076–77 (D. Haw. 2014) (noting that the sentencer's weighing determination "is not a finding of fact"); Saffle v. Parks, 494 U.S. 484, 506 (1990) ("The decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding."); Olsen v. State, 67 P.3d 536, 570 (Wyo. 2003) (noting that a death sentence requires judging the moral guilt of the defendant); United States v. Mills, 393 F. Supp. 3d 650, 664 n.4 (E.D. Mich. 2019) ("The Supreme Court's decision in *Kansas v. Carr* . . . calls into question whether the jury is even making factual findings when determining what sentence to impose . . . , distinguishing between the 'purely factual determinations' at the eligibility phase, and the 'value call[s]' . . . at the selection phase.").

[53] *See, e.g.*, People v. Skinner, 917 N.W.2d 292, 305 n.11 (Mich. 2018) (citing *Gabrion* and *Carr* approvingly); State v. Poole, 297 So. 3d 487, 503 (Fla. 2020) (citing *Carr* approvingly); People v. McDaniel, 493 P.3d 815, 850 (Cal. 2021), *opinion modified on denial of reh'g*, 2022 WL 2295630 (U.S. June 27, 2022) (citing *Carr* to support the determination that capital sentencing is a moral function); Commonwealth v. Lawlor, No. FE-2009-304, 2017 WL 9833485, at *18 (Va. Cir. Ct. Mar. 6, 2017) (citing *Carr* for the proposition that a moral determination is not a factual one to which the application of a burden of proof makes conceptual sense).

cumstances is not a factual finding, but a moral judgment."[54] The case involved a Michigan statute which made an "irreparable corruption" finding involving the consideration of aggravating and mitigating factors a precondition for juvenile life without parole.[55] The defendant argued that since the "irreparable corruption" determination is a factual finding that enhances his sentence, it should be made by the jury under the reasonable doubt standard. The court disagreed, observing that "just as whether a sentence is proportionate is not a factual finding, whether a juvenile is 'irreparably corrupt' is not a factual finding."[56] Notably, the concurrence found questionable what it described as "the majority's *assertion* that '[w]hether a juvenile is irreparably corrupt is not a factual finding,'" but acknowledged "that other courts have reached the same conclusion."[57]

In a case decided last year, *People v. McDaniel*, the California Supreme Court grappled with the question of whether the state jury trial right requires submitting the question of whether the defendant deserves the death penalty to the jury under the reasonable doubt standard.[58] The court granted, for the sake of argument, McDaniel's key state-law premise that "the right to a reasonable doubt standard governing *factfinding* by a jury in criminal cases is secured by article I, section 16 [of the state constitution]."[59] But it rejected the factual status of the judgment of death-deservingness.[60] The court distinguished questions that are "normative or moral in nature as opposed to purely factual,"[61] while citing *Carr*.[62] Notably, the question McDaniel raised was one of state statutory and constitutional law. The court acknowledged that there was language in the 1957 death penalty statute which tended to suggest that the legislature conceived of the final death-deservingness judgment as a factual determination.[63] The statute provided that the "determination of the penalty . . . shall be in the discretion of the . . . jury trying *the issue of fact* on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict."[64] But the court disregarded this evidence, emphasizing (a) its own view on the nature of moral judgment and

54 917 N.W.2d at 305.
55 *Id.* at 310.
56 *Id.*
57 *Id.* at 321 n.4.
58 *McDaniel*, 493 P.3d at 849.
59 *Id.* (emphasis added).
60 *Id.* at 851 (noting that the moral judgment is not "factual . . . in any relevant sense").
61 *Id.* at 866.
62 *Id.* at 850.
63 *Id.* at 851.
64 *Id.* (citing Stat. 1957, ch. 1968, § 2, pp. 3509–10) (emphasis added).

factuality,[65] and (b) the fact that other judges have favored the same view in non-binding cases.[66] It was not swayed, either, by the attorney general's concession at oral argument that the reasonable doubt standard "would improve our system of capital punishment and make it even more reliable."[67]

Other state courts have made similar observations. In a case from 2020, *State v. Poole*, the Florida Supreme Court observed that the weighing finding "is mostly a question of mercy" and "is not a finding of fact [to which the jury trial right attaches], but a moral judgment."[68] The court claimed that a determination that the aggravating factors outweigh the mitigating factors is "not a 'fact'" and that "[a] subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable" and is instead "a discretionary judgment call."[69] In *Poole*, the court acknowledged that the Florida death sentencing statute referred to the weighing determination as factual, but largely dismissed this statutory language:

> We acknowledge that section 921.141(3)(b) requires a judicial finding "as to the fact" that the mitigators do not outweigh the aggravators. But the legislature's use of a particular label is not what drives the Sixth Amendment inquiry. . . . In *substance*, what section 921.141(3)(b) requires "is not a finding of fact, but a moral judgment."[70]

The court could not have stated in clearer terms that the question of factuality is not terminological and that it was taking a substantive position on the nature of moral questions, quite apart from the legislature's "labels."

These cases support an initial set of observations about judicial reflections on morality: (a) The non-factual status of moral questions is the principal rationale numerous courts have offered for not applying a standard of proof to moral questions at sentencing (and for not engaging with the question of whether substantive justice and public policy, not to mention *Apprendi*, militate in favor of application); and (b) the judiciary's observations about moral judgment are

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[65] *Id.* at 850 ("We also have cited *Kansas v. Carr* . . . to support our conclusion that capital 'sentencing is an inherently moral and normative function.'").

[66] *Id.* (citing *Carr*).

[67] *Id.* at 844.

[68] 297 So. 3d 487, 503 (Fla. 2020), *reh'g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), *cert. denied sub nom.* Poole v. Florida, 141 S. Ct. 1051 (2021).

[69] *Id.* at 503.

[70] *Id.*

general and not specific to any individual jurisdiction's view or legislative history. As one court put it,

> [The truth is] recognized by courts across the nation, that the FDPA's weighing process is not a "fact" to be "found" by the jury but a deeply personal decision based on private beliefs, values, and experiences whereby juries, guided by mercy, make a reasoned and subjective moral judgment about the appropriate sentence.[71]

Before moving on to interpretive questions, it is worth noting that at least some courts have taken the opposing position—namely, that a standard of proof *should* apply to the final moral determination that the defendant deserves an especially severe penalty.[72] These courts appear to be in the minority, and we shall discuss their reasoning in greater detail shortly. Additionally, at least one Utah concurrence drew a more unusual inference, arguing that precisely because moral judgments are not factual, the reasonable doubt standard should apply, whereas the preponderance of evidence standard could not possibly.[73] The concurrence suggested that the preponderance standard is "meaningless" when applied to the death-deservingness question because the standard is reserved for factual disputes; meanwhile, the reasonable doubt standard uniquely "conveys to the jury . . . that the values upon which the criminal justice system is built do not permit the ultimate sanction to be imposed unless the conclusion is free of substantial doubt of any kind."[74] The rationale for the concurrence's outlier position is far from transparent, though I offer a sympathetic reconstruction in Part III.

For now, the goal is to take stock of the terms under which a majority of courts have described moral judgments: "not objectively verifiable,"[75] "not a fact,"[76] "value call,"[77] "judgment call,"[78] "subjec-

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[71] United States v. Con-Ui, No. 3:13-CR-123, 2017 WL 1393485, at *6 (M.D. Pa. Apr. 18, 2017).

[72] *See, e.g.*, State v. Biegenwald, 524 A.2d 130, 156 (N.J. 1987) (stating that "as a matter of fundamental fairness" the "balance" of aggravating and mitigating factors must be found beyond a reasonable doubt); People v. Tenneson, 788 P.2d 786, 797 (Colo. 1990) ("[T]he jury still must be convinced beyond a reasonable doubt that the defendant should be sentenced to death."); State v. Rizzo, 833 A.2d 363, 408 (Conn. 2003) ("[I]t makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment."). For discussion, see *infra* Section III.B.

[73] State v. Brown, 607 P.2d 261, 275–76 (Utah 1980).

[74] *Id.*

[75] State v. Poole, 297 So. 3d 487, 503 (Fla. 2020), *reh'g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), *cert. denied sub nom.* Poole v. Florida, 141 S. Ct. 1051 (2021).

[76] *Id.*

[77] Kansas v. Carr, 136 S. Ct. 633, 642 (2016).

[78] *Id.* at 648 (Ginsburg, J., dissenting) (citation omitted).

tive,"[79] "personal,"[80] "choice,"[81] "decision,"[82] "like saying that Beethoven was a better composer than Brahms,"[83] "highly subjective, largely moral,"[84] "subjective determination,"[85] "not a finding of fact,"[86] "not an objective truth."[87] These claims about morality invite clarification, as does the claim that it is meaningless to apply epistemic concepts like reasonable doubt or more likely than not to a determination about what ought to be done.

B. Cognitivism vs. Non-Cognitivism

We know, now, what judges have claimed about the nature of moral judgments. But the basis for their claims remains unclear. Put differently, the judiciary's reasons for claiming, for example, that moral judgments are not factual or that reasonable doubt in a moral determination is unintelligible, remain opaque. The opacity is driven by the fact that courts have presented such claims about morality as self-evident. However, the claims are not self-evident given that many defendants and some courts view things quite differently.[88] Insight into the assumptions that might be driving the judiciary's claims will prove both explanatorily useful and necessary for purposes of evaluating, in Parts II and III, the basis for recent rulings.[89]

This Section introduces a distinction between cognitivist and noncognitivist theories of moral judgment and assertion, setting up a discussion in Section I.C of its usefulness for understanding the judiciary's claims.[90] The distinction is borrowed from the literature in

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[79] United States v. Con-Ui, No. 3:13-CR-123, 2017 WL 1393485, at *5 (M.D. Pa. Apr. 18, 2017).

[80] *Id.*

[81] United States v. Gabrion, 719 F.3d 511, 549 (6th Cir. 2013) (quoting Sawyer v. Whitley, 505 U.S. 333, 370 (1992) (Stevens, J., concurring)).

[82] United States v. Robinson, 367 F.3d 278, 293 (5th Cir. 2004).

[83] *Gabrion*, 719 F.3d at 533.

[84] United States v. Fields, 483 F.3d 313, 346 (5th Cir. 2007) (citations omitted).

[85] State v. Poole, 297 So. 3d 487, 503 (Fla. 2020).

[86] *Id.*

[87] United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007).

[88] *See* cases cited *supra* note 72. For further discussion, see *infra* Section III.B.

[89] Judges may not have any terribly precise metaethical view in mind, but we can nevertheless detect certain sympathies of considerable interest. It seems unlikely that the judiciary's approach to morality could be entirely unrelated to the kinds of metaethical views that find currency among ethicists as well as laypersons.

[90] *See* Mark van Roojen, *Moral Cognitivism vs. Non-Cognitivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018), https://plato.stanford.edu/entries/moral-cognitivism [https://perma.cc/GN49-F629] (providing an overview of the debate over these two approaches in metaethics); *see also* David Bourget & David Chalmers, *Philosophers on Philosophy: The 2020 PhilPapers Survey* (Nov. 1, 2021) (unpublished manuscript), https://philarchive.org/archive/BOUPOP-3 [https://perma.cc/BG5F-54UM]. Bourget and Chalmers sent an online survey to 7,685 professional philosophers in North America,

metaethics, which studies the nature of moral thought—its metaphysical, epistemological, and other commitments.[91] In commenting on the distinction, I move somewhat quickly, since the Article's goal is not philosophical. Its goal is to interpret and evaluate the law, and so the exposition of key theoretical concepts is only as detailed as it needs to be.[92]

We can begin with moral cognitivism. Cognitivists maintain that moral judgments are beliefs which can be true or false. Moral claims like "lying is wrong" are similar to ordinary, descriptive claims like "the table is white," at least insofar as the truth or falsity of such claims turns on how things are in the world. According to the cognitivist, when we deliberate about what we morally ought to do, or about moral right and wrong, we hope to discover facts about the world, and the objectivity of morality is supposed to accommodate this feature of practical deliberation.[93] However, being a cognitivist does not necessarily entail being committed to the existence of a timeless set of moral truths about right and wrong that transcend community conventions or people's attitudes.[94] What unifies cognitivists is the claim that moral judgments are truth-apt. But there is considerable disagreement among cognitivists about the nature of moral truth.[95]

Europe, and Australasia. Respondents were asked about their views on the central questions of philosophy. Regarding the nature of moral judgment, 1,641 respondents neither skipped the question nor indicated that they were "insufficiently familiar with the issues." Of these, 1,133 (69%) accepted or leaned towards moral cognitivism, 339 (21%) accepted or leaned towards non-cognitivism, and 169 (10%) accepted or leaned towards some other view.

[91] *See supra* note 16.

[92] This Part suggests several lines of further inquiry for those interested in a more fine-grained analysis of the judiciary's metaethical leanings. For example, while I argue that judges embrace moral non-cognitivism, I do not settle whether they are inclined towards any particular brand of non-cognitivism, or what their reasons might be for rejecting moral cognitivism.

[93] *See, e.g.*, David Enoch, *Why I Am an Objectivist About Ethics (And Why You Are, Too)*, *in* THE ETHICAL LIFE: FUNDAMENTAL READINGS IN ETHICS AND MORAL PROBLEMS (Russ Shafer-Landau ed., 3d ed. 2015) (describing features of moral deliberation that might support a cognitivist view of moral judgment).

[94] In fact, a moral cognitivist might even be an "error theorist" who thinks that although moral judgments are beliefs, such beliefs are always false. John Mackie famously argued that all moral claims involve a commitment to obscure, non-natural moral properties (of objective "rightness" or "wrongness") which couldn't exist because, among other reasons, our awareness of such properties would have to involve "some special faculty of moral perception or intuition, utterly different from our ordinary ways of knowing everything else." JOHN L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38 (1977).

[95] While some ("moral non-naturalists") think that moral facts are sui generis, others ("moral naturalists") maintain that moral facts are identical to mundane, natural facts—that is, the kinds of facts that are the subject matter of the natural and social sciences. *See*

Non-cognitivists, by contrast, have traditionally denied that moral judgments are beliefs and that moral claims are descriptive.[96] On simple versions of non-cognitivism (sometimes referred to as "emotivism"), moral assertions serve the same linguistic function as booing and hurrahing—they are a means of expressing one's feelings and motivations, which are not appraisable for truth or falsity. For example, to assert that lying is wrong is to express one's aversion to lying (and, perhaps, attempt to elicit a similar aversion in others), just as booing the Boston Celtics is a way of expressing one's dislike for the basketball team. Note that non-descriptive speech-acts like booing are not truth-apt. It makes no sense to ask whether such speech-acts are true or false. And the non-cognitivist's distinctive thesis is that moral judgments resemble such speech-acts in that they express feelings, intentions, and other practical attitudes rather than report facts.

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generally DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM 181 (2011) (defending moral non-naturalism). A moral naturalist might hold that there is nothing more to the fact that lying is wrong than some ordinary, empirical fact about lying—for example, that lying impairs trust and coordination. On a suitably capacious understanding of the category of "natural facts" (facts whose characterization does not involve appealing to any moral or normative concepts), even a "divine command" theory of morality counts as a version of moral naturalism, since according to the divine command theorist there is nothing more to the truth of the proposition that lying is wrong than the fact that the gods proscribe lying. *See generally* Matthew Lutz & James Lenman, *Moral Naturalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018), https://plato.stanford.edu/entries/naturalism-moral [https://perma.cc/CQ6K-R97Y]. On some (but not all) versions of moral naturalism, the connection between moral and natural facts is supposed to be analytic or conceptual, modeled after definitional truths like all bachelors are unmarried. *See generally* Sayre-McCord, *supra* note 15; FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS (1998). By contrast the "synthetic naturalist" maintains that the connection between moral and natural facts is not conceptual in nature. The connection is modeled after connections discovered by science. *See generally* Richard N. Boyd, *How to be a Moral Realist*, *in* ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord ed., 1988).

[96] *See, e.g.*, ALFRED J. AYER, LANGUAGE, TRUTH AND LOGIC 107–08 (2d ed. 1946) (comparing moral judgments to emotive speech acts like booing). Contemporary versions of non-cognitivism offer more sophisticated accounts of the practical function of moral and more broadly normative claims. *See, e.g.*, SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING ch.3 (Oxford Univ. Press 1998) (arguing that moral assertions express a complex set of higher-order preferences); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 8 (1990) (describing his norm expressivism as non-cognitivist in the sense that "to call a thing rational is not to state a matter of fact, either truly or falsely"). *See generally* Emad H. Atiq, *Supervenience, Repeatability, and Expressivism*, 54 NOÛS 578, 584 (2020) ("According to the expressivist, the judgment that one ought to ϕ in C is wholly constituted by a motivation to ϕ in C. To assert that one ought to ϕ in C is to express the relevant motivation."). For purposes of this paper, the discussion focuses entirely on the simple emotivist strain of non-cognitivism, since for reasons to be discussed below there is no reason to ascribe to judges a more sophisticated version of non-cognitivism.

The debate between cognitivists and non-cognitivists turns on a broad range of considerations. A serious discussion of the stakes would take us well beyond the scope of this Article. But briefly, the argument for non-cognitivism typically begins with the observation that moral determinations are intimately related to motivation: Moral reasoning about what is right or wrong often concludes in action. Moreover, non-cognitivists tend to think that we can capture the significance of morality in people's lives without needing to invoke anything like an obscure realm of sui generis moral facts.[97] A powerful line of reasoning appeals to persistent moral disagreement—the fact that similarly situated parties can agree about all the non-moral facts and yet continue to disagree about moral questions. For example, parties might agree about the expected consequences of lying in a particular case, and yet disagree forcefully abouts its wrongness. The fact that moral disagreement seems irresolvable suggests to the non-cognitivist that moral disagreements are unlike ordinary factual disagreements, because parties to ordinary factual disputes tend to converge over time or become less confident in their own view in light of persistent disagreement.[98] The non-cognitivist explains moral disagreements in terms of a desire or preference conflict rather than a conflict in the parties' beliefs.

Before turning to this Part's central thesis—that the judiciary's claims about non-factuality and moral doubt are best explained through the lens of non-cognitivism—it is worth highlighting one important feature of the cognitivist/non-cognitivist distinction. Since cognitivists vary in their account of the nature of moral facts, there can be "relativistic" or "subjectivist" strains of moral cognitivism.[99] For instance, a simple form of moral subjectivism holds that to believe that lying is wrong is simply to believe that one is averse to lying.[100] The moral belief is true if and only if the speaker is, in fact, averse to lying. This view is importantly distinct from non-cognitivism. The subjectivist is very much committed to thinking that moral claims can be

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[97] Non-cognitivism is often motivated based on skepticism that there could be any such facts. *See, e.g.*, Simon Blackburn, *Must We Weep for Sentimentalism?*, *in* PRACTICAL TORTOISE RAISING: AND OTHER PHILOSOPHICAL ESSAYS 109–28 (2010). However, contemporary non-cognitivists maintain that we can still make sense of moral objectivity.

[98] *See generally* James Fritz & Tristram McPherson, *Moral Steadfastness and Meta-Ethics*, 56 AM. PHIL. Q. 43 (2019) (evaluating the non-cognitivist's argument based on moral steadfastness).

[99] *See, e.g.*, Gilbert Harman, *Moral Relativism*, *in* MORAL RELATIVISM AND MORAL OBJECTIVITY 1–64 (Gilbert Harman & Judith J. Thomson eds., 1996) (defending a relativistic cognitivism).

[100] *See generally* Emad H. Atiq, *How to be Impartial as a Subjectivist*, 173 PHIL. STUD. 757 (2016) (describing simple subjectivism).

true or false, depending, obviously, on the speaker's feelings. By contrast, the non-cognitivist does not think moral judgments amount to claims about one's feelings (or about anything else). Moral judgments are simply not apt for truth or falsity because they do not purport to describe how things are in the world; instead, moral judgments have a feeling-expressive function.

What is it to *express* a feeling or desire without describing that one has the desire? Consider that when I assert "I believe it's raining outside," I introduce a fact about myself into the conversational context, which is quite different from asserting "it's raining outside," which introduces a proposition. By the same token, the non-cognitivist thinks "lying is wrong" thrusts into the conversational context a feeling or attitude (an *aversion to lying*) rather than any claim about the speaker. The attitude becomes the subject of conversation and debate rather than facts about the speaker's psychology.

The above taxonomy suffices for the argument in Section I.C. I have avoided discussing metaethical views that are difficult to parse under our key distinction, since they have no obvious bearing on the interpretation of the case law.[101] For example, a mixed or pluralistic view is rarely defended in the literature, according to which some moral claims are best analyzed in cognitivist terms and others in terms of non-cognitivism. A pluralistic interpretation of judges is disfavored because courts have cast their observations about morality in entirely general terms—for example, by claiming that moral questions, as a class, are non-factual.

C. A Non-Cognitivist Interpretation of Adjudication

Previously, we observed that courts have claimed, among other things, that: moral judgments are not factual; and concepts like "reasonable doubt" or "preponderance of the evidence" do not intelligibly apply to moral judgments.

It is important to understand why judges might be making such claims. And non-cognitivism offers a plausible explanation: Judges are in all likelihood sympathetic to the view that moral claims do not purport to describe how things are in the world, but, rather, serve a feeling- or preference-expressive function. The reasons why non-cognitivism offers the best explanation, and why neither one of the

[101] For example, a view that some find hard to characterize embraces the traditional non-cognitivist claim that moral judgments amount to expressions of desire and intent, while maintaining that ordinary concepts of truth or factuality do apply to moral determinations. *See, e.g.*, BLACKBURN, *supra* note 96, at 48–84. This "quasi-realist" position has limited relevance, since the judicial commentary under discussion emphatically denies that moral determinations are factual.

above claims observed in case law, taken individually, would be a sufficient basis for inferring the judiciary's metaethical assumptions, warrant a brief discussion.

The terms that courts have used to draw a contrast between factual findings and moral judgments serve as clues to what might be motivating judges. The moral judgment that the defendant deserves death (or life without parole) "is not a 'fact' to be 'found' by the jury but a deeply personal *decision*."[102] The jury does "not need to be instructed as if it were making a finding of fact" when it is invited to determine what kind of sentence would be "just."[103] The non-factual status of a "value *call*" can be appreciated "in the abstract."[104] As discussed, the defining thesis of non-cognitivism is that moral judgments are best understood in practical, emotive, or imperatival terms. They are a means by which subjects express their desires and intentions (and attempt to elicit similar desires and intentions in others). And consistent with this thesis, courts have characterized moral judgments in overtly non-cognitive terms—as decisions to be contrasted with beliefs—in order to explain their non-factual status. Moreover, the routine classification of such judgments as highly subjective and deeply personal further supports the inference that courts do not think of a judgment like the defendant is irreparably corrupt as a belief that can be appraised for truth or falsity, setting aside the non-moral, empirical assumptions on which the judgment—or decision—might be based.

However, the repeated insistence that moral judgments are not factual is not decisive. For example, it is possible that judicial skepticism about a "fact" of the matter about questions of justice reflects a relativistic strain among judges. Recall from our earlier discussion that there are forms of moral cognitivism according to which whether a moral claim is true or false depends entirely on the speaker's own preference, just as aesthetic judgments about "Beethoven being better than Brahms" might be true relative to a person's tastes. Perhaps some courts think that moral claims cannot be true or false, without qualification, because there are no speaker-independent truths about justice. Rather, each juror's claims about what the defendant deserves

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[102] United States v. Con-Ui, No. 3:13-CR-123, 2017 WL 1393485, at *6 (M.D. Pa. Apr. 18, 2017) (emphasis added); *see also* United States v. Lawrence, 735 F.3d 385, 428 (6th Cir. 2013) (noting that in *Gabrion*, the court found that a death sentence is based on a moral judgment rather than only findings of fact); United States v. Gabrion, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc) (suggesting that courts considering a death sentence make "not a finding of fact, but a moral judgment").

[103] *Gabrion*, 719 F.3d at 532–33.

[104] Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (emphasis added).

is "true" relative to the juror's own preference or general framework (perhaps because moral truths are truths about one's psychology). If this is the sort of view that is implicit in recent case law, then judges count as moral cognitivists who happen to be relativists about moral truth.

However, this interpretation is disfavored by the fact that courts do not simply deny that there is a fact of the matter about moral questions; they insist, further, that moral determinations are not susceptible to a burden of proof. According to these courts, it strains intelligibility to ask whether the sentencer has reasonable doubt about her moral judgment. Recall the Supreme Court's assertion that "it would mean nothing" to apply concepts like "reasonable doubt" or "more-likely-than-not" to a "value call."[105] This claim is hard to explain within a cognitivist interpretation. Cognitivists who think judgments about whether the defendant deserves the death penalty can be true or false relative to the sentencer's own preferences should have no trouble making sense of the idea that we can be more or less confident in our moral judgments, just as we can be more or less confident about facts concerning our own preferences. Indeed, no moral cognitivist has ever claimed that moral doubt and moral certainty are meaningless concepts, as far as I am aware.[106]

By contrast, judicial resistance to applying concepts of doubt and certainty to moral judgments is much easier to explain if we interpret judges as non-cognitivists. The moral non-cognitivist tells us not to be deceived by the surface grammar of moral claims. Although claims like "the defendant deserves mercy" seem like ordinary, descriptive judgments, in fact, the linguistic function of such claims is to express the speaker's desires and decisions. The juror who asserts that the defendant deserves mercy is simply expressing her aversion to the death penalty in the defendant's case (and, perhaps, calling on others to feel the same). It is at least prima facie plausible that if moral judgments are not descriptions of fact but, instead, serve an emotive or imperatival function, then the application of concepts like doubt and certainty to a moral determination may be a category mistake. Imagine querying someone after they've booed the Boston Celtics

[105] *Id.* at 642.

[106] For similar reasons, judicial commentary is not so plausibly interpreted along the lines of the "non-naturalist" strain of moral cognitivism. Recall that the non-naturalist thinks moral facts belong to a class of their own, one that is distinguishable from the class of ordinary, empirical facts. A non-naturalist interpretation of the courts, like the relativistic alternative discussed above, renders puzzling why courts deem the concept of "reasonable moral doubt" unintelligible. I am aware of no moral non-naturalist who thinks that it is impossible to be more or less certain about the truth of moral claims.

whether they were certain or had reasonable doubt. The query would seem more than a little strained.

As it turns out, an important critique of non-cognitivism in the philosophical literature is based precisely on the assumption that non-cognitivists cannot make sense of what seems utterly intuitive to moral cognitivists—namely, that we can, in fact, be more or less confident in our moral judgments.[107] I explain this argument in detail later, in Section III.A, as well as how it might be challenged. But the main point for now is that it is plausible that non-cognitivists would have a harder time making sense of varying degrees of moral confidence. And standards of proof are standardly understood in terms of degrees of confidence. So, by interpreting judges as non-cognitivists, we can begin to understand why courts might balk at the intelligibility of applying notions of reasonable doubt or preponderance of the evidence to moral determinations. These courts do not think of moral determinations as beliefs about how things are; they conceive of moral determinations in practical terms—as constituted by an expressed intention or decision.

A final observation should reinforce a non-cognitivist interpretation of recent rulings. As discussed in Section I.B, the division between cognitivists and non-cognitivists marks one of the most recalcitrant disputes in contemporary moral philosophy.[108] Cognitivists and non-cognitivists have strikingly different intuitions about morality.[109] And just as many courts seem intuitively drawn to the thesis that moral judgments are "non-factual" and not subject to "reasonable doubt," others seem to find the opposite view just as intuitive and self-evident. Some courts have stated categorically that moral judgments can be made with more or less confidence, and that the concept of reasonable doubt unquestionably applies to such judgments. For example, the New Jersey Supreme Court has held that "[i]f anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here[,]" and "as a matter of fundamental fairness the jury must

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[107] The moral philosopher Michael Smith has argued, for reasons to be discussed later, that varying degrees of confidence in moral claims are not so easily modeled based on practical attitudes, like desires or intentions. *See* Smith, *supra* note 16, at 308; *see also infra* Section III.A.

[108] A recent survey of philosophers found that of 1,651 respondents on the nature of morality, 1,133 (69%) accepted or leaned towards moral cognitivism, 339 (21%) accepted or leaned towards non-cognitivism, and 169 (10%) accepted or leaned towards some other view. *See* Bourget & Chalmers, *supra* note 90, at 9.

[109] *See supra* note 90 and accompanying text (explaining various cognitivist and non-cognitivist views of morality).

find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt."[110]

The Colorado Supreme Court has, likewise, observed that applying the reasonable doubt standard to the final moral question in capital sentencing is necessary "to communicate to the jurors *the degree of certainty* that they must possess that any mitigating factors do not outweigh the proven statutory aggravating factors before arriving at the ultimate judgment that death is the appropriate penalty."[111] And, finally, the Connecticut Supreme Court has stated even more explicitly that:

> [T]he nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, *it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment*. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.[112]

Such divergent intuitions among judges about the intelligibility of moral certainty and doubt suggest deep differences in how judges conceive of morality. It seems likely that the divergence among jurists tracks or is otherwise related to a persistent and fundamental disagreement among value theorists (and, as we'll discover shortly, laypersons as well)—namely, the disagreement between moral cognitivists and non-cognitivists.

Taking stock, I have argued that judicial sympathy towards moral non-cognitivism best explains why a broad range of courts have claimed that moral judgments are neither factual nor susceptible to a burden of proof. Moreover, the fact that at least some judges take an opposing stance on morality in equally categorical terms suggests that the divergence among judges corresponds to a similar and very basic disagreement that is observed more widely between cognitivists and non-cognitivists. Our conclusion can be qualified, however. We

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[110] State v. Biegenwald, 524 A.2d 130, 156 (N.J. 1987). *See also* People v. Tenneson, 788 P.2d 786, 797 (Colo. 1990) ("[T]he jury still must be convinced beyond a reasonable doubt that the defendant should be sentenced to death."); State v. Wood, 648 P.2d 71, 83 (Utah 1982) ("Furthermore, in our view, the reasonable doubt standard also strikes the best balance between the interests of the state and of the individual for most of the reasons stated in *In re Winship.*") (citation omitted); State v. Simants, 250 N.W.2d 881, 888 (Neb. 1977), *disapproved on other grounds*, State v. Reeves, 453 N.W.2d 359 (Neb. 1990); ARK. CODE ANN. § 5-4-603(a)(3) (requiring the reasonable doubt standard for the final penalty verdict).

[111] *Tenneson*, 788 P.2d at 794 (emphasis added).

[112] State v. Rizzo, 833 A.2d 363, 408 n.37 (Conn. 2003) (emphasis added).

needn't assume that courts have a fully fleshed-out theory of morality, or even that they must hold consistent views across different types of moral questions. We can leave open the possibility that courts with non-cognitivist sympathies only have such convictions about the class of moral questions that concern what wrongdoers deserve (or justice in sentencing). Even if judicial non-cognitivism is selective in this way, it would not undercut the arguments of the following Sections. For example, Part III grants for the sake of argument that moral questions involving criminal justice might be non-factual and shows that a standard of proof should nevertheless apply. In any case, we have good reasons for supposing that courts are not being selective, insofar as their claims about morality and justice in the cases discussed earlier, in Section I.A, are stated in entirely general terms.

II
The Case for Metaethical Neutrality in Adjudication

Courts do not always adjudicate from the common ground—nor should they. In the process of reaching a verdict, a judge might deem a practice cruel—or compensation fair, or terms unreasonable—on grounds that are reasonably contestable. Likewise, her judgments might be informed by a contestable theory of statutory interpretation or a contestable view of the state of the market. But such cases of judicial discretion are quite different from a judge rendering a verdict based on a comprehensive theory of the nature of morality. Decisions based on contentious metaethical claims raise unique concerns, concerns that can be made vivid based on a familiar principle of neutrality defended by John Rawls.

Rawls famously argued that in a pluralistic democracy there is some pressure on public officials to justify laws in the language of public reason—that is, in terms that are broadly accessible to citizens who might reasonably disagree on many moral and non-moral questions but agree on enough to share a legal system amicably.[113] There is some debate over the scope of the public reason requirement, but "the strongest case" emerges "where the political questions concern the most fundamental matters."[114] This Part suggests that questions of

[113] *See* John Rawls, Political Liberalism 16, 378–79 (2005) (arguing that interpersonal respect among persons who reasonably disagree about fundamental questions—including questions of ethics—is only possible if constitutional rules are justified in the language of public reason or shared viewpoints).

[114] *Id.* at 215. *See generally* Jonathan Quong, *The Scope of Public Reason*, 52 Pol. Stud. 233, 245 (2004) (arguing that the demands of public reason extend beyond "constitutional essentials" and "matters of basic justice").

metaethics are relevantly fundamental—answers to such questions are contested, imbued with significance, and supra-constitutional: Metaethical assumptions define the framework through which all of the Constitution's claims about justice are to be understood. The public reason requirement thus provides a powerful basis for thinking that judges ought to be more neutral on metaethical questions, at least insofar as cases can be resolved without taking a stand on the objectivity of morality.[115]

Section II.A begins by summarizing empirical research on the public's perceptions of morality. Research by social psychologists over the past two decades suggests that the views of the judiciary are not very representative. Section II.B further develops the case for neutrality based on an analogy with the judicial practice of avoiding hard constitutional and jurisprudential questions in ordinary cases—the so-called "constitutional avoidance doctrine." The discussion takes for granted that the question of whether courts should be deciding cases based on non-cognitivist assumptions can be addressed separately from the question of whether non-cognitivism is true.

A. "Folk" Metaethical Pluralism

A substantial body of empirical work over the past two decades has examined whether and to what extent lay persons take moral judgments to be factual.[116] Researchers have developed several different measures of broadly cognitivist intuitions about morality. In a recent review of the literature, Thomas Pölzler and Jennifer Cole Wright describe two principal measures: the "disagreement measures" and the "truth-aptness measures."[117] The disagreement measure tracks subjects' intuitions about cases of moral disagreement—in particular, whether subjects think it is possible for one party to a moral disagreement to be mistaken. For example, Goodwin and Darley's influential 2008 study invited subjects to consider various statements as potential topics of disagreement, some of which were moral ("Discriminating against someone on the basis of race is morally wrong."), others empirical ("The Earth is not at the center of the known uni-

[115] One might be tempted to find a "neutral" justification for non-cognitivist adjudication in the fact that judges must adopt *some* view of morality in order to resolve a pressing legal question concerning standards of proof for moral questions. After all, if the legal question were decided based on a cognitivist view of morality, that would be equally controversial. However, this justification wrongly assumes that a decision cannot be reached on metaethically neutral grounds, as I try to show in Part III. Metaethical "neutrality" in my sense involves a commitment to deciding cases without resolving contested metaethical questions wherever possible.

[116] *See generally* sources cited *supra* note 17.

[117] Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 2.

verse."), and others aesthetic ("Frank Sinatra was a better singer than is Michael Bolton.").[118] Participants were asked whether one party to the disagreement "is surely mistaken" or whether "it is possible that neither you nor the other person is mistaken."[119] Goodwin and Darley found that subjects tended to think that it is possible for people to be mistaken about ethical and empirical matters but not aesthetic matters.[120] The researchers concluded that "individuals seem to treat core ethical beliefs as being almost as objective as scientific or plainly factual beliefs, and reliably more objective than beliefs about social convention or taste."[121] The results have been replicated, with researchers drawing on participants from diverse age groups and backgrounds.[122] However, Goodwin and Darley's conclusions have been contested in the literature, since the results examined closely indicate a wide range of opinions on the nature of moral disagreement: Thirty percent of the participants in their study described moral disagreements in terms that the researchers took to be indicative of a denial of objectivity.[123]

Goodwin and Darley employed a second measure to track people's intuitions.[124] Under the "truth-aptness" measure, subjects were asked whether a particular moral statement is a "[t]rue statement," "[f]alse statement," or "[a]n opinion or attitude."[125] A related set of studies invite subjects to evaluate statements like: "There exists a single moral code that is applicable to everyone, regardless of any

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118 Goodwin & Darley, *supra* note 17, at 1361–62.

119 *Id.* at 1344.

120 *See id.* at 1352–53 (noting that subjects considered ethical and empirical matters more "objective" than aesthetic matters).

121 *Id.* at 1354.

122 *See* Jennifer C. Wright, Piper T. Grandjean & Cullen B. McWhite, *The Meta-Ethical Grounding of Our Moral Beliefs: Evidence for Meta-Ethical Pluralism*, 26 PHIL. & PSYCH. 336, 353–54 (2013) (showing that politically controversial moral issues, concerning, for example, the permissibility of first-trimester abortion, elicited relativistic judgments, while other moral issues were viewed objectively); *see also* Jennifer C. Wright, Cullen B. McWhite & Piper T. Grandjean, *The Cognitive Mechanisms of Intolerance: Do Our Meta-Ethical Commitments Matter?*, *in* 1 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 56 (J. Knobe, T. Lombrozo & S. Nichols eds., 2014) (concluding that moral claims that generate concensus are more likely to be seen as objectively grounded); Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 7 (collecting studies based on diverse age groups and cross-cultural research).

123 Goodwin & Darley, *supra* note 17, at 1351; *see also* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 3–4 (highlighting that in the Goodwin and Darley study, almost 30% of responses to the disagreement measure and almost 50% of responses to the truth-aptness measure chose the subjective option for moral statements, and that while some moral statements were considered objective, others were considered non-objective).

124 Goodwin & Darley, *supra* note 17, at 1344.

125 *Id.*

individual person's beliefs or cultural background[,]"[126] and "[w]hen a person says that something is morally right or wrong, good or bad, etc. she intends to state a fact. Such facts exist—and they are independent from what anybody thinks about them."[127]

Other studies have evaluated subjects' reactions to moral norms being described as "discovered," or "cultural [or] individual inventions," or "illusions," or "divine commandments."[128] On the whole, the results of these broad-ranging studies indicate considerable disagreement about the objectivity of morality, not just across participants, but regarding different moral questions.[129] Summarizing this literature, Pölzler and Wright observe that:

> More recent studies have by and large confirmed [the] hypothesis of folk metaethical pluralism. Wright et al. (2013) and Wright, McWhite, and Grandjean (2014), for example, replicated Goodwin and Darley's results, using the exact same measures, but letting subjects classify the presented statements as moral and nonmoral themselves. Objectivity ratings for statements that were dominantly self-classified as moral varied [across subjects] between as little as 5% and as much as 85%. Research based on different measures yielded high proportions of intrapersonal variation as well.[130]

More recently, researchers have begun exploring the factors that predict whether subjects are more likely to judge a moral claim as factual. The identified factors shown to correlate with broadly cognitivist intuition include religious belief, acceptance of a moral statement within the subject's community, and moral statements concerning intentional harm.[131] While the methodology of these

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126 Hagop Sarkissian & Mark Phelan, *Moral Objectivism and a Punishing God*, 80 J. EXPERIMENTAL SOC. PSYCH. 1, 4 (2019).

127 Pölzler & Wright, *Anti-Realist Pluralism*, *supra* note 17, at 60.

128 *See* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 3 (collecting studies).

129 *See id.* at 3–4 (summarizing different results of studies).

130 *Id.* More recent studies report greater sympathy towards non-cognitivism. For example, Pölzler and Wright report that of 172 subjects, 77% offered non-cognitivist responses to abstract questions about the factuality of morality, whereas 26% offered cognitivist responses. Pölzler & Wright, *Anti-Realist Pluralism*, *supra* note 17, at 70. However, Pölzler and Wright suggest that more research is needed before definitive conclusions can be reached about whether lay persons are more or less inclined towards objectivist views on morality. *See* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 11.

131 *See* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 4 (describing objectivist intuitions about a moral statement as being correlated with various factors including: (1) the degree of consensus the statement attracts; (2) a person's religious beliefs; (3) the statement being about harmful transgression; and (4) the statement being about wrongs).

studies is not immune to criticism,[132] the research provides a reasonably strong basis for inferring that there is considerable disagreement among laypersons about whether and to what extent moral questions admit of true or false answers.

Moreover, the objectivity of morality is not just controversial. There are reasons for thinking that it is an issue of significant public concern, given that moral convictions are often deeply held and tied up with a person's fundamental worldview.[133] In fact, the legal propriety of state actors endorsing contentious metaethical claims via public school textbooks has previously been litigated under the Establishment Clause.[134]

B. A Supra-Constitutional Avoidance Doctrine

The case for judicial neutrality on questions of metaethics can be reinforced based on an analogy with a familiar canon of adjudication—the "constitutional avoidance doctrine."[135] This doctrine is embodied in the judicial practice of not ruling on hard constitutional questions if a case can be resolved without the ruling. Justice Brandeis in his famous concurrence in *Ashwander v. Tennessee Valley Authority* described a set of rules "under which [the Court] avoid[s] passing upon a large part of all the constitutional questions pressed

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[132] *See id.* at 6–8 (raising various concerns including about the representativeness of samples, the metaethical definitions employed, and the likelihood that ordinary concepts of "truth" and factuality correspond to philosophical notions).

[133] *See* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 4 (describing moral objectivism as correlated with religious belief).

[134] Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987). In *Smith*, after plaintiffs challenged the maintenance of religious prayer services in the public school system of Mobile, Alabama, several school officials filed a motion to intervene arguing that if the plaintiffs were entitled to an injunction enjoining religious prayer, then the injunction should be expanded to "the religions of secularism, humanism, evolution, materialism, agnosticism, atheism and others." *Id.* at 686. The intervenors' main allegation was that the school system's economics, history, and social studies textbooks endorsed a "relativistic" and subjective view of morality which they claimed was antithetical to their core religious beliefs in violation of the Establishment Clause. *See id.* at 690–91. The textbook content that the intervenors found objectionable included such observations as "morals are rules made by people," "moral standards vary in different families," "values are expressed in strong feelings [and] are very closely related to our emotions," "values can change," and "values are personal and subjective." Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939, 1003–04 (S.D. Ala.), *rev'd and remanded*, 827 F.2d 684 (11th Cir. 1987). The case is helpful not so much for its constitutional upshot, but as an example of how the state risks alienating segments of the public by privileging a contested view of the grounds of morality.

[135] *See generally* Slocum, *supra* note 20 (maintaining that in the context of the constitutional avoidance doctrine, the concept of ambiguity should be a neutral trigger but is instead currently applied ideologically). *See also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) (describing the avoidance canon as "the preeminent canon of federal statutory construction").

upon it for decision," including that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter" and that "the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[136]

While the avoidance doctrine has traditionally been understood in terms of ordinary questions of constitutional law, its scope is probably broader, covering "supra-constitutional" questions—that is, questions concerning the correct framework principles for interpreting the Constitution. Metaethical questions are supra-constitutional insofar as they bear on the correct interpretation of the Constitution's use of moral language. For example, if we assume that moral assertions are non-descriptive expressions of a speaker's desires, then all of the framing generation's claims about justice (or cruelty, or fairness) as embodied in the Constitution would need to be construed in that light (as expressing the framing generation's preferences rather than referring to immutable moral facts). A closer look at judicial practice suggests that judges avoid settling difficult or controversial supra-constitutional questions in ordinary adjudication. This practice makes sense precisely because supra-constitutional commitments have downstream constitutional implications, and the avoidance doctrine calls for deciding cases on narrow grounds.

Consider, for instance, jurisprudential claims about the nature of law and legal interpretation. Such claims define a framework for understanding what the Constitution, here or elsewhere, requires and why.[137] Yet judges do not generally litigate their jurisprudential disagreements in ordinary adjudication. For example, it is common knowledge that judges come to the court with competing views on questions of statutory or constitutional interpretation. But good judges, nevertheless, endeavor to decide cases without resolving, say, whether originalism or non-originalism is the true theory of constitutional interpretation. While a judge might rely on originalist reasoning

136 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

137 *See generally* Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967) (defending a general theory of law according to which judges must reason morally to discern the legal facts); Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975) (defending an anti-positivist theory of law based on judicial reasoning in hard cases). Dworkin famously observes that "[j]urisprudence is the general part of adjudication, silent prologue to any decision at law." Ronald Dworkin, Law's Empire 90 (1986). And on this point, opponents of Dworkin's theory of law by and large agree. *See, e.g.*, H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory 158–59 (Clarendon Press 1982) (observing that jurisprudence clarifies what the ideal of fidelity to law amounts to).

in the process of justifying her legal conclusions, she is also likely to make an effort to vindicate the holding based on alternative jurisprudential theories with which she may not personally agree.[138] At the very least, in the public justifications they offer for their rulings, and in their engagement with their peers, judges do not behave as if originalism—or some other controversial interpretative theory—can be presupposed without argument.[139]

Similarly, judges are routinely called upon to make moral judgments in the course of determining what the law requires, but their judgments on moral questions tend to be informed by the community's perspective.[140] Indeed, judges have considerable discretion in deciding moral and evaluative questions, which pervade judicial decisionmaking, including on matters of constitutional law.[141] However, judges make an effort to adjudicate from the common ground, regularly reaching for values that enjoy widespread communal support in

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[138] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 612–26 (1987) (Scalia, J., dissenting) (offering an argument from legislative history in response to the majority's argument from legislative history). *See generally* Emad H. Atiq & Jud Matthews, *The Uncertain Foundations of Public Law Theory*, CORNELL J.L. PUB. POL'Y (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032904 [https://perma.cc/M692-PCVY] (arguing that uncertainty regarding the foundations of jurisprudence should lead judges to be charitable towards alternative jurisprudential theories with which they disagree).

[139] *See, e.g.*, Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1961, 2001 (2007) ("All theories [of statutory interpretation] find material use on the Supreme Court, with textualism and legislative intent being far and away the most frequently used. Although individual Justices clearly vary in their use of interpretive theories, the Court as a whole is quite pluralist in its methods of statutory interpretation."); Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115, 1122 (2012) ("Most judges do not wear their interpretive hearts on their sleeves the way constitutional theorists do. Judges, even Supreme Court Justices, typically do not articulate a systematic interpretive methodology in their opinions.").

[140] *See* Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 340 (1987) (arguing that the Supreme Court "follows the changing public moods" and that courts frequently "explicitly appeal to, and make actual use of, 'conventional morality' and community standards relevant to the issues before the court) (citations omitted).

[141] *See* sources cited *supra* note 137.

the face of pervasive moral disagreement.[142] The practice is appropriate precisely because judges make decisions in the public's name.[143]

Given this tradition of ecumenicism, it is unclear why judges should feel at liberty to resolve contentious metaethical questions based on their personal commitments. After all, metaethical claims bear on questions of both morality and legal interpretation. In fact, a doctrine of metaethical avoidance can be defended on pragmatic and not just principled grounds.

Most states have codes of judicial conduct which mirror to varying degrees the American Bar Association's Model Code of Judicial Conduct, and the preamble to the Model Code directs judges to "ensure[] the greatest possible public confidence in their independence, impartiality, integrity, and competence."[144] Rule 2.2 directs judges to "perform all duties of judicial office fairly and impartially,"[145] and the comments observe that "[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded."[146] Comments two and three add important caveats—namely, that "each judge comes to the bench with a unique background and personal philosophy" and that in "applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law" which "do not violate this Rule."[147] As the comments make clear, courts are routinely called upon to make legal determinations that turn on the judge's personal views on hard questions of fact and law, and it is no violation of impartiality for a judge to rely in good faith on her personal philosophy. Indeed, no principle of judicial ethics could plausibly be construed as barring judges from relying on their sincerely held convictions just because a subject is controversial.

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142 *See generally* W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW 227 (2007) (arguing that judges generally do and should aspire to adjudicate based on "constitutional morality" which "consists of the moral norms and convictions to which the community, via its various social forms and practices, has committed itself and that have in some way or other been drawn into the law"). There are limits, of course, to the duty to reach for common values. The hard question of judicial review, which needn't be resolved here, concerns what judges should do when community norms violate the basic principles of justice. Such difficult questions of political philosophy can be sidestepped. The limited point for present purposes is just that judges are under some pressure to reach for public reason on fundamental questions when it is possible to do so.

143 *See id.*; *cf.* Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L. J. CONST. L. 2, 5 (2009) ("Neither judges nor legislators are deciding what to do as individuals. When they deliberate and vote in their respective institutions, they are deciding what is to be done in the name of the whole society.").

144 MODEL CODE OF JUD. CONDUCT pmbl. (AM. BAR ASS'N 2011).

145 *Id.* r. 2.2.

146 *Id.* r. 2.2 cmt. 1.

147 *Id.* r. 2.2 cmts. 2, 3.

Nevertheless, there is clearly a tension between the legal system's tolerance of judicial discretion and the obligation to promote public confidence in the legal system. Indeed, certain ways of exercising discretion reinforce the public's suspicion that legal analysis is systematically driven by a court's non-legal ideological commitments. Professor Charles Geyh writes that the public is generally suspicious "that broad segments of the judiciary are captured by their . . . political interests" and "that judges allow their ideological interests to subvert the rule of law."[148] The basic worry is that a judge's "constitutional and statutory analyses are polluted by her ideological biases"—her preference, for example, for liberal or conservative policy goals.[149] Accordingly, a powerful means of shoring up public confidence involves endeavoring to resolve legal questions without relying on potentially idiosyncratic non-legal assumptions. This obligation is perhaps strongest where the assumptions in question concern a matter of significant public concern (like the nature of morality).

In sum, the case for avoiding contested metaethical questions is exceptionally strong. It is consistent with the juridical virtue of avoiding contentious questions of law and jurisprudence in ordinary adjudication. And a principle of avoidance is supported by the need to shore up the public's confidence in the judiciary. Fortunately, the question of whether standards of proof should apply to moral questions can be analyzed without taking a stand on hard metaethical issues, as the next Part demonstrates, so that it is indeed possible to decide an urgent question of sentencing law without resolving whether moral judgments are objective.

III
Neutrally Applying a Standard of Proof to Moral Questions

This Part argues that there are good and ecumenical reasons for requiring a standard of proof for at least some important moral determinations at sentencing. The aim is not to decisively settle the various questions defendants have raised, but to show that it would be a mis-

[148] Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 529 (2013).

[149] *Id.* at 505. Geyh notes that there is a political or ideological dimension to calls for judicial impartiality, but the idea of partiality to a viewpoint or ideology requires clarification. We usually think of partiality as an unfair privileging of persons. How could it be objectionably "partial" for a judge to rely on views she thinks are true? One way to make sense of ideological partiality is in terms of a judge's failure to reason from the common ground on questions that inspire fundamental disagreement, or in terms of her willingness to base her legal analysis on her own non-legal commitments in ways that undermine the public's confidence in the judiciary.

take for the legal system to evade the questions based on visceral skepticism about moral doubt. For the sake of clarity and brevity, I shall focus principally on the final moral assessment at sentencing, regarding the appropriateness of an extraordinary penalty (like the death penalty or juvenile life without parole), and whether it should be subject to the reasonable doubt standard.

Section III.A begins by revisiting the reasons non-cognitivist judges might have for thinking that, in general, a burden of proof for moral determinations is unintelligible. For all their initial plausibility, I argue in Section III.B that those reasons are, in fact, insufficient: We can doubt a moral determination even if moral questions are not factual. Once we clarify the sense in which we can be more or less confident in a practical decision, a standard of proof for key moral determinations seems both intelligible and normatively desirable.

To put the legal significance of this conclusion in context, recall that defendants have demanded a standard of proof for moral determinations that expose them to extraordinary penalties for several reasons. One reason is that our sentencing jurisprudence calls for fair and non-arbitrary sentencing decisions.[150] Another reason is the need for sentencing procedures to be designed to ensure that jurors give full legal effect to relevant mitigating evidence.[151] And, finally, defendants have suggested that consequential moral findings fall within the scope of *Apprendi*'s requirement that factual findings must be based on the reasonable doubt standard if they enhance the defendant's sentencing exposure.[152] In what follows, I explain why a standard of proof for key moral findings should (1) help minimize arbitrariness in sentencing; (2) empower jurors to give full legal effect to relevant mitigating evidence; and (3) ensure that jurors properly apply the reasonable doubt standard to ordinary, factual findings.

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[150] *See* Furman v. Georgia, 408 U.S. 238, 257 (1972) (finding discretionary death penalty schemes unconstitutional since the purpose of the Eighth Amendment "is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary"). *See generally* Flanders, *supra* note 4 (exploring the notion of arbitrariness in the Supreme Court's death penalty jurisprudence).

[151] *See* Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that sentencing procedures must empower the jury to properly consider and give effect to mitigating evidence); *see also* Boyde v. California, 494 U.S. 370, 380 (1990) (holding that the standard for evaluating jury instructions turns on "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

[152] Apprendi v. New Jersey, 530 U.S. 466, 489–90 (2000).

A. The Puzzle of Moral Doubt

A broad range of state and federal judges have suggested that the idea of "reasonable doubt" in a moral determination makes little sense. It is helpful to revisit the reasons why non-cognitivists might be tempted by this view—though, of course, judges have not made their reasons explicit. For the non-cognitivist, a moral determination is just an intention or a decision (the decision to vote for the death penalty) expressed via moral language ("the defendant deserves the death penalty!"). And it is not clear what it means to have reasonable doubt in a decision. One can, of course, have doubts about the non-moral, empirical assumptions on which a decision is based, as courts have regularly emphasized.[153] For example, one might doubt whether the defendant knew what he was doing when he committed the crime. But what could it possibly mean to have further doubts targeted at the decision to vote for the death penalty having already resolved what to believe about the defendant's actions and other empirical matters?[154] If decisional doubt, untethered from the underlying empirical facts, is unintelligible, then there is no reason to think the reasonable doubt standard, applied to moral findings, would improve our sentencing procedures.

The above explanation for the conventional wisdom among judges appeals to the separability of a decision from the empirical assumptions on which it is based. A different explanation appeals to the fact that decisions are not gradable—they do not come in degrees. Yet standards of proof like the reasonable doubt standard are often analyzed in terms of degrees of confidence.[155] To be convinced of the defendant's guilt beyond a reasonable doubt is to have a very high degree of confidence that the defendant is guilty. To think that the defendant's guilt is supported by a preponderance of the evidence is to have more confidence that he is guilty than that he is not. Theorists sometimes attach precise numbers to these standards, so that certainty beyond a reasonable doubt amounts to something greater than ninety-

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[153] *See, e.g.*, Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (questioning whether it is "possible to apply a standard of proof to the mitigating-factor determination"). The courts admit that moral judgments turn on ordinary, empirical judgments—for example, judgments concerning the nature of the defendant's crime or his socio-economic background—and that such broadly empirical matters can be subject to a standard of proof. But the moral significance of the empirical facts—for example, their "weight" in aggravation or mitigation—is not itself a "fact" to which epistemic concepts like doubt or certainty apply.

[154] *See* discussion *supra* Section I.C.

[155] *See generally* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY ch. 2 (2006) (discussing theoretical accounts of the reasonable doubt standard).

percent confidence.[156] On this view, applying the reasonable doubt standard to a moral determination involves presupposing that we can make sense of varying degrees of confidence in a moral judgment. But if a moral judgment is just a decision, then the concept of degrees of moral confidence seems contradictory.[157] Hence, the basic assumptions underlying defendants' demand for a standard of proof for moral findings—namely, that decisions come in degrees, or that one can have doubts about a decision that are separable from doubts about the factual assumptions on which it is based—seem false or, at the very least, questionable. That is, in effect, what courts have recently maintained.

B. Making Sense of Reasonable Moral Doubt: Context-Sensitive Doubt About Relevant Empirical Matters

In what follows, I argue that the concept of moral (or practical) doubt is non-obvious but intelligible even if moral determinations are non-factual. We regularly doubt our personal and professional decisions, where this involves more than simply doubting the empirical assumptions on which the decision is based. The challenge is to give a precise account of what else is involved (through examples discussed below). As the earlier Sections of this Article have already demonstrated, whether one can intelligibly express doubt about what ought to be done is not a question of purely academic interest; addressing it is crucial for purposes of evaluating recent rulings on sentencing procedure.

The literature on moral doubt has suggested several analyses of the concept, and a proposal of considerable relevance relies on the observation that we can be more or less confident in the expected stability or robustness of a decision in the face of new information or

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[156] *Id.* at 44–47 (describing the probabilistic approach before critiquing it); *see also* Adam J. Kolber, *Punishment and Moral Risk*, 2018 U. ILL. L. REV. 487 (2018) (describing how 95% or 99% confidence is frequently attributed to the reasonable doubt standard).

[157] Even desires, though they vary in strength, do not have the right structure to be understood in terms of confidence levels. The moral philosopher Michael Smith points out that desire strength is more likely to represent the importance of an issue or outcome to the desirer than her degree of confidence in her practical conclusion. For example, I am very confident that it is wrong to cut queues, but my aversion to queue-cutting is weak since it is not an important issue for me. By contrast, I have a strong aversion to the death penalty despite being considerably less confident that the death penalty is always wrong. If motivational strength is the only dimension along which desires come in degrees, desires lack the kind of structure that can make sense of both the importance of a moral determination to an agent and the degree of confidence with which it is made. Smith, *supra* note 16, at 309–10; *see also id.* at 319 (taking the argument to be a *reductio* of non-cognitivism). There are other reasons why desire strength is not analogous to degrees of moral confidence. *See* Bykvist & Olson, *supra* note 24 (responding to Smith's argument).

reflection.[158] Doubts about the stability of a decision are not just doubts about the facts on which the decision is based, but instead implicate the future and our tendencies to change our minds. On this view, to have a high degree of confidence in a moral determination, say, that the defendant deserves death, is to be very confident that no amount of new information or future reflection is likely to change one's decision. This approach explains, in terms consistent with non-cognitivism, why it might make sense to apply the reasonable doubt standard to the final moral determination. To ask the jury to determine beyond a reasonable doubt that the defendant deserves death is to invite the jury to be appropriately certain that its decision to impose an extraordinary penalty will withstand new evidence and further reflection.

However, there are problems with this proposal. When we think about what we morally ought to do or how confident we should be in a moral determination, our deliberation is typically focused on the evidence that is presently at hand. Moral deliberation of this sort is not generally focused on the future. Hence, if moral confidence comes in degrees, presumably that variance is to be explained by the evidence that is already available to the agent, rather than evidence that may or may not appear in the future. Indeed, few jurors are likely to infer from being asked about their reasonable doubts regarding the appropriateness of sentencing the defendant to death that the law is interested in the stability of their preferences for the penalty over time.

The literature on moral doubt has explored other analyses,[159] but instead of reviewing this work further, I consider an approach that the theoretical literature seems to have overlooked but that seems uniquely suited to the legal question animating this Article. Defendants, along with a few sympathetic courts, have maintained that the reasonable doubt standard in the final analysis is necessary to reinforce in the minds of the jury the unique certainty that is required

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158 *See, e.g.*, Simon Blackburn, *Truth and* A Priori *Possibility: Egan's Charge Against Quasi-realism*, 87 AUSTRALASIAN J. PHIL. 201, 202–04 (2009) (describing doubts that stem from an agent's commitment to further examination and improving their epistemic situation). For further discussion, see Ridge, *supra* note 24, at 3328.

159 One approach models practical doubts in terms of conceptual and desire indeterminacy. *See* John Eriksson & Ragnar Francén Olinder, *Non-cognitivism and the Classification Account of Moral Uncertainty*, 94 AUSTRALASIAN J. PHIL. 719 (2016). There are other non-cognitivist-friendly models of moral credence that have been suggested in the literature. *See* Ridge, *supra* note 24, at 3329–36 (reviewing the various models); *see also id.* at 3336–44 (offering an account of moral credence in terms of an agent's betting dispositions). None of these existing approaches seem to fit the sentencing context as well as the approach I explore below, though a full discussion of alternative accounts lies beyond the scope of this Article.

before imposing an extraordinary penalty.[160] But defendants have not explained how asking jurors about their doubts about a *moral* determination at sentencing—namely, that the defendant deserves the severest penalty—helps elicit the appropriate degree of certainty. In what follows, I argue that moral questions make explicit the practical stakes relative to which a juror should be deciding what to believe about ordinary matters of fact. Moreover, we express stakes-driven doubts about factual matters when we express doubts about a decision. This is different from expressing doubts about factual matters untethered to any decision or practical determination.[161] Clarifying this view and why it bears on rational decisionmaking in the criminal trial requires some setup.

First, a broad range of epistemologists have observed that a subject's confidence or willingness to believe a proposition is sensitive to contextual factors, such as the practical stakes or the error possibilities that have been made salient in the context.[162] When the practical stakes are high, I might refrain from believing a proposition that I would otherwise believe when the stakes are low. For example, on an average day I might believe that it will rain tomorrow based solely on a friend's testimony and report feeling confident since I know my friend to be reliable. But if it turns out that I have scheduled a significant outdoor event tomorrow, my friend's testimony will not seem sufficient for a judgment about the likelihood of rain. I might check the Weather Channel or other sources for further evidence before I form a belief. In the latter case, the higher practical stakes of being wrong in either direction inspire greater caution in belief-formation.[163] Moreover, it seems rational for our belief-forming dispositions to be sensitive to the stakes in this way, given that our beliefs drive our

160 *See, e.g.*, State v. Rizzo, 833 A.2d 363, 408 n.37 (Conn. 2003) ("[I]t makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment.").

161 Put another way, decisional doubts are a means of contextualizing one's doubts about ordinary factual matters.

162 Contextualism has been defended by a number of philosophers based on evidence of the systematic sensitivity of ordinary beliefs to contextual factors. *See, e.g.*, David Lewis, *Elusive Knowledge*, 74 AUSTRALASIAN J. PHIL. 549 (1996) (defending contextualism about knowledge); Weatherson, *supra* note 21 (arguing that there are practical conditions on belief); Ganson, *supra* note 21 (arguing that the epistemic evaluation of a belief is sensitive to the practical stakes); Jie Gao, *Credal Pragmatism*, 176 PHIL. STUD. 1595 (2019) (arguing that credence, not just outright belief, is context sensitive). *See generally* Rysiew, *supra* note 21 (describing the leading forms of epistemic contextualism along with the primary arguments for and against).

163 The stakes, in this example, are set by my own cares and concerns. But that needn't always be true. In general, we can remain neutral about what drives the stakes. The stakes might be driven by objective moral facts, to the extent that there are any.

choices. Epistemologists have documented a broad range of examples of the ways in which our beliefs are context sensitive.[164]

Contextualism about belief-formation has implications for the best interpretation of legal standards of proof. According to the conventional view, at least among theorists, standards like the reasonable doubt standard or the preponderance of the evidence standard track context-invariant objective likelihoods. For example, the reasonable doubt standard is normally analyzed by theorists in terms of a proposition—say, that the defendant was at the scene of the crime—being more than 90% likely, whereas a proposition supported by a preponderance of the evidence is supposed to be more than 50% likely.[165] There are serious problems with this conventional story, many of which have been documented by Larry Laudan.[166] For one, it is a stretch to imagine that the kinds of propositions on which legal outcomes turn can be assigned likelihoods or probabilities. Propositions like, "the defendant was at the scene of the crime," are generally not the kind to be believed on the basis of statistical evidence. Contrast, for instance, the decay rate of a radioactive isotope, which might be determined based on statistical averages over observed frequencies. Moreover, while the objective probabilities approach is popular among theorists, courts have been extremely reluctant to impose probabilistic interpretations and have consistently struck down jury instructions that have attempted to define the reasonable doubt standard in this (or any other) way.[167] But these problems are independent of contextualist insights.

Contextualism suggests a different reason why the conventional account of standards of proof is, at a minimum, incomplete. If contextualism is true, then what counts as reasonable doubt is probably sensitive to context. To invite the jury to ensure that the defendant committed the crime beyond a reasonable doubt is to invite the jury to ensure that the evidence is sufficient for belief in the defendant's guilt given the specific practical purpose of conviction. As the stakes vary—for example, due to variance in the seriousness of the crime and the potential sentencing exposure—so does (should) the standard for

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164 *See supra* note 162.

165 LAUDAN, *supra* note 155, at 44.

166 *Id.* at 44–47.

167 *See id.*; *see also* Larry Laudan, *Is It Finally Time to Put "Proof Beyond a Reasonable Doubt" Out to Pasture?*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 317, 318 (Andrei Marmor ed., 2012) ("[T]he U.S. Supreme Court is on record multiple times as urging judges not to attempt to define what a reasonable doubt is, not even when (as commonly occurs) jurors explicitly request the judge to clarify the meaning of this key notion . . . . If judges give any responses to jurors' requests for clarification, they tend to be empty bromides of the sort: 'Well, a reasonable doubt is not an unreasonable doubt.'").

what counts as sufficient evidence for belief. Of course, there might be objective limits to the variance that context can induce in a standard of proof in criminal law (because the stakes are always high). For example, it may be that the reasonable doubt standard tracks a narrow range of likelihoods (85%–98%), while the precise value that distinguishes reasonable from unreasonable doubt is sensitive to contextual factors. But we need not settle the details of a contextualist approach to legal standards for present purposes. The following discussion assumes only, on the strength of contextualism as an intuitive and well-defended position within epistemology, that legal standards of proof are context sensitive to some degree or, at the very least, that they ought to be since it is rational for our beliefs to be context-sensitive.[168]

What does this have to do with the puzzle of moral doubt? Contextualism suggests a natural interpretation of what it means to doubt a moral determination. Our decisions (and preferences more broadly) turn on an assessment of the non-moral, empirical facts. And there are at least two ways of entertaining the question of what to believe about empirical matters. One way is to reason in the abstract about what to believe—say, about whether it will rain tomorrow. A different way is to engage in contextualized reasoning, which involves consciously attending to the practical consequences of one's beliefs—for example, an outdoor meeting—in the process of deciding what to believe about matters of fact. Normative questions framed in terms of a decision (about what one ought to do) make salient the practical stakes relative to which a person should be forming and revising her ordinary beliefs. Moreover, expressing doubt about a decision ("I'm not sure tomorrow is a good day for an outdoor meeting" or, on a more serious level, "I'm not sure that the defendant deserves death") becomes a means of communicating not just our doubts about the facts informing our decision, but, crucially, the fact that our doubts, say, about the likelihood of rain or the appropriateness of a death sentence, are driven by the stakes involved in the decision. Note that this approach is entirely compatible with moral non-cognitivism, since it does not assume that moral determinations are factual, just that they are based on ordinary matters of fact.

The implications of this view are perhaps best illustrated using the example of the criminal trial. When the jury is invited to consider

[168] Does the view presuppose that an agent's credence in a proposition, and not just outright belief, is context sensitive? Not necessarily, since the argument assumes the context sensitivity of the sentencer's particular judgment that there is no room for reasonable doubt. For a defense of credal contextualism, see Gao, *supra* note 162. I thank Vishnu Sridharan for an illuminating discussion on this point.

its doubts about whether the defendant ought to be punished to death, it must ensure that its confidence regarding the underlying empirical facts is stakes-adjusted. The jury is reminded that, in the final analysis, it needs to reassess its empirical findings, including ones made at conviction, based on the specified stakes: death or life for the defendant. A rational jury will reexamine any doubts it might have had in the conviction phase of the trial regarding various empirical matters—whether the defendant committed the crime, whether he did so with malicious intent, whether he had a financial motive, whether he showed no contrition, and so on—to ensure that its beliefs regarding such matters continue to be justified given the more significant consequences of being wrong.

To see the importance of such reexamination, consider a form of bias to which jurors would otherwise be susceptible due to the bifurcated nature of criminal trials. In a bifurcated trial, jurors first determine questions of liability or guilt in a conviction phase, and only after conviction in the penalty phase does the jury treat questions related to the appropriate sentence. The jury often makes findings at conviction, many based on the reasonable doubt standard, that become relevant at sentencing in ways that are not fully predictable ex ante. For example, jurors might determine facts about the nature of the defendant's crime—say, whether there was a financial motive behind the murder—that end up being aggravating factors at sentencing. Crucially, when the jury is asked in the conviction phase to determine the existence of aggravating factors beyond a reasonable doubt, the stakes are lower, since the death penalty is not yet guaranteed. A rational jury may treat the evidence presented by the state as sufficient to justify belief for the limited practical purpose of conviction and exposing the defendant to a risk of severe punishment, but it may not treat the same evidence as sufficient for the death penalty.

Now, suppose that in the sentencing phase, the defense presents no evidence in mitigation and immediately rests its case. Such egregious lack of effort from defense counsel is all too common, unfortunately.[169] When jurors are not advised on a standard of proof in the

[169] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841 n.45 (1994) ("In Tennessee, for another example, defense lawyers offered no evidence in mitigation in approximately one-quarter of all death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute."). In one of Bright's examples, *Romero v. Lynaugh*, a Texan lawyer failed to present any mitigating evidence, and his closing argument at sentencing was: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." *Id.* at 1858 (quoting 884 F.2d 871, 875 (5th Cir. 1989)). The Fifth Circuit evaluating the ineffective assistance of counsel claim described the closing argument as a "dramatic ploy"

final moral analysis and instead told that their only job is to discern whether the aggravating factors outweigh the mitigating factors, they are likely to feel obliged to issue the death sentence having already found aggravating factors beyond a reasonable doubt in the conviction phase.[170] Indeed, the state can be expected to point out that it has already proven aggravating factors beyond a reasonable doubt at conviction and that the defense has presented no evidence in mitigation.[171] In other words, jurors risk making the easy error of thinking their hands are tied and not adjusting their confidence in the underlying empirical facts based on the higher stakes. But if jurors are asked in pointed terms a further stakes-defining moral question—are you certain, beyond a reasonable doubt, that the defendant deserves to die?—it reminds jurors that their prior conclusions do not control the outcome, and that they need to reassess whether their factual beliefs about the defendant's guilt and other matters remain justified given the stark consequences.

One might object that there is already a reasonable doubt standard for key aggravating factors at sentencing.[172] For example, jurors are generally invited to determine in the penalty phase the existence of at least one aggravating factor, often defined in empirical terms, beyond a reasonable doubt.[173] However, this instruction is unlikely to motivate the jury to adjust its confidence in its various assumptions from the guilt phase. One problem is that jurors have already been asked virtually identical questions about the nature of the crime in the guilt phase (for example, whether the defendant created a risk of

and affirmed the sentence. *Romero*, 844 F.2d at 877; *see also* Strickland v. Washington, 466 U.S. 668, 680 (1984) (evaluating defense counsel's failure to investigate mitigating evidence). If defense counsel and the adversarial system cannot be relied on to ensure justice in sentencing, as Bright persuasively argues, it reinforces the need to design sentencing procedures that increase the likelihood of the factfinder adequately evaluating the moral question.

170 The state often relies on guilt-phase evidence as sufficient for proof beyond a reasonable doubt of aggravating factors at sentencing. *See, e.g.*, Kansas v. Carr, 136 S. Ct. 633, 640 (2016) ("The State relied on the guilt-phase evidence, including Holly's two days of testimony, as evidence of four aggravating circumstances . . . .").

171 The State's claim would be both true and misleading on the present analysis. The State might have proven the facts relative to a standard of reasonable doubt that is based on the stakes in the guilt phase, but not based on the updated stakes at sentencing.

172 *See* United States v. Gabrion, 719 F.3d 511, 532–33 (6th Cir. 2013) ("Here, Gabrion was already 'death eligible' once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were present."). Thanks to Alex Reinert for discussion on this point.

173 *See, e.g.*, FLA. STAT. ANN. § 921.141(2)(a) (West 2019) ("After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).").

death to many persons). If asked the same question at sentencing, jurors are likely to refer back to their earlier answer, rather than update their beliefs based on the heightened stakes.[174] Indeed, prosecutors often rely on guilt-phase evidence for such aggravators, appealing to what has already been supposedly established at trial beyond a reasonable doubt.[175] Jurors are more likely to reevaluate the broad range of empirical matters on which the death penalty turns if asked a distinct question from any asked in the guilt phase, and one designed to promote contextualized decisionmaking. This is admittedly an empirical prediction that is subject to empirical confirmation or disconfirmation. But it is supported by the evidence that framing effects and contextual cues drive legal decisionmaking.[176] The final

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174 There is little empirical work on how jurors construe the reasonable doubt standard, but there is plenty of evidence that jurors find standard instructions confusing. *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1542 (1998) ("Among other things, we have good reason to believe that jurors don't really have a very good grasp of the instructions they receive. For example, many jurors wrongly think they *must* return a death sentence if they find the defendant's crime was especially heinous . . . .") (citations omitted); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2614–17 (1996) (describing juror misunderstandings).

175 *See, e.g.*, *Carr*, 136 S. Ct. at 640.

176 *See, e.g.*, Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586, 1586 (2013) (arguing that "varying the context in which judges review evidence or altering the form in which that evidence is presented shifts judges' attention and alters their decisions"); *see also* Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH., PUB. POL'Y, & L. 622, 665 (2001) (reviewing studies that "suggest that the wording used to convey the standard of proof has a substantial impact on jury verdicts"). Moreover, some empirical work has shown that in contexts where the jury fully expects a specific penalty, the severity of the penalty interacts with the jury's likelihood of convicting the defendant in ways that support my predictions in this paper. For example Anna Bindler & Randi Hjalmarrson used two natural experiments from English history to study the effect of punishment severity on conviction rates. Anna Bindler & Randi Hjalmarsson, *How Punishment Severity Affects Jury Verdicts: Evidence from Two Natural Experiments*, AM. ECON. J.: ECON. POL'Y, Nov. 2018, at 36. They found, first, that "the decrease in punishment severity resulting from the abolition of the death penalty [in the 1800s] had a large, significant, and persistent impact on jury behavior, generally leading to the jury being more likely to convict." *Id.* at 75. Second, they observed that "the unexpected decrease in punishment severity at the time of the American Revolution resulted in a significant increase in convictions, albeit one that is smaller than that in the death penalty context." *Id.* Interestingly, this interaction between the penalty—in other words, the stakes at trial—and jury findings of guilt was observed in contexts where the penalty was more or less certain; the trial was not conducted in its modern bifurcated form. *Id.* at 45. The authors noted that "[a] unique feature of this period is that jurors had extensive experience. In contrast to the US jury system today, the same jury decided one case after another" and "knew (or had an expectation of) the punishment associated with a guilty verdict." The authors observed further that "from the 1840s on . . . the judge announced the sentence immediately after the verdict; that is, the jury observed the sentence for each case before hearing the next." *Id.* (citations omitted). *See also* Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 J.

moral question—are you certain beyond a reasonable doubt that the defendant deserves death?—is unique to sentencing and reminds the jury of the serious practical consequences of its empirical assumptions.

The risk of jurors not updating their beliefs in the absence of a moral beyond a reasonable doubt instruction is exacerbated by the fact that the Supreme Court has repeatedly sidestepped the question of whether defendants have a constitutional right to argue that residual doubt at conviction is a mitigating factor at sentencing.[177] "Residual doubt" refers to the jury's remaining doubts about the defendant's guilt despite being willing to convict. Such doubts are presumably unreasonable relative to the practical stakes at conviction so long as the jury has properly applied the reasonable doubt standard in the guilt phase. On the present analysis, there is a further phenomenon of "renewed" or "recontextualized" doubt at sentencing that might be based on residual doubt at conviction but has the status of being reasonable given the raised stakes. Judicial commentary on residual doubt has ignored these contextualist dynamics inherent in the concept of reasonable doubt.

To sum up, a standard of proof for final moral determinations at sentencing mitigates the risk of non-rational belief formation in the bifurcated criminal trial. Asking the jury about its moral doubts—in particular, its doubts about whether the defendant deserves an extraordinary penalty—is a means of getting jurors to reevaluate their empirical beliefs based on the practical consequences for the defendant. To affirm, specifically, that the defendant deserves the death

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PERSONALITY & SOC. PSYCH. 1431, 1431 (1978) (finding based on a study of 449 undergraduates that "[t]he conviction rate for individual mock jurors was inversely related to the severity of the prescribed penalty" and arguing that the analysis "confirmed the prediction that more evidence of guilt would be required for conviction when the prescribed penalty was severe"). *But see* Jennifer Teitcher & Nicholas Scurich, *On Informing Jurors of Potential Sanctions*, 41 LAW HUM. BEHAV. 579 (2017) (observing, based on a study involving subjects drawn using Mechanical Turk, that mock jurors did not vary their willingness to convict based on the expected punishment). One worry about the use of mock juries is that fictional stakes are unlikely to fully elicit the stakes-sensitive nature of belief formation. Natural experiments, of the sort studied by Bindler & Hjalmarsson, offer stronger evidence. Thanks to Scott Altman for an illuminating discussion on these issues and for drawing attention to the empirical literature.

177 *See* Oregon v. Guzek, 546 U.S. 517, 525 (2006) (stating that Franklin v. Lynaugh, 487 U.S. 164 (1988), "makes clear . . . that this Court's previous cases had *not* interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction" and that the "*Franklin* plurality said it was 'quite doubtful' that any such right existed" (quoting *Franklin*, 487 U.S. at 173 n.6)); *id.* at 525 ("In this case, we once again face a situation where we need not resolve whether such a right exists, for, even if it does, it could not extend so far as to provide this defendant with a right to introduce the evidence at issue.").

penalty beyond a reasonable doubt is to take full responsibility for the practical consequences of one's factual beliefs. The same analysis applies, *mutatis mutandis*, to a determination based on the reasonable doubt standard that a juvenile defendant is irreparably corrupt as a precondition for life without parole.

One might worry that this rationale is too complex for the jury to understand. However, jurors need not fully grasp the rationale behind applying the reasonable doubt standard to their final moral determination to apply it effectively. It is not an unreasonable expectation that jurors should have an intuitive awareness of the point in being asked to ensure that their final endorsement of an extraordinary penalty is free of reasonable doubt.[178] The point, after all, is to afford jurors a final opportunity to reexamine their doubts. And no other question at conviction or sentencing highlights the stakes more sharply than the final moral question.

Finally, it should be emphasized that the point of this Section is not to rule out all doubts about applying the reasonable doubt standard to moral determinations at sentencing. The point is that the issue needs serious consideration. There is much more to be said, and for reasons of space, this Article cannot provide an exhaustive normative analysis. Its aim, however, is to start a conversation, one that the legal system has tried to evade. Belief-updating based on shifting stakes is rational, and capital sentencing procedures, both as a practical matter and constitutionally, ought to be designed to ensure that factfinders form rational and context-sensitive beliefs throughout the criminal trial. There are good reasons to think that applying the reasonable doubt standard to moral determinations at sentencing that expose defendants to an extraordinary penalty will improve the factfinder's reasoning. And the defendant, as the ultimate beneficiary, will receive what was promised: the benefit of reasonable doubt.

Conclusion

> Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. . . . [I]t is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; *a certainty that convinces and directs the understanding*, and satisfies the reason and judgment,

[178] At least some state courts and state legislatures find the notion entirely intuitive that one can doubt a moral determination. *See* cases discussed *supra* Section I.C.

> *of those who are bound to act conscientiously upon it*. This we take to be proof beyond reasonable doubt . . . .[179]

The case law on standards of proof for moral determinations at sentencing raises several distinct questions. One set of questions is interpretive. What conception of morality does our legal system endorse? What metaethical justifications have judges offered for our sentencing procedures? Another set concerns questions of institutional legitimacy. Should our laws be based on contentious metaethical assumptions? Do judges have an obligation to be ecumenical given folk metaethical pluralism and familiar canons of constitutional avoidance? And a final set of questions is both epistemological and deeply practical. What makes doubt reasonable? Can we make sense of reasonable doubt about a moral determination? Does asking jurors about their moral doubts facilitate rational belief-formation during the criminal trial?

This Article has attempted to make progress on these diverse fronts. Resources drawn from moral philosophy and social psychology help clarify views on the nature of morality to which courts seem intuitively drawn. Clarifying the judiciary's metaethics is essential for purposes of evaluating the justifications judges have offered for recent rulings. In particular, the clarification helps us compare the judiciary's views to the general public's; this comparison, in turn, reveals reasons for courts to be more neutral on the objectivity of morality in their rulings on the legal questions that defendants have raised. Metaethical neutrality would be consistent with the requirements of public reason and constitutional avoidance. Furthermore, a more neutral approach is suggested by the theoretical literature on moral doubt. Drawing on contextualist insights from epistemology, I have argued that reasonable doubt in a moral determination is intelligible. It reflects doubts about empirical matters that are driven by the practical stakes. The view sheds light on an overlooked bias in the structure of the criminal trial, one that can be corrected by asking the sentencer about her moral doubts at sentencing.

Ultimately, the analytical goal was to sharpen questions of legal significance that deserve our urgent attention yet have received surprisingly little scholarly commentary. In particular, the question of whether there ought to be a standard of proof for key moral determinations at sentencing warrants reevaluation by theorists, the judiciary, and the legal system more broadly. The legal community must address this question more systematically and with sensitivity to the larger

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[179] Commonwealth v. Webster, 59 Mass. (1 Cush.) 295, 320 (1850) (emphasis added).

issues that the discussion has brought to light, such as the importance of metaethical neutrality in ordinary adjudication.

Since the Article's primary focus was a distinctly legal problem, I have sometimes moved quickly on the philosophical points raised by the discussion (for instance, in Parts I and III). Some of these points I have addressed elsewhere, but as a final observation, and to encourage further investigation, I highlight some of the ways this Article attempts to make progress on traditionally philosophical problems by examining legal problems and reasoning.

In moral philosophy, claims about a theory's intuitive plausibility have great argumentative significance. For example, moral cognitivists have traditionally claimed that a reason to favor cognitivism over non-cognitivism is that cognitivism is the more intuitive position.[180] Such claims are usually based on "introspection and/or unsystematic observations in classrooms."[181] A more plausible measure of the intuitiveness of a metaethical view is its appeal among officials ostensibly forced to adopt a metaethical view as a means of solving an urgent practical dilemma. In fact, one might argue that judicial commentary offers a more accurate gauge of the appeal of a metaethical view among non-philosophers than general surveys. For (applying contextualist insights) it is one thing to express sympathy towards moral non-cognitivism in response to a survey question when the stakes couldn't be lower and quite another to defend non-cognitivism as justification for a fraught legal determination. The latter is evidence of real conviction.

Additionally, our discussion of the nature of moral doubt in sentencing highlights an account of the phenomenon that the philosophical literature seems to have overlooked. The puzzle of moral doubt—of explaining what is involved in expressing doubt about what ought to be done—is related to the legal puzzle of explaining why juries should decide moral questions based on a standard of proof. Addressing the legal puzzle involves considering the reasons why, given the structure of the criminal trial, the law needs to instruct jurors to be certain beyond a reasonable doubt that the defendant

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[180] *See* Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 1–2 (noting that philosophers often "appeal to lay persons' intuitions" but that "evidence for these empirical claims has been surprisingly weak"); *id.* at 2 ("This suggests that there is a need for rigorous scientific research on folk intuitions about moral objectivity."); *see also* Enoch, *supra* note 93, at 205 ("I hope that you now see how you are probably a moral objectivist, at least in your intuitive starting point. Perhaps further philosophical reflection will require that you abandon this starting point. But this will be an *abandoning*, and a very strong reason is needed to justify it."); Smith, *supra* note 16, at 315 (observing that the more intuitive view is that persons can have varying degrees of confidence in moral claims).

[181] Pölzler & Wright, *Folk Moral Objectivism*, *supra* note 17, at 1–2 (citations omitted).

deserves an especially severe sentence. Appreciating the reasons why the instruction is necessary reveals an overlooked solution to the puzzle of moral doubt: Expressing doubt about what ought to be done conveys our uncertainty about relevant empirical matters and, crucially, that our uncertainty is driven by the practical stakes.