Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death

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Unique social psychological conditions exist that enable capital jurors to contemplate, discuss, and take actions to bring about the death of another. This article discusses five methods of moral disengagement in the context of existing capital trial procedures: the dehumanization of the victim, the exaggeration of difference, the perception that one's actions are compelled by self-protection or self-defense, the minimization of the human consequences of one's actions, and the diffusion of personal responsibility through reliance on instructional authorization. These mechanisms are essential to any system of democratically administered capital punishment that depends on ordinary citizens to overcome deep-seated prohibitions against violence and assist in taking the life of a fellow citizen.

> We smother under padded words a penalty whose legitimacy we could assert only after we had examined the penalty in reality. Instead of saying that the death penalty is first of all necessary and then adding that it is better not to talk about it, it is essential to say what it really is and then say whether, being what it is, it is to be considered as necessary.
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> —Albert Camus[1]

INTRODUCTION

This essay develops a simple thesis: To ensure its viability, the system of death sentencing in the United States depends on the creation of an *extraordinary* set of psychological conditions. These conditions must prevail in capital trials to facilitate or somehow "enable" the participation of ordinary people in a potentially deadly course of action. Since, under typical circumstances, a group of twelve law-abiding persons would not calmly, rationally, and seriously discuss the killing of another, or decide that the person in question should die and then take actions to bring about that death, this unique set of conditions is

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1. ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 134 (Justin O'Brien trans., Modern Library 1960).

crucial to allow the death-sentencing process to go forward.[2] This essay discusses the legal and psychological mechanisms that are employed in death penalty law and trial practice to bridge the gulf between deep-seated inhibitions of capital jurors against hurting others and state-sanctioned violence of the most profound sort.

Professor Robert Cover, whose writing is notable for reminding us that the business of law is violence, recognized that "[t]he gulf between thought and action widens wherever serious violence is at issue, because for most of us, evolutionary, psychological, cultural, and moral considerations inhibit the infliction of pain on other people."[3] He also noted that "capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence."[4] Although Cover was primarily concerned with judges, they are not the only ones who must overcome this "special measure of . . . reluctance and abhorrence" in order to do the "deed of capital punishment."[5] Death penalty trials represent a rare moment in criminal jurisprudence because, in all but a few jurisdictions, capital jurors, not judges, bear the burden of making a sentencing decision that entails the stark and profound choice between life and death. Sharing none of the judge's prior socialization into the norms of coordinated legal violence and lacking the judicial experience that would accustom them to its routine application,[6] capital jurors must travel a greater psychological distance to overcome the special measure of reluctance and abhorrence that the choice to impose a death sentence presents to them.

Although studies suggest that capital jurors consistently differ from other citizens in terms of their demographic characteristics and certain legally relevant attitudes and behaviors,[7] there is no reason to believe they are any less averse to violence than other citizens. In fact, research on death qualification[8] indicates that one of the distinguishing characteristics of persons selected through this unique process is the extent to which they strongly subscribe to a general "crime control" perspective.[9] The fact that each year since 1980 two to

2. By this statement, I do *not* intend to imply any moral equivalence between the actions taken by death-sentencing jurors and the violence of the capital defendants who are on trial. Instead, I intend a more basic and less controversial point: that the actions taken by capital jurors in rendering a death penalty verdict are designed to bring about the death of another human being.

3. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613 (1986).

4. *Id.* at 1622.

5. *Id.*

6. *See id.* at 1613-14.

7. *See* 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, 31-32 (1970); Craig Haney, *Juries and the Death Penalty: Readdressing the* Witherspoon *Question*, 26 CRIME & DELINQ. 512, 517-21 (1980).

8. Death qualification is the process of screening out jurors whose extreme attitudes for or against the death penalty legally disqualify them from service on a capital jury. *See* Haney, *supra* note 7, at 514.

9. *See* Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 33-34 (1984) (operationalizing some of the ideas contained in HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968), and applying them to death qualified jurors).

three hundred juries in the United States have been able to traverse the moral and psychological barriers against taking a life[10] suggests that the system is surprisingly effective in overcoming natural inhibitions and creating an atmosphere conducive to lethal judgments.

In this essay, I analyze five "mechanisms of moral disengagement"[11]—the social and cognitive processes that distance people from the moral implications of their actions—as they function to facilitate the lethal behavior of capital jurors in our system of death sentencing. My implicit premise in this discussion is that, absent the mystification that generally surrounds capital punishment in our society and without the specific mechanisms of disengagement that separate capital jurors from the realities of their decisions, a system of democratically administered death sentencing would not be possible. In examining the psychological mechanisms that make it easier for people to act with the utmost punitiveness by condemning another to die, I heavily rely on and make special reference to data that my colleagues, graduate students, and I have collected over the last several years,[12] as well as data emerging from a new generation of social science studies concerning the death-sentencing process.[13]

I note at the outset that prospective jurors come to the courthouse having *already* been elaborately prepared to do legal violence in capital cases.[14] The distance that must be traversed by ordinary citizens who may soon be called on

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10. *See* David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 61-72 (1991); *see also* Charles Z. Smith, *The Death Penalty and Juveniles*, 2 KY. CHILDREN'S RTS. J. 1, 5 tbl.1 (1992) (compiling data on capital defendants who committed crimes as minors); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 848-51 (1990) (compiling data on the number of female offenders executed between 1632 and 1984).

11. Albert Bandura, *Mechanisms of Moral Disengagement*, *in* ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 161 (Walter Reich ed., 1989).

12. *See* Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 624-31 (1994) [hereinafter Haney et al., *Modern Death Qualification*]; Craig Haney & Mona Lynch, *Clarifying Life and Death: An Analysis of Instructional Comprehension and Penalty Phase Arguments*, 21 LAW & HUM. BEHAV. 575 (1997); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 420-32 (1994) [hereinafter Haney & Lynch, *Comprehending Life and Death Matters*]; Craig Haney, Lorelei Sontag & Sally Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149, 160-73 (1994) [hereinafter Haney et al., *Deciding to Take a Life*]; *see also* Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1230-31 (1995).

13. In particular, I have drawn heavily on the fine empirical work done by members of the Capital Jury Project, including the papers published in a recent law review issue devoted to their research, *see* Symposium, *Capital Jury Project*, 70 IND. L.J. 1033 (1995), and several previously published pieces, *see* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4-14 (1993); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19 (1993).

14. There is extensive literature on the ways in which the media provides members of the public with frameworks for understanding criminality that intensify both their emotional responses and the punitive crime control perspectives they bring to bear on these issues. For example, see generally 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); William Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177 (1994). *See also* George Gerbner, *Violence and Terror in and by the Media*, *in* MEDIA, CRISIS, AND DEMOCRACY: MASS COMMUNICATIONS AND THE DISRUPTION OF THE SOCIAL ORDER 94 (Marc Raboy & Bernard Dagenais eds., 1992).

to do the state's lethal bidding cannot be entrusted to the relatively brief, albeit intense, experience of the capital trial. Particularly in a political culture in which the death penalty has become such a useful "hot button" issue,[15] public sentiments are manipulated and misconceptions about capital punishment and capital defendants are instilled well in advance of jury service.[16] As I have written elsewhere, media stereotypes systematically misinform the public about the causes of violent crime and the characteristics of the persons who commit it and do so in ways that make death penalty imposition more likely.[17]

We also know that, despite the political prominence of the topic, the public continues to be systematically misinformed about the death penalty itself. In California, for example, my colleagues and I found that a majority of citizens believed that capital punishment should be justified primarily by the broader social purposes it serves rather than by simple retribution, but they were badly misinformed about how well or poorly it functions to achieve those purposes.[18] Thus, members of the public are not only systematically miseducated about the nature of the social problem of crime that drives their support for capital punishment, but they are also misinformed about the utility of the death penalty in solving it. In this way, a vast and elaborate system *outside* the courtroom, founded on misconception, supports the existence, operation, and increased popularity of the death penalty.

In addition, recent research on the death-sentencing process[19] suggests that our system of capital punishment also depends on the implementation of various legal procedures *inside* the courtroom that give decisionmakers even greater distance from the realities of their decisions. Mechanisms of moral disengagement distort the human context in which capital jurors operate, reframe the decisions they are called on to make in ways that rob them of their moral tenor, and minimize jurors' sense of personal agency and their awareness of the full range of consequences that flow from their actions. Such mechanisms are anathema to caring and compassion, and in this sense, they undermine and limit the effect of mitigating testimony in capital penalty trials and simultaneously facilitate and intensify the human punitive response. Thus, they represent what

15. *See* Sandy Grady, *Bush's Willie Horton Legacy Lives*, SAN JOSE MERCURY NEWS, Mar. 18, 1990, at C2 ("From Texas to Florida to California, governors' races show how shamelessly politicians adopted the message of the '88 Bush campaign: Fear of crime is the hottest button a politician can push.").

16. *See id.* (describing how, today, "[t]he electric chair has replaced the American flag as your all-purpose campaign symbol").

17. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 548-59 (1995). *See generally* Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, *in* READINGS ABOUT THE SOCIAL ANIMAL 120 (Elliot Aronson ed., 1988).

18. *See* Haney et al., *Modern Death Qualification*, *supra* note 12, at 626-28. We found that roughly three-quarters of a representative sample of adult Californians believed that the death penalty deterred murder and that two-thirds believed that people sentenced to life without parole eventually managed to get out of prison. *See id.* at 626 tbl.2. Moreover, half believed that the death penalty was not administered in a racially biased manner, and more than twice as many believed that the death penalty was cheaper than life in prison than believed the opposite. *See id.* None of these beliefs, however, is empirically correct.

19. For a brief list of some of these studies, see notes 12-13 *supra*.

might be called "structural aggravation," i.e., psychological factors that the law has built into the very process of death sentencing, serving to make death verdicts more likely, even though they do not explicitly appear in any capital statute.

Finally, in the course of this discussion, I often generically refer to "the law" and "the system of capital punishment" in ways that may seem to imply that they are monolithic entities with conscious and even conspiratorial characteristics. I intend to impute none of these qualities. Instead, I believe that the procedures and legal structures that I discuss have evolved over time as a function of accumulated decisions made by numerous legislators and judges who, because of their support for the death penalty, have chosen, preferred, and approved certain policies and practices and not others. Whether consciously or not, these decisionmakers understood that these procedures would ensure the viability of capital punishment by morally distancing jurors (among others) from the otherwise difficult psychological task that death sentencing presents to them.

I. DEHUMANIZATION AND CAPITAL VIOLENCE

The first mechanism of moral disengagement that assists jurors in overcoming the prohibition against lethal violence is the *dehumanization* of the capital defendant. It has become a virtual truism among capital defense attorneys that they must "bring the defendant to life so that the jury will want to let him live."[20] Joan Howarth has decried recent Supreme Court attempts to limit what she considers the real point of the individualized capital-sentencing hearings, "which is to permit the jury to hear about humanizing aspects of the defendant simply in order to be sure that the jury may see him as a human being."[21] But why? The answer lies in the comparative ease with which we are able to act destructively against presumably threatening targets who are not viewed as persons. As Albert Bandura put it, "People seldom condemn punitive conduct—in fact, they create justifications for it—when they are directing their aggression at persons who have been divested of their humanness."[22]

In this regard, writer Arthur Koestler once characterized the psychological dividing line between those who support the death penalty and those who do not as one "between those who have charity and those who have not. . . . The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace

20. For example, an early manual on capital defense published by the Southern Poverty Law Center emphasized that "an important way to convince the jury to permit the client to live is to show them that he is a human being." SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 8 (1981); *see also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983) (listing "portray the defendant as a human being" as the first element in an effective defense mitigation case).

21. Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1385 (1994).

22. Bandura, *supra* note 11, at 181.

of God, drop I."[23] But the "shuddering recognition of kinship" is something that can be *made* more or less apparent and significant depending on the way in which the capital defendant is depicted. Rituals of killing, whether sanctioned by the state (as in executions or war) or at an individual level, almost always involve the systematic dehumanization of the victim—the stripping of human qualities from the target of the lethal act. Preparations for war almost always seem to include some form of dehumanization of the enemy.[24] There are numerous historical examples, perhaps the most grotesque of which is the Nazi's dehumanization of their victims during the Holocaust.[25] And as Robin Williams observed, "[I]t is justifiable . . . to kill those who are monsters or inhuman because of their abominable acts or traits, or those who are 'mere animals' (coons, pigs, rats, lice, etc.), or those whose political views are unthinkably heinous (Huns, communists, fascists, traitors)."[26]

Because "[c]apital punishment is warfare writ small,"[27] it is not surprising to find this mechanism of moral disengagement at work in the death-sentencing process. Like the chronicles of war, the history of the death penalty is replete

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23. ARTHUR KOESTLER, REFLECTIONS ON HANGING 166-67 (1956). The Supreme Court quoted this passage in *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.17 (1968). Camus made a similar observation:

> There is a solidarity of all men in error and aberration. . . . [I]f justice has any meaning in this world, it means nothing but the recognition of that solidarity; it cannot, by its very essence, divorce itself from compassion. Compassion, of course, can in this instance be but awareness of a common suffering and not a frivolous indulgence paying no attention to the sufferings and rights of the victim. Compassion does not exclude punishment, but it suspends the final condemnation. Compassion loathes the definitive, irreparable measure that does an injustice to mankind as a whole because of failing to take into account the wretchedness of the common condition.

CAMUS, *supra* note 1, at 166.

24. For a general discussion of some of the psychological changes necessary to prepare for warfare, which, at its core, requires individual soldiers to somehow reverse the internal prohibition against killing, see J. GLENN GRAY, THE WARRIORS: REFLECTIONS ON MEN IN BATTLE 131 (1959); LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 156 (1995). *See also* Nevitt Sanford, *Dehumanization and Collective Destructiveness*, 1 INT'L J. GROUP TENSION 26, 34-36 (1971); Lloyd G. Stires, *The Gulf "War" as a Sanctioned Massacre*, 15 CONTEMP. SOC. PSYCHOL. 139-43 (1991); Ofer Zur, *Neither Doves nor Hawks: Marking the Territory Covered by the Field of the Psychology of Peace and War*, 12 CONTEMP. SOC. PSYCHOL. 89-100 (1987).

25. *See, e.g.*, DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996). Goldhagen stated:

> Since the Germans were helotizing the denizens of the camp world, they, not surprisingly, took many measures to dehumanize them. They robbed the prisoners of their individuality, both because this made it easier to treat them brutally and because they thought it appropriate, in conformity with the moral order of the world—for the Germans did not conceive of the prisoners as meriting the fundamental respect that the recognition of individual personalities confers.

Id. at 175; *see also* RICHARD LERNER, FINAL SOLUTIONS: BIOLOGY, PREJUDICE, AND GENOCIDE 45 (1992) (describing how the national socialist ideology in Nazi Germany designated Jews as "life not worth living" and "life not worthy of life").

26. Robin M. Williams, Jr., *Legitimate and Illegitimate Uses of Violence: A Review of Ideas and Evidence*, *in* VIOLENCE AND THE POLITICS OF RESEARCH 23, 34 (Willard Gaylin, Ruth Macklin & Tabitha M. Powledge eds., 1981). Williams' discussion of the ways in which violence is psychologically and socially transformed to become acceptable, justifiable, and "legitimate" is especially pertinent to the present analysis.

27. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1764 (1987).

with examples of the ways in which dehumanization has facilitated state-sanctioned killing. The tendency to extend mercy to those with whom we feel kinship was recognized in Thomas Green's study of jury nullification by thirteenth and fourteenth-century English juries.[28] He observed that

> [t]he leniency accorded villagers by their neighbors may be put down to favoritism, but given what jury behavior in homicide suggests, that may be just another way of saying that jurors thought the rules too harsh when forced to apply them to persons whom they knew well enough to identify with.[29]

Another example of dehumanization as a predicate to state-sanctioned violence comes from a shameful chapter in American history. Remember that de Tocqueville thought that the American criminal justice system was quite lenient *except* in its treatment of the slaves, whom white Americans failed to perceive not only as equals, but as human at all, and thus often summarily executed.[30] Others have commented on the ways in which the mistreatment of American slaves was facilitated, in part, by thinking of them as less than human.[31] Finally, studies of the modern execution ritual itself emphasize the degree to which elaborate bureaucratic routines are employed to ensure that "the condemned prisoner is literally and often completely dehumanized."[32]

Of course, there are important social and psychological dimensions to the process by which the dehumanization of capital defendants helps jurors to condemn them to death. Sociologists have long known that institutional mistreatment is facilitated by the dehumanization of patients and inmates. Harold Garfinkel termed the systematic process in institutional settings a "degradation

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28. *See generally* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985).

29. *Id.* at 63 (footnote omitted).

30. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 564-65 (George Lawrence trans., 1969). His logic is worth quoting at some length:

> When ranks are almost equal among a people, as all men think and feel in nearly the same manner, each instantaneously can judge the feelings of all the others . . . . It makes no difference if strangers or enemies are in question; his imagination at once puts him in their place. Something of personal feeling is mingled with his pity, and that makes him suffer himself when another's body is torn.
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> There is no country in which criminal justice is administered with more kindness than in the United States. . . .
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> . . . .
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> There is a circumstance which conclusively shows that this singular mildness of the Americans is chiefly due to their social condition, and that is the way they treat their slaves.
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> . . . .
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> It is easy to see that the lot of these unfortunates inspires very little compassion in their masters and that they look upon slavery . . . as an ill which scarcely touches them. Thus the same man who is full of humanity toward his fellows when they are also his equals becomes insensible to their sorrows when there is no more equality. It is therefore to this equality that we must attribute his gentleness . . . .

Id.

31. *See, e.g.*, WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

32. ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 4 (1990). *See generally* HORACE BLEACKLEY & JOHN LOFLAND, STATE EXECUTIONS VIEWED HISTORICALLY AND SOCIOLOGICALLY (1977); STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY (1992).

ceremony."[33] Erving Goffman described it as a "mortification ritual"—the killing of the individual self to be remade in the institutional image of something less than a full person.[34] Social psychologists have recognized that dehumanization is one of the most powerful cognitive processes that can distance people from the moral implications of their actions.[35] Herbert Kelman suggested that it is an especially powerful force in weakening moral prohibitions against violence because of its capacity to deprive both victim and victimizer of identity *and* community—the two things that individually and collectively bind us to a set of overarching principles that transcend individual need, will, or impulse.[36] And as Tom Tyler put it, "[D]enying victims full human status by dehumanizing them . . . prevents the moral issues which are normally raised when harm is being done to other human beings from being raised in a particular instance."[37]

Capital trials help jurors to build the psychological barriers between themselves and the defendant that facilitate dehumanization. Some of these barriers are structured into the trial process itself and derive from the formality that attaches to legal language and court proceedings. As Lynne Henderson noted, "[T]he 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."[38] And as Toni Massaro suggested, the courtroom setting is "hardly intimate or otherwise conducive to 'knowing' someone,"[39] such that anyone who advocates the empathetic understanding of a defendant in a legal proceeding "must favor radical restructuring of court procedures to make them more congenial to [such] 'contextual' justice."[40] Gerald López argued that normative legal storytelling inevitably "disfigure[s] individuals"[41] and "distort[s] . . . social arrangements" and their descriptions.[42] Yet emotional distancing and the denaturing effects of legal formality are even

33. *See* Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 421-24 (1956).

34. *See* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 14 (1961).

35. *See* Bandura, *supra* note 11, at 180-82; *see also* Albert Bandura, Bill Underwood & Michael E. Fromson, *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. IN PERSONALITY 253, 255 (1975) ("Dehumanizing the victim is . . . a further means of reducing self-punishment for cruel actions."); Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, *in* NEBRASKA SYMPOSIUM ON MOTIVATION 237, 296-99 (William J. Arnold & David Levine eds., 1969) (describing how dehumanization prevents persons from empathizing with those regarded as objects or numbers).

36. *See* Herbert C. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 J. SOC. ISSUES 25, 48-52 (1973).

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

38. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987).

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

40. *Id.* (footnote omitted).

41. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 43 (1992).

42. *Id.* at 59; *cf.* Massaro, *supra* note 39, at 2116 (noting that, although trial procedures permit a limited amount of personalizing storytelling, "all stories cannot dominate, and . . . law often privileges the stories of the powerful and drowns out the voices of the weak and marginal").

more damaging in death penalty cases because, in order to be fair to the individual whose life they hold in their hands, capital jurors *must* experience the defendant as a person.[43]

Mitigating the punishment by humanizing the defendant is a direct attempt to overcome the *de*humanizing aspects of the trial process and the case against the defendant that make lethal violence by the jury more likely. However, the capital trial process builds on preexisting stereotypes about the inhumanity of persons convicted of murder by delaying opportunities to humanize the capital defendant until the very last phase of the trial itself. As Linda Carter put it:

> While the state has often presented the evidence in the guilt phase that arguably makes the homicide especially heinous, the penalty phase is usually the defense's first opportunity to present to the factfinder the personal aspects of the defendant's life.
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> . . . [I]t would be an unusual case where the defendant's family history and character were introduced in the guilt phase.[44]

Until the sentencing phase—days, weeks, or even months into the process—most capital defendants sit mute in the courtroom, each one a kind of criminological Rorschach card onto which jurors may project their deepest fears and anger.

In addition, traditional guilt phase inquiries depict defendants as the agents of violence, never as its victims, further distancing them from the rest of us. However, in most cases, capital defendants have been victims as well as perpetrators of violence.[45] Yet while capital jurors sit in judgment of the defendant,

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43. Although our capital jurisprudence still occasionally pays homage to the importance of compassion, it often does nothing to ensure that this compassion is engendered in sentencing decisions. For example, Justice Blackmun openly wrote about mercy and compassion in capital jury decisionmaking: "[W]e adhere so strongly to our belief . . . [in the importance] of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value." California v. Brown, 479 U.S. 538, 562-63 (1987) (Blackmun, J., dissenting). Yet this had become a distinctly minority view on the Court by the time Justice Blackmun expressed it. *Cf.* Howarth, *supra* note 21, at 1363 ("Capital jurisprudence, like other areas of law, aspires to a masculine version of itself, which consists of rule-based, distanced, and reasoned decisionmaking. The ever-present contextual, proximate, and emotional aspects of the decision to kill are vehemently hidden and disowned within the doctrine."). Indeed, Howarth argued that "[t]he feminist call to revalue and reincorporate compassion or mercy into law implicates a core concern of penalty adjudication." *Id.* at 1399 (footnotes omitted).

44. Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 101 (1987). One study of the era preceding bifurcated capital proceedings illustrates the tensions that once surrounded the introduction of *any* humanizing background information in death penalty trials. *See generally* Joel F. Handler, *Background Evidence in Murder Cases*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 317 (1960). Handler noted that, in nineteenth-century California cases, the courts permitted the introduction of aggravating background evidence whose "purpose . . . was to influence the jury in favor of the death penalty," but "[w]hen it came time for the defendants to introduce background evidence in mitigation of punishment, the California courts became restrictive." *Id.* at 318.

45. *See* Haney, *supra* note 17, at 559-74 ("[M]any capital defendants share[ ] a pattern of early childhood trauma and maltreatment."); *see also* Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on the "Mere Extinguishment of Life,"* 16 STUD. L., POL. & SOC. 3, 11-12 (Austin Sarat & Susan S. Sibley eds., 1997) (providing a detailed social historical account of the traumatic and troubled life of Robert Harris—the first capital defendant put to death in California in the post-*Furman* era).

the tragic logic of his aggression remains hidden from them until the very last moment in the trial.[46]

Thus, the structure of the capital trial facilitates the dehumanization of the defendant. The prolonged period of time during which the jury is encouraged to perceive the defendant only as an autonomous agent of violence acting outside of any historical context dehumanizes him; by the time defense attorneys are afforded a full opportunity to begin the process of humanization, jurors' attitudes and impressions have crystallized and rigidified. Not surprisingly, then, researcher Marla Sandys found that, at the conclusion of the guilt phase and before any penalty phase testimony had been presented, twice as many capital jurors believed that the defendant should be sentenced to death as believed that life was the more appropriate verdict.[47]

Moreover, the ordering of issues placed before the capital jury not only impedes the humanization of the defendant, but it also creates an implicit contrast between the violence of the defendant and the violence the jury is later invited to authorize. Research tells us generally that, whenever events are compared in sequence, "the first one colors how the second one is perceived and judged" so that, in contexts like these, the more flagrantly inhumane the defendant's initial acts, the more "one's own destructive conduct will appear trifling or even benevolent."[48] In this way, capital jurors—especially those with qualms about the death penalty—can become morally disengaged from the human consequences of their sentencing verdict due to an implicit and sequential comparison between the defendant's actions and their own.

Another way in which capital jurors are disengaged from the humanity of the defendant and the human and moral dimensions of their own decision involves prosecutorial strategy. In the typical capital trial, prosecutors encourage jurors to make their ultimate sentencing decision on the basis of isolated, albeit tragic and horrible, moments of aggression that they offer, in the absence of any other information, to represent the defendant's entire life and worth as a person. This perfectly understandable and highly effective strategy is employed by advocates of death sentences to project the alleged essence of the defendant into the snapshot that has been taken of his violence. From this perspective, the full measure of the person is to be restricted to this field of isolated violent acts.[49]

On the other hand, fairly clear constitutional case law requires that the crime alone should *not* be the exclusive basis for the jurors' life-and-death decision.[50] The constitutional mandate that jurors consider the defendant's back-

46. *See* notes 97-105 *infra* and accompanying text. Indeed, capital jurors are not even supposed to contemplate the defendant as the victim of the execution they are being asked to bring about. *See* notes 148-164 *infra* and accompanying text.

47. *See* Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1192-93 & tbl.2 (1995).

48. Bandura, *supra* note 11, at 171.

49. For an insightful discussion of this issue, see generally Sarat, *supra* note 13.

50. *See* Penry v. Lynaugh, 492 U.S. 302, 319-20 (1989) (concluding that a defendant's sentence should be a "moral response to [his] background, character, and crime" (footnote omitted)); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (rejecting the State's mandatory death sentence and reaffirming the principle that "justice generally requires consideration of more than the particular acts by which

ground and character has been operationalized through the creation of a separate penalty trial and judicial instructions that broaden the nature of the jurors' decisionmaking process so as to include many other factors. Unfortunately, as I discuss below, in practice, these procedural reforms still have too little actual impact on the atmosphere of moral distancing in which capital jurors are otherwise immersed.

If nothing else, a judge's capital-sentencing instructions should clearly frame the broadened scope of the penalty phase inquiry so that capital jurors understand that the defendant's entire life lies at the heart of their sentencing decision. Yet research indicates that these instructions fail to convey this message. In fact, they appear to contribute further to the jurors' narrow crime-focus by failing to clarify *what else*, such as the background and character of the defendant, should be taken into account.

> The seemingly inexorable (and perhaps unintended) narrowing of relevant considerations to the circumstances of the crime and little else likely stems from the relative ease with which legislative judgments and jury decision making can be precisely focused on crime characteristics, as compared to the more difficult, elusive, and ultimately discretionary inquiry into the moral nature and essential worth of the person whose life stands in the balance.[51]

In so focusing, the instructions themselves encourage jurors to ignore the defendant's personhood, further disengaging them from the moral implications of their decision.

The opportunity to put the defendant's life in context—to give it substance, texture, history, and a set of connections to other lives—is first withheld until the final stage of the trial (when it may be too late) and then denied the authoritative imprimatur of the judge's instructions, which might provide the clarity and legitimacy needed to make the opportunity meaningful. The poor timing of the defense case in mitigation, the fact that it would require most jurors to perform the difficult work of essentially changing their minds about the defendant, and the heavy crime-focus of the penalty instructions that follow may help to explain why the Capital Jury Project found that the penalty trial was the least well-remembered stage of the entire process for capital jurors.[52] Half of the jurors studied had actually made up their minds about the appropriate penalty

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the crime was committed"); *see also* Spaziano v. Florida, 468 U.S. 447, 460 (1984) (holding that the State "must allow the sentencer to consider the individual circumstances of the defendant"); Eddings v. Oklahoma, 455 U.S. 104, 113-12 (1982) (holding that, as a matter of law, the "sentencer" may not "refuse to consider . . . any relevant mitigating evidence"); Bell v. Ohio, 438 U.S. 637 (1978) (reversing a death sentence because the statute precluded consideration of various aspects of defendant's background); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (concluding that "an individualized decision is essential in capital cases").

51. Haney & Lynch, *Comprehending Life and Death Matters*, *supra* note 12, at 430. Failing to assist jurors in understanding the causes of the crime in question can compromise not just the reliability of their verdict, but—especially in highly publicized cases—decisions of the public at large. Absent a meaningful discussion of motivation that includes context and history, jurors are left with a sense that crime is random, unpredictable, and unpreventable. Confronted with inexplicable violence, capital jurors are more likely to impose the death penalty. And a society confronted with similarly incomplete narratives is more likely to become paranoid and punitive.

52. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1086-87 & tbl.2 (1995).

once they had convicted the defendant of the guilt phase crime.[53] Unsurprisingly, in this context, roughly forty percent of the capital jurors believed that the heinousness of the crime *compelled* a sentence of death.[54]

One final consideration helps to explain the above data and, in many cases, adds another morally disengaging dimension to the capital trial. An effective case in mitigation—one that genuinely humanizes a capital defendant—requires deep commitment to one's client, a moderately sophisticated grasp of human psychology, and hundreds of hours to assemble. Yet typically impoverished capital defendants are too frequently represented by inadequately compensated, inexperienced, and sometimes incompetent court-appointed attorneys who are unable or unwilling to gather and present this kind of evidence.

Experienced capital litigators have repeatedly warned that the lack of training and experience in finding and developing "humanizing" testimony, as well as the time and expense that doing so entails, means that little if any such evidence is effectively gathered, prepared, or presented by the defense in far too many penalty trials.[55] As Carol and Jordan Steiker summarized, "[I]t 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."[56] States that fail to provide the necessary training and resources for attorneys, investigators, and experts to pursue this information and that refuse to develop and enforce legal mandates that require them to do so virtually guarantee that capital defendants will have their lives ended by juries never given a chance to understand them. These juries will be morally disengaged from the defendant's humanity by the absence of the vital information that the defense counsel failed—for lack of skill, effort, or resources—to present to them.

In this context, consider the fairly remarkable data the Capital Jury Project assembled showing that capital jurors from a number of states perceived prose-

53. *See id.* at 1089 & tbl.5.

54. *See id.* at 1091 & tbl.7.

55. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) ("[P]eople accused of capital crimes are often defended by lawyers who lack the skill, resources, and commitment to handle such matters."); 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, 680-81 (1990) ("Poverty . . . may result in a less than vigorous defense at a trial where the death penalty is imposed." (footnote omitted)); 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, 861 (1992) ("[O]ften whether someone receives the death penalty is determined not by whether he committed the worst crime but whether he was assigned the worst lawyer . . . ."); Richard H. Burr III, *Representing the Client on Death Row: The Politics of Advocacy*, 59 U.M.K.C. L. REV. 1, 2-16 (1990) (discussing the unfair obstacles facing capital defendants); William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 277-78 (1990-91) (discussing the increased importance and complexity of, and the effort that must be invested in, the capital penalty trial); Goodpaster, *supra* note 20, at 301-05 (presenting two contrasting cases to show that the incompetency of defense counsel at the penalty phase is a "major cause of unequal treatment" of capital defendants); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 801-10 (1986) (describing a number of egregious instances where defense counsel acted ineffectively).

56. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 421 (1995) (footnote omitted).

cutors to be significantly better than defense attorneys in communicating and preparing their case.[57] Prosecutors were also seen as more committed to their case and fighting harder at *both* the guilt and punishment stages of the trial.[58] It is difficult to account for these findings except as a partial function of the disparity in resources that characterizes capital cases.[59]

Intensifying the effect of this perceived disparity in ability and the actual disparity in resources is the fact that the prosecution's implicit and overarching "theory" of the typical capital case generally comports with the jurors' stereotypical beliefs about crime and punishment. The notion that a 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 that capital jurors (like most citizens) have been conditioned to accept uncritically.[60] Add to this the well-documented tendency of most people to commit what psychologists have termed the "fundamental attribution error"—providing causal explanations for the behavior of others in largely dispositional or personal as opposed to situational or contextual terms.[61] As a result, the typical juror's preexisting framework for understanding behavior is highly compatible with the basic terms of the typical prosecutorial narrative.

A prosecutor, then, literally speaks the capital jurors' language, whereas the defense attorney must overcome the jurors' preexisting beliefs in order to educate them to think in unfamiliar ways about the nature of fair and just punishment. As Henderson noted, "While the defense will seek to have the jury empathize with the defendant, the defense narrative—unattached to legal form—is a difficult one to convey, and the legalistic formula can provide sanctuary from moral anxiety."[62] And as Samuel Pillsbury put it:

> The prosecution will tell a story designed to provoke anger; the defense will respond with one to evoke sympathy. The sentencer must choose between or among them. As the law now stands, this gives the prosecution a significant advantage at the punishment stage. The law's sanction of retribution, and the fact of criminal conviction, give weight and legitimacy to the prosecution's

57. *See* Bowers, *supra* note 52, at 1098-1101 & tbl.12.

58. *See id.* at 1100.

59. The fact that the Capital Jury Project did not find as large a disparity with respect to perceived resources may be a function of the fact that the defense's disadvantage was not as obvious inside the courtroom as outside, as well as the fact that the jury could not be expected to anticipate or understand all of the things that the defense could or should or might have done (but did not) if they had been given the necessary resources with which to do them. *See id.*

60. *See* Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the "Formative Era,"* 6 LAW & HUM. BEHAV. 191, 195-99 (1982).

61. A brief but cogent summary of much of the research documenting this tendency is presented in LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 125-44 (1991). In conventional social psychological terms, the defense penalty phase presentation must somehow correct and reverse the fundamental attribution error by educating jurors about the historical, contextual, and situational determinants of the defendant's behavior. The prosecution's approach typically is to embrace and build on this error.

62. Henderson, *supra* note 38, at 1590 (footnote omitted).

> angry appeal. The defense needs a similar, legally authorized, emotional appeal to check that anger, to keep the debate within moral bounds.[63]

Thus, the disparity in resources worsens an already disadvantageous position. Data collected directly from capital jurors highlighting greater prosecutorial effectiveness indicate that defense attorneys have much to learn about humanizing defendants and keeping the sentencing debate within moral bounds.[64] In the absence of explicit legal authorization for a defense-oriented emotional appeal, defense attorneys have to try much harder than prosecutors to reach persuasive parity. But they also need much more training and trial-related resources if they are consistently to accomplish the task of morally engaging capital jurors.

Indeed, some commentators have argued that the defense case in mitigation is so critical to the fair administration of the death penalty that courts should *appoint* attorneys especially to develop and present it in certain cases[65] and that appellate courts should apply heightened standards of review when examining ineffective assistance claims arising from the penalty phase of the capital trial.[66] Given the importance of mitigation testimony in deciding the fate of a capital defendant, one may wonder why we do not *require* its presentation before any jury is permitted to reach a death verdict. Indeed, in many jurisdictions, judges would not think of sentencing a criminal defendant to prison, even for a modest term of confinement, before reviewing a reasonably comprehensive and presumably carefully prepared "presentence report." Yet capital juries in these same jurisdictions can be called on to sentence a defendant to death with much less information at their disposal. At a minimum, trial courts could require a meaningful showing that defense attorneys exercised due diligence in attempting to obtain such information and that they employed a coherent and defensible rationale in deciding not to present it (if, indeed, such a rationale ever exists).

II. VIOLENCE AGAINST THE DEVIANT, DIFFERENT, AND DEFICIENT

The second mechanism of moral disengagement contributing to the violence of the capital jury closely relates to the first, but is more narrowly drawn. Human beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves. Sobering histori-

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63. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 697 (1989).

64. *See* notes 52-54 *supra* and accompanying text.

65. *See* Carter, *supra* note 44, at 142-51. The failure to present mitigating evidence at trial can render appellate review meaningless: "Without a record containing mitigating evidence, the courts cannot conduct more than a pro forma review of the balance between aggravating and mitigating circumstances in an individual case." *Id.* at 127.

66. *See* Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 156-57 (1993) (arguing that because a defendant's life is placed at risk by errors made during the sentencing phase, appellate courts should be reluctant to use "harmless error" doctrine in their review); Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 486 (1987) (calling for the application of strict procedural safeguards by appellate courts when a capital defendant claims ineffective assistance of counsel).

cal accounts document the ways in which "scientific" attempts to prove defect or deviance have served as a prelude to mistreatment and even extermination.[67] And in wartime, when the distinguishing characteristics of foreign enemies can be exaggerated to emphasize their fundamental difference from the rest of us, it is unnecessary to depict them as less than fully human to facilitate killing them.[68] Indeed, the notion of a "foreign menace" has been used in numerous political campaigns to create false unities among citizens, unities which are founded on little more than common hatred of the different "other."

Illustrations of this mechanism of disengagement can be found in the popular media, as well as the criminal justice system. Both on-screen dramas and real-life trials typically depict villians as deviant in as many ways as possible.[69] Indeed, in the case of serious crime, this mechanism simplifies the difficult task of assigning moral blame and "condemn[ation] beyond what is deserved."[70] As Pillsbury observed:

> When called upon to judge a stranger who is responsible, to some extent, for a serious harm, the decisionmaker's temptation is to ignore moral complexities and declare the person and his act entirely evil. The decisionmaker labels the offender a Criminal, remaining indifferent to the person (he being capable of both good and evil) behind that label. In this way, the offender is designated as "other." The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person. We 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.[71]

Similarly, those persons seen as seriously deficient along some important dimension, or defective in some seemingly fundamental way, are more easily mistreated and targeted for violence. Historically, the depiction of criminals as defective has always facilitated their mistreatment at the hands of the criminal justice system, and the more "scientifically" the defect could be documented,

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67. *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 25 (1981) (analyzing the quantification of intelligence and "the use of these numbers to rank people in a single series of worthiness, invariably to find that oppressed and disadvantaged groups—races, classes, or sexes—are innately inferior and deserve their status"); LERNER, *supra* note 25, at 45-49 (describing how the Nazis employed both doctors and scientists to justify the systematic extermination of the Jewish people); ROBERT N. PROCTOR, RACIAL HYGIENE: MEDICINE UNDER THE NAZIS 3 (1988) (exploring the "place of science, especially biomedical science, under the Nazis, with particular reference to the functions of apology and social control").

68. For discussions of how this process operated among U.S. soldiers during and after the Vietnam War, see ROBERT JAY LIFTON, HOME FROM THE WAR: VIETNAM VETERANS: NEITHER VICTIMS NOR EXECUTIONERS 197-216 (1973); Seymour Leventman & Paul Camacho, *The "Gook" Syndrome: The Vietnam War as a Racial Encounter*, *in* STRANGERS AT HOME: VIETNAM VETERANS SINCE THE WAR 55, 61-66 (Charles R. Figley & Seymour Leventman eds., 1980); Chaim F. Shatan, *Stress Disorders Among Vietnam Veterans: The Emotional Content of Combat Continues*, *in* STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH, AND TREATMENT 43, 46-51 (Charles R. Figley ed., 1978).

69. *See, e.g.*, Haney & Manzolati, *supra* note 17, at 121-24.

70. Pillsbury, *supra* note 63, at 692.

71. *Id.* (footnotes omitted); *see also* KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND 157-68 (1995) (arguing that the punitive consensus that now dominates public attitudes towards crime and punishment can be explained, in large part, by an inability to empathize or perceive commonalities with persons who have committed crimes and view them, instead, as having moved "beyond the pale").

the greater the mistreatment.[72] Thus, the easier it is to derogate defendants, the easier it is to treat them harshly. Both sides of this dynamic help to explain the American public's fixation with the potential biological and genetic basis of criminality: The belief that criminals are born defective and therefore different facilitates society's harsh treatment of them.

There are numerous instances of these mechanisms at work in the legal system itself. For example, Martha Duncan's analysis of the "metaphors of filth,"[73] which she argued permeate the criminal justice system, cited thirty-four appellate cases in which the prosecutor's reference to the defendant as "filth," "dirt," "slime," or "scum" was at issue[74] and discussed the various purposes served by portraying criminals in these ways.[75] Among other things, she explained that the use of this kind of imagery cognitively reinforced the separation of the "criminals" from the "noncriminals" who employed the terminology.[76] Similarly, Louis Masur's study of the death penalty in the United States between the Revolutionary and Civil Wars noted that "foreign-born convicts accounted for a significant percentage of persons executed in America."[77] Masur offered this explanation: "Juries most likely found it easier to convict outsiders—defined as foreigners, minorities, and those literally not from the

72. *See* Haney, *supra* note 60, at 199-201 (describing the ways in which psychological pseudoscience facilitated the expansion of the criminal justice system, especially the prison system in the United States during the nineteenth century). The public's fixation with the possible biogenetic basis of criminality is shared, I am afraid, by all too many of my colleagues in psychology. For an example of the resurgence of biological and genetic criminology during the recent rise of punitive justice, see Sarnoff A. Mednick, William F. Gabrielli, Jr. & Barry Hutchings, *Genetic Influences in Criminal Convictions: Evidence from an Adoption Cohort*, 224 SCIENCE 891, 893 (1984) ("[S]ome factor transmitted by criminal [biological] parents increases the likelihood that their children will engage in criminal behavior."). *See also* STANTON E. SAMENOW, INSIDE THE CRIMINAL MIND 21, 23 (1984) ("[W]e and the criminal are very different. *Criminals think differently.*"); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 27 (1985) ("[O]n the average, offenders differ from nonoffenders in physique, intelligence, and personality."). For a truly extreme example that even most psychologists reject (although consistently publish), see J. Philippe Rushton, *Race and Crime: International Data for 1989-1990*, 76 PSYCHOL. REP. 307, 312 (1995) (opining that crime rates are highest in countries with predominantly African populations because, as the races mixed and "African populations evolved into Caucasoids and Mongoloids, they did so in the direction of larger brains and lower levels of sex hormones, with concomitant reductions in aggression").

73. Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1994).

74. *See id.* at 792 & n.341 (referring readers to a list of 34 cases).

75. *See id.* at 793.

76. *See id.* at 798. Duncan also pointed to the early 1840s example of the progressive prison reformer Alexander Maconochie, who was repudiated by the British Crown because his accomplishments revealed the humanity within the hard-core prisoners who were consigned to what once had been a hellish prison on Norfolk Island. According to Duncan, "By undermining Norfolk Island's ability to function as a symbol of hell, Maconochie challenged the noncriminals' dualistic vision of the world and, with it, their dialectically-determined identity as the pure noncriminals, the untainted remnant." *Id.* at 777. Duncan also underscored the psychologically threatening nature of attempts to bridge this divide: "To appreciate the profundity of this challenge, one has only to remember Victor Hugo's character Javert in *Les Miserables*. Toward the end of the novel, forced to recognize the noble qualities in his criminal prey, Javert despairs of life's meaning and drowns himself." *Id.* at 777 (footnote omitted).

77. LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 38 (1989).

immediate community—of capital crimes, and governors felt less pressure to commute the death sentence of those with few ties to the community."[78]

This mechanism of moral disengagement—creating, highlighting, and exaggerating difference and transforming it into defect and deficiency—stands at the core of the chronic racism that has plagued our criminal justice system throughout its history,[79] including the legacy of discriminatory death sentencing.[80] As Pillsbury observed, "In a society such as ours, where race is an obvious and deeply-rooted source of social differences, race presents the most serious otherness problem."[81] Yet the structure of capital trials facilitates and even encourages race-based otherness. Death-qualified juries are less likely to share the racial and status characteristics or the common life experiences with capital defendants that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight.[82] If "[d]ifferences in group membership between punisher and punished increase the risk of nonmoral judgment,"[83] then death qualification increases the likelihood that these kinds of judgments will be made in capital trials.

Of course, few capital jurors will ever truly know—by experience, identification, or intuition—the harsh realities of capital defendants' lives. Yet the only way to prevent the "otherness" of capital defendants, which is intensified by initial inferences about the internal causes of their criminality, from facilitating the jury's moral disengagement is by placing their radically different behavior and lifestyles in a context that allows them to be better understood. Unfortunately, our criminal law generally eschews explicit consideration of personal background in its normative decisionmaking processes, and evidence

78. *Id.* at 39.

79. *See generally* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (examining the role played by race in the adjudication of guilt in criminal trials); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (discussing the existence of a "blindspot" within the laws of criminal procedure that fails to fully address the specter of racial discrimination in criminal trials); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (reconsidering the doctrine of "discriminatory purpose," which requires those who are "challenging the constitutionality of a facially neutral law to prove racially discriminatory purpose"); William J. Sabol, *Racially Disproportionate Prison Populations in the United States: An Overview of Historical Patterns and a Review of Contemporary Issues*, 13 CONTEMP. CRISES 405 (1989) (finding a gross disparity in the level of black imprisonment that is unaccounted for by differential arrest rates); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992) (finding that a defendant's race has a significant effect on sentencing decisons).

80. *See generally* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183 (1991); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

81. Pillsbury, *supra* note 63, at 707.

82. *See* Fitzgerald & Ellsworth, *supra* note 9, at 34-39; Haney et al., *Modern Death Qualification*, *supra* note 12, at 631.

83. Pillsbury, *supra* note 63, at 692.

about social context and situation typically plays an extremely limited role in traditional guilt phase inquiries.[84]

In all but the rarest of guilt phase cases, jurors are not permitted to consider the influence of social background and the press of life circumstance as they have impacted a criminal defendant. Even in capital penalty trials, where the scope of potentially admissible evidence is in theory significantly broadened, capital jurors will not only encounter but also be encouraged to dwell on the nature of the defendant's crime long before they learn anything about the context in which it occurred or the life history of the person who committed it. Thus, the legal process is ill-suited to accomplish the task of bridging the gap between defendants and those who judge them. It greatly constricts what Henderson called "empathetic narratives," which describe "concrete human situations and their meanings to the persons affected in the context of their lives."[85]

Critics of this "call to empathy" worry that it will elevate a "more individualized justice" above the generalized principles that characterize the rule of law.[86] Yet individualized justice is supposed to be the touchstone of constitutional capital penalty decisionmaking. As Pillsbury noted, "The 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."[87] Although "[l]egal decisions and lawmaking frequently have nothing to do with understanding human experiences,"[88] the failure to overcome this bias in capital penalty trials can, and regularly does, have fatal consequences. Yet as Howarth has argued, although the Supreme Court once recognized and protected "the obvious correlation between a decisionmaker's perceived connection to the defendant and the reluctance to impose death,"[89]

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84. *Cf.* Craig Haney, *The Good, the Bad, and the Lawful: An Essay on Psychological Injustice*, *in* PERSONALITY THEORY, MORAL DEVELOPMENT, AND CRIMINAL BEHAVIOR 107 (William S. Laufer & James M. Day eds., 1983). Sometimes this poses another dilemma for capital defense attorneys. The limited scope of guilt phase mental defenses requires extensive reliance on psychiatric opinion and the corresponding use of medical terminology and diagnostic labels. Yet this kind of labeling can reduce very complicated human beings to disembodied psychiatric categories. Such categorization is at odds with penalty phase efforts to ensure that jurors do not overemphasize or exaggerate the defendant's apparent defects or fundamental differences and thereby further distance themselves from him.

Much as they are encouraged to do with the capital crime itself, jurors can morally disengage from the defendant by substituting the disorder for the person. The most extreme example of this occurs when prosecutors encourage jurors to substitute an "antisocial personality" for the personhood of the defendant, robbing him of many human qualities with which jurors might otherwise identify and instead putting in their place a host of diabolical traits that typically imply, without benefit of proof, an evil "inner self" that extends far beyond any overt behavior.

85. Henderson, *supra* note 38, at 1592.

86. *See* Massaro, *supra* note 39, at 2100.

87. Pillsbury, *supra* note 63, at 669.

88. Henderson, *supra* note 38, at 1574. Indeed, as Lewis Sargentich suggested, empathy or sympathy may be less likely to occur spontaneously in a multicultural society like ours because of the "easier acceptance of one's position as a spectator and a candid recognition of the limits of one's ability to enter into the experiences of another." Lewis Sargentich, Note, *Sympathy as a Legal Structure*, 105 HARV. L. REV. 1961, 1967 (1992). If true, this would provide an additional argument for proactive legal mechanisms that encourage or better enable capital jurors to overcome their "spectator" position and connect to the formative experiences of the defendant.

89. Howarth, *supra* note 21, at 1382.

current doctrine serves to "increase the distance between the decisionmaker and the accused" and effectively "send the capital defendant further and further into the distance."[90] Nonetheless, if capital jurors are to avoid the disengagement from defendants that comes from exaggerating the differences between them, then defendants must somehow be shown in settings or situations familiar to jurors.

Thus, the starting point for compassionate justice becomes the recognition of basic human commonality—an opportunity for capital jurors to connect themselves to the experiences, moral dilemmas, and human tragedies faced by the defendant. For example, in her powerful book about murder and the media,[91] Wendy Lesser discussed *The Thin Blue Line*[92] and filmmaker Errol Morris' portrayal of the life of David Harris, who was presumably the real killer in the case of *Adams v. Texas*.[93] As Lesser explained:

> [David] is given his moment of sympathy in the movie, when Errol Morris, against a quick montage of old family snapshots of two towheaded boys, allows David to describe the accidental childhood drowning of his brother and his own subsequent sense of survivor's guilt. This is offered neither as psychiatric explanation nor as mitigating circumstance; it is simply offered as a fact about David, one that enlarges our view of him and momentarily makes us feel something for him.[94]

Of course, our view of David is enlarged by giving him a sympathetic past. But what is sympathetic is not only that David may have been shaped by this early traumatic event—the psychiatric explanation that Lesser avows—but that he has experienced an event and accompanying emotions with which we can identify. This not only makes us "feel something for him," it also makes us feel something positive (for surely we have felt something negative for him all along). This *is* mitigation—not of the crime, but of the person—and whenever a capital penalty trial fails to do at least this, it encourages a basic distancing from the moral task at hand.

At times, a capital defendant's experiences may seem too foreign to provide the typical juror with the basis for any common understanding. For example, many capital defendants have confronted chronic poverty, extraordinary instability, and, for some, almost unimaginably brutal and destructive mistreatment over which, for most of their lives, they have been granted little or no control.[95]

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90. *Id.*

91. *See generally* WENDY LESSER, PICTURES AT AN EXECUTION: AN INQUIRY INTO THE SUBJECT OF MURDER (1993).

92. *The Thin Blue Line* was an American Playhouse production directed by Errol Morris and released in 1988. The film was instrumental in winning the release of the petitioner in *Adams v. Texas*, 448 U.S. 38 (1980), when it revealed prosecutorial misconduct in the case and included a confession by the person who was apparently the real killer. For a discussion of Adams' case and the circumstances of his eventual release after 12 years of confinement on death row, see MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 60-76 (1992).

93. 448 U.S. 38 (1980); *see also* LESSER, *supra* note 91, at 93-99.

94. LESSER, *supra* note 91 at 91.

95. *See, e.g.*, Haney, *supra* note 17, at 562-78 (discussing the effects of poverty, abuse, abandonment, and neglect on the lives of capital defendants).

Many of these experiences are unrecognizable to the average person and, absent attempts to teach a different lesson, will instead convince jurors that the defendant has been rendered fundamentally and irredeemably different from them. After all, the defendant's mere presence in a capital trial means that he not only confronted these experiences, but that he eventually succumbed to them, with tragic and destructive consequences for others as a result. Yet the defendant's final destructive acts may be the culmination of failed struggles against enormous odds or a lifetime of attempts to overcome extraordinary barriers, disadvantages, and otherwise overwhelming circumstances. Jurors deserve the opportunity both to understand these struggles and to appreciate their significance in judging the life before them. If they are precluded from seeing the ways in which lapses into lethal violence, outbursts of destructive anger, or long-term predatory habits often have compelling traumatic histories and psychologically powerful contexts associated with them, then they will proceed distanced and alienated from the life they are called upon to judge.[96]

To be sure, "[t]he best way to draw the decisionmakers closer to the defendant is to tell them his story."[97] Context, then, helps attorneys "to present to the penalty jurors a portrait of their client that humanizes him: that is, makes connections between the client and the jurors."[98] Recently published autobiographic[99] and ethnographic[100] accounts of the structural disadvantages of race and class underscore many of the difficulties that capital defendants and others like them have confronted, as well as the prevalence of violence as an all too common adaptation to these disadvantages.[101] Because capital jurisprudence

96. An accurate rendering of these life struggles requires an amassing of the kind of elaborate contextualizing information that, as I have suggested, the criminal law disfavors and finds so unwieldy to address. *See* Henderson, *supra* note 38, at 1593-1649 (arguing that the Supreme Court often empathizes with petitioners who have suffered because of their race, class, or gender, but rarely expresses any sympathy for those who have committed repugnant acts); Howarth, *supra* note 21, at 1381-94 (discussing the vast emotional and psychological distances between the jury and the capital defendant); Massaro, *supra* note 39, at 2106-20 (calling for the abandonment of a too rigid adherence to the rule of law and the adoption of greater judicial discretion that would lead to greater individualized justice); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1649 (1990) (noting that context "represents the acknowledgment of the situatedness of human beings who know, argue, justify, judge, and act" and arguing that the acknowledgment of "the human situation and the location of a problem in the midst of communities of actual people . . . is a precondition to honesty in human judgments").

97. Howarth, *supra* note 21, at 1383 (citation omitted).

98. *Id.*

99. *See generally* NATHAN MCCALL, MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA (1994) (describing the continuing struggle to overcome the hardships of the inner city); LUIS J. RODRIGUEZ, ALWAYS RUNNING, LA VIDA LOCA: GANG DAYS IN L.A. (1993) (tracking the personal experiences of Latino gang members in South Central Los Angeles); BRENT STAPLES, PARALLEL TIME: GROWING UP IN BLACK AND WHITE (1994) (recounting the life of a black family living in Roanoke, Virginia).

100. *See generally* ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY (1990) (tracing the evolution of racial division within a small community); ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991) (discussing the experience of two young brothers living in Chicago housing projects); Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 81-94.

101. *See generally* Nancy F. Dubrow & James Garbarino, *Living in the War Zone: Mothers and Young Children in a Public Housing Development*, 68 CHILD WELFARE 3 (1989) (noting that children who grow up in urban housing projects are exposed to traumatic violence comparable to children living

fails to *require* attorneys to educate jurors about these contexts and since many states correspondingly fail to provide the resources to enable defense counsel to explore these issues adequately, capital trials often obscure the common human connection between jurors and defendants and implicitly highlight differences in ways that make them appear essential rather than situational, thus encouraging jurors to understand variations in behavior in terms of the defendant's fundamental defectiveness.

Ironically, at times, the very social conditions and experiences that have rendered the behavior of capital defendants difficult for jurors to comprehend or understand are those that our society imposes on them in juvenile justice and adult penal institutions. Many capital defendants have been inadequately or badly treated by juvenile justice institutions, which lack the resources, time, and expertise with which to reverse rather than worsen the effects of years of preexisting trauma.[102] For others, adult "correctional" institutions provide the past context that has shaped present violent behavior. As one notorious prisoner prophetically wrote, "I feel that if I ever did *adjust to prison*, I could by that alone never adjust to society. I would be back in prison within months."[103] Many capital defendants have moved through a progression of such "adjustments" and present this paradox of institutional control: They have learned to adapt too well to the habits of prison life so that its norms, routines, and ways of being are so deeply ingrained that they cannot be relinquished, no matter how dysfunctional they prove to be for life in free society.[104] Again, the failure of capital penalty trials to explicitly address the contextual explanations for individual differences in violent behavior, including the adverse effects of institutionalization and other social historical patterns that help to explain such conduct, gives capital jurors little choice but to morally disengage by focusing on the differences between themselves and the defendant.[105] Once having done so, prohibitions against lethal violence are relaxed.

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in war zones and may suffer the same kinds of psychological aftershocks requiring the same kinds of treatment); William B. Harvey, *Homicide Among Black Adults: Life in the Subculture of Exasperation*, *in* HOMICIDE AMONG BLACK AMERICANS 153 (Darnell F. Hawkins ed., 1986) (describing how numerous social pressures, including a pervasive sense of hopelessness, contribute to high crime rates among African American communities within the inner city). For a useful summary of some of this literature and a discussion of some community-based interventions that appear to reduce these harms, see Michael B. Greene, *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth*, 39 CRIME & DELINQ. 106, 107-21 (1993).

102. *See* Greene, *supra* note 101, at 11-21; Edward Ziegler, Cara Taussig & Kathryn Black, *Early Childhood Intervention: A Promising Preventative for Juvenile Delinquency*, 47 AM. PSYCHOLOGIST 997, 998-1002 (1992) (discussing a number of early intervention programs designed to reduce the amount of juvenile delinquency).

103. JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 14 (1981).

104. *See, e.g.*, Lynn Goodstein, *Inmate Adjustment to Prison and the Transition to Community Life*, 16 J. RES. CRIME & DELINQ. 246 (1980); Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155 (1988); Thomas J. Schmidt & Richard S. Jones, *Suspended Identity: Identity Transformation in a Maximum Security Prison*, 14 SYMBOLIC INTERACTION 415 (1991).

105. *Cf.* Massaro, *supra* note 39, at 2123. Massaro noted:

> Although we 'know' at some level that we tend to treat people like ourselves better than those outside our spheres of familiarity, we often ignore this knowledge. If verbal reminders of this

III. CAPITAL VIOLENCE AS VICARIOUS SELF-DEFENSE

Human beings react aggressively against people who are frightening or who they believe pose a physical or psychological threat. Under these circumstances, we morally disengage from the potential consequences of our violent behavior and regress to a more fundamental principle—self-preservation. In the extreme case, this forms the basis of legal self-defense doctrine,[106] whose venerability reflects the law's recognition of the psychological power of fear to propel aggression. Despite widespread public skepticism about most exculpatory doctrines, self-defense not only continues to be widely understood and endorsed, but also represents one of the very few criminal defenses to be extended into previously uncharted territory.[107] By expanding the concept of self-defense to cover previously punishable acts, the law continues to recognize that fear can motivate violence. Indeed, the most powerful argument in favor of the death penalty is couched in precisely these terms: We execute others to protect ourselves and our community.[108] To be sure, much of the fear a capital jury experiences does not depend on a legal process of embellishment for its force and power. The basic facts of a typical capital murder case are themselves frightening, and the jury's reaction is natural and inevitable. Notwithstanding the universality of this emotional response, prosecutors put tremendous effort into "the graphic presentation of the murder, as well as the actions which led to death and its consequences,"[109] and will often spare no expense to "bring to life the violence outside law."[110] In addition, the structure of a capital trial ensures that the "weapons and wounds, instrumentalities and effects"[111] of the defendant's violence will always precede any acknowledgment of the humanity or personhood of the one responsible for it. Accordingly,

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tendency are built directly into our legal discourse, they may stimulate legal decisionmakers to reach beyond those tendencies more consistently.

Id. (citation omitted).

106. *See, e.g.*, Norman J. Finkel, Kristen W. Meister & Dierdre M. Lightfoot, *The Self-Defense Defense and Community Sentiment*, 15 LAW & HUM. BEHAV. 585, 586-88 (1991).

107. *See generally* Diane R. Follingstad, Darlene S. Polek, Elizabeth S. Hause, Lenne W. Deaton, Michael W. Bulger & Zanthia D. Conway, *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 LAW & HUM. BEHAV. 253 (1989) (examining how objective and subjective standards of reasonableness shape our understanding of whether a battered woman actually perceives she is in danger); Jessica P. Greenwald, Alan J. Tomkins, Mary Kenning & Denis Zavodny, *Psychological Self-Defense Jury Instructions: Influence on Verdicts for Battered Women Defendants*, 8 BEHAV. SCI. & L. 171 (1990) (discussing how the law of self-defense might be expanded to include the concept of psychological danger).

108. The legacy of punitive mistreatment of black defendants by the American criminal justice system can be understood, in part, by the racist fear that blacks engender among whites. *See, e.g.*, GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" (1990). The Rodney King case—both the beating and the trial verdicts—provides a specific, vivid example. *See generally* READING RODNEY KING: READING URBAN UPRISING (Robert Gooding-Williams ed., 1993). Los Angeles police sergeant Stacey Koons' bizarre speculation that, in King's presence, a female officer feared "a Mandingo sexual encounter" provides another psychological layer to this observation. Richard Serrano, *Sergeant Pens Blunt Book About Life in LAPD*, L.A. TIMES, May 16, 1992, at B1.

109. Austin Sarat, *Violence, Representation and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1124 (1995).

110. *Id.* at 1124 (footnote omitted).

111. *Id.*

most capital juries will be terribly frightened of defendants, and provoked to punitive and vengeful feelings, long before they are exposed to any other information about them.

Note that the overall structure of the trial is replicated in the capital penalty phase, where the prosecution presents evidence of aggravating factors first. When this presentation entails testimony about prior crimes the defendant may have committed, the evidence is often focused on the same types of frightening "weapons and wounds, instrumentalities and effects" that were at the core of the guilt phase trial. Defense attorneys are not permitted to present mitigation that moderates the capital jury's fear of their client until the very last stage of the penalty trial, when they are given their first and only opportunity to humanize the defendant and explain his deviance in a way that links it to common human experience. Because the vast majority of the capital trial is devoted to dramatic renderings of the defendant's prior crimes and acts of individual violence, its structure helps to ensure that violence outside the law will be presented to the jury without context, leaving the jurors with little but the misleading stereotypes and partial truths to which they have been exposed long before entering the courtroom and no framework with which to explain or understand them save the fundamental attribution errors they have implicitly been encouraged to commit.[112]

Not surprisingly, many capital jurors report that they considered the defendant's future dangerousness even when that issue was not explicitly raised at trial. For example, Theodore Eisenberg and Martin Wells found that capital jurors discussed the defendant's future dangerousness more than they considered his criminal past, background, social history, or any of his personal attributes, such as intelligence or remorse. Moreover, despite having no special knowledge or expertise with which to analyze the question, approximately three-quarters of the jurors concluded that the evidence presented at trial established that the defendant *would* be dangerous in the future.[113] Yet this conclu-

112. Although the structure and sequencing of evidence in the capital trial process contributes to moral disengagement, no easy remedy exists for this problem. However, by acknowledging its existence and analyzing its consequences, I underscore its cumulative effect on the other mechanisms of moral disengagement that *could* be remedied. It is also interesting to speculate about what special modifications might be made in capital trial procedures to address these order effects, out of a recognition that death is different and an acknowledgment of the significance that we attach to the sanctity of life, including the life the jury is being asked to take. For example, capital trials might broaden the scope of permissible guilt phase testimony by the defense that humanizes the defendant and give the defense the option to request that evidence in the penalty trial be presented in a more chronological sequence so that the defense could open as well as (perhaps) close the penalty trial. *Cf.* Handler, *supra* note 44, at 327 (suggesting, in an article written prior to the modern era of capital punishment, that, in the guilt phase of nonbifurcated capital proceedings, defendants should be able to present mitigating background information that the state should be prohibited from rebutting because "[t]his will encourage the presentation of background information, which is in accord with the statutory policy, and, at the same time, prevent convictions based upon the bad-man theory").

113. *See* Eisenberg & Wells, *supra* note 13, at 7. Others have speculated that psychiatric experts frequently amplify these preexisting biases held by capital jurors. In this light, capital penalty trials sometimes become forums in which "grossly prejudicial and unreliable predictions of future dangerousness [are presented] by psychiatrists with the imprimatur of state authority." James Wyda & Bert Black, *Psychiatric Predictions and the Death Penalty: An Unconstitutional Sword for the Prosecution but a Constitutional Shield for the Defense*, 7 BEHAV. SCI. & L. 505, 519 (1989); *see also* George E. Dix,

sion directly contradicts what is known about the relative lack of violence not only among death and life-sentenced prisoners, but also among condemned inmates who were subsequently released from prison.[114] The structure of the capital trial and the focus on "weapons and wounds" may have helped to distort the jurors' views on these issues in ways that facilitate their death sentencing.

But fear about the future dangerousness of capital defendants is intensified by another misconception that plagues capital trials and that goes uncorrected in the typical case. The same Eisenberg and Wells study showed a significant difference between the amount of time that life-sentencing jurors thought a defendant who did not get the death penalty would spend in prison as compared to death-sentencing jurors, who believed the defendant would be released much sooner if they did not sentence him to die.[115] Similarly, another study found that three-quarters of those jurors who sentenced their defendant to death believed he would spend less than twenty years in prison if they did not condemn him to die and that an equally high percentage of death-sentencing jurors reported being concerned about the possibility that "the defendant might return to society" if they let him live.[116]

In fact, jurors even voice these concerns in states where capital-sentencing statutes give them the option of sentencing the defendant to life without the possibility of parole instead of imposing the death penalty. In California, for example, members of the public generally do not believe that life without parole means that the defendant will never be released from prison.[117] Moreover, death-qualified respondents are significantly more likely to hold this mistaken belief.[118] Not surprisingly, this widespread misconception has given rise to serious concerns voiced by actual capital jurors in California about the potentially dangerous implications of life verdicts.[119] As Eisenberg and Wells summarized, "Refusing to inform jurors about the statutorily mandated length of nondeath sentences appears to lead jurors to sentence to death when they would not do so if they were more fully informed of the law."[120]

Participation by Mental Health Professionals in Capital Murder Sentencing, 1 INT'L J. L. & PSYCHIATRY 283, 307 (1978) ("Whether or not the legal framework formally focuses the sentencing authority's attention upon defendants' 'dangerousness,' the danger that a mental health professional's testimony will cause the life or death decision to be influenced by an erroneous impression as to the predictability of serious assaultive conduct is a serious one.").

114. Indeed, direct research on the topic suggests that, like most people, capital jurors overpredict dangerousness. *See* James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorenson, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449, 464-66 (1989); *see also* G.I. Giardini & R.G. Farrow, *The Paroling of Capital Offenders*, *in* CAPITAL PUNISHMENT 169, 177-84 (Thorsten Sellin ed., 1967) (providing an in-depth statistical analysis of the recidivism rates of capital offenders).

115. *See* Eisenberg & Wells, *supra* note 13, at 7-8; *see also* James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1178 tbl.5, 1179 tbl.6 (1995).

116. Luginbuhl & Howe, *supra* note 115, at 1178-79.

117. *See* Haney et al., *Modern Death Qualification*, *supra* note 12, at 626 tbl.2.

118. *See id.*

119. *See* Haney et al., *Deciding to Take a Life*, *supra* note 12, at 160-71.

120. Eisenberg & Wells, *supra* note 13, at 8.

There are other dimensions to the dangerousness issue that morally disengage capital jurors from their sentencing verdicts. Although the propriety of a capital trial's initial focus on the violence of the defendant is indisputable, it is important to note that the typical jury is only given a *partial* understanding of the origins of this violence. This incomplete understanding intensifies the fear engendered. Jurors who learn that capital defendants were victims long before they became victimizers may be less likely to fear them, but this information is kept from such jurors until long after it may do many defendants any good (if, indeed, it is presented at all). When jurors learn about the defendant's violence absent its context, they are deprived of an opportunity to connect his criminality to early experiences in settings or situations in which he was himself the fearful target of brutal mistreatment, chronic neglect, abandonment, and the like.

Yet empirical research indicates that most habits of violence and aggressive demeanors are learned defensively—usually in childhood and often in response to chronically abusive, harmful, or threatening circumstances defendants certainly did not choose and over which they had little or no control. In fact, it is possible to think of psychological self-defense as playing an early causal role in the development of violent behavior patterns that eventually lead to at least some capital murders. Some psychoanalysts have argued that acts of seemingly senseless violence can be understood only by reference to the developmental role of aggression in protecting the self against a hostile, seemingly psychologically life-threatening environment. Children who attempt to reduce this intolerable anxiety through aggression have typically found the threat overwhelming.[121] At that point, "[t]he child's attempt at protecting his psychological self having failed, a pathological fusion of the self-structure and the defence (aggression) will emerge. Aggression becomes inextricably linked with self-expression."[122]

For example, we now know that abused children are much more likely to engage in violence as adults, giving rise to what some have called a "cycle of violence."[123] Further, there appears to be a relationship between the kind of abuse suffered as a child and the nature of the aggression manifested in adulthood.[124] Not only are the people accused and convicted of capital murder very

121. *See* Peter Fonagy, George S. Moran & Mary Target, *Aggression and the Psychological Self*, 74 INT'L J. PSYCHO-ANALYSIS 471, 475 (1993); *cf.* JAMES GILLIGAN, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES 41 (1996) (advocating the theory that "[t]he death of the self . . . brings with it a sense of the intolerability of existence . . . . Murder is an attempt not just to rescue one's self—for many, it is already too late for that; the self has already died—but to bring one's dead self back to life.").

122. Fonagy et al., *supra* note 121, at 475.

123. *See* Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 160 (1989); *see also* Kenneth A. Dodge, John E. Bates & Gregory S. Petit, *Mechanisms in the Cycle of Violence*, 250 SCIENCE 1678, 1682 (1990) (examining the impact of abuse on child development); Derek Truscott, *Intergenerational Transmission of Violent Behavior in Adolescent Males*, 18 AGGRESSIVE BEHAV. 327, 332-33 (1992) (reporting that violent behavior in adolescence is associated with having been the victim of paternal verbal and physical aggression).

124. *See* Donald G. Dutton & Stephen D. Hart, *Evidence for Long-Term, Specific Effects of Childhood Abuse and Neglect on Criminal Behavior in Men*, 36 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 129, 135 (1992) (finding that childhood "physical abuse . . . increase[s] the odds [of committing] physical abuse in the family [as an adult] fivefold and the abuse of strangers . . . twofold"

often the victims of physical abuse, sexual abuse, and chronic neglect as children,[125] but many capital defendants come from homes in which their mothers and other siblings were also physically attacked in their presence. We also know that exposure to the abuse of others can be psychologically damaging as well.[126]

As Vonnie McLoyd wrote, "[P]overty and lower-class status are marked by relatively punitive and coercive patterns of parenting behavior,"[127] and most researchers agree that this relationship is caused, in large part, by the parents' psychological distress.[128] Further, families in the midst of economic pressure often confront other personal problems like instability, unemployment,[129] and divorce[130] that add to the stress that can lead to child abuse.[131] In addition, poverty itself appears to create increased levels of depression, impulsivity, low self-esteem, and delinquency among children, in part, because of its effects on parenting behavior.[132]

Additionally, poverty and its link to child maltreatment are related to race. For example, African American children are more likely to experience not only

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and that childhood "sexual abuse increases the odds of committing sexual abuse against strangers [as an adult] fivefold and within the family eightfold"). *See generally* Joan McCord, *The Cycle of Crime and Socialization Practices*, 82 J. CRIM. L. & CRIMINOLOGY 211 (1991) (reporting evidence of the generational transmission of criminality, including the role of parental criminality, conflict, and aggression in subsequent crime among children); Arlene McCormack, Frances E. Rokous, Robert R. Hazelwood & Ann W. Burgess, *An Exploration of Incest in the Childhood Development of Serial Rapists*, 7 J. FAM. VIOLENCE 219 (1992) (documenting the frequent occurrence of sexual abuse, including incest, in the childhoods of men who become serial rapists).

125. *See* Dorothy Otnow Lewis, Richard Lovely, Catherine Yeager, George Ferguson, Michael Friedman, Georgette Sloane, Helene Friedman & Jonathan H. Pincus, *Intrinsic and Environmental Characteristics of Juvenile Murderers*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582, 586-87 (1988). *See generally* Marilyn Feldman, Katharine Mallouh & Dorothy Otnow Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 345 (1986). Research related to these studies and those cited in the several footnotes immediately following have been more elaborately and systematically reviewed in Haney, *supra* note 17.

126. *See, e.g.*, Mindy S. Rosenberg & Ronita S. Giberson, *The Child Witness of Family Violence*, *in* CASE STUDIES IN FAMILY VIOLENCE 231, 242-46 (Robert T. Ammerman & Michael Hersen eds., 1991).

127. Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311, 313 (1990) (reporting that poverty lessens the capacity for supportive parenting, renders parents more vulnerable to negative life events, and adversely affects children's socioemotional functioning).

128. *See id.* at 327-35; *see also* Jessica H. Daniel, Robert L. Hampton & Eli H. Newberger, *Child Abuse and Accidents in Black Families: A Controlled Comparative Study*, 53 AM. J. ORTHOPSYCHIATRY 645, 652 (1983) ("[B]lack families who abuse their children appear to suffer from poverty, social isolation, and stressful relationships with and among kin."). *See generally* Glen H. Elder, Tri Van Nguyen & Avhalom Caspi, *Linking Family Hardship to Children's Lives*, 56 CHILD DEV. 361 (1985) (discussing how the pressures of unemployment and divorce affect the emotional, psychological, and social development of children); Viktor Gecas, *The Influence of Social Class on Socialization*, *in* 1 CONTEMPORARY THEORIES ABOUT THE FAMILY: RESEARCH-BASED THEORIES 365 (Wesley R. Burr, Reuben Hill, F. Ivan Nye & Ira L. Reiss eds., 1979).

129. *See* McLoyd, *supra* note 127, at 316.

130. *See id.* at 316-17.

131. *See id.* at 324-25.

132. *See id.* at 322-27; David T. Takeuchi, David R. Williams & Russell K. Adair, *Economic Distress in the Family and Children's Emotional and Behavioral Problems*, 53 J. MARRIAGE & FAM. 1031, 1037-39 (1991) (reporting that economic stress significantly impacts children's emotional and behavioral problems, often resulting in higher levels of depression, antisocial behavior, and impulsivity).

poverty per se, but also poverty that is "marked by its persistence and geographic concentration."[133] Persistent poverty is even more directly linked with child maltreatment, and the geographic concentration of such poverty makes the existence of community "buffers" less likely.[134] Other studies have indicated that urban housing projects—where a disproportionate number of minority families are consigned to live—expose children to levels of trauma comparable to those in war-torn areas of the world, with the same attendant psychological effects.[135]

Yet many capital jurors are denied the kind of broad-based contextualizing information that would help them to begin to understand the origins and limits of the defendant's violence. Deprived of this broad-based knowledge about the defensive etiology of violent behavior, they will be ill-equipped to measure their own fearful reactions to the evidence of criminal behavior to which they have been exposed. Because many capital jurors are never told these things, they have little choice but to attribute the defendant's violence to his alleged evil nature or inherent malevolence, an attribution that undoubtedly makes him appear more frightening and dangerous.

Other contextualizing information that capital jurors need to know in order to balance their own fearful reactions and the realities of their sentencing decision is often omitted from the proceedings. For example, jurors should learn that a violent criminal act is typically the *joint* product of personal characteristics and unique situational forces that are often unlikely to recur.[136] In addition, capital jurors deserve to know that violent behavior in free society is *not* necessarily predictive of violent behavior in prison, largely because the nature of the environments themselves differs so greatly.

Indeed, attempts to establish the legitimacy of capital punishment by references to its historical (even biblical) acceptance ignore the fact that earlier widespread use of the death penalty occurred in societies that did not have modern prisons at their disposal; they simply lacked the capacity to safely contain their violent citizens short of drastic measures like execution.[137] Capital jurors now make the choice between life and death in the face of very different contingencies. Thus, as Richard Lempert summarized, "Research suggests that

133. McLoyd, *supra* note 127, at 335; *see also* Greg J. Duncan, Jeanne Brooks-Gunn & Pamela Kato Klebanov, *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296, 313-14 (1994) ("Black families are not only more likely to be poor but also to live in poor neighborhoods.").

134. *See* McLoyd, *supra* note 127, at 321-22.

135. *See, e.g.*, Dubrow & Garbarino, *supra* note 101, at 4-6.

136. That is, violent actions, like all others, need to be "understood in relation to the actions of other people, and in relation to spatial, situational, and temporal circumstances in which the actors are embedded." Carol W. Werner, Irwin Altman, Diana Oxley & Lois M. Haggard, *People, Place, and Time: A Transactional Analysis of Neighborhoods*, *in* ADVANCES IN PERSONAL RELATIONSHIPS 244 (Warren H. Jones & Daniel Perlman eds., 1987); *see also* ARNOLD P. GOLDSTEIN, THE ECOLOGY OF AGGRESSION 3-11 (1994) (discussing this "duet" between persons and their environment).

137. For many critics of capital punishment, one of the most troubling features of the modern death penalty is that, because the protection of society can now be accomplished so effectively in other ways, killing even the worst criminal has simply become gratuitous.

murderers rarely kill in prison and are unlikely to engage in violent crime if they are paroled."[138]

Finally, capital jurors are rarely sufficiently well-educated about the ways in which elaborate and sophisticated prison security and surveillance procedures and devices effectively control the behavior of persons confined inside. Whenever the capital trial process fails to disabuse them of their stereotypes about the origins of criminal violence and neglects to educate them about the ability of modern prisons to control and contain even the most unruly prisoners, capital jurors are forced to make their sentencing decisions based solely on fear and concerns about future dangerousness that are premised more on misconception than on fact.

IV. Minimizing the Personal Consequences of Capital Violence

People are more likely to act on the impulse to punish when the consequences or personal costs of such actions are made to seem small, insignificant, or distant. Thus, people can act punitively if they feel that they, or others they care about, have nothing to lose by the punitive actions they take. Research suggests that acts of obedience, even acts of obedient aggression, are facilitated by an organizational context in which behavior is "fragmented," that is, removed from its consequences.[139] The classic Milgram obedience studies[140]—where subjects delivered to others what they believed were lethal doses of electric shocks simply because they were "ordered" to do so by an apparently legitimate authority figure—provide some empirical evidence for this proposition. Most of the experimental conditions in these studies were structured in such a way that the subjects were not brought face-to-face with the human consequences of their actions.[141] Indeed, Milgram empirically demonstrated that the subjects' increased proximity to the victim reduced the likelihood that they would administer apparently painful and dangerous levels of shock. In this and similar research settings, people who are forced to "get involved" and feel responsible for the safety and well-being of others and who receive feedback about their condition are more likely to behave in a socially responsible rather than blindly obedient manner.[142]

In a related vein, Kelman demonstrated that "routinization"—the organization of human action in such a way that there is no opportunity and seemingly

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138. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 Mich. L. Rev. 1177, 1189 (1981). *See generally* Pamela Steinke, *Using Situational Factors to Predict Types of Prison Violence*, 17 J. Offender Rehabilitation 119 (1991).

139. *See, e.g.*, Maury Silver & Daniel Geller, *On the Irrelevance of Evil: The Organization and Individual Action*, 34 J. Soc. Issues 125-36 (1978).

140. *See* Stanley Milgram, Obedience to Authority: An Experimental View (1974); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Hum. Rel. 57 (1965); *see also* Bruce K. Eckman, *Stanley Milgram's Obedience Studies*, 34 Et Cetera 88, 89-93 (1977) (providing a succinct description of Milgram's experiments).

141. *Cf.* Eckman, *supra* note 140, at 90 ("Bringing the victim into the same room . . . upped the disobedience to 60% . . . .").

142. *See, e.g.*, Harney A. Tilker, *Socially Responsible Behavior as a Function of Observer Responsibility and Victim Feedback*, 14 J. Personality & Soc. Psychol. 95, 99-100 (1970); Zimbardo, *supra* note 35, at 328.

no reason to consider moral issues in the course of performing it—is an especially effective technique for undermining the ethical restraints against violence.[143] In this regard, language can be used to distance people from the true nature of the activities in which they engage. This euphemistic blurring or masking of the moral consequences of aggression makes it easier to initiate and repeat.[144]

As Williams suggested, language can "obscure, mystify, or otherwise redefine acts of violence."[145] He provided these examples:

> [I]n the Vietnam conflict one did not kill the enemy soldier—one "wasted" or "zapped" him. In 1979 a member of the Oklahoma legislature who introduced a bill to require castration or other surgical procedures to be performed on the male genitalia of rapists described the requirement as "asexualization." Kulaks during the revolutionary period after 1918 in the USSR were not murdered, they were "liquidated."[146]

The modern execution ritual also provides a poignant and instructive illustration. As Robert Johnson's study of a state execution team underscored, each member is drilled in one specific and very small part of the overall killing process.[147] This repetitive practice allows the members not only to become practiced and efficient at their tasks, but also to distance themselves from the final consequences of their collective, coordinated actions. Moreover, the more the drill is performed, the more routine it becomes, thereby minimizing the execution team member's opportunity for thoughtful reflection on the true consequences of the activity. The tasks are described in terms that belie their overall lethal consequences so that participants are encouraged to disengage from the deadly actions in which they play a part.

Using the Milgram studies as a point of departure, Robert Weisberg's classic article on capital jury decisionmaking posed an important empirical question: "whether jurors artificially distance themselves from choices by relying on legal formalities."[148] At the time of his article, Weisberg was right to assert that social scientists had little direct data with which to answer the question. However, data I collected in the late 1980s in collaboration with my graduate students and additional, more comprehensive data collected more recently by the Capital Jury Project confirm Weisberg's suspicions. For example, one study of Indiana capital jurors not only uncovered "juror misperception of responsibility for the death sentencing decision,"[149] but also found widespread difficulty among jurors in accepting responsibility for the defendant's fate. Additionally, the study revealed jurors' doubts about the propriety of individuals

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143. *See* Kelman, *supra* note 36, at 460.

144. *See id.* at 46-48.

145. Williams, *supra* note 26, at 34.

146. *Id.*

147. *See* JOHNSON, *supra* note 32, at 69-82.

148. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 391 (1983) (footnote omitted).

149. Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1138 n.11 (1995).

like themselves performing the capital-sentencing task in the first place.[150] Indeed, the issue of responsibility loomed so large for one jury in this study that a lone holdout was able to sway the others by bringing them face-to-face with the consequences of their decision: "I told them, 'Put the kid in the chair. Now would you go up there [and] throw the switch yourself?' They said, 'Well that's not my job.' I said, 'You are doing your job now. If you say go ahead, that's the same as [if] you are doing it.'"[151] Perhaps not surprisingly, despite fairly consistent national data about capital jurors' inability to comprehend and recall sentencing instructions accurately, this study found that most Indiana jurors "remember vividly the portion of the judge's instructions that indicated the jury's decision was only a 'recommendation.'"[152]

Capital trials, as Austin Sarat observed, present jurors with skewed narratives of violence.[153] Indeed, as he put it, "The law compels the juror to view . . . graphic representations [of the defendant's violence] and to grasp the death-producing instrumentalities which are given special evidentiary value in the state's case against the accused."[154] Recent Supreme Court decisions that sanction the use of so-called "victim impact" testimony in capital penalty trials now authorize prosecutors to go even further; in essence, prosecutors can require capital jurors to directly confront and consider the full range of terrible consequences that the defendant's violence has wrought—regardless of whether those consequences were intended, anticipated, or foreseeable—and explore the myriad dimensions of grief and loss that a killing invariably produces.[155] However, the fact that most jurors will have an intuitive, empathetic sense of the pain of such profound loss would seem to make this kind of embellishing testimony unnecessary. Moreover, holding persons accountable for consequences they neither specifically intended nor reasonably could have foreseen raises some questions about the fairness of using such testimony in a proceeding ostensibly focused on moral blameworthiness. Yet the practice is arguably justified in the interest of maximizing the amount of information available to jurors called on to make a death-sentencing decision.

But what of the asymmetry that characterizes this knowledge? Why is the viewing of the violence of the crime made mandatory and the learning of its myriad (even unintended) consequences permissible while the law systematically and explicitly prevents capital jurors from learning anything comparable about the death sentence they are being asked to impose?[156] Sarat's description

150. *See id.* 1142-55.

151. *Id.* at 1146 (quoting an unidentified Indiana capital juror).

152. *Id.* at 1147.

153. *See* Sarat, *supra* note 13, at 24; *see also* Sarat, *supra* note 109, at 1121-23.

154. Sarat, *supra* note 109, at 1126.

155. *See, e.g.*, Payne v. Tennessee, 508 U.S. 808, 825 (1991) (appearing to authorize the fairly unregulated use of "victim impact" testimony in capital penalty trials).

156. For example, in *People v. Fudge*, 875 P.2d 36 (1994), the California Supreme Court concluded 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. *Id.* at 60 (citations omitted). The court reached this conclusion without benefit of analysis, but merely asserted that the nature of the punishment itself is "not relevant to any issue material to the choice of penalty." *Id.* at 65. Yet this doctrine and the one announced in *Payne* are simultaneously

of the trial he studied accurately applies to capital cases across the country: "Jurors were presented with no images of the scene of the prospective execution, of the violence of electrocution. No such images were admissible or available for the juror eager to understand what he was being asked to authorize."[157] The one-sided way in which the law makes one set of consequences salient and another set invisible to jurors operates to disengage them from the full moral implications of their actions.

Research with capital jurors also shows not only that the details of the execution ritual are systematically hidden from them, but that most believe the event is unlikely ever to occur. For example, in our study of capital jurors in California and Oregon, we found that "verdict skepticism"—disbelief that the sentencing decisions they reached would actually be imposed—pervaded the deliberation process.[158] As one juror put it:

> We talked about the fact that if you have a hard time voting for the death penalty, are you really not just voting for life imprisonment? Because there hasn't been an execution in over 20 years in California. And so, you know, is it really more a statement than it is an actuality?[159]

Similarly, Sarat found that capital jurors in Georgia were skeptical about whether death actually meant death: "We all pretty much knew that when you vote for death you don't necessarily or even usually get death. Ninety-nine percent of the time they don't put you to death. You sit on death row and get old."[160]

Indeed, the treatment of capital jurors mirrors the way the public, in general, is systematically misinformed about many of these issues and kept from confronting the truth about the lethal process that proceeds in their name. In a case that facilitated the televising of criminal trials, Chief Justice Burger concluded that our society could not "erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[161] Yet the courts have not only permitted but insisted on this darkness with respect to executions.

> pulling the victim closer [to the jury] while pushing the defendant and the execution away. . . . The pain of the victims should be brought home to a juror asked to make a moral determination as to appropriate punishment; so should the pain of the defendant, and the violence of the execution being contemplated.

Howarth, *supra* note 21, at 1393-94.

157. Sarat, *supra* note 109, at 1124 (footnote omitted). Sarat further noted:

> To refuse to participate in the spectacle of seeing and touching th[e] representations and instrumentalities [of the victim's death] is, in essence, to refuse to consider all the evidence and is, thus, to defy one's oath as a juror. Because the gaze cannot be legitimately averted, the juror becomes a victim of viewing.

Id. at 1126. But it is the clear asymmetry of this victimization that morally disengages jurors from the decision they are called upon to make and that facilitates death sentencing.

158. *See* Haney et al., *Deciding to Take a Life*, *supra* note 12, at 170-71.

159. *Id.* at 171.

160. Sarat, *supra* note 109, at 1133.

161. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion) (citations omitted).

As John Bessler argued, the real purpose of so-called "private execution laws," which regulate who can attend executions, may be to prevent the general public from hearing about the details of the process by which the state kills its citizens,[162] a stance which he believes "is reinforced by several state statutes, which provide that executions only be conducted during the middle of the night or that the details of executions not be published at all."[163]

Historian Thomas Laqueur argued that the state's increasing inability to effectively manage the "theater" of the execution, by controlling both the message of the gallows performance and the public's reaction to it, is what resulted in the move from public to private execution rituals: "As execution becomes ever more private and untheatrical it becomes ever more irrelevant. As it becomes public—if not on television then through the printed media—it becomes carnival which does not fit well with the culturally dominant view of the body politic."[164] So the modern state carefully regulates the private nature of the execution ritual to ensure that its citizens learn just enough (but not too much) about it. Moreover, those citizens who arguably have the greatest need to know the details of the process—capital jurors who are being asked to authorize it—learn the least of all.

More generally, psychologists have observed that people are "less willing to obey authoritarian orders to carry out injurious behavior when they see firsthand how they are hurting others."[165] The capital penalty trial's asymmetrical focus on one kind of violence and not another is also furthered by failing to require jurors to get a firsthand look at the extent of the hurt the death penalty inflicts. That is, nothing about the trial process requires capital jurors to be sensitized to the fact that the defendant may have family, friends, and other

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162. *See* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 358 (1993).

163. *Id.* at 406. Wendy Lesser's analysis of one California case in which the issue of televising executions was heatedly contested is instructive. *See* LESSER, *supra* note 91, at 24-46. In *KQED v. Vasquez*, 18 Media L. Rep. 2323 (N.D. Cal. 1981), a local public television station sued in federal court to compel the state's department of corrections to permit condemned inmate Robert Harris' impending execution—the first in the state in some 25 years—to be televised. The KQED suit implied that the governor and his appointed officials, all staunchly pro-death penalty, were restricting access in order to maintain popular support for capital punishment. *See* LESSER, *supra* note 91, at 30-31. Although the state refused to concede this in its reply, it indirectly supported the contention by focusing on the reactions of certain members of the public who, the state's attorneys argued, would be incensed by exposure to the sight of an execution from which they would otherwise be prohibited. Thus, they claimed that prisoners would become enraged and uncontrollable, that some members of the public might want to take revenge upon those prison staff members who participated directly in the execution, and even that some members of the press might attempt to use their videotape equipment to break the glass-enclosed gas chamber and halt the execution. *See id.* When a group of California legislators introduced a bill that would have allowed for televised executions, the leader of those opposing its passage argued that "[t]here is a hidden agenda to this bill and that is to eliminate capital punishment as a law in California." Greg Lucas, *Televised Executions Bill Dies: Assembly Votes It Down for a Second Time*, S.F. CHRON., Sept. 4, 1991, at A14; *see also* Roderick Patrick, *Hiding Death*, 18 NEW ENG. J. CRIM. & CIV. CONFINEMENT 117, 143 (1992) ("[H]iding executions reveals a society that does not wish to confront the death it generates."). The bill was defeated after "spirited debate." Lucas, *supra*, at A14.

164. Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions, 1604-1868*, *in* THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE 305, 355 (A.L. Beier, David Cannadine & James M. Rosenheim eds., 1989).

165. Bandura, *supra* note 11, at 175 (footnotes omitted).

people who care about him and who will also be victimized by his execution. Consequently, the penalty trial fails to inform jurors of the full range of psychic injuries that a death verdict is likely to bring about, denying them the opportunity to weigh all of the potentially relevant moral considerations in their decisionmaking.

Similarly, in many jurisdictions, capital jurors are never told the truth about their only alternative to the violence of a death sentence—life imprisonment. Case law in many jurisdictions prevents defense attorneys from presenting details about the pains of imprisonment and the severity of punishment it represents.[166] Most capital jurors discount or dismiss the painful consequences of a life in prison as an alternative to death by harboring the belief that all life-sentenced prisoners will someday be released. For example, Howarth reported that, in one small sample of interviews, "[e]very juror interviewed who voted for death incorrectly interpreted the alternative (life without the possibility of parole) as allowing for release."[167] Because the law denies capital jurors effective education about the nature of prison as punishment and the harshness and finality of a life sentence, many too easily conclude that it is not enough suffering, leaving death as the only way they can express "their moral horror and revulsion at the violent and 'whimsical' killing"[168] they must adjudicate. Thus, they vote to execute the defendant not because they have carefully made the moral decision that death is the uniquely appropriate punishment, but because they have been misled to believe that its alternative is no punishment at all. Again, jurors become disengaged from the moral complexities of their choice because the law does not allow them to understand the real human consequences of the alternatives from which they must select.

Capital jurors are further distanced from the moral complexities of their sentencing decision by the law's failure to educate them about a range of other consequences that attach to death penalty verdicts. Like most people, capital jurors are beset with misinformation about the death penalty. They mistakenly believe that it deters murder, that it is always administered in ways that are racially fair, and that it is far less expensive than life imprisonment.[169] Unlike those of the general public, however, the misconceptions of capital jurors are acutely relevant to the life-and-death decision before them. Yet the law not only does nothing to proactively disabuse them of their mistaken beliefs before a death sentence can be contemplated, but it also precludes defense attorneys from doing so. Thus, many capital jurors leave their life-and-death deliberations completely uninformed about the realities of either of the punishments between which they have chosen and quite confused about their consequences.

166. *See* People v. Daniels, 802 P.2d 906, 938-39 (1991) (holding that excluding testimony about what defendant's life would be like in prison is permissible); *see also* People v. Fudge, 875 P.2d 36, 60 (1994) (holding that evidence of the "nature and quality of life for [a defendant who is] imprisoned for life without the possibility of parole is properly excluded" (citations omitted)).

167. Howarth, *supra* note 21, at 1416 (footnote omitted).

168. Sarat, *supra* note 109, at 1133.

169. *See* Haney et al., *Modern Death Qualification*, *supra* note 12, at 626-31 (discussing juror beliefs about the general nature and effect of the death penalty). *See generally* Craig Haney, *Death Penalty Opinion: Myth and Misconception*, 1995 CAL. CRIM. DEF. PRAC. REP. 1 (1995).

By passively encouraging capital juries to operate on the basis of inaccurate assumptions and misconceptions, the legal system disengages them from the realistic consequences of their sentencing choice in ways that facilitate death verdicts.

Capital jurors can also distance themselves from the moral consequences of their penalty decisions by ignoring the value of the person whose life they are being asked to take. Pillsbury has argued that, in order to address this problem, capital trials should discharge what he calls an "empathy obligation."[170] Because an empathetic perspective highly "values and seeks to find the good in the offender's character," the capital jury "should be informed of the obligation to care about the offender as a morally worthy creature and should be given the opportunity to hear about his good deeds, his capacity for and desire to do good,"[171] just as they are, and should be, reminded of the importance of their caring for the victims of his actions. Currently, the law does nothing to require capital juries to contemplate the defendant's good qualities—qualities which will die with him if he is executed—and nothing in the capital-sentencing instructions mandates them to take such consequences into account. For example, no existing capital penalty procedure or instruction requires jurors to consider the possibility that a future life of meaning in prison may be foregone, that someone who might make useful contributions in the form of needed prison labor or as a potentially calming influence on younger, less experienced prisoners will be lost, that continuing relationships on which loved ones have come to depend and from which they draw support will end, that the use of creative talent that gives pleasure to others will expire, or that the exercise of a religious commitment and the dedication to a life of redemption will be terminated by a death verdict.[172] To be sure, none of these things is necessarily dispositive of a sentencing decision; indeed, some capital jurors may decide that many of them are trifling matters when compared to the deeds for which the defendant has been convicted. Yet they form the other side of the life-and-death balance sheet that jurors should at least take into account and seriously consider before they render their sentencing decision.

Finally, these procedural mechanisms of moral disengagement highlight another way in which the ultimate consequences of the decision are minimized. Psychological research has generally taught us that "[p]eople behave in injuri-

170. *See* Pillsbury, *supra* note 63, at 693-98 (arguing that an empathy obligation ensures due process by keeping the jury's life-and-death decision on a moral plane).

171. *Id.* at 694.

172. In this regard, see the debate between philosophers Jeffrie Murphy and Jean Hampton over the comparative virtues of forgiveness versus "moral hatred." *See generally* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988). Hampton highlighted the ways in which moral hatred could blind others to potentially good aspects of a wrongdoer's character and lead them to ignore circumstances that place his actions in a less blameworthy light. *See id.* at 35-87. The mechanisms of moral disengagement that operate in capital trials make the good aspects of a defendant's character and the circumstances that might lessen his blameworthiness more difficult to perceive. Moral hatred rather than forgiveness is thus more likely to prevail. Hampton conceded that forgiveness, which she argued has potentially beneficial effects for both victim and perpetrator, should be forgone when "too much of the person is 'morally dead.'" *Id.* at 153. Restricting the range of information that jurors are given about a capital defendant presents him in precisely this light.

ous ways they normally repudiate if a legitimate authority accepts responsibility for the consequences of their conduct."[173] Not surprisingly, although jurors in capital cases are charged with an extraordinary responsibility, as Howarth put it, "individual jurors are relieved to share the decision with other jurors."[174] However, many capital jurors further distance themselves from the moral implications of this awesome responsibility by maintaining the belief that *someone else*—typically appellate judges—will ultimately decide the sentencing question that has been posed to them. Standard capital penalty instructions do nothing to disabuse jurors of this widespread misconception, and the Supreme Court has taken an increasingly broad view of how far prosecutors can go in giving the impression that jurors are just contributing to rather than actually making the life or death decision.[175] Yet the very judges on whom capital jurors rely to review and "correct" their decisions also defer to and rely on the *jury's* decision to insulate themselves from the moral issues posed by death verdicts.[176] Thus, in Howarth's words, "[J]ury capital sentencing could be seen as a paradigm of collectivity as diffusion of and thus escape from responsibility."[177]

V. Instructional Authorization for Capital Violence

Most of us are more likely to act with punitive decisiveness, unrestrained by compassion, when we feel we have been ordered to do so. Social scientists have long known that violence is facilitated when those in power define certain situations as ones in which standard moral principles do not apply and then "authorize" people to act outside the boundaries of normative moral codes.[178] Actions taken in these situations can be termed "crimes of obedience" because their harm stems not from individual pathology or deviance, but from conformity with coercive norms created by the powerful political and legal structures that dominate modern society.[179] Again, the classic psychological demonstration of this is found in the Milgram obedience experiments.[180] In general, when such authorization occurs, "lower-level actors need not deny their moral values, simply their applicability to the situation,"[181] because their actions have been condoned, encouraged, or ordered by higher authorities.

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173. Bandura, *supra* note 11, at 173 (footnote omitted).

174. Howarth, *supra* note 21, at 1410.

175. *See* Sarat, *supra* note 109, at 1131. As Sarat summarized:

> [S]ubstantive inadequacies in the arsenal of criminal punishment, as well as the processes of review and appeal that automatically are entailed by a death sentence, combined to push the jurors to authorize [a death] sentence . . . even though most jurors were neither deeply enthusiastic about their decision nor convinced that [the defendant] would ever be executed.

Id.

176. *See* Howarth, *supra* note 21, at 1410-11.

177. *Id.* at 1411.

178. *See* Herbert C. Hampton & V. Lee Hamilton, Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility 16-17 (1989).

179. *See id.*

180. *See* text accompanying notes 140-142 *supra.*

181. Tyler, *supra* note 37, at 1093.

This kind of authorization is present in certain aspects of our capital trial process, making it appear that the law favors death verdicts over life imprisonment.[182] These procedures are most salient at the end points of the capital trial, during death-qualifying voir dire, and in the final judicial instructions that precede the sentencing decision. Although most analyses of the death qualification process have focused on its tendency to produce conviction-prone juries,[183] there is a secondary, morally disengaging dimension to its biasing effects. Obviously, a jury composed only of persons who publicly state that they *can* impose the death penalty is more likely to do so than a jury selected without this capacity specifically in mind. But capital jury selection procedures in which persons opposed to the death penalty are systematically excluded from participation may seem to convey the message that the legitimate and favored position in the legal system is one supporting imposition of the death penalty. The effects of this message may well persist through the end of the trial, when some jurors—those who believe they have made a "promise" to the judge to impose the death penalty—will be influenced by it and will in turn influence others. The Indiana study found that members of one capital jury questioned the legitimacy of the one juror who refused to agree to a death sentence on precisely these grounds. That is, "because the holdout indicated support for the death penalty during jury selection," the rest of the jury felt justified in arguing that "the holdout no longer [had] the right—or the responsibility—to make a sentencing decision based on lingering feelings of opposition to the death penalty."[184]

Moreover, prospective jurors are often repeatedly asked whether they can "follow the law" and impose the death penalty. Indeed, depending on how death-qualifying questions are posed, they may seem to imply that the law actually *requires* jurors to reach death verdicts. Under this rubric, death qualification may come to resemble a kind of "obedience drill" in which jurors feel they are voluntarily relinquishing the power to deviate from the outcome "the law" seems to favor. In fact, given the critical role that individual attitudes appear to play in understanding social behavior,[185] it is very possible that the personal characteristics of death-qualified jurors render them especially receptive to arguments that they must follow the implicit "promise" made to the court.[186] If

182. *See, e.g.*, Geimer, *supra* note 55, at 284-88.

183. Research shows that the *process* of death qualification produces a *conviction-prone* jury largely through the implicit suggestion that the defendant is *probably* guilty, or at least likely enough guilty to justify often protracted discussions of what penalty to impose, which take place long before any evidence has been presented. *See* Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 134-35 (1984) (illustrating the biasing process, describing the ways in which it unfolds in court, and discussing its effects on participants); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 128-32 (1984).

184. Hoffmann, *supra* note 149, at 1156 n.38.

185. A number of social scientists have underscored the importance of social attitudes in the analysis of rule-following behavior. *See generally* ELLEN S. COHN & SUSAN O. WHITE, LEGAL SOCIALIZATION: A STUDY OF NORMS AND RULES (1990) (exploring how cognitive development shapes adherence to the law); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (examining how normative values affect legal compliance).

186. *See* Fitzgerald & Ellsworth, *supra* note 9, 39-48.

so, then, in at least some cases, the death penalty may be imposed by persons who are unsure of its moral appropriateness in light of the particular facts of the case before them, but who believe that the legal process has already secured their commitment to render such a verdict.

At the other end of the procedure, the standard jury instructions on death sentencing also lead capital jurors to believe that death is a more legitimate or legally "authorized" choice than life imprisonment. Psychologists know generally that, "[t]hrough convoluted verbiage, destructive conduct is made benign and people who engage in it are relieved of a sense of personal agency."[187] Yet the convoluted verbiage of the capital jury instructions distances jurors from the realities of the impending decision. Furthermore, it confuses jurors about the critical concept of "mitigation," on which all life verdicts essentially depend, and fails to provide an intellectual or moral framework, or even an orderly cognitive process, by which life verdicts can be consistently reached.[188] As Welsh White observed, "Under the pre-*Furman* system, the jury rendered a moral decision; it reached into its gut to decide whether death was the appropriate punishment for the defendant. Now, however, the jury is sometimes torn between rendering a moral decision and applying a legal formula they don't quite understand."[189] In this regard, Eisenberg and Wells found that penalty instructions not only created false expectations about alternatives to the death penalty, but that they also confused jurors about burdens of proof in the sentencing phase.[190] Jurors' strong initial inclination to impose the death sentence following the typical guilt phase trial significantly increased the likelihood that a death verdict would be reached. Indeed, the authors concluded that "[t]he default sentence in a capital case is death. . . . [T]he tilt towards death suggests that a defendant with a confused jury may receive a death sentence by default, without having a chance to benefit from legal standards designed to give him a chance for life."[191]

An additional study documented the ways in which capital penalty instructions often say one thing, but because of the way in which they are written and understood by capital jurors, accomplish another.[192] The problems were serious overall—less than fifty percent of the jurors were correct on more than half the questions asked about the operation of the sentencing statute—but largely assymmetrical. Thus, close to half or more of the capital jurors interviewed mistakenly believed that the judicial instructions authorized them to rely on *any* aggravating circumstance, regardless of whether it was enumerated in the statute, but to rely on mitigating circumstances *only* when there was unanimous agreement that they had been proved beyond a reasonable doubt.[193] The

187. Bandura, *supra* note 11, at 170.

188. *See* Haney & Lynch, *Comprehending Life and Death Matters*, *supra* note 12, at 411-16; Haney et al., *Deciding to Take a Life*, *supra* note 12, at 171-74; Weisberg, *supra* note 148, at 328-35.

189. WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 69 (1987).

190. *See* Eisenberg & Wells, *supra* note 13, at 9-12.

191. *Id.* at 12.

192. *See* Luginbuhl & Howe, *supra* note 115, at 1161.

193. *See id.* at 1167.

death-tilting effect of the state's instructions was further underscored by the answers to another set of questions the researchers posed: "[R]oughly one-fourth of the jurors felt that death was mandatory when it was not and approximately one-half of the jurors failed to appreciate those situations which mandated life."[194]

Similarly, in California, Mona Lynch and I found that many key provisions of the capital-sentencing instructions were very difficult to understand and that, overall, they failed to explain absolutely crucial but novel and unfamiliar concepts like "mitigation" and "extenuating circumstances."[195] Because few people have any preexisting framework for understanding and applying the key concept of mitigation, it is more likely to be discounted or ignored in the jury's decisionmaking process. For example, after having heard the sentencing instruction read to them three times, less than half of our subjects could provide even a partially correct definition of mitigation.[196] Almost a third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was so mystified by the concept that he or she was unable to venture a guess as to its meaning.[197]

Robert Cover understood that the discomfort an individual feels in the face of a difficult moral choice "will be reduced insofar as he can view himself as a mechanical instrument of the will of others."[198] The lesson is not lost on capital jurors, who, despite receiving sentencing instructions that are extremely difficult for them to comprehend, heavily rely on them in reaching penalty verdicts.[199] Indeed, these badly framed and poorly understood instructions seem to provide jurors with a protective shield that enables them to avoid a sense of personal responsibility for their decisions. Many capital jurors readily acknowledge the sense in which condemning someone to death is "not really my decision, it's the law's decision,"[200] and they come to believe they are just following legal orders.[201] Similarly, a number of capital jurors in Indiana tended to inaccurately believe that

> the judge's sentencing instructions were intended to define a legally "correct" capital sentencing outcome. These jurors tended to see the sentencing decision as analogous to the guilt-innocence determination. They interpreted the judge's instructions as eliminating most of their own personal moral responsibility for choosing life or death for the defendant . . . .[202]

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194. *Id.* at 1173.

195. *See* Haney & Lynch, *Comprehending Life and Death Matters*, *supra* note 12, at 420-22.

196. *See id.*

197. *See id.*

198. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 235 (1975).

199. *See* Haney et al., *Deciding to Take a Life*, *supra* note 12, at 168-70.

200. *Id.* at 166. As Robert Weisberg speculated, "In the case of the death penalty, the law has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual." Weisberg, *supra* note 148, at 393. The research I have cited throughout confirms that capital jurors rely on this illusion to avoid the reality of the personal decision at hand.

201. *See* Haney et al., *Deciding to Take a Life*, *supra* note 12, at 167.

202. Hoffmann, *supra* note 149, at 1152.

If capital jurors are not explicitly and clearly informed that legal authorities do not require death verdicts in *any* case, a "the-law-made-me-do-it" tendency will persist. Moreover, the dry and disconnected discourse of legal authorization can be balanced only by the creation of an atmosphere that explicitly recognizes and authoritatively respects and legitimates the full range of human elements in this ultimate juror sentencing decision.

CONCLUSION

Mechanisms of moral disengagement enable capital jurors to overcome the prohibitions against violence that must be traversed if normal, law-abiding citizens are to condemn their fellow citizens to death. Through a variety of practices and procedures structured into the very process of death sentencing, capital jurors are encouraged to dehumanize capital defendants, overemphasize the differences between them, and interpret those differences in terms of fundamental defects and profound deficit. The death-sentencing process also acts to decontextualize the defendant's violence in ways that make it more frightening, thus exaggerating the jurors' impulse toward self-protection and self-defense. In a variety of other ways, mechanisms of moral disengagement also serve to minimize the perceived personal consequences of the legal violence in which the jurors are asked to participate. By couching the life-and-death decision in terms of legal authorization, which removes the jurors' collective and individual sense of moral responsibility, the process finally conveys to them a quality of legal compulsion that disengages their most critical ethical sensitivities.

To be seen and ultimately judged as a human being, a capital defendant must be given a reality as a person that extends beyond the typical juror's stereotypes of violent criminals and the understandably emotional reactions to their violent crimes. Yet capital-sentencing instructions and the various legal procedures attached to them fail to clarify the nature and importance of this humanizing task and even undermine the jury's ability to perform it. The complex capital-sentencing calculus, in which criminal behavior is weighed against the humanity of the person on trial, is structurally and procedurally constricted, narrowed, and oversimplified. The actual moral grayness of the inquiry is thus misrepresented as a black-and-white drawing, where, as Sarat observed, "the force of law is represented as serving common purposes and aims as against the anomic savagery lurking just beyond law's boundaries."[203]

Moreover, there are few legal correctives applied *later* in the death-sentencing process to reverse the effects of these mechanisms of disengagement once the capital jury's decision has been influenced by them. Legal commentators have decried the higher courts' much greater distance from the realities of these life-and-death decisions than that of the juries who render them, even terming appellate judges in capital cases "the epitome of distanced, clean, bureaucratic executioners" who engage in "sentencing as paperwork."[204] And as if to com-

203. Sarat, *supra* note 109, at 1134.

204. Howarth, *supra* note 21, at 1386 (footnote omitted). Similarly, Robin West observed that both the conservative majority and the liberal minority on the Supreme Court fail to do justice to the

plete the moral distancing that the system of capital punishment maintains to prevent us from taking responsibility for our actions, subsequent decisionmakers use the preceding stages of legal authorization as excuses for leaving well enough alone: "[J]udicial imprimatur serves to absolve other governmental actors from responsibility for independently evaluating death decisions."[205]

Yet if the machinery of death sentencing failed to perform these various rituals of bad faith and ceased resorting to the mechanisms of moral disengagement that I have outlined above, it might well fail in the task of finding volunteers who are both willing to take on the job of condemning their fellow citizens to death and capable of performing it. It is not surprising that, in this context, researchers have been impressed by the emotional reactions that many capital jurors undergo in the aftermath of their trials: "[A]fter the trial was over, many jurors suffered lingering traumatic effects from their experience."[206] Indeed, if the realities of this system were laid bare for capital jurors—not just the cold intricacies of the legal machinery of death and the human face that endures the consequences, but also the larger sociopolitical system that produces capital crime in the first place and then mystifies its origins—then the death-sentencing process might just break from the weight of all the honesty.

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humanity of capital defendants. *See generally* Robin West, *Narrative, Responsibility, and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990). The conservatives *only* focus on the facts of the crime and recount them in such a way that the defendant invariably emerges as alien, inexplicable, and inhuman. *See id.* at 169-72. The liberals, on the other hand, *exclusively* focus on the defendant's rights and avoid any meaningful, contextualizing discussion of his humanity. *See id.* at 172-76. Ironically, *both* sides "underscore rather than challenge the tendency to view the defendant as well as the act as inhuman, and thus to discharge him from the human community." *Id.* at 175.

205. Paul Whitlock Cobb, Jr., *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 395 (1989) (footnote omitted). Cobb also noted that the "bureaucratization" of capital punishment, which exempts individual decisionmakers from having to confront the personal question of extending mercy to capital defendants, "affords everyone involved in capital sentencing the illusion that no one has decided that any given individual should die; in doing so, it poses the question whether we want a 'headless and soulless' institution sending people to their deaths." *Id.* at 404 (footnotes omitted).

As Franklin Zimring and Gordon Hawkins observed:

> The multiplicity of individual decisions necessary for an execution merge into a single depersonalized act of the state. . . . The people who make decisions in these matters frequently talk and think as if no individual is in charge. That this image gives comfort, that this state of diffuse responsibility is felt necessary, seems powerful evidence of ambivalence about legal execution in the United States.

FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 104 (1988).

206. Hoffmann, *supra* note 149, at 1156.