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CHAPTER NINE:

CONDEMNING THE OTHER:

RACE, MITIGATION AND THE “EMPATHIC DIVIDE”

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.

—Justice William Brennan, *McCleskey v. Kemp* (1987)¹

At the start of this book I noted that the various social psychological influences and effects that facilitated the death sentencing process were cumulative—that is, that together they represented a procedural whole that was larger and more powerful than the sum of its individual parts. In this chapter I want to examine some of the ways in which those forces come together to affect whether a capital defendant is condemned to death. Although the social psychological processes that I have discussed to this point apply to death penalty trials in general, here I want to discuss an important subset of capital cases—ones in which defendants are African American. These cases have special historical significance, as I will note below, and they illustrate the way in which the capital trial process can be further compromised by the pernicious influence of race-based animus.

¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Brennan, J., dissenting), at p. 344.

One mechanism of moral disengagement that I discussed at some length in Chapter Seven—the tendency to create, highlight, or exaggerate difference and transform it into defect and deficiency—helps to explain the chronic racism that has plagued the criminal justice system throughout our nation’s history,² including, of course, the legacy of discriminatory death sentencing.³ As Samuel 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.”⁴ I will argue in this chapter that aspects of the death sentencing process serve to preserve this sense of race-based otherness and amplify its effects on jurors’ choice between life and death.

Finding and Presenting Mitigation: Flaws at the Heart of the System

In the typical capital trial, prosecutors encourage jurors to make their ultimate sentencing decision on the basis of what are often isolated—albeit tragic and horrible—moments of aggression that, in the absence of any other information, are used to represent the entire life and the whole of the person. The strategy is to appear to have captured the essence of the defendant in the snapshot that has been taken of his violence. From this

² For example, see: Johnson, S., Black Innocence and the White Jury, 83 *Michigan Law Review* 1611-1708 (1985); Johnson, S., Comment: Unconscious Racism and the Criminal Law, 73 *Cornell Law Review* 1016-1037 (1988); Charles Lawrence, The *Id*, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 *Stanford Law Review* 317-388 (1987); William Sabol, Racially Disproportionate Prison Populations in the United States, 13 *Contemporary Crises* 405-432 (1989); Laura Sweeney, and Craig Haney, The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies, 10 *Behavioral Science and Law* 179-195 (1992).

³ For example, see: Baldus, D., Woodworth, G., & Pulaski, C., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston: Northeastern University Press (1990); Samuel Gross and Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing*. Boston: Northeastern University Press (1989); Craig Haney, Let Them Eat Due Process: The Fourteenth Amendment and Symbolic Legality, 15 *Law & Human Behavior* 183-204 (1991); Randall Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment and the Supreme Court, 101 *Harvard Law Review* 1388-1443 (1988).

⁴ Samuel Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 *Cornell Law Review* 655 (1989), at 707.

perspective, the full measure of the life and the worth of the person are restricted to this field of isolated violent acts.⁵ Understandably, it is an effective way to seek and to obtain death sentences.

On the other hand, as I have noted, the Constitution requires that capital jurors be permitted to consider a broader evidentiary base on which to premise their life and death decision. Thus, they must at least consider testimony about the background and character of the defendant in those cases where it is presented. The existence of a separate penalty trial allows the capital jury to focus intensely on the defendant and his life. Similarly, the rule that capital sentencing instructions should not explicitly narrow or preclude the scope of mitigating evidence that jurors are told they may rely on in their decisionmaking process reflects a bedrock constitutional principle—the choice between life and death should *not* be premised on a consideration of the crime alone.⁶ Unfortunately, there is much evidence that, in practice, little is done to insure that the spirit of this broadening principle is upheld in all or even most cases.

As I noted in the last chapter, the capital sentencing instructions do not clearly articulate the scope of penalty-phase decisionmaking process so that capital jurors understand the breadth of information that is relevant to their moral inquiry into the defendant's culpability. As the research I discussed in the last chapter indicates, the instructions appear to contribute to the jurors' narrow crime-focus by failing to make clear *what else* (like the background and character of the defendant) should be taken into

⁵ An especially insight discussion of this issue appears in Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 *Law & Society Review* 19 (1993).

⁶ In fact, just a year after the death penalty was reinstated and the *Gregg*-approved capital sentencing reforms were implemented on an even more widespread basis, the Supreme Court offered a truly important clarification of the nature of individualized justice it had in mind. In *Lockett v. Ohio*, the Court held that “the Eighth and Fourteenth Amendments require that the sentencer... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586 (1977), at p. 604. The series of cases in which this requirement has been reaffirmed and expanded is: *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Wiggins v. Smith*, 123 S.Ct. 2527 (2003).

account in choosing between life and death. In so doing, the instructions themselves seem to assist or encourage jurors to ignore the defendant's personhood, further disengaging jurors from the moral implications of their decision.

Recall also that attorneys appear to spend surprisingly little time attempting to clarify the penalty phase jury instructions. When they do undertake this task, as Lynch and I found, they often are either incorrect or incomplete in the definitions they provide. Moreover, prosecutors and defense attorneys are likely to offer jurors fundamentally different interpretations of the meaning of the concepts and opposing accounts of whether such evidence has been presented in the penalty trial and how much weight it should be given. Jurors typically have to sift diametrically opposed explanations of the key concepts, precisely the ones that are typically poorly defined in the instructions themselves.⁷

There is another way in which defense attorneys may fall short with respect to the critically important concept of mitigation. As death penalty scholar Welsh White described it:

Because defense counsel often fail to understand the dynamics of the penalty trial, there has been a surprisingly large number of cases in which defendants have been executed after their attorneys presented little or no mitigating evidence at their penalty trials... But even attorneys who understand the dynamics of a capital trial may be ill equipped to assume the role demanded of them in that setting.⁸

Thus, capital jurors may have to decide the defendant's fate lacking any real understanding of the concept of mitigation—the only one in the sentencing instructions that can lead them to a life verdict—and without the benefit of having had the case

⁷ Craig Haney & Mona Lynch, Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Arguments, 21 *Law & Human Behavior* 575-595 (1997), at pages 583-591.

⁸ Welsh White, *The Death Penalty in the Eighties*. Ann Arbor, MI: University of Michigan Press (1987), at p. 53-6);

presented by a defense attorney who even understood the concept and had effectively assembled the evidence to embody it.

Failing to assist jurors in understanding the causes of the capital crime and the various forces that may have influenced the defendant and impacted his level of culpability does these lay decisionmakers a disservice. But, especially in highly publicized cases in which the public has become invested, it does citizens at large a disservice as well. That is, absent a meaningful discussion of the defendant's life and an explanation of his criminality that includes context and history, jurors are left with a sense that crime is random, unpredictable, and unpreventable. Confronted with inexplicable violence, capital jurors certainly are more likely to impose the death penalty. But a society confronted with similarly incomplete narratives also is more likely to become fearful and punitive.

Putting the defendant's life in a human context, situating his actions within a personal history, and appreciating set of connections he has to other lives are among the only ways a capital jury can be led to a life rather than a death sentence. As I noted in Chapter Seven, the opportunity to present this kind of information and encourage the jurors to engage in these kinds of analyses and to make these connections is withheld until the final stage of the trial, when it may be too late. Moreover, because of the instructional incomprehension discussed in Chapter Eight, the information itself may be received by the jurors without any coherent, clarifying, and legitimizing message from the judge about its importance to the decision at hand. Yet, despite the fact that they may start at a significant disadvantage, defense attorneys who fail to undertake these challenges in essence concede a death verdict for their clients.

The poor timing of the defense case in mitigation, the fact that it would require most jurors to perform the difficult work of in essence changing their minds about the defendant, the heavy crime-focus of the penalty instructions that follow, and the poor performance of many defense attorneys who lack the training and resources to overcome

these obstacles may help to explain why the Capital Jury Project found that the penalty phase (i.e., “evidence about the defendant’s punishment”) was the *least* well remembered stage of the entire trial process for capital jurors,⁹ and that half of the jurors had actually made up their minds (were “absolutely convinced” or “pretty sure”) about the appropriate penalty once they had convicted the defendant of the guilt-phase crime.¹⁰ It is also not surprising, in this context, that 40% of the capital jurors believed the heinousness of the crime *compelled* a sentence of death.¹¹

In this chapter I suggest that various aspects of the death sentencing process that accumulate and interact with one another to facilitate death verdicts overall operate with special force and effect in the case of African American defendants. The racial dynamics that are added to this already deadly mix of social psychological forces help to explain the high rates at which African Americans continue to be sentenced to death. I address these issues in some greater detail below.¹²

Biographical Racism and Discriminatory Death Sentencing

The practice of capital punishment and the social evil of racism have certain things in common. They are both forged from many of the same human emotions, including anger, and hatred, and fear. They are both facilitated when their adherents treat people as though they were not human. They both focus our attention only on certain isolated, odious characteristics—observed, inferred, assumed, or simply attributed—

⁹ William Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *Indiana Law Review* 1043 (1995), at 1087, tbl. 2.

¹⁰ *Id.* at 1090, tbl. 6.

¹¹ *Id.* at 1091, tbl. 7.

¹² Many of these issues are discussed in: Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 *De Paul Law Review* 1557-1590 (2004).

which then are taken as emblematic, to the exclusion of all others, and that facilitate our condemnation of their targets.¹³ The death penalty and racism depend upon a form of “psychological secrecy”—the refusal to deal with the painful emotional dilemmas that would be generated and the moral ambiguities we would be forced to confront if we looked closely and honestly at what we are doing and why.¹⁴ Instead, in the case of the death penalty, the public is given access to only superficial and schematic details of the lives of capital defendants that facilitate their dehumanization and enhance what historians have called the civil ordering function of the execution ritual. Much as racism requires us to ignore the truth about those it victimizes and diminishes, and insists that we keep a distance from the persons that it targets lest we learn the truth about the cruel falsehoods racism perpetuates, capital punishment, as I tried to show in Chapter Seven, thrives under circumstances that push us away from truly understanding those on whom it is inflicted and how.

Of course, there are differences between lawfully condemning someone to die and prejudicially condemning someone to the margins of social existence. In addition to the difference between literal and social death is the fact that someone who is condemned to die almost always has done something truly horrible in order to become eligible for execution, while the victims of racism have done nothing to precipitate their invidious mistreatment. Yet, there are similarities in the psychology by which both proceed, and those similarities have forged an empirical connection between capital punishment and racist times and places. Throughout the history of American criminal justice, African Americans have received death sentences disproportionate to their numbers in the general population. These disproportions have been more shocking in some jurisdictions than

¹³ Some of these “mechanisms of moral disengagement” were discussed at length in Chapter Seven.

¹⁴ For example, see: Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on “the Mere Extinguishment of Life,”* 16 *Studies in Law, Politics, and Society* 3-69 (1997).

others, and for some crimes (rape, in particular) than others, but the variations have rarely been so great as to mask the overall differences in treatment.

Louis Masur's historical study of capital punishment in the eighteenth and nineteenth centuries noted that even then, "those whom the state hanged tended to be young, black, or foreign."¹⁵ More recent statistics suggest that relatively little has changed since then. For example, between 1930 and 1982, African Americans comprised 10-12% of the United States population but 53% of those executed.¹⁶ In presumably more enlightened times, only modest reductions in these disparities have been brought about. For example, in 1995, a year in which 56 persons were executed in the United States, over 40% were persons of Color (25 of 56), almost all of whom were African American (22 of 56, or 39% of the total).¹⁷ The overrepresentation of African Americans on death row also persists. For example, in 1987 they comprised 41 percent of the prisoners condemned to death in the United States, about 3.5 times their number in the general population.¹⁸

Of course, these gross racial disparities do not account for the higher rates at which African Americans are arrested for murder in the United States. Yet, even though they are not necessarily probative of "discrimination" in criminal justice system decisionmaking, unadjusted statistics—the percentages of African Americans sent to death row or executed—are nonetheless relevant to discussions of racial fairness. Unless one is prepared to defend the indefensible proposition that African Americans have an innate predisposition to homicidal violence, these persistent disparities indirectly reflect

¹⁵ Louis Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*. New York: Oxford University Press (1989), at 6.

¹⁶ National Prisoner Statistics, *Capital Punishment 1982*. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics (1984), at p. 9.

¹⁷ Capital Punishment 1995, National Criminal Justice Reference Service.

¹⁸ Amnesty International (1988). *USA: The Death Penalty: Developments in 1987*. New York: Amnesty International (1988), at p. 15.

the continued exposure of African Americans to powerful criminogenic conditions, something I discuss later in this chapter.

Moreover, even much more sophisticated statistical analyses of patterns of death penalty decisionmaking that do control for rates of arrest, and sometimes for many other variables, generally find that the race of the defendant (as well as, certainly, the race of the victim) has an important effect on whether suspected murderers are charged with a death-eligible crimes and whether juries vote to impose the death penalty in their cases.¹⁹ Despite some variation in the outcomes of the studies, racial discrimination in the act of sentencing someone to death persists, sometimes strikingly so, as when an African American capital defendant has been convicted of a potentially capital murder in which his victim was White. Because most homicide is intra-racial, and criminal justice decisionmakers appear to undervalue African American victims, the extent that we overpunish African American defendants is masked somewhat by the smaller number of cases in which they are charged with killing White victims.

However, the point at which calculations begin in many of studies of sentencing discrimination occurs long *after* some of the most potent and destructive racialized forces at work in our society have already taken their life-altering toll. Research that focuses on the lives of capital defendants of all racial and ethnic backgrounds underscores the extent to which they were exposed to powerful criminogenic (or “crime producing”) factors and other traumatizing events and experiences long before their capital crimes were

¹⁹ The best archival studies reach these conclusions in varying degrees. See, for example: David Baldus, George Woodworth & Charles Pulaski, *Equal Justice and the Death Penalty: A Legal Empirical Analysis*. Boston: Northeastern University Press (1990); David Baldus, George Woodworth, David Zuckerman, Neil Weiner, and Barbara Broffitt, Racial Discrimination and the Death Penalty in the Post Furman Era: A Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 *Cornell Law Review* 1638 (1998); Samuel Gross & Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing*. Boston: Northeastern University Press (1989). In a congressionally mandated summary and review of some 28 studies of the topic, a Government Accounting Office report found race of victim significantly influenced death sentencing in about four out of five of the studies, and that race of defendant significantly influenced it in about half of them. See United States Government Accounting Office, *Death Penalty Research Indicates Pattern of Racial Discrimination* (1990).

committed. This is especially—perhaps uniquely—true in the case of African American capital defendants who, because of the continued significance of race in American society, face more severe criminogenic factors, more often, and for longer periods of time.

These experiences represent a form of “biographical racism”—the accumulation of race-based obstacles, indignities, and criminogenic influences that characterizes the life histories of so many African American capital defendants. As these experiences accumulate over the life span, they exercise such profound influence over the life course and social histories of those exposed to them that they literally shape their biographies. These experiences are structural, and are built into the very social contexts and life circumstances that have surrounded many African American capital defendants at key developmental stages of their lives. These life-shaping forces are psychologically central to understanding the “background and character” of a defendant and, as a result, should be uniquely legally relevant to the decision of whether or not he lives or dies. Yet, as I will discuss in the remainder of this chapter, too often this information is either not presented to or not appreciated by the capital jury that should rely on it.

Some Structural Components of Biographical Racism

Terrible, traumatizing, and criminogenic social histories are not the unique province of minority capital clients.²⁰ The lives of many such defendants are filled with what psychologists have termed “risk factors,” potentially harmful experiences that greatly increase the likelihood that persons will engage in troubled, problematic behavior

²⁰ I have discussed some of these issues more broadly in: Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *Santa Clara Law Review* 547-609 (1995).

in the future.²¹ However, because of the continued correlation of race with so many other painful and potentially damaging experiences in our society, the life histories of African American defendants tend to be replete with such risk factors, in ways that are distinctive, and distinctly mitigating. In this section I briefly touch on just some of the components of the biographical racism from which many African American capital defendants have suffered.²²

For example, we know that poverty forces family members to adapt to scarcity in ways that affect interpersonal relationships and, in turn, child development. One ethnographer studying children growing up in a poor urban neighborhood acknowledged their impressive resourcefulness in coping with poverty, but nonetheless was forced to conclude that these admirable adaptive skills were still “no match for the physical toll of poverty and its constant frustrations and humiliations.”²³ African American children, particularly, are more likely to live under conditions of *chronic* poverty,²⁴ the kind most likely to produce dysfunctional long-term adaptations.²⁵ Many researchers have documented the ways in which chronic economic hardships produce family disruption

²¹ See Ann Masten & Norman Garmezy, Risk, Vulnerability and Protective Factors in Developmental Psychopathology. In F. Lahey & A Kazdin (Eds.) *Advances in Clinical Child Psychology* (pp. 1-52). New York: Plenum (1985).

²² There is a vast literature on these issues. In this single chapter, I cannot do it justice. What follows is an idiosyncratic rather than comprehensive review.

²³ Carl Nightingale, *On the Edge: A History of Poor Black Children and Their American Dreams*. New York: Basic Books (1994), at 55.

²⁴ For example, see: Bane, M., & Ellwood, D., Slipping In and Out of Poverty: The Dynamics of Spells, 21 *Journal of Human Resources* 21 (1986).

²⁵ Ethnographers have documented many of the ways in which poor children literally live different lives from children who are not poor. They have, as Annette Lareau has phrased, “unequal childhoods.” Although many of these deep consequences of these differences remain “invisible and thus unrecognized” they nonetheless have “profound implications for life experiences and life outcomes.” Annette Lareau, *Unequal Childhoods: Class, Race, and Family Life*. Berkeley, CA: University of California Press (2003), at p. 257. However, arguments that social class may be a more important predictor of these deep consequences than race are difficult to resolve, in part because they often overlook the way both class and race still are inextricably bound in our society.

and psychological distress for both parents and children. This distress undermines parents' ability to provide nurturing care and increases tendencies toward inconsistent discipline that are, correspondingly, associated with increased depression, drug use, and delinquency among their adolescent children.²⁶

We also know that persistent poverty is predictive of severe and recurrent child abuse. That is, parental “[v]iolence does occur at all income levels but it is more often repeated among the persistently poor.”²⁷ Thus, even though they suffer disproportionately from “virtually every form of stress affecting full and healthy development,” including being denied proper medical care and deprived of adequate food, clothing, and housing, “[n]one of these stressors is more threatening to the healthy development of black children and to the stability of their families than intrafamilial child abuse.”²⁸ Among other things, exposure to violent, abusive parenting is *criminogenic*. That is, it shapes and influences young lives in ways that make subsequent criminal behavior more likely and significantly increases the chances of juvenile justice system intervention later on.

Of course, not every family adapts to the pressures of chronic poverty in the same way, and certainly not all African American capital defendants have experienced abusive parenting. But there are many other aspects to biographical racism that many of them have endured. For example, significant numbers of African American children “still

²⁶ For example, see: Lempers, J., Clark-Lempers, D., & Webb, V., Economic Hardship, Parenting, and Distress in Adolescence, 60 *Child Development* 25-39 (1989). See, also, Sampson, R., Urban Black Violence: The Effect of Male Joblessness and Family Disruption, 93 *American Journal of Sociology* 348 (1987), who has suggested that high crime rates in urban African American communities stem from structural linkages between unemployment, economic deprivation, and family disruption.

²⁷ Kruttschnitt, C., McLeod, J., & Dornfeld, M., The Economic Environment of Child Abuse, 41 *Social Problems* 299-315 (1994), at 310. This fact may help to explain the comparatively higher rates of child maltreatment reported in African American families.

²⁸ Lassiter, R., Child Rearing in Black Families: Child-Abusing Discipline? In R. Hampton (Ed.), *Violence in Black Families* (pp. 39-54). Lexington, MA: Lexington Books (1987), at 39. See, also, Daniel, J., Hampton, R., & Newberger, E., Child Abuse and Accidents in Black Families: A Controlled Comparative Study, 53 *American Journal of Orthopsychiatry* 645-653 (1983); Vonnie McLoyd, The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioeconomic Development, 61 *Child Development* 311-46 (1990).

encounter expressions of racial hatred, live in racially segregated neighborhoods, and endure the suspicion widespread among many people in positions of authority.”²⁹ Many of them grow up in communities torn by violence, so that they are at risk of victimization in their own neighborhoods, where they lack physical and psychological safe havens.

If it is true, as sociologists teach us, that “[t]o understand the biography of an individual... we must understand the institutions of which [he is] a part,”³⁰ then understanding the biographical racism to which African Americans are exposed requires special attention to the nature of the institutions into which they are disproportionately drawn. Indeed, the lives of African American children are more often shaped and redirected by harsh forms of direct state intervention in ways that increase the likelihood that they will be drawn into juvenile justice institutions and, at later ages, into the adult criminal justice system.³¹ There are many factors that contribute to this funneling effect.

Thus, African American children, especially—either because of different levels of need or differential processing at the hands of agency decisionmakers, or both—are more often drawn into the so-called “child welfare” system in the United States, and subjected

²⁹ Carl Nightingale, *supra* note 23, at p. 10. Many compelling urban ethnographies and other social science analyses that have been written over the last decade about life in inner-city minority communities. For example, see: Elijah Anderson, *Streetwise: Race, Class, and Social Change in an Urban Community*. Chicago: University of Chicago Press (1990); Elijah Anderson, The Code of the Streets: How the Inner-City Environment Fosters a Need for Respect and a Self-Image Based on Violence, *The Atlantic Monthly*, 81-94 (1994, May); Geoffrey Canada, *Fist Stick Knife Gun: A Personal History of Violence in America*. Boston: Beacon Press (1995); Daniel Coyle, *Hardball: A Season in the Projects*. New York: G.P. Putnam (1993); Alex Kotlowitz, *There Are No Children Here*. New York: Doubleday (1991); Darcy Frey, *The Last Shot: City Streets, Basketball Dreams*. Boston: Houghton Mifflin (1994); Jonathan Kozol, *Amazing Grace: The Lives of Children and the Conscience of a Nation*. New York: Crown (1995); Jerrold Ladd, *Out of the Madness: From the Projects to a Life of Hope*. New York: Warner (1994); Nathan McCall, *Makes Me Wanna Holler: A Young Black Man in America*. New York: Random House (1994); Luis Rodriguez, *Always Running, La Vida Loca: Gang Days in L.A.* Curbstone (1993); Brent Staples, *Parallel Time: Growing Up in Black and White*. New York: Pantheon (1994); and Mercer Sullivan, “*Getting Paid*”: *Youth Crime and Work in the Inner City*. Ithaca, NY: Cornell University Press (1989).

³⁰ C. Wright Mills, *The Sociological Imagination*. Oxford: Oxford University Press (1957), at p. 161.

³¹ A report on foster care in California found that about two thirds of all foster children in the state were from two minority groups—African Americans (36%) and Latino (28%). See *California Child and Family Services Review: Statewide Assessment*. Sacramento, CA: California Department of Social Services (August, 2002), at p. 105.

to its often painful and potentially criminogenic influences. Although African Americans comprise 17% of the nation's children, they account for 42% of all children in foster care in the United States.³² In some communities the disparities are even more dramatic. For example, African American children constitute 95% of all those in foster care in city of Chicago.³³ Moreover, once they are in the child welfare system, African American children are less likely to receive in-home social services, or mental health care, and they are more likely to be institutionalized for their emotional problems.³⁴

Other patterns in the treatment of African American children are likely to have differential criminogenic effects. For example, they appear to be singled out disproportionately for school discipline, and are more likely to be punished for nebulous infractions (such as “excessive noise” and “disrespect”). The differentials are large—one study found that, even after controlling for socioeconomic differences, African American children in middle school were more than twice as likely to be sent to the principal's office or suspended, and four times as likely to be expelled than their White counterparts.³⁵

³² Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare*. New York: Basic Civitas Books (2002), at 8.

³³ *Id.* at 9.

³⁴ *Id.* at 21-23.

³⁵ R. Skiba, Indiana Education Policy Center, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, Policy Research Report #SRS1, at 13, 16 (2000). Earlier reports on the same issue found some of these same patterns of racially discriminatory treatment in public schools: in Oakland, California, at a time when African American students comprised 28% of the students in the school system they represented 53% of the suspensions. Commission for Positive Change in the Oakland Public Schools, *Keeping Children in Schools: Sounding the Alarm on Suspensions*. Oakland, CA: The Commission (1992), at p. 1. The issue received national attention in the early 1990s. See J. Hull, Do Teachers Punish According to Race? *Time Magazine*, April 4, 1994, p. 30-31. Almost a decade later, the problem had not abated. See J. Morse, Learning While Black, *Time Magazine*, May 27, 2002, p. 50-53. See, also, a comprehensive statistical analysis sponsored by the *Seattle Post-Intelligencer* examining nearly 40,000 Seattle secondary school disciplinary records that found that African American students were more than twice as likely as any other group to be suspended or expelled. The statistical disparities remained even after the variables of poverty and living in a single-parent family (both of which also were associated with higher rates of school discipline) were taken into account. The differentials were particularly pronounced for vague or subjective offenses like “disobedience” and “interference with authority.” R.

Some social scientists have theorized about various ways that public schools help to construct “bad boys” out of young African American male students.³⁶ For example, differences in “manners, style, body language, and oral expressiveness” may subtly but systematically influence the way in which teachers apply school rules and label African American students, ultimately placing them “at the bottom rung of the social order.”³⁷ Moreover, as Anne Ferguson has put it, “[i]n the case of African American boys, misbehavior is likely to be interpreted as symptomatic of ominous criminal proclivities”³⁸ and the long-term consequence of this interpretation may be to “substantially increase one’s chance of ending up in jail.”³⁹

There is also evidence of racial inequality in the assignment of African American children to special education classes. Nationwide statistics indicate that they are three times more likely to be labeled developmentally disabled and twice as likely to be labeled emotionally disturbed as their White counterparts.⁴⁰ Once diagnosed, they are more likely

Denn, Blacks Are Disciplined at Far Higher Rates Than Other Students, *Seattle Post-Intelligencer*, March 15, 2002.

³⁶ Anne Ferguson, *Bad Boys: Public Schools in the Making of Black Masculinity*. Ann Arbor, MI: University of Michigan Press (2000). See, also: A. Barona, A., & Eugene Garcia, (Eds.), *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity*. Washington, DC: National Association of School Psychologists (1990); Jonathan Kozol, *Savage Inequalities: Children in America’s Schools*. New York: Harper Collins (1991).

³⁷ Ferguson, *supra* note 36 at p. 51. Indeed, Ferguson noted that schools are “replete with symbolical forms of violence,” in part because children who are regarded by authorities as “troublemakers” are themselves “conscious of the fact that school adults have labeled them as problems, social and educational misfits” and many are also aware “that what they bring from home and neighborhood —family, structure and history, forms of verbal and nonverbal expression, neighborhood lore and experiences—has little or even deficit value.” *Id.* at 169.

³⁸ *Id.* at 89.

³⁹ That is because, “in the daily experience of being [named as a ‘troublemaker’] regulated, and surveilled, access to the full resources of the school are increasingly denied as the boys are isolated in nonacademic spaces in school or banished to lounging at home or loitering on the streets.” Moreover, time spent in the school detention center “means time lost from classroom learning; suspension, at school or at home, has a direct and lasting negative effect on the continuing growth of a child” so that “human possibilities are stunted at a crucial formative period of life.” *Id.* at 230.

⁴⁰ D. Losen & Gary Orfield (Eds.), *Racial Inequality in Special Education*. Boston, MA: Harvard Education Press (2002).

than White students to be separated from mainstream classrooms, and are more often relegated to under-funded and poorly designed programs that provide them with marginal educational experiences and minimal employment skills. At least one study of this problem concluded that its long-term effects contributed to higher rates of unemployment and incarceration among young African American adults.⁴¹

As adolescents, African Americans are more likely to be exposed to violence in their neighborhoods and in their schools, experiences that not only predispose them to higher rates of post-traumatic stress disorder (“PTSD”)⁴² but serve as risk factors for subsequent emotional problems, drug use, delinquency, and criminality. One critically important consequence of the way these and other risk factors combine in the lives of African American children and adolescents is the *much* higher rate of juvenile justice system intervention to which they have been subjected.

In fact, the overrepresentation of minority youth in these institutions so widespread that juvenile justice researchers and policymakers refer to it by its acronym—“DMC” (for “disproportionate minority confinement”). African American and Latino children are over-represented at literally every stage of juvenile justice system processing—in arrests, referrals to juvenile court, and among those who are held in detention awaiting the disposition of their case. They also are more likely to be formally charged in juvenile court, more likely to have their case waived from juvenile to adult court, and more likely to receive a disposition that requires an out-of-home placed (such as a commitment to a locked institution).⁴³

⁴¹ Losen & Orfield, *supra* note 40.

⁴² For example, see: Margaret Berton & Sally Stabb, Sally, Exposure to Violence and Post-Traumatic Stress Disorder in Urban Adolescents, 31 *Adolescence* 489-498 (1996).

⁴³ For example, see: Leonard, K., Pope, C., & Feyerherm, W. (Eds.), *Minorities in Juvenile Justice*. Thousand Oaks, CA: Sage Publications (1995); Amnesty International, *Betraying the Young: Human Rights Violations Against Children in the U.S. Justice System*. AI Index: AMR 51/60/98; Snyder, H., & Sickmund, M., *Juvenile Offenders and Victims: 1999 National Report*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention (1999); M. Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*. Washington, DC: Building Blocks for Youth (2000); and

Indeed, minority youth represent the *majority* of children held in juvenile facilities. For example, although they comprised 34% of the U.S. population in 1997, they represented 62% of children who were incarcerated that year. The disparities are especially large for African American youth. For example, African American children with no prior admissions to the juvenile justice system were six times more likely to be incarcerated in a public facility than White children with the same background who were charged with the same offense. African American children had one or two prior admissions were *seven* times more likely to be incarcerated than Whites with the same background history. Moreover, African American youth who were held in custody remained an average of 61 days longer than Whites. And the disparity in length of confinement was particularly pronounced for drug offenses, for which African American juveniles were confined an average of 90 days longer than their White counterparts.⁴⁴

As recently as the late 1990s, after decades of supposed reform, the American Bar Association and the United States Justice Department issued a joint report that was highly critical of many of the nation's juvenile justice institutions. Echoing the concerns expressed in previous nationwide studies, the report acknowledged that the facilities were "increasingly overcrowded," "significantly deficient," and held a disproportionate number of minority young offenders incarcerated for property and drug-related crimes. The authors expressed concern over the "[w]ell documented deficiencies" in conditions of confinement, and the nature and poor quality of treatment and educational services, security, and suicide prevention. As they noted, "[s]ubjecting youth to abusive and

E. Poe-Yamagata & M. Jones, *And Justice For Some*. San Francisco, CA: National Council on Crime and Delinquency (2000).

⁴⁴ These data appear in: DeComo, R., *The Juveniles Taken Into Custody Research Program: Estimating the Prevalence of Juvenile Custody Rates by Race and Gender*. San Francisco, CA: National Council on Crime and Delinquency (1993).

unlawful conditions of confinement serves only to increase rates of violence and recidivism and to propel children into the adult criminal justice system.”⁴⁵

“Disproportionate minority confinement” means that these harmful consequences necessarily fall more heavily on African American children than others. Along with other minority children, they will be placed at even greater risk of subsequent incarceration as a result of this form of early state intervention. In fact, analysts like Barry Feld have argued persuasively that the increasingly punitive juvenile justice policies that “impose harsh sanctions disproportionately on minority youths” have, in turn, transformed the very nature of the juvenile court system in the United States, blurring the differences in procedures and substantive goals between it and the adult criminal courts.⁴⁶ In part because “the segregation of blacks living in concentrated poverty in urban America coalesced and influenced patterns of youth crime,”⁴⁷ it was easier for predominately White policymakers deciding how to handle “someone else’s kids”—usually African American kids—to implement increasingly severe punishments. Softer and more benign

⁴⁵ Puritz, P., & Scali, M., *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*. Washington, DC: U.S. Department of Justice (1998), p. xi. Earlier researchers described many juvenile institutions as engendering “a constant struggle for survival” in an environment where wards “spend much of their time either exploiting weaker youths or defending themselves against victimization.” Davi, D., Chance, Change and Challenge in Juvenile Corrections, *Juvenile & Family Court Journal* 45-50 (1982), at p. 47. A team of criminologists appropriately labeled the victimization of juveniles inside the very institutions where they had been sent to be helped as a “paradox.” The authors described the extraordinary adaptations young offenders forced on young offenders trying to cope in an institutional environment that was, on the one hand, a “punishment-centered bureaucracy,” and, on the other, a “terrifying... social world.” Bartollas, C., Miller, S., & Dinitz, S. *Juvenile Victimization: The Institutional Paradox*. New York: Halsted (1976), at p. 197, 271. The living units the facilities they examined were “worse than the streets,” places where a young inmate often was required to “feign bravery and toughness so convincingly that he is not challenged.” *Id.* at 12. They concluded that, even in the best juvenile institutions, “very little correction, training, or adjustment occurs—or can, in fact, occur under present circumstances and social policies.” *Id.* at 271. See, also, Clemens Bartollas, Survival Problems of Adolescent Prisoners, In R. Johnson & Hans Toch (eds.), *The Pains of Imprisonment* (pp. 165-180). Beverly Hills, CA: Sage Publications (1982).

⁴⁶ Barry Feld, *Bad Kids: Race and the Transformation of the Juvenile Court*. New York: Oxford University Press (1999), at p. 5.

⁴⁷ *Id.* at p. 14.

methods, once were justified by the increasingly defunct rehabilitative ideal, fell into disfavor.

Many African American children are further “propelled” toward the adult criminal justice system by an additional set of factors that compounds whatever painful and damaging experiences they suffered in juvenile institutions. For adults as well as juveniles, crime is shaped by its social ecology—the characteristics of the neighborhoods in which it occurs. Like other people returning from juvenile and adult institutions, many African Americans are consigned to inner-city environments filled with criminogenic risks and threats.⁴⁸ The difference is that, in many communities, there are so many more of them. Lacking any social and economic cushion with which to absorb returning and displaced residents, these places hover at the “tipping point,” beyond which insurmountable levels of personal and neighborhood disorganization and chaos may occur.⁴⁹

In many of these areas, the lives of African American residents are much affected by what researchers have termed “criminal embeddedness”—immersion in a network of interpersonal relationships that increase their exposure to crime-prone role models.⁵⁰ Neighborhoods characterized by criminal embeddedness are highly criminogenic also extremely difficult to survive. Recent statistics indicate that African Americans are about nine times more likely than Whites to be murdered with firearms.⁵¹ Not surprisingly, as

⁴⁸ For a discussion of some of the problems ex-convicts bring with them as they re-enter free society, as well as the problems they confront once they arrive, see: Jeremy Travis and Michelle Waul (Eds.), *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities*. Washington, DC: Urban Institute Press (2003).

⁴⁹ For example, see Todd Clear, Dina Rose, and Judith Ryder, Incarceration and the Community: The Problem of Removing and Returning Offenders, 47 *Crime and Delinquency* 335-351 (2001).

⁵⁰ For example, see McCarthy, B., & Hagan, J., Getting into Street Crime: The Structure and Process of Criminal Embeddedness, 24 *Social Science Research* 63-95 (1995).

⁵¹ Bureau of Justice Statistics, *Special Report: Weapon Use and Violent Crime*. NCJ 194830. September, 2003.

social scientists Michelle Fine and Lois Weiss found in their study, urban inner city residents of both genders and all races and ethnicities were very concerned about street crime and violence. However, despite the high rates at which they were victimized by street crime, African American and Latino men were more likely to voice fears about “*state-initiated* violence, detailing incidents of police harassment, the systemic flight of jobs and capital from poor communities of color, the over-arrest of men of color, and the revived construction of prisons.”⁵²

Other researchers have used the term “neighborhood disadvantage” to describe the nexus or cluster of interrelated factors that often accompany poverty in minority communities and amplify its negative effects on individual development as well as on adult behavior.⁵³ As I noted above, the impact of these factors disrupts of the social organization of the neighborhood, undermines the development of shared community norms, and weakens families and their ability to socialize children in positive ways. Not surprisingly, many of these neighborhood disadvantages are criminogenic in nature. For example, high rates of unemployment and the prevalence of single-parent families in neighborhoods can minimize the amount of time that children spend with positive role models. Disadvantaged neighborhoods also tend to suffer extreme levels of transience and mobility that contributes to an overall sense of impermanence and disorganization. The development of stable, consistent, and consensual community norms against crime and violence is undermined as a result.

⁵² Michelle Fine and Lois Weiss, *The Unknown City: The Lives of Poor and Working-Class Young Adults*. Boston: Beacon Press (1998), at p. 110 (emphasis in original). There is an extensive literature on this inter-related set of problems. For example, see, William Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 *Social Problems* 177 (1994), at 183. Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*. New York: Oxford (1995).

⁵³ Elliott, D., Wilson, W., Huizinga, D., Sampson, R., and Rankin, B., *The Effects of Neighborhood Disadvantage on Adolescent Development*, 33 *Journal of Research in Crime and Delinquency* 389-426 (1996).

Indeed, many autobiographical and ethnographic accounts of the lives of African Americans have underscored precisely these disadvantages, ones that many African American capital defendants have confronted throughout their lives.⁵⁴ They are the result of powerful sociopolitical and economic forces that adversely affect the choices of individual actors, choices that are often less a product of rational or conscious decisionmaking processes than attempts to struggle with “[f]eelings of sheer humiliation and embarrassment, disappointment and frustration, grief and loneliness, and fear and anxiety (especially concerning suspicion, rejection, and abandonment).”⁵⁵

Race continues to shape the biographies of African American capital defendants well into adulthood. For example, the racial dimension to poverty in the United States in some ways deepens the stigma, renders its consequences more chronic for adults as well as children.⁵⁶ In some areas of the country the structural disadvantage and economic marginality are staggering. For example, Neeta Fogg reported in 2003 that an incredible 45% of Black men in Chicago between the ages of 20 and 24 were out of work and out of school.⁵⁷ Similarly, nearly half of all African American men between the ages of 16 and 64 in New York City were unemployed in 2003.⁵⁸ In the face of such severe deprivation and disadvantage, race seems to heighten the sense of injustice, and intensify the

⁵⁴ See *supra*, note 29 and the reference cited therein.

⁵⁵ Nightingale, *supra* note 23, at 40.

⁵⁶ E.g., Sampson, *supra* note 26. See, also, Balkwell, James, Ethnic Inequality and the Rate of Homicide, 69 *Social Forces* 53-70 (1990), who reported that ethnic inequality was a strong predictor of homicide, and Blau, J., & Blau, P., The Cost of Inequality: Metropolitan Structure and Violent Crime, 47 *American Sociological Review* 114-129 (1982) who also found that racial and economic inequality contributed to levels of violent crime.

⁵⁷ Quoted in Bob Herbert, Locked Out at a Young Age, *New York Times*, October 20, 2003, p. A19. See, also, “Out-of-School & Jobless Youth Reach Crisis Levels: 87,000 Jobless Youth Walk Chicago’s Streets; New Report Releases Data on State, Metro, and City Disconnected Youth, *PR Newswire*, October 20, 2003.

⁵⁸ Janny Scott, Nearly Half of Black Men Found Jobless, *New York Times* (February 28, 2004) at p. B1, B4. For the full report, see: Mark Levitan, A Crisis of Black Male Employment: Unemployment and Joblessness in New York City, 2003. Community Service Society Annual Report, February, 2004.

righteous outrage that develops among people who have been confined in what one commentator has termed a “subculture of exasperation.”⁵⁹

In addition to these sociological and economic consequences, racism also impacts the biographies of African Americans in ways that are more psychological in nature, exposing them to significantly higher levels and unique forms of interpersonal and “environmental” stress.⁶⁰ For example, they may be subjected to what have been termed “micro-aggressions”—the “subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks” by Whites who may employ them “unintentionally” but nonetheless persistently.⁶¹ The cumulative impact of these micro-aggressions “has the potential to be the straw that breaks the camel’s back due to the relentless nature of the racialized bombardment and the difficulty of attributing racial animus, that hostility which is thought to indicate intention.”⁶²

Although as a rule African Americans are subjected to a greater number of such provocations, they do not have the same leeway as others to respond. Indeed, the greater amount of criminal justice system surveillance, monitoring, and intense policing of African Americans, disparities in the prosecution and punishment of African Americans for similar crimes that are treated very differently (perhaps as a function of the race of the defendants likely to commit them),⁶³ and the multitude of other criminogenic criminal

⁵⁹ Harvey, W., Homicide among Black Adults: Life in the Subculture of Exasperation. In Hawkins, D. (Ed.), *Homicide Among Black Americans* (pp. 153-171). Lanham, MD: University Press of America (1986).

⁶⁰ For example, see: Grace Carroll, *Environmental Stress and African Americans: The Other Side of the Moon*. Westport, CN: Praeger (1998).

⁶¹ Peggy Davis, Law as Microaggression, 98 Yale Law Journal 1559-1577 (1989), at p. 1565, quoting psychiatrist Chester Pierce, who first coined the term. See Chester Pierce, "Offensive Mechanisms" in Floyd B. Barbour (Ed.), *The Black Seventies* (pp. 265-282). Boston, MA: Porter Sargent Publisher (1970).

⁶² Camille Nelson, Breaking the Camel’s Back: A Consideration of Mitigatory Defenses and Racism-Related Mental Illness, 9 *Michigan Journal of Race and Law*, 77-146 (2003), at p. 93.

⁶³ For example, although Blacks and Whites use drugs at approximately the same rate, African Americans have been arrested for drug offenses at a much higher rate than Whites. See Alfred Blumstein, Making Rationality Relevant—The American Society of Criminology 1992 Presidential Address. *Criminology*, 31,

justice interventions to which they are exposed (such as higher rates of “three strikes” prosecutions⁶⁴) help to account for the drastic levels of overincarceration of African American adult men—rates that exceed those of Blacks in South Africa.⁶⁵ Prison itself, the difficulties of post-prison adjustment, and the fact that probation and parole now function as an agencies of social control rather than providers of reintegrative services⁶⁶ all combine in potentially destructive ways to adversely affect the lives of African Americans than others.

This brief cataloging of the structural and other obstacles faced by African Americans has addressed only some of the factors that distinguish their lives from just about everyone else in this society. These components of biographical racism go a long way toward explaining—at a broad level with sobering implications—the continuing disproportion of African Americans in our nation’s prisons and on its death rows. Any one who has worked extensively with capital defendants knows firsthand about the wages of this kind of racism, the way it interacts with criminal justice system decisionmaking,

1-16 (1993). For a discussion of the sentencing disparities between powder and crack cocaine-related offenses, see B. Poindexter, *The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa*, 22 *Loyola of Los Angeles Journal of International and Comparative Law Review*, 375-402 (2000): See, also, *supra* note 59 and the references cited therein.

⁶⁴ For example, see Lisa Cowart, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 *DePaul Law Review* 615 (1998) citing sources to the effect that “African Americans are sentenced under three strikes laws at a rate of thirteen-to-one over Caucasians” (at p. 652). See, also: Dragan Milovanovic and Katheryn Russell, *Petit Apartheid in the U.S. Criminal Justice System: The Dark Figure of Racism*. Durham, NC: Carolina Academic Press (2001).

⁶⁵ A. King, *The Impact of Incarceration on African American Families: Implications for Practice*, 74 *Families in Society: The Journal of Contemporary Human Services* 145-153 (1993). Approximately one-third of all African American men between the ages of 20-29 are in prison, or on probation or parole. Marc Mauer and Tracy Huling, *The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later* (1995), at p. 3. Although the rate at which White men were imprisoned in the United States rose dramatically in the 1980—growing from a rate of 528 per 100,000 in 1985 to a rate of 919 per 100,000 in 1995—it never remotely approximated the incarceration rate for African Americans. The number of African American men who were incarcerated rose from 3,544 per 100,000 in 1985 to an astonishing rate of 6,926 per 100,000 in 1995. C. Mumola & J. Beck, *Prisoners in 1996*. (Bureau of Justice Statistics Bulletin NCJ 164619). Rockville, MD: Bureau of Justice Statistics (1997, June).

⁶⁶ For example, see: Edwin Lemert, *Visions of Social Control: Probation Considered*, 39 *Crime & Delinquency* 447-461 (1993); and Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*. Chicago: University of Chicago Press (1993).

and inflicts additive effects upon the lives of young minority men that often explain the troubled path they have traveled toward their trial for life.

Structural Mitigation in the Social Histories of Capital Defendants

On a case-by-case basis, biographical racism represents a form of what might be called “structural mitigation”—mitigation that is structured into the lives of African American defendants by the continued importance and pernicious consequences of race in American society. In precisely the degree to which African American capital defendants have undergone these unique and potentially criminogenic experiences in our society, they approach their capital trials with social histories that include a built-in store of significant mitigation that capital juries are required to consider in deciding their fates.

To be sure, this kind of mitigation is not categorical—it does not, on its face, preclude the imposition of the death penalty (as the Supreme Court now has ruled that, say, age and developmental disability do).⁶⁷ Nor is this an argument to the effect that African Americans are not “capable” of committing a capital crime or that they are not “responsible” for what they do.⁶⁸ Rather it is a statement about the special store of

⁶⁷ On the age-based limits to death penalty imposition, see: *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989). On developmental disability as a bar to capital punishment, see: *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁶⁸ In this context, it is important to reject false dichotomies suggesting that people must be seen either as fully autonomous agents who are not only equally responsible but completely culpable for everything they do, or otherwise are being depicted as helpless, downtrodden victims who cannot initiate actions or make choices on their own. Of course, neither caricature is accurate and the dichotomy is a false one. An analysis that recognizes the way in which structural and other forces influence actions and constrain choices does not diminish the dignity of the persons to whom it is accurately applied. The social philosopher Martha Nussbaum is persuasive on this point. She writes: “[P]eople are dignified agents, but they are also, frequently, victims. Agency and victimhood are not incompatible: indeed, only the capacity for agency makes victimhood tragic.” Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*. Cambridge: Cambridge University Press (2001), at p. 406. Thus, I must confess that, try as I might, I do not understand the logic of the argument that we uphold the dignity of a group of people by executing them at high rates for crimes they committed in part in response to conditions created and imposed on them by others.

mitigation— considerations that weigh heavily in favor of granting life rather than death verdicts—that has been inscribed into their social histories by the very nature of the experiences to which, as a result of their race, African American defendants have been exposed and subjected.

To develop this notion a little more, let me briefly discuss the concept of mitigation and how it is supposed to operate in capital trials. Legal commentators have helped to refine the concept of mitigation by reminding defense attorneys that they must show jurors that the defendant’s actions were “humanly understandable in light of his past history and the unique circumstances affecting his formative development.”⁶⁹ Thus, a mitigating social historical analysis of a defendant’s life that highlights the role of factors like poverty and abuse does not excuse serious violent crime, but it renders past criminal behavior “more understandable and evokes at least partial forgiveness.” It is a framework that must be brought to bear in a capital penalty trial in order “to spark in the sentencer the perspective or compassion conducive to mercy.”⁷⁰

In 1987, Justice O’Connor articulated what she characterized as a “long held” societal belief, namely that, “defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”⁷¹ She summarized the significance of this belief for “the individualized assessment of the appropriateness of the death penalty,” noting that the process of understanding the role that someone’s disadvantaged background or their emotional or mental problems have played in their life course and past criminal behavior is central to the constitutionally required “moral inquiry into the

⁶⁹ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 *New York University Law Review* 299 (1983), at 335-6 (footnotes omitted).

⁷⁰ *Ibid.*

⁷¹ *California v. Brown*, 479 U.S. 538, 545 (1987) (concurring).

culpability of the defendant.”⁷² And, just two Terms ago, O’Connor authored an opinion that finally imposed a *duty* upon defense attorneys to assist jurors with this inquiry by developing mitigation through a detailed social historical analysis of the capital defendant’s life.⁷³

These legal notions about the basis of mitigation are grounded in sound psychological theory. The theoretical basis for a model of mitigation begins with what social psychologists know as “attribution theory,” the notion that people regularly make causal attributions about the behavior that they witness other people engaging in.⁷⁴ Depending on whether they attribute the causes of the behavior in question to the internal dispositions and willful choices of the actor, or to external circumstances and conditions over which the actor has less control, the behavior and the actor are judged very differently. That is, the nature of the causal attribution affects judgments about the moral quality of the act and the moral culpability of the actor.

It is well established in the application of attribution theory to legal settings that jurors engage in a process of analyzing the causes of a defendant’s behavior, his intentions in the course of that behavior, and the outcome of the behavior itself in the

⁷² Ibid.

⁷³ *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Postconviction investigation revealed that Mr. Wiggins had a “bleak life history” that included neglect and severe forms of abuse “at the hands of his mother and while in the care of a series of foster parents” (at 2533). His trial attorneys did not uncover, develop, or present any of this information at his sentencing hearing. The Court found that had the jury been appraised of this “troubled history,” which constituted “considerable mitigating evidence,” there was “a reasonable probability they it would have returned a [life] sentence” (at 2542-3). The *Wiggins* Court imposed a duty upon competent trial counsel to diligently seek to develop precisely this kind of information in capital cases.

⁷⁴ Attribution theory was formalized in Fritz Heider, *The Psychology of Interpersonal Relations*. New York: Wiley (1958). It has been corroborated, elaborated, and extended in numerous publications since then. For thoughtful overviews, see: Edward Jones, David Kanouse, Harold Kelley, Richard Nisbett, Stuart Valins, and Bernard Weiner (Eds.), *Attribution: Perceiving the Causes of Behavior*. Hillsdale, NJ: Lawrence Erlbaum (1987); Harold Kelley, Attribution Theory in Social Psychology, 15 *Nebraska Symposium on Motivation* 192-238 (1967); Harold Kelley, The Processes of Causal Attribution, 28 *American Psychologist* 107-128 (1975); Harold Kelley and John Michela, Attribution Theory and Research, 31 *Annual Review of Psychology* 457-301 (1980); Lee Ross and Richard Nisbett, *The Person and the Situation: Perspectives of Social Psychology*. New York: McGraw-Hill (1991).

course of attributing blame, gauging blameworthiness, and assessing culpability.⁷⁵ When the perceived cause of a criminal act is internal and volitional—stemming from personal traits and choices—increased levels of culpability are assigned and higher levels of punishment are perceived as warranted. Reversing or moderating the attributional process by which higher levels of culpability are assigned—by providing alternative causal explanations for actions or for an entire life course—is the essence of mitigation in a capital sentencing context (or any context for that matter). Thus, in terms of the “moral inquiry into the culpability of the defendant” that is essential to the capital jury’s choice between life and death, anything that shifts the ultimate causal attribution (in part or in whole) from the defendant to some external cause or condition not under the control of the defendant, has a mitigating effect or consequence.

Because of the well-documented general tendency for people to attribute actions to the actor, not to the situation or to other background factors—committing what social psychologists call the “fundamental attribution error”⁷⁶—the task of shifting the

⁷⁵ There are too many studies on this topic to cite comprehensively. One of the best syntheses of this scientific theory is: Kelly Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness*. New York: Springer-Verlag (1985). For a representative sample of research studies in which the theory is elaborated and extended, see: Norman Anderson, Psychodynamics of Everyday Life: Blaming and Avoiding Blame. In Norman Anderson (Ed.), *Contributions to Information Integration Theory* (pp. 243-275). Volume I. Hillsdale, N.J.: Lawrence Erlbaum (1990). Brad Bell, Distinguishing Attributions of Causality, Moral Responsibility, and Blame: Perceivers’ Evaluations of the Attributions, 17 *Social Behavior & Personality* 231-236 (1989); Francis Cullen, Gregory Clark, John Cullen, and Richard Mathers, Attribution, Salience, and Attitudes Toward Criminal Sanctioning, 12 *Criminal Justice & Behavior* 305-331 (1985); Darnell Hawkins, Causal Attribution and Punishment for Crime, 2 *Deviant Behavior* 207-230 (1982); Joanne Joseph and James Tedeschi, Perceived Responsibility and the Least of Evils Principle, 7 *Law and Human Behavior* 51-58 (1983); Joseph Sanders and Lee Hamilton, Is There a “Common Law” of Responsibility? The Effect of Demographic Variables on Judgments of Wrongdoing, 11 *Law and Human Behavior* 277-297 (1987); Arvind Sinha and Pawan Dumar, Antecedents of Crime and Suggested Punishment, 125 *Journal of Social Psychology* 485-488 (1985); Thomas Shultz, Michael Schleifer, and Ian Altman, Judgments of Causation, Responsibility, and Punishment in Cases of Harm-Doing, 13 *Canadian Journal of Behavioural Science* 238-253 (1981); and Bernard Weiner, Sandra Graham, and Christine Reyna, An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment, 10 *Social Justice Research* 431-452 (1997).

⁷⁶ For an excellent discussion of this and related topics, see Ross and Nisbett, *supra* note 74. For examples of fundamental attribution error in practice, see: Lee Hamilton, Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process, 39 *Journal of Personality & Social Psychology* 767-772 (1980); Eric Hansen, Charles Kimble, and David Biers, Actors and Observers: Divergent Attributions of

attributional frame or schema can be extremely difficult. Moreover, all other things being equal, the greater the harm that the particular behavior brings about, the more likely that it will be attributed to internal causes (i.e., to the perpetrator of the act).⁷⁷ In addition, the less similar the persons whose behavior is being judged to the persons making the judgment, the greater the tendency to perceive internal causes for their behavior, to hold them more responsible and culpable for their actions, and to punish them more harshly.⁷⁸

In the case of capital jurors, who typically are called upon not just to evaluate a single act but an entire life—indeed, to assess the moral worth and overall culpability of the person who is on trial in a death penalty case—the process of understanding the attributional causes of the course of the defendant’s life requires a narrative understanding of who the defendant is and how and why he has done the things he has. As one commentator has summarized it, “[i]n compiling evidence of mitigating circumstances, attorneys and social workers investigate not only a clients' present mental state, but his childhood, family life, and the community in which he was raised.”⁷⁹ In other words, in a capital penalty trial, the inquiry into moral culpability is broadened in a way that provides the jury with insights into how and why the defendant made certain life altering choices and, as a result, what level of blameworthiness attaches to them overall.

Thus, evidence that provides a humanizing narrative account of the defendant’s life and prior actions is essential to a case in mitigation because it helps capital jurors

Constrained Unfriendly Behavior, 29 *Social Behavior & Personality* 87-104 (2001); Joel Johnson, John Jemmott, and Thomas Pettigrew, Causal Attribution and Dispositional Inference: Evidence of Inconsistent Judgments, 20 *Journal of Experimental Social Psychology* 567-585 (1984); Martin Safer, Attributing Evil to the Subject, Not the Situation, 6 *Personality & Social Psychology Bulletin*, 205-209 (1980).

⁷⁷ For example, see: Chimaeze Ugwuegbu and Clyde Hendrick, Personal Causality and Attribution of Responsibility, 2 *Social Behavior & Personality* 76-86 (1974).

⁷⁸ For example, see: Curtis Banks, The Effects of Perceived Similarity Upon the Use of Reward and Punishment, 12 *Journal of Experimental Social Psychology* 131-138 (1976).

⁷⁹ Francine Banner, Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant, 26 *New York Review of Law and Social Change* 569- (2000-2001), at p. 579.

understand how forces beyond the defendant's control shaped the direction of his life and the adaptive nature of many of the actions in which he engaged. A narrative that allows the jury to see the defendant as a person, rather than, for example, as a "monster," shifts the attributional framework and thereby lessens his level of moral culpability.⁸⁰

The opportunity to render compassionate justice requires that jurors be given the guidance to walk the "delicate line" that philosopher Martha Nussbaum describes: "We are to acknowledge that life's miseries strike deep, striking to the heart of human agency itself. And yet we are also to insist that they do not remove humanity, that the capacity for goodness remains when all else has been removed."⁸¹ Of course, like all capital defendants who are more than the sum total of the risk factors to which they have been exposed, African American defendants are, and must be depicted as, whole persons whose humanity transcends the biographical racism to which they have been subjected and the structural mitigation offered on their behalf.

Crossing the Empathic Divide: The Need to Transcend Otherness

A meaningful moral inquiry into the culpability of the individual defendant requires capital jurors to cross an "empathic divide"—a cognitive and emotional distance between them that acts as a psychological barrier, preventing genuine understanding and insight into the role of social history and context in shaping a capital defendant's life course. The recognition of basic human commonality, an opportunity for capital jurors to connect themselves to the defendant through familiar experiences, common moral dilemmas, and recognizable human tragedies is the starting point for compassionate

⁸⁰ It should go without saying that these principles cannot be implemented as mere tactics or ploys. Mitigation must be rooted in the actual social history and life circumstances of the capital defendant, as reflected in and conveyed by the testimony of numerous lay and expert witnesses.

⁸¹ Nussbaum, *supra* note 68, at p. 409.

justice. But the empathic divide stands in the way of that kind of understanding. Its roots are deep but not difficult to trace.

In a capital penalty trial, precisely because the harm for which the defendant is responsible is so great, and the typical capital defendant is perceived as dissimilar to the jurors (by virtue of his behavior if nothing else), the challenge of overcoming basic attributional bias is always significant. It can be met only through the most conscientious effort. This requires painstaking investigation, the organization of diverse life facts into a meaningful narrative with coherent mitigating themes, and an effective, honest, humanizing presentation to jurors that places the defendant's behavior in a larger context that will allow them to better understand him.

However, in the case of African American capital defendants, the empathic divide unfortunately is much wider. This is in part because of an even more extreme attribution error that Whites tend to commit when they interpret and judge the behavior of minority group members. Indeed, this tendency to attribute the causes of the behavior of African Americans to their negative internal traits has been termed the “*ultimate* attribution error.”⁸² Whether the error is ultimate or merely fundamental, its consequences are truly significant. As Amsterdam and Bruner have observed, racism involves the opportunistic use of race:

To disempower the group constructed as “other” in order to empower *our group* by contrast to “them.” This requires the creation and maintenance of an *essentialist*, “natural kinds” category scheme that imbues the “others” with intrinsic, immutable qualities making them different from us.⁸³

Attributing deeper and more negative traits and motives to minority groups members in our society—traits and motives that are represented and perceived as natural, intrinsic,

⁸² For example, see: Thomas Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, in Michael Hogg and Dominic Abrams (Eds.), *Intergroup Relations: Essential Readings. Key Readings in Social Psychology* (pp. 162-173). Philadelphia, PA: Psychology Press (2001).

⁸³ Anthony Amsterdam and Jerome Bruner, *Minding the Law*. Cambridge, MA: Harvard University Press (2000), at 247 (emphasis in original, footnote omitted).

and immutable—makes it even more difficult for Whites to appreciate the role of social history and present circumstances in shaping the life course of African Americans.

In capital cases, it interferes with the ability of jurors to take structural mitigation into account as they assess the culpability of individual African American defendants. Thus, the empathic divide that separates jurors from capital defendants in general grows wider as a result of the psychological distance between Whites and African Americans. If the psychological distance between White jurors and African American defendants is even greater than usual—for example, if the jurors themselves are racially prejudiced—then the problem is likely to be much worse.⁸⁴

Moreover, there is some evidence that it may be increased by certain aspects of the capital trial process. For one, as I pointed out in Chapter Five, the legally-mandated practice of death qualification means that the already considerable racial and corresponding experiential and attitudinal divisions that separate defendants from jurors in criminal trials will be significantly widened in capital cases. Put differently, death-qualified juries are even less likely than most to share any status characteristics or common life experiences with capital defendants that would allow them to bridge the vast differences in behavior that the trial is designed to highlight. If “[d]ifferences in group membership between punisher and punished increase the risk of nonmoral judgment,”⁸⁵ then death qualification increases the likelihood that these kinds of judgments will be made in capital trials.⁸⁶

⁸⁴ There is extensive research linking racial prejudice with death penalty support. See Robert Bohm, American Death Penalty Opinion, 1936-1986: A Critical Examination of Gallup Polls, In Robert Bohm (Ed.), *The Death Penalty in America: Current Research* (pp. 113-145). Cincinnati, OH: Anderson Publishing (1991); and Robert Young, Race, Conceptions of Crime and Justice, Support for the Death Penalty, *54 Social Psychology Quarterly* 67-75 (1991).

⁸⁵ Samuel Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, *74 Cornell Law Review* 655-710 (1989), at 692.

⁸⁶ In addition to the way that death qualification is likely to increase existing differences between capital jurors and the persons they judge, research by David Baldus and his colleagues suggests that prosecutors may more successful than defense attorneys in using peremptory challenges to control the composition of the jury. Specifically, Baldus et al. concluded their study of 317 capital murder trials in Philadelphia by

My colleagues Laura Sweeney, Mona Lynch, and I have conducted several studies on the nature of the death sentencing process in which this concept—the empathic divide—appears to have played a role. For example, in a meta-analysis of experimental studies of race and sentencing that included some of our own research on death penalty imposition, Laura Sweeney and I found that jurors sentenced differently as a function of the racial characteristics of the case. Thus, in the 14 individual studies that we analyzed, there *were* overall racial discriminatory effects for both race of defendant and race of victim.⁸⁷ The statistically significant discriminatory effects were larger when the studies were well controlled and when the race of the jurors was taken into account. Specifically, White jurors in these experimental jury studies tended to sentence African American defendants more harshly.⁸⁸

 Insert Table 9.1 About Here

Because the results suggested that special decisionmaking processes might be at work when jurors and defendants were of different races, Sweeney and I followed the meta-analysis with a direct simulation study of the death sentencing process in which we

suggesting that the prosecutor’s comparative advantage in the capital jury selection process resulted in more racial discrimination in the application of the death penalty, denied many capital defendants the right to a trial by a jury that included at least one of their peers, and resulted in a greater number of death sentences being rendered overall, and especially against Black defendants. David Baldus, George Woodworth, David Zuckerman, Neil Weiner, and Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, University of Pennsylvania Journal of Constitutional Law, 3, 3-170 (2001).

⁸⁷ A meta-analysis is a widely used methodological and statistical technique that allows researchers to combine the results of a number of different studies to estimate overall strength of relationships and the various mediating variables that help to account for larger and smaller effects.

⁸⁸ The specific results can be found in: Laura Sweeney and Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 *Behavioral Science and the Law* 183-204 (1992).

systematically varied the race of the defendant and victim. We hoped to determine how jurors thought about sentencing issues in general and whether they thought differently about them when the defendant was a member of another racial group. We found first of all that there were large differences, across different types of capital crimes, for race of defendant and race of victim. That is, our student-jurors discriminated against African Americans both as defendants and as victims. Participants who considered exactly the same case facts and “evidence,” presented in exactly the same way, rendered significantly more death sentences if the defendant was African American and if his victim was White.

When we tried to determine how and why this occurred by asking participants in each condition to explain their sentencing decisions, we found that White participants interpreted aggravating and mitigating circumstances differently as a function of the racial characteristics of the case. In particular, they tended to weigh aggravating circumstances more heavily when the defendant was African American. Similarly, they were reluctant to attach much significance at all to mitigating circumstances when they were offered on behalf of an African American defendant. The participants also mentioned “stereotype-consistent” reasons for their sentencing verdicts (i.e., negative qualities of the African American defendants), and they appeared less able or willing to empathize with or enter the world of African American defendants (as manifested by the tendency to write significantly less overall in explaining their sentencing decision, and significantly less about the Black defendant in specific).

In the late 1990s, Mona Lynch and I studied some of these same issues, but in conjunction with the research we had done on the comprehension of capital sentencing instructions that I described in the last chapter. This time, however, we used death-qualified, jury-eligible participants from the surrounding community rather than students. Our experimental study was designed to examine what role if any the jurors’ difficulty in understanding and correctly applying capital sentencing instructions might play in

racially discriminatory death sentencing.⁸⁹ Among other things, Lynch and I found that our White jurors sentenced African American defendants to death more often than they did Whites. There was about a 10 percentage point overall difference that was determined by race—White defendants were given death sentences a little more than 40% of the time, African American defendants a little more than 50%.

 Insert Figure 9.1 About Here

However, as Figure 9.1 illustrates, when we looked only at those participants who had a difficult time correctly understanding the sentencing instructions—the bottom half of our group of participants in terms of instructional comprehension—the margin of discriminatory death sentencing doubled from a 10 to a 20 percentage point difference. That is, African American defendants were sentenced to die 60% of the time, to life by 40% of the participants; exactly the reverse was true in the case of White defendants—they got life sentences about 60% of the time, and death sentences 40%. Thus being confused about the instructions seemed to allow a greater amount of prejudice to come into play in the death sentencing process.

Keep in mind that the case facts—including all of the facts that were presented at the penalty trial—were identical; race was the *only* thing that varied. Thus, we were surprised to find that our jurors regarded exactly the same mitigating and aggravating evidence very differently depending on whether it was offered in a case in which the defendant was White as opposed to one in which he was African American. These

⁸⁹ This study appeared as: Mona Lynch & Craig Haney, Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty, 24 *Law & Human Behavior* 337-358 (2000).

differences were marginal in the case of aggravation—although in each instance the same aggravating factors were regarded as slightly more aggravating for African American than White defendants, none the differences was statistically significant. However, in the case of three of the four mitigating factors we introduced—that the defendant suffered abuse as a child, had psychological problems that had gone untreated, and suffered from drug abuse problems—jurors found the testimony significantly more mitigating for White defendants than it was for African Americans. Only one mitigator—that the defendant had a loving family that did not want to see him die—was interpreted the same way for African American as White defendants. In addition, jurors not only were more likely to underuse mitigation for African American defendants, but many of them actually *misused* it. That is, they were more likely in the case of African American defendants to take the mitigation that was presented and use it as aggravation.

 Insert Table 9.2 About Here

These data help to confirm, as I have suggested, that White jurors, in particular, are either less able or less willing to empathize and come to terms with, in a mitigating way, the significance of key background factors in the lives of African American defendants in making assessments of blameworthiness and moral culpability. This failure to hear and acknowledge the impact of race in the lives of African American defendants brought about by the empathic divide is reminiscent of what Peggy Davis wrote about the Supreme Court's handling of the *McCleskey* case, discussed at length in Chapter One, but here writ small in the minds of capital jurors whose “cognitive habit[s], history, and culture” sometimes leaves them “unable to hear the range of relevant voices and grapple

with what reasonably might be said in the voice of discrimination's victims.”⁹⁰ But that barrier—the built-in barrier against hearing, understanding, taking into account, and integrating into compassionate decisionmaking—can only be overcome by attorneys on behalf of their death penalty clients. The failure to do it would seem to virtually guarantee death rather than life verdicts for most African American capital defendants.

There are a few final points to be made on this issue. For the most part, our current system of death sentencing fails to recognize the existence of this empathic divide—for death penalty defendants in general or African American defendants in particular. It does little or nothing to require that defense attorneys make every effort to cross the divide for jurors, and has refused to mandate that judges assist them in doing so (by, at least, using sentencing instructions that the jury can comprehend). Moreover, in conjunction with the mechanisms of moral disengagement I discussed in Chapter Seven and the psychological consequences of the death qualification process, the capital trial process seems to operate in ways that intensify the effects of this divide. With respect to death qualification, recall that this unique feature of death penalty voir dire renders the jury pool less representative and less likely to contain African American potential jurors. In addition, it helps to identify prospective jurors of all races who may be uncertain or ambivalent about the death penalty who, in turn, are then more likely to be targeted for prosecutorial peremptory challenges.⁹¹

Thus, death qualification helps to insure that African American defendants are more likely to be judged by White jurors. But, by selecting for death penalty supporters,

⁹⁰ Davis, *supra* note 61, at p. 1576.

⁹¹ Indeed, David Baldus and his colleagues have conducted intensive research in at least one jurisdiction—Philadelphia—showing that the prosecutors’ effective use of peremptories “enhances the probability of death for all defendants; it raises the level of racial discrimination in the application of the death penalty; and it denies defendants a trial by a jury that includes at least one of their ‘peers’” See David Baldus, George Woodworth, David Zuckerman, Neil Weiner, and Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 *University of Pennsylvania Journal of Constitutional Law* 3-172 (2001), at p. 10.

it also helps to guarantee that those jurors are less likely to accurately comprehend the capital sentencing instructions than if death qualification had not occurred. Recall the study described in the last chapter that Amy Smith and I conducted in which we found that death penalty support was highly correlated with poor instructional comprehension. This suggests that, ironically, the jury selection process that is used at the outset of a capital trial helps to insure that fewer jurors will understand the crucial instructions that are supposed to govern their behavior at its final stage.⁹² Poorer levels of instructional comprehension, as Lynch and I showed, are likely to further disadvantage African American capital defendants.

Conclusion

This chapter addressed some of the ways in which the various social psychological components of our system of death sentencing can accumulate and interact over the course of a capital prosecution to diminish the constitutional right to have a capital jury consider the full range of available mitigation in deciding between life and death. By taking one historically important example—the fate of African American defendants in this process—I have tried to illustrate the way in which the reality of death penalty trials may fall short of the image of fairness that surrounds them. Because of the operation of various social psychological forces and mechanisms—created by practices and procedures that are built into the system of death sentencing—defendants receive a diminished rather than enhanced brand of justice. Instead of correcting the problematic effects of the biases introduced into this process at earlier stages, our system of death

⁹² Recall also that Carmel Benson and I found that death penalty supporters were more likely to inaccurately recall closing arguments made by prosecution and defense, and were more likely to recall closing argument themes that were crime-oriented in nature. This suggests that the tendency for jury selection in death penalty cases to select jurors on the basis of their support for capital punishment may result in juries that are especially prone to error. Death-qualified juries that favor the death penalty appear more likely to make mistakes both in comprehending instructions *and* in accurately recalling closing argument themes.

sentencing either ignores or proactively compounds them at subsequent stages. In the end, less reliable and less fair outcomes are the predictable result.

This chapter has focused primarily on another error of omission rather than commission—a recognizable problem or bias that the system of death sentencing simply fails to address. That is, it could be argued that the courts have an affirmative duty in the case of African American capital defendants to proactively seek to overcome the operation of racial animus—epitomized by what I have termed the empathic divide between jurors and defendants that is widened in the case of African Americans who are on trial for their lives. By requiring jurors to grapple with the nature of those structural forces outside the courtroom that might help to account for the defendant’s behavior and life course, our system of capital punishment could at least begin to fulfill the promise that death sentencing will turn on inquiries into the moral culpability of defendants. However, by subjecting these cases to the same set of problematic social psychological forces that characterizes death sentencing in general, we allow their punitive effects not only to go uncorrected but to be amplified.