

EXONERATION AND WRONGFUL  
CONDEMNATIONS:  
  
EXPANDING THE ZONE OF  
PERCEIVED INJUSTICE IN DEATH  
PENALTY CASES

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INTRODUCTION

Dramatic exonerations of death-sentenced and other prisoners have had a significant impact on the public's view of our criminal justice system. For many citizens, an aura of infallibility has been shattered. This, in turn, has certainly affected their views on capital punishment,<sup>1</sup> and helps to account for modestly but consistently declining death penalty support over the last decade or more.<sup>2</sup> In particular, the previously wide-

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<sup>1</sup> A number of studies have established a relationship between skepticism about the fairness and reliability of the system of capital punishment and support for a moratorium on death sentencing. See, e.g., Scott Vollum, Dennis Longmire, & Jacqueline Buffington-Vollum, *Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes*, 21 JUSTICE Q. 521 (2004).

<sup>2</sup> See, e.g., Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR: AMERICA'S DEATH PENALTY 7, 16 (Stephen P. Garvey ed., 2003); James Liebman, *The New Death Penalty Debate What's DNA Got to Do With It?*, 33 COLUM. HUM. RTS. L. REV. 527, 534 (2002). Various news reports have carried the same message of declining death penalty support in recent years. See, e.g., Thomas Healy, *Death Penalty Support Drops as Debate Shifts; Foes Turning Focus from Moral Issues to Flaws in the System*,

spread and largely unchallenged assertion that capital cases were routinely handled with such care that mistakes rarely, if ever, occurred has been placed in doubt.<sup>3</sup> Moreover, the miscarriages of justice that have given rise to these new-found concerns are fundamental and dramatic, involving persons who literally did not commit the crimes in question but were held accountable for them nonetheless.<sup>4</sup>

In addition, there have been many more of these errors than most laypersons (or scholars) had predicted or believed possible. For example, in one often-cited turn of events, it was reported that the state of Illinois removed more wrongfully convicted people from its death row than were added as a result of new death sentences.<sup>5</sup> The fact that the miscarriages in question were so fundamental yet so numerous suggests that the underlying causes are systemic in nature, rather than the result of mere inadvertence or occasional human error. The exonerations of wrongfully convicted, factually innocent persons have spurred calls for moratoria on the imposition of capital punishment, at least until fundamental reforms can be introduced into the system by which the death penalty is administered.<sup>6</sup>

In this article I argue that despite the very serious nature and surprisingly large number of these kinds of exonerations,

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BALTIMORE SUN, July 25, 2001, at A1.

<sup>3</sup> As two commentators put it, before the “innocence revolution” began in the early 1990s, “we, as a society, believed our criminal justice system was highly accurate. We believed that those caught and executed were guilty, and that the innocent were never executed or even charged, protected by a system that rarely, if ever, made mistakes.” Mark Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 265-66 (2004) (footnotes omitted).

<sup>4</sup> Carol Steiker and Gordon Steiker term these kinds of exonerations as involving “pure” innocence. They note that, although some exonerated persons were “not wholly blameless,” it is the cases of pure innocence, “with DNA exonerations serving as the paradigm of ‘erroneous’ convictions,” that have “captured popular and political attention.” Carol Steiker & Jordon Steiker, *The Seduction of Innocence: That Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 598 (2005) [hereinafter Steiker & Steiker, *The Seduction of Innocence*].

<sup>5</sup> See Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 382 (2005).

<sup>6</sup> As two knowledgeable commentators put it, “[t]he driving concern is the risk of death-sentencing and executing innocents. This issue emerged as lawyers and journalists brought to light numerous instances of innocents erroneously sentenced to death.” Steiker & Steiker, *The Seduction of Innocence*, *supra* note 4, at 594.

revelations about factually innocent death-sentenced prisoners represent only the most dramatic, visible tip of a much larger problem that is submerged throughout our nation's system of death sentencing. That is, many of the very same flaws and factors that have given rise to these highly publicized wrongful convictions also produce a more common kind of miscarriage of justice in capital cases. I refer to death sentences that are meted out to defendants who, although they may be factually guilty of the crimes for which they were placed on trial, are not "death worthy" or "deserving" of the death penalty. This includes the many who, if their cases had been handled properly by competent counsel at the time of trial *and* adjudicated in a fairer and more just system, would have been sentenced to life instead.

This more common kind of miscarriage of justice has resulted in, to use James Liebman's evocative phrase, "the overproduction of death."<sup>7</sup> Liebman has argued that "[t]rial-level actors drastically overproduce death sentences," rendering many more times the number of death verdicts than "the system means to carry out," and that they do so because of the "strong incentives" they reap in the form of the "robust psychic, political, and professional rewards."<sup>8</sup> In addition to these incentives and rewards, I argue that there are other aspects of the system of death sentencing that consistently bias and badly distort the outcome of capital cases. Beyond the flaws and biases that produce the wrongful convictions (or what might be called "the overproduction of guilt") there are a number of *additional* problems, many of which are unique to death penalty cases, that undermine the fairness and reliability of the process of death sentencing itself.

In this regard, I should emphasize that there is no inherent or necessary tension between the "exoneration movement" and more comprehensive efforts at reforming or eliminating the system of capital punishment. That is, I do not believe that what Carol and Jordon Steiker have called "the seduction of innocence" necessarily diverts attention from the many other flaws in the system of death sentencing.<sup>9</sup> Indeed, despite the

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<sup>7</sup> James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2033 (2000).

<sup>8</sup> *Id.* at 2032.

<sup>9</sup> See Steiker & Steiker, *The Seduction of Innocence*, *supra* note 4.

surprisingly high number of exonerations, it is also still true that most people who are tried for death penalty crimes *are* factually guilty. But this concession is no cause for celebration or self-congratulation about the quality of justice or the quantity of due process that is routinely dispensed in capital cases.<sup>10</sup> The forces that produce miscarriages of justice in guilt determinations still too often combine with other biasing influences to compromise and undermine the quality of many other equally important decisions that are made in death penalty cases, raising profound questions about the fairness and reliability of the ultimate outcomes.

Thus, many aspects of our flawed system of capital punishment not only increase faulty guilt determinations but also can result in defendants being convicted of a higher degree of homicide than is justified by the actual facts of the case and operate to facilitate death sentences when life is the legally and morally correct verdict. Elsewhere I have termed this “death by design”—the special social psychological design of our system of death sentencing that enables ordinary citizens to engage in behavior that, under normal circumstances, many of them would be unable to do—namely, to take the life of another person.<sup>11</sup> In fact, I have suggested that without the elaborate, legally-supported network of practices and procedures that facilitate people overcoming their deep-seated psychological barriers against doing the “deed of capital punishment,”<sup>12</sup> the death penalty might well fall into disuse in our society. That is, it is possible that too few normal, average persons would be capable of regularly (and sometimes enthusiastically) calling for the death of their fellow citizens, let alone, as jurors, taking steps designed to bring those deaths about.

Our system of death sentencing has come to rely on the practices and procedures that help people overcome deep-seated psychological barriers against killing. They lower the threshold that is required for conviction, for conviction of death-eligible crimes, and for condemning someone to death. Collectively, these practices and procedures are built into the very system of death sentencing; they are part of its normative

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<sup>10</sup> See e.g., Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005).

<sup>11</sup> CRAIG HANAY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (Oxford University Press 2005).

<sup>12</sup> Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1613 (1986).

mode of operation. They certainly help to account for some of the wrongful convictions that have shaken the system so profoundly in recent years, but they also contribute to the wrongful death sentences that are still often overlooked. As I will suggest in the final section of this article, because these aspects of the system operate cumulatively and in tandem, they pose a set of inter-related problems that must be solved in a comprehensive rather than piecemeal fashion.

I. BROADENING THE CATEGORY OF “EXONERATION”:  
ERRONEOUS DETERMINATIONS OF FACTUAL, LEGAL, AND  
“MORAL” GUILT

In thinking about the nature of “exoneration” in the context of death penalty cases, it is useful to parse the concept of “guilt” into three separate components.<sup>13</sup> First, there is the most basic kind of guilt, and what most laypersons think about when they consider whether an accused is “guilty” of a criminal offense. It is what might be called “factual guilt.” In the classic definition of the elements of a crime, this is the *actus reus*, the physical or behavioral component of the criminal act. It requires the factfinder to address the threshold question that must be answered before legal responsibility can be ascribed: is this the person who carried out the physical acts that are defined as criminal?

The exonerations that have garnered so much media and legal attention in recent years have been ones in which this basic kind of factual guilt was placed at issue. In each case, the criminal justice system arrested, prosecuted, convicted, and sentenced (sometimes to death) persons who were factually innocent of the crimes of which they had been accused. That is, they were the “wrong” people, in the most basic and fundamental sense. The overwhelming majority of them had nothing whatsoever to do with the acts or behaviors that resulted in criminal harm—they were nowhere near the crime, knew nothing about it and yet, somehow, they were convicted and sen-

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<sup>13</sup> The first two components reflect the traditional elements of a crime. Thus, “[i]n the vernacular of the common law, these requirements correspond, roughly speaking, to the traditional elements of *actus reus* and *mens rea*, the physical and mental aspects of a crime, respectively.” Samuel Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 12-13 (2005). See also WAYNE LAFAVE, CRIMINAL LAW 239 (4th ed. 2000).

tenced for having committed it.

Even though factual guilt is what most laypersons mean when they talk about whether someone is guilty—or in the case of miscarriages of justice and subsequent exonerations, whether an “innocent” person has been wrongly convicted—law-trained persons know that, for the great majority of crimes, there is another important element of a crime that must be proven before someone can be held legally responsible. Thus, *mens rea* pertains to the state of mind of the defendant just before and often during the act in question.<sup>14</sup> Except for strict liability crimes, criminal defendants must have general intent—essentially, be conscious and sane—at the time the crime was committed.<sup>15</sup> In addition, for most offenses, there are other aspects of the perpetrator’s state of mind in the form of various specific intents that determine the degree of the crime for which he or she can be convicted.

Mens rea is hardly a secondary matter in establishing criminal responsibility or what might be called “legal guilt.” This is especially true in homicide cases where the issue of what the defendant was thinking in the course of the crime often garners more legal attention than any other. Under the law of homicide in California, for example, mental states like “intent to kill,” “malice aforethought,” and “premeditation and deliberation” distinguish manslaughter from murder, and second- and first-degree murder from one another.<sup>16</sup> Depending on what a jury decides a homicide defendant was thinking just before and during the time he performed the criminal act—in

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<sup>14</sup> Martin Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 636 (1993) [hereinafter Gardner, *The Mens Rea Enigma*] (“Early in the English legal tradition, the idea arose that criminal liability entails some mental activity on the part of the offender relating to the proscribed conduct.”). I do not mean to suggest that there is anything straightforward or uncomplicated about the definition of mens rea or the application of the concept to actual fact patterns. See, e.g., Jeremy Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21 (2001).

<sup>15</sup> Gardner, *The Mens Rea Enigma*, *supra* note 14, at 667.

<sup>16</sup> See, e.g., Charles Hobson, *Reforming California’s Homicide Law*, 23 PEPP. L. REV. 495, 504-05 (1996). More generally, see the classic article Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1261 (1937). Other statutes employ different mental states to grade the degrees of homicide. For example, the Model Penal Code relies on purpose, knowledge, recklessness, and negligence. MODEL PENAL CODE § 2.02. For a discussion, see Alan Michaels, *“Rationales” of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54 (2000). See also CAL. PENAL CODE § 187-89 (West 2006).

this case, the unlawful taking of a human life—he or she may end up serving a term of years in prison, receive a sentence of life without the possibility of parole, or become eligible for the death penalty.

Finally, there is a separate guilt-related issue that has special significance in death penalty cases. It poses the question of what might be called “moral guilt”: how blameworthy is the person for the actions in question? Blameworthiness or culpability is a key determinant of the amount or level of punishment a wrongdoer is thought to deserve. Professors Elizabeth Scott and Laurence Steinberg are correct to suggest that “[c]alibrated measures of culpability are embedded in the criminal law, particularly in mens rea doctrine and the law of homicide.”<sup>17</sup> Yet there is more to assessing culpability than merely establishing the degree of the crime.<sup>18</sup> For this reason, the issue of moral guilt—to the extent that it is considered explicitly at all—tends to surface in sentencing proceedings. It arises when decisions are made about the precise amount of punishment that should be meted out to an otherwise factually and legally guilty defendant.<sup>19</sup>

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<sup>17</sup> Elizabeth Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 827 (2003).

<sup>18</sup> Phyllis Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 36-37 (1997). Although she believes the approach is problematic, Professor Phyllis Crocker noted that the United States Supreme Court’s theory of culpability in capital cases employs a distinction akin to the one I have made between legal and moral guilt. That is, the Court acknowledges the two very different kinds of inquiries in which capital jurors must engage:

At times the Court seems to differentiate between the two by casting the punishment phase determination as one about the defendant’s moral culpability, as opposed to his purely legal culpability at the guilt phase. In this respect, a defendant’s moral culpability for murder may be greater or lesser, depending on aggravating and mitigating circumstances, even though his legal culpability remains the same. *Id.* (footnote omitted)

To avoid confusion over the similarity in terms, especially the incorrect inference that once someone has been found legally responsible for a death penalty crime, he automatically “deserves” the death penalty, Professor Crocker proposes to substitute the term “deathworthiness” for “moral culpability.” *Id.* at 22.

<sup>19</sup> An example of this distinction appears in the opening paragraph of Justice Stevens’s *Atkins* opinion, where he notes that although mentally retarded persons “who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes,” the disabilities from which they suffer (particularly with respect to reasoning, judgment, and impulse control) mean that they cannot “act with the level of moral culpability” required to be eligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). In addition to mental retardation, the youthfulness of

Sentencing proceedings are the very centerpiece of many death penalty cases. They are often the most elaborately prepared and intensely contested stage of the trial. As Ronald Tabak put it, “in most capital punishment cases, the main battle occurs during the penalty phase, not the guilt/innocence phase.”<sup>20</sup> This may be in part because there often appear to be so few doubts about whether the defendant is factually or legally guilty at the outset of many capital cases (although, to be sure, the exoneration movement has given pause to death penalty lawyers, cautioning them against taking anything for granted, including in cases where the guilt phase issues seem “open and shut”). However, *after* a capital defendant has been found legally responsible for the criminal act or acts for which he or she is being tried, capital jurors still must render a profoundly important second verdict, choosing between a sentence of life or death. Not only are the stakes extraordinarily high but the law has significantly broadened the nature of the inquiry in which they must engage. Thus, jurors are supposed to look beyond a single act and consider blameworthiness or moral guilt over an entire life course. They are invited to ask, in essence, what kind of person is this?

The increased legal emphasis on the separate determination of moral guilt or blameworthiness in capital cases began some thirty years ago. When the U.S. Supreme Court reinstated the death penalty in 1976,<sup>21</sup> it made the individualized determination of the “deathworthiness” of capital defendants the hallmark constitutional death sentencing. For example, in *Woodson v. North Carolina*,<sup>22</sup> the Court invalidated that state’s death penalty statute because it created a system of mandatory death sentencing that did not include a separate inquiry into the overall culpability of the defendant. Instead, to decide whether death is the appropriate punishment, the Court required an inquiry that went *beyond* simply determining

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the defendant also categorically precludes death penalty imposition. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Otherwise, the question of moral guilt or overall culpability is decided by capital jurors on a case-by-case basis.

<sup>20</sup> Ronald Tabak, *The Egregiously Unfair Implementation of Capital Punishment in the United States: “Super Due Process” or Super Lack of Due Process?*, 147 PROCEEDINGS OF THE AM. PHILOSOPHICAL SOCIETY 13, 22 (2003).

<sup>21</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>22</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).



whether the defendant was factually and legally guilty.<sup>23</sup>

Indeed, Justice Stewart's opinion in *Woodson* underscored the importance of a "[p]articularized consideration of relevant aspects of the character and record of the convicted defendant."<sup>24</sup> This separate assessment should include, as Stewart put it, consideration of the "compassionate or mitigating factors stemming from the diverse frailties of humankind."<sup>25</sup> The importance of this unique determination was reiterated and emphasized in a line of cases that began two terms later in *Lockett v. Ohio*<sup>26</sup> and has continued to the present.<sup>27</sup> Justice O'Connor articulated the core purpose of this "individualized assessment of the appropriateness of the death penalty" as one requiring capital juries to engage in a "moral inquiry into the culpability of the defendant."<sup>28</sup>

Determinations of each one of the different types of guilt I have described—factual, legal, and moral—can produce its own kind of miscarriage of justice (and, by implication, its own form of exoneration). As I noted earlier, most of the high profile exonerations that have heightened public and political concerns involved the erroneous determination of factual guilt—cases in which the police arrested and the prosecutors convicted the "wrong" person. Because the person who actually committed the crime must be in custody before justice can begin to be done, factual guilt determinations involve a very basic threshold issue. Not surprisingly, these miscarriages are the ones that garner the most attention and create the most fundamental doubts about the fairness and reliability of the criminal justice system.

The other obvious reason that these kinds of exonerations have provoked so much legal, political, and public debate is that they are subject to more objective, definitive forms of proof (and disproof). That is, factual guilt determinations are bound,

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<sup>23</sup> *Id.* at 303-04.

<sup>24</sup> *Id.* at 303.

<sup>25</sup> *Id.* at 304. See also *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (emphasizing that "[w]hat is essential is that the jury have before it *all possible* information about the individual defendant whose fate it must determine.") (emphasis added).

<sup>26</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>27</sup> See, e.g., *Rompilla v. Beard*, 545 U.S. 374 (2005); see also *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

<sup>28</sup> *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

at least to some degree, by the physical laws of nature. In addition, increasingly sophisticated forensic technologies (especially DNA testing) now can definitively *rule out* potential perpetrators. Thus, in the case of such an exoneration, not only is the nature of the erroneous factual guilt determination a basic one, but the demonstration of error, because of the physical principles on which it is based, is usually decisive and beyond dispute.<sup>29</sup> However much they help to insure correct determinations of factual guilt (and in identifying those cases in which incorrect determinations were made), few if any of these definitive, objective techniques are available to assist in the evaluation of what I have termed legal and moral guilt. In the case of legal guilt, decisions about state of mind involve inherently subjective assessments. Indeed, an assessment of what someone was or might have been thinking at a particular point in time is the very epitome of subjectivity. It is not, therefore, susceptible to the same kind of clear-cut, objective disproof.

Similarly, few if any judgments about the overall culpability of an otherwise factually guilty person can be made on the basis of a single, definitive scientific test.<sup>30</sup> Indeed, the amount of imprecision and equivocality is greatest for assessments of moral guilt, not because such judgments are necessarily more subjective than in the case of *mens rea*, but rather because so many potential issues can be brought to bear on the decision. This is especially true for blameworthiness in a capital case, where a defendant's entire life course is placed at issue. Thus, not only are the standards to be considered by the jury in determining whether to impose death sentence "by necessity, somewhat general,"<sup>31</sup> but the factors that can be taken into ac-

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<sup>29</sup> As Innocence Project Director Barry Scheck put it, DNA testing has given us "a remarkable data set that's never existed before in the history of our criminal justice system where you can say these people are stone cold innocent. We can't argue about it." Barry Scheck, *Call to Action: A Moratorium on Executions*, 4 N. Y. CITY L. REV. 117, 171 (2002). Of course, not all exonerations of factually innocent persons involve DNA or such clear-cut, scientific demonstrations of error.

<sup>30</sup> I suppose that one limited exception to this generalization might occur in the case of mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), as I noted earlier, the Court decided that mentally retarded defendants were not eligible for the death penalty because they lacked the requisite moral culpability. The determination of whether a defendant is mentally retarded turns in large part on the results of scientific tests. However, even here, intelligence and related tests, and their implications for the ultimate legal question, are somewhat more open to interpretation than the DNA and other testing relied upon in many of the factual guilt exonerations.

<sup>31</sup> *Gregg v. Georgia*, 428 U.S. 153, 193-94 (1976). The Model Penal Code, which

count also are so many and varied.<sup>32</sup>

However, simply because determinations of legal and moral guilt are not subject to objective and definitive disproof does not mean that the decisions cannot be demonstrably incorrect, or serve as the basis for egregious miscarriages of justice, or provide an occasion for their own kind of exoneration. In fact, because judgments made about states of mind (in the case of legal guilt) and attributions of blameworthiness for a single act or entire life course (in the case of moral guilt) are inherently subjective, they are much *more* susceptible to the psychological pressures and influences that may compromise their fairness and reliability.

In the broadest sense, then, the case of an erroneous death sentence occurs whenever a person is sentenced to die who, if he had been subjected to a fairer and less biased legal system and decision-making process, would have been sentenced to life instead. These cases are ones in which capital defendants, although they have not been “wrongly convicted,” have been “wrongfully condemned.” The legally unique and unusually broad-based nature of the capital penalty-phase inquiry in which these decisions are made renders it especially vulnerable to these kinds of miscarriages of justice.

## II. A FLAWED, “ERROR-PRONE” SYSTEM OF DEATH SENTENCING

Samuel Gross and others have argued persuasively that erroneous determinations of factual guilt may be *more* likely to occur in capital cases than in other kinds, a surprising claim given the longstanding and widespread contention that death is different and that death penalty cases are typically handled

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served as the basis for many of the new death penalty statutes that the Court approved in 1976, listed eight aggravating and eight mitigating circumstances. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). On the other hand, the Georgia statute that the Court approved in *Gregg* specified ten aggravating circumstances but no mitigating circumstances. *Gregg*, 428 U.S. at 166. Even so, Justice Stewart suggested that a capital defendant in Georgia was “accorded substantial latitude as to the types of evidence that he may introduce.” *Id.* at 164.

<sup>32</sup> See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Capital Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) [hereinafter Haney, *The Social Context of Capital Murder*] (discussing some of these many and varied factors).

differently, and much better, than other cases.<sup>33</sup> Yet, as Gross has noted, there are many factors at work in capital cases that increase the probability of a wrongful conviction. These factors impinge on murder cases in general to distort and undermine the normal fact-finding process, and they operate with even more effect in those murder cases that are death-eligible. They include such things as the added pressure on the police and prosecutors to solve high visibility homicides, the way that pressure affects how these officials investigate and process the case, and the heightened stakes in murder cases that may produce unreliable witness and jailhouse “snitch” testimony.<sup>34</sup>

However, beyond the astute categorization of the factors that generate miscarriages of justice at the level of factual guilt that Gross and other scholars have made,<sup>35</sup> the zone of perceived injustice in capital cases can be broadened to include the influence and impact of factors that contribute to erroneous determinations of legal guilt and, to an even greater extent, what I have termed moral guilt.<sup>36</sup> Expanding this zone of perceived injustice would entail giving much greater attention to miscarriages of justice in which people are convicted of higher degrees of crime than are warranted by the facts and, more broadly, those who receive death sentences in part as a result of the strong “death tilt” that is built into the design of our system of death sentencing. Below I discuss several categories of factors

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<sup>33</sup> Samuel Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996) [hereinafter Gross]. Like most scholars who address this issue, Professor Gross limited his analysis to erroneous determinations of what I have termed “factual guilt”— specifically, “convictions of ‘the wrong person’; a defendant who did not do the act that caused the death or deaths for which he was convicted.” *Id.* at 475.

<sup>34</sup> *Id.* at 476-88.

<sup>35</sup> Gross, *supra* note 33; see also Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); MICHAEL RADELET, HUGO BEDAU & CONSTANCE PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (Northeastern University Press 1992).

<sup>36</sup> Among the primary causes of wrongful convictions identified by scholars and advocates, two are especially problematic, namely, incompetent lawyers and prosecutorial suppression of evidence that is favorable to the defense. Compare JIM DWYER, PETER NEUFELD, & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 172-92* (Doubleday 2000), with James Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1864 (2000). For reasons I discuss later in this article, however, I believe that what I have termed “wrongful condemnations” may be caused by a broader and more varied set of psychological influences.

that *may* contribute to miscarriages of justice in which capital defendants are wrongfully condemned.

#### A. MEDIA BIAS AS A SOURCE OF WRONGFUL CONDEMNATIONS

The media may contribute significantly to miscarriages of justice, especially in capital cases.<sup>37</sup> For one, citizens, voters, and jurors are treated to a steady flow of misinformation about capital punishment. This misinformation pertains not only to who commits capital crime and why, but also to the way the system of death sentencing actually operates in our society and whether it has any real utility in the fight against violent crime. The inaccuracies are not random, but rather slanted in such a way as to favor death sentences over life. In fact, much social science research indicates that the widespread dissemination of misinformation has produced basic misconceptions about the death penalty held by many members of the public.<sup>38</sup> Researchers also have found that support for the death penalty is directly related to those misconceptions. That is, the more persons endorse inaccurate beliefs about the death penalty, the more likely they are to favor it.<sup>39</sup>

As a result, many members of the public are left with only flawed and incomplete knowledge with which to reason and decide about whether and when capital punishment is justified. In the final analysis, this may result in some persons being sentenced to death who, if the public were more fully and accurately informed, would be sentenced to life instead.<sup>40</sup> A juror

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<sup>37</sup> I am aware that, especially in recent years, the media also have played an important role in publicizing and even helping to uncover miscarriages of justice. But I believe that these cases still represent notable exceptions rather than the rule. Moreover, the media still often focus only on the fact that a miscarriage of justice has occurred, without including any overall analysis of its causes (and certainly not ones that might implicate the media themselves). The public is often left with the impression that such miscarriages are infrequent and, while certainly regrettable, are the product of human error or caprice rather than structural flaws in the criminal justice system itself.

<sup>38</sup> See James Fox, Michael Radelet & Julie Bonsteel, *Death Penalty in the Post-Furman Years*, 18 N. Y. U. REV. L. & SOC. CHANGE 499 (1990-1991); Craig Haney, Aida Hurtado & Luis Vega, "Modern" *Death Qualification: New Data on Its Biasing Effects*, 18 L. & HUM. BEHAV. 619 (1994) [hereinafter Haney, Hurtado & Vega].

<sup>39</sup> See HANEY, *DEATH BY DESIGN* *supra* note 11, at Chapter 4.

<sup>40</sup> See, e.g., Timothy J. Flanagan & Dennis R. Longmire, *Americans' Attitudes About the Ultimate Weapon: Capital Punishment*, in *AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY* 93-108 (Timothy Flanagan & D. Longmire eds., 1996).

whom the media have convinced that the death penalty should be imposed because it deters murder or will cost the state less money than life imprisonment, or who believes that the system of capital punishment is free of the taint of racial bias and is administered so carefully that innocent persons are virtually never sentenced to death, is not only misinformed but is someone who is poised to render an erroneous death verdict. Cases of capital defendants who have been wrongfully condemned because their death sentences were based in large part on media-based myth and misconception represent serious but typically overlooked miscarriages of justice.

The media also play a direct role in helping to shape the way people think about crime and the people who commit it. Studies of the impact of media coverage of crime-related topics bear this out. According to at least one survey, the media were the *most important* source of information about the crime problem for ninety percent of the respondents.<sup>41</sup> Many researchers also have observed that the media focus so often and extensively on crime that they distort and exaggerate its prevalence and significance. The media's obsession with crime may produce inflated or unjustified crime-related fears that lead members of the public to demand harsh punishments, including the death penalty.<sup>42</sup>

The media not only help to create and maintain people's general beliefs about crime and punishment but also shape their views of criminal defendants. There is a consistent slant to the perspective that is conveyed. For example, John Sloop analyzed the way the media portrayed the perpetrators of crime over the more than forty-year period from 1950-1993.<sup>43</sup> He found evidence of a dramatic shift away from depicting them as redeemable or subject to personal growth and change. Instead, there was a growing tendency to show prisoners as ir-

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<sup>41</sup> RICHARD SURRETTE, *MEDIA, CRIME & CRIMINAL JUSTICE: IMAGES AND REALITIES* 58 (Wadsworth 1992).

<sup>42</sup> See, e.g., Melissa Barlow, David Barlow & Theodore Chiricos, *Mobilizing Support for Social Control in a Declining Economy: Exploring Ideologies of Crime Within Crime News*, 41 *CRIME & DELINQ.* 191 (1995); Jason Ditton & James Duffy, *Bias in the Reporting of Crime News*, 23 *BRITISH J. OF CRIMINOLOGY* 159 (1983); S. Gorelick, "Join Our War": *The Construction of Ideology in a Newspaper Crimefighting Campaign*, 35 *CRIME & DELINQ.* 421 (1989); Edie Greene, *Media Effects on Jurors*, 14 *L. & HUM. BEHAV.* 439 (1990).

<sup>43</sup> JOHN SLOOP, *THE CULTURAL PRISON: DISCOURSE, PRISONERS, AND PUNISHMENT* (University of Alabama Press 1996).

rational, predatory, dangerous, and incapable of being reformed. Violent criminals in particular were depicted as “animalistic and senseless,” governed by their “warped personalities.”<sup>44</sup>

This media stereotype of the “typical” criminal may exacerbate pre-existing tendencies to attribute deviant behavior exclusively to negative traits, malevolent thoughts, and bad moral character. Indeed, as one legal commentator has observed, demonizing the perpetrators of crime in these ways helps to simplify the difficult task of assigning moral blame and to “condemn beyond what is deserved,” the paradigmatic case of a wrongful condemnation.<sup>45</sup> To be sure, persons perceived as fundamentally different from us are easier to hurt and, in an ultimate sense, to condemn to death. When the media exaggerate and essentialize apparent differences between criminal defendants and the rest of society, they increase the temptation “to ignore moral complexities [inherent in the process of judging another] and declare the person and his act entirely evil.”<sup>46</sup> Too often, the media encourage us to “assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.”<sup>47</sup>

Moreover, as I have emphasized, deciding whether to impose the death penalty is a normative, value-laden process. Unlike the determination of factual guilt, it is not anchored in the physical universe. Thus, the judgment about whether someone deserves death is especially vulnerable to these biasing psychological influences, which, in turn, increases the frequency with which miscarriages of justice occur.

In addition to the demonizing of criminals as part of a general framework for understanding crime-and-punishment issues, the media can create many *case-specific* biases. Because death penalty cases involve serious violent crimes, they gener-

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<sup>44</sup> *Id.* at 142.

<sup>45</sup> Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 692 (1989) [hereinafter Pillsbury].

<sup>46</sup> *Id.*

<sup>47</sup> See Pillsbury, *supra* note 45, at 692; KATHRYN GAUBATZ, CRIME IN THE PUBLIC MIND 163 (University of Michigan Press 1995) (arguing that the punitive consensus that came to dominate public attitudes towards crime and punishment by the mid-1990s could be explained in large part by an inability to empathize or to perceive commonalities with persons who had committed crimes and to view them instead as having moved “beyond the pale.”)

ate high levels of community interest and heightened attention from the local media and law enforcement officials. Commentators have cited the fact that capital cases often involve “high profile crimes that attract enormous media attention” as one of the important factors that contributes to “high error rates in convicting and sentencing innocent people to death row.”<sup>48</sup>

The publicity that surrounds a particular death penalty case puts enormous pressure on the police to find a culprit and on prosecutors to gain a conviction and death sentence. As one prosecutor acknowledged, “[t]he pressure on the District Attorney is particularly great in a high profile case, a homicide or multiple homicide so grievous and so aggravated that there is a hue and cry and a determination to pursue capital punishment.”<sup>49</sup> Certain kinds of cases “can fever a community, large or small, particularly if there’s agitated press about it.”<sup>50</sup>

But there are various additional ways that the media can contribute to the erroneous attribution of legal and moral guilt. Indeed, local news coverage of specific capital cases typically is slanted in such a way that it compounds pre-existing, general biases held by community residents. Much research indicates that exposure to prejudicial pretrial publicity increases the guilt-proneness of potential jurors, especially when specific items of publicity are absorbed in memory.<sup>51</sup> In cases where the media has decided that a particular defendant is guilty, community members who have few if any other sources of information about the case, often come to share this view.<sup>52</sup> This

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<sup>48</sup> Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypothesis*, 26 N. Y. U. REV. L. & SOC. CHANGE 309, 345 (2000-2001).

<sup>49</sup> Michael McCann, *Call to Action: A Moratorium on Executions*, 4 N. Y. CITY L. REV. 117, 160-161 (2002).

<sup>50</sup> *Id.* McCann went on to acknowledge that “[t]he handling of a high profile capital punishment case resulting in a conviction and the execution of the defendant appears, at least to some prosecutors, as an attractive way to advance their political interests.” *Id.* at 161.

<sup>51</sup> See, e.g., E. Constanti & J. King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW AND SOC’Y REV. 9 (1980); Craig Haney & H. Fukurai, *Indifferent as They Stand Unsworn?: Pretrial Publicity, Fairness, and the Capital Jury*, (2006) (unpublished manuscript, on file with author); N. Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219 (1999); Christina Studebaker & Steven Penrod, *Pretrial Publicity: The Media, Law, and Commonsense*, 3 PSYCHOL. PUB. POL’Y & L. 428 (1997).

<sup>52</sup> See, e.g., Gross, *supra* note 33 at 494. Jurors in highly publicized cases “may have seen or heard or read police officers or other government officials declare the defendant guilty. They may have witnessed or felt a general sense of communal outrage. All this will make them more likely to convict . . . . As a result, the records of erroneous



is another way in which prejudicial or inflammatory publicity contributes to factually innocent persons being convicted of crimes they did not commit.

In addition, however, news reporting can bias the judgments that people make about a defendant's evil intent or blameworthy state of mind, as well as his moral guilt and overall culpability. For example, in a study Susan Greene and I did of the newspaper reporting in a large sample of capital cases, we found that the press focused intensely on the gruesome details of the crimes, left little doubt about who was fully responsible for having committed them, and contained extremely negative characterizations of defendants.<sup>53</sup> Moreover, most of this incriminating "information" was provided by seemingly credible sources—law enforcement and prosecutors.<sup>54</sup>

The articles often repeated descriptions of defendants that essentialized their identity as a criminal, such as "thrill killer," "career criminal," "escapee," "fugitive," "inmate," or "serial date rapist."<sup>55</sup> In many cases, the sensationalized details of the crime became the defendant's one-dimensional social identity—a total description of his personhood—as though he had no potentially humanizing life experiences outside of his criminal behavior. Thus, one defendant was described as having "the street cunning of a longtime criminal,"<sup>56</sup> and another was reported to commit crimes "for the thrill and sense of power,"<sup>57</sup> both in advance of their trials.

The stories provided readers with little or no real understanding of the social historical and structural causes of the crime, and no sense of how the defendant's past experiences and background factors may have contributed to his behavior. The amount of attention given to the crime itself, and the way

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convictions include scores of cases in which publicity and public outrage clearly contributed to the error . . ." *Id.*

<sup>53</sup> Craig Haney & Susan Greene, *Capital Constructions: Newspaper Reporting in Death Penalty Cases*, 4 ANALYSES OF SOC. ISSUES & PUB. POL'Y 1, 129-50 (2004) [hereinafter Haney & Greene].

<sup>54</sup> See Haney & Greene, *supra* note 53; Marla Sandys & Steven M. Chermak, *A Journey into the Unknown: Pretrial Publicity and Capital Cases*, 1 COMM. L. & POL'Y 533 (1996).

<sup>55</sup> See Haney & Greene, *supra* note 53.

<sup>56</sup> *Street Smart Escapee Knows Tricks of Eluding Team of Pursuing Lawmen*, L. A. TIMES, Oct. 9, 1992, at B1.

<sup>57</sup> "Gone Bad" Cop Wanted in Killing at Grocery Store, S. F. EXAMINER, Aug. 21, 1994, at C3.

its most dramatic or heinous features were so often repeated, were likely to evoke feelings of anger and outrage in the community. Of course, there is only one obvious target at which these feelings can be directed—the (necessarily) unsympathetic defendant. Among other things, this lack of coverage regarding a defendant’s personal history, “serves to deny the humanity of the persons who commit capital murder, substituting the heinousness of their crimes for the reality of their personhood.”<sup>58</sup>

Indeed, a profile of the typical capital defendant is constructed by the media, one in which he appears to have functioned throughout his life as an otherwise fully autonomous agent making willfully blameworthy choices, presumably from a range otherwise attractive or desirable options, which have resulted in a pattern of incorrigible, violent criminality. The “media model” of violent criminality leads inexorably to the conclusion that each individual defendant has “freely” committed the violent act in question and, therefore, is solely responsible, completely morally blameworthy, and entirely deserving of the sentence imposed upon him.

Obviously, case-specific publicity that reinforces this view gives community residents and potential jurors a perspective on a particular capital defendant that favors the death penalty in his or her case. In addition, media coverage of capital cases focuses far more extensively on aggravation than mitigation.<sup>59</sup> However, the omitted or under-reported information—the mitigating background and social histories of capital defendants—is a major part of what capital juries are supposed to consider and take into account in their assessment of moral guilt or culpability. In most cases it will be the only thing they can use as the basis for a life rather than a death sentence. In contrast, unlike aggravating factors with which the media typically inundates potential jurors, people are unlikely to encounter any mention or description of mitigating factors until the trial itself.

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<sup>58</sup> Craig Haney, *The Social Context of Capital Murder*, *supra* note 32, at 547.

<sup>59</sup> See Haney & Greene, *supra* note 53, at 142. The disproportion is extreme. For example, Greene and I found that there were about 4.5 aggravating facts for every one mitigating fact that was reported in the newspaper stories we analyzed. The ratio did not vary much for cases that resulted in death (where aggravation would be expected to outweigh mitigation and therefore be covered more extensively) as opposed to those that resulted in life (where mitigation would be expected to outweigh aggravation and be more often reported). *Id.*

The one-sided media model of capital crime may help to explain another problematic feature of our system of death sentencing that may contribute to the rendering of death rather than life verdicts. Although I discuss it in greater detail below, it is worth noting briefly here as well. The all-important capital sentencing instructions that are supposed to govern jury decision-making in death penalty cases are very poorly understood overall. However, research shows that the errors in comprehension are not evenly distributed and that the term “mitigation” is the most poorly understood of the core concepts on which jurors are supposed to rely.<sup>60</sup> The fact that news reports of capital cases omit nearly all mention of this kind of mitigation means that few people will enter a death penalty trial with a pre-existing “framework of understanding” that includes the mitigating significance of background social history information. Because of the one-sided crime focus of the news reporting, the task of even identifying such information, let alone understanding its relevance to determinations of blameworthiness and knowing how to take it into account in deciding on a defendant’s life or death sentence, may be so foreign and unfamiliar that jurors are uncertain about whether and how to do it. The fact that the term “mitigation” is so poorly understood in the capital sentencing instructions may be a reflection of these inter-related problems. But it underscores an additional fact: the instructions themselves cannot be relied upon to remedy these problems.

#### B. JURY-RELATED FACTORS: IGNORING BIAS AND INCREASING DEATH PRONENESS

In part because of the high levels of publicity that surround them, capital cases present a special set of jury-related issues and problems that can contribute to capital defendants being wrongfully condemned. In some instances, miscarriages

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<sup>60</sup> See, e.g., S. Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423 (1993); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411 (1994); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Arguments*, 21 LAW & HUM. BEHAV. 575 (1997); R. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. OF APPLIED PSYCHOLOGY 455 (1995).

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of justice are likely to occur because of the legal system's failure to address these problems. In other instances, however, the problems are of the system's own creation.

As I have noted, the media rarely depict capital crimes, defendants, and trials in balanced and complex ways that fully inform citizens and potential jurors about the range of issues they should consider and reflect on before deciding whether to sentence someone to die. The legal system itself does little to address this problem and actually may compound it. For example, the law allows parties to request a change of venue when they believe there is a risk that the community from which the jury pool will be drawn has been tainted by prejudicial pretrial publicity. Although the legal doctrines vary somewhat from jurisdiction to jurisdiction, they generally require a showing of a "reasonable likelihood" that a fair and impartial jury cannot be impaneled there.<sup>61</sup> Unfortunately, despite the existence of this potentially effective legal remedy for publicity-related pretrial bias, courts are extremely reluctant to change venue, even in capital cases.<sup>62</sup> As one legal commentator correctly observed, among the possible remedies for prejudicial pretrial publicity, "[c]hange of venue motions, above all others, are under-utilized by trial judges."<sup>63</sup> As a result, many

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<sup>61</sup> "Reasonable likelihood that a fair trial cannot be had" is the standard endorsed by the American Bar Association. See Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 8-3.3 (c) (1980). For two useful discussions of these issues see Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 197 (1988), and Michael Jacob Whellan, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 193 (1990).

<sup>62</sup> Among other things, the added costs of conducting a trial away from the jurisdiction where most of the trial participants reside means that changes of venue are expensive to undertake. This is especially true in capital cases, where the length and complexity of the trial itself tend to be much greater. Moreover, highly publicized capital cases often are highly politicized as well, placing "elected trial judges under considerable pressure not to . . . change venue." Stephen Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B. U. L. REV. 759, 766 (1995). Thus, in those cases where community sentiments run highest, precisely the ones for which changes of venue are most needed, the political risks, especially to elected trial judges, are greatest. *Id.*

<sup>63</sup> Joseph Mariniello, *The Death Penalty and Pre-trial Publicity: Are Today's Attempts at Guaranteeing a Fair Trial Adequate?*, 8 NOTRE DAME J.L. ETHICS & PUB. POLY 371, 376 (1994). Similarly, psychologists Michael Nietzel and Ronald Dillehay have noted that, despite its effectiveness, "courts are reluctant to change venue because of the expense, the inconvenience, and the tradition that justice should be administered in the community where the crime occurred." MICHAEL NIETZEL & RONALD

capital cases go to trial in communities that have been saturated with publicity that contains extremely prejudicial characterizations of defendants and damaging case-related information.<sup>64</sup>

Thus, case-related publicity not only puts pressure on law enforcement and prosecutors to secure a conviction in capital cases but also increases the likelihood that defendants in death penalty cases will face jurors who harbor case-specific biases and prejudices against them. Denying a change of venue motion in a highly publicized capital case can heighten the chances of conviction *and* increase the likelihood that a death sentence will be imposed. Of course, a death sentence arrived at for this reason—a capital defendant sentenced to die who would have been given life by a jury chosen from another venue that was not exposed to such damaging pretrial publicity—represents a serious miscarriage of justice.

Jury selection or voir dire is the other legal remedy available to address pretrial bias. Unfortunately, it is of limited value in many highly publicized cases.<sup>65</sup> Typical voir dire ques-

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DILLEHAY, *PSYCHOLOGICAL CONSULTATION IN THE COURTROOM* 68 (Pergamon 1986).

<sup>64</sup> Courtney Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 *LAW & CONTEMP. PROBS.* 137, 142 (1980). Especially in small venues, “[t]he community demands justice and exerts tremendous pressure on the judge to keep the murder trial within its sphere of influence . . . . Since the change of venue is discretionary with the judge, is costly in terms of time and money, and is not customarily granted, most judges opt to deny the motion . . . .” *Id.*

<sup>65</sup> For example, in theory, jury selection, where attorneys and judges have an opportunity to identify and excuse those persons who may be tainted by negative case-related publicity, should help to insure the fair-mindedness of the jury that remains. In many highly publicized capital cases, however, jury selection procedures fall far short of realizing this potential. Among other things, research has shown that although potential jurors may be cognizant of having been exposed to negative pretrial publicity (indeed, publicity that typically has led them to develop a prejudicial opinion of the defendant), they still tend to claim impartiality. G. Moran & B. L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 *J. OF APPLIED SOC. PSYCHOLOGY* 345-367 (1991). Moreover, even those persons who claim not to be influenced by negative pretrial publicity nonetheless are more likely to convict the defendant than those exposed to neutral publicity. See, e.g., Norber L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 *AM. U. L. REV.* 665 (1991); S. Sue et al., *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 *J. OF CRIM. JUST.* 163 (1974); S. Sue et al., *Authoritarianism, Pretrial Publicity and Awareness of Bias in Simulated Jurors*, 37 *PSYCHOLOGICAL REPORTS* 1299 (1975); W. C. Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 *J. OF PERSONALITY & SOC. PSYCHOLOGY* 453 (1981). Research also indicates that despite attempts to ask jurors about the influence of pretrial publicity in voir dire, those who disclaim any bias are still more inclined to be punitive toward the defendant. See Hedy Dexter et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Pub-*

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tions require prospective jurors to make difficult self-assessments and subtle predictions about themselves: Can you be fair? Are you able to set aside whatever you may have read and heard about the case? Will you base your verdict entirely on the evidence and instructions you receive in court? Few people honestly know whether they are genuinely capable of these things, and few want to admit to being closed minded, unwilling to listen, or reluctant to follow orders from a judge. Fewer still will depict themselves as persons inclined to render unfair and biased verdicts.<sup>66</sup>

Moreover, because capital cases require jurors to assess moral guilt as the basis for a decision about the appropriateness of the death penalty, publicity-related bias is not restricted to the issue on which voir dire is usually focused: whether someone is predisposed with respect to factual or legal guilt. Thus, prospective jurors who have become familiar with the consequences of the crime for the larger community (so that they feel pressure to impose the harshest punishment on the community's behalf), or who may know legally inadmissible details about the defendant's past life (so that they begin their assessment of case-related evidence with a store of negative information that might be used as extra-legal aggravation), or have seen or heard opinions expressed about the defendant's moral turpitude or unsavory character (that conform to their

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licity, 22 J. OF APPLIED SOC. PSYCHOLOGY 819 (1992). Finally, studies suggest that judicial admonitions or instructions to ignore pretrial publicity generally fail to reduce its biasing effects. See, e.g., S. Fein et al., *Can the jury disregard that information? The use of suspicion to reduce the prejudicial effects of pretrial publicity and inadmissible testimony*, 23 PERSONALITY & SOC. PSYCHOLOGY BULL. 1215 (1997); G. P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990); S. Sue et al., *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 J. OF CRIM. JUST. 163 (1974).

<sup>66</sup> For example, in an observation and interview study that Cathy Johnson and I did, we found that jurors were able to survive the voir dire process and sit on felony juries even though they held opinions that were at odds with basic tenets of American jurisprudence (such as presumption of innocence), and had been asked about these very things during jury selection. Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 LAW AND HUM. BEHAV. 487 (1994) [hereinafter Johnson & Haney]. Specifically, nearly half of the actual jurors in several felony cases said in post-trial interviews that they had *not* been able to "set aside" their personal opinions and beliefs even though they had agreed, during jury selection, to do so. *Id.* Another study that relied on post-trial interviews of persons who sat on criminal cases estimated that between one quarter to nearly one third of jurors were not candid and forthcoming in accurately and fully answering questions posed during the voir dire process. R. Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. OF CRIM. JUST. 451 (1991).

pre-existing stereotype about irredeemably violent and vicious criminals) are biased in ways that may prove literally fatal to a capital defendant. Even though these publicity-related biases can profoundly affect the judgments that capital jurors may be called upon to make about culpability and moral guilt, the effects are extremely difficult to uncover in the course of jury selection. In any event, prospective jurors are rarely questioned about these things. Moreover, few people are willing and able to give accurate, candid answers about whether they have formed such complex, subtle, and deep-seated judgments.

In fact, voir dire is conducted in capital cases in a way that increases rather than decreases the likelihood that flawed determinations of factual, legal, and moral guilt will occur. In addition to the failure of voir dire to effectively reduce or eliminate publicity-created biases, jury selection in death penalty cases suffers from a unique and serious problem that contributes to capital defendants being wrongfully convicted as well as wrongfully condemned. *Death qualification* is an anomalous feature of the capital trial process; it requires penalty to be discussed with jurors at the outset of the case, before any evidence has been presented and long before penalty is relevant. The attention of prospective jurors is drawn away from the presumption of innocence and onto what will happen *after* they have convicted the defendant.

This anomaly is structural, built into the very nature of the capital process, and it operates to increase the likelihood that miscarriages of justice will occur. As one legal commentator put it, “[d]eath qualification as currently practiced tilts the jury first towards guilt and then towards death, both by removing too many of certain kinds of people from the pool, and by affecting the expectations and perceptions of those who remain.”<sup>67</sup> Much has been made of the way that death

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<sup>67</sup> Susan Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 699 (2002). Similarly, two social science researchers concluded: “At all stages of the trial—jury selection, determination of guilt or innocence, and the final judgment of whether the defendant lives or dies—death qualification results in bias against the capital defendant of a nature that occurs for no other criminal defendant.” James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors’ Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 279 (1988) [hereinafter Luginbuhl & Middendorf]. For an excellent overview see William Thompson, *Death Qualification after Wainwright v. Witt and Lockhart v. McCree*, 13 LAW & HUM. BEHAV. 185 (1989). See also Craig Haney (Ed.), *Special Issue on Death Qualification*, 8 LAW & HUM. BEHAV. 1 (1984), and

qualification creates guilt-prone capital juries, and rightly so. This practice undoubtedly contributes to wrongful convictions in capital cases. Death-qualified juries are more likely to endorse a crime control rather than due process perspective on criminal justice issues, so they begin a capital case tending to side more with the prosecution than the defense.<sup>68</sup> They tend to deliberate less vigorously and effectively than more demographically and attitudinally diverse juries (i.e., the kind of jury that sits in other kinds of criminal cases).<sup>69</sup> In addition, death-qualified juries are exposed to a process that implies that the defendant is guilty. Research indicates that otherwise premature questions about penalty lead them to make precisely that inference, adding to the predisposition to convict and, in turn, making a wrongful conviction more likely.<sup>70</sup>

However, death qualification also appears to increase the chances that juries will wrongfully attribute legal and moral guilt to capital defendants. For example, we know that, all other things being equal, death-qualified juries are less likely to accept the insanity defense and more likely to endorse the view that it is a “loophole” that allows too many guilty persons to go free.<sup>71</sup> Moreover, because death-qualified jurors are more likely to reject mental health defenses, they may be left more susceptible to what I have termed the “media model” of will-

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the various articles contained therein.

<sup>68</sup> See, e.g., Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984) [hereinafter Fitzgerald & Ellsworth]; William Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984); Edward Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Edward Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON J. OF LAW 11 (1980).

<sup>69</sup> Claudia Cowan, William Thompson & Phoebe Ellsworth, *The Effects of Death Qualification and Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984). As a meta-analysis of studies done through the late 1990s concluded: “The results indicate that the more a person favors the death penalty, the more likely that person is to vote to convict a defendant.” Mike Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715 (1998).

<sup>70</sup> Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of Death Qualification*, 8 LAW & HUM. BEHAV. 121 (1984); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984).

<sup>71</sup> Phoebe Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984); see also Fitzgerald & Ellsworth, *supra* note 68, at 43.



fully violent criminality.<sup>72</sup> That is, they may be predisposed to attribute blameworthy states of mind to capital defendants, especially in cases where the defense presents evidence that mental illness or emotional disturbance has clouded the defendant's judgment or impaired his ability to conform his conduct to the requirements of law.

The final biasing effect that skews the verdicts rendered by persons eligible to sit on capital juries is an obvious one: death qualification facilitates death sentences by insuring that the *only* jurors allowed to decide whether a capital defendant lives or dies have been selected on the basis of their willingness to vote for death.<sup>73</sup> Of course, a group selected on this basis is more likely to actually impose the death penalty than one selected through non-death qualifying voir dire.<sup>74</sup> Thus, death-qualified jurors are more likely to favor the death penalty in general, and are also more likely to believe that it furthers important societal goals in a legally proper way (for example, to believe incorrectly that it deters murder and is administered fairly and reliably).

Death-qualified jurors also weigh and evaluate penalty phase evidence differently. Specifically, they are more likely to endorse numerous aggravating factors while diminishing the significance of both statutory and non-statutory mitigation.<sup>75</sup>

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<sup>72</sup> This not only makes them more likely to attribute intent in situations where it may be lacking, but also, to the extent they see the defendant as having psychopathic rather than psychotic traits, more likely to impose the death penalty. See John Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & LAW 603 (2005).

<sup>73</sup> Strictly speaking, since *Morgan v. Illinois*, 504 U.S. 719 (1992) was decided, capital jurors also are supposed to be selected on the basis of their willingness to vote for life. However, most commentators believe that so-called "life qualification" is not strictly adhered to or effectively practiced by the courts and that many "automatic death penalty jurors" manage to serve on capital juries. Thus: "The starkest failure of capital voir dire is the qualification of jurors who will automatically impose the death penalty ('ADP jurors') regardless of the individual circumstances of the case." John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1220 (2001).

<sup>74</sup> This commonsense relationship has been supported in a number of studies. For one of the early ones, see George Stricker & George Jurow, *The Relationship Between Attitudes Toward Capital Punishment and Assignment of the Death Penalty*, 2 J. OF PSYCHIATRY & LAW 415 (1974).

<sup>75</sup> See Brooke Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175 (2002); Haney, Hurtado, & Vega, *supra* note 38; Luginbuhl & Middendorf, *supra* note 67.

In addition, the process of death qualification has a direct impact on the death sentencing behavior of capital jurors. Among other things, exposure to death qualification convinces jurors that the major trial participants favor capital punishment, desensitizes them to the imposition of the death penalty, labels the case and the defendant as potentially “death-worthy” before any evidence has been presented, and requires the jurors to publicly affirm their willingness to impose the death penalty (which likely increases their commitment to doing precisely that).<sup>76</sup>

In each instance, capital jury decisions are being made by a carefully screened group of people whose demographic and attitudinal characteristics mean they are more in favor capital punishment. These same people likely have been changed by the process of screening in ways that lead them to impose death more often. Thus, death qualification makes wrongful condemnations more likely. These miscarriages of justice are not easy to definitively identify. Yet the available evidence suggests that they are not infrequent.

### C. TRIAL STRUCTURE, PROCESS, AND CONTENT: TILTING THE JURY TOWARD DEATH VERDICTS

The nature and content of the capital trial process contribute to what has been termed the “moral disengagement” of capital jurors.<sup>77</sup> Moral disengagement means that the psychological barriers against taking the life of another are lowered by virtue of the practices and procedures that distance decision-makers from the human consequences of their decision.<sup>78</sup> In a death penalty case, the morally distancing features of the process include the structure of the trial and the sequencing of the evidence that is presented in the guilt phase of the trial.

Specifically, there is a virtually exclusive focus on crime-

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<sup>76</sup> These processes are described at greater length in HANEY, DEATH BY DESIGN, *supra* note 11, at Chapter 6, and Johnson & Haney, *supra* note 66.

<sup>77</sup> I discuss these issues at greater length in Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997). The term “moral disengagement” is Albert Bandura’s. See Albert Bandura, *Mechanisms of Moral Disengagement*, in ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 161 (W. Reich ed., 1989); Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 45 (W. Kurtines & J. Gewirtz eds., 1991).

<sup>78</sup> Haney, *Violence and the Capital Jury*, *supra* note 77, at 1449.

related evidence and correspondingly minimal attention given to the personhood of the accused. This is followed by exclusively crime-related aggravating evidence in the penalty phase. Typically, only then is the presentation of contextualizing, social historical information about the defendant possible.

This means that evidence and testimony that is likely to have a morally disengaging effect on jurors—evidence that encourages them to dehumanize the defendant and to distance themselves from him as a person—occurs first and cannot be effectively addressed or rebutted until the very last stage of the trial. We know that dehumanization operates to cognitively distance people from the moral implications of their actions.<sup>79</sup> For example, as Tom Tyler has noted, dehumanization “prevents the moral issues which are normally raised when harm is being done to other human beings from being raised in a particular instance.”<sup>80</sup> Whatever else dehumanization accomplishes in this context, it is likely to facilitate death sentencing (including imposing death sentences on persons who do not deserve to receive).

Some of the moral disengagement that facilitates death sentencing also derives from the formal, legalistic atmosphere of the trial itself, and some from legal doctrines that prohibit jurors from learning about certain issues that might balance the moral equation with which they are presumably working. For example, as one legal commentator has noted, “the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in legal discourse . . . .”<sup>81</sup> Another acknowledged that the courtroom setting is “hardly intimate or otherwise conducive to ‘knowing’ someone” and that anyone who advocates the empathetic understanding of a defendant in a legal proceeding “must favor radical restructuring of court

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<sup>79</sup> See, e.g., Bandura, *Mechanisms of Moral Disengagement*, *supra* note 77; Bandura, *Social Cognitive Theory of Moral Thought and Action*, *supra* note 77; Albert Bandura, Bill Underwood & Michael Fromson, *Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. OF RESEARCH IN PERSONALITY 253 (1975); Philip Zimbardo, *The Human Choice: Individuation, Reason, Order Versus Deindividuation, Impulse, and Chaos*, in NEBRASKA SYMPOSIUM ON MOTIVATION 237-309 (W. Arnold & D. Levine eds., 1969).

<sup>80</sup> Tom Tyler, *The Social Psychology of Authority: Why Do People Obey an Order to Harm Others?*, 24 LAW & SOC'Y REV. 1089, 1093 (1990).

<sup>81</sup> Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987).

procedures to make them more congenial” to such things.<sup>82</sup>

Although these are normative statements about legal language and proceedings in general, they are particularly problematic—and indeed may be fatal—in a capital case. Because jurors have to make a moral assessment of the defendant’s overall culpability, one that requires them to empathically “know” someone (and his or her life history) if they are to truly do justice, anything that drives the jury farther away from the defendant can lead to a death sentence being wrongly imposed. As Samuel Pillsbury has pointed out, “[t]he question of what punishment an offender deserves requires a complex factual and moral evaluation . . . . [I]f accuracy in desert evaluation is paramount, as it is in the capital context, we must adopt a broad view of culpability that defies encapsulation in rules.”<sup>83</sup> Although, in general terms, “[l]egal decisions and lawmaking frequently have nothing to do with understanding human experiences, affect, suffering—how people *do* live,”<sup>84</sup> the law’s tendency to disengage us from these issues in capital penalty trials can have fatal consequences.

Moreover, there is an asymmetry to the kind of information that capital jurors can receive that tends to increase levels of moral disengagement. Specifically, the viewing of the *defendant’s* violence, showing the jurors the capital crime in graphic and gruesome detail, has become routine in the guilt phase of these cases. In addition, the Supreme Court has sanctioned the use of so called victim-impact testimony in capital penalty trials, authorizing prosecutors to go even farther by presenting capital jurors with the full range of terrible consequences that the defendant’s violence has brought about, regardless of whether those consequences were intended or foreseeable. They now routinely explore the myriad dimensions of grief and loss and longing that the defendant’s violence has produced.<sup>85</sup>

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<sup>82</sup> Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2108 (1989).

<sup>83</sup> Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 669 (1989).

<sup>84</sup> Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574-1575 (1987) (emphasis added).

<sup>85</sup> *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (authorizing the use of “victim impact” testimony in capital penalty trials). The practice remains controversial for a variety of reasons, including the fact that it holds persons accountable and morally blameworthy for consequences that they did not specifically intend and could not have reasonably foreseen. Nonetheless, the use of victim impact testimony in capital cases is

However, the law systematically and explicitly prevents capital jurors from learning anything comparable about the nature and consequences of the state's violence—the execution that they are being asked to authorize.<sup>86</sup>

Thus, the consequences of the defendant's violence are made highly salient, sometimes through the use of narrative devices that are so richly, comprehensively, and graphically detailed that they easily become the most compelling, wrenching part of the trial. On the other hand, the consequences of the violence in which the capital jury is being asked to directly participate are minimized, hidden from view, sanitized, or treated in a way that implies that other decisionmakers (at later stages in the process) will be responsible for bringing them about.<sup>87</sup> Jurors disengaged in these ways from the consequences of the death verdicts they are being asked to authorize are more likely to render them. They are also more likely to render them erroneously (that is, to return death verdicts when, in fact, they would have voted for life if they had been better and more fully informed).

Another aspect of the capital trial process also has the potential to increase the number of times a capital defendant is wrongfully condemned. In the 1976 decisions in which the U.S. Supreme Court reinstated the death penalty, it confidently endorsed a set of statutory reforms that relied heavily on judicial instructions to regularize and rationalize the death sentencing process.<sup>88</sup> The basic notion, as expressed in these early, land-

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now widespread.

<sup>86</sup> For example, in one California case the state supreme court ruled unequivocally that “[e]vidence of how the death penalty will be performed, as well as the nature and quality of life for one imprisoned for life without the possibility of parole, is properly excluded” from the jury’s consideration.” *People v. Fudge*, 7 Cal. 4th 1075, 1117 (1994). In this case and others, these assertions come without any underlying analysis or reasoning; they simply are part of a broader rule that the nature of the punishment itself is “not relevant to any issue material to the choice of penalty.” *Id.* at 1124.

<sup>87</sup> See, e.g., Joseph Hoffman, *Where's the Buck?--Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995).

<sup>88</sup> A series of state death penalty statutes passed in the aftermath of *Furman* were evaluated in opinions issued simultaneously by the Court in its 1976 Term. The lead case, *Gregg v. Georgia*, 428 U.S. 153 (1976), approved of Georgia’s new death penalty statute in which a judge or jury was required to find at least one aggravating circumstance beyond a reasonable doubt and then to consider other aggravating and mitigating circumstances before sentencing a defendant to death. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the Court similarly approved the new Florida death penalty statute in which, following a jury’s “advisory” verdict, a judge was required to weigh aggravating against mitigating factors to determine whether the death penalty should be

mark cases, was that the previously “unbridled” discretion of capital jurors could be brought under control by having judges provide them with a list of factors or issues that they should think about, consider, and use in certain specified ways in making the choice between life and death.<sup>89</sup>

There is now much reason to believe that the Court’s “guided discretion” model was advanced with far too much optimism, long before its supposed curative effects had been demonstrated. In fact, a number of studies, including ones conducted shortly after the new sentencing models were implemented in the mid- to late 1970s, demonstrated that many of the very same problems that plagued the earlier “arbitrary and capricious” and potentially discriminatory system remained.<sup>90</sup> Among other things, these standard penalty phase instructions are so difficult for average people to understand and apply that many jurors simply are unable to comprehend their most basic features. This instructional confusion begins with the concepts of aggravation and, especially, mitigation, and extends to uncertainty about which of the specific factors should tip the scales in the direction life or death. The errors are fundamental, they are made frequently, and there is no evidence that they are corrected in the course of jury deliberation. As a result, there is no assurance that the death sentencing process that is supposed to be governed by this process results in fair, accurate, and reliable verdicts.

Moreover, there is a significant one-sidedness to the jurors’ confusion. On the one hand, the kind of evidence that typically

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imposed. The Court approved a very different kind of death penalty statute in *Jurek v. Texas*, 428 U.S. 262 (1976), examining the new Texas death penalty statute that required capital jurors to answer three questions affirmatively before sentencing him to death: first, whether the defendant’s homicidal act was intentional; second, whether it was not a reasonable response to provocation; and third, whether there was a probability that the defendant would commit future acts of violence constituting a continuing threat to society.

<sup>89</sup> See *Gregg*, 428 U.S. at 193-95; *Proffitt*, 428 U.S. at 249-51; *Jurek*, 428 U.S. at 274-77.

<sup>90</sup> See, e.g., David C. Baldus et al., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS* (Northeastern University Press 1990); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *CRIME & DELINQ.* 563 (1980); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 69 *SOC. SCI. Q.* 853 (1988); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 *J. CRIM. L. & CRIMINOLOGY* 754 (1983); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 *HARV. L. REV.* 456 (1981).

makes up the bulk of a case in aggravation (the facts of the crime, prior criminal acts, victim accounts of pain and loss) are things that tend to be socially agreed upon as increasing the severity of whatever punishment is deserved. They make death verdicts more likely and are not only socially agreed upon but the better understood of the two key terms in the instruction. On the other hand, the kind of evidence that makes up the typical case in mitigation is significantly undermined by the jurors' inability to understand the concept itself. Every study on the topic confirms that it is poorly comprehended by a significant number of participants, including potential and actual jurors. In addition, even when jurors do understand the concept in the abstract, they tend to associate it with crime-related factors that rarely are presented by the defense in a capital penalty phase.<sup>91</sup> Jurors who can understand and apply aggravation, but who do not understand and cannot apply mitigation are likely to wrongly condemn a capital defendant out of sheer ignorance and confusion, rather than any careful and reliable "moral inquiry into the culpability of the defendant."<sup>92</sup>

In addition, by couching the jury's life-and-death decision in terms that imply that some kind of legal formula is driving the sentencing verdict, the instructions may remove or undermine the jurors' collective and individual sense of moral responsibility. Thus, at this very final stage, the process leaves some jurors with a feeling that they are being compelled to reach a death verdict that does not reflect their personal views. By disengaging critical ethical concerns and deep moral considerations in this way, formulaic death sentencing and instructions that appear to allow or even encourage jurors to relinquish personal responsibility may also contribute to wrongful condemnations.

#### D. LETHAL LAWYERING: INEFFECTIVE ASSISTANCE AND THE ATTRIBUTION OF MORAL GUILT

There is one final way in which the nature of the capital trial may contribute to the dehumanization of the defendant,

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<sup>91</sup> See, e.g., James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203 (1992).

<sup>92</sup> *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

morally disengage jurors from the decision before them, and lead them to wrongfully condemn someone to die. A capital penalty phase presents defense attorneys with a special challenge—to explain their client's life course and contextualize his behavior in terms of his social history and present circumstances. Defense attorneys are unlikely to have encountered such a challenge in any other kind of case. Yet, if they fail to effectively meet it, there is a high probability that the jury that sits in final judgment of their client will be denied the essential information needed to render a fair and reliable sentence.

The challenge itself is rooted in deep-seated psychological tendencies. Social psychologists have written extensively about the way observers attribute the causes of behavior to the internal states and traits of the persons who perform it, even when other, more external causes may be responsible.<sup>93</sup> This common tendency is termed the "fundamental attribution error." In a legal context, of course, it may lead jurors to attribute intentionality and blameworthy states of mind to a criminal defendant, even when situational forces have contributed to, and help to account for, the criminal act that they are called upon to judge.<sup>94</sup> This may contribute to one kind of miscarriage of justice that I described earlier, wherein jurors attribute more culpable states of mind to criminal defendants than the evidence in their case otherwise warrants.<sup>95</sup>

Although the tendency to commit the fundamental attribution error is widespread and may occur whenever observers make judgments about the actions of others, certain factors make this erroneous allocation of legal responsibility more likely. For example, all other things being equal, the greater the harm that the particular behavior brings about, the more likely that it will be attributed to internal causes (i.e., to the

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<sup>93</sup> See Lee Hamilton, *Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process*, 39 J. OF PERSONALITY & SOC. PSYCHOLOGY 767 (1980); Joel Johnson et al., *Causal Attribution and Dispositional Inference: Evidence of Inconsistent Judgments*, 20 J. OF EXPERIMENTAL SOC. PSYCHOLOGY 567 (1984); LEE ROSS & RICHARD NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (McGraw-Hill 1991).

<sup>94</sup> See, e.g., Eric Hansen, Charles Kimble, & David Biers, *Actors and Observers: Divergent Attributions of Constrained Unfriendly Behavior*, 29 SOC. BEHAV. & PERSONALITY 87 (2001); Martin Safer, *Attributing Evil to the Subject, Not the Situation*, 6 PERSONALITY & SOC. PSYCHOLOGY BULL. 205 (1980).

<sup>95</sup> See *supra* notes 33-60 and accompanying text.



perpetrator of the act).<sup>96</sup> In addition, the less similar the person whose behavior is being judged to the person making the judgment, the greater the tendency to perceive internal causes for the behavior, to hold the actor more responsible and culpable for his actions, and to punish him more harshly.<sup>97</sup>

When the defendant is a minority group member, it may give rise to what has been termed the “ultimate attribution error”, which in this context entails using racial differences as the basis for assigning additional blame and meting out harsher punishment.<sup>98</sup> In addition, stereotyped media messages about the “kind of people” who are likely to commit crime also may increase the amount of responsibility and blame that jurors will allocate to perpetrators.<sup>99</sup> This may change the nature of the moral inquiry into the culpability of the defendant in which a capital jury is supposed to engage, skew its view of him, change jurors’ assessment of his deathworthiness, and lower the threshold for imposing a death sentence.

To effectively rebut these tendencies in a case in mitigation, defense attorneys must humanize the defendant by contextualizing his behavior. That is, they should assist jurors in overcoming their pre-existing stereotypes and expectations about the internal and individualistic nature of violence. These are precisely the stereotypes that are created and amplified by the media coverage of death penalty cases and the various aspects of the capital trial process that I have referred to above.<sup>100</sup>

Yet, experienced capital litigators and death penalty scholars have repeatedly warned that too many defense attorneys lack the kind of training and professional experience that is needed to find and develop this humanizing testimony.<sup>101</sup> In addition, many of them are denied the time and resources it

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<sup>96</sup> See, e.g., Chimaeze Ugwuegbu & Clyde Hendrick, *Personal Causality and Attribution of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76 (1974).

<sup>97</sup> See, e.g. Curtis Banks, *The Effects of Perceived Similarity Upon the Use of Reward and Punishment*, 12 J. EXPERIMENTAL SOC. PSYCHOLOGY 131 (1976).

<sup>98</sup> See, e.g., Thomas Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, in INTERGROUP RELATIONS: ESSENTIAL READINGS. KEY READINGS IN SOCIAL PSYCHOLOGY 162-173 (Michael Hogg & Dominic Abrams eds., 2001).

<sup>99</sup> See Haney & Greene, *supra* note 53.

<sup>100</sup> See *supra* notes 33-92 and accompanying text.

<sup>101</sup> 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, 1851 (1994).

would take to accomplish these tasks properly.<sup>102</sup> As a result, too little of this testimony is effectively gathered, prepared, or presented in many penalty phase cases.<sup>103</sup> As one capital litigator summarized:

In the sentencing phase of these proceedings, defendants often find themselves represented by lawyers who have no experience in or knowledge about developing evidence of mental illness or other mitigating factors. In case after case, the jury never hears that the defendant had an honorable military record and then developed post-traumatic stress disorder, or that the defendant had serious mental illness when growing up but was never treated.<sup>104</sup>

Indeed, two legal commentators concluded that “it is commonplace in many states for trial counsel to fail to present *any* evidence or argument at all during the punishment phase of a capital trial.”<sup>105</sup>

In addition, defense attorneys in many jurisdictions are overmatched and outspent by experienced prosecutors who have the state’s considerable resources at their disposal.<sup>106</sup> This disparity in resources increases the likelihood that wrongful condemnations will occur in death penalty cases. The disparity in resources amplifies a pre-existing advantage—the fact that the prosecution’s implicit and overarching theory in the typical capital trial generally comports with stereotypic beliefs

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<sup>102</sup> *Id.* at 1854.

<sup>103</sup> See, e.g., Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 680 (1990); 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 (1994); Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849 (1992); Richard H. Burr, *Representing the Client on Death Row: The Politics of Advocacy*, 59 UMKC. L. REV. 1(1990); William Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N. Y. U. REV. L. & SOC. CHANGE 273 (1991); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N. Y. U. L. REV. 299 (1983); Ronald Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N. Y. U. REV. L. & SOC. CHANGE 797 (1986).

<sup>104</sup> Ronald Tabak, *The Egregiously Unfair Implementation of Capital Punishment in the United States*, *supra* note 20, at 18.

<sup>105</sup> Carol Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 421 (1995) (emphasis added).

<sup>106</sup> Bright, *Counsel for the Poor*, *supra* note 101, at 1849.

about crime and punishment held by citizens and jurors. That is, the notion that the defendant's crime stems entirely from his evil makeup, and that he therefore deserves to be judged and punished exclusively on the basis of his presumably free, morally blameworthy choices, is rooted in a longstanding cultural ethos.<sup>107</sup> As I have noted, the media has conditioned many capital jurors to grant it uncritical and unquestioned acceptance. By providing causal explanations for the behavior of others in largely dispositional or personal (as opposed to situational or contextual) terms, this ethos meshes perfectly with the well-documented fundamental attribution error described above.<sup>108</sup>

From a social psychological perspective, then, the defense penalty phase presentation must somehow induce jurors to temporarily suspend belief in a cultural ethos that many of them regard as commonsense, and to correct the fundamental attribution error by educating them about the historical, contextual, and situational determinants of the defendant's behavior. The prosecution's approach, on the other hand, is to embrace and build upon the jurors' pre-existing tendencies. As a result, the average juror's intuitive understanding of behavior is highly compatible with the basic terms of the typical prosecutorial narrative.

This means that defense attorneys have a much greater educational burden to meet in capital penalty trials. They must, in essence, overcome what many jurors already regard as commonsense. When attorneys lack the significant training and resources needed to properly find, assemble, and present the available mitigation, they are unlikely to meet this burden. As a result, many capital defendants will have their lives ended by juries that were never given a chance to truly understand them. Juries may remain morally disengaged when trial attorneys are unable—for lack of skill, effort, or resources—to present humanizing, mitigating explanations for their client's behavior.

Among other things, then, the sheer legal and psychological complexity of capital cases, including the significant added

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<sup>107</sup> See, e.g., Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the "Formative Era,"* 6 LAW & HUM. BEHAV. 191 (1982).

<sup>108</sup> See Luginbuhl, *supra* note 91, and the articles cited therein.

burden of having to conduct an elaborate penalty trial and the need to overcome the widespread but erroneous tendencies I have discussed, greatly increase the demands that are placed on defense attorneys. In this sense, the deficiencies in lawyering that plague capital representation generally and contribute to wrongful convictions are even more likely to jeopardize the outcome of capital penalty phases. These deficiencies contribute directly to death sentences being imposed in cases where, had the trial attorney handled the penalty trial properly, a life sentence would have resulted. As the authors of the American Bar Association's proposal to critically examine the administration of the death penalty put it, "[i]t is scarcely surprising that the results of poor lawyering are often literally fatal to capital defendants."<sup>109</sup>

Finally, there is no reason to assume that the wrongful condemnations that come about as a result of the various pre-trial and trial-related problems I have described will necessarily be corrected in later stages of the case. Indeed, the poor quality of legal representation at the trial level is replicated and exacerbated in many states *after* a defendant is sentenced to death. These post-conviction appeals are critically important because they are the only real opportunity to determine whether mistakes or omissions may have contributed to the outcome of the case. One experienced attorney described the situation that still prevails in some parts of the country where "states allow only a token fee of a few thousand dollars, or cap expenses at about the same amount, or have no standards for lawyer competence, or inflict all three plagues on the condemned. These states in fact deny any meaningful representation to men and women on death row."<sup>110</sup>

### III. BEYOND FACTUAL INNOCENCE: ADDRESSING WRONGFUL CONDEMNATIONS

Largely in response to the highly publicized exonerations of many death-sentenced persons over the last several decades, and the realization that there were many factually innocent

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<sup>109</sup> American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L. J. 487, 541 (2002).

<sup>110</sup> Elisabeth Semel, *Representing Death Row Inmates at the Outskirts of the Southern Front*, 26 CACJ Forum 37, 40 (1999) (footnote omitted).

persons who not only were convicted of serious crimes but also, in the most extreme cases, were sentenced to die for them, a number of commissions, organizations, and individuals promulgated guidelines and recommendations intended to achieve the fair administration of the death penalty.<sup>111</sup> These proposals are intelligent and important, and they go a long way toward insuring that many aspects of the system of death sentencing in the United States will be improved, becoming fairer and more reliable. However, in part because these recommendations were prompted by wrongful convictions, most of them are designed to improve what I have termed factual guilt determinations. In this section I discuss some of the reforms that would need to be introduced to reduce or eliminate wrongful condemnations.

Although it is difficult to provide reliable estimates of the number of wrongful condemnations, there is reason to believe that they are widespread, especially in comparison to wrongful convictions. For example, in describing the broken system of capital punishment in the United States, James Liebman and his colleagues have shown that for every hundred death sentences meted out over a twenty-year period, some sixty-eight of them were overturned because of "serious legal errors."<sup>112</sup> On retrial, eighty-two percent of those defendants were found not to have deserved the death penalty and seven percent were found to be not guilty of the offense for which they had been convicted.<sup>113</sup> Using this ration as a *very* rough estimate would suggest that for every exoneration of a factually not guilty person, there may be more than ten times as many whose moral guilt was erroneously assessed (that is, who were initially wrongfully condemned).

I have discussed many of the standard policies and practices that operate in our system of capital punishment to morally distance citizens, voters, and jurors from the otherwise im-

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<sup>111</sup> See, e.g., Massachusetts Governor's Council on Capital Punishment, Final Report (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04%20MassDPRReportFinal.pdf> (last visited Aug. 1, 2006); Judge Leonard Sand & Danielle Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?* 78 CHI.-KENT L. REV. 1359 (2003); J. Wilgoren, *Illinois Panel: Death Sentence Needs Overhaul*, N. Y. TIMES, April 15, 2001, at A1, A19.

<sup>112</sup> James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1852 (2000).

<sup>113</sup> *Id.*

possibly difficult psychological challenges with which death sentencing presents them. Of course, as the process of death sentencing unfolds in any given case, it is experienced by decision-makers as the sum of all of its interlocking parts, and those parts operate in tandem to help facilitate the actual imposition of the death penalty. It is my belief that in reality the death penalty functions as a complex social psychological network that creates a special set of reactions in those persons who are exposed to and influenced by it. Those reactions are what make the operation of the system possible and, in the final analysis, facilitate the imposition of the death penalty. For this reason, systemic reforms are necessary to significantly improve the way the death penalty is implemented in the United States. An overall revamping of this system is the only way to make it truly fair, and to insure that wrongful condemnations are rare or non-existent.

Thus, many aspects of the current system require fundamental change. For example, as I have noted, many citizens, voters, and capital jurors rely primarily on the media for the information about crime and punishment.<sup>114</sup> As a result, they are mis-educated by what they see and hear. Thus, the media's tendency to locate the causes of violent crime exclusively within those persons who perpetrate it reinforces and exacerbates fundamental attribution error. In addition, the risk of victimization is exaggerated and the social contextual roots of criminality typically ignored. As a result, exposure to the individualizing and sensationalized images of criminality that the media typically project serves to heighten the audience's fear not only of crime but also of the persons who commit it. In general, this helps to shape the public's perspective on the need for harsh punishment, including capital punishment.

The challenge of correcting media-related biases is a daunting one. In addition to educational efforts aimed at making citizens more critical consumers of media messages, the media can be encouraged and lobbied to rely on a broader range of sources in their death penalty reporting. Law professor Susan Bandes observed that it also would require reporters and news commentators to appreciate the fact that a particular capital defendant "may have committed a crime worthy of punishment, but not of a death sentence," something she concedes

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<sup>114</sup> See *supra* notes 37-60 and accompanying text.

is presently “too nuanced to fit any recognizable dramatic category.”<sup>115</sup>

On the other hand, although I have been highly critical of the media, I also believe the media could become a part of the solution for at least some of these problems. As one capital litigator observed:

[It] takes the press to reach the public. If you can get the press interested, you reach the court of public opinion. For the many languishing on death row, whose trials did not attract press, appeal to that court is foreclosed. The miscarriage of justice in those cases, owing so often to inadequate assistance of counsel, does not come to public notice. The resources at the command of the press for investigation of the facts are not available to the accused . . . .<sup>116</sup>

In addition, a more concerted effort would need to be made to directly correct the collective media myths and store of misinformation that currently distorts the public’s understanding of capital punishment. James Coleman, head of an American Bar Association committee that examined the fairness of capital punishment in the United States, reminded his colleagues, “[a]s lawyers, public officials, and citizens, we have a responsibility to educate ourselves and to educate the public about the administration of the death penalty and to take whatever actions each of us as individuals and all of us collectively can take to make capital punishment and how it is administered fair and unbiased.”<sup>117</sup>

Beyond public education, there are a variety of legal reforms that would be needed to significantly reduce or eliminate wrongful condemnations in capital cases. For example, because of what research tells us about the way that exposure to extensive pretrial publicity can prejudice the jury pool, the change of venue criteria that judges currently apply in many capital cases would need to be liberalized. That is, capital cases especially should not go to trial in jurisdictions where prospective jurors have been saturated with prejudicial public-

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<sup>115</sup> Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 588 (2004).

<sup>116</sup> Eleanor Jackson Piel, *The Death Row Brothers*, 147 PROCEEDINGS OF THE AM. PHILOSOPHICAL SOCIETY 30, 36 (2003).

<sup>117</sup> James Coleman, *Call to Action: A Moratorium on Executions*, 4 N.Y. CITY L. REV. 117, 147-48 (2002).

ity and as a result may hold beliefs and have formed conclusions that will compromise their ability to fairly decide the case. Indeed, a rebuttable legal presumption might be created *in favor* of a change of venue in capital cases that have generated a certain significant quantity of publicity, or for those in which properly conducted, reliable community surveys empirically document that specified high levels of pretrial case awareness and prejudice exist.

It is also worth recognizing the important role that effective jury selection can play in enhancing the fairness of certain capital trials. However, to achieve this goal, courts would need to insure that high quality, expansive voir dire is permitted and practiced in capital cases, so that potentially prejudiced jurors can be ferreted out. In addition to making capital voir dire more effective by expanding its scope, its problematic features would need to be addressed and eliminated. This will not be easy. Specifically, because the negative effects of death qualification flow from its structurally anomalous position in the jury selection process, they can be effectively addressed only by somehow eliminating the death qualification of the guilt phase jury. This would require a separate jury to be death qualified (or the guilt-phase jury to be subsequently death qualified) and empowered to proceed with sentencing if and only if the defendant is convicted of a death-eligible crime.<sup>118</sup>

At the very least, more attention needs to be paid in jury selection to the issue of mitigation so that prospective jurors are questioned about whether and how they would give particular kinds of mitigating evidence life-giving effect. As John Blume and his colleagues have noted, it means that “voir dire should ensure that the venire members seated on the jury are empowered to react to mitigating evidence in accordance with the dictates of their conscience, even in the face of adverse reactions from other jurors.”<sup>119</sup> However, in order to get to this

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<sup>118</sup> That is, the procedure might entail the subsequent death qualification of the original guilt-phase jury (augmented by additional alternate jurors, selected at the time that the guilt-phase jury is impaneled and substituted as needed for original jurors who are not death qualified). Or, it might entail a process of bifurcation in which a completely separate penalty-phase jury is impaneled. This second jury might be selected and seated at the outset of the guilt-phase trial, and assume full responsibilities only after a penalty trial became necessary. Alternatively, such a second jury might be selected and impaneled from a new pool of prospective jurors drawn if and when the defendant was convicted.

<sup>119</sup> John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir*



point, prospective jurors would need to receive an accurate explanation of mitigation and attorneys would need to be given an opportunity to question veniremen to determine whether they are willing to at least consider mitigation in their penalty-phase decision-making.

With respect to the capital trial process itself, the virtually exclusive focus on crime-related evidence and correspondingly minimal attention given to the personhood of the defendant in the guilt phase of the trial has a morally distancing effect on the jurors. This is exacerbated in the penalty phase of the trial by the initial, exclusive focus on crime-related evidence. Only then is the presentation of contextualizing, social historical information about the defendant possible. Capital trial procedures might address these order effects by broadening the scope of permissible guilt-phase testimony (for example, by allowing the defense to introduce evidence that humanizes the defendant and contextualizes his actions). Consideration might also be given to allowing the defense the option of both opening and closing the penalty trial.

With respect to the all-important penalty phase instructions, a strong argument can be made in favor of revising them in ways that will make them comprehensible. In addition, courts that are serious about increasing the reliability and fairness of capital jury decision-making will need to consider making sure not only that the instructions are adequately understood by jurors but also that they are not laboring under any of the widespread misconceptions that are both likely to be held by the typical capital juror and introduce error into the death-sentencing process.<sup>120</sup>

Recently conducted research shows that it *is* possible to correct and improve some of the most problematic features of the capital jury sentencing instructions. Thus, a relatively straightforward modification in the standard California penalty phase instruction that relied on linguistic principles to simplify some of the most cumbersome and confusing language, and the inclusion of pinpoint instructions that provided case-

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*Dire*, 29 HOFSTRA L. REV. 1209, 1215 (2001).

<sup>120</sup> See Anthony Paduano & Clive Stafford-Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 214-230 (1987); Benjamin Steiner, William Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 499 (1999).

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related examples of key terms (i.e., specific pieces of evidence that were either aggravating or mitigating) both significantly improved participants' understanding of the concepts of aggravation and mitigation.<sup>121</sup> Although this study represents only an initial step in answering this important question, these encouraging results suggest that there are ways to improve instructional comprehension and increase reliability of the capital jury decision-making process.

Finally, many wrongful condemnations have likely come about because the law has not *required* attorneys to perform effectively in the penalty phase of capital cases by humanizing their clients and contextualizing their lives in ways that would allow jurors to better understand them and to weigh the full range issues that are supposed to guide their decision-making at this stage. In too many cases where attorneys have failed to do this, jurors must render verdicts on the basis of knowledge and information that is inadequate, skewed, or just plain wrong.

Of course, no amount of legal reform, including specific proposals made in the preceding pages, can succeed without the presence of competent lawyers who have the resources, skill, and opportunity to take proper advantage of it. Despite recently promulgated guidelines indicating that attorneys should have extensive experience and training before they represent a death penalty defendant, under-funded, under-trained, and inexperienced attorneys continue to handle capital cases.<sup>122</sup> For example, the ABA standards that govern the appointment, training, and monitoring of defense counsel in capital cases establish an attainable model for the proper representation of a capital client.<sup>123</sup> Despite their reasonableness and the imprimatur of the ABA, no state currently requires that these standards be adhered to.<sup>124</sup>

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<sup>121</sup> Amy Smith & Craig Haney, *Get to the Point: The Use of Pinpoint Instructions to Improve Juror Instructional Comprehension in Capital Penalty Trials* (2004) (unpublished manuscript, on file with author).

<sup>122</sup> See, e.g., Stephen Bright, *Counsel for the Poor*, *supra* note 101.

<sup>123</sup> See *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

<sup>124</sup> For example, Elisabeth Semel, then Director of the ABA's Capital Representation Project, speaking about states in the Southern "death belt" of the United States, observed that, even if the states had adopted standards for the appointment of counsel, "they most certainly are not the minimum standards the ABA put into place over eleven years ago. Indeed, because of the refusal to adequately fund counsel, the stan-

The failure to follow these minimal standards is likely to continue to produce miscarriages of justice at the penalty phase stages of capital cases, resulting in wrongful condemnations that would have resulted in life sentences had competent counsel handled them.

#### IV. CONCLUSION

Michael McCann, the elected District Attorney for Milwaukee County, Wisconsin, was no doubt correct when he asserted that our nation's criminal justice system is plagued by an "epidemic of wrongful convictions," brought about by an "epidemic of errors" that undermine the fairness and reliability of the process by which factual guilt is assigned.<sup>125</sup> But the same error-plagued system that produces wrongful convictions is responsible for deciding on legal and moral guilt in capital cases. As I have suggested in the preceding pages, there is much reason to believe that it accomplishes these tasks with even *less* fairness and reliability. To be sure, the decision of whether a defendant "deserves" the death penalty presents profoundly complex legal and moral issues. Even in an ideal system, attorneys, judges, and jurors would be forced to grapple with a host of deep and difficult psychological, intellectual, and even spiritual questions. By confusing these issues and clouding these questions, our system of death sentencing helps to insure that there are too many capital defendants who, even though they may be factually guilty, are wrongfully condemned.

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dards are honored, if at all, in the breach." Elisabeth Semel, *Call to Action: A Moratorium on Executions*, 4 N. Y. CITY L. REV. 117, 137 (2002).

<sup>125</sup> Michael McCann, *Call to Action: A Moratorium on Executions*, 4 N. Y. CITY L. REV. 117, 165 (2002).