

# WHY WE WOULD SPARE WALTER WHITE: *BREAKING BAD* AND THE TRUE POWER OF MITIGATION

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## INTRODUCTION

What if federal authorities captured Walter White? Considering that he committed the murders of many individuals and orchestrated many more in the course of building and running his global meth trade, the prosecution would be able to seek the ultimate punishment against him. But, would a jury give him the death penalty? Walter's gripping journey stirred within viewers a range of complex emotions, but even those revolted by his actions must concede that it is extraordinarily difficult to envision a random collection of twelve people unanimously agreeing that he deserves a state-sanctioned execution. Indeed, it seems that many of us actually rooted for Walter throughout the series, even when we struggled to understand why.

This Essay explores the answer to the question of why we would spare Walter White from the death penalty. Its exploration underscores the critical importance of "mitigation"—a capacious term that refers to evidence introduced by capital defense lawyers to persuade jurors to hand down something less harsh than a death sentence.

*Breaking Bad*, through its masterful construction of its core narrative, situated us to empathize with Walter, to view him as someone we could understand, to feel about him the way we might feel about a friend or colleague or neighbor. Whether we argued vociferously in online forums that his actions were nearly always justified or simply watched with a suppressed but distinct hope that he might emerge as a partially redeemed man, many of us never condemned Walter. We did not want him to die an undignified death at someone else's hands. In fact, we were relieved that death came to him on his own terms. And, if he had been captured, we would not have sent him to the death chamber. Knowing Walter—understanding his "mitigation"—bent us towards mercy.

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To start, this Essay explains how a capital trial unfolds and sets out the factors that jurors must take into account when they decide whether to choose death for a convicted capital defendant. After establishing the basic framework for the death-determination in Part I, this Essay then focuses on Walter White's hypothetical penalty phase. Part II describes both the "aggravating" evidence the prosecution would use to persuade jurors that death is the appropriate punishment and the "mitigating" evidence the defense would use to persuade jurors that a sentence less than death is appropriate. Part II concludes with an explanation of why a jury likely would not sentence Walter White to die.

Part III steps back to identify distinct conclusions that we could draw from viewers' prevailing willingness to ride with Walter until the end. It concludes that it would be unwise to dismiss Walter as a fictitious outlier. Rather than ask ourselves what makes Walter's particular case for mercy special, we should ask ourselves *how* the show managed to make him so real. *Breaking Bad's* storytelling proved so powerful that the show's writers were themselves amazed that viewers continued to stand by Walter's side through it all. If we would spare Walter White, surely we would spare many others facing capital punishment. But to get there, we need to do more than hear that they have struggles and triumphs of their own; we need to walk with them on their journeys. We must feel like we did when the last episode of *Breaking Bad* began—wondering exactly how things will end, but unwilling to bring that end by our hands.

## I. A BACKGROUND ON THE DEATH PENALTY DETERMINATION

To envision what the death penalty determination might look like in Walter's case, this Essay initially presents some critical background information about the capital trial process.<sup>1</sup> The U.S. Supreme Court's Eighth

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1. This Essay proceeds on the premise that federal authorities captured Walter White. However, it does not assume that he is tried capitally in a federal court. The federal capital trial process (governed by the Federal Death Penalty Act ("FDPA"), see 18 U.S.C. §§ 3591–3598) is distinctive in several ways, and not particularly representative of the process more typical across the states. See, e.g., Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make A Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 14 (2010) (describing the FDPA). Because this Essay seeks to develop a general understanding of Walter's case for a life sentence based on the power of his mitigation, it does not analyze the federal capital sentencing scheme or situate its analysis in that federal framework. Instead, it erects an imaginary scheme that draws mostly from state capital trial models. Of course, New Mexico itself abolished the death penalty in 2009, so the punishment is not available in Walter's home state. See *New Mexico Governor Repeals Death Pen-*

Amendment jurisprudence largely informs the ways in which death penalty jurisdictions structure capital trials. That jurisprudence warrants a brief summary. A look at the influence of the Court's seminal Eighth Amendment decisions will tee up a few specific questions particularly relevant to the issues this Essay explores. Those questions are:

- What are aggravating circumstances?
- What are mitigating circumstances?
- How do jurors decide the appropriate sentence?

In 1972, the U.S. Supreme Court struck down as unconstitutional the capital statutory schemes challenged in *Furman v. Georgia*.<sup>2</sup> The *Furman* decision “effectively brought nationwide administration of the death penalty to a halt.”<sup>3</sup> In a brief per curiam opinion, the Court held that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>4</sup> Despite the clarity of this declaration, nine separate and distinct opinions undergirded the decision. Although the *Furman* decision proved to be one of the most convoluted and complicated that the Court ever issued,<sup>5</sup> scholars, commentators, legislators and litigators—then<sup>6</sup> and now<sup>7</sup>—perceived that a majority of the justices' views could be cobbled together to divine two core principles that capital sentencing schemes must observe to pass constitutional muster.

First, justices in the plurality indicated that the states applied the death penalty to too few of the many offenders eligible for the ultimate

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*alty in State*, CNN.COM, Mar. 18, 2009, <http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty/>.

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

3. Bidish Sarma, *Furman's Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill Furman's Promise*, 2009 CARDOZO L. REV. DE NOVO 238, 239 (2009).

4. *Furman*, 408 U.S. at 239–40.

5. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995) (“The longest decision ever to appear in the *U.S. Reports*, the majority ‘opinion’ in [*Furman*] is a one-paragraph per curiam invalidating under the Eighth Amendment the death sentences imposed on the three petitioners in the case. Each of the five Justices in the majority then appended his own opinion, none of which was joined by any other Justice. Each of the four dissenters wrote his own opinion as well, although some of them joined in each other’s dissents.”).

6. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 221–25 (2011).

7. See, e.g., Sarma, *supra* note 3, at 239.

punishment.<sup>8</sup> From this concern with infrequent application and the arbitrariness of losing the death lottery emerged the principle that capital punishment must be narrowed in its scope: “death penalty statutes must reasonably limit the class of offenders eligible for the ultimate punishment.”<sup>9</sup> Second, the plurality suggested that the laws posed an unconstitutional risk of arbitrariness.<sup>10</sup> Because the laws did not set forth considerations that sentencers had to either account for or exclude from their decision-making process, the sentencer had almost unlimited discretion to decide.<sup>11</sup> And that unbridled discretion facilitated unconstitutional arbitrariness,<sup>12</sup> if not outright discrimination.<sup>13</sup> The Court explained in *Furman* (and clarified in a later opinion) that the laws challenged did not meaningfully differentiate the few offenders whom the state would execute from the many whom sentencers would spare from a death sen-

8. See, e.g., *Furman*, 408 U.S. at 293 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.”); *id.* at 309 (Stewart, J., concurring) (“[I]t is equally clear that these sentences are ‘unusual’ in the sense that the penalty of death is infrequently imposed for murder . . . These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 313 (White, J., concurring) (“I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”).

9. Sarma, *supra* note 3, at 239. The principle is often referred to as the ‘narrowing’ doctrine. See Steiker & Steiker, *supra* note 5, at 372 (“One body of doctrine is designed to ensure that only those who are most deserving of the death penalty are eligible to receive it. Given the observed rarity of death sentences in relation to serious violent crimes, including murder, this doctrine—which we call ‘narrowing’—seeks to force communities, speaking through state legislatures, to designate in advance those offenders most deserving of death.”).

10. See Janet C. Hoefel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 774–75 (2005).

11. See, e.g., *Furman*, 408 U.S. at 253 (Douglas, J., concurring) (“[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty.”).

12. See *id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

13. See *id.* at 255 (Douglas, J., concurring) (“[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”).

tence.<sup>14</sup> The second principle was thus that “legislatures must channel the sentencer’s discretion to minimize the risk of arbitrary sentences.”<sup>15</sup>

Sent back to the drawing board, state legislatures responded overwhelmingly to *Furman*’s invitation to fix their death penalty systems rather than abandon the punishment altogether.<sup>16</sup> In 1976, the Supreme Court decided cases in which death-sentenced defendants challenged the recently-minted capital sentencing schemes of Louisiana,<sup>17</sup> North Carolina,<sup>18</sup> Georgia,<sup>19</sup> Florida,<sup>20</sup> and Texas.<sup>21</sup> These states had adopted a range of approaches after *Furman*. The Court assessed each state’s scheme individually.<sup>22</sup> It rejected the Louisiana and North Carolina approaches in part because the mandatory nature of those death sentences unconstitutionally deprived the defendant of an opportunity to present reasons for a lesser sentence.<sup>23</sup> The same day it struck down mandatory death

14. *See id.* at 313 (White, J., concurring) (“[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

15. Sarma, *supra* note 3, at 239; *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”). This principle is often referred to as the ‘channeling’ doctrine. *See Steiker & Steiker, supra* note 5, at 378–79.

16. *See Gregg*, 428 U.S. at 179–80 (“The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”).

17. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion).

18. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

19. *See Gregg*, 428 U.S. 153.

20. *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion).

21. *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

22. *See Gregg*, 428 U.S. at 195 (“[E]ach distinct system must be examined on an individual basis.”); *see also Steiker & Steiker, supra* note 5, at 363 (“The *Gregg*, *Proffitt*, and *Jurek* opinions did not attempt to list in any definitive fashion the prerequisites for a valid capital punishment regime; rather, they simply upheld each particular scheme presented on the basis of its own peculiar mix of procedural protections.”).

23. *See Woodson*, 428 U.S. at 303 (noting that “constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death”); *Roberts*, 428 U.S. at 333–34 (“Even the other more narrowly drawn categories of first-degree murder in the Louisiana law [that result in a mandatory death sentence] afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.”). *Woodson* and *Roberts* thus added a constitutional principle, “individualized sentencing,” to the narrowing and channeling doctrines identified in *Furman*. Jeffrey L. Kirchmeier, *Aggravating and Mitigating*

sentences, the Court approved the “guided discretion” statutes drawn up in Georgia, Florida, and Texas.<sup>24</sup>

The Texas approach, first presented to the Court in *Jurek*, remains unique<sup>25</sup> and has generated Eighth Amendment controversies that the Court has addressed haltingly over the past four decades.<sup>26</sup> On the other hand, the Georgia and Florida approaches—though far from uncontroversial—were widely replicated and adopted by other states after the 1976 Supreme Court rulings.<sup>27</sup> These approaches produced the most common features of the prevailing capital trial process.<sup>28</sup>

Some of these common features of capital trials include:<sup>29</sup>

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*Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 346 (1998).

24. See Kirchmeier, *supra* note 23, at 353 (“When legal challenges to these schemes reached the Supreme Court in several cases in 1976, the Court struck down the mandatory schemes and upheld the guided discretion statutes.”); see also James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 29–34 (2007).

25. See Sean Fitzgerald, *Walking A Constitutional Tightrope: Discretion Guidance and the Texas Capital Sentencing Scheme*, 28 HOUS. L. REV. 663, 664 (1991) (“Since its inception, the Texas capital sentencing scheme has pushed the outer boundaries of constitutional limits and sharply divided the United States Supreme Court.”).

26. See *id.* at 665 (“The *Franklin* and *Penry* decisions leave the Texas capital sentencing scheme in a state of disarray.”); Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 751 n.74 (2014) (listing Georgia and Florida cases focusing on capital punishment).

27. These approaches drew upon the Model Penal Code. See, e.g., *Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (plurality opinion). And, “the Supreme Court . . . upheld the statutes based upon the Model Penal Code. As a result of these decisions, all death penalty regimes now effectively follow the basic structure of the Model Penal Code.” Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1015–16 (2001).

28. The Court in *Gregg* broadly approved these features while it simultaneously engaged in an individual review of each jurisdiction’s unique sentencing scheme. It held:

[T]he concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

*Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

29. These features emanate largely from the Model Penal Code. See Stacy, *supra* note 27, at 1016 (“The Model Penal Code death penalty provisions have three basic features. First, the Code bifurcates a capital trial into two separate phases the guilt-innocence phase and a subsequent sentencing phase. Second, in an effort to guide the sentencer’s deliberations, the Model Penal Code specifies eight aggravating factors

- **Two stages** (capital trials are bifurcated).<sup>30</sup>
  - In the first stage, the jury determines whether the defendant is guilty or innocent just as it would in an ordinary criminal trial. This is often called the guilt phase.
  - If the jury finds the defendant guilty of a capital crime, then the trial moves into a second stage—a sentencing or penalty phase in which the jury must decide whether the defendant will receive the death penalty or a lesser sentence. This is often called the penalty phase.
- **Aggravating circumstances.** (These circumstances are explained and explored in more detail below.) Essentially, capital sentencing statutes set out these circumstances to narrow the class of offenders who are eligible to receive the death penalty.<sup>31</sup> They signal a legislature’s determination that certain circumstances render some homicide crimes worse than others.<sup>32</sup> A defendant has a constitutional right to require a jury to decide whether the state has proved a statutory aggravating circumstance beyond a reasonable doubt.<sup>33</sup>
- **Mitigating circumstances.** (These circumstances are explained and explored in more detail below.) These are circumstances that the defendant can use to demonstrate that he should receive a sentence less than death. They do not justify or excuse the crime, but explain how the defendant came to be on trial for his life.<sup>34</sup> A state cannot prevent a juror from considering any relevant miti-

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and permits death to be imposed only if the sentencer finds the presence of at least one such factor. Third, it enumerates eight mitigating factors and permits a decision in favor of the death penalty only upon consideration of the joint import of aggravating and mitigating factors.”).

30. Bifurcation attempts to minimize the risk that sentencing information will prejudice the guilt determination. *See Gregg*, 428 U.S. at 190–92.

31. *See, e.g., id.* at 196–97 (“Georgia did . . . narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.”).

32. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.”).

33. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002).

34. *See, e.g., American Bar Association, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1060 (2003) [hereinafter ABA Guidelines] (footnote omitted) (“[A] mitigation presentation is offered not to justify or excuse the crime ‘but to help explain it.’”).

gating circumstances the defense wants to offer.<sup>35</sup> Mitigating circumstances help ensure that each defendant gets individualized consideration.<sup>36</sup>

- **Appellate review.** Every jurisdiction ensures that the defendant, after trial, has a right to an appeal.<sup>37</sup> Many jurisdictions also provide for mandatory review by the state's highest court.<sup>38</sup> That review may include an independent appellate determination of whether the death penalty in a particular case is disproportionate.<sup>39</sup>

To develop a better sense of what the penalty phase would look like for Walter White, more information about aggravating circumstances, mitigating circumstances, and the sentencing process is necessary.

#### A. *What Are Aggravating Circumstances?*

Death penalty jurisdictions ostensibly utilize aggravating circumstances to narrow the class of offenders eligible for the death penalty in

35. See *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion) (“The limited range of mitigating circumstances which may be considered by the sentencer under the [state] statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.”).

36. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (striking down a mandatory death penalty statute because “[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind”).

37. Cf. *Murray v. Giarratano*, 492 U.S. 1, 7 (1989) (noting that under *Douglas v. California*, 372 U.S. 353 (1963), “an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court”).

38. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (“By providing prompt judicial review of the jury’s decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.”).

39. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 166–67 (plurality opinion); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice,”* 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996) (“Eager to reenact death penalty provisions, state legislatures took the Supreme Court at what seemed to be their word, and read *Gregg* as a how-to manual for constructing a constitutional capital punishment statute. Over thirty states almost immediately enacted proportionality review procedures similar to those upheld in *Gregg*.”).

accordance with the *Furman* mandate.<sup>40</sup> While some aggravating circumstances can be non-statutory, all jurisdictions require the jury to find at least one statutory aggravating circumstance before a defendant is eligible to receive the death penalty.<sup>41</sup> Once a jury has determined in the guilt phase that the defendant is death-eligible, a demonstration of aggravating circumstances represent the prosecution's reasons for a death verdict. Thus, in deciding on statutory aggravating circumstances, legislatures convene to determine what circumstances should render a criminal defendant eligible for the ultimate punishment. They seek to identify the "worst" murders<sup>42</sup> and make those particular crimes punishable by death. And, though they were originally designed to serve a "narrowing" function, aggravating circumstances have proliferated and expose nearly every individual convicted of a homicide to a potential capital prosecution.<sup>43</sup>

In his exhaustive work on aggravating circumstances, Professor Jeffrey Kirchmeier compiled a list of aggravating circumstances that "reflects the range of aggravating factors used in the United States."<sup>44</sup> As he explained, "[n]o single jurisdiction has the complete list of [these] forty-five statutory aggravating factors, but most jurisdictions incorporate many of these factors."<sup>45</sup> He broke the list of forty-five circumstances into four different categories. Here is an edited version of the list, organized within these categories:

### 1. Facts Surrounding the Murder

- (1) The murder was especially heinous, atrocious, cruel, or depraved (or involved torture).
- (2) The defendant dismembered or mutilated the victim after death.

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40. See Jeffrey L. Kirchmeier, *Casting A Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 6 (2006) ("[T]he Eighth and Fourteenth Amendments require that some sort of factors be used to effectively determine the category of murderers who are eligible for the death penalty.").

41. See *Ring v. Arizona*, 536 U.S. 584, 593 (2002); Kirchmeier, *supra* note 40, at 7 ("In order to sentence someone to death, a jury must find the defendant eligible for the death penalty by finding at least one such eligibility factor beyond a reasonable doubt.").

42. After the Supreme Court's decision in *Kennedy v. Louisiana*, states cannot punish non-homicide offenses with the death penalty. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

43. Kirchmeier, *supra* note 23, at 430–31 (noting these circumstances "can make almost every first-degree murder defendant eligible for the death penalty").

44. *Id.* at 430.

45. *Id.*

(3) The capital offense was committed during the commission of, attempt of, or escape from a specified felony (such as robbery, kidnapping, rape, sodomy, arson, oral copulation, train wrecking, carjacking, criminal gang activity, drug dealing, or aircraft piracy). . . .

(5) The defendant committed "mass murder." . . .

(7) The murder was committed from a motor vehicle or near a motor vehicle that transported the defendant. . . .

(9) The defendant knowingly created a grave risk of death for one or more persons in addition to the victim of the offense.

(10) The defendant committed or attempted to commit more than one murder at the same time.

(11) The defendant committed the murder after substantial planning and premeditation. . . .

(14) The defendant committed the offense while engaged in a "[c]ontinuing criminal enterprise involving drug sales to minors."

(15) The murder was committed by means of a bomb, destructive device, explosive, or similar device.

(16) The murder was committed by means of poison or a lethal substance.

(17) The defendant committed the offense with an assault weapon. . . .

## 2. Motivation for the Murder

(1) The murder was committed for pecuniary gain or pursuant to an agreement that the defendant would receive something of value.

(2) The defendant caused or directed another to commit murder, or the defendant procured the commission of the offense by payment, promise of payment, or anything of pecuniary value.

(3) The murder was committed to avoid or prevent arrest, to effect an escape, or to conceal the commission of a crime.

(4) The capital offense was committed to interfere with the lawful exercise of any government function or the enforcement of the laws. . . .

## 3. Defendant's Status

(1) The defendant is a future danger.

(2) The defendant has been convicted of, or committed, a prior murder, a felony involving violence, or other serious felony. . . .

(5) The defendant was a drug dealer or has prior convictions involving the distribution of a controlled substance.

#### 4. Victim's Status

- (1) The victim was under a certain age.
- (2) The victim was over a certain age.
- (3) The victim was especially vulnerable due to mental or physical disability or because the defendant was in a position of familial or custodial authority over the victim. . . .
- (5) The victim was a government employee, including peace officers, police officers, federal agents, firefighters, judges, jurors, defense attorneys, and prosecutors, in the course of his or her duties.
- (6) The victim was a correctional officer.
- (7) The victim was an inmate of a correction facility. . . .
- (11) The murder was committed against a witness, a potential witness, or a family member of a witness in a criminal or civil proceeding to prevent the witness from appearing, or for revenge. . . .
- (16) The victim was involved, associated, or in competition with the defendant in the sale, manufacture, distribution, or delivery of any controlled substance or counterfeit controlled substance.<sup>46</sup>

Remarkably, the number of aggravating circumstances continues to grow.<sup>47</sup> It comes as no surprise that leading commentators have observed that “[i]nstead of achieving the narrowing function suggested in the *Furman* and *Gregg* decisions, these aggravating factors merely give the sentencer the illusion that the offense at issue truly falls within the select set of crimes that justifies imposition of the death penalty.”<sup>48</sup>

Symbolically, aggravating circumstances embody the legislature's concern about certain types of homicides. Practically, these circumstances augment prosecutorial power. Because prosecutors possess unchecked discretion on when to actually seek a death sentence and because so many murders are now punishable by death, it is the prosecutor who effectively determines whether a particular homicide prosecution will be a capital one.<sup>49</sup> However, jurors nevertheless must be the ones tasked with finding an aggravating circumstance at trial.

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46. *Id.* at 400–30.

47. *See, e.g.,* Kirchmeier, *supra* note 40, at 17–25.

48. Steiker & Steiker, *supra* note 5, at 375.

49. *See, e.g.,* Thomas Johnson, *When Prosecutors Seek the Death Penalty*, 22 AM. J. CRIM. L. 280, 280 (1994) (“[I]t is the prosecutor's decision to seek the death penalty.”).

### B. What Are Mitigating Circumstances?

Mitigating circumstances explicitly come into play in the penalty phase of a capital trial.<sup>50</sup> They constitute reasons that jurors should sentence a death-eligible defendant to a sentence less than death<sup>51</sup> (most often, a sentence of life without the possibility of parole<sup>52</sup>). They give meaning to the Eighth Amendment requirement that jurors give each capital defendant individualized consideration and meaningfully consider a life sentence.<sup>53</sup> Like aggravating circumstances, mitigating circumstances can be both statutory and non-statutory; however, unlike aggravating circumstances, jurisdictions cannot limit the mitigating circumstances that jurors can consider in the penalty phase.<sup>54</sup> And, whereas jurors must agree unanimously that at least one aggravating circumstance exists beyond a reasonable doubt before it can impose a death sentence, the Constitution imposes no unanimity requirement or specific burden of proof on the defense to persuade jurors that mitigating circumstances exist.<sup>55</sup>

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50. Aggravating circumstances, on the other hand, may come into play in the guilt phase or penalty phase. *See, e.g.*, Kirchmeier, *supra* note 40, at 7 (“Depending on a state’s statutory scheme, these eligibility factors may apply at sentencing . . . or at the guilt phase as part of the definition of capital murder.”); *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).

51. *See, e.g.*, ABA Guidelines, *supra* note 34, at 1060 (“[A]reas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant’s moral culpability for the offense or otherwise supports a sentence less than death.”).

52. *See generally* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006).

53. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted) (“[T]he Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (“[O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual . . .”).

54. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.”); Kirchmeier, *supra* note 23, at 380 (“The Court thus has reasoned that nonstatutory aggravating factors, which are permitted, are not as constitutionally significant as non-statutory mitigating factors, which are required.”).

55. *See McKoy v. North Carolina*, 494 U.S. 433, 444 (“We conclude that North Carolina’s unanimity requirement [on the existence of a mitigating circumstance] impermissibly limits jurors’ consideration of mitigating evidence . . .”); *id.* (White, J., concurring) (“Neither does the Court’s opinion hold or infer that the Federal Consti-

Although a capital sentencing cannot limit mitigating circumstances, “[m]ost states list some of the factors that are mitigating in their capital sentencing statutes.”<sup>56</sup> Professor Kirchmeier has also explored the role of mitigating circumstances in capital sentencing and, as he did with aggravating circumstances, compiled a list of common mitigating circumstances that is broken down into four categories:

1. Good Character Factors: Mitigating Factors Unrelated to the Crime That Show Defendant Has Some Good Qualities.

- Assisted in the prosecution of another
- Capacity to love
- Character in general
- Cooperated with police or prosecutor / Did not resist arrest
- Creative (art/poetry)
- Criminal history (lack of) . . .
- Defendant’s family will suffer from execution
- Education obtained in prison
- Good behavior in prison or a structured environment
- Good citizen / Good character
- Good employment history
- Military service
- Not a future danger
- Potential for rehabilitation
- Religious
- Remorse<sup>57</sup>

2. Crime Involvement Factors: Mitigating Factors That Show the Defendant Had Less Involvement in the Murder

- Belief that the killing was morally justified . . .
- Causation / Defendant’s act was not the sole proximate cause of the victim’s death
- Circumstances that justify or reduce the crime . . .
- Consent
- Duress or coercion
- Felony-murder
- Lack of presence at the homicide

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tution forbids a State to place on the defendant the burden of persuasion with respect to mitigating circumstances.”).

56. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward A Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 655 (2004).

57. *Id.* at 658–64.

- Minor participation: defendant was an accomplice and her or his participation was relatively minor
- Residual doubt / Innocence
- Unforeseen risk of causing death
- Victim's actions make the defendant less culpable (victim's provocation).<sup>58</sup>

### 3. Legal Proceeding Factors: Mitigating Factors Relating to the Legal Proceedings

- Ineligible for parole . . .
- Prosecutor (or victim's family) recommended leniency
- Sentencing disparity with co-defendant<sup>59</sup>

### 4. Disease Theory Factors: Mitigating Factors That Show Less Culpability and/or That Help Explain Why a Defendant Committed the Crime

- Age . . .
- Brain damage / Head injury
- Childhood abuse / Deprived childhood
- Circumstances that excuse the crime
- Drug addiction
- Emotional problems from death of a family member
- Extreme mental or emotional disturbance
- Family background . . .
- Insanity
- Intoxication / Substantially impaired capacity
- Mental retardation
- Personality disorder . . .
- Post-traumatic stress
- Substantially impaired capacity
- Stress (unusual / substantial)<sup>60</sup>

This list includes many commonly presented mitigating circumstances. It captures and conveys—in an abstract way—that mitigating circumstances provide a range of reasons why a sentence less than death may be appropriate in any given case. In the penalty phase, jurors who have heard and found evidence of at least one aggravating circumstance then must confront the question of whether any mitigating circumstances

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58. *Id.* at 665–70.

59. *Id.* at 672.

60. *Id.* at 674–83.

exist. And, more importantly, how to reach a reasoned decision about whether the defendant should live or die.

### C. *How Do Jurors Decide?*

With aggravating circumstances on one hand and mitigating circumstances on the other, the question remains—how do jurors decide whether to sentence a defendant to death or life? That question turns out to be complicated. Unpacking the answer requires a look not merely to the law but also to the social sciences.

From the legal perspective, most capital sentencing schemes take one of two general approaches. After a jury unanimously finds beyond a reasonable doubt the existence of an aggravating circumstance, the schemes (1) require the jurors to weigh the mitigating circumstances against the aggravating circumstances and either choose life in prison if the mitigators outweigh the aggravators or return death if the aggravators outweigh the mitigators (this is sometimes called the “weighing” approach); or (2) require the jurors to consider all of the evidence in aggravation and all of the evidence in mitigation and reach a decision about what sentence the juror believes most appropriate in light of all the circumstances (this is sometimes called the “non-weighing” approach).<sup>61</sup> Each approach has its benefits and drawbacks, but both treat the death determination as a “reasoned *moral* response” based on the defendant’s moral culpability.<sup>62</sup> Jurors cannot sentence a defendant to death merely because they found him guilty of the underlying crime, or merely because they found him guilty of an aggravating circumstance. Instead, they must “be open to imposing a life sentence despite a finding of aggravating circumstances” and “must consider any circumstance that might call for a sentence less than death.”<sup>63</sup>

The legal framework for the jury’s death determination was designed to promote a fair decision-making process that adequately respects an individual’s constitutional rights. Empirical evidence gathered from hundreds of interviews with capital jurors conducted by the Capital Jury

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61. See, e.g., Liebman, *supra* note 24, at 10 (discussing the adoption of majority and minority approaches); Nicholas A. Fromherz, *Assuming Too Much: An Analysis of Brown v. Sanders*, 43 SAN DIEGO L. REV. 401, 404–05 (2006) (explaining the two stage post-*Furman* sentencing approach).

62. *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (emphasis in original).

63. Ursula Bentle & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1016 (2001).

Project (“CJP”),<sup>64</sup> however, reveals that the real decision-making process “significant[ly] deviat[es] from the fundamental constitutional principles governing the decision about whether a defendant should live or die.”<sup>65</sup> In short, jurors return death verdicts for a range of reasons that do not comport with the legal strictures. Some of these reasons include: the defendant is guilty, jurors have already decided on the appropriate sentence before hearing mitigating evidence, and jurors misunderstand the jury instructions (and often believe death is a required verdict in certain circumstances).<sup>66</sup>

The CJP research provides a sobering and critical reminder that there is a significant gap between the law and reality. What explains why a particular defendant received a death sentence or a life sentence may very well reside in that gap.

Equipped with an understanding of both the legal framework governing capital trials and the challenges that capital jurors confront when deciding whether someone should live or die, we can now turn to the question of whether a capital jury would condemn or spare Walter White.

## II. WALTER WHITE’S CAPITAL SENTENCING PHASE

The hypothetical penalty phase in Walter White’s capital prosecution is complicated, if nothing else. Given the range of crimes with which the prosecution could charge him as well as the number of possible aggravating circumstances the prosecution could seek, the case for the death penalty itself would involve testimony from dozens of witnesses and take many days or many weeks. And that all precedes the defense’s case for life and the prosecution’s opportunity to present rebuttal evidence.

For purposes of understanding the show’s influence, this hypothetical penalty phase entails one particularly important assumption: that the jurors in the case watched the entire series, and that the full array of events depicted in the show has been submitted to the jurors.<sup>67</sup> This as-

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64. The CJP is a university-based research program that was initiated in 1991 that explores how jurors who served on capital cases made the life or death sentencing decision. See *What is the Capital Jury Project?*, UNIV. AT ALBANY SCH. OF CRIMINAL JUSTICE, <http://www.albany.edu/scj/13189.php> (last visited on Mar. 22, 2015).

65. See Bentele & Bowers, *supra* note 63, at 1019.

66. See generally *id.*

67. *Breaking Bad*’s plot tracks the transformation of Walter White from a mild-mannered high school chemistry teacher into a methamphetamine manufacturing kingpin. His closest associate is Jesse Pinkman, a former student of Walter’s and a methamphetamine addict who provided initial entry into the world of drug dealing. See *Season 1*, BREAKING BAD WIKI, [http://breakingbad.wikia.com/wiki/Season\\_1](http://breakingbad.wikia.com/wiki/Season_1) (last

sumption sets aside potential problems of proof.<sup>68</sup> Witnesses do not need to be located; plea bargains do not need to be struck. While this assumption diminishes how realistic the hypothetical penalty phase feels, it concentrates energy on the question of how jurors would react even given access to private moments and otherwise inaccessible events. It also enables us to focus on how the show's writers primed us to view Walter somewhat charitably rather than speculate about how the prosecution and defense teams would investigate their cases.

#### A. *The Prosecution's Case for Death*

Walter committed many crimes during the two-year period *Breaking Bad* portrayed. The case for death would be powerful in part due to the number, variety, and consequences of the crimes which he committed. Most immediately relevant are the murders, the victims of which range from rival participants in the methamphetamine trade to innocent women and children who tangentially encounter Walter or Jesse. Walter White, also known as Heisenberg, personally inflicted the fatal injuries upon at least thirteen individuals: Emilio Koyama inside the RV;<sup>69</sup> Diego Molina, also known as Crazy 8, in the basement of Jesse's house;<sup>70</sup> two rival drug dealers whom Jesse was confronting on the street;<sup>71</sup> two of Gus Fring's henchmen inside the superlab;<sup>72</sup> Mike Ermantraut after he left his partnership with Walter and Jesse;<sup>73</sup> Lydia Rodarte-Quayle at the diner in the final episode;<sup>74</sup> and Kenny, Frankie, Matt, Lester, and Jack at their compound just before Walter himself died.<sup>75</sup>

In addition to the thirteen deaths he caused by his own hands, Walter orchestrated Gus Fring's killing at the hands of Hector Salamanca at Casa Tranquila. The bomb that Walter built and Hector detonated also killed Tyrus Kitt (and Hector himself).<sup>76</sup> Walter later hired Jack Welker and his crew to kill nine inmates and their jailed lawyer almost simultane-

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visited Mar. 22, 2015). Walt and Jesse's bilateral acts (and Walter's unilateral acts) provide the foundation for many of the murders and other crimes described below.

68. Although it would be an interesting exercise to determine what evidence would actually be available to the parties and how it would be available, those questions stretch beyond this Essay's scope.

69. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

70. See *Breaking Bad: . . . And the Bag's in the River* (AMC television broadcast Feb. 10 2008).

71. See *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010).

72. See *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

73. See *Breaking Bad: Say My Name* (AMC television broadcast Aug. 26, 2012).

74. See *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

75. See *id.*

76. See *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

ously.<sup>77</sup> These thirteen additional deaths double the homicide count against Walter.

The murders the prosecution could pin on Walter do not stop there. While Jesse Pinkman pulled the trigger and killed Gale Boetticher, Walter picked up the phone and urged him to do it.<sup>78</sup> On a felony-murder theory,<sup>79</sup> the prosecution could also charge Walter for his role in other murders. Working with Jesse, Mike, and Todd, Walter helped plan to steal hundreds of gallons of methylamine from a train.<sup>80</sup> Immediately after completing the heist, Todd shot and killed Drew Sharp.<sup>81</sup> Walter also played a role in the death of Tuco Salamanca. His involvement in the meth business with Tuco led to Tuco's kidnapping him;<sup>82</sup> Hank's efforts to find Walter led him to track Jesse's car to Hector Salamanca's house, where Hank killed Tuco in the ensuing shootout.<sup>83</sup> And, most importantly from the prosecution/law enforcement perspective, Hank tracked Walter to the place where Walter buried barrels full of money he earned cooking meth and Walter called in (then tried futilely to call off) Jack Welker and members of his white supremacist gang to assist him.<sup>84</sup> In the gunfight that followed the gang's arrival on the scene, Jack's crew killed DEA Agent Gomez.<sup>85</sup> Jack then killed Hank Schrader.<sup>86</sup> Counting Gale and these four felony-murder victims—including a young child and two DEA agents—the prosecution can introduce evidence of five more deaths against Walter.<sup>87</sup>

Walter also failed to act to save Jane Margolis, Jesse's landlord and love interest, who choked to death on her own vomit in front of Walter.<sup>88</sup>

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77. See *Breaking Bad: Gliding Over All* (AMC television broadcast Sept. 2, 2012).

78. See *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010).

79. See Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 (2011) ("The felony murder doctrine, imposing murder liability for some unintended killings in the course of some felonies, is part of the law of almost every American jurisdiction.").

80. See *Breaking Bad: Dead Freight* (AMC television broadcast Aug. 12, 2012).

81. See *id.*

82. See *Breaking Bad: Seven Thirty-Seven* (AMC television broadcast Mar. 9, 2009).

83. See *Breaking Bad: Grilled* (AMC television broadcast Mar. 15, 2009).

84. See *Breaking Bad: To'hajiilee* (AMC television broadcast Sept. 8, 2013).

85. See *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013).

86. See *id.*

87. See *Breaking Bad: Box Cutter* (AMC television broadcast July 17, 2011); *Breaking Bad: Granite State* (AMC television broadcast Sept. 22, 2013); *Breaking Bad: One Minute* (AMC television broadcast May 2, 2010); and *Breaking Bad: I See You* (AMC television broadcast May 9, 2010).

88. See *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009).

Whether this failure to act could result in a criminal charge is unclear,<sup>89</sup> but the prosecution would surely underscore it to demonstrate Walter's moral demise. "One look at Mr. White's face as he watches Jane choke to death on her own vomit following a post-blackmail bender with Jesse says it all: he knows he's responsible for the loss of her life, and he's making the choice deliberately."<sup>90</sup>

On top of the many murders and his failure to rescue Jane, the prosecution could also prove attempted murder charges. Walter makes an agreement with Jack and Kenny that they will kill Jesse Pinkman.<sup>91</sup> And, as the show memorably revealed, Walter poisoned a child named Brock Cantillo to dissolve Jesse's loyalty to Gus Fring, but the child survived.<sup>92</sup>

Assuming the prosecution would be able to put into its evidence in aggravation everything the show depicted,<sup>93</sup> there is a long list of other crimes Walter committed. They include, among others:<sup>94</sup>

- The destruction of evidence of many murders;<sup>95</sup>

89. This would depend on the charging jurisdiction's particular laws. Generally speaking, criminal liability attaches if the person who failed to act had a legal duty to do so. See Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 548 (1988) ("The conventional approach to criminal omissions defines the limits of such liability through the concept of duty. The theory is appealingly simple: if a person has a duty to prevent a harm and fails to do so, he shall be punished the same as one who affirmatively acts to cause that harm. . . . [C]riminal law punishes only those omitters who, at the time of their omission, were under a 'legal duty' to act.").

90. *'Breaking Bad': Ten Most Memorable Murders*, ROLLING STONE, Aug. 5, 2013, <http://www.rollingstone.com/movies/lists/breaking-bad-bloodshed-walter-white-and-companys-10-best-kills-20130805/jane-margolis-season-2-episode-12-phoenix-19691231#ixzz3HMBixg3Z> (last visited Mar. 22, 2015).

91. See *Breaking Bad: To'hajiilee* (AMC television broadcast Sept. 8, 2013).

92. See *Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011); *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

93. The prosecution usually can put on evidence all of the defendant's bad acts in the penalty phase. See Scott Coffee, *Preparing to Make the Case for Life: How Getting Ready to Present A Mitigation Case Brings Unique Challenges to the Defense Investigation of Death Penalty Cases*, NEV. LAW., June 2010, at 22, 23 ("[D]uring the penalty phase of a death case virtually every legal transgression ever committed by the defendant will be presented by the state.").

94. The following list describes the criminal conduct, but does not utilize statutory terminology because each jurisdiction has its own particular laws.

95. See *Breaking Bad: . . . And the Bag's in the River* (AMC television broadcast Feb. 10, 2008) (depicting Walter helping Jesse clean up the mess created by Emilio Koyama's body and disposing of that evidence); *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012) (depicting Walter helping to dispose of Drew Sharp's body); *Breaking Bad: Gliding Over All* (AMC television broadcast Sept. 2, 2012) (depicting Walter getting Todd to destroy Mike's car; *Breaking Bad: Box Cutter* (AMC

- The destruction of evidence of other crimes;<sup>96</sup>
- The production of massive amounts of methamphetamine;<sup>97</sup>
- The destruction of the superlab;<sup>98</sup>
- The destruction of the room Walter was in with Tuco Salamanca;<sup>99</sup>
- The sexual assault of his wife, Skyler;<sup>100</sup>
- The assault and fight with Skyler over a dangerous weapon;<sup>101</sup>
- The kidnapping of his daughter Holly and her abandonment in a fire truck;<sup>102</sup>
- The intentional endangerment of Hank and others when Walter intentionally caused a car accident;<sup>103</sup>
- The kidnapping of Saul and threatening him with a gun;<sup>104</sup>
- The theft of substantial quantities of methylamine from a train;<sup>105</sup>
- The theft of a large barrel of methylamine and the imprisonment of a security guard in a port-a-potty;<sup>106</sup>
- The extortion of Gretchen and Elliott Schwartz;<sup>107</sup>
- The creation of ricin—a hazardous and poisonous substance;<sup>108</sup>
- The creation of a pipe bomb and the placement of a bomb in a public place;<sup>109</sup>

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television broadcast July 17, 2011) (depicting Walter helping Jesse dispose of Victor's body after Gus killed him); *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011) (depicting Walter and Jesse blowing up the superlab after Gus was killed; and *Breaking Bad: Live Free or Die* (AMC television broadcast July 15, 2012) (depicting Walter and Jesse burning the corpses of two men Walter killed there).

96. For example, Walter, Jesse and Mike made and deployed a huge magnet to destroy evidence of their criminal activities located on a computer at the police station. See *Breaking Bad: Live Free or Die* (AMC television broadcast July 15, 2012). Walter also had the RV destroyed. See *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010).

97. The repeated commission of this crime is depicted throughout the series.

98. See *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

99. See *Breaking Bad: Crazy Handful of Nothin'* (AMC television broadcast Mar. 2, 2008).

100. See *Breaking Bad: Seven Thirty-Seven* (AMC television broadcast Mar. 8, 2009).

101. See *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013).

102. See *id.*

103. See *Breaking Bad: Crawl Space* (AMC television broadcast Sept. 25, 2011).

104. See *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009).

105. See *Breaking Bad: Dead Freight* (AMC television broadcast Aug. 12, 2012).

106. See *Breaking Bad: A No-Rough-Stuff-Type Deal* (AMC television broadcast Mar. 9, 2008).

107. See *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

108. See *Breaking Bad: Seven Thirty-Seven* (AMC television broadcast Mar. 8, 2009); *Breaking Bad: Problem Dog* (AMC television broadcast Aug. 28, 2011).

109. See *Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011).

- The purchase of illegal firearms;<sup>110</sup>
- The interference with a federal investigation in which Walter helps review Gale's notebook;<sup>111</sup>
- The illegal electronic tracking of a federal agent's (Hank's) computer and office;<sup>112</sup>
- The laundering of money through Walter Jr.'s website SaveWalterWhite.com;<sup>113</sup>
- The laundering of money through the car wash business;<sup>114</sup>
- The destruction of property.<sup>115</sup>

An exhaustive list may be significantly longer.<sup>116</sup>

Undoubtedly the prosecution could succeed in proving at least one aggravating circumstance beyond a reasonable doubt. Even though Walter's guilt for many of the crimes and circumstances could be hotly contested by the defense,<sup>117</sup> a remarkable number of aggravating circumstances apply. For example, referring back to a sampling of the long list of aggravating circumstances set forth in the previous Part,<sup>118</sup> many aggravating circumstances accompany the various murders for which Walter is responsible:

- The defendant dismembered or mutilated the victim after death—this applies to the deaths of Emilio Koyama, Diego Molina, the two henchmen killed in Gus's superlab, Mike Ehrmantraut, and Drew Sharp because Walter either dissolved or burned their bodies after death.

110. See *Breaking Bad: Thirty-Eight Snub* (AMC television broadcast July 24, 2011); *Breaking Bad: Live Free or Die* (AMC television broadcast July 15, 2012); *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

111. See *Breaking Bad: Bullet Points* (AMC television broadcast Aug. 7, 2011).

112. See *Breaking Bad: Dead Freight* (AMC television broadcast Aug. 12, 2012).

113. See *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009); *Breaking Bad: ABQ* (AMC television broadcast May 31, 2009).

114. See, e.g., *Breaking Bad: Problem Dog* (AMC television broadcast Aug. 28, 2011).

115. See *Breaking Bad: Cancer Man* (AMC television broadcast Feb. 17, 2008) (depicting Walter destroying the car with the "KEN WINS" license plate); *Breaking Bad: Problem Dog* (AMC television broadcast Aug. 28, 2011) (depicting Walter destroying the 2009 Dodge Challenger he had purchased for Walter Jr.).

116. Walter also drove his car with a cracked windshield. See *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2012).

117. For example, Walter arguably killed Emilio Koyama in self-defense. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

118. See *supra* Part I(A).

- The capital offense was committed during the commission of, attempt of, or escape from a specified felony (such as robbery, kidnapping, rape, sodomy, arson, oral copulation, train wrecking, carjacking, criminal gang activity, drug dealing, or aircraft piracy)—this applies to perhaps every murder because they were committed during the course of Walter’s drug dealing.
- The defendant committed “mass murder”—broadly interpreted, this could apply to any situation in which Walter killed more than one person, including when he killed the two drug dealers Jesse was confronting and when he killed Gus’s two henchmen in the superlab. Even with a more exacting definition of mass murder, Walter could very well be guilty for having ten inmates killed almost simultaneously and for using a M-60 machine gun to kill four members of Jack’s gang immediately before killing Jack as well.
- The murder was committed from a motor vehicle or near a motor vehicle that transported the defendant—this applies to Walter’s killing of the two drug dealers Jesse confronted on the street.
- The defendant knowingly created a grave risk of death for one or more persons in addition to the victim of the offense—this applies to the multiple-victim killings, including the two drug dealers on the street, the two henchmen in the superlab, the white supremacist gang, and the killings of Gus Fring and Tyrus Kitt.
- The murder was committed by means of poison or a lethal substance—this applies to the killing of Lydia Rodarte-Quayle.
- The defendant caused or directed another to commit murder, or the defendant procured the commission of the offense by payment, promise of payment, or anything of pecuniary value—this applies to the killings of the inmates and arguably to the killing of Gale.
- The defendant was a drug dealer or has prior convictions involving the distribution of a controlled substance—this applies to every homicide for which Walter could be charged.
- The victim was a government employee, including peace officers, police officers, federal agents, firefighters, judges, jurors, defense attorneys, and prosecutors, in the course of his or her duties—this applies to the deaths of Hank Schrader and Steven Gomez.

In short, even a quick review of the aggravating circumstances and the facts of the offenses makes clear that Walter would be found death-eligible.

Beyond death-eligibility, the real question is whether the prosecution could marshal all of the aggravating evidence to secure a death verdict. Much like the defense should construct a meaningful narrative on

which jurors can rely, the prosecution would seek to do more than introduce facts of dozens of offenses. It would try to tell a compelling story about Walter's evil character. In addition to the significant amount of evidence of Walter's criminal activity, the prosecution would also present other evidence to support its view that he remains dangerous, is morally bankrupt, and has the requisite culpability to be executed. (This evidence about dangerousness and morality, though subjective, is often at issue in the penalty phase.)<sup>119</sup> Death would strike a juror as a just and appropriate punishment if they believed Walter to be evil, incapable of change, and lacking remorse.<sup>120</sup>

Although Walter continually claimed that all of his decisions were motivated by a desire to care for his family, the prosecution would certainly challenge that claim with significant evidence that he recklessly endangered his family throughout the show. His involvement in the meth trade generated risks involving individuals seeking retribution against him and his family.<sup>121</sup> Moreover, his sometimes erratic behavior in the house led not only to instances of violence against Skyler,<sup>122</sup> but also to encouraging Walter Jr. to drink multiple shots of tequila.<sup>123</sup> To the extent the defense might try to utilize his family relations in mitigation, the prosecution would also hammer on the lies Walter told time and time again. He repeatedly lied flat-out to Skyler and others about where he was go-

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119. See, e.g., Sharon Turlington, *Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials*, 6 PIERCE L. REV. 469, 478–79 (2008) (“Evidence of the defendant’s prior bad acts may also be admitted as non-statutory aggravating evidence. This can include arrests, unadjudicated bad acts, [and] pending cases that have yet to be adjudicated[.] . . . This is basically character evidence—the proof of punishment based not on what was done but rather on who did it. . . . Much of the non-statutory aggravating evidence the jury is allowed to hear would not normally be admitted as evidence in the guilt phase of the trial.”).

120. Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 720 n.108 (2008) (“Post-verdict interviews of capital jurors reflect jurors who perceive the defendant as ‘remorseless’ are likely to impose a sentence of death.”).

121. See, e.g., *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2012) (depicting the cousins seeking revenge for Tuco’s death, breaking into Walter’s home, and waiting for him until called off by Gus); *Breaking Bad: Granite State* (AMC television broadcast Sept. 22, 2013) (depicting Todd breaking into Skyler’s home, threatening her, and telling her not to mention Lydia to anybody).

122. See *Breaking Bad: Seven Thirty-Seven* (AMC television broadcast Mar. 8, 2009) (depicting Walter sexually assaulting Skyler in the kitchen); *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013) (depicting Walter and Skyler fighting over a knife in front of Walter Jr.).

123. See *Breaking Bad: Over* (AMC television broadcast May 10, 2009).

ing, who was on the phone, whether he had a second cell phone, and whether he was accepting payments for medical costs from the Schwartzes. He even spun an elaborate tale about a “fugue state” to explain an extended meth-business-related absence.<sup>124</sup> Eventually, after Skyler confronts him again about his numerous lies,<sup>125</sup> Walter finally reveals that he has been producing and selling meth.<sup>126</sup> But that revelation only heightened tensions in their relationship over the remainder of the series.

Walter’s ostensible elevation of his family as the reason for his life of crime seems tenuous, too, when one considers how much time he spent dealing with his burgeoning drug trade at his family’s expense. Walter failed to make it to the birth of his daughter Holly because he was too busy making a drug deal to win Gus’s trust.<sup>127</sup> Later, after a fight Walter has with Jesse because Walter placed a tracking device on Jesse’s car, Walter fails to celebrate his son’s sixteenth birthday with him.<sup>128</sup>

Lying often devastated not only his immediate family, but also his extended family. Effectively baiting Hank into revealing information about the DEA’s investigation was just the beginning. After Hank discovered that Walter was Heisenberg, Walter concocted a “confession” that dishonestly implicated Hank in his criminal activity.<sup>129</sup> Walter entangled Hank through deceitful tactics, and ultimately got Hank killed.

The White family breaks down as the series progresses. Walter’s lying planted the seed of dissonance that shredded his marriage. And, despite his ongoing desire to transfer the wealth he accumulated in the drug trade back to Skyler, Walter Jr., and Holly, his last outreach to his son leaves no doubt that Walter Jr. hates him for what happened to Hank.<sup>130</sup>

The ups and downs of Walter’s partnership with Jesse reflect in many ways Walter’s self-created struggles with his family. Walter lies to Jesse repeatedly, manipulating Jesse to advance the drug trade and protect himself.<sup>131</sup> Indeed, Walter’s relationship with Jesse is built upon coer-

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124. See *Breaking Bad: Bit by a Dead Bee* (AMC television broadcast Mar. 22, 2009) (covering the “fugue state” situation).

125. See *Breaking Bad: ABQ* (AMC television broadcast May 31, 2009) (depicting Skyler confronting Walter about “lies on top of lies on top of lies”).

126. See *Breaking Bad: No Más* (AMC television broadcast Mar. 21, 2010).

127. See *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009).

128. See *Breaking Bad: Salud* (AMC television broadcast Sept. 18, 2011).

129. See *Breaking Bad: Confessions* (AMC television broadcast Aug. 25, 2013).

130. See *Breaking Bad: Granite State* (AMC television broadcast Sept. 22, 2013).

131. See, e.g., *Breaking Bad: 4 Days Out* (AMC television broadcast May 3, 2009) (depicting Walter lying to Jesse about methylamine spoiling so that Jesse will cook with him); *Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011) (depicting Walter convincing Jesse that Gus poisoned Brock).

cion when Walter threatens to turn Jesse in if he does not work with him.<sup>132</sup> And, though Jesse and Walter save each other's lives at various points in the series,<sup>133</sup> the prosecution would point to Walter's cold-hearted disclosure to Jesse that he watched Jane die and did nothing to help her as proof of Walter's terrible character.<sup>134</sup>

Walter negatively impacted many more lives than the ones already mentioned. In addition to the countless drug-seekers his product reeled in, captured, and destroyed across this country and others,<sup>135</sup> Walter also bears some responsibility for the deaths of 167 passengers killed when two planes collided because air traffic controller Donald Margolis was distraught over his daughter Jane's death<sup>136</sup>—a death Walter could have stopped.<sup>137</sup> Given the enormous body count the prosecution could attach to Walter's misdeeds, it may not need to work minutiae into this already vast case for death. But, if the prosecution decided to, it could also introduce evidence that Walter wronged other everyday people. For example, Walter stands idle as he discovers that Hugo Archuleta—a friendly janitor who treated Walter well—was arrested on the suspicion of stealing school property that Walter had actually taken.<sup>138</sup> Additionally, in a show of frustration with Gus, Walter pays three women at the Laundromat to clean the lab for him, knowing it would infuriate Gus; in response, Gus deports them back to Honduras.<sup>139</sup>

The quality and quantity of crimes and bad acts *could* overwhelm the jurors. With its abundant amount of aggravating evidence, the prosecution could tell a fairly convincing story that Walter was evil from the get-go.<sup>140</sup> The prosecution's case for death—assessed by the evidence

132. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

133. See, e.g., *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010) (depicting Walter saving Jesse from being killed in a confrontation with two drug dealers); *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010) (depicting Jesse saving Walter's life by killing Gale).

134. See *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013).

135. See, e.g., *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009) (depicting the lives of two meth addicts and a child when Jesse goes to confront the two addicts for stealing product and money from his dealer).

136. See *Breaking Bad: ABQ* (AMC television broadcast May 31, 2009).

137. See *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009).

138. See *Breaking Bad: Crazy Handful of Nothin'* (AMC television broadcast Mar. 2, 2008).

139. See *Breaking Bad: Cornered* (AMC television broadcast Aug. 21, 2011).

140. See, e.g., Laura Bennett, *The True Anti-Hero of 'Breaking Bad' Isn't Walter White*, THE NEW REPUBLIC, Aug. 8, 2013, <http://www.newrepublic.com/article/114245/breaking-bad-review-walter-white-not-antihero> (“[H]is inner evil [is] fully telegraphed from day one”); Jen Girdish, *Who's This Mr. Chips? Walter White Has Always Been a Jerk*, BADASS DIGEST, Aug. 30, 2012, <http://badassdigest.com/2012/08/30/>

compiled in this Part—seems damning. How could a juror instead vote for life?

### B. *The Defense's Case for Life*

Whereas the prosecution would characterize Walter as a mass murderer, the defense would present the situations, the tensions, and the complicated motives that led to many of the deaths for which Walter would be charged. The defense could not protect Walter from criminal liability altogether; instead, it would seek to make him real. It might defeat some of the charges, and it would strive to prevent the others from overwhelming the jurors' capacity to see him as human. The defense would seek to capitalize on the truth that Crazy 8 spoke to Walter early in the first season: "You getting to know me won't make it easier."<sup>141</sup> The more jurors come to know Walter, the more difficult it will be for them to sentence him to death.<sup>142</sup>

To start, the defense would set the backdrop to explain how Walter came to start cooking meth with Jesse. It begins with his family's situation. Walter summarizes it well when discussing his prolonged absence (what later was referred to as his "fugue state") with his doctor:

Doctor, my wife is seven months pregnant with a baby we didn't intend. My fifteen-year-old son has cerebral palsy. I am an extremely over-qualified high school chemistry teacher. When I can work, I make \$43,700 per year. I have watched all of my colleagues and friends surpass me in every way imaginable. And in eighteen months I will be dead.<sup>143</sup>

Of course, that unnecessarily truncates what the defense—like the show—would take time to establish.

We learn about Walter's life and plight through compelling vignettes at the start of the series. Though clearly intellectually gifted, he is a mid-

whos-this-mr.-chips-walter-white-has-always-been-a-jerk/ ("Walter White has always been a jerk."); Hank Stuever, *'Breaking Bad' Finale: What happened to Walt – and to us*, THE WASHINGTON POST, Sept. 29, 2013, [http://www.washingtonpost.com/entertainment/tv/breaking-bads-last-episode/2013/09/29/c6bd9fe6-292d-11e3-8ade-af1f23cda135e\\_story.html](http://www.washingtonpost.com/entertainment/tv/breaking-bads-last-episode/2013/09/29/c6bd9fe6-292d-11e3-8ade-af1f23cda135e_story.html) ("Walt was never good. Walt chose evil.").

141. See *Breaking Bad: . . . And the Bag's in the River* (AMC television broadcast Feb. 10, 2008).

142. See, e.g., Scott Helman, *Defending those accused of unthinkable crimes*, BOSTON GLOBE, Jan. 21, 2015, <http://www.bostonglobe.com/magazine/2015/01/21/defending-those-accused-unthinkable-crimes/voOv6Kay9rCI1a8leGPKVP/story.html> (illustrating that even in the face of complex and overwhelming charges, it is not a foregone conclusion that a defendant like Walter would receive the death penalty).

143. *Breaking Bad: Bit by a Dead Bee* (AMC television broadcast Mar. 22, 2009).

dle-class American. Walter works two jobs to support his family: he is a high school chemistry teacher and an employee at a local car wash. He gets frustrated when he suffers public humiliation in his job at the car wash.<sup>144</sup> His son, Walter Jr., has cerebral palsy and uses forearm crutches to assist in walking. His wife, Skyler, is early in an unplanned pregnancy. After he collapses at the car wash and is rushed to the hospital, Walter finds out that, despite being a non-smoker, he has inoperable lung cancer. These facts set the stage.

The cancer diagnosis is the motor that propels the dramatic two years depicted in *Breaking Bad*. The defense would present evidence of the enormous physical and emotional toll this sort of a diagnosis and the resulting treatment has on a person. During a family intervention that Skyler staged to pressure Walter to begin treatment, he described poignantly the struggles that come with treatment<sup>145</sup>—the pills, the hair loss, the pain, and the nausea. He stated that he wanted to live with dignity rather than “just survive.” And he did not want his family to remember him that way—as a shell of a person needing constant care and lacking vitality. Nonetheless, the next morning he decided to do the treatment.

On top of the physical and emotional toll that cancer wreaks, the defense would present evidence of the considerable financial toll Walter had to somehow pay as well. The bills for the treatment were not covered by insurance. Although his former business partners, now wealthy entrepreneurs, offered to pay for his medical care,<sup>146</sup> Walter could not bring himself to accept their charity. Gretchen and Elliott had wronged him in the past, capitalizing on his intellectual investments without ever providing him the recognition he deserved. As desperate as he may have been—desperate enough to begin and continue cooking meth—Walter would not cave and take the easy way out.<sup>147</sup> His pride, though it would lead him

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144. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 8, 2008) (depicting one of Walter’s students identifying him, laughing at him, and taking a picture of him to send to other students).

145. See *Breaking Bad: Gray Matter* (AMC television broadcast Feb. 24, 2008).

146. See, e.g., *Breaking Bad: Gray Matter* (AMC television broadcast Feb. 24, 2008).

147. Matthew Yglesias, *Breaking Bad, Season 5, Part 2*, SLATE.COM, Sept. 23, 2013, [http://www.slate.com/articles/arts/tv\\_club/features/2013/breaking\\_bad\\_final\\_season/week\\_7/breaking\\_bad\\_season\\_5\\_part\\_2\\_episodes\\_recap\\_and\\_review\\_of\\_granite\\_state\\_2.html](http://www.slate.com/articles/arts/tv_club/features/2013/breaking_bad_final_season/week_7/breaking_bad_season_5_part_2_episodes_recap_and_review_of_granite_state_2.html) (“[H]e chose to go back into meth cooking to avoid accepting their charity. He didn’t want to have to be grateful to people who he clearly and profoundly believes screwed him over in some way.”).

further into a dangerous and illegal business, is an emotion with which some jurors may be able to connect (but others might take issue with).<sup>148</sup>

After providing some context for Walter's decision to produce meth, the defense would challenge many of the prosecution's charges and provide critical context missing from its case for the death penalty. For example, Walter's killing of Emilio arguably constituted self-defense.<sup>149</sup> Emilio was likely going to kill Walter in the RV once he and Krazy 8 learned Walt's meth recipe. Krazy 8's death does not seem to be as straightforward a case for self-defense, but the defense would be able to help explain how difficult it was for Walter to do. He lost a coin-flip with Jesse and was tasked with dealing with Krazy 8; he provided Krazy 8 water and food; and he made a pro-con list that included the observation that "He'll kill your entire family if you let him go."<sup>150</sup> After discovering that Krazy 8 had kept a shard of a broken plate, Walter killed him. Immediately afterwards, he said, "I'm so sorry."<sup>151</sup>

The defense would also point out that Walter's killing of two drug dealers whom Jesse was confronting likely saved Jesse's life.<sup>152</sup> Those two dealers were also responsible for using a ten year-old kid to kill Jesse's friend Combo<sup>153</sup> and for later killing that kid.<sup>154</sup> While these facts do not provide justifications or defenses for Walter's actions, they help explain the decisions he made and limit his moral culpability.

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148. But it would be much easier to connect with if the show revealed precisely why and how Walter separated from Gray Matter Technologies. That question would be one a defense team must answer. Unfortunately, the show never really did. See, e.g., Alessandra Stanley, *A Clear Ending to a Mysterious Beginning*, N.Y. TIMES, Sept. 30, 2013, <http://www.nytimes.com/2013/10/01/arts/television/breaking-bad-finale.html> ("But the show never fully spelled out why Walt broke away from Gretchen and Elliott in the first place."); Ellen Killoran, *As 'Breaking Bad' Nears Finale, A Gray Matter is Unresolved*, INT'L BUS. TIMES, Sept. 18, 2013, <http://www.ibtimes.com/breaking-bad-nears-series-finale-gray-matter-unresolved-1408062> ("There's a lot we still don't know about Walter White: The 'unassuming high school chemistry teacher' profile emerged after a murky professional and personal separation . . . . Something significant must have happened for Walt to abruptly abandon Gretchen and sell his stake in Gray Matter Technologies for peanuts; and 'Breaking Bad' will feel incomplete if we never revisit it.").

149. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 8, 2008).

150. *Breaking Bad: . . . And the Bag's in the River* (AMC television broadcast Feb. 10, 2008).

151. *Id.*

152. See *Breaking Bad: Half Measures* (AMC television broadcast Jun. 6 2010).

153. See *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009).

154. See *Breaking Bad: Half Measures* (AMC television broadcast Jun. 6 2010).

Similarly, when Walter screams at Jesse to go kill Gale, Walter fears for his own life while being held at gunpoint by Mike and Victor.<sup>155</sup> At the moment, given the circumstances and the reality that Walter's life is on the line, his behavior cannot be excused but it can be understood. He is desperate, and desperate people do desperate things to survive.

Other murders for which Walter is directly responsible prove more challenging to contextualize. There is no doubt, however, that the status of some of those victims—Lydia and Jack and his white supremacist gang, for example—could help cushion our judgment of Walter's actions against them.<sup>156</sup>

Of the several murders for which Walter could be charged but was not directly responsible, the defense could limit his moral culpability by showing the distance between him and the lethal act. For example, Todd killed Drew Sharp after the methamphetamine heist without any notice.<sup>157</sup> Even though he was a willing participant in the underlying felony, Walter had no intent to kill that child. The allegation that he killed a child is weighty, but a more nuanced look reveals important details for the jury's life-or-death determination.

In the deaths of Agent Gomez and his brother-in-law, Hank Schrader, Walter was culpable for the circumstances that led to a high-powered gunfight,<sup>158</sup> but he also tried vigorously to save Hank from death. In fact, the moment Walter realized that it was Hank who was coming to confront him in the desert, Walter told Jack not to come and back him up. But, Jack and his crew did come, and did open fire on the law enforcement officers. As Jack prepared himself to shoot Hank, "Walt *did* beg—and offer \$80 million of his buried cash—for Jack to spare Hank's life."<sup>159</sup> His desperate pleas failed; Jack shoots Hank.<sup>160</sup> At that moment, Walter crumbles to the ground in total agony and despair.

The defense strategy for dealing with these murders basically starts with identifying the crime-involvement mitigating circumstances set out

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155. See *Breaking Bad: Full Measure* (AMC television broadcast Jun. 13, 2010).

156. See Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 104 (1997) (noting the reality that sentencers often are "basing punishment on the perceived worth of the victim"). Indeed, one of the mitigating circumstances captured in the list presented in *supra* Part I(B) is that the victim's actions make the defendant less culpable. This mitigating circumstance clearly applies to Tuco's death as well.

157. See *Breaking Bad: Dead Freight* (AMC television broadcast Aug. 12, 2012).

158. See *Breaking Bad: To'hajiilee* (AMC television broadcast Sep. 8, 2013).

159. Adam Bryant, 'Breaking Bad' Postmortem: Can Walter White Be Redeemed?, TV GUIDE, Sept. 16, 2013, <http://www.tvguide.com/news/breaking-bad-ozymandias-moira-walley-beckett-1070400.aspx>.

160. See *Breaking Bad: Ozymandias* (AMC television broadcast Sep. 15, 2013).

in Part I(B) that apply to each alleged murder. Those mitigating circumstances included, among others:

- Belief that the killing was morally justified—this applies to Walter’s killing of Crazy 8.
- Causation/Defendant’s act was not the sole proximate cause of the victim’s death—this applies to all of the felony-murder charges (and “felony-murder” is its own mitigating circumstance on the list).
- Consent—this applies to Hector Salamanca’s death.
- Duress or coercion—this applies to Gale’s death, and arguably Crazy 8’s as well.
- Lack of presence at the homicide—this applies to Gale’s death and the deaths of the ten inmates.
- Victim’s actions make the defendant less culpable (victim’s provocation)—interpreted broadly, this may apply to nearly all of the murders with the exceptions of Drew Sharp, Hank Schrader, and Steven Gomez.

The other mitigating circumstances the defense would develop involve qualities and characteristics of the defendant and are not crime-specific.

While a defense team would need to analyze the facts of each murder and additional offense and develop a tailored mitigation strategy for each, it is clear that some of the killings and crimes are very difficult to mitigate. Rather than dwell on what Walter was thinking when he ordered a nearly-simultaneous hit on ten inmates, or what facts can be picked apart around the bomb Walter had detonated at an elder-care facility, it would behoove the defense to build an overarching narrative about Walter that gives a reason for life. The cancer, his family, and his (somewhat obscure) work history provide a footing.

The larger narrative would emphasize to jurors a few core themes: Walter’s cancer diagnosis forced him to devise a means to provide for his growing family in a potentially short period of time; Walter identified a lucrative opportunity but immersed himself too deep into a dangerous world; and, he is capable of change. Although the prosecution would problematize Walter’s treatment of his family, there is little doubt that the Walter White who began this battle against cancer was a family man. His love for his family was clear when he knocked a jock to the ground for making fun of his son who was trying on jeans at a clothing store.<sup>161</sup> Despite all the difficulties he experienced with them and the pain he put them through, Walter never stopped trying to provide. In fact, he used a

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161. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 8, 2008).

phone call to Skyler that he knew was being monitored by law enforcement to help lift suspicions of her involvement.<sup>162</sup> Then, in the penultimate episode, he called Walter Jr. and offered to send a substantial sum of money for him to take care of Skyler and Holly.<sup>163</sup> That effort failed, but Walter nonetheless found a way to channel the millions he earned and managed to keep back to his family through Gretchen and Elliott Schwartz.<sup>164</sup>

Unable to turn away completely from the many bad acts he committed, Walter's defense must acknowledge on some level that he occupied a powerful place in a dark world. But, jurors may not condemn him for that if they can find a way to relate to it. One strategy the defense may need to consider is to proactively discuss a statement Walter made that the prosecution will likely introduce to debunk the claim that Walter did this all for his family: "I did it for me. I liked it. I was good at it. And I was really—I was alive."<sup>165</sup> Walter shares this truth with Skyler in the final episode. And, as a truth, it would be difficult to suppress in the penalty phase. However, if the defense can persuade the jurors that Walter did what he did at least in part to provide for his family, the jurors may forgive him for enjoying the feelings of power and satisfaction he derived from his illegal activity. They may accept that his ego led him too far down a dark path. Indeed, Walter's recognition and admission of his own selfishness demonstrates that he may be able to overcome it and put crime behind him.

Ultimately, the defense would demonstrate that Walter can change. He is not inherently evil. Instead, in the terrible circumstances his life presented him, he changed, at times for the worse. But that capacity to change also means he could change for the better. Walter did many terrible things and some of them by choice, but he should not be defined by those decisions alone. Walter described to his high school chemistry class that chemistry is the study of change—"it is growth, then decay, then transformation."<sup>166</sup> The defense would need to persuade the jury that the cycle is not yet complete. The relevant transformation was not his emergence as Heisenberg; instead, that was the decay. The transformation is yet to come, and can only be realized without a death sentence.

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162. *See Breaking Bad: Ozymandias* (AMC television broadcast Sep. 15, 2013).

163. *See Breaking Bad: Granite State* (AMC television broadcast Sep. 22, 2013).

164. *See Breaking Bad: Felina* (AMC television broadcast Sep. 22, 2013).

165. *Id.* (quoting Walter's statement to Skyler in their last conversation).

166. *Breaking Bad: Pilot* (AMC television broadcast Jan. 8, 2008).

### C. *How Jurors Would Decide*

It is a bold claim that the jury would sentence Walter to life in prison rather than death. The aggravation is extreme and overwhelming. And, the mitigation feels slippery and somewhat insubstantial in comparison. Nevertheless, many *Breaking Bad* viewers continued to root for Walter despite the terrible crimes he committed. “But one thing [Walter] hasn’t done . . . is entirely forfeit the sympathies of his audience. As a cultural phenomenon, this is the most striking aspect of ‘Breaking Bad’—the persistence, after everything he’s done, for a [group] that still wants him to prevail.”<sup>167</sup>

While there is no question that the extent of the crimes could compel some jurors to vote for death without a second thought, this Essay contends that at least one juror would spare Walter White.<sup>168</sup> The show’s brilliant writing led us to see Walter as more than a one-dimensional evil-doer: “We related to Walter more than we’d like. We understand the very human emotions behind his inhuman actions.”<sup>169</sup> And although this “lingering sympathy” may make us “uncomfortable,” it also demonstrates that we can recognize the humanity and complexity in others.<sup>170</sup>

One commentator explained intelligently why so many viewers had been unable to distance themselves from Walter altogether:

The approach that makes sense . . . is that Walter is not only a good guy or only a bad guy, nor solely a provider or a destroyer, nor solely even primarily Walter or Heisenberg. He might have been a good person at one time; he has been a very bad person for a while now. That doesn’t mean there’s no good left in him . . . .<sup>171</sup>

*Breaking Bad* compels viewers to experience, confront, and embrace emotional complexities. And, this is what the real world is like. Jurors should be able to agree that the world is not black-and-white.

167. Ross Douthat, *The World According to Team Walt*, N.Y. TIMES, Sept. 28, 2013, [http://www.nytimes.com/2013/09/29/opinion/sunday/douthat-the-world-according-to-team-walt.html?\\_r=0](http://www.nytimes.com/2013/09/29/opinion/sunday/douthat-the-world-according-to-team-walt.html?_r=0).

168. Depending on the jurisdiction’s laws, a lone vote for life could either lead to a life sentence or could result in a hung jury. *See, e.g.*, Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, CHAMPION, Nov. 2010, at 18, 27 (“One vote for life means a life penalty will be imposed.”).

169. Joann Robinson, *Sympathy for the Devil: Why It’s Crucial That You Still Like Walter White*, PAJIBA, Sept. 28, 2013, [http://www.pajiba.com/think\\_pieces/sympathy-for-the-devil-why-its-crucial-that-you-still-like-walter-white.php](http://www.pajiba.com/think_pieces/sympathy-for-the-devil-why-its-crucial-that-you-still-like-walter-white.php).

170. *Id.*

171. Matt Zoller Seitz, *Seitz on Breaking Bad, and Why Viewers Need to White-wash Walter White*, VULTURE, Sept. 18, 2013, available at <http://www.vulture.com/2013/09/seitz-breaking-bad-walter-white-apologists-phone-call.html>.

“[W]hat makes sense is the notion that Walter, like me, like you, like everybody, is complicated . . . and Walter like you, like me, like everyone, can be more than one thing at the same time . . . .”<sup>172</sup>

Because so many viewers stayed with Walter until the very end, it appears fair to conclude that a vote for life is plausible, if not likely. Given that, it is crucial to identify what lessons capital defendants can learn from the case study. What broader conclusions can be drawn?

### III. WHAT BROADER CONCLUSIONS CAN WE DRAW FROM THIS CASE?

This Part of the Essay ultimately distills a few broader conclusions that we can draw from Part II's conclusion that we would not have condemned Walter White. That we can draw broader conclusions about the death penalty and the representation of capital defendants based upon Walter White's story is a point with which readers may take issue. Two general objections seem like the most potentially powerful critiques of the claim that we can find lessons here that are widely applicable: (a) the realities of the capital sentencing process reveal that the *Breaking Bad* example is not well-situated to provide meaningful insight; and (b) Walter White—so different from the typical capital defendant—is too singular a character. This Part first addresses these objections in sub-parts A and B and then discusses how *Breaking Bad* demonstrates the way to harness the true power of mitigation.

#### A. *The Challenges in a Real Capital Sentencing Render the Breaking Bad Example Irrelevant*

Part I described how the parties present aggravating and mitigating circumstances in a capital trial and Part II explored what those circumstances may look like in a capital prosecution of Walter White. But, those Parts necessarily oversimplified the circumstances, and more importantly, overlooked altogether some other realities of capital cases. One could make a strong objection that the procedural realities of a capital prosecution present challenges that render Walter White's theoretical penalty phase too dependent on resources and advantages that capital defendants simply do not possess. This Part identifies some of those realities and acknowledges the very real challenges present in a capital trial. Yet it also responds that this objection does not supersede the pedagogical benefits available in *Breaking Bad*.

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172. *Id.*

While Part II described the aggravating and mitigating circumstances by reference to events and details revealed in the show, jurors in a capital case would obviously not come to know about Mr. White in the same way that we did. The capital trial process—including jury selection and the guilt-innocence phase preceding the penalty phase—is structured in a way that makes learning about the defendant’s life difficult for jurors.<sup>173</sup> In short, capitally-charged clients do not have their lives captured on film and pieced together in a way to make them compelling characters. Instead, their stories are mediated by a capital trial process that serves the purposes of the criminal justice system rather than those of drama television show writers.

Once prospective jurors reach a courtroom,<sup>174</sup> the parties and court conduct *voir dire* to help them decide who will ultimately serve on the jury. In a capital case, jurors must be “death-qualified.” In other words, they must be willing to consider both a death sentence and a life sentence if they find the defendant guilty of first-degree murder.<sup>175</sup> To determine whether prospective jurors would truly be willing to consider both sentencing options in the penalty phase, the lawyers and judge ask them questions about their views on the death penalty at the outset, before any evidence has been presented about the charged crime or the defendant’s

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173. This Essay does not address in its text the considerable substantive advantages the prosecution possesses when it seeks a death sentence. It instead focuses on the procedural realities to explore whether lessons about storytelling can be extracted from the show and applied in other contexts. Some of the prosecution’s substantive advantages are touched upon in the footnotes, but are generally beyond this Essay’s scope.

174. The way in which the jurisdiction calls jurors to serve itself often leads to the underrepresentation of certain groups of people. See J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1115 n.37 (2014) (explaining that “[i]n *Duren v. Missouri*, 439 U.S. 357 (1979) and *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court held that a statutory scheme or procedure effectively excluding females from service violates the fair cross-section requirement for juries under the Sixth Amendment”). Legislatures also create baseline qualifications for jurors. While most of those qualifications involve residency, age, language, and mental capacity, many jurisdictions disqualify individuals who have been convicted of crimes. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (“Thirteen million people . . . are banned for life from jury service because they are felons. Thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion.”). The disenfranchisement of felons also disproportionately affects certain groups of people, notably black men. See *id.* at 113–14.

175. See *Adams v. Texas*, 448 U.S. 38, 45 (1980) (“[A] juror may . . . be challenged for cause based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath . . .”).

background. This part of the voir dire process in a capital case is called death-qualification. And, the process itself creates challenges for capital defendants.<sup>176</sup>

To answer the questions asked in death-qualification, prospective jurors must presume that the defendant is guilty of a capital crime and they are deciding his fate in the penalty phase. It is no surprise then that “[s]itting through a death qualification influences prospective jurors by making guilt seem more likely and death more appropriate.”<sup>177</sup> Not only do jurors presume the defendant guilty at the early stages of jury selection, but they also witness the removal of prospective jurors who oppose the death penalty. “[C]apital jury selection procedures in which persons opposed to the death penalty are systematically excluded from participation may seem to convey the message that the legitimate and favored position in the legal system is one supporting imposition of the death penalty.”<sup>178</sup> Studies have demonstrated that these “process effects” of death-qualification are significant; jurors who have been through the process are “more likely to find defendants guilty after going through jury selection, [and] the selection process psychologically primes them to return a death verdict in the penalty phase.”<sup>179</sup>

Once selected,<sup>180</sup> the jurors then enter the guilt-innocence phase of the capital trial. Because it bears the burden to prove the defendant guilty

176. See, e.g., Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 42 U. MEM. L. REV. 907, 922 (2012) (“[T]he process of jury selection has its own independent effects on the minds of selected jurors.”).

177. Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 693–94 (2002).

178. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1482 (1997).

179. Sarma, *supra* note 176, at 922–23 (citing Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122 (1984)).

180. This Essay examines some of the challenges the capital trial process produces for capital defendants seeking to avoid a death sentence, but does not explore the various substantive disadvantages that may come into play as well. For example, death-qualification and peremptory challenges alter who actually serves on the jury, and skew the jury toward death. See, e.g., F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 IND. L.J. 295, 329 (1987) (“[A] person charged with a capital crime receives a different kind of trial than any other criminal defendant . . . one which affords the state a special advantage in the composition of the jury . . .”); Sarma, *supra* note 176, at 915 (“[R]esearch suggests that a greater percentage of people who generally oppose the death penalty are excluded than those who strongly favor the death penalty.”); *id.* at 921 (“[I]mbalances [in the use of peremptory challenges] can tilt the jury in the State’s direction.”). Some other systemic disadvantages that scholars and com-

of first-degree murder beyond a reasonable doubt, the prosecution gets to tell its story first. The question the jury confronts at this juncture is much narrower than the penalty phase determination: did the defendant commit the charged crime? Although Part II envisioned the prosecution's evidence of aggravating circumstances to constitute part of the penalty phase tug-of-war between death and life, a great deal of aggravating evidence actually comes into the trial initially at the guilt phase. This occurs because many penalty phase aggravating circumstances duplicate statutory definitions of first-degree murder.<sup>181</sup> The prosecution thus not only establishes guilt at this phase, but also lays the groundwork for its penalty phase case for death.

The defense has an opportunity to present a case in the guilt phase, but that case is not necessarily connected in an obvious way to the penalty phase presentation. With the prosecution hawking defense evidence to ensure it remains relevant to the jury's determination of guilt, the defense may encounter difficulties in using the guilt phase to set up its penalty phase case.<sup>182</sup> Contrary to what it does for the prosecution, the guilt

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mentators have identified include inadequate or unqualified defense counsel, trial court judges operating under the influence of judicial elections, the damaging effect of pre-trial publicity in high-profile murder cases, and the State's ability to use emotional victim impact evidence to stoke the passion of the jurors. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994) (addressing the issue of inadequate and unqualified defense lawyers); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. REV.* 759 (1995) (addressing the issue of judicial elections and their influence on capital cases); *see also*, Joseph R. Mariniello, Note, *The Death Penalty and Pre-Trial Publicity: Are Today's Attempts at Guaranteeing A Fair Trial Adequate?*, 8 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 371, 374 (1994) (addressing the issue of pre-trial publicity in capital cases); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 *ARIZ. L. REV.* 143 (1999) (addressing the role of victim impact evidence in capital cases).

181. *See, e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (“[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.”); Jesse Cheng, *Frontloading Mitigation: The “Legal” and the “Human” in Death Penalty Defense*, 35 *LAW & SOC. INQUIRY* 39, 47 (2010) (“In proving aggravating circumstances, the prosecution submits facts that often replicate or are consistent with the case for guilt, just by virtue of their natural relevance to the crime.”).

182. While it is difficult, it is not impossible. Defense teams have been learning the importance of ‘frontloading’ their mitigation case—that is, finding a way to present a

phase does not give the capital defendant leverage for his penalty phase. Instead, it forces defense teams to be more creative so that, if they proceed to the penalty phase, they do not alienate jurors by telling a story that is perceived by them to be inconsistent with the guilt-phase defense.<sup>183</sup> For the prosecution, however, “the aggravation is the crime.”<sup>184</sup>

In cases in which the jury finds the defendant guilty of first-degree murder, the prosecution typically gets to present its case first in the penalty phase as well.<sup>185</sup> Thus, in the trial in which a jury decides whether a man lives or dies, the jury that must decide the defendant’s fate first presides over an entire trial focused narrowly on the crime and then hears evidence in aggravation before they finally hear about the defendant’s life history.<sup>186</sup>

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guilt-phase defense that prepares the jurors to receive and believe the penalty phase presentation. *See, e.g.*, Cheng, *supra* note 181, at 41 (“For example, a guilt phase insanity defense may produce evidence of psychological symptomology that defense advocates can build on in the penalty phase by describing the experiential sequelae of mental illness. This practice is known as the ‘frontloading’ of mitigating sentencing factors into the guilt phase—a trial technique that defense advocates have long recognized and deliberately sought to refine as a tactical strategy.”); John H. Blume et. al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 *HOFSTRA L. REV.* 1035, 1044 (2008) (“[C]ompetent defense counsel have long recognized the importance of foreshadowing or frontloading mitigation themes in the guilt phase, either through cross-examination aimed at eliciting facts that mitigate either the heinousness of the defendant’s role in the crime or his responsibility for his actions, or by the presentation of evidence relevant to some aspect of the mitigation theory case.”).

183. *See, e.g.*, ABA Guidelines, *supra* note 34, at 1059 (“[C]ounsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.”); Blume et. al., *supra* note 182, at 1045 (“What the empirical evidence does do is to suggest how important it is to coordinate the presentations at each phase so that the story the jury hears from the defense is internally coherent and consistent.”).

184. Cheng, *supra* note 181, at 47.

185. The State must prove one aggravating circumstance beyond a reasonable doubt before a defendant can be eligible for the death penalty. *See Ring v. Arizona*, 536 U.S. 584 (2002). Because most states locate the ‘eligibility’ determination in the penalty phase, the State has the initial burden of proof and leads with its evidence. This happens even when the aggravating circumstances duplicate or closely reflect elements of the underlying first-degree murder charge that the State already proved in the guilt phase.

186. Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 *ARIZ. ST. L.J.* 769, 793 (2006) (“[T]he same jurors who heard and decided a defendant’s guilt generally also will hear and decide that defendant’s punishment.”); Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation*

These procedural realities—among others—significantly disadvantage the capital defendant. The structure of the capital trial appears to have a real bearing on outcomes. According to research done by the Capital Jury Project, jurors in capital cases often return death sentences because they fixate on their earlier determination that the defendant is guilty of a first-degree murder, believe that the finding of an aggravating circumstance required a verdict of death, and do not seriously consider mitigating circumstances.<sup>187</sup> One commentator and the principle research scientist for the Capital Jury Project provided some insight into why this occurs:

In a criminal trial, the prosecution's story is the central story; it goes first, and it is presented with much fanfare. If the trial were a play, it would consume the entire first act, and set the stage for what followed. And in a murder trial, the prosecution's story is inevitably one of violence, violence at the hands of the defendant. As we have seen, this evidence regarding the crime looms large at the penalty phase of the trial; for example, jurors often describe the physical presence of the weapon used, or photographs of the victim, in the jury room during the deliberations. In the hands of the prosecutor, the story of the killing will be linked to the conclusion that the sentence should be death.<sup>188</sup>

The researchers continue, and succinctly capture the dilemma the capital defendant has in the penalty phase:

For any hope of a life sentence, the defense must produce a strong counter story to dislodge this kind of imagery—a picture crying out for the ultimate punishment. Yet the defendant's life story of mitigation has the initial disadvantage of being the side story, hardly a competing story. It follows rather than precedes the prosecution's story. Its details are less dramatic and more complex than the story of the killing. To present this story effectively is an extraordinarily complicated and difficult task that requires the skillful blending of lay and expert testimony. Most lawyers, even the most competent ones, are not trained to tell such stories; many do not understand the importance of telling the intricate story of

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*Evidence*, 29 QUINNIPIAC L. REV. 237, 278 (2011) (“Due to the bifurcated structure of the capital trial into culpability and sentencing phases, jurors in capital cases do not usually hear evidence about the defendant's potentially mitigating factors until after they have already found him guilty of capital murder.”).

187. See generally Bentele & Bowers, *supra* note 63.

188. *Id.* at 1053–54 (footnote omitted).

the defendant's background and upbringing to help jurors make the moral choice assigned to them.<sup>189</sup>

The prosecution thus dictates the "narrative," and mitigation is the "counter-narrative."

In a normal capital trial, the bottom-line reality is that the prosecution tells its story first. And, its story is easier to tell and easier for the audience to receive. It involves a narrative that resonates in our society. Ironically, the objection that the reality of the capital trial process renders a life sentence less likely draws support from the nearly ubiquitous crime drama narrative that dominates television (and that *Breaking Bad* partially destabilizes). As Dr. Craig Haney's research into crime drama storytelling revealed, "television criminals were depicted uniformly without context, life connections, social relationships, basic human needs, wants, or hardships. They were, in short, non-people."<sup>190</sup> These stories of unhinged and disconnected evildoers constitute the reservoir of narratives upon which jurors draw to frame and comprehend the evidence presented in a capital trial.<sup>191</sup> Insofar as the capital trial process channels the parties' story-telling in a manner that comports with jurors' expectations, capital defendants face tough sledding.<sup>192</sup> Even if an individual facing the death penalty has a powerful mitigation narrative, that narrative

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189. *Id.* at 1055 (footnotes omitted).

190. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 550 (1995); see also *id.* at 549 ("[O]ur system of death sentencing instead leads us to view capital defendants as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human. The public is given access . . . to only superficial and schematic details of the lives of capital defendants, typically only those 'facts' that underscore their deviance and that facilitate their dehumanization.").

191. See, e.g., Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 7 (2005) (footnote omitted) ("[J]urors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us—through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood—provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds.").

192. Cf. Craig Haney, *On Mitigation As Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 914 (2009) ("There is a great deal of synergy between the crime master narrative and traditional legal doctrines of responsibility that are applied in typical criminal trials.").

not only must be able to stand on its own, but must also be able to emerge from the considerable shadow cast by the prosecution's story.<sup>193</sup>

While the critique that a capital trial's procedural realities render the *Breaking Bad* example irrelevant has some persuasive force, Walter White's story should not be discarded. The show's unique pursuit, like mitigation, takes on the status as counter-narrative. And, though the way in which we learned about Walter differs fundamentally from how a capital juror learns about a defendant, the relevant question is how to achieve a similar result in an admittedly distinct process.

In a sense, *Breaking Bad's* widespread success and appeal is a testament to the challenge and opportunity that capital defendants face in their penalty phases. The show broke sharply from the "crime master narrative" that has dominated television and media for decades. In the traditional drama,

the perpetrators . . . are typically depicted without a personal history or set of interpersonal relationships that would humanize them. Similarly, they are rarely placed in a social context that would help to explain their actions. Viewers hardly, if ever, see the . . . connections between traumatic social histories and adult criminality that exist in real life.<sup>194</sup>

*Breaking Bad*, however, began by situating us in Walter's shoes.<sup>195</sup> It provided us with critical glimpses into his personal history.<sup>196</sup> It drew us into his interpersonal relationships. It gave us the social context. Understood

193. Cf. Sean D. O'Brien, *Death Penalty Stories: Lessons in Life-Saving Narratives*, 77 UMKC L. REV. 831, 839 (2009) ("The complete story was simply too complex, and they had become too conditioned to the crime master narrative."); William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 287–88 (1991) ("The reality that defense counsel bears both the burden of production and the burden of persuasion in a capital penalty trial becomes quite clear when one considers the typical aggravating factors assigned for "proof" to the prosecution. They have no new elements; instead, they derive from matters which were established during the guilt/innocence phase.").

194. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 838 (2008).

195. See, e.g., Michaeleen Doucleff, *Point of View: How So Many Rooted for 'Breaking Bad's' Walter White*, NPR, Sept. 27, 2013, <http://www.npr.org/blogs/monkeysee/2013/09/27/224437071/point-of-view-how-so-many-rooted-for-breaking-bads-walter-white> ("[*Breaking Bad's*] creators quickly build up sympathy for the nerdy chemistry teacher by letting us see a world full of obstacles through Walt's eyes").

196. See, e.g., *Breaking Bad: Gray Matter* (AMC television broadcast Feb. 24, 2008) (providing background on Walter's previous personal and business relationships with Gretchen and Elliott).

as a stand-alone creation, *Breaking Bad*'s construction of the Walter White narrative was unimpeded—unlike a capital defendant's case for life, it was not overshadowed by another competing story. But, viewed against the wider backdrop of the crime master narrative, *Breaking Bad* can be seen as a counter-narrative.<sup>197</sup> Similarly, “[i]n the context of a capital penalty trial . . . mitigating evidence is offered as a basic counter-narrative juxtaposed against the traditional master narrative.”<sup>198</sup>

Another reason *Breaking Bad* remains an important example is that an effective mitigation presentation requires an extraordinary level of preparation, care, and sweat-equity to build. The *Breaking Bad* team worked extremely hard and paid attention to thousands of details. “Over the course of five years, Vince Gilligan and his friends have constructed a world piece by piece, with attention to detail worthy of a Fabergé egg.”<sup>199</sup> And, while the show's makers did not set out to make a case for life for Walter, *Breaking Bad* touched on a truth that “[c]apital defense lawyers know” matters in a penalty phase: “more important than legal issues are ‘the stories of life-stories about treachery, ambition, betrayal, greed, sacrifice, commitment, devotion, love—and in these stories we find a reason, not a fancy argument but a reason, for life.’”<sup>200</sup> Mitigation stories are complex, but capital defendants are saved by the details; the details make *Breaking Bad* one of a kind. “It’s a beautifully complex, yet complete path . . . Nothing like it has come before.”<sup>201</sup> If nothing else, *Breaking Bad*'s storytelling—though unquestionably distinct from a mitigation presentation—delivers potentially life-saving lessons.

### *B. A Defense Lawyer Would Be Fortunate to Defend a Middle-Class, Intelligent, White, Cancer-Stricken Client*

The preceding critique identifies the realities of the capital trial process and how they can undermine the case for a capital defendant's life in the real world; another critique calls into question the utility of drawing

197. See Aleksandr Smechov, ‘*Breaking Bad*’ *Finale: 4 Ways the Show Changed Television*, MIC, Sept. 29, 2013, <http://mic.com/articles/65683/breaking-bad-finale-4-ways-the-show-changed-television> (“Unlike the righteous man and the evil man in stereotypical westerns, which divide the good and the bad into two distinct categories, *Breaking Bad*, as a ‘postmodern western,’ deconstructs the notion of a purely good or bad protagonist, instead aiming for that postmodern . . . sweet spot of moral ambiguity.”).

198. Haney, *supra* note 194, at 843.

199. Allen St. John, *Why ‘Breaking Bad’ is the Best Show Ever and Why That Matters*, FORBES, Sept. 16, 2013, <http://www.forbes.com/sites/allenstjohn/2013/09/16/why-breaking-bad-is-the-best-show-ever-and-why-that-matters/>.

200. O’Brien, *supra* note 193, at 834 (citation omitted).

201. Smechov, *supra* note 197.

broader conclusions from Walter White's mitigation. Walter would be an unusual capital defendant in many respects. His uniqueness may render his story uninstructional. While this critique has some merit, it ultimately fails because it does not appreciate the ultimate reality of mitigation: every client is unique. The reason we fully comprehend Walter's uniqueness is that *Breaking Bad* told his story in painstaking detail. That is precisely what needs to be done in the penalty phase.

One reason the critique based on Walter's uniqueness has legs is that many defense lawyers would see themselves as relatively fortunate to represent a middle-class, intelligent, white, cancer-stricken client. The average capital defendant possesses few if any of those characteristics.<sup>202</sup> And, having that constellation of characteristics makes it easier to tell a story to which jurors can connect and relate.

It is not possible to label or describe accurately an "average" or "normal" capital defendant. Yet, the vast majority of individuals who end up in a capital penalty phase are indigent,<sup>203</sup> many suffer from major mental illnesses,<sup>204</sup> and many are low-functioning intellectually.<sup>205</sup> Less the monsters the media often makes them out to be, they are more the damaged, neglected, and abandoned in our society. Walter is, obviously, different.

Walter was by no means rich at the start of the show, but he and his family were squarely middle-class.<sup>206</sup> His cancer diagnosis threatened the limited resources his family did possess, putting the Whites on the brink of poverty.<sup>207</sup> Unlike many capital defendants, Walter was not raised in

202. Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1229 (2014) ("Our examination reveals that the vast majority of executed offenders—eighty-seven percent—fell into at least one mitigation category [of intellectual disability, youthfulness, mental illness, and childhood trauma]; and most offenders fell into two or more categories.").

203. See, e.g., Bright, *supra* note 180, at 1878.

204. See, e.g., Julie D. Cantor, M.D., *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 IND. HEALTH L. REV. 119, 136 (2005).

205. See, e.g., Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 86 (2003) ("[E]stimates of the proportion who are mentally retarded range between 4% and 20%."); Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 919 n.162 (1991).

206. See, e.g., Tim Burrows, *Breaking Bad: There's a bit of Walter White in all men*, THE TELEGRAPH, Sept. 24, 2013, <http://www.telegraph.co.uk/men/thinking-man/10328954/Breaking-Bad-Theres-a-bit-of-Walter-White-in-all-men.html> ("[Walter White] has come to embody the logical end-point of the middle-class obligation to be A Good Man . . .").

207. Julie Withers, *Money Changes Everything: The Ascent of Walter White*, CLASS ACTION, Oct. 2, 2013, <http://www.classism.org/money-ascent-walter-white> ("Like

and did not live in a state of deprivation, but the risk of financial destruction motivated at least in part his initial decision to engage in criminal activity.<sup>208</sup> (At some point, the amount of money he made no longer mattered to him, and by the show's end, Walter had amassed great wealth.)<sup>209</sup> In contrast to most capital defendants, Walter was intellectually gifted. Not only was he a chemistry mastermind,<sup>210</sup> but over time he learned how to run a sophisticated criminal enterprise despite a lack of any personal experience in the drug trade.<sup>211</sup> The question of whether Walter suffered from a mental illness is open (and important), but the show focused on the development of his character and situational decision-making rather than on any clear symptoms of possible mental illness. So, across three major dimensions—class, intellectual functioning, and mental health—Walter is different from most capital defendants.

Walter's middle-class status combines with his race to make him even more relatable to most jurors. Many capital defendants belong to minority races.<sup>212</sup> Race matters in capital sentencing, for a variety of reasons. While the race-of-the-victim effect remains the most influential racial dynamic in capital sentencing,<sup>213</sup> the race of the defendant still plays a

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many middle-class folk, he is one medical diagnosis away from financial ruin. When we meet Walter, he is drowning in the bills he can't cover and his wife Skyler is pregnant with their second child. Then he gets the diagnosis. Walter White's American Dream is dead.”).

208. See *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

209. See *Breaking Bad: Gliding Over All* (AMC television broadcast Sept. 2, 2012) (depicting Walter taking Skyler to the money pile in a storage facility).

210. See, e.g., *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

211. This becomes clear over the course of the final two seasons. Walter is even distributing his product as far as the Czech Republic. See *Breaking Bad: Gliding Over All* (AMC television broadcast Sept. 2, 2012).

212. See, e.g., Ray Sebastian Pantle, *Blacker Than Death Row: How Current Equal Protection Analysis Fails Minorities Facing Capital Punishment*, 35 CAP. U. L. REV. 811, 816 (2007); see also Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1559 (2004) (citation omitted) (“Louis Masur’s historical study of capital punishment in the eighteenth and nineteenth centuries noted that even then, ‘[t]hose whom the state hanged tended to be young, black, or foreign.’”).

213. See David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1413, 1423–26 (2004). The race-of-the-victim effect refers to the influence that a victim’s racial status has upon sentencing outcomes in capital cases. In cases with white victims, the jury is more likely to return a death sentence against the defendant.

role in some places.<sup>214</sup> In short, being white could help a capital defendant avoid a death sentence. In *Breaking Bad*, race does not factor explicitly into the plot, but as one commentator noted “[Walter’s] is the voice of white male privilege, the angry, unfiltered sense that one is owed something and has had it taken away.”<sup>215</sup> Though it seems unlikely that jurors would connect consciously to that sense, it could certainly play a role on an unconscious level.<sup>216</sup>

The critique about Walter’s uniqueness draws strength from research about jury selection and the capital jury decision-making process. The process of death-qualification<sup>217</sup> tends to exclude jurors who can relate to typical capital defendants.<sup>218</sup> The result is that there is a “psychological distance” between jurors and defendants.<sup>219</sup> This distance—sometimes referred to as a “cultural chasm”<sup>220</sup> or “empathic divide”<sup>221</sup>—is a serious obstacle to a life sentence. The empathic divide “describes jurors’ relative inability to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors’ own.”<sup>222</sup>

The empathic divide identifies the gap that most capital defendants must attempt to cross in the penalty phase. Defense lawyers “want to show the jury from the outset that our client is a human being with faults, feelings, family, disappointments, and the like. It is much harder for a

214. *See id.* at 1414–22. Where race of the defendant makes a difference, the defendant’s status as a racial minority increases the likelihood the jury will sentence him to death.

215. Todd Van Der Werff, ‘*Breaking Bad’s*’ racial politics: Walter White, angry white man, SALON, Sept. 22, 2013, [http://www.salon.com/2013/09/22/breaking\\_bads\\_racial\\_politics\\_walter\\_white\\_angry\\_white\\_man/](http://www.salon.com/2013/09/22/breaking_bads_racial_politics_walter_white_angry_white_man/).

216. FeministTV, *White, Pink, Brown, Blue: The Racial Politics of Breaking Bad*, TUMBLR, <http://feministtv.tumblr.com/post/61247485431/white-pink-brown-blue-the-racial-politics-of> (last visited Mar. 29, 2015) (“Whiteness cloaks Walt’s actions in innocence and legitimacy, allowing viewers to privilege his emotional experiences as valid, while rooting for the destruction of the Salamanca Cousins, and later Gus Fring.”).

217. *See supra* Part III(A).

218. *See Haney, supra* note 212, at 1583–84 (“[T]he legally mandated process of death qualification insures that white (and African-American) capital jurors are not likely to be representative of their respective groups in the communities from which they are drawn. Moreover, death-qualified juries are likely to be different from other juries in ways that further increase the distance between them and the persons whom they judge.”).

219. *Id.* at 1583.

220. Sarma, *supra* note 176.

221. Haney, *supra* note 212.

222. *Id.* at 1558.

jury to kill someone that they know.”<sup>223</sup> But, it is very difficult for individual jurors to “know” a capital defendant whom they perceive as being different from them. The gap Walter White needs to cross might be much smaller than a typical capital defendant.

Walter’s background may make him more comprehensible, but the aggravating circumstances in the case for death are far more numerous and extreme than those presented in the typical penalty phase. Indeed, the sheer number of murders for which he could be charged plus the far-reaching consequences of his other actions overwhelm what most capital defendants face. The aggravating circumstances the prosecution could prove in Walter’s case cut against the notion that a defense lawyer would be fortunate to have him as a client. It must be kept in perspective that Walter’s is not an easy case for life, even if he is better positioned to elicit empathy from prospective jurors because of his race, class, intelligence, and mitigating circumstances.

While the extreme aggravation in Walter’s case provides one response to the critique based on Walter’s uniqueness, an underlying principle of mitigation reveals the central response: that each individual possesses a story that must be uncovered and told.<sup>224</sup> The fact that Walt’s story was made known largely explains why claims about his uniqueness can be made in the first place. What facts exist, what stories may reside beneath the surface—those are “unknown unknowns” upon which assumptions should not be based. Even if it is true that Walter is better situated in some ways to bridge the empathic divide that separates capital jurors from capital defendants, *Breaking Bad*’s lessons in mitigation should not be discounted. And, even if the stories that defense teams uncover in their own cases seem less likely to compel others than the stories told about Walter’s life, the obligation remains to tell those stories in the most persuasive way possible.<sup>225</sup>

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223. Natman Schaye & Roseann Schaye-Glos, *Mitigation in the Death Belt—Twelve Steps to Saving Clients’ Lives*, CHAMPION, July 2005, at 18, 21.

224. See *supra* text accompanying note 36.

225. The critique based on Walter’s uniqueness also overlooks the fascinating role that penalty phases play in our legal system. The penalty phase is a forum that provides an (albeit fraught) opportunity to tell a powerful story. See Haney, *supra* note 190, at 561 (“Capital penalty trials, then, have become unique legal forums in which it is possible to tell the truth about the lives of capital defendants. These are stories that are being told almost nowhere else in the United States.”).

*C. The True Power of Mitigation Is Harnessed By Careful and Memorable Storytelling*

The *Breaking Bad* case study reinforces critical lessons about how to prepare and present persuasive mitigation. Above all, the show demonstrates that extremely hard work and careful, detailed, and thoughtful storytelling have a lasting impact on listeners and viewers. From the beginning, the writers planned to turn the show's viewers against Walter: "the mandate here has always been take our hero and turn him into a bad guy throughout the life of the series."<sup>226</sup> But, to their surprise, people continued to root for him.<sup>227</sup> While people have posited many reasons for the show's unintentional cultivation of a loyal Walter following, there is no question that viewers followed Walter because of the story that was told and because of how it was told.

Mitigation calls for the same attention to detail and textured storytelling as *Breaking Bad*. Whereas the show relies on beautiful sets and scenery, engaging writing (with cliffhangers), and action that changes or reveals character, a penalty phase depends on reliable documentation, informed expert testimony, relatable lay testimony, and a focus on key events that shaped a capital defendant's life and central themes that explain it. To achieve the goals in a penalty phase:

[t]he mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the rest of the defense team and experts to develop a comprehensive and cohesive case in mitigation.<sup>228</sup>

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226. Tim Appelo, *Vince Gilligan on Why 'Breaking Bad' Will Go Down in TV History (Q&A)*, THE HOLLYWOOD REPORTER, Aug. 12, 2013, <http://www.hollywoodreporter.com/news/vince-gilligan-why-breaking-bad-604341>; see also Brian Donovan, *Is Breaking Bad Changing TV History?*, THOUGHT CATALOG, Sept. 4, 2012, <http://thoughtcatalog.com/brian-donovan/2012/09/is-breaking-bad-changing-tv-history/> (noting that Walter "changes into someone unsympathetic").

227. John Plunkett, *Breaking Bad creator Vince Gilligan: 'How long can anyone stay at the top?'*, THE GUARDIAN, Aug. 18, 2013, <http://www.theguardian.com/media/2013/aug/18/breaking-bad-vince-gilligan-walter-white> ("I have kind of lost sympathy for Walt along the way," says Gilligan. "I find it interesting, this sociological phenomenon, that people still root for Walt.").

228. Schaye & Schaye-Glos, *supra* note 223, at 21.

*Breaking Bad* is revered in large part because of how the many different aspects of its writing and production tie together so beautifully. A persuasive mitigation presentation must also tie together the many moving parts of the underlying investigation.

Moreover, *Breaking Bad* demonstrates to a certain degree how social histories inform decision-makers. Unlike the characters responsible for bad acts in traditional crime dramas, *Breaking Bad*'s characters have connections, relationships, and personal histories. Similarly, capital defense teams must show that their clients have the same things: "the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them."<sup>229</sup> *Breaking Bad* humanized Walter early in the first season, providing a context to frame the subsequent seasons' events. Similarly, penalty phase 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 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."<sup>230</sup> In some ways, *Breaking Bad* did not take us far back in Walter's history; in a real capital case, the mitigation investigation must include a multi-generational analysis. But, compared to the run-of-the-mill television crime drama, *Breaking Bad* gave its main character a significant history.

## CONCLUSION

In the end, *Breaking Bad* cared deeply about and for its characters. That care, reflected profoundly in so many ways, brought us as viewers into the show in a special way. That may be the key mitigation lesson. Even a character whom the writers plan to have break bad can be treated when he is properly developed and cared for. If the same care is shown to a client that the defense team actually wishes to save, perhaps the desired result will be achieved.

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229. Haney, *supra* note 190, at 560–61.

230. Haney, *supra* note 212, at 1581.

