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Morgan v. Illinois: The Supreme Court Supports the Right of a Capital Defendant to an Impartial Sentencing Jury

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Notes

Morgan v. Illinois: The Supreme Court Supports the Right of a Capital Defendant to an Impartial Sentencing Jury

Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. . . . The doorkeeper gives him a stool and lets him sit down at one side of the door. . . . The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet.¹

I. INTRODUCTION

On June 15, 1992, the United States Supreme Court decided *Morgan v. Illinois*.² In a six-to-three decision, the Court held that the Due Process Clause of the Fourteenth Amendment³ grants capital defendants the right to question prospective sentencing jurors on their propensity to vote in favor of capital punishment.⁴ The Court also ruled that capital sentencing jurors who intend to vote automatically for a death sentence upon conviction of a defendant cannot be impartial, as due process requires.⁵

Despite a forceful dissent and heretofore limited recognition of rights to specific *voir dire* inquiries,⁶ the *Morgan* Court reached a conclusion dictated by fundamental fairness: capital defendants must have effective means of detecting and excluding the most seriously partial of prospective capital sentencing jurors—those who would impose the death penalty on any person convicted of a capi-

1. FRANZ KAFKA, *Before the Law*, in LEGAL FICTIONS: SHORT STORIES ABOUT LAWYERS AND THE LAW 285 (Willa & Edwin Muir trans., Jay Wishingrad ed., 1992).

2. 112 S. Ct. 2222 (1992).

3. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

4. *Morgan*, 112 S. Ct. at 2233.

5. *Id.* at 2229-30, 2233-35.

6. See *infra* notes 24-29 and accompanying text.

tal crime. In doing so, the Court expanded the due process rights of capital defendants.

This Note first reviews the constitutional aspects of capital sentencing, the elements of the *voir dire* process, and the trial court's power to shape *voir dire*.⁷ The Note also traces the Court's prior rulings on challenges for cause based on the death-penalty beliefs of prospective capital sentencing jurors, and examines the Illinois death penalty statute.⁸ The Note then summarizes the facts of *Morgan* and analyzes its majority and dissenting opinions.⁹ Next, the impact of the *Morgan* ruling is explored.¹⁰ Finally, this Note concludes that *Morgan* is a sound affirmation of the capital defendant's due process rights.

II. BACKGROUND

A. *The Constitution and Capital Sentencing*

The Constitution does not require capital sentencing to be conducted by jury.¹¹ The Supreme Court has held that if a jury is used, however, the Due Process Clause of the Fourteenth Amendment requires that it meet the impartiality standard of the Sixth Amendment.¹² Further, the Court has also held that for all but the rarest of cases, the Eighth Amendment¹³ prohibits mandatory capital sentencing and guarantees capital defendants the right to present mitigating evidence to the sentencing judge or jury.¹⁴

7. See *infra* parts II.A and B.

8. See *infra* parts II.C and D.

9. See *infra* part III.

10. See *infra* parts IV and V.

11. *Morgan*, 112 S. Ct. at 2228 (citing *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)); see also 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW*, § 2.14(f), at 250 & n.94 (1986) (noting that the death penalty is not constitutionally required to be imposed by a jury).

12. *Morgan*, 112 S. Ct. at 2229. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI. The Sixth Amendment guarantees criminal defendants an impartial guilt-determining jury but does not apply directly to capital sentencing juries. *Morgan*, 112 S. Ct. at 2229. However, the Fourteenth Amendment Due Process Clause independently requires that a capital sentencing jury meet an impartiality standard equivalent to that of the Sixth Amendment. *Id.* (citing *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)).

13. The Eighth Amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII.

14. *Lockett v. Ohio*, 438 U.S. 586, 600-01, 604 (1978). In *Lockett*, the Court stated: [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the cir-

B. Voir Dire

During *voir dire*, the trial judge, counsel, or both¹⁵ question prospective jurors on their personal beliefs and knowledge.¹⁶ Counsel may then attempt to exclude from the jury persons who have expressed views unfavorable to their case.¹⁷ This is accomplished through discretionary but numerically limited peremptory challenges or through judge-approved challenges for cause.¹⁸

Venirepersons¹⁹ may be excluded for cause if they possess a bias that would prevent them from serving impartially as jurors. Statutes and court decisions commonly specify the grounds that justify exclusion for cause.²⁰ In a given case, the trial judge ultimately decides if a challenged person's responses form a proper basis for exclusion,²¹ and an unlimited number of prospective jurors may be excluded for cause.²² The trial court's ruling on a challenge for cause may ordinarily be reversed only for manifest error.²³

The trial court typically enjoys broad discretion in controlling the questions posed to prospective jurors in *voir dire*.²⁴ State courts are required to grant defendants' requests for specific inquiries only

cumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (footnote omitted).

15. 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 21.3(a), at 722 (2d ed. 1992) [hereinafter LAFAVE, CRIM. PROC.].

16. *Id.* § 21.3(a), at 718.

17. *Id.*

18. *Id.*

19. A venire is "[t]he group of citizens from [which] a jury is chosen in a given case." BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

20. LaFave and Israel provide the following example, taken from the ALI Code of Criminal Procedure and used as a model by many states: "That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offense charged, or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality . . ." LAFAVE, CRIM. PROC., *supra* note 15, § 21.3(c), at 728-29.

The Illinois criminal *voir dire* statute identifies no grounds for challenge for cause. It states only: "Each party may challenge jurors for cause." ILL. REV. STAT. ch. 38, para. 115-4(d) (1991). The identical language appears in the Illinois Supreme Court Rule on criminal *voir dire*. ILL. REV. STAT. ch. 110A, para. 434(a) (1991).

The U.S. Supreme Court has defined proper grounds for challenge for cause as "narrowly specified, provable, and legally cognizable bases of partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

21. LAFAVE, CRIM. PROC., *supra* note 15, § 21.3(a), at 718; *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (stating that "[i]t is then the trial judge's duty to determine whether the challenge is proper").

22. LAFAVE, CRIM. PROC., *supra* note 15, § 21.3(c), at 728.

23. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1907 (1991) (citing *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)).

24. LAFAVE, CRIM. PROC., *supra* note 15, § 21.3(a), at 719.

if due process demands it.²⁵ The Court has stated that refusing a requested inquiry violates due process when it renders a trial "fundamentally unfair."²⁶ Before *Morgan*, the Court recognized due process rights only to questions regarding racial or ethnic prejudice, and then only in cases in which it was substantially probable that such prejudice might influence the jury.²⁷ Emphasizing the singularly grievous consequence of an erroneously imposed capital sentence, the Court has ruled that in cases involving interracial capital crimes defendants must be allowed to probe prospective jurors for racial bias.²⁸ In instances in which it has recognized rights to defendant-requested *voir dire* inquiries, the Court has also qualified that recognition: the trial judge must cover the subject of the request, but the judge retains control over the exact content and number of questions asked.²⁹

25. *Mu'Min*, 111 S. Ct. at 1903-04. The Court's supervisory powers allow it to hold federal courts to a higher standard. *Id.* For a discussion of the Court's use of its supervisory powers, see LAFAYE, CRIM. PROC., *supra* note 15, § 21.3(a), at 719.

26. *Mu'Min*, 111 S. Ct. at 1905.

27. LAFAYE, CRIM. PROC., *supra* note 15, § 21.3(a), at 719-23. The Court's decisions in this area, however, are not entirely consistent. *Id.*

In *Ham v. South Carolina*, 409 U.S. 524, 525, 527 (1973), the Court held that an African-American civil rights worker who alleged that he had been "framed" for marijuana possession in retaliation for his activities was entitled by due process to ask specific questions with regard to racial bias. However, shortly afterward, the Court ruled against a defendant whose claim of entitlement to a racial bias inquiry centered on the fact that he, an African-American, was accused of violently assaulting a white victim. *Ristaino v. Ross*, 424 U.S. 589, 590, 597-98 (1976). The *Ristaino* Court suggested that allowing an inquiry on racial bias is required by due process only in cases in which racial issues are "inextricably bound up with the conduct of the trial." 424 U.S. at 597; *see also* *Rosales-Lopez v. United States*, 451 U.S. 182, 190-91 (1981) (endorsing this principle and the result reached in *Ristaino*). The Court found that these circumstances were not present in *Ristaino*. 424 U.S. at 597.

The *Ristaino* Court noted, however, that if *Ristaino* had been a federal case, the Court would have used its supervisory powers to allow the defendant the inquiry he requested. *Ristaino*, 424 U.S. at 598 n.9. In *Rosales-Lopez*, 451 U.S. at 192, the Court further detailed this position by construing *Ristaino* and *Aldridge v. United States*, 283 U.S. 308 (1931), to conclude that "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups."

In the recent *Mu'Min* decision, the Court held five-to-four that due process was not violated when a trial judge, who had questioned venirepersons on the subject of pretrial publicity in a capital case, refused the defendant's request for *specified* questions on the exact content of the publicity to which the venirepersons had been exposed. 111 S. Ct. at 1908. The Court determined that due process did not require a judge to pose the exact questions requested. *Id.*

28. *Turner v. Murray*, 476 U.S. 28, 35-37 (1986).

29. "[T]he trial judge retains discretion as to the form and number of questions on the subject . . ." *Turner*, 476 U.S. at 36-37 (citing *Ham*, 409 U.S. at 527).

C. Challenges for Cause Based on Death Sentence Bias

The *Morgan* decision extends a line of Court decisions that have ruled on the state's power to exclude prospective capital sentencing jurors who oppose the death penalty.³⁰ In those cases, the Court confronted the polarized self-interests that are at work in capital case *voir dire*.³¹ Prosecutors seeking the death penalty naturally try to keep persons opposed to or uncertain about capital punishment off the jury and try instead to load the jury with death penalty advocates. Capital defendants, of course, want a sentencing jury stacked with death penalty opponents. Moreover, defendants and prosecutors must strive to select favorable jurors from a pool of individuals with varying beliefs about capital punishment.³²

Against this backdrop, in the pre-*Morgan* decisions the Court attempted to identify the anti-death-penalty bias that would make a prospective sentencing juror partial and therefore subject to exclusion for cause. In *Witherspoon v. Illinois*,³³ for example, the prosecutor relied on an Illinois statute that allowed the State to exclude for cause venirepersons who expressed scruples against imposing capital punishment.³⁴ The prosecutor thereby excluded forty-seven venirepersons, nearly one-half of the prospective jurors, on the basis of their death penalty views.³⁵ Only five of those who were excluded had expressed an *absolute* unwillingness to vote for a death sentence;³⁶ the remainder had voiced a more general opposition to the death penalty, based on principle.³⁷ The jury thus selected convicted the defendant and imposed a death sentence.³⁸

On review, the Court found that the grounds for challenge used

30. See *infra* notes 33-54 and accompanying text.

31. See *id.*

32. According to a June 1991 Gallup Poll, 76% of the national population favored capital punishment as an option in murder cases. Alec Gallup & Dr. Frank Newport, *Death Penalty Support Remains Strong*, THE GALLUP POLL MONTHLY, June 1991, at 40. In contrast, a 1966 poll showed that 42% of the population favored and 49% opposed the death penalty option. *Id.* Half of those supporting the death penalty in the 1991 poll based their position on their belief in the concept of "an eye for an eye." *Id.* at 41-42. However, if given a choice between prescribing either the death penalty or a life term without parole for murderers, 53% of those surveyed in 1991 would choose the former and 35% the latter. *Id.* at 44.

33. 391 U.S. 510 (1968).

34. *Id.* at 512-13. The Illinois statute at issue in *Witherspoon* stated: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512 (quoting ILL. REV. STAT. ch. 38, para. 743 (1959)).

35. *Id.* at 514.

36. *Id.*

37. *Id.* at 514-15, 520.

38. *Witherspoon*, 391 U.S. at 512.

by the Illinois prosecutor had produced a jury "uncommonly willing to condemn a man to die."³⁹ The Court held that a capital sentencing jury is not impartial, as required by the Sixth and Fourteenth Amendments, if the state systematically⁴⁰ excludes prospective jurors who express no more than general objections to the death penalty.⁴¹ The Court added, however, that it would not prohibit the state from excluding for cause venirepersons who indicated with unmistakable clarity that they would never impose a capital sentence.⁴²

The Court has since revisited *Witherspoon* in further defining the proper grounds for excluding venirepersons who oppose capital punishment.⁴³ In *Wainwright v. Witt*,⁴⁴ the Court addressed the then widely held view that *Witherspoon* limited exclusions for cause to *only* those venirepersons who clearly announced that they would never vote for a death sentence.⁴⁵ The *Wainwright* Court

39. *Id.* at 521.

40. *See id.* at 519:

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgement entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which *all such men* have been excluded cannot perform the task demanded of it.

(emphasis added); *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) ("In *Witherspoon*, this Court held that the State infringes a capital defendant's right . . . when it excuses for cause *all those members* of the venire who express conscientious objections to capital punishment.") (emphasis added).

41. *Witherspoon*, 391 U.S. at 522.

42. *Id.* at 522 n.21. Footnote 21, which has engendered considerable controversy, states:

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them

Id.

43. *See, e.g.*, *Adams v. Texas*, 448 U.S. 38 (1980) (addressing the correct interpretation of *Witherspoon*).

44. 469 U.S. 412 (1985). The Court's latest reassessment of the *Witherspoon* footnote, prior to *Morgan*, occurred in *Wainwright*.

45. *Wainwright*, 469 U.S. at 417-19. The Court noted that "[d]espite *Witherspoon*'s limited holding, later opinions in this Court and the lower courts have referred to the language in footnote 21, or similar language in *Witherspoon*'s footnote 9, as setting the standard for judging the proper exclusion of a juror opposed to capital punishment." *Id.* at 418 (citing *Maxwell v. Bishop*, 398 U.S. 262, 265 (1970); *Boulden v. Holman*, 394 U.S. 478, 482 (1969); *Hackathorn v. Decker*, 438 F.2d 1363, 1366 (5th Cir. 1971); *People v. Washington*, 458 P.2d 479, 496-97 (Cal. 1969)). This interpretation of *Witherspoon* was widespread. *See* NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES* § 23.03[2] (2d ed. 1992) [hereinafter *JURYWORK*] (noting that prior to *Wainwright*, the only venirepersons who could be excluded for cause were those who stated affirmatively

saw this interpretation as part of a "general confusion" over "dicta."⁴⁶ The Court dismissed the test of impartiality that resulted as too exacting to be practical.⁴⁷ The Court stressed that generally, an impartial juror is one who will "conscientiously apply the law and find the facts."⁴⁸ It then held that the state may exclude for cause prospective capital sentencing jurors whose views on capital punishment would "prevent or substantially impair the performance" of their duties.⁴⁹

that they would never vote for a death sentence); Valerie P. Hans, *Death by Jury, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 153 (Kenneth C. Haas & James Inciardi eds., 1988) [hereinafter *CHALLENGING CAPITAL PUNISHMENT*] (indicating that *Wainwright* necessitated a shift away from the long-term and wide application of the *Witherspoon* footnote as a limiting standard).

46. *Wainwright*, 469 U.S. at 417-19, 422. The *Wainwright* Court labeled the footnote dicta because *Witherspoon's* "holding focused only on circumstances under which prospective jurors could not be excluded; under *Witherspoon's* facts it was unnecessary to decide when they could be." *Id.* at 422.

47. *Id.* at 424-25. "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'" *Id.*

48. *Id.* at 423.

49. *Wainwright*, 469 U.S. at 424 (Rehnquist, J.) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The Court introduced the phrase *prevent or substantially impair the performance of his duties as a juror* as an exclusion standard in *Adams*, which, even before *Wainwright*, rejected the *Witherspoon* footnote as a limit on state challenges for cause. *Adams*, 448 U.S. at 47-48 (stating that "it is clear beyond peradventure that *Witherspoon* is not a ground for challenging of any prospective juror").

To further justify its standard, the *Wainwright* Court added: "[W]e do not believe that [the *Witherspoon* footnote] language can be squared with the duties of present-day capital sentencing juries." *Wainwright*, 469 U.S. at 421. The Court noted that when *Witherspoon* was decided, capital sentencing jurors were largely left to their own discretion in determining a sentence. *Id.* at 421-22. According to the Court, a juror at that time needed only to be willing to consider the death penalty in order to follow the sparse instructions which were then prevalent. *Id.* In other words, those instructions had allowed capital sentencing jurors to be guided sheerly by their conscience when choosing between death and imprisonment. The Court reasoned that prospective jurors of that time were thus partial only if their beliefs against capital punishment were so strong that they were in fact incapable of any real choice. *Id.*

The Court continued by observing that since *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), capital sentencing juries have been constrained by more detailed instructions, which guide them through one or more factual determinations as a prerequisite to imposing a death sentence. *Wainwright*, 469 U.S. at 422. As such, the Court concluded, a currently correct measure of impartiality should focus on a prospective juror's ability to follow instructions, regardless of personal beliefs. *Id.*

The Court has since opined:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Observers have commented that under

While *Witherspoon* and *Wainwright* addressed the state's power to exclude venirepersons who *oppose* the death penalty, those cases did not rule on the defendant's right to exclude those who *favor* it. However, the Court did comment on this issue in *Ross v. Oklahoma*.⁵⁰ In *Ross*, the trial court had denied a capital defendant's challenge for cause of a venireperson who stated that he would automatically vote for a death sentence upon conviction of the defendant.⁵¹ The defendant removed the venireperson with a peremptory challenge instead.⁵² On review, the Court held that the trial court's denial of the challenge for cause did not deprive the defendant of an impartial jury, since the challenged person had never sat on the jury.⁵³ The Court stated in dicta, however, that had the challenged person been seated, it would have been necessary to overturn the sentence.⁵⁴

D. The Illinois Death Penalty Statute

In Illinois, a defendant convicted of capital murder by a jury may have his sentence determined either by that same jury or by a judge.⁵⁵ Capital sentencing by jury consists of two stages, an eligibility stage and a weighing stage.⁵⁶ In the eligibility stage, the jury determines whether any aggravating factors are present; if there are none, the defendant is automatically sentenced to a term of imprisonment.⁵⁷

Wainwright, prosecutors can exclude more venirepersons on the basis of their opposition to the death penalty than was possible under the interpretation of the *Witherspoon* footnote that *Wainwright* discounted. See JURYWORK, *supra* note 45, § 23.03[1][a] (stating that *Wainwright* "broadened the standards" of exclusion and "will increase the number of people who can be excluded for cause as a result of their beliefs in opposition to the death penalty"); LAFAVE, CRIM. PROC., *supra* note 15, § 21.3, at 248 (Supp. 1991) (characterizing the Court's decision in *Wainwright* as adopting a "less demanding standard").

50. 487 U.S. 81 (1988).

51. *Id.* at 83-84.

52. *Id.* at 84.

53. *Id.* at 85-88.

54. *Id.* at 85.

55. ILL. REV. STAT. ch. 38, para. 9-1(d) (1991).

56. The *Morgan* Court employed this useful characterization of the operation of the statute. *Morgan*, 112 S. Ct. at 2225-26. The statute is found at ILL. REV. STAT. ch. 38, para. 9-1(b)-(g) (1991). A sentencing judge follows essentially the same process. *Id.* at para. 9-1(h).

57. ILL. REV. STAT. ch. 38, para. 9-1(b)-(h) (1991). "Aggravating factors may include but need not be limited to," murder of a peace officer, firefighter, or corrections officer; multiple murders; murder committed during a hijacking; murder for hire; certain felony murders; exceptionally brutal murder of a victim under 12 years of age; murder of a witness or other person assisting in a criminal prosecution; murder committed in connection with an offense under the Controlled Substances Act; certain murders committed in a correctional institution; "cold, calculated and premeditated" murder. *Id.* at para. 9-

If the jury unanimously finds beyond a reasonable doubt that one or more aggravating factors exist, the defendant is eligible for a death sentence.⁵⁸ The jury then proceeds to the weighing stage, in which it weighs mitigating⁵⁹ and aggravating factors against each other.⁶⁰ If the jury unanimously finds that the mitigating factors are not sufficient to preclude a death sentence, the court sentences the defendant to death.⁶¹

III. DISCUSSION

A. *The Facts of Morgan v. Illinois*

Petitioner Derrick Morgan was charged with the contract murder of a drug dealer.⁶² The Illinois prosecutor pursued a capital sentence.⁶³ As required by Illinois law, the trial court conducted *voir dire*.⁶⁴

1(b)-(c). The prosecution must prove the existence of aggravating factors beyond a reasonable doubt. *Id.* at para. 9-1(f).

58. *Id.*

59. "Mitigating factors may include but need not be limited to," defendant has no significant prior criminal record; defendant under extreme emotional stress at the time of the murder; victim was a participant in the homicidal conduct or consented to the homicidal act; defendant acted under threat of death or great bodily harm; defendant was not personally present during the commission of the murder. *Id.* at para. 9-1(c). No burden of proof is specified for mitigating factors.

60. *Id.* at para. 9-1(b)-(h). The statute directs that "[t]he court . . . shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty." *Id.* at para. 9-1(c); *see also* *People v. Simms*, 572 N.E.2d 947, 959 (Ill. 1991) (stating that "[t]he State bears the burden of going forward with factors in aggravation and the defendant has the burden of going forward with evidence of mitigating factors. The sentencing determination is a weighing process in which neither party bears the burden of proof.") (citations omitted).

61. ILL. REV. STAT. ch 38, para. 9-1(g). A sentencing judge follows essentially the same procedure. *Id.* at para. 9-1(h). In September 1992, U.S. District Court Judge Marvin Aspen vacated an Illinois death sentence on Eighth and Fourteenth Amendment grounds, declaring: "The Illinois statute, as implemented through the [Illinois pattern jury instructions and the instructions given in the case decided], permits the arbitrary and unguided imposition of the death sentence." *United States ex rel. Free v. Peters*, 806 F. Supp. 705, 731-32 (N.D. Ill. 1992), *vacated*, *Free v. Peters*, No. 89 C 3765 (N.D. Ill. April 15, 1993). The court relied largely on two studies that showed conflicting and erroneous understanding of the instructions among survey respondents. *Id.* at 728-31 (citations omitted). The State is appealing. NAT'L L.J., October 12, 1992, at 6. Judge Aspen vacated *Free* because the Seventh Circuit Court of Appeals decision in *Gacy v. Welborn*, Nos. 92-3448 and 92-3965, WL 007075 (7th Cir. April 12, 1993) amounted to a de facto reversal of *Free*. *Free v. Peters*, No. 89 C 3765 (N.D. Ill. April 15, 1993).

62. *Morgan*, 112 S. Ct. at 2226.

63. *Id.*

64. *Id.* (citing *People v. Gacy*, 468 N.E.2d 1171, 1184-85 (1984), *cert. denied*, 470 U.S. 1037 (1985)). The controlling Illinois Supreme Court rule states:

The court shall conduct the *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to

Prior to *voir dire*, the trial court explained capital trial procedure in general terms to each of the three venires called.⁶⁵ In addition, pursuant to the prosecutor's request and over defense counsel's objection, the court asked each venire *en masse* whether anyone had beliefs that would prohibit him or her from voting for the death penalty if Morgan were convicted.⁶⁶ As a result of their affirmative answers, seventeen venirepersons were excused.⁶⁷ Also, each of the jurors eventually empaneled was asked individually a similar question; all said that they would not automatically vote against a death sentence.⁶⁸

After seven members of the first venire, including three who became jurors, were asked individually whether they would automatically vote *against* a death sentence, defense counsel requested the trial court to ask the venirepersons individually whether they would automatically vote *for* a death sentence upon a conviction.⁶⁹ The court refused, maintaining that it had already substantially covered the question by asking the venirepersons if they could serve impartially and if they could follow jury instructions.⁷⁰ In fact, each eventual juror had responded affirmatively to those questions.⁷¹

The jury convicted Morgan and imposed a death sentence.⁷² Morgan appealed his conviction and sentence directly to the Illi-

serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper.

ILL. REV. STAT. ch. 110A, para. 234 (1991).

65. *Morgan*, 112 S. Ct. at 2226.

66. *Id.* The trial court asked the following question of all those eventually empaneled on the jury: "Would you automatically vote against the death penalty no matter what the facts of the case were?" *Id.* The practice of excluding persons through such questions, known as "death-qualifying" the jury, is an accepted and almost universal practice in capital *voir dire*. JURYWORK, *supra* note 45, § 23.01[1].

67. *Morgan*, 112 S. Ct. at 2226.

68. *Id.*

69. *Id.* Defense counsel requested the following question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.*

70. *Id.*

71. *Id.* Nine of the jurors responded affirmatively to the question: "Would you follow my instructions on the law, even though you may not agree?" *Id.* The remaining three jurors were not asked that particular question. *Id.* All 12 jurors indicated either that they could "be fair and impartial" or that they could "give both sides a fair trial." *Id.* at 2227.

72. *Morgan*, 112 S. Ct. at 2226.

nois Supreme Court,⁷³ which affirmed the conviction and rejected Morgan's claim that he had been denied an impartial sentencing jury owing to the failure of the court to question the jurors about their pro-death-penalty views.⁷⁴ The United States Supreme Court granted certiorari on Morgan's appeal of sentence,⁷⁵ noting disagreement among the states on whether a capital defendant has the right to such an inquiry.⁷⁶ Finding that the *voir dire* in Morgan's case had not adequately assured the impartiality of his sentencing jury, the Court reversed the Illinois Supreme Court's affirmance of

73. *Id.* Appeal of a capital conviction or sentence lies directly with the Illinois Supreme Court. ILL. REV. STAT. ch. 38, para. 9-1(i) (1991).

74. *People v. Morgan*, 568 N.E.2d 755, 778 (Ill. 1991). The Illinois Supreme Court claimed that it had previously held that a trial court was not required to ask venirepersons if they would automatically vote for the death penalty. *Id.* at 778 (citing *People v. Brisbon*, 478 N.E.2d 402, 409-10 (Ill.), *cert. denied*, 474 U.S. 908 (1985); *People v. Caballero*, 464 N.E.2d 223, 234 (Ill.), *cert. denied*, 469 U.S. 963 (1984)). *But see infra* note 92.

75. 112 S. Ct. 295 (1991). The Court did not review Morgan's conviction and stated that its decision had no effect on the conviction. *Morgan*, 112 S. Ct. at 2235 n.11 (citing *Witherspoon*, 391 U.S. at 523 n. 21).

The effect on guilt-determining juries of excluding anti-death-penalty persons, so-called death qualification, has been explored in cases, commentary, and research. The *Witherspoon* Court rejected the defendant's claim that his jury:

unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death . . . is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt.

391 U.S. at 516-17. The Court found unconvincing the studies that the defendant produced as evidence that death-qualified juries are more likely to convict. *Id.* at 517-18. The Court ruled: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Id.*

The Court amplified this position in *Lockhart v. McCree*, 476 U.S. 162 (1986), in which it rejected a defendant's argument that the State's exclusions for cause under *Wainwright* violated his rights to an impartial guilt-determining jury and a jury selected from a representative cross-section of the community. *Id.* at 177, 184. The Court ruled against the defendant even though it gave some credence to certain studies submitted as evidence of the greater likelihood of conviction with death-qualified juries. *Id.* at 168-73.

Lockhart has effectively neutralized capital defendants' longstanding claims that death-qualification is unconstitutional. JURYWORK, *supra* note 45, §§ 23.01[1], [3]. Both *Lockhart* and *Hovey v. Superior Court*, 616 P.2d 1301 (Cal. 1980), contain extensive citations to and critiques of studies on death qualification, as does JURYWORK, *supra* note 45, §§ 23.04[2]-[4].

76. *Morgan*, 112 S. Ct. at 2227. The Court identified three states that agreed with the Illinois position that questions on pro-death-penalty bias are unnecessary if each juror swears to be impartial and to follow instructions: Delaware, South Carolina, and Missouri. The Court identified 11 states that disagreed: California, Georgia, Louisiana, New Jersey, North Carolina, Utah, Virginia, Arkansas, Florida, Kentucky, and Alabama (based on Alabama lower court decisions). *Id.* at 2227 n.4.

Morgan's sentence.⁷⁷

B. *The Decision of the Supreme Court*

In the majority opinion, Justice White resolved several issues in determining that the trial court had violated Morgan's due process rights by denying him the requested inquiry.⁷⁸ First, the Court reviewed and affirmed the established principle that if a state chooses to conduct capital sentencing by jury, due process requires that the jury be impartial.⁷⁹ On the basis of that principle, the Court held that a capital defendant may exclude for cause a prospective capital sentencing juror who declares that he or she will automatically vote for the death penalty upon a conviction.⁸⁰ This conclusion might appear to have been easily reached—an automatic death penalty (ADP)⁸¹ juror would seem to epitomize bias and partiality. In *Wainwright*, however, the Court had ruled that bias makes an individual partial only if it hampers his or her ability to follow sentencing instructions.⁸² Thus, the Court was compelled to demonstrate in detail that ADP bias will have that effect.

The Court first posited that the Illinois capital murder statute,⁸³ consistent with general Eighth Amendment requirements,⁸⁴ directs that at the weighing stage, jurors be instructed to determine whether mitigating factors are sufficient to preclude the death penalty.⁸⁵ The Court reasoned that ADP jurors will surely fail to follow these instructions, however, because by announcing an intention to vote automatically for the death penalty, they thereby announce an intention to ignore mitigating evidence—no matter how strong.⁸⁶ Thus, the Court concluded, under *Wainwright* per-

77. *Id.* at 2235.

78. *Id.* at 2228. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter joined in the majority opinion. *Id.* at 2225. Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion written by Justice Scalia. *Id.* at 2235.

79. *Id.* at 2229.

80. *Id.* at 2230-31, 2233-35.

81. In this Note, the acronym *ADP* will be used to refer to persons who would always vote for the death penalty upon a capital conviction, and *NDP* will be used to designate persons who would never vote for the death penalty.

82. 469 U.S. at 424; *see also supra* notes 44-49 and accompanying text.

83. The Illinois first degree murder statute itself outlines in detail how capital sentencing juries are to be instructed. ILL. REV. STAT. ch. 38, para. 9-1(b)-(g); *see also supra* notes 55-61 and accompanying text.

84. *Morgan*, 112 S. Ct. at 2234 (citing *Turner v. Murray*, 476 U.S. 28, 34-35 (1986) (White, J., plurality opinion)).

85. *Id.*

86. *Id.* at 2234-35.

sons with ADP views are inherently partial⁸⁷ and subject to exclusion for cause.⁸⁸ A death sentence imposed by a jury containing even one ADP juror, the majority held, cannot stand.⁸⁹

The majority opinion focused only on the weighing stage of the Illinois sentencing process; the Court did not specifically address the question of a juror who would deliberately "find" a nonexistent aggravating factor at the eligibility stage.⁹⁰ On the whole, *Morgan* does not consider the way death penalty bias might affect a sentencing juror in determining the existence of aggravating factors.⁹¹

The Court next held that upon the defendant's request, a judge conducting capital *voir dire* must directly question prospective jurors on their propensity toward imposing capital punishment.⁹² The Court began by acknowledging that trial judges have histori-

87. Illinois did not argue to the *Morgan* Court that ADP jurors could serve impartially on capital sentencing juries. *Id.* at 2230. The Court addressed the ADP impartiality issue in large part, perhaps, because of the dissent, which contended that ADP jurors serve impartially. See *infra* notes 103-09 and accompanying text. The Court charged that there was "no support in either the statutory or decisional law of Illinois" for the proposition that an ADP juror could be impartial. *Morgan*, 112 S. Ct. at 2234. However, in *People v. Brisbon*, 478 N.E.2d 402, 409-10 (Ill.), *cert. denied*, 474 U.S. 908 (1985), the Illinois Supreme Court suggested that the fact that a juror would "automatically impose the death penalty for all premeditated murders" does not make that juror subject to exclusion for cause. Thus, *Brisbon* suggests a position in disagreement with the *Morgan* Court.

88. *Morgan*, 112 S. Ct. at 2229-30; see also *supra* notes 44-49 and accompanying text (discussing the *Wainwright* rule).

89. *Morgan*, 112 S. Ct. at 2230.

90. Justice Scalia remarked in his dissent that *Morgan* had framed the issues in his brief so that "the juror who will ignore the requirement of finding an aggravating factor is not at issue." *Id.* at 2236 n.1 (Scalia, J., dissenting). The dissent also indicated that even if raised, that issue would be insubstantial because few jurors would "not impartially make the strictly factual determination, at the first stage of Illinois' two part sentencing procedure, that the defendant is *eligible* for the death penalty." *Id.*

91. This may have left an issue untouched. It is correct that determination of aggravating factors, at least in Illinois, does involve a factual inquiry into whether the defendant engaged in certain conduct as part of the murder. Did he kill for hire? Was the murder premeditated? See *supra* notes 56-61 and accompanying text. This fact-finding process might constrain even an ADP juror from conjuring an aggravating factor out of thin air. Still, factual questions are often close. In a close case, an ADP juror's vote on factual matters affecting the sentence would be assured.

92. *Id.* at 2228, 2232, 2235. The Court overruled the Illinois Supreme Court, which had relied on its previous rulings to hold that *Morgan* was not entitled to an ADP inquiry. See *People v. Morgan*, 568 N.E.2d at 778 (citing *Brisbon*, 478 N.E.2d at 409-10; *Caballero*, 464 N.E.2d at 234).

The Illinois court's reliance on *Brisbon* and *Caballero*, however, was arguably misplaced, because the questions involved in those cases were not necessarily the same as the question in *Morgan*. The *Brisbon* defendant did not claim that he had been denied an ADP inquiry. 478 N.E.2d at 409-10. *Caballero* rejected a defendant's claim that the trial judge erred in not *sua sponte* questioning the venirepersons on ADP bias. 464 N.E.2d at 234.

cally enjoyed wide discretion in controlling the questions asked in *voir dire*.⁹³ The Court stressed that this discretion, however, is "subject to the essential demands of fairness,"⁹⁴ and that capital cases involve unique concerns, which justify allowing defendants a sentencing-bias inquiry.⁹⁵ The Court emphasized that without questions on sentencing bias, capital defendants cannot effectively exercise their right to exclude ADP persons from their sentencing juries.⁹⁶ The Court also noted its decisions supporting state-requested inquiries on sentencing bias; the Court reasoned that defendants should have a complementary right to their own inquiries.⁹⁷

Finally, the Court found that in conducting Morgan's *voir dire*, the Illinois trial court had relied on inadequate questions.⁹⁸ Those general questions, the Court maintained, might not have exposed improper pro-death-penalty bias:⁹⁹ persons subjected to no more than general questions might believe and even say that they could follow instructions yet still harbor unannounced death penalty biases that would prevent them from doing so.¹⁰⁰ The Court also

93. *Morgan*, 112 S. Ct. at 2230.

94. *Id.* (citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

95. *Id.* at 2230 (citing *Turner v. Murray*, 476 U.S. 28, 36-37 (1986); *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973)).

96. *Id.*

97. *Id.* at 2232 (citing *Lockhart v. McCree*, 476 U.S. 162, 170 n.7 (1986); *Wainwright*, 469 U.S. at 423). The *Lockhart* Court rejected a defendant's argument that the State's exclusion for cause under *Wainwright* of persons opposing the death penalty violated his rights to an impartial guilt-determining jury and to a jury selected from a cross-section of the community. 476 U.S. at 177, 184.

98. *Morgan*, 112 S. Ct. at 2233.

99. *Id.*

100. *Id.* The Court quoted the following exchange from *Wainwright* as support for its proposition:

THE COURT: Wait a minute ma'am. I haven't made up my mind yet. Just have a seat. Let me ask you these things. Do you have any prefixed ideas about this case at all?

[A]: Not at all.

THE COURT: Will you follow the law that I give you?

[A]: I could do that.

THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you unable to follow the law of this State.

[A]: I could not bring back a death penalty.

THE COURT: Step down.

Id. at 2233 n.9 (citing *Wainwright*, 469 U.S. at 432 n.12).

One author noted a similarly remarkable exchange involving a prospective juror's preconceived notions of a defendant's guilt:

[D]uring the questioning of prospective jurors for the 1971 murder trial of Black Panthers Bobby Seale and Ericka Higgins . . . defense attorney Catherine

noted that in *People v. Jackson*¹⁰¹ the Illinois Supreme Court itself had commented that although it did not require trial judges to provide direct questioning on pro-death-penalty bias, such questioning is not inappropriate and is the best way to expose bias.¹⁰²

C. *The Dissenting Opinion*

Although the State did not argue that an ADP juror could be impartial,¹⁰³ Justice Scalia did. His dissenting opinion squarely contradicted the majority by arguing that ADP jurors can follow instructions as *Wainwright* requires, and thus can serve impartially on capital sentencing juries.¹⁰⁴

Justice Scalia first noted that the Illinois murder statute requires jurors to determine whether mitigating evidence is "sufficient" to outweigh aggravating factors and thus preclude a death sentence.¹⁰⁵ Justice Scalia reasoned that this requirement does not prohibit a juror from taking the "bright line position" that no mitigating evidence is *ever* sufficient to outweigh an aggravating factor.¹⁰⁶ Such a juror, he concluded, can properly apply Illinois

Roraback asked a juror who had said repeatedly that she could be fair, "Is there anything about your attitude or experiences we haven't covered in all these questions that would make you unable to listen to the evidence in this case and reach an unbiased verdict?" The prospective juror looked directly at the defendant for the first time and burst out, "She's guilty!" . . . The judge promptly excused her for cause.

JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 141 (1977).

101. 582 N.E.2d 125 (Ill. 1991), *vacated*, *Jackson v. Illinois*, 113 S. Ct. 32 (1992).

102. *Id.* In deciding *Jackson*, the Illinois Supreme Court relied on its *Morgan* ruling to uphold a denial of a capital defendant's request for an ADP inquiry. *Jackson*, 582 N.E.2d at 156. The U.S. Supreme Court has since vacated that judgment in accordance with its ruling in *Morgan*. *Jackson v. Illinois*, 113 S. Ct. 32 (1992). In *Jackson*, despite its holding, the Illinois Supreme Court recommended that capital defendants be allowed a sentencing bias inquiry: "[G]iven the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard." 582 N.E.2d at 156.

103. *Morgan*, 112 S. Ct. at 2230.

104. *Id.* at 2236-37 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion. *Id.* at 2235.

105. *Id.* at 2237 (Scalia, J., dissenting). The statute directs:

If there is a unanimous finding by the jury that one or more [aggravating factors] exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

ILL. REV. STAT. ch. 38, para. 9-1(g) (1991).

106. *Morgan*, 112 S. Ct. at 2237 (Scalia, J., dissenting).

instructions.¹⁰⁷

Justice Scalia further maintained that neither due process nor the Eighth Amendment requires capital jurors to actually give weight to mitigating evidence when choosing a sentence.¹⁰⁸ He concluded, in essence, that although capital defendants have an Eighth Amendment right to present mitigating evidence at sentencing, they do not have a right to sentencing jurors who will listen to it. He maintained that though a juror who ignores mitigating evidence might be "merciless," that juror could nonetheless follow instructions and therefore would not also be "lawless."¹⁰⁹

Finally, Justice Scalia argued that even if it were conceded that ADP individuals are partial, due process does not require trial judges to honor requests for specific questions aimed at identifying them.¹¹⁰ Justice Scalia charged that as a rule, defendants are entitled to a specific *voir dire* inquiry only if a "special circumstance," like an interracial capital crime, would make refusal to conduct a specific inquiry fundamentally unfair.¹¹¹ Justice Scalia maintained that no circumstance warrants allowing all capital defendants a pro-death-penalty inquiry.¹¹² Rather, Justice Scalia opined, general questioning on each venireperson's ability to follow instructions is sufficient, since it is that ability which determines impartiality.¹¹³

Justice Scalia acknowledged that Morgan's trial judge conducted an anti-death-penalty (NDP)¹¹⁴ inquiry at the prosecutor's request.¹¹⁵ He argued, however, that this did not entitle Morgan to complementary questioning as a matter of fairness. This was so, Justice Scalia reasoned, because it takes only one anti-death-pen-

107. *Id.* at 2241 (Scalia, J., dissenting). Justice Scalia reasoned:

[T]he juror who says he will always vote for the death penalty is *not* promising to be lawless, since there is no case in which he is by law *compelled* to find a mitigating fact "sufficiently mitigating." The people of Illinois have decided, in other words, that murder with certain aggravators will be punished by death, unless the jury chooses to extend mercy. That scheme complies with our (ever-expanding) death-penalty jurisprudence as it existed yesterday. The Court has, in effect, now added the *new* rule that no merciless jurors can sit.

Id.

108. *Id.* at 2236, 2238 (Scalia, J., dissenting).

109. *Id.* at 2241 (Scalia, J., dissenting).

110. *Id.* (Scalia, J., dissenting).

111. *Morgan*, 112 S. Ct. at 2241 (Scalia, J., dissenting).

112. *Id.* at 2239-41 (Scalia, J., dissenting).

113. *Id.* at 2240 (Scalia, J., dissenting).

114. *See supra* note 81.

115. *Morgan*, 112 S. Ct. at 2240-41 (Scalia, J., dissenting).

alty juror to block a death sentence, while eleven pro-death-penalty jurors cannot impose one.¹¹⁶

IV. ANALYSIS

Witherspoon, as it was widely interpreted, provided a straightforward and strict standard for excluding prospective capital sentencing jurors who oppose the death penalty. *Wainwright* set forth a less stringent standard, which, as the *Morgan* opinions show, proved difficult to interpret and implement. Leaving a gap in the law, the Court's decisions prior to *Morgan* did not rule on the right of capital defendants to identify and exclude pro-death-penalty jurors.

Through *Morgan*, the Court has now established sound rules for both states and defendants. *Morgan* implements fundamental fairness by sensibly characterizing biased capital sentencing jurors. *Morgan* also reflects the recognition by the Court that judicial autonomy is not an end in itself but rather that it must be balanced against and sometimes subordinated to individual rights. The two major thrusts of *Morgan*, recognizing capital defendants' rights to specific *voir dire* inquiries and characterizing biased capital sentencing jurors, are analyzed below.

A. Right to a Specific Inquiry

In deciding whether a defendant has the right to a specific ADP inquiry, the Court encountered the basic tension between preserving judicial autonomy while at the same time providing fairness to criminal defendants. It responded by extending to capital defendants the rare right to a specific *voir dire* inquiry.¹¹⁷ In doing so, the Court advanced due process rights without unduly sacrificing judicial discretion.

Morgan is a significant departure from past rulings because the Court did not make potential racial or ethnic prejudice in the ve-

116. *Id.* at 2241 (Scalia, J., dissenting). Proposing that ADP and NDP jurors will have unequal influence on a sentencing jury, Justice Scalia remarked:

I reject petitioner's argument that it is "fundamentally unfair" to allow Illinois to make specific inquiries concerning those jurors who will always vote against the death penalty but to preclude the defendant from discovering (and excluding) those jurors who will always vote in favor of death. . . . [T]here is no unfairness in the asymmetry. By reason of Illinois' death-penalty unanimity requirement . . . the practical consequences of allowing the two types of jurors to serve are vastly different: A single death-penalty opponent can block that punishment, but 11 unwavering advocates cannot impose it.

Id. (citations omitted).

117. *See id.* at 2233, 2235.

nire a condition of this specific *voir dire* inquiry.¹¹⁸ Rather, the *Morgan* Court made its allowance for capital defendants solely because they are capital defendants. Thus, the *Morgan* decision may inspire less meritorious *voir dire* claims that similarly do not turn on potential racial or ethnic prejudice. Also, by adding incrementally to the due process rights of capital defendants, the *Morgan* decision arguably further complicates capital punishment jurisprudence.¹¹⁹

Nonetheless, fundamentally fair treatment of capital defendants can hardly be achieved unless they are equipped with effective means to detect those jurors who will not be impartial in determining a sentence. Questioning venirepersons about their basic capacity for fairness cannot accomplish this.¹²⁰ Only questioning them directly about their sentencing biases can safeguard jury integrity in the way that due process demands.

Clearly, the convicted capital defendant has a paramount due process concern: that the jury which chooses a punishment of either incarceration or execution will do so in an impartial manner.¹²¹ In selecting that jury, judicial autonomy should be

118. See *supra* note 27 and accompanying text.

119. Justice Scalia charged:

Today, obscured within the fog of confusion that is our annually improvised Eighth-Amendment "death-is-different" jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment.

Morgan, 112 S. Ct. at 2242 (Scalia, J., dissenting).

Justice Scalia's *Morgan* dissent has been cited as an example of the "[t]ensions on the Supreme Court, arising from strongly held and widely divergent philosophies, [which] increasingly find reflection in intemperate language in the Justices' opinions." Arnold C. Johnson, *Supreme Court Sound and Fury*, LEGAL TIMES, December 14, 1992, at 30.

120. The majority of the states that have considered the issue support this view. See *supra* note 76; e.g., *People v. Bittaker*, 774 P.2d 659, 679 (Cal. 1989), *cert. denied*, 496 U.S. 931 (1990) ("In order to intelligently exercise the right to challenge for cause defendant's counsel must be accorded reasonable opportunity to lay a foundation for the challenge by questioning prospective jurors on *voir dire* to learn whether any entertain" ADP views.) (quoting *People v. Hughes*, 367 P.2d 33, 36 (Cal. 1961)); *State v. Williams*, 550 A.2d 1172, 1184 (N.J. 1988) ("[T]he failure to inquire into [ADP views] denied counsel and the trial court the tools with which to insure that the jury panel could fairly undertake its role . . .").

121. The Court has announced before that capital cases raise particularly serious due process concerns. See *Lankford v. Ohio*, 111 S. Ct. 1723, 1732 (1991) (emphasizing the "special importance of fair procedure in the capital sentencing context"); *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (basing entitlement to a *voir dire inquiry* in part on the severity of capital punishment); *California v. Ramos*, 463 U.S. 992, 998 (1983) (stating "[t]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Barclay v. Florida*, 463 U.S. 939, 988 (1983) (Marshall, J., dissenting) (asserting that "[w]here a life

subordinated to the capital defendant's unique due process concerns in order to properly safeguard the defendant's interest in life.¹²² Capital defendants deserve access to the inquiry that Derrick Morgan was denied. Furthermore, providing that access will help maintain an image of basic fairness in our criminal justice system.¹²³

B. Juror Impartiality

Morgan establishes three points regarding impartiality. First, it holds that ADP jurors are partial and may be excluded for cause.¹²⁴ Second, it supports the already established practice of excluding NDP persons.¹²⁵ In making these first two points, the Court has acknowledged that capital jurors who decide a sentence

is at stake, the risk that a particular defendant has been selected [for a death sentence] for the wrong reason is unacceptable and incompatible with the Eighth and Fourteenth Amendments"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion) (noting that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

122. The subordination of judicial autonomy is minor: "The risk that [ADP] jurors may have been empaneled in this case and 'infected petitioner's capital sentencing is unacceptable in light of the ease with which that risk could have been minimized.'" *Morgan*, 112 S. Ct. at 2233 (quoting *Turner*, 476 U.S. at 36). The Court noted in *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981), that the burden placed on a trial court by requiring it to ask racial bias questions would "likely . . . be slight." The *Mu'Min* dissent rejected "the majority's claim that content questioning . . . would unduly burden trial courts," noting that "[n]umerous Federal Circuits and States" had concluded that content questions would not "compromis[e] judicial efficiency." *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1916-17 (1991) (Marshall, J., dissenting). For a discussion of *Mu'Min*, see *supra* note 27.

123. The Court has spoken to this concern in countering a proposal that defendants not be allowed an inquiry on racial bias:

We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Rosales-Lopez, 451 U.S. at 191 (quoting *Aldridge*, 283 U.S. at 314-315).

124. *Morgan*, 112 S. Ct. at 2229-30. This point may not be a "holding" in the purest sense. To illustrate, the Court phrased the core issue before it as "whether, during *voir dire* for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant." *Id.* at 2225. Before reaching its holding on that overarching question, the Court found it necessary to resolve whether an ADP sentencing juror is partial. *Id.* at 2230; see also *supra* note 87. It was perhaps necessary to answer that question only because Justice Scalia raised it. See *supra* note 87. This makes the Court's point on the partiality of ADP jurors an unusual component of its holding.

125. *Morgan*, 112 S. Ct. at 2229, 2233. Since *Morgan* ruled specifically on the impartiality of ADP jurors, any statement it made on the impartiality of NDP jurors can be characterized as dicta. However, six Justices agreed that NDP jurors are undeniably partial. See *id.* at 2229. The Court also stated that along with ADP jurors, NDP jurors

before trial cannot reasonably follow sentencing instructions and are therefore partial under *Wainwright*. Finally, *Morgan* makes *Wainwright*'s general "follow the instructions" standard applicable to both states and defendants.¹²⁶ Under that standard, venirepersons with less than absolute death penalty beliefs can be assessed for their ability to follow capital sentencing instructions properly.¹²⁷

All told, neither side enjoys an advantage over the other. Nonetheless, states might argue, as Illinois did in *Morgan*, that because it may take several unanimous jury findings in order to impose a death sentence,¹²⁸ states cannot adequately advance their interest in capital punishment unless they are allowed an advantage in seating death penalty proponents.¹²⁹ Capital defendants might counter that the severity and irrevocability of capital punishment entitles them to their own advantage in excluding such persons. Nevertheless, it is most judicious to provide both parties with equal means to pursue their interest in seating a favorable sentencing jury. If the legislature and the people choose to punish certain offenders

"by definition are ones who cannot perform their duties in accordance with [the] law." *Id.* at 2233.

These propositions of course echo the once popular interpretation of the now much discounted *Witherspoon* footnote 21. See *supra* notes 42-49 and accompanying text. However, as of *Morgan* the Court still maintains: "At its inception, *Witherspoon* conferred no 'right' on a State, but was in reality a limitation of a State's making unlimited challenges for cause to exclude those jurors who 'might hesitate' to return a verdict imposing death." *Morgan*, 112 S. Ct. at 2231 (citing *Witherspoon*, 391 U.S. at 512-13).

The Court's approach suggests that though it agrees with the assertion in the footnote that those who would never impose a death sentence are partial, it is concerned about lending too much authority to the footnote and thus raising again the widespread interpretation of it as a limit on exclusion grounds.

Regardless of any vagaries in the Court's opinions, probing for and excluding death penalty opponents remains an almost universal practice in capital *voir dire*. JURYWORK, *supra* note 45, § 23.03.

126. See *Morgan*, 112 S. Ct. at 2229. The Court applied *Wainwright* to determine that "[a] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Id.* The Court also stated that "a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Id.* What follows necessarily from these points is that *Wainwright* must serve as the test *whenever* a prospective sentencing juror's impartiality is challenged on the grounds of death penalty beliefs—whether those beliefs are pro or con, absolute or less pronounced.

127. See JURYWORK, *supra* note 45, § 23.03[1][a] (noting that the broad *Wainwright* standard can be applied to exclude venirepersons with less than absolute death penalty beliefs).

128. In Illinois, for example, the jury must unanimously convict the defendant, find an aggravating factor, and agree that mitigating circumstances do not rule out a death sentence. See *supra* notes 55-61.

129. *Morgan*, 112 S. Ct. at 2232 n.8.

with death, that punishment should be imposed in a forum in which neither party has a procedural advantage over the other.

Indeed, Justice Scalia's position that ADP jurors can be impartial is not entirely untenable. He argued persuasively that the Illinois murder statute and prior Court decisions require only that capital sentencing jurors hear mitigating evidence, not that they also be amenable to it.¹³⁰

Regarding the Illinois statute, Justice Scalia's difference with the Court turned on his determination that the word *sufficient* would accommodate the absolutist juror who believes that no mitigating factor should ever preclude a death sentence for a murder with an aggravating factor.¹³¹ There is nothing that directly supports or refutes this position in the text of the statute. In fact, the Illinois Supreme Court suggested in *People v. Brisbon* that it would follow Justice Scalia's view.¹³² Additionally, the *Free v. Peters* court, which recently vacated an Illinois death sentence on constitutional grounds,¹³³ wrestled with the ambiguity of the word *sufficient* in the context of the statute.¹³⁴ In view of all of this, Justice Scalia's argument looks at least creative if not correct.

To support his assessment of Eighth Amendment requirements, Justice Scalia offered a restrictive interpretation of key phrases from numerous Court rulings. By his narrow reading, in each case the Court went no further than to affirm the capital defendant's bare right to *present* mitigating evidence at sentencing. That interpretation, while conveniently literal, is not outright unreasonable.¹³⁵

130. *Id.* at 2236-38.

131. *Id.*

132. 478 N.E.2d 402 (Ill.), *cert. denied*, 474 U.S. 908 (1985); *see also supra* note 87.

133. 806 F. Supp. 705, 731-32 (N.D. Ill. 1992), *vacated*, No. 89 C 3765 (N.D. Ill. April 15, 1993). The *Free* court vacated its ruling because of a de facto reversal by the Seventh Circuit. *See supra* note 61.

134. *Free*, 806 F. Supp. at 728-31.

135. To demonstrate that the Court's death penalty cases allow for the "merciless" juror, Justice Scalia supplied an extensive string cite of those cases. He quoted phrases stating variously that: "[the Eighth Amendment is satisfied] by *allowing* the jury to consider all relevant mitigating evidence"; "the State cannot *bar* relevant mitigating evidence"; "[jurors must] be *permitted* to consider and give effect to mitigating evidence"; "[states may not] *prevent* the sentencer from considering and giving effect to [mitigating evidence]"; "[the sentencer] *must be free* to weigh relevant mitigating evidence." *Morgan*, 112 S. Ct. at 2238 (citations omitted). Reading these phrases as Justice Scalia did does not necessarily contradict their plain meaning. Nor does a plain reading necessarily support the meaning the Court would give them.

The power of Justice Scalia's argument may also come from the nature of his writing: "From a dramatic standpoint, too, Scalia stands out. Of the three justices who regularly write their own opinions (David Souter and John Paul Stevens are the other two), only

In summary, though Justice Scalia's semantics may raise eyebrows in the context of this case, his conclusions are not patently erroneous. The Court could have taken his view without abandoning, at least technically, supportable reasoning or express precedent. The Court instead ruled reasonably and fairly.

V. IMPACT

The *Morgan* decision affects capital offense *voir dire* in Illinois and in all other states that have denied or would deny defendants the right to a *voir dire* inquiry on death penalty views. Defendants will no longer have to rely on general questioning by trial judges to expose persons whose biases render them unqualified to sit on capital sentencing juries. Also, prisoners currently on death row may have a new avenue for appeal.¹³⁶

Morgan, however, may leave room for interpretation regarding exactly what inquiry it prescribes. The most obvious reading of *Morgan* limits defendants to a very specific inquiry, perhaps just one question: "Will you automatically vote for a death sentence?"¹³⁷ That reading, however, departs from the Court's past rulings, which required judges to cover only a certain subject rather than to ask precisely scripted questions.¹³⁸ Consistent with those past rulings, *Morgan* could be interpreted as requiring *some* inquiry on sentencing bias, with the particulars still shaped by the trial judge.¹³⁹ In the future, counsel and the courts may have to

Scalia writes with flair." Jeffrey Rosen, *The Leader of the Opposition*, THE NEW REPUBLIC, January 18, 1993, at 20.

136. In *People v. Jackson*, the Illinois Supreme Court relied on its *Morgan* ruling to uphold a denial of a capital defendant's request for an ADP inquiry. 582 N.E.2d 125, 156 (Ill. 1991). The Court has since vacated that judgment in accordance with its ruling in *Morgan*. *Jackson v. Illinois*, 113 S. Ct. 32 (1992).

137. Supporting the possibility that the Court meant to mandate only the specific ADP question, the Court defined the issue before it narrowly. See *Morgan*, 112 S. Ct. at 2225; see also *supra* note 124. The Court ruled that "the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge." *Id.* at 2235. That precise inquiry was: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.* at 2226. The Court also stated that its ruling dealt with the need for a *voir dire* to "lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction." *Id.* at 2232. Taking the Court at its word suggests that it intends defendants to have an ADP-specific inquiry only.

Moreover, the Court's holding focuses on ADP bias; it does not address the question of how less pronounced forms of sentencing bias might result in partiality. See *Morgan*, 112 S. Ct. at 2229-30, 2233-35. Perhaps, then, the Court meant to limit the questions it mandated to ones (or one) on the very specific topic it addressed.

138. See *supra* note 29 and accompanying text.

139. From the defendant's tactical viewpoint, either direct ADP questions or more

resolve this uncertainty.

The impact of *Morgan* will depend in large part on the number of ADPs in the jury pool. Estimates are disparate.¹⁴⁰ Adding to the uncertainty is the possibility that what persons report to researchers may not accurately conform with their behavior when they actually sentence a capital offender.¹⁴¹

Morgan should also promote the effective use of peremptory challenges by capital defendants. A response to *Morgan*-authorized questioning that does not justify exclusion for cause may still provide reason to exercise a peremptory challenge.¹⁴² Without a

general inquiries would have advantages and disadvantages. A pointed ADP question should of course succeed in revealing ADP bias. It is less likely, though not inconceivable, that such a question would also expose less extreme bias that would still justify an exclusion for cause or give reason to exercise a peremptory challenge. JURYWORK, *supra* note 45, § 23.02[1].

If the judge must cover only the subject of death penalty bias, the judge may, if he or she wishes, avoid asking the specific ADP question. Then the most vehement and potentially harmful bias, ADP bias, might not be exposed. *See id.* § 23.03[1][a] n.23 (noting that ADP persons are reluctant to reveal their views). However, other biases might be detected.

All this illustrates an inherent dilemma in prescribing *voir dire* inquiries. The Court hesitates to undertake scripting inquiries in detail, and perhaps rightfully so. *See Mu'Min v. Virginia*, 111 S. Ct. 1899, 1904, 1906 (1991) (noting that “*voir dire* is not easily subject to appellate review,” and that “primary reliance on the judgment of the trial court makes good sense”). But when the Court instead directs the trial judge to cover only a certain subject, the judge is left with leeway to manipulate the questions within that subject in order to circumvent the Court’s practical intent. *See id.* at 1909 (Marshall, J., dissenting) (stating that not requiring judges to ask specified questions on pretrial publicity “turns . . . the Sixth Amendment’s right to an impartial jury—into a hollow formality”).

140. *See, e.g.,* Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467, 473 (1987) (stating that of 242 prospective capital jurors removed for cause in 18 trials, 25.8% were removed because they were ADP); Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCI. & L. 479, 485 (1987) (noting that a survey of 135 registered voters in Kentucky showed 24.1% to be ADPs); Joseph Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Juror*, 8 L. & HUM. BEHAV. 115, 116 (1984) (finding that 1% of the national adult population claimed they would be fair and impartial in deciding guilt or innocence in a capital case but would always vote for the death penalty); *Grigsby v. Mabry*, 569 F. Supp. 1273, 1296-97 (E.D. Ark. 1983) (stating that 2% of respondents in a nonrandom survey were ADP) (citing George L. Jurow, *New Data on the Effect of a “Death-Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971)).

141. *See* WELSH S. WHITE, LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES 101 (1984) (stating that “[e]ven the most well-designed social science experiment will only provide, at best, circumstantial evidence of the truth of the proposition it seeks to prove”); Kenneth C. Haas & James Inciardi, *Lingering Doubts About a Popular Punishment*, in CHALLENGING CAPITAL PUNISHMENT, *supra* note 45, at 11 (noting that “people’s willingness to endorse capital punishment in the abstract is not necessarily an accurate measure of their willingness to put it into practice”).

142. *See* *People v. Howard*, 588 N.E.2d 1044, 1057-58 (Ill. 1991), *cert. denied*, 113 S.

Morgan inquiry, a sentencing bias might not be exposed at all.

The *Morgan* decision should be interpreted as clearly and comprehensively delineating the proper grounds for challenges for cause based on capital sentencing biases. The difficulty the Court has had in setting and promulgating an impartiality standard,¹⁴³ however, indicates that *Morgan* may not be the final word on this subject.

Morgan may stir more determined state legislatures to revise their capital sentencing laws to the advantage of prosecutors seeking the death penalty.¹⁴⁴ States may also choose to delegate capital sentencing to trial judges, many of whom must please a public that largely supports the death penalty¹⁴⁵ in order to secure elected posts.¹⁴⁶

VI. CONCLUSION

The *Morgan* Court recognized that capital defendants need special safeguards to ensure the integrity of sentencing juries. The Court also made clear that the Constitution will not allow capital sentencing to be entrusted to jurors who would determine a sentence before the trial begins. The Court has thus extended to capital defendants what fundamental fairness requires. Death penalty

Ct. 215 (1992) (approving a prosecutor's peremptory challenge of a venireperson whose anti-death-penalty views were not strong enough to justify exclusion for cause under *Wainwright*); see also *supra* note 139.

143. See *supra* notes 33-49 and accompanying text.

144. A LEXIS search performed on March 18, 1993 revealed the following legislative proposals to add aggravating factors to death penalty laws: Illinois (murder committed with a machine gun, sawed-off shotgun or rifle, semi-automatic shotgun or rifle, molotov cocktail, bomb, or grenade); Florida (victim was a minor in defendant's care); Maryland (witness murder, murder related to a drug offense, murder committed during a carjacking); New Jersey (murder connected with drug trafficking); South Carolina (murder committed during a carjacking). These are presented not to suggest a direct correlation with *Morgan* but rather to show the steps that can be taken by states to widen the application of the death penalty.

145. See *supra* note 32.

146. Since the Constitution does not require states to conduct capital sentencing by jury, revising statutes or delegating capital sentencing to judges would not necessarily be prohibited. See *supra* note 11. Indeed, in a footnote to his *Witherspoon* dissent, Justice White announced: "The States should be aware of the ease with which they can adjust to today's decision . . . replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois legislature through the procedure struck down today." 391 U.S. at 542 n.2.

In *Morgan*, Justice Scalia charged that "the wholesale elimination of jurors favoring the death penalty . . . will be the consequence of today's decision." 112 S. Ct. at 2241. While it may prove to be an overstatement, Justice Scalia's charge demonstrates the fervor with which death penalty proponents can react to cases like *Morgan*.

opponents and advocates alike should view the *Morgan* decision as balancing the scales of justice.

THOMAS J. EME

