LETHAL CRAPSHEET: THE FATAL UNRELIABILITY OF THE PENALTY PHASE

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"I love judges, and I love courts. They are my ideals that typify on earth what we shall meet hereafter in heaven under a just God."
William Howard Taft 1

I. INTRODUCTION

Capital sentencing today is reliable and predictable, consistent and nonarbitrary, transparent and verifiable in its accuracy. In contrast to the wide-open, amorphous approach briefly tolerated in McGautha v. California, 2 capital decision making is now channeled and anchored. The deliberate and rational have displaced the impressionistic and visceral. Aggravation is well delineated and delimited better still; prejudicial irrelevancies are held at bay. Mitigation, virtually without limit, is culled and compassionately comprehended in relation to culpability. With exactitude and objectiveness worthy of the mathematical universe, mitigating factors are weighed against aggravating factors.

This process abounds with check, balance, and backstop. It resolves the tension between individuated fairness and principled treatment of like cases alike. So long as the right to counsel is taken seriously, the sentencing process perfects the complementarity of justice and mercy.

Yes, all this is true — and the moon is made of green cheese.

Aggravating factors, even as defined by statute, are both elastic and porous. Jurors can adapt them to accommodate whatever factual element strikes them as most offensive, no matter how arbitrary or impermissible.

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2 402 U.S. 183 (1971) (holding as constitutional a jury’s imposition of the death penalty without governing standards, as well as the constitutionality of a jury’s determination of guilt and penalty after only a single trial and single verdict).
The uncovering and presentation of life-history-mitigation evidence are inherently difficult and bound to fail too much of the time, in whole or part, even when the defense team enjoys adequate training and resources. Mitigation of a more abstract, scientific character finds a chilly reception among jurors long ago alerted to the dangerous flimflam of the “Twinkie defense” and its ilk. Mental health experts improve matters little, if at all.

Most fundamentally, there is no common — much less prescribed — understanding of the extent to which mitigating evidence of any variety should favor leniency. The subjectiveness of all this, fatal in itself, almost entraps jurors into racially-tainted decision making.

Capital sentencing, aspirations and pretensions aside, amounts to a crapshoot. It is a game of chance implicating stakes that may not constitutionally ride on luck, certainly not today when we can incapacitate so readily through a life sentence without parole.

II. AGGRAVATING FACTORS’ INEVITABLE ENTANGLEMENT WITH IMPERMISSIBLE CONSIDERATIONS

Ideally, a set of aggravating factors, especially when confined to those statutorily identified, would operate as does the best-designed, most specialized net. Drawn through the sea of evidence, an aggravating factor should capture only those things rationally related to a defendant’s culpability. Instead, aggravating factors scoop up not only morally relevant reasons for severity but also every species of arbitrary, impermissible muck.

This necessarily happens for two reasons: First, trial is more literary than linear; and this is no less true in the bifurcated setting of a capital trial. Aggravating factors, even while taking form in statute, derive their weight from the peculiar case “story.” Second, jurors absorb evidence in a courtroom, not a vacuum.

A. Trial Stories

The effective trial lawyer tells a story. That is what the prosecution aims to do; that is what the defense aims to do. Stories organize and convey information. Stories hold attention. Stories engender attorney credibility and rapport.

Stories operate on the plane of understanding but also the plane of will. The story that unfolds successfully at trial imparts data necessary for a given verdict. But it also impels the jury to deliver that verdict,
notwithstanding reluctance to do so; the story registers cognitively but also asserts itself volitionally. Thus stories amount to more than the sum of their parts. They penetrate the moral imagination to link facts, organically and irrevocably, both within the narrative and within the juror who has internalized the narrative by way of bringing himself to render a condemning verdict.

In *Old Chief v. United States*, Justice Souter unabashedly acknowledges both how “making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness” and how such a “colorful story with descriptive richness” can spur a hesitant jury. Recognizing the prosecution’s ordinary prerogative to prove its case with evidence of its choosing, Justice Souter wrote for the majority:

Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent. *Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.*

*This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.* Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. *When a juror’s duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment.* Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell *a story of guiltiness* as to

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support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.  

A problem in penalty phase is that the “story of guiltiness” carries through from guilt phase. “[T]he concrete and particular” from the first stage wield “persuasive power” in favor of execution, whether or not that “concrete and particular” bear legitimate relation to death-worthiness. This might not be so if aggravating factors did not, as a practical matter, absorb, and draw their power from, the specifics of the given case. Yet they do.  

Trial tells a story. Aggravation is a creature of the story. Nowhere does aggravation comprise only bare penal-law elements. Many states’ capital statutes make no effort at, or pretense of, precisely defining or identifying aggravation beyond the statutory aggravating factor required, by Zant v. Stephens, 5 to render the defendant eligible for the death penalty. 6

New York, unlike most capital states, allows capital sentencers to consider only those- aggravating factors both set out in statute and proven beyond a reasonable doubt. 7 Those factors, however, serve largely as dredges, into which the “concrete and particular” fall and onto which the “concrete and particular” barnacle. This is because the aggravating factors’ all-decisive weight must ordinarily reflect “the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted.” 8

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4 Id. at 187-88 (emphasis added) (citations omitted).

5 462 U.S. 862, 878 (1983) (indicating that statutory aggravating circumstances serve the necessary function of circumscribing the class of persons eligible for the death penalty, yet noting that ignoring other possible aggravating factors in the process of selecting who will actually be sentenced to death is not required by the Constitution).

6 See generally James R. Acker & Charles S. Lanier, Aggravating Circumstances and Capital Punishment Law: Rhetoric or Real Reforms, 29 CRIM. L. BULL. 467, 496 & n.145 (1993) (discussing the role of nonstatutory aggravating factors); Jeffrey L. Kirchmeier, Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 374-81 (1998) (further discussing the court’s decision in Zant, as well as, the court’s treatment of nonstatutory aggravating circumstances in other cases).

7 C.P.L. § 400.27(3).

8 C.P.L. § 400.27(6) (certain prior convictions, as also defined by statute, may also be considered. See C.P.L. § 400.27(7)).
Aggravation is then case-specific, not generic. The defendant will be punished not simply for first-degree murder. He will be punished for the first-degree murder he committed at a certain place and time, of a specific victim, animated by particular motivations and under unique circumstances—all of which the jury will have learned in great detail.

Whether left wide-open or, as in New York, ostensibly narrowed, aggravation ultimately becomes a matter of gestalt or narrative impression rather than a discrete category born of, or subject to, objective analysis. Each juror absorbs, consciously or unconsciously, from the whole body of evidence—or, rather, from the “story of guiltiness” the juror has internalized—her own reasons to execute, with little or no assurance as to the rationality or permissibility of those reasons.9

The most obvious hazards arising from this go to race and victim worth. Neither the race of the defendant nor the race of the victim may

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9 A warning signal as to the Rorschach qualities of all aggravation issued early from capital jurisdictions trying to standardize calculations through statutorily prescribed variations on the aggravator “heinous, atrocious, and cruel.” For instance, in his dissent in Walton v. Arizona, Justice Blackmun noted how Arizona sentencers would tie themselves in knots to establish the presence of this aggravator because they:

find heinousness and depravity on the basis of “gratuitous violence” if the murderer uses more force than necessary to kill the victim, see State v. Summerlin, 675 P.2d 686, 696 (Ariz. 1983); State v. Ceja, 612 P.2d 491, 496 (Ariz. 1980), but the murder will be deemed cruel if the killer uses insufficient force and the victim consequently dies a lingering death, see State v. Chaney, 686 P.2d 1265, 1282 (Ariz. 1984). A determination that a particular murder is “senseless” will support a finding of depravity; but a murder to eliminate a witness is also depraved, a murder for pecuniary gain is covered by a separate aggravating circumstance, and evidence showing that the defendant killed out of hatred for the victim or a desire for revenge may be used to buttress the court’s conclusion that the killer ‘relished’ the crime. See State v. Jeffers, 661 P.2d 1105, 1131 (Ariz. 1983). In State v. Wallace, 728 P.2d 232, 238 (Ariz. 1986), the court’s determination that the crime was “senseless” (and therefore heinous and depraved) was based in part on the fact that the defendant ‘steadfastly maintains there was no reason or justification for what he did’—this in a case where the defendant argued that his remorse for the crime constituted a mitigating factor.

497 U.S. 639, 696-97 (1990) (Blackmun, J., dissenting) (parallel citations omitted). Justice Blackmun even noted a case in which it was found “that a particular murder was committed both for an unworthy purpose and for no purpose at all.” Id. at 696 n.18 (emphasis in original). Most alarming perhaps, all the findings Justice Blackmun criticized issued not from jurors but judges, appellate and trial.
constitutionally weigh in death's favor.\textsuperscript{10} That each has historically, and does statistically, cannot surprise, given the unmistakableness of racial identity at trial and the nature of racial prejudice.

At trial, physical appearance betrays the racial identity of a black capital defendant or a white capital murder victim. The defendant sits within spitting distance of the jury when he is identified by an arresting officer; the jury sees victim photographs and family member witnesses who identify the decedent. Jurors do not have to ferret out the racial facts.

Nor do prejudiced jurors have to choose a reaction; prejudice is self-starting. Whether a family legacy, an illogical inference from embittering experience, or assimilation from mass culture, prejudice involves conditioned response at least as much as conscious choice.\textsuperscript{11}

\textsuperscript{10} Furman v. Georgia, 408 U.S. 238, 242 (1972) (stating that it would be deemed unusual punishment if the death penalty were inflicted on a defendant because of discrimination based on race, religion, wealth, social position, or class). See also C.P.L. §§ 270.16, 470.30(3)(b).

\textsuperscript{11} People v. Cahill, 2 N.Y.3d 14, 95 (2003) (Smith, J., concurring) (“But how many jurors who hold views determined largely by race, which can range from virulent to latent, will publicly acknowledge their views during voir dire?”). See also McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 558 (1983) (“The bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.”) (Brennan, J., concurring), quoting Smith v. Phillips, 455 U.S. 209, 221-22 (1982); Geagan v. Gavin, 292 F.2d 244, 249 (1st Cir. 1961) (“Certainly prospective jurors, like everyone else, suffer from a variety of biases and prejudices of which they are not aware.”); People v. Williams, 628 P.2d 869, 874 n.2 (Cal. 1981) (studies suggest “that the accuracy of a person’s estimation of his own fair mindedness is likely to be inversely proportional to the depth of his actual prejudices and predispositions.”).

Few things can better illustrate the elusive, insidious, nonvolitional nature of prejudice than its appearance among those whose personal moral greatness we, as a nation, unanimously celebrate as having stood the test of time. And we need look no further than one of the greatest figures of the Revolutionary Period and one of the greatest figures of the Civil War Era.

Abigail Adams believed in the intellectual, moral, and spiritual equality between black and white Americans. This was, for her, not just a matter of political pretension but personal conviction, to which she gave defiant expression in her own New England community. Nonetheless, in the middle 1780’s, Adams attended a London stage production of \textit{Othello}. Whether arising from “the prejudices of education” or “natural antipathy,” Adams’ reaction to the interracial sexuality was startling to her: “My whole soul shuddered whenever I saw the sooty heretic Moor touch the fair Desdemona.” Consider how much deeper the shudder would have run, had Othello been played by a black actor, rather than a white player in make-up. David McCullough, \textit{JOHN ADAMS} 345-46, 480 (Simon & Schuster 2001).
Race then differs from a confession or forensic lab test; it is not something that is incorporated or rejected after deliberation. No, this piece of the “concrete and particular” automatically becomes part of the “narrative,” the story, which has brought the jury to penalty phase.

For instance, as Nicholson McCoy proceeded into his sentencing phase, the “story of guiltiness” did not change in Suffolk County. The story continued to feature a 6'5", 275-pound dark-skinned African-American sexually victimizing and killing a petite white co-employee.\(^\text{12}\)

The story also still included the poignant facts that McCoy’s victim was a mechanic’s wife, that the couple had only recently been able to buy a home, and that they had two small children and hoped for more.\(^\text{13}\) Likewise, as Stephen LaValle’s Suffolk County jury embarked on penalty phase, they knew and could not “unknow” or “unlearn” that LaValle’s victim, varsity track-coach Cynthia Quinn, met her terrible death while trying to fit in an early morning run as her young daughter and younger son slept back at the house.\(^\text{14}\)

So, just as race is embedded in the “story of guiltiness,” which has moved the jury to convict for capital murder, so are particulars that emotionally color the decedent, regardless of whether these particulars go to a defendant’s culpability. These particulars too remain embedded as the jury decides a defendant’s ultimate fate. One need not wonder why jurors so frequently decide on sentence before commencement of the penalty phase.\(^\text{15}\)

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What American greater than Frederick Douglass occupied the public square in the Civil War Era? Abraham Lincoln maybe. Notwithstanding Douglass’s remarkable breadth of experience, depth of intellect, and fervor of conviction, even he was not immune from prejudice. Writing in 1846 about his recent travels in Ireland, Douglass, with great compassion and almost too much vividness, recounts a poverty that called to his mind the “same degradation as the American slaves” suffered. Settling on the “immediate cause” and perhaps the “main cause of the extreme poverty,” Douglass indicted Irish “intemperance” in alcohol consumption. \textit{The Life and Writings of Frederick Douglass, Early Years 1817-1849} 138-42 (Philip S. Foner, ed., 1975). The intemperance Douglass observed no doubt worsened conditions. Still, what is striking about Douglass’s theory of Irish poverty is that, by 1846, Ireland was in the midst of a potato famine (caused by blight).

\(^{12}\) Record on Appeal at 13706, 14408-09, 17452, 29390, People v. McCoy (March 31, 2003) (Suffolk County Indictment No. 2582-98).

\(^{13}\) \textit{Id.} at 13705-08.


\(^{15}\) William J. Bowers et al., \textit{Foreclosed Impartiality in Capital Sentencing};
To be sure, some illicit aggravation may be filtered out of the sentencing process — maybe a great deal. Defense lawyers can bring motions in limine before trial as to some facts and arguments. Some conscientious prosecutors will err on caution’s side; certain trial courts will effectively curb some of the rest. And this will reduce the risk of constitutional contaminants.

Still, illicit aggravation will hobble reliable sentencing in a significant number of capital cases, because contaminants will inevitably seep through in the majority of cases. And we dare not indulge the notion that they can always be checked through prophylactic or curative jury instructions. The very nature and insidiousness of this illegitimate aggravation defies such measures: Some of the illicit material, such as race, simply falls beyond the reach of ad hoc jury instruction.

As to other contaminants, explicitly identifying, invoking, and reprising them, in the guise of preventative instructions, would only risk compounding the harm. In either event, “it would be quixotic to expect the jurors to perform [the] mental acrobatics,” — not to mention the emotional ones — that such “curatives” would demand.

It beggars reality, then, to assume or even hope that jurors can mentally purge those images and elements of the “story of guiltiness” that jeopardize a fair sentence, certainly not when they make the emotionally...

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*Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making,* 83 COLUM. L. REV. 1476 (1998) (based on interviews with some one thousand capital jurors in more than ten states and revealing that nearly half of them felt they knew what the punishment should be before sentencing phase).

16 *Cf.* e.g., United States v. Jones, 16 F.3d 487, 492-493 (2d Cir. 1994) (in finding laudable but doomed to failure the trial judge’s effort at “damage control,” observing: “In the course of giving this limiting instruction, the judge reminded the jurors repeatedly that Jones was a convicted felon as he simultaneously asked them to put this consideration out of their minds . . . ”); People v. Griffin, 242 A.D.2d 70, 73 (1st Dept. 1998) (in finding ineffective the trial judge’s effort to “unring the bell” regarding prejudicial testimony, appellate court notes the judge’s acknowledgment to the jury, “I know the longer I talk about it the harder it is to put it out of your mind.”) (internal quotation marks omitted).

17 *Jones,* 16 F.3d 487, at 493.

18 *See generally* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (presumption that a jury will follow limiting instructions disappears where a great probability exists that the jury will be unable to follow them and the evidence is highly damaging to the defense).
charged, and profoundly subjective, decision between execution and life-without-parole. As Old Chief explains, the juror has adopted a story, but, too, the story — unfiltered — may well have adapted the juror, making the juror one willing to return a verdict of condemnation.

B. Functional Aggravation from Outside the Record

Finally, assume flawless in limine rulings, absolutely circumspect advocacy, and impeccable juror obedience to instruction all occur. As a result, nothing in evidence weighs in aggravation that ought not weigh in aggravation. Even still, sentencing error is in the offing. Because the undeniable, inescapable, on-the-ground truth is that some of the most devastating aggravation comes from outside the body of evidence.

Jurors observe. They observe outside the courthouse. They observe outside the courtroom’s well. And, above all, they observe defendant at counsel table, from the first day of jury selection through sentencing verdict.

Notwithstanding efforts to protect jurors from outside influences, real life intrudes. In many instances, sidewalk protests against the death penalty have greeted venirepersons as they reported on their first day of jury duty as a capital case got underway.19 In all likelihood, this, ironically, has led many execution-averse venirepersons to exclude themselves automatically rather than examine their ability to set aside personal views and faithfully serve.

Apart from demonstrations are news reports and opinion pieces. Presumably, jurors ordinarily avoid, at the behest of the trial court, stories directly pertaining to the case on trial. Still, wholly independent events picked up in the news potentially alter jury opinion. Heaven help the defense lawyer summing up in penalty phase the day after a widely reported prison break. Good luck to the prosecutor summing up in penalty phase the same week as DNA evidence brings belated exoneration to a murder convict.20


20 By way of real-life illustration, a New York State sentencing jury considered
Obviously, nobody engineers prison escapes or post-conviction vindications to tilt a capital jury. Most often, commentary also emerges as a matter of coincidence.

Yet, in at least one instance here in New York State, one would have to have wondered. On the very morning a penalty phase commenced, an op-ed by the District Attorney himself appeared in the city’s only major newspaper. The op-ed essentially made three points: that “death cases are for the very worst of all defendants who commit the most heinous murders”; that the decision to seek death, “the most awesome decision that any district attorney will ever make,” had been exercised only “with the greatest care”; and the District Attorney’s office at trial was a David fighting the Goliath of the Capital Defender Office. The name of the young man whose penalty phase was beginning appeared nowhere in the District Attorney’s commentary.\(^2\) The jury was thus free to read it.\(^2\)

Inside the courtroom but still outside the record, members of the victim’s family and the defendant’s family are bound to draw attention.\(^2\) Often victims’ rights, law enforcement, or anti-death-penalty groups might turn out in force for some or all of the proceeding.

We might pretend that all these presences offset each other in each case, leaving every jury uninfluenced. But wishing does not make it so.
And, yes, *Musladin v. Lamarque*\(^24\) — to be heard in the United States Supreme Court come fall and arising from a trial court’s allowing three members of a victim’s family to wear buttons with the victim’s photograph, while seated prominently behind the prosecution during trial — may issue some guidance. No court, high or low, will, however, choreograph court attendees precisely enough to place the jury beyond effect.

Last and most dangerous, the in-court appearance and demeanor of the defendant throughout the proceedings inevitably draw intense juror attention and exert influence, even though they are not in evidence and may be wholly misleading as indicia of death-worthiness.

People judge other people by appearance. These judgments extend to moral assessment. Leonardo da Vinci was not speaking in code when he asserted that “Beauty Adorns Virtue”\(^25\); he was conveying a universal intuition.

Social science research confirms that attractiveness can bear on a noncapital defendant’s treatment in the criminal justice system\(^26\). Where a death notice looms, the judgment potentially in the offing is more plainly absolute and radical than any other passed within our legal system. The jury’s scrutiny of the capital defendant’s person — his appearance and demeanor — for characterological clues would seem inevitable, as a matter of common sense\(^27\).

\(^{24}\) 427 F.3d 653 (9th Cir. 2005), cert. granted sub nom. Carey v. Musladin, 126 S. Ct. 1769 (2006). (Carey v. Musladin, 127 S. Ct. 343 (2006), decided after submission of Taylor’s brief to the New York Court of Appeals, offered no such guidance.)


\(^{26}\) See, e.g., Diane S. Berry & Leslie Zebrowitz McArthur, *Some Components and Consequences of a Baby-face*, 48 J. PERSONALITY AND SOC. PSYCHOL. 312 (1985) (finding that students judged “baby-faced” adults as being more naive and rated them not-guilty of intentional criminal acts more often than “mature-faced” adults); A. Chris Downs & Phillip M. Lyons, *Natural Observances of the Links Between Attractiveness and Initial Legal*, 17 PERSONALITY AND SOC. PSYCHOL. BULL. 541 (1991) (finding a strong negative correlation between physical attractiveness of defendants in over 1500 misdemeanor cases in Texas and the amount of fines assessed by judges); John E. Stewart, II, *Defendants’ Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348, 352-55 (1980) (finding in Pennsylvania study that attractive people were significantly more likely to avoid incarceration than were their unattractive counterparts). See also McCleskey v. Kemp, 481 U.S. 279, 317-18 (1987) (acknowledging the existence of such studies).

But we need not trust only common sense. Studies substantiating this fact are not in short supply. Researchers establishing the centrality of remorse in the jury decision to kill or spare have repeatedly affirmed that jurors regularly measure regret or recalcitrance based on their observation of the defendant at counsel table. One study found mercy more freely dispensed to the defendant who seemed “uncomfortable or ill at ease” or chastened in a guilty verdict’s wake. The defendant whose manner bespoke boredom or detachment found less favor. Another study, centering on California jurors, also found the defendant’s courtroom demeanor to have been the primary gauge for hard-heartedness or contrition; woe befell the defendant who projected pride, nonchalance, or cockiness, especially as graphic proof of his crime came into evidence. This corroborated yet an earlier study that found a third of jurors citing defendants’ remorseless, “emotionless” demeanor as contributing to their vote for execution.

The problem with juror assessment of defendant’s nontestimonial demeanor is threefold: It is not lawful, because such demeanor is not in evidence. It is inevitable. It is unreliable.

New York, in keeping with most jurisdictions, holds that the courtroom bearing of the accused is not in evidence. Never mind that comment on it might constitute comment on the defendant’s right to remain offender in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community...."


29 Id. See also Gary Goodpaster, The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 332 (1983) (“Depending on defendant’s general demeanor and reaction to trial events, this [chance to observe the defendant during trial] may dispose the sentencer in the defendant’s favor.”).


32 See, e.g., People v. Ferguson, 82 N.Y.2d 837, 838 (1993) (prosecutor’s summation assertion that defendant was taking notes during trial with his left hand “constituted an improper reference to facts not in evidence” where no evidence was elicited at trial regarding whether defendant was left- or right-handed).
silent. Never mind that use of it could mean a price was exacted for the defendant’s exercising his right to attend his own trial. Courtroom bearing simply does not belong to the evidence. Reliance on it, therefore, sets any resultant sentence outside the bounds of due process and reliability.

The accused’s courtroom bearing is not in evidence. But, of course, most often it is — as a practical matter. Ask Professor Wigmore. “[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory.” Ask Scott Peterson, whose jurors, after trial, underscored as a key reason for his death sentence his remorseless manner throughout a trial at which he did not take the stand.

Even pausing the argument at this point, a constitutional infirmity is clear. Due process presupposes that the factfinders and the advocates share a common body of evidence. Argument centers on that body of evidence. The relevant law applies to it. Some, most, or all jurors tapping into a side store of evidence injects imbalance and subverts reliability. This would be so, even if the side evidence were reliable. But it is not.

Posture, gait, gestures, facial expressions, and contortions — all these admit ambiguity under the most relaxed and ordinary circumstances. A legal context can heighten the ambiguity. Hence, in People v. Basora, this court held that evidence that the defendant smiled during his arrest “thwart[ed] defendant’s Fifth Amendment right” because it attributed “communicative value” to the act of smiling. The evidence, this court said,

33 People v. Basora, 75 N.Y.2d 992, 993 (1990) (prosecutor’s attributing communicative value to defendant’s smiling violates state and federal constitutional right to remain silent).

34 United States v. Carroll, 678 F.2d 1208, 1209 (4th Cir. 1982) (noting that the defendant’s “presence and his non-testimonial behavior in the courtroom could not be taken as evidence of his guilt” and holding that the prosecutor’s improper comments at summation about those matters violated the defendant’s Sixth Amendment rights to trial by jury and to be present).


37 See People v. DeLucia, 20 N.Y.2d 275, 280 (1967) (holding an unauthorized crime scene visit “in and of itself, constitutes inherent prejudice to the defendants.”).

38 75 N.Y.2d 992, 993.
should not have been admitted because of its minimal probative value: “A smile . . . can convey many different states of mind — for example, relief, bewilderment, nervousness, exasperation or happiness. Admission of such testimony as evidence of a consciousness of guilt was erroneous because the evidence was ambiguous and its probative value minimal.”

The artificiality and assigned roles of the courtroom increase ambiguity of the nonverbal further still. And then, when arising in the uniquely pressurized circumstances of a capital trial and read off an individual viewed through the scrim of a hideous capital indictment, the ambiguity of nonverbal communication (real or imagined) multiplies a hundredfold.

Now, finally, multiply one more time by the factor of cross-cultural mistrust, misunderstanding, and misinterpretation.

Interpreters can bridge language differences to enable understanding by, for, and of witnesses and defendants. Nobody, though, renders a running translation of demeanor across racial, ethnic, or national lines.

Worse, at least where the spoken word is concerned, one is alerted to a gap in understanding. Hearing Farsi, Hebrew, or Manx, one does not mistake it for English and ascribe meaning. In contrast, it is almost impossible to take in but not decipher, accurately or inaccurately, another’s manner. See a grimace, a raised eyebrow, a flared nose, a furrowed brow, pursed lips, or a blank stare and you involuntarily take it to signal something: maybe hostility or perhaps anguish; snideness or surprise; anger or contempt; concentration or worry; condescension or secrecy; indifference or shock.

Yet signals scramble as they cross cultural boundaries. Some cultures encourage a more or less animated demeanor; a more formal or vulnerable bearing; a greater or lesser degree of emotional transparency. Courts have recognized the lethal dangers attending nonverbal miscommunication — even where defendants have testified or have otherwise had their demeanor legitimately available for factfinder or other adjudicator assessment. Specifically, in Mak v. Blodgett, the Ninth

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39 Id. at 994 (citations omitted). See also People v. Caruso, 246 N.Y. 437, 442 (1927) (suggesting that the physician-decedent’s seeming smile, after defendant told him defendant’s six-year-old had died, likely resulted from a facial twitch).

40 Holtzman v. Manniello, 202 N.Y.S.2d 952, 954 (Sup. Ct. Nassau County 1960) (“Certainly, the interpretation of smiles and nods, conscious or unconscious, and the mental operation of a juror are not the province of the court.”).

41 970 F.2d 614 (9th Cir. 1992).
Circuit affirmed a grant of habeas relief from a death sentence in a highly aggravated case, faulting trial counsel for, *inter alia*, failing to present an expert witness to illuminate issues of cultural dislocation and differences:

Dr. Johnson would have discussed serious assimilation problems experienced by many Chinese who are moved during adolescence from Hong Kong to North America, and certain values in the Chinese culture of Hong Kong which could help to explain petitioner’s involvement in criminal activities here. [The testimony] would also suggest that petitioner’s apparent lack of emotion at trial did not necessarily indicate disinterest or coldness, but was consistent with cultural expectations of Chinese males.42

Thus, the defendant’s in-court, nontestimonial demeanor makes for one more potential source of illicit aggravation and unreliable sentencing. Might it be checked by court instruction or expert testimony of the kind discussed in *Mak*? In some at-risk cases for some jurors but, realistically, not for all jurors in all at-risk cases.43

III. LIFE-HISTORY MITIGATION: DIFFICULTY IN UNCOVERING AND IMPOSSIBILITY IN MEASUREMENT

The United States Constitution endows a capital defendant with the rights to present and to have considered in sentencing virtually anything that favors sparing him from execution.44

42 Id. at 618 n.5 (emphasis added). Accord id. at 620. See also People v. Superior Court (Du), 7 Cal. Rptr. 2d 177, 181 (Cal. Ct. App. 1992) (upholding as within a trial court’s discretion a probationary sentence for manslaughter and crediting the trial-court finding that the probation department’s failure to discern defendant’s remorse owed to barriers of language and culture).

43 Inevitably, some capital defense counsel will reasonably, per *Strickland v. Washington*, 466 U.S. 668 (1984), but wrongly conclude that court instruction or expert testimony on a defendant’s unfavorable demeanor would only exacerbate the problem. Additionally, some jurors will inevitably react to a nontestifying defendant’s demeanor, notwithstanding a judge’s charge or expert’s opinion.

Further, since defendant’s in-court nontestimonial demeanor belongs to the category of things that “cannot be shown from a trial transcript,” *Riggins v. Nevada*, 504 U.S. 127, 137 (1992), the problem of, and remedies for, prejudicial defendant demeanor evade appellate reach in individual capital cases.

44 *Lockett v. Ohio*, 438 U.S. 586, 603-605 (1978) (arguing that capital sentencer must be allowed to grant independent weight to mitigating evidence of defendant’s
In some instances, a mitigation case will focus on commendable behavior before the time of the crime or redeeming conduct since. Life-history mitigation — *i.e.*, evidence of abuse, neglect, and deprivation during the formative years — however, has long made up the most cogent and common mitigation in capital litigation.

New York’s experience since 1995 has not placed it apart in this. New York saw fifteen cases go into penalty phase under the 1995 statute. The penalty phase verdict sheet, the “Jury Sentencing Determination and Findings Form,” from each case reflects both mitigation argued by the defense and mitigation independently identified by jurors. Taken together, these verdict sheets reveal that in eleven of fifteen cases some evidence of neglect, deprivation, or abuse was under consideration for its mitigating value.

character, record, and background, along with circumstances of the offense favoring less harsh punishment); Eddings v. Oklahoma, 455 U.S. 104, 110-15 (1982) (explaining that it is unconstitutional to disregard mitigation falling outside that statutorily defined); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (explaining that it is unconstitutional to bar evidence of defendant’s good behavior while fired for the current offense); Tennard v. Dretke, 542 U.S. 274, 284-87 (2004) (rejecting requirement that mitigation must have some nexus to the capital offense).

45 People v. Harris, 98 N.Y.2d 452, 473 (2002) (“During the riot, defendant rescued a fellow corrections officer, an act of heroism that earned him a Medal of Honor from the Department of Correction in 1987.”).

46 *Eddings*, 455 U.S. at 115 (“Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.”) (citations omitted); Penry v. Lynaugh, 492 U.S. 302, 304 (1989) (“Those decisions are based on the principle that punishment must be directly related to the defendant’s personal culpability, and that a defendant who commits crimes attributable to a disadvantaged background or emotional and mental problems may be less culpable than one who has no such excuse.”).

47 Jury Sentencing Determination and Findings Form, People v. Alvarez, (May 23, 2003) (Supreme Court of the State of New York, Indictment No. 1352/00); Jury Sentencing Determination and Findings Form, People v. Gordon, (Dec. 18, 1998) (Supreme Court of the State of New York, County of Queens, Indictment No. 273/97); Jury Sentencing Determination and Findings Form, People v. Harris, (June 6, 1998) (Supreme Court of the State of New York, County of Kings, Indictment No. 15265/96); Jury Sentencing Determination and Findings Form, People v. McCoy, (Aug. 16, 2000) (County Court, Suffolk County, State of New York, Court Case No. 2582-98); Jury Sentencing Determination and Findings Form, People v. McIntosh, (July 23, 1998) (County Court of the State of New York, County of Dutchess, Indictment No. 146/96); Jury Sentencing Determination and Findings Form, People v. Mateo, (Dec. 16, 1998) (County court of the State of New York, County of Monroe, Indictment No. 0914/96); Jury Sentencing Determination and Findings Form, People v. Owens, (Apr. 30, 2001) (Supreme Court of the State of New York, County of Monroe, Indictment Nos. 547/99,
The relevance of such evidence is obvious. Human action and character emerge from personal choice but also from circumstances not chosen. While we should hold the individual to account for how he has played his cards, neither justice nor honesty allows us to pretend we are all dealt the same hand or even draw from the same deck. The relevance of life-history evidence is a given. We cannot say the same for its consistent availability or ultimate measurability.

A. **Time and Distance as Obstacles to a Complete, Accurate Penalty-phase Presentation**

Any defendant capitally prosecuted today in New York or elsewhere in America will have passed his eighteenth birthday. Therefore, at best, the defense will be reaching back over at least a decade to reconstruct not just discrete, seminal events in his life but day-in-day-out patterns of existence and interaction. “Over the years, the witnesses who were acquainted with the defendant are likely to have become geographically dispersed and more difficult to trace than guilt phase witnesses.” As a practical matter, the defense’s burdens of proof and production can become impossible to bear.

To pretend otherwise locates capital sentencing advocacy in its own alternative universe, a place very different from the one requiring the doctrine of laches and statutes of limitations. Through these and other common-law doctrines and statutes, as well as constitutional principles, the law recognizes the difficulty of gathering, much less proving, facts after great lapses of time. For example: “Statutes of limitation, like the equitable doctrine of laches . . . are designed to promote justice by preventing

414/99); Jury Sentencing Determination and Findings Form, People v. Parker, (Oct. 24, 1998) (County Court of the State of New York, County of Erie, Indictment No. 97-0762); Jury Sentencing Determination and Findings Form, People v. Santiago, (June 23, 2000)(Supreme Court of the State of New York, County of Essex, Indictment No. 99-023); Jury Sentencing Determination and Findings Form, People v. Shulman, (May 6, 1999) (County Court of the State of New York, County of Suffolk, Indictment No. 1112-96); Jury Sentencing Determination and Findings Form, People v. Taylor, (Nov. 26, 2002) (Supreme Court of the State of New York, Queens County, Indictment Nos. 1845/00, 1012/01).


surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.\textsuperscript{50}

More particularly in the criminal justice arena, the passage of time may render “too difficult . . . a retrospective determination of trial competence” — where a competency hearing has been wrongly denied in the first instance — thus requiring vacatur of the conviction.\textsuperscript{51} “[T]ime’s erosion of exculpatory evidence and testimony” — indeed, the overall “effect of delay on adjudicative accuracy” — constitutes as well the major prejudice concern underlying federal and state constitutional speedy-trial and due-process-delay analysis.\textsuperscript{52} In fact, in determining that this State’s due-process clause extends speedy-trial protection to juveniles, this Court — with observations strikingly apt to the difficulties inherent in reconstructing a capital defendant’s life-history — noted that the effects of delay may be even more profound [than for an adult accused]. A juvenile, experiencing the vicissitudes of childhood and adolescence, is more likely to suffer from a lack of memory than an adult. A juvenile is less likely than an adult to preserve his or her memory concerning the incident in question . . . and various other crucial details.\textsuperscript{53}

Of course, in some cases, records — whether from schools, social agencies, or other institutions — may partially offset the difficulties confronting the defense team in proving up mitigation originating in the distant past. This possibility, however, offers limited solace. Put aside lapses in reporting, investigation, recordation, and preservation that occur in the best of circumstances. Put aside how anemic the printed word can seem in comparison to a live witness. A disproportionate number of capital defendants emerge from economically distressed communities wherein

\textsuperscript{50} Railroad Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944). Accord Covington v. Walker, 3 N.Y.3d 287, 293 (2004) (observing that such policy considerations lie “at the heart of our statutes of limitations jurisprudence”). See also, e.g., Tavarez v. City of New York, 26 A.D.3d 297, 298 (1st Dept. 2006) (rejecting late notice-of-claim because of adversary’s “loss of opportunity to locate witnesses while memories were still fresh and other prejudice”).

\textsuperscript{51} People v. Peterson, 40 N.Y.2d 1014, 1015 (1976).

\textsuperscript{52} Doggett v. United States, 505 U.S. 647, 655 & n.2 (1992).

\textsuperscript{53} In re Benjamin L., 92 N.Y.2d 660, 669 (1999) (citations omitted).
record-keeping ranks low in importance. At least seven of the fifteen men who proceeded through penalty phase under the 1995 statute were born to poverty.

Beyond poverty, a not insignificant number of capital defendants come from elsewhere. According to the Death Penalty Information Center, 120 foreign nationals from thirty-two different countries currently await execution across America and twenty-one foreign nationals have been put to death since 1976. Three of the fifteen men who faced sentencing juries

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54 See J. Garbarino & D. Sherman, High-risk Neighborhoods and High-risk Families: The Human Ecology of Child Maltreatment, 51 CHILD DEV., 188 (1980) (In a study of communities within the Chicago metropolitan area, the areas at high risk for child maltreatment were characterized by social disorganization (e.g., criminal activity) and lack of social coherence (e.g., lack of availability and knowledge of social services and support networks). See also J. Garbarino & K. Kostelny, Child Maltreatment as a Community Problem, 16 CHILD ABUSE AND NEGLECT, 455, 463 (1992) (“[P]ublic agencies are pushed beyond their capacity to respond. The link between poverty and child maltreatment continues as a powerful feature of the problem.”).

A class-based handicap in penalty-phase preparation raises discrete race issues insofar as poverty often correlates with race. The poverty rate for African-Americans remains well over double that for white Americans (24.7% versus 10.8%). See http://wvw.census.gov/hhes/www/poverty/histpov/hstpov2.html (last visited Aug. 25, 2006). Black unemployment also persists at more than twice the level of white unemployment (9.5% versus 4.1%). See http://www.bls.gov/data (follow “Access to Historical Data for the ‘A’ Tables” hyperlink; follow “Table A-2” hyperlink; check boxes for “white unemployment rate” and “black unemployment rate”; and retrieve data.) (last visited Aug. 25, 2006).


56 See http://www.deathpenaltyinfo.org (follow “Issues” hyperlink; then follow “Foreign Nationals” hyperlink).
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If time and distance present obstacles to mitigation’s excavation and exposition, they can pale in comparison to the stumbling blocks of shame and secrecy.

### B. Dirty Laundry Kept Hidden and Damaged Families Unmended

Even if the defense vaults every temporal and geographical challenge, no small number of sentencing juries will deliver death verdicts without having heard the neglect and abuse the defendant suffered growing up in his dysfunctional family. Three things alert us to this inevitability: Shame surrounding family flaws. Deficits common in dysfunctional families. And the predictably poor reactions many of these families will have when crisis descends in the form of a capital prosecution.

Most afflicted families will treat dysfunction, abuse, and neglect as painfully private “dirty laundry.”\footnote{See Hodgson v. Minnesota, 497 U.S. 417, 440 n.26 (1990) (“Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home.”) (citations omitted); *In re: Commitment of Marino S.*, 293 A.D.2d 223, 225-26 (1st Dept. 2002) (noting that, after child was being raped by father and reported this to mother, mother “refused to believe” it and ordered her not “to lie;” and that “most of” the child’s other relatives knew of the abuse but made no report and took no action).
} Even when abuse constitutes a current, ongoing threat, silence and secrecy frequently ensnared injurious abuse in the home.\footnote{Trash TV has enjoyed commercial success because its voyeur-exhibitionist symbiosis falls outside the social norm; most Americans don’t, under any circumstances, want to recount to strangers histories of physical, sexual, or emotional abuse. See *Steve Allen, Vulgarians at the Gate: Trash TV and Raunch Radio: Raising Standards of Popular Culture* (2001); Neal Gabler, *The Culture Wars: Audience Stays Superior to the Exploitative Shows*, L.A. TIMES, March 19, 1995, at M1.
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\footnote{See Eric Nagourney, *Women Often Hide Domestic Abuse from Doctors*, N.Y.
This cannot wholly surprise. The law recognizes, and ample research corroborates, a strong link between shame and a history of abuse.\textsuperscript{60} Families riddled with dysfunction and abuse are not just disinclined toward disclosure of these evils and ills; they are communicatively disabled in general. As noted by renowned family therapist Virginia Satir, dysfunctional families “have rigid rules, unclear and dishonest communication patterns, low self-esteem among members, and weak ties to the rest of the community. . . . Weak social ties are consistently cited as a characteristic of abusive families, as are rigid, autocratic family power systems.”\textsuperscript{61}

But, surely, a family is a family. And any family will surmount its difficulties when one of its own faces literally mortal danger, right? If only it were so.

A defendant’s indictment for capital murder visits both fear and scorn on a family.\textsuperscript{62} Far from being an occasion for family members

\textsuperscript{60} People v. Leon, 209 A.D.2d 342 (1st Dept. 1994) (holding that prompt-outcry evidence was wrongly admitted but harmlessly so, given essential reliability of outcry by sexually abused child who felt fear, vulnerability, and shame); Staggs v. Commonwealth, 877 S.W.2d 604, 606 (Ky. 1994) (recognizing that victims of child sexual abuse are frequently “locked in the psychological shackles of fear and bound in shamed silence’’); In re Seaman, 627 A.2d 106, 118 (N.J. 1993) (noting expert testimony that “shame, humiliation, fear, and dependence of the victim” contribute to the under-reporting of sexual harassment); State v. Edward L., 398 S.E.2d 123, 140 (W.Va. 1990) (“Because of the child’s confusion, shame, guilt, and fear, disclosure of [father’s sexual] abuse is often long delayed. When the child does complain of sexual abuse, the mother’s reaction frequently is disbelief; and she fails to report the allegations to the authorities.’’) (internal citation omitted). See also Colette L. Hoglund, & Karen B. Nicholas, Shame, Guilt, and Anger in College Students Exposed to Abusive Family Environments, 10 J. FAM. VIOLENCE 141 (1995).

\textsuperscript{61} \textsc{Alan Kemp, Abuse in the Family: An Introduction} 25-26 (1998) (citing \textsc{Virginia Satir, The New Peoplemaking} (1998)).

\textsuperscript{62} Perhaps telling of the hostility toward capital-defendant families is how little they have been studied. Even limited study, however, has revealed episodes of threats, harassment, and abuse from the community, even extending to young siblings forced to leave school when school officials concluded there was an irresolvable mortal threat. Of course, at least as often, fear is felt over the fate of the loved one potentially facing execution. See Elizabeth Beck et al., \textit{Seeking Sanctuary: Interviews with Family
inevitably to rally and slip the shackles of secrecy and denial, a capital prosecution can foreseeably result in a family’s denial and terror, shame and anger, renewed vulnerability and deep defensiveness. One study of defendants’ families still caught up in the capital process included, *inter alia*, psychological assessments of twelve parents and one sibling. All but two individuals were diagnosed as suffering from major depression; all thirteen displayed symptoms suggestive of post-traumatic stress disorder. This sample is, admittedly, small. But the findings are consistent with what we know about many radically troubled families faced with disaster.

A family that has lived with severe abuse and dysfunction will, in general, be rigid and brittle, unable to bend to the needs of the emergent situation. Tragically, therefore, when a heinous crime is charged and execution is sought, a family with such a history may be least apt to disclose family secrets and most likely to lapse into a pattern of almost contagious despair. Indeed, psychologists have long identified *apathy-futility syndrome*, a pattern of maladaptation common among impaired families.

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*Members of Capital Defendants, 88 CORNELL L. REV. 382 (2003).*

63 Of course, the capital defendant is part of that family; and not infrequently he himself hampers life-history investigation and presentation. *See, e.g.*, Knight v. Dugger, 863 F.2d 705, 750 (11th Cir. 1988) (“Petitioner did not want his family background or history explored and made public for mitigation purposes. The lawyers testified that Petitioner did not want the subject of his father brought out at the penalty phase. Petitioner’s lead attorney, Matthews, recalled that Petitioner did not want his family’s history of mental illness or his father’s imprisonment for the rape incident to become matters of public knowledge. Petitioner’s reluctance was based, Matthews recalled, on the intensely personal subject matter (which he had not been able to face in his adult life) rather than mere embarrassment.”). *See also* Letter from Stephen LaValle to Stuart M. Cohen (Clerk of the New York Court of Appeals) (Feb. 12, 2001) (on file at the Capital Defender Office and the Court of Appeals of the State of New York) (indicating defendant’s prospective refusal to involve himself or his family in penalty phase on remand).

64 Beck et. al., * supra* note 63, at 406.

65 According to the systems-theory model, which is applied to families, “systems resist change if that change is perceived as a threat to stability or homeostasis. [The systems-theory model can be used] to understand and explore both the pain of living with family abuse and the resistance to change.” *KEMP, supra* note 62, at 17.

66 The apathy-futility syndrome includes eight components: “(1) a pervasive conviction that nothing is worth doing, (2) emotional numbness (sometimes mistaken for depression), (3) interpersonal relationships that can be characterized as desperate and ‘clingy,’ (4) lack of competence in many areas of living (partially caused by fear of trying and failing), (5) passive aggression or reluctant and hostile compliance, (6) negativism or
Resembling — or perhaps co-existing with — a debilitating depression, this syndrome would badly hobble any impulse to cooperate by revealing mitigating evidence. To be clear, apathy-futility syndrome does not spring from a lack of caring, but rather from a profound, pervasive, long-instilled sense of helplessness. Any effort or attempt at rescue seems to the sufferer to be doomed to failure. All is futile; the die is cast; what will be will be.

Clouding any effort to surmount such pathological fatalism, furthermore, is the counterintuitive nature of the mitigation project. As one commentator noted:

Locating lay witnesses is only half the battle. Once you have found them, you must succeed in obtaining from them the information you need. In most cases lay witnesses are initially suspicious of people asking questions about the client because, like the client, their experiences have been with individuals wanting to hurt them. Thus, time must be spent demonstrating commitment and a sincere desire to save the client’s life.

One of the greatest hurdles in communicating with and gaining the trust of lay witnesses is explaining that what they may have thought was “bad” about their friend or loved one is actually helpful information.67

What is negative in the defendant’s history is, in fact, positive. The destructive episodes and elements from his life will now serve to construct a case for letting him live. How easily do even people blessed with healthy upbringings grasp this?

How eagerly do the members of a dysfunctional, neglectful, or abusive family grasp it, especially absent any guarantee as to an impact on case outcome? Take the siblings who shared an ordeal of physical or sexual abuse and hoped it was behind them. Will not a significant number decline to revisit and relive their past in public testimony? Won’t many tell themselves their testimony would not make a difference?

Take the adult bystanders who failed to stop abuse. Will they, who

noncommitment to positive stands, (7) verbal inaccessibility to others, and (8) an uncanny ability in making others feel the same sense of futility.” Id. at 99. It is precisely this personality type that cannot rally in the service of saving the life even of a beloved family member.

abided the victimization of an innocent child, consistently step up years later to (possibly) rescue an adult guilty of an intentional, aggravated murder? Not consistently enough to stake a human life on it.\footnote{Jeffrey Kirchmeier, \textit{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, 706 (2004) (Mitigating evidence “is often difficult to find” because factors “such as child abuse, are not matters family members may be willing to discuss.”).}

Take the defendant’s abuser himself. Forget, for the moment, the stigma or jeopardy that derives directly from that adult’s abusive acts.\footnote{Dorothy Otnow Lewis et al., \textit{Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States}, 145 AM. J. PSYCHIATRY 584, 588 (1988) (remarking that parents had “vested interests in concealing” abuse).} A capital-sentencing phase potentially casts that adult as bearing an important role in the creation of a violent criminal, a killer, the worst of the worst.\footnote{Beck et al., \textit{supra} note 63 at 413 (discussing how interviews showed that relatives of capital offenders experience “shame” about “mitigation which, though essential to the defense, may be interpreted as suggesting the defendant’s family is culpable”).} What percentage of such adults will thus inculpate themselves in the inevitable media glare of a capital proceeding? Yes, it has happened.\footnote{In the fall of 1994, Susan Smith killed her two sons by sending her car into a South Carolina lake as the boys slept in the backseat; she then told a credulous public that the car, children inside, had been seized by an African-American carjacker. At Smith’s trial, her stepfather, Beverly C. Russell, a state Republican executive committee member and nephew of a South Carolina governor, initially resisted revealing his molestation of his teenage stepdaughter; eventually, however, he testified on her behalf. Henry Eichel, \textit{Smith Abuse Allegations Revealed; for Months, Her Stepfather Came into Her Room to Kiss and Fondle Her, She Said}, CHARLOTTIE OBSERVER, Apr. 12, 1995, at 1C; Andrea Weigl, \textit{Susan Smith’s Stepfather to Continue Supervised Visits with his Son}, GREENVILLE NEWS, June 16, 1999, at 1B.} But how often does the truth go untold?\footnote{Dorothy Otnow Lewis et al., \textit{supra} note 70, at 588-89 (“Family members requested that histories of abuse be minimized” and “collude . . . to minimize or conceal entirely the violence and abusiveness experienced in the home”). \textit{See also} Marilyn Feldman et al., \textit{Filicidal Abuse in the Histories of 15 Condemned Murderers}, 14 BULL. AM. ACAD. PSYCHIATRY & L. 345, 351 (1986) (observing that families may be more interested in concealing abuse than in helping the defendant); Winston v. United States, 172 U.S. 303, 313 (1899) (finding that the mitigating question of whether “explanatory facts may exist which have not been brought to light is “committed by the act of Congress to the sound discretion of the [capital] jury”).} How often will it go untold if the death penalty is deemed viable under the New York State Constitution?
And then, finally, how much more often will the truth go untold where African-Americans are on trial for their lives? For here, once again, race and racism complicate and exacerbate the death penalty’s ever fallible application. Owing to history and our yet incomplete journey toward racial equality, some African-Americans “tend to be suspicious of requests by White providers for intimate life details. It is seen by the African-American Community as dangerous and potentially self-destructive to not hide one’s feelings from Whites until their trustworthiness can be assured.”

What has been coined “healthy cultural paranoia” among some African-Americans dictates that they be wary of disclosing family secrets.

Besides feeling that they will not be helped, African-Americans will often refrain from anecdotally affirming a dominant stereotype of Black families as “disorganized, unstable and psychologically unhealthy.”

Sentencing errors will occur; mitigation will go unheard. And African-American capital defendants will be at greater risk for such infirmities.

Does the passage of time or challenge of distance or barrier of family-shame preclude the recovery of life-history evidence in every penalty phase? Certainly not. At least in those jurisdictions that ensure competent capital counsel, one can realistically hope that only a minority of sentencing juries will be deprived of crucial life-history mitigation as they choose between life and death. But it will be a significant minority, significant enough to raise constitutional alarm. Moreover, a jury’s hearing life-history mitigation successfully gleaned by defense counsel is only the start of a reliable sentence. Once heard, what is the jury to do with it? What is it worth?

C. Mitigation in the Beholder’s Heart

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74 FREDDY PANAIAGUA, ASSESSING AND TREATING CULTURALLY DIVERSE CLIENTS 34 (3d ed. 2005) (“Slavery and racism are two important factors in the history of African-Americans in the United States . . . [a]n important consequence [of which] has been the development of healthy cultural paranoia among African-Americans.”) (emphasis in the original) (citations omitted). This mistrust most certainly can extend to counsel in a capital case.

75 Id. at 43.

76 Burger v. Kemp, 483 U.S. 776, 794 (1987) (“Mitigation . . . , after all, may be in the eye of the beholder.”) (citations and internal quotation marks omitted).
As noted, the threshold relevance of life-history mitigation is obvious. A mitigation case takes for granted the defendant’s grave moral culpability for his crime; the issue is not whether to punish but how to punish. The defense does not attempt to excuse, justify, or explain away. Rather, pointing to developmental disadvantage, detriment, and damage, it seeks the mercy of life imprisonment based on our awareness of diluted accountability, diminished autonomy, or moral misformation.

Few, if any, on the defense side win contending that the capital defendant is a mere cog in a cause-and-effect universe wherein freedom and agency are only illusions. Just as surely, few, if any, on the prosecution side prevail contending that the capital defendant is simply a Lucifer, a metaphysical rebel engaged in evil purely for the sake of evil or the sole originator of his own sinfulness, independent of outside influences and encumbrances.

Penalty phase, then, is not a disputation between the Party of Determinism and the Party of Free Will. It is a battle of gradations, degrees, and emphasis. What weight does the life-history mitigation deserve? How much does it explain about the defendant’s violent criminality? To what extent does it favor mercy?

Virtually no one doubts that things outside the person help shape his moral behavior. This truth transcends boundaries of time, faith, and ideology. It finds voice in Hebrew and Christian scripture (which themselves exist to exert moral and spiritual influence). It finds voice in the most secular contemporary thought. It issues politically from left-of-

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77 See Eddings v. Oklahoma, 455 U.S. 104, 123 n.4 (1982) ("Dr. Gagliano was also willing to state categorically, on the basis of this single interview and without reference to the results of the psychological testing of Eddings, that Eddings was 'preordained' to commit the murder from the time his parents were divorced, when he was five. This sort of 'determinist' approach is rejected by an overwhelming majority of psychiatrists.") (Burger, C.J., dissenting) (internal citations omitted).

78 "I want to talk about the concepts of free will and determinism. Doctrine of free will . . . versus what I would would submit to be the post-Freudian secularist view . . ." People v. Dennis Alvarez, Westchester County, State’s opening statement in penalty phase resulting in deadlock, Trial Transcript, at 15777, May 15, 2003.


it echoes back politically from right-of-center. Even the least sympathetic, most retributive observers confess the connection between bad upbringing and bad moral outcome.

Strong consensus exists as to very specific early risk factors for violent adult criminality: poverty, abuse (direct or indirect), neglect,

moral systems).

81 See generally HILLARY RODHAM CLINTON, IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US (Simon & Schuster 1996) (discussing ways of raising a successful generation of adults).


83 Peggy Noonan, They Should Have Killed Him. The Death Penalty Has a Meaning, and it Isn’t Vengeance, WALL ST. J., May 4, 2006, OpinionJournal Archives, http://www.opinionjournal.com/columnists/pnoonan/?id=110008330 (“Of course [Moussaoui] had a bad childhood; of course he was abused. You don’t become a killer because you started out with love and sweetness. Of course he came from unhappiness.”).

84 “One national survey found that welfare status or perceived financial stress was significantly related to children’s emotional and behavioral problems — specifically, to higher levels of depression, antisocial behavior, and impulsivity. Unemployment and employment in poor quality jobs are systematically related to the arrest rates among juveniles and young adults . . . We also know about the way in which persistent poverty is predictive of severe and recurrent child abuse. That is, ‘[v]iolence does occur at all income levels but it is more often repeated among the persistently poor.’” Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547, 563-5 (1995) (citations omitted). See also Furman v. Georgia, 408 U.S. 238, 447 (“Certainly the claim is justified that this [capital] sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The ‘have-nots’ in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation . . . .”) (Powell, J., dissenting).

85 Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (“Because Penry was mentally retarded . . . and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally ‘culpable than defendants who have no such excuse.’”) (citations omitted) (emphasis added). See COMMISSION ON DOMESTIC VIOLENCE FATALITIES, THE REPORT TO THE GOVERNOR (Oct. 1997), http://www.opdv.state.ny.us/publications/fatality/part7.html#36)

In addition to death and physical injury, the consequences of domestic violence in terms of emotional and developmental impact on children are serious as well. ‘Among preschoolers . . . signs of terror [are] evidenced by the children’s yelling, irritable behavior, shaking, and stuttering .
noxious moral example;\textsuperscript{87} and brain defect or damage.\textsuperscript{88}

\textemdash Adolescent boys exposed to domestic violence may use aggression as a predominant form of problem solving \ldots and may exhibit a high degree of anxiety.\textsuperscript{86} Studies of children have indicated that children who witness domestic violence at home, compared to those who do not, exhibit more aggressive and antisocial behavior, depression, anxiety, low self-esteem and low cognitive, verbal and motor skills. There are indications that these children may replicate in their own adult lives the domestic violence they witnessed.

(emphasis added) (citations omitted). Indeed, so great is the damage of abuse to a child’s moral-formation that the “Commission recommend\(\text{ed}\) that a violent partner’s commission of acts of domestic violence against another adult or child in the family or household be a sufficient basis for a charge of Endangering the Welfare of a Child.” Id. The Commission even urged against any “requirement that the child physically witness the conduct.” Id.

\textsuperscript{86} Williams v. Taylor, 529 U.S. 362, 395 (2000) (finding counsel ineffective in capital sentencing where adequate investigation would have revealed, \textit{inter alia}, criminal neglect of the defendant and his siblings). \textit{See also} Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (“Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background.”); Summerlin v. Schriro, 427 F.3d 623, 642 (9th Cir. 2005) (ineffective capital counsel did not demonstrate, \textit{inter alia}, defendant’s desertion by his father); King v. Bell, 392 F. Supp. 2d 964, 979 (M.D. Tenn. 2005) (ineffective capital counsel failed to show, \textit{inter alia}, that defendant “spent his formative years in New York with little supervision”); Rose v. State, 675 So. 2d 567, 571-574 (Fla. 1996) (capital counsel ineffective at penalty phase where reasonably available evidence would have revealed, \textit{inter alia}, neglect).

\textsuperscript{87} See Tison v. Arizona, 481 U.S. 137, 167 n.7 (1986) (excerpting from psychologist’s report on sibling capital petitioners):

These most unfortunate youngsters were born into an extremely pathological family and were exposed to one of the premier sociopaths of recent Arizona history \ldots [Their murder-convict father] exerted a strong, consistent, destructive but subtle pressure upon these youngsters \ldots There was a family obsession, the boys were ‘trained’ to think of their father as an innocent person being victimized in the state prison but both youngsters have made perfectly clear that they were functioning of their own volition. At a deeper psychological level it may have been less of their own volition than as a result of Mr. Tison’s ‘conditioning’ and the rather amoral attitudes within the family home.

(Brennan, J., dissenting) (citations omitted); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (faulty capital counsel failed to investigate and present evidence that defendant, abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother, where he was exposed to group sex, bestiality, and
Any of these things, though not of the individual’s choosing, may skew his choices abominably. The relevance of life-history evidence is not in issue. Its net effect is. How far should any life history move a jury away from execution and toward imprisonment for life? The answer: It depends. And here is the problem: As a practical matter, it depends as much on the uniqueness of the juror as it does on the uniqueness of the defendant as portrayed in life-history mitigation. It is a breathtakingly subjective determination.\(^8\)

\[^8\] In 1967, California Governor Ronald Reagan commuted a death sentence in light of “pre-existing brain damage resulting in a chronic mental condition.” Quin Denvir, Executive Clemency: Restore It To Its Rightful Position, 26 C.A.C.J./Forum 10 (1999). See also Rompilla v. Beard, 125 S. Ct. 2456, 2468-2469 (2005) (counting evidence of fetal-alcohol syndrome among the mitigation withheld for want of reasonably diligent capital counsel); Summerlin, 427 F.3d at 641-43 (identifying a temporal-lobe-seizure disorder, possible organic-brain-syndrome, and impaired impulse-control among the mitigation omitted by ineffective capital counsel); Harries v. Bell, 417 F.3d 631, 639-40 (6th Cir. 2005) (holding capital counsel ineffective where jury never heard about, \textit{inter alia}, defendant’s multiple traumatic scars on the head, numerous head injuries, carbon monoxide poisoning and frontal lobe damage); Smith v. Mullin, 379 F.3d 919, 941-43 (10th Cir. 2004) (finding ineffectiveness where capital jury did not learn about brain damage due to a near drowning and oxygen starvation and how “organic brain damage [could have] caused these outbursts of violence”); Hamblin v. Mitchell, 354 F.3d 482, 490 (6th Cir. 2003) (finding second prong of \textit{Strickland} satisfied where unbeknownst to the jury, \textit{inter alia}, defendant’s early signs of mental disorder may have arisen from a blow to the head with a dog chain wielded by his father); Battenfield v. Gibson, 236 F.3d 1215, 1226 (10th Cir. 2001) (finding second prong of \textit{Strickland} satisfied where, unbeknownst to jury, capital defendant suffered, \textit{inter alia}, severe head injuries in an automobile accident, after which he heavily abused drugs and alcohol); Sanford v. State, 25 S.W.3d 414, 421 (Ark. 2000) (finding second prong of \textit{Strickland} satisfied where, unbeknownst to jury, defendant seemed a “bit slower” after suffocation under a load of cotton seed and later suffered a blow to the head with a two-by-four wielded by his sister.)

\[^89\] Turner v. Murray, 476 U.S. 28, 33-34 (1986) (“In a capital sentencing
Whatever his intention, a concurring Justice Scalia underscored this fact of capital life (or death) memorably in *Walton.* There, he abjured the unlimited right to mitigation’s consideration, a right anchored in *Woodson,* *Lockett,* and *Eddings,* deeming the right both inconsistent with the Eighth Amendment’s text and historical meaning and doctrinally unworkable. Justice Scalia lamented:

We have . . . repeatedly rebuffed States’ efforts to channel that discretion by specifying objective factors on which its exercise should rest. It would misdescribe the sweep of this principle to say that “all mitigating evidence” must be considered by the sentencer. *That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden.* Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision . . . that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim’s race, or that he had a pathological hatred for the victim’s race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despaired his mother. Whatever evidence bearing on the crime or the criminal the defense wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer.

But, for Justice Scalia, the infirmity does not dwell simply in the lack of gatekeeping. The problem is not merely that capital defendant Smith may prove he acted wholly out of character, while, down the hall, capital defendant Jones may prove his acts flowed naturally from his long-damaged psyche. No, adding to the randomness is the jurors’ radical discretion. The states may not embargo any potentially mitigating evidence and each juror may make of it, and make with it, what she will.

proceeding before a jury, the jury is called upon to make a ‘highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.’ *Caldwell v. Mississippi,* 472 U.S. 320, 340, n.7 (1985) (quoting *Zant v. Stephens,* 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in judgment))” (subquotation marks omitted) (parallel citations omitted).


*Id.* at 662-63 (emphasis altered) (citations omitted).
Nor may States channel the sentencer’s consideration of this evidence by defining the weight or significance it is to receive . . . Rather, they must let the sentencer “give effect” to mitigating evidence in whatever manner it pleases. *Nor, when a jury is assigned the sentencing task, may the State attempt to impose structural rationality on the sentencing decision by requiring that mitigating circumstances be found unanimously; each juror must be allowed to determine and “give effect” to his perception of what evidence favors leniency, regardless of whether those perceptions command the assent of (or are even comprehensible to) other jurors.*

Mitigation, then, bears no objective value and operates in no objectively prescribed, or even described, fashion. The jury neither wields a common yardstick against which to measure mitigation nor enjoys a common understanding of the manner in which mitigation can, may, or must extenuate.

Nobody can specify the measure of mercy that ought be engendered — or will typically be engendered — by, say, total parental abandonment before defendant reached the age of twelve; or defendant’s unsuccessful

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92 *Id.* at 663-64 (emphasis altered) (citations omitted).

93 More precisely, it bears no objective value that we can collectively discern with a reasonable degree of confidence. Right and wrong, along with degrees of good and degrees of fault, exist independent of our opinions and imaginings; there is nonrelative moral truth. Our laws would otherwise make no sense. Nor would our intense attention to the legitimacy of execution.

94 Justice Scalia makes plain, finally, that the paradoxical, unpredictable, subjective character of mitigation is not an illusion or surface imperfection. It is not a shadow or blemish giving rise to quizzical anomalies, apparent or real; it is a cancer eating at the goal of consistency:

To acknowledge that “there perhaps is an inherent tension” between this line of cases [*Woodson-Lockett-Eddings*] and the line stemming from *Furman, McCleskey v. Kemp*, 481 U.S., at 363 (Blackmun, J., dissenting), is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing “twin objectives,” *Spaziano v. Florida*, 468 U.S., at 459, is rather like referring to the twin objectives of good and evil.

*Id.* at 664 (parallel citations omitted).

95 Jury Sentencing Determination and Findings Form, People v. Alvarez, (May 23, 2003) (Supreme Court of the State of New York, Indictment No. 1352/00).
teenage attempt at enlistment in the United States Navy; or the parole-eligibility of defendant’s co-perpetrator; or defendant’s suffering severe physical abuse as child; or defendant’s growing up with an habitually criminal father-figure eventually convicted of murder; or defendant’s birth to a thirteen-year-old whose own father raped and otherwise abused her; or defendant’s cocaine dependence; or defendant’s weeping with remorse in the immediate wake of his crime; or the absence of a father figure, owing to the suicide of defendant’s father when defendant was two years of age; or defendant’s mother telling him as a young boy that he

96 Jury Sentencing Determination and Findings Form, People v. Bell, (June 28, 1999). (Supreme Court of the State of New York, County of Queens, Indictment No. 128/97).


100 Id.


102 Jury Sentencing Determination and Findings Form, People v. LaValle, 697 N.Y.S.2d 241 (Aug. 6, 1999) (Suffolk County Court No. 1350-97).

would grow up to be a murderer like his father; or defendant’s mother strangling to death his father in the one-room-apartment where defendant, less than three years of age, and his siblings lived; or defendant’s childhood diagnosis of schizophrenia and ongoing institutionalization; or defendant’s childhood of ridicule, on account of a severe speech impediment; or defendant’s malnourishment as a child; or defendant hearing his mother’s cries as his father beat her; or defendant’s finding a suicide note left by his drug-overdosed mother when he was nine years old; or defendant’s sudden childhood isolation upon his mother’s conversion to a religion that forbade participation in birthdays, celebrations, holiday festivities, and community recreation programs; or defendant’s lack of a significant history of prior criminal convictions involving the use of violence; or defendant’s growing up fair-skinned, red-headed, and consequently hated by his father in a poor, remote Puerto Rican village; or defendant’s father leveling death threats against his entire family; or defendant’s suicide gesture as a thirteen-year-old on the day of his father’s funeral; or defendant’s requiring admission to a psychiatric unit and

104 Id.
106 Id.
107 Jury Sentencing Determination and Findings Form, People v. McIntosh, (July 23, 1998) (County Court of the State of New York, County of Dutchess Indictment No. 146/96).
108 Id.
110 Id.
112 Jury Sentencing Determination and Findings Form, People v. Taylor, (Nov. 26, 2002) (Supreme Court of the State of New York, Queens County, Indictment Nos. 1845/00, 1012/01).
114 Id.
lithium injections after discovering his suicidal brother’s body.\(^{116}\)

Mercy dispensed in response to the same mitigation will differ from juror to juror and from jury to jury.\(^{117}\) Nothing allows us to imagine reasonable predictability, consistency, or transparency; honesty forbids us to do so.\(^{118}\)

**D. Hard Sciences: Hardly the Answer**

Direct life-history evidence is not the only form of mitigation that

\(^{115}\) Jury Sentencing Determination and Findings Form, People v. Shulman, (May 6, 1999) (County Court of the State of New York, County of Suffolk, Indictment No. 1112-96).

\(^{116}\) *Id.*

Alongside the problem of one juror’s giving mitigating evidence maximal weight and another’s assigning it minimal weight, there hides another threat to reliability: the danger of some jurors’ treating mitigation as aggravation. In *Penry*, Justice Brennan — ever attune to the gap between capital theory and capital practice — noted that merely requiring that a defendant’s mental retardation be considered by the jury did not protect against those who would sidestep the equity of reduced culpability and fixate on the retarded defendant’s future dangerousness or the dim “possibility of his ever becoming a useful citizen.” 492 U.S. at 346–47 (Brennan & Marshall, JJ., concurring in part and dissenting in part) (quoting “Upholding Law and Order, Hartsville Messenger, June 24, 1987, p. 5B, col. 1).

Under New York’s 1995 statute, sentencing juries have heard prosecutors argue that: a defendant’s heroic and dangerous rescue of a (then) fellow corrections officer should have made the defendant “more sensitive to people who were helpless and in need before he killed, not one, not two, but three of them execution style” (Record on Appeal at 20286, People v. Harris (Kings County, Indictment No. 15265/96)); a defendant’s lack of criminal convictions should not weigh heavily against execution, but “in fact that the opposite is true. If the defendant had been convicted of crimes in the past, perhaps we can see some sort of explanation for the premeditated killing of Charlie Davis and Mike Epstein” (Trial Minutes at 14060, People v. Bell (County of Queens, Indictment No. 128/97)); John Taylor’s children’s testimony as to his fathering and their love for him represented his failure to “spare” them a courtroom ordeal and his willingness to reduce them to “props.” Brief for Appellant at IX (Taylor’s Children), 9 N.Y. 3d 129, (N.Y. 2007).

\(^{118}\) Appellate resignation to the subjective nature of the capital-sentencing enterprise and resultant lack of jury uniformity is hard to miss. *See, e.g.*, State v. Cross, 132 P.3d 80, 103, 105 (Wash. 2006) (*en banc*) (“A jury could have granted him mercy on these [mitigating] factors” including “his underlying mental disease or defect.”; “[A]busive childhood and medically diagnosed personality disorders (that do not rise to the level of competence-destroying mental illness) do not necessarily render a death penalty disproportionate, though they are certainly grounds for a jury to show mercy.”).
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engenders mercy by showing how factors not within the defendant’s control shaped and shunted the defendant, undercutting though not supplanting his autonomy. Increasingly, the hard sciences reveal influences on behavior more suggestive of the laboratory scientist’s universe than the less linear realm of the compassion-tainted social worker.

One might hope that hard science would render more precise, verifiable, and quantifiable those things that put a person at risk for homicidal behavior and that hard science would provide the new language through which we understand the realities now imperfectly proffered in life-history narratives. Maybe in the future. Who knows?

Currently, however, the intersection of hard science and capital mitigation only highlights additional reasons to distrust the reliability of penalty-phase determinations.

Genetic research makes ever clearer that some people come into the world with a particular vulnerability to violence,119 or addiction potentially leading to violence.120 Longitudinal study has identified very early cardiovascular characteristics predictive of aggressive behavior,121 just as it

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119 For example, one genetic deficit, when combined with early maltreatment, has been strikingly linked to greatly heightened risk for violent adult behavior. Researchers following a large sample of young males for almost a quarter century found behavioral problems in 85% of those who suffered early mistreatment or abuse and whose DNA revealed a genetic variation leading to under-expression of a particular enzyme — monoamine oxidase A (MAOA) — needed to metabolize neurotransmitters. This group, making up 12% of the cohort, accounted for 44% of the cohort’s violent crimes. A Genetic Defense Against Child Abuse?, Harvard Mental Health Letter, Mar. 2003, at 8, (citing Avshalom Caspi et al., Role of Genotype in the Cycle of Violence in Maltreated Children, 297 SCIENCE 851-54 (2002)).

120 See, e.g., K. Blum et al., Allelic Association of Human Dopamine D2 Receptor Gene in Alcoholism, 263 JAMA 2055 (1990). K. Xu et al., Association of Specific Haplotypes of D2 Dopamine Receptor Gene with Vulnerability to Heroin Dependence in 2 Distinct Populations, 61 ARCH. GEN. PSYCHIATRY 597-606 (2004). See also Avshalom Caspi et al., Influence of Life Stress on Depression: Moderation by a Polymorphism in the 5-HTT Gene, 301 SCIENCE 386 (2003) (finding that adults carrying the short-form of a particular gene more prone to clinical depression after experiencing distressing life events).

121 “The basic finding [of the Mauritius Child Health Study] was that low resting cardiac rate in toddlers predicted aggressiveness and anti-social tendencies at a better-than-chance level even when environmental factors, such as social deprivation and broken homes, and biological factors, such as body size, activity level, physical development, muscle tone, and general health were controlled for . . . [Y]oungsters at high risk for criminality because they had criminal fathers were more likely to avoid crime if their resting heart rates during childhood were high.” JONATHAN KELLERMAN, SAVAGE SPAWN 89 (The Ballentine Publishing Group 1999).
has linked the combination of birth complication and early maternal rejection with criminal violence in early adulthood. Environmental exploration and analysis have uncovered compelling links between certain forms of pollution (i.e., metal, lead, pesticide) and heightened incidence of violence. Military science and media studies have combined to make a startling case against play violence as a cause of lethal violence. Even dietary risk factors for violence have emerged from nutrition studies. On the apolitical, non-polemical plane of reason, this would seem a promising development for the capital-sentencing enterprise. The more an analysis

122 Adrain Raine et al., Birth Complications Combined with Early Maternal Rejection at Age 1 Year Predispose to Violent Crime at Age 18 Years, 51 ARCH. GEN. PSYCHIATRY 984 (1994).

123 Paul B. Stretesky & Michael J. Lynch, The Relationship Between Lead Exposure and Homicide, 155 ARCH. PEDIATR. ADOLESC. MED 579 (2001) (studying air-lead concentrations in the contiguous 48 states, along with county homicide rates, and finding association between violent behavior and lead exposure); Kim N. Dietrich et al., Early Exposure to Lead and Juvenile Delinquency, 23 NEUROTOXICOLOGY AND TERATOLOGY 511 (2001) (both in utero and ex utero exposure to lead found associated with risk for antisocial and delinquent behaviors); RODER D. MASTERS ET AL., Environmental Pollution, Neurotoxicity, and Criminal Violence, in 7 ENVIRONMENTAL TOXICOLOGY: CURRENT DEVELOPMENTS (J. Rose Ed., 1998) (discussing lead and manganese in their effect on individual neurochemistry and demonstrating their environmental levels as predictive of geographical differences in violent crime rates). See also Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (finding counsel ineffective for failing to investigate and present evidence of client’s brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining “the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child”).

124 “Another way to look at this is to make an analogy with AIDS . . . . The [inborn] ‘violence immune system’ exists in the midbrain, and conditioning in the media creates an ‘acquired deficiency’ in this immune system. With this weakened immune system, the victim becomes more vulnerable to violence-enabling factors, such as poverty, discrimination, drug addiction . . . . or guns and gangs . . . . .” LT. COL. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (Little, Brown and Company 1996) (parentheticals omitted). See generally SISELLA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT (Perseus Books 1998) (suggesting reasons behind and solutions for television violence inciting real violence).

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takes root in the physical world — the world of brain and biology, as opposed to the world of mind and sociological construct — the greater the prospect for exactitude and authentication, correct?

One would think. In reality, however, mass culture virtually inoculates many jurors against genuine consideration of mitigation evidence born of highly specialized knowledge. Furthermore, even among those experts most conversant in these newer species of mitigation, comprehension of violence-inducing effects remains too rudimentary to surmount jurors’ visceral aversion. Hard science then imparts to us not assurances but notice of all we have yet to learn about influences on and causes for human behavior.

Entertainment and news media resound with cynical, distorting laments about criminal defendants who escape accountability through an “abuse excuse” or “Twinkie defense.” It is telling that the phrase “Twinkie defense” has gained such currency as shorthand for a sham state-of-mind claim that it was recently invoked in the United State Supreme Court. During oral argument, Justice Scalia — apparently voicing the perspective of a factually guilty, remorseless criminal defendant — challenged a government lawyer’s claim that any competent defense counsel could be safely substituted for chosen defense counsel: “I don’t want a ‘competent’ lawyer. . . . I want a lawyer to get me off. I want a lawyer to invent the Twinkie defense. I want to win.”

More telling, there never really was a “Twinkie defense.” Yes, death-penalty defendant Dan White, a former San Francisco city Supervisor, garnered only manslaughter convictions after shooting Mayor George Moscone and Supervisor Harvey Milk. Yes, the jury heard about White’s consumption of Twinkies and other snack foods. But, overwhelmingly, expert testimony and defense argument pointed to White’s junk diet (along with other things) as symptomatic not causal.

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127 Carol Pogash, Myth of the ‘Twinkie Defense’: the Verdict in the Dan White Case Wasn’t Based on His Ingestion of Junk Food, SAN FRANCISCO CHRON., Nov. 23, 2003, at D1 (noting, inter alia, defense’s summation brief gave tepid mention of “a minority of opinion in psychiatric fields” that high concentrations of preservatives and sugar can alter behavior). See also Massachusetts Mutual Life Ins. Co. v. Woodall, 304 F. Supp. 2d 1364, 1377 n.7 (S.D. Ga. 2003) (noting that White defense “offered junk food use as proof of White’s mental state — in other words, Twinkie consumption was an effect rather than the cause of White’s problems. But the media and public immediately — and misleadingly — dubbed the defense’s argument the ‘Twinkie defense.’”).

The myth of the “Twinkie defense” flourishes in many ideological climates.
White’s incessant ingestion of soda and cream-injected cakes helped signal the deep depression in the once athletic, formerly nutrition-conscious White, a depression that precluded premeditation and deliberation and diminished his mental capacity. As for the underlying suggestion that White was more slick than sick, he killed himself by asphyxiation not long after his release from prison.\textsuperscript{128}

The average capital juror, who will weigh mitigation in New York or elsewhere, will not know about the mentally-ill White’s suicide. Nor will she know that, Twinkies aside, a double-blind, placebo-controlled, randomized trial of nutritional supplements administered to 231 young adult prisoners in a British correctional facility resulted in a marked reduction in antisocial behavior among the “active” — i.e., non-placebo — group.\textsuperscript{129} She will only “know” about the contrived “Twinkie defense.”\textsuperscript{130}

Alas, in today’s polemical environment, it is a steep hill any capital defendant climbs, should he attempt to link something as gut-wrenching as the unjustified, intentional murder of an innocent human being to something so theoretical as defendant’s genotype or nervous system. The climb shifts from steep to near vertical insofar as a hard-science framework implies to jurors that the defense will be able to explain just how the given mitigation affected the defendant they must sentence. For, at this stage of scientific understanding, nobody even pretends to certainty when it comes to explaining, for instance, just why certain lumbar cerebrospinal fluid concentrations, along with certain levels of skin conductance, prove predictive of physical aggression and institutionalization in children and


\textsuperscript{129} See generally Gesch et al., supra note 126.

\textsuperscript{130} None of this means to say that only the most abstract scientific evidence comes in for caricature and derision. Mitigation more readily comprehended by the lay person has also long suffered jaded ridicule from some quarters. Sondheim & Bernstein, \textit{Gee, Officer Krupke}, on \textit{West Side Story} Musical Soundtrack (“Dear kindly Sergeant Krupke, You gotta understand, it’s just our bringin’ up-ke, that gets us out of hand. Our mothers all are junkies, our fathers all are drunks. Golly Moses, natcherly we’re punks!”).
adolescents with disruptive behavior disorders, or how malnourishment at age three sets a child up for behavior problems that, in turn, predispose him to adult violence, or the mechanism by which a mother’s smoking while pregnant quadruples the chance that a son will be diagnosed with conduct disorder before puberty, or the meaning of the high testosterone concentrations found to accompany both psychopathology and genetically-influenced alcoholism.

More importantly, while at times science can quantify the increased risks posed by factors of nature or nurture, it can only do so in the abstract. That is, statistical calculations will inform us about the likelihood of effects on the average individual but not on the particular capital defendant whose life has invariably been handicapped by other risk factors.

And here — in the problem of assessing multiple risk factors and their negative synergy — we find perhaps the most overwhelming obstacle to reliable sentencing.

Offenders’ weaknesses, extenuators, and vulnerabilities constitute “diverse frailties” belonging to “uniquely individual human beings,” in large part, because they inflame, infect, and intensify one another. This is an unhappy truth for the capital prosecutor, because it undercuts a popular, simplistic motif of capital prosecution: A lot of people are physically abused (or neglected or sexually brutalized or abandoned or raised amidst violence . . .) and most of them do not become murderers. The


132 Jianghong Liu et al., Malnutrition at Age 3 Years and Externalizing Behavior Problems at Ages 8, 11, and 17 Years, 161 AM. J. PSYCHIATRY 2010 (2004) (“It is possible that malnutrition predisposes to a general disinhibitory tendency and that broad cultural differences influence the precise manifestations of such disinhibition at a behavioral level.”).


136 Michelle Locke, Childhood Trauma: ‘Abuse Excuse’ or Mitigating
significance of risk factors in destructive combination, nonetheless, has repeatedly centered capital decisions from the Supreme Court.

In Rompilla,\textsuperscript{137} the Court invalidated a death sentence because of counsel’s failure to discover and present mitigating evidence that the defendant’s parents were severe alcoholics who drank constantly, that his parents fought violently and seriously abused and neglected him and his siblings, and that he appeared to have suffered from fetal-alcohol syndrome and organic brain damage. The Court concluded: “It goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of Rompilla’s culpability . . . ’”\textsuperscript{138}

Similarly, in Wiggins v. Smith,\textsuperscript{139} the Court set aside the death sentence in light of the “powerful” “totality” of the mitigating evidence that counsel had failed to unearth and present.\textsuperscript{140} This included evidence that the defendant had experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. [Wiggins] thus has the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.\textsuperscript{141}

Finally, in casting the deciding votes in Williams,\textsuperscript{142} Justices O’Connor and Kennedy joined in a concurring opinion that similarly explained how the totality of mitigating risk factors was determinative: Williams’ trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation

\textsuperscript{137} Rompilla v. Beard, 125 S.Ct. 2456.
\textsuperscript{138} \textit{Id.} at 2469 (internal punctuation and citations omitted) (emphasis added).
\textsuperscript{139} 539 U.S. 510 (2003).
\textsuperscript{140} \textit{Id.} at 534 (emphasis added).
\textsuperscript{141} \textit{Id.} at 534-35.
\textsuperscript{142} Williams, 529 U.S. at 415.
evidence. For example, speaking only of that evidence concerning Williams’ ‘nightmarish childhood,’ the mitigation evidence that trial counsel failed to present to the jury showed that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody... More generally, the Virginia Circuit Court found that Williams’ trial counsel failed to present evidence showing that Williams had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family [and] that he was borderline mentally retarded... The Virginia Supreme Court’s decision reveals an obvious failure to consider the totality of the omitted mitigation evidence.143

Courts readily grasp the need to see risk factors in destructive combination. Commentators do as well. Almost a decade ago, Judy Briscoe, Texas Youth Commission Chief of Staff and Director of Delinquency Prevention, addressed risk factors from a preventative policy perspective:

The Carnegie study identified many risk factors in a child’s life, e.g., personality, physical health, family, social/peer influence, neighborhood, community, school, and individual interaction with the environment. Risk factors are often multiplicative, not additive, in their effects. ‘When children showed only one risk factor, their outcomes were no worse than those of children showing none of the identified risk factors. But when children had two or more risk factors, they were four times as likely to develop social and academic problems...’144

143 Id. at 415-16 (O’Connor and Kennedy, JJ., concurring) (citations and internal quotation marks omitted) (emphasis added).

More in-depth examination of multiple risks, by Cornell Professor James Garbarino, has elucidated ever starker concurrence regarding the multiplicative danger. In 1998, he wrote:

[W]e have come to understand in child development research that the presence or absence of any single risk factor tells us very little about the outcome for a child. Rather, it is the accumulation of risk factors. This emerges over and over again in research when it is designed to reveal it. It may be accurate to say that runaways and drug addicts and sexually abused children come from all strata of society, but it is not to the point because the point is that victimization, when coupled with other risk factors, is what really does the damage.145

In 1999, Garbarino described the same truth more concretely:

Threats accumulate; support ameliorates. The presence of only one or two risk factors does not disable a child. Rather, it is the accumulation of threats that does the damage. And trouble really sets in when these threats accumulate without a parallel accumulation of compensatory “opportunity” factors. Once overwhelmed, defenses are weakened the next time the child faces threat. Children and adolescents become highly sensitive to any negative social influences around them. I look at it this way: Give me one tennis ball, and I can toss it up and down with ease. Give me two, and I can still manage easily. Add a third, and it takes special skill to juggle them. Make it four, and I will drop them all. So it is with threats to development.146

http://www.healthyplace.com/communities/parenting/nimh/children/violence/index.htm (“Many studies indicate that a single factor or a single defining situation does not cause child and adolescent antisocial behavior. Rather, multiple factors contribute to and shape antisocial behavior over the course of development. Some factors relate to characteristics within the child, but many others relate to factors within the social environment (e.g., family, peers, school, neighborhood, and community contexts) that enable, shape, and maintain aggression, antisocial behavior, and related behavior problems.”).


146 JAMES GARBARINO, LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM 75-76 (Free Press 1999).
Finally, University of California Santa Cruz Professor of Psychology Craig Haney deals with multiple risks in the context of the death penalty:

It is possible to think of these mitigating variables or experiences as “risk factors” that when added up over the course of a life form a whole that is greater than its individual parts. Many capital defendants have led lives that are the criminogenic equivalent of being born into hazardous waste dumps — Love Canals of crime — being exposed to crime-producing carcinogens since birth, breathing the social and psychological equivalents of smog-infested air through most of their young lives and into adulthood. They have had risk factor dumped upon risk factor over the course of a life — impoverished, abused kids, the targets of racism, poor schools, badly botched treatment or no treatment at all in the juvenile justice system, unemployment, harsher treatment still at the hands of a warehousing adult prison system, and on and on.

We do no justice to these issues by oversimplifying them or by pulling them out, one by one, and saying that “not everybody” who experienced any one of them reacted the way a particular capital defendant did. A life is an accumulation of interacting variables and it needs to be understood in that way. For most capital defendants, the risk factors are so many and varied that the real issue is not why “not everybody” responded this way but rather how anybody could survive and why more people do not succumb.\(^\text{147}\)

The analogy to Love Canal is powerful, but it is imperfect in at least one respect. In Love Canal the damage to individuals was, in part, empirically demonstrable. Roughly two years after a newspaper series ignited concerns about toxic waste hazards around Niagara Falls, the Environmental Protection Agency announced blood test results showing chromosomal damage among residents of the Love Canal community.\(^\text{148}\)


Thus some causal mechanism emerged making the concentrated presence of chemical refuse and reportedly higher incidents of birth defects and cancer less arguably a matter of coincidence.

There is nothing equivalent to a lab test by which a capital defendant can demonstrate the behavioral impact of mitigating risk factors. Medical science does not afford us an X-ray, CAT scan, or MRI of a defendant’s developmentally-crippled conscience. A stunted superego won’t reveal itself on an ultrasound. His moral state does not open up to flow cytometry.

Yes, brain imaging can, in certain instances, suggest organic damage or defect compromising of impulse control. But this technology is underdeveloped, inexact, and hardly beyond the reach of abuse-excuse, “Twinkie-defense” derision.149

E. Mental Health Experts and Deliverance from Error

And, yes, experts regularly provide forensic assessments of mental health. Their opinions pretty much moor some noncapital legal determinations.150 The law, though, has been emphatic about the limitations — at least fourfold — of mental health evidence. These limitations cannot be squared with the notion of mental-health experts as verifiers or quantifiers of mitigation.

First, within the mental-health sciences, controversy often edges out consensus even as to abstract categories and diagnoses. In Clark v. Arizona,151 the Supreme Court upheld Arizona’s restriction of mental-

149 See generally Tie-Qiang Li et al., Adolescents with Disruptive Behavior Disorder Investigated Using an Optimized MR Diffusion Tensor Imaging Protocol, 1064 ANNALS OF N.Y. ACADEMY OF SCIENCE 184 (2005) (white-matter microstructural abnormality, observed through imaging, may be related to developmental deficits); Adrian Raine, Murderous Minds: Can We See the Mark of Cain?, 1 CEREBRUM: THE DANA FORUM ON BRAIN SCIENCE 16, 22, 29 (1999), available at http://www.dana.org/news/cerebrum/detail.aspx?id=3066 (“It is possible, for example, that prefrontal dysfunction does not cause violence; instead, living a violent life (including substance abuse and fights) may cause the brain dysfunction we observed.” Additionally, “[b]rain-imaging research is beginning to give us new insights into what makes a violent offender. These early findings may at least lead us to rethink our approach . . .”).

150 Addington v. Texas, 441 U.S. 418, 429 (1979) (“Whether the individual is mentally ill and dangerous to either himself or others and is in need of [involuntary] confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.”)

health evidence to the consideration of sanity but not *mens rea*. It strongly noted how a “diagnosis may mask vigorous debate within the psychiatric profession about the very contours of the mental disease itself.”

With peer debate naturally comes new and inevitably changing understanding. As if to stress that any end of such debate or settling of understanding “is not imminent,” Justice Souter, writing for the majority, echoed a decision a half-century old: “The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment.”

Second, even putting aside shifting criteria, diagnosis of a real person is not as simple as a checklist; it entails inference, interpretation, and informed intuition. In condoning a civil-commitment burden lower than reasonable doubt, the Supreme Court in *Addington* openly acknowledged “lack of certainty and the fallibility of psychiatric diagnosis.” It stated:

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical “impressions” drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient.

Uncertainty clouds the science of mental health when applied to a person and compounds when that person is a party to a proceeding. The third problem with mental health evidence arises from diverging statutory

152 Id. at 2734.
153 Id.
154 Id. (internal quotation marks and citations omitted). See also O'Connor v. Donaldson, 422 U.S. 563, 579 n.2, 585 n.5 (1975) (“It is not for us to say in the baffling field of psychiatry that ‘milieu therapy’ is always a pretense.”; “Indeed, there is considerable debate concerning the threshold questions of what constitutes ‘mental disease’ and ‘treatment.’”) (Burger, C.J., concurring) (emphasis added) (citation omitted); *Eddings*, 455 U.S. at 126 n.8 (“One might even be surprised if a person capable of a brutal and unprovoked killing of a police officer did not suffer from some sort of ‘personality disorder.’”) (Burger, C.J., dissenting).
155 *Addington*, 441 U.S. at 429.
156 Id. at 430.
and clinical purposes. “[E]ven when an expert is confident that his understanding of the [defendant’s] mind is reliable, judgment addressing the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility.”  

Finally, all these things combine with limited juror ability to evaluate and integrate testimony from mental-health experts: Evidence of mental disease, then, can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form mens rea, whereas that doubt may not be justified. And of course, in the cases mentioned before, in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do. Because allowing mental-disease evidence on mens rea can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion.  

Mental-health experts then are guides not gods, even if some jurors will mistake them for the latter when presented by the defense or the prosecution. We cannot rely on mental-health experts as guarantors against the killing of defendants who, though factually guilty, are not death-worthy. No matter their credentials or good faith, psychologists and psychiatrists cannot certify mitigation and thereby offer assurances against wrongful execution. On the contrary, restrictions on, and reservations over, their role in our justice system only raise troubling questions.  

If decisive understanding of the mind and its disorders is nowhere in sight after decades of well-funded, professionally-refereed mental-health studies, what moral confidence can we claim in the lethal judgments emerging from sentencing proceedings that don’t even aspire to scientific  

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157 Clark, 126 S. Ct. at 2736.  
158 Id. at 2735. See also Basciano v. Herkimer, 605 F.2d 605, 611 (2d Cir. 1978) (“[T]he value of cross-examination to discredit a professional medical opinion at best is limited.”).
If “inexactness and uncertainty” plague proceedings for the
determination of competency, what can be said about penalty phase?
Because the psychiatric diagnostician reckons outside the realm of
“specific, knowable facts,” certainty ordinarily eludes her. How many
galaxies (or dimensions!) farther away from the realm of “specific,
knowable facts” is the capital juror calculating the significance of a
nightmare-life-history in relation to a horrific sodomy-murder or a stone-
cold contract killing?

The concepts of psychology, because they are devised for thinking
about treatment, ill-prepare the mental-health expert to grapple with the
concepts of legal sanity, which are devised for thinking about criminal
responsibility. From just what conceptual framework does the capital juror
embark when he grapples with concepts devised for deciding whether or
not to spare someone execution in favor of lifelong imprisonment? Or are
there as many frameworks as jurors?

States may conclude that jurors cannot be trusted to parse and
evaluate mental-health testimony as it bears on starkly delineated mens rea;
jurors can be easily mislead. Still, somehow we can rely on jurors to hand
down an irrevocable, ultimate sentence after figuring out the relationship of
mental-health evidence to the shape-shifting ideas of mitigation and
aggravation?

It makes no sense.

We, as a society, would engage in mass hypocrisy were we to latch
on to mental-health professionals as unerring distillers of mitigation or
invincible guardians of capital sentencing reliability.

F. The Killer of Race

Race seems to add strain to every crack in the machinery of death.
Certainly, it heightens the danger arising out of the subjectivity of
mitigation and other vagaries of capital sentencing. Most often, the defense
mission in capital sentencing is to get one or more jurors to look at the
defendant and think: “There but for the grace of God . . .” or “There but for
fortune . . . .” The defense aims to create a moment of empathy, even if
that moment lasts a fraction of a fraction of a fraction of a second.¹⁶⁰

¹⁵⁹ Cooper v. Oklahoma, 517 U.S. 348, 353 (1996) (internal quotation marks
omitted).
¹⁶⁰ Welch S. White, Effective Assistance of Counsel In Capital Cases: The
several objectives: to make the sentencer empathize with the defendant . . . In every case,
The truth, however, is that race is a barrier to empathy, that both group affinities and aversions regularly cloud judgment and erode fairness. This may bespeak the Human Condition, the American Condition, or the American Condition 2006, when great progress toward racial justice lies in our past and our future. It is, in any event, the plain (if awkward) truth. It is as plain as the wildly disproportionate, often-obsessional media attention generated by crimes against white victims.  

It is as plain as those well-designed, Wall Street Journal-reported experiments showing that a black job applicant with no criminal record competes at a slight disadvantage against a white applicant who informs his prospective employer that he has completed an eighteen-month sentence for possessing cocaine with intent to sell; or showing that, on written job applications, a white-sounding name (e.g., Emily Walsh), as opposed to an African-American-sounding name (e.g., Lakisha Washington), confers a leg-up equal to eight additional years of work experience. As plain as a study demonstrating that, adjusting for all relevant variables, a less stereotypically black face could save an African-American defendant eight months on his sentence of imprisonment.  

Or as plain as a more recent study showing that, among Philadelphia’s interracial capital prosecutions of African-Americans, a more stereotypically black defendant ran a risk of a death sentence more
than twice as great as that run by a less stereotypically black defendant.\footnote{164} As plain as Justice Scalia’s admission as to the “ineradicability” of the “irrational sympathies, including racial” that play on the juror’s unconscious.\footnote{165}

Too often, race will thwart the empathetic impulse. It will desensitize many jurors to mitigating risk factors in a capital defendant’s life history. This would be troubling even if the racially prejudiced were not overrepresented on capital juries. It is all the more troubling in light of evidence suggesting racially prejudiced citizens may serve on capital juries at a higher than average rate.\footnote{166}

Maintaining a death penalty in a society with America’s racial history is like building a munitions depot on a volcano or an \textit{in vitro} lab at Love Canal. It does not simply invite danger; it conscripts it.

\textbf{IV. CONCLUSION: MORTAL CONSEQUENCES AND MORTAL BEINGS}

All too often, a penalty phase will be a constitutionally unreliable determination waiting to happen. It is a multi-step process wherein error at any step can result in a wrongful death sentence. Yet, realistically, every step carries a significant risk of error.

Perhaps added precautions and safeguards might reduce risk, might lessen the frequency with which the mercy of life-without-parole is wrongfully withheld. The problem, though, arises not from how we attempt penalty phase but from the very enterprise itself. That enterprise — necessitating a jury’s weighing “considerations that are often unquantifiable


\footnote{165} R\textsc{andall} K\textsc{ennedy}, R\textsc{ace}, C\textsc{rime}, A\textsc{nd} T\textsc{he L\textsc{aw}} 339 (Pantheon Books 1997). (quoting Memorandum to the Conference from Justice Antonin Scalia in McCleskey v. Kemp, No. 84-6811, Jan. 6, 1987, available in McCleskey v. Kemp File, Thurgood Marshall Papers, The Library of Congress, Washington, D.C.).

and elusive . . . when it determines whether a defendant deserves death,”¹⁶⁷ — is irreformable.

In a day when we can incapacitate murderers through life without parole, penalty phase is an exercise in unalloyed hubris. In contrast to a guilt determination, it is unnecessary. And its premise, that we can render irrevocable judgment on a person’s moral and spiritual state, would make Prometheus blush.

Granted, all criminal law both springs from and hands down moral judgments. Agreed, all criminal law necessarily engages in a sort of mind reading, insofar as mens rea ordinarily anchors penal liability. Conceded too, every capital jurisdiction equips a sentencing jury with special vocabulary, distinctive labels, designated factors, delineated tests, and clear standards of proof. These supposed instruments of characterological assessment, however, can neither conceal nor conquer the unique task capital jurors are asked to perform: soul reading, divining the good and evil, virtue and vice, depravity and grace that reside in the capital defendant.

Opponents of capital punishment sometimes claim that we, as a society, “play God” when we execute, despite a fundamental right to life. At least as correctly, we “play God” when we attempt to sort those worthy of mercy from those worthy only to die. This task simply mocks the paltry powers of fallible humanity. Its continued attempt ensures lethal mistakes.