

## EVOLVING STANDARDS OF DECENCY: ADVANCING THE NATURE AND LOGIC OF CAPITAL MITIGATION

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### I. INTRODUCTION

Several years ago, I began work on a book about the system of capital punishment in the United States, the thesis of which was that the process of death sentencing required ordinary people (as citizens, voters and, especially, as jurors) to do an extraordinary thing—participate in authorizing the killing of another person.<sup>1</sup> For this reason, I argued, the system of death sentencing depended on an elaborate scaffolding of myth and misinformation designed to blur that core truth, preventing the people who participated in the process from fully understanding exactly what they were being asked to do.

In the course of the background research and reading that I did as I was beginning to write, I revisited some of the landmark death penalty cases that were crucial to the development of modern capital jurisprudence. They were cases that I had not read in years. This time, however, I realized something that I had not noticed when I first read them. In three of the pivotal death penalty decisions decided in the last half century—arguably, *the* three pivotal decisions—*Furman v. Georgia*,<sup>2</sup> *Gregg v. Georgia*,<sup>3</sup> and *McCleskey v. Kemp*,<sup>4</sup> there was literally *no* mitigation whatsoever presented to the jurors who sentenced the defendants to death. Moreover, this fact was apparently so

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1. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005).

2. 408 U.S. 238 (1972).

3. 428 U.S. 153 (1976).

4. 481 U.S. 279 (1987).

insignificant to the Justices who decided the cases that not one of them saw fit to mention it anywhere in their opinions. This was especially telling and ironic in *Gregg* because “mitigation” was explicitly identified as one of the key components in the new and improved death penalty statutes that the Court found constitutional.<sup>5</sup> And it was even more notable in *McCleskey*, where the Court had denied the petitioner’s challenge to the death penalty in part by emphasizing the ““unceasing efforts””<sup>6</sup> (including the opportunity to consider “*all* relevant information for sentencing”) that the government had made to render the death penalty fair.<sup>7</sup> Those efforts, it would seem, did not include a requirement that capital jurors learn anything about the backgrounds or social histories of the persons they were being asked to condemn to death.

Clearly, then, one of the ways that the state facilitated death sentencing in those days was to allow capital jurors to deliberate the defendant’s fate without coming to terms with who he really was. Equally clearly, however, death penalty trial practice and the norms and standards that govern the investigation, analysis, and presentation of capital mitigation have come a long way since those earlier times. In this Article, I briefly discuss one perspective on how and why things have changed so dramatically over the last several decades.

I examine these changes by first discussing the stark juxtaposition that now regularly occurs in capital penalty trials: a conventional “crime master narrative”—one that many jurors come into the courtroom already endorsing or predisposed to believe—is contrasted with a “mitigation counter-narrative” that incorporates a more comprehensive and empirically well-documented understanding of a capital defendant’s life.

The next section of the Article reviews some of the substantive legal changes that have taken place in capital mitigation doctrine—doctrine that now not only allows this mitigating counter-narrative to be presented to the jury but also mandates that one be effectively developed for precisely this purpose. Of course, that mandate is the result of slow but steady advances in the United States Supreme Court’s understanding

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5. *Gregg*, 428 U.S. at 193, 206-07.

6. *McCleskey*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).

7. *Id.* at 302 (emphasis added). Justice Powell certainly emphasized that defendants had the right to present “any relevant mitigating evidence that might influence the jury not to impose a death sentence.” *Id.* But the fact that *McCleskey*’s attorney had presented *none* apparently was of little consequence.

of the nature of capital mitigation and its acknowledgement of how central mitigation is to a constitutional system of death sentencing.

I suggest further that, in addition to this process of legal change, other major developments occurred over the last several decades that helped to frame the nature of the mitigation counter-narrative and underscore its importance in death penalty cases. Specifically, scholars and researchers began to extensively document the many ways in which past social history and immediate circumstances shape and influence people's thoughts and actions, including their criminality.

In the final section of the Article, I briefly discuss the attributional nexus between these new insights into the social historical and contextual roots of human behavior and the nature of mitigation—explaining, in essence, why this more sophisticated psychological perspective can and does matter to contemporary capital trial practice and the standards that govern it.

## II. THE CRIME MASTER NARRATIVE AND MITIGATION COUNTER-NARRATIVE

Jurors do not come to the courtroom as *tabulae rasae* in death penalty cases (or any other kind of criminal case for that matter). They have been elaborately prepared—and systematically mis-educated—long before a single question is asked on voir dire or any evidence has been presented in the trial itself. This preparation comes from a variety of sources, but the mass media in our society play a critically important role. Like citizens in general, most jurors have been exposed to countless hours of consistent media stereotypes about the nature of violent crime, the kind of person who supposedly commits it, and why. No matter which form of media they prefer, American audiences are immersed in crime-related themes and stories. Crime dominates the newspapers, magazines, and airwaves, and this dominance is long-standing, stretching back many decades.<sup>8</sup> Moreover, the amount of crime-related

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8. For example, crime is the single most popular story element in the fifty-year history of television, with between one-quarter to one-third of all television shows estimated to be crime-related. RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 24 (2d ed. 1998). One study of well over a hundred thousand stories covered in network evening newscasts during the 1990s found crime to be the most frequently addressed topic. *The Media at the Millennium: The Network's Top Topics, Trends, and Joke Targets of the 1990s*, MEDIA MONITOR, July-Aug. 2000, at 1, 1-4.

reporting and crime drama is largely de-coupled from crime rates—there is a steady diet of it whether crime is increasing or decreasing.<sup>9</sup>

It is not just the sheer amount of crime-related media coverage but also the nature and consistency of the messages that are conveyed that are problematic. The mass media's "agenda-setting" function has been much studied and well-established.<sup>10</sup> In the case of crime-related coverage the media's obsession with the issue elevates the level of public concern—periodically placing crime high or at the top of the list of issues that citizens say are important to them. In addition, it provides audiences with a biased or skewed framework for understanding the nature of crime itself. Crime is regularly sensationalized and the perpetrators of crime are often demonized in characteristically simplistic ways. The media messages and images by which this is accomplished are repetitive and nearly inescapable.

For example, the perpetrators in ubiquitous television crime dramas are typically depicted without a personal history or set of interpersonal relationships that would humanize them. Similarly, they are rarely placed in a social context that would help to explain their actions. Viewers hardly, if ever, see the criminogenic effects of socioeconomic disadvantage play out in these crime shows or witness the connections between traumatic social histories and adult criminality that exist in real life.<sup>11</sup>

In fact, one analyst has identified a media trend taking place over several recent decades in which the perpetrators of crime are shown as having "animalistic and senseless" characteristics that stem from their "warped personalities."<sup>12</sup> Although some crime show episodes are more

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9. Even reporting about crime statistics is done in such a way as to maintain public concern about and interest in the topic of crime. Thus, there is a pronounced tendency to downplay decreasing crime rates and interpret any increase "as a portent of things to come and give it a lot of play." Christopher Jencks, *Is Violent Crime Increasing?*, AM. PROSPECT, Winter 1991, at 98, 99.

10. See, e.g., Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 177 (1972); David L. Proress & Maxwell McCombs, *Part I: The Public Agenda*, in AGENDA SETTING: READINGS ON MEDIA, PUBLIC OPINION, AND POLICYMAKING 1, 2-3 (David L. Proress & Maxwell McCombs eds., 1991).

11. Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, in READINGS ABOUT THE SOCIAL ANIMAL 125, 126-27 (Elliot Aronson ed., 3d ed. 1981). Other studies have also concluded that the media depict criminals as "isolated from their historical and social context, denied legitimacy of conditions or cause, and portrayed as unpredictable and irrational, if not insane" so that they come to "symbolize a menace that rational and humane means cannot reach or control." George Gerbner, *Violence and Terror in and by the Media*, in MEDIA CRISIS AND DEMOCRACY: MASS COMMUNICATIONS AND THE DISRUPTION OF SOCIAL ORDER 94, 96 (Marc Raboy & Bernard Dagenais eds., 1992).

12. JOHN M. SLOOP, THE CULTURAL PRISON: DISCOURSE, PRISONERS, AND PUNISHMENT 142 (1996).

sophisticated and complex than others, most storylines still unfold as simple “morality plays,” where good is pitted against evil and there are certainly “never any mitigating circumstances that might justify illegal behavior.”<sup>13</sup> Moreover, there is evidence that heavy consumers of these shows tend to internalize their messages.<sup>14</sup>

Needless to say, then, television crime drama—from which many potential jurors get much of their “information” about crime and punishment—does little to promote genuine insight or a nuanced understanding about the origins of criminal behavior.<sup>15</sup> Unfortunately, many of these same kinds of media biases are replicated in news reporting about crime. Thus, a number of studies have documented the way in which crime reporting systematically ignores the influence of broad social and economic factors on criminal behavior.<sup>16</sup> In addition, crime-related news stories tend to rely very heavily on law enforcement and governmental sources.<sup>17</sup> Perhaps not surprisingly, researchers have documented the way that general crime news reflects a largely traditional, conservative worldview—including the notion that crime control is primarily about managing the human propensity for evil, which requires maximizing a potential wrongdoer’s fear of punishment and holding individuals accountable for their transgressions.<sup>18</sup>

A decontextualized view of crime in which persons are depicted as its exclusive causal agents appears in numerous media outlets, even ones not otherwise known for particularly simplistic or sensational coverage.

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13. JAMES M. CARLSON, *PRIME TIME LAW ENFORCEMENT: CRIME SHOW VIEWING AND ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM* 189 (1985).

14. *See, e.g., id.* at 179-80; Haney & Manzolari, *supra* note 11, at 126-27.

15. As one television historian observed, the basic message of much television crime drama has been that “[p]roblems came from the evil of other people, and were solved . . . by confining or killing them.” ERIK BARNOUW, *TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION* 214 (1975).

16. *See, e.g.,* Melissa Hickman Barlow et al., *Mobilizing Support for Social Control in a Declining Economy: Exploring Ideologies of Crime Within Crime News*, 41 *CRIME & DELINQ.* 191, 196 (1995); Drew Humphries, *Serious Crime, News Coverage, and Ideology: A Content Analysis of Crime Coverage in a Metropolitan Paper*, 27 *CRIME & DELINQ.* 191, 202 (1981).

17. The term “subsidized news” has been given to the tendency of reporters to rely largely on “official” or government sources. In the case of crime reporting, especially, this practice is likely to contribute heavily to the one-sidedness of the perspectives that are represented. Craig Haney & Susan Greene, *Capital Constructions: Newspaper Reporting in Death Penalty Cases*, 4 *ANALYSES SOC. ISSUES & PUB. POL’Y* 129, 131 (2004).

18. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 75 (1997). Beckett found that the percentage of stories conveying individual-level model of criminal responsibility was more than three times the number containing the message that poverty causes crime, and more than six times the number that suggested a balancing of short term enhancement of effective law enforcement while simultaneously pursuing ways to eradicate the root causes of crime. *Id.*

For example, *The New York Times* devoted more than a full page worth of coverage in its “Science Times” section to the proposition that “For the Worst of Us, the Diagnosis May Be ‘Evil,’”<sup>19</sup> even though it is hard to imagine a scientific position with less support among informed psychologists and psychiatrists.

Beyond providing the public with a consistently individualistic and decontextualized view of the causes of crime, the media rely heavily on sensationalistic images that are designed to simultaneously shock and engage viewers. The covers of national news magazines carry emotive messages like: “Evil: What Makes People Go Wrong?”<sup>20</sup> Another showed the faces of two notorious criminal suspects who had recently been captured, overlain with the bold, capitalized headline, “Monsters.”<sup>21</sup> Inside the magazines, articles describe criminal defendants in the most negative possible terms, through simplistic and empirically unsupported caricatures, such as: “The Incurables: They Rape and Molest. They Defy Treatment. How Can Society Protect Itself?”<sup>22</sup> A later cover story showed a teenager running with a rifle, headlined “Teen Violence: Wild in the Streets,” referring to an article inside that was subtitled: “Murder and Mayhem, Guns and Gangs: A Teenage Generation Grows Up Dangerous . . . .”<sup>23</sup> Others feature interviews in which self-described leading experts make claims about the diabolical characteristics and “twisted psyches” of violent criminals, sometimes in articles where defendants are referred to as “devils,” and “misfits and monsters.”<sup>24</sup>

In addition, the newspaper coverage of death penalty cases that appears in the actual jurisdictions where the capital crimes have occurred suffers from many of the same biases.<sup>25</sup> Even in large, metropolitan areas, local newspaper reporters typically rely very heavily on law enforcement sources. One study found that law enforcement, prosecutors, and prosecution lay witnesses accounted for nearly three-

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19. Benedict Carey, *For the Worst of Us, the Diagnosis May be ‘Evil’*, N.Y. TIMES, Feb. 8, 2005, at F1.

20. NEWSWEEK, May 21, 2001.

21. U.S. NEWS & WORLD REP., Nov. 4, 2002 (referring to a cover story on the capture of the so-called “D.C. Snipers,” John Allen Muhammad and Lee Boyd Malvo).

22. David A. Kaplan et al., *The Incurables: They Rape and Molest. They Defy Treatment. How Can Society Protect Itself?*, NEWSWEEK, Jan. 18, 1993, at 48.

23. Barbara Kantrowitz, *Wild in the Streets: Murder and Mayhem, Guns and Gangs: A Teenage Generation Grows Up Dangerous—and Scared*, NEWSWEEK, Aug. 2, 1993, at 40.

24. Anastasia Toufexis, *Dancing With Devils*, PSYCHOL. TODAY, June 1999, at 55, 55.

25. See Haney & Greene, *supra* note 17, at 147; Marla Sandys & Steven M. Chermak, *A Journey into the Unknown: Pretrial Publicity and Capital Cases*, 1 COMM. L. & POL’Y 533, 575-76 (1996).

quarters of the sources cited in the newspaper articles that were published about a representative sample of capital cases.<sup>26</sup> Because much of this coverage is disseminated pretrial, in the jurisdictions where the case eventually will be tried, it may influence the mindset of the community members, some of whom will serve as jurors.

News coverage also tends to be concentrated on the early stages of the case, when crime-related details are often the only things that are known about it. By one estimate, fewer than ten percent of a sample of newspaper stories written about death penalty cases pertained to the penalty trial—the only stage of the trial where humanizing social history evidence is likely to be introduced.<sup>27</sup> Instead, case-specific news coverage tends to hone in on and repeat the graphic details of the crime, often emphasizing its most sensational aspects or features.<sup>28</sup> To the extent that the defendant's background or social history figures at all in the coverage of capital cases, the emphasis tends to be primarily on past criminality (for example, past criminal record, drug use, or gang affiliation). Remotely sympathetic background information that might convey a nuanced explanation of the defendant's criminal behavior—one in terms of past trauma, an especially deprived or abusive upbringing, or some other set of social contextual factors—gets short shrift if it is mentioned at all.

The exclusion of sympathetic background and potentially mitigating social history information from local newspaper reporting means that citizens and potential jurors will have few if any opportunities to get the full story about the real causes of crime and the factors that have influenced the lives of people who commit it. These consistent omissions also implicitly suggest that background and social history information is legally and psychologically irrelevant. That is, because it is covered so little by the press, citizens may come to assume that the circumstances of the defendant's life have no bearing on his blameworthiness or the decision about which punishment should be meted out at the conclusion of his trial.

The systematic media biases in crime-related programming and news reporting contribute mightily to something that the media certainly did not create but which their misleading portrayals of crime and criminal defendants reinforce on a daily basis—what is, in essence, a “crime master narrative.” Master narratives are official frameworks for

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26. See Haney & Greene, *supra* note 17, at 138.

27. *Id.* at 144.

28. See *id.*

understanding important human events. Contemporary historians have described master narratives as cultural frameworks that are “institutionalized, canonical, and legitimizing.”<sup>29</sup> That is, they are widely shared, at least in part, because they come from authoritative, institutional sources that confer legitimacy (and, therefore, apparent truth). Toni Morrison observed that these kinds of narratives or “official stor[ies]” assist in the “manufacture of a public truth” by “control[ling] the presumptions and postulates of the discussion” in ways that “enforce the narrative and truncate alternative opinion.”<sup>30</sup>

In the crime master narrative that is now prevalent in the United States, criminal behavior is depicted—through the media, political discourse, and public discussion—as entirely individualistic and lacking a meaningful social historical context. As a result, crime continues to be analyzed entirely in terms of the free will and character of the person who commits it. Because individual lawbreakers are viewed as the exclusive causal locus of criminal behavior, the crime master narrative implies that they alone should be blamed for their actions and, collectively, for the magnitude of the “crime problem.” Accordingly, the law’s only appropriate response to criminal behavior is to sanction the persons who engage in it. As two legal commentators put it: “The individualism of the badness model parallels the criminal law’s individualistic approach to punishment.”<sup>31</sup>

In a capital case, the crime master narrative is also typically at the heart of the prosecutor’s argument that the jurors should return a death verdict—a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty. Because his crime is regarded as entirely the product of his free and autonomous choice-making, unencumbered by past history or present circumstances, the defendant alone is seen as fully culpable for it. The extreme nature of the capital crime itself is thought to reflect the essential badness at the core of the defendant’s character—something he has chosen to embody and is unlikely ever to relinquish. Explicitly or implicitly, this badness typically becomes the major focus of the prosecutor’s case. Through it,

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29. Kerwin Lee Klein, *In Search of Narrative Mastery: Postmodernism and the People Without History*, 34 *HIST. & THEORY* 275, 282 (1995).

30. Toni Morrison, *The Official Story: Dead Man Golfing*, in *BIRTH OF A NATION’HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE*, at vii, xvi (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

31. Stephanos Bibas & Richard A. Bierschbach, Essay, *Integrating Remorse and Apology Into Criminal Procedure*, 114 *YALE L.J.* 85, 89 (2004).

the defendant's criminal behavior is asserted as the full measure of his life and the primary justification for ending it.

In the context of a capital penalty trial, however, mitigating evidence is offered as a basic *counter*-narrative juxtaposed against the traditional master narrative. Mitigating counter-narratives typically offer a much more comprehensive perspective and, as I will discuss in a later section of this Article, a more scientifically valid framework with which to understand the defendant and his actions. The mitigating counter-narrative is guided by several basic assumptions, all of which are well-grounded in contemporary psychological research and theory. The first is that no meaningful account of criminal behavior can begin without extensive social historical knowledge about the life of the perpetrator. It assumes that because people's actions are influenced in large part by their past experiences, counter-normative behaviors (like crime) must be partly rooted in counter-normative social historical experiences.

The mitigating counter-narrative also assumes that analyzing the immediate social context in which crime occurs is essential to gain a meaningful understanding of how and why a particular kind of criminal act occurred when and where it did. It also recognizes that past and present are typically interconnected; that is, that social contexts are composed not just of immediate situational conditions but also of broader background experiences and expectations. Thus, situations have different psychological meaning to different people based, in part, on their unique past experiences and the particular significance that the situation has acquired over time. Moreover, background and social history play a role in determining which circumstances and situations people are likely to encounter later in their lives.

In a capital trial, as Francine Banner observed, the prosecutor's case, "though on one hand a 'historical account' of the events"—specifically, the defendant's criminal record and the heinous facts of the crime for which he is being sentenced—"is also at least partly a lie because of what it excludes and ignores."<sup>32</sup> In contrast, the mitigating counter-narrative seeks to challenge that unduly narrow and misleading view by broadening the analysis, making it more comprehensive and, in Banner's word, "plac[ing] this set of true facts, or 'history,' within a context that reveals another story behind them."<sup>33</sup> The other, fuller story

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32. Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 573 (2001).

33. *Id.* Despite its longevity, the limitations of the master crime narrative have been understood for many years in legal circles. Thus, Roscoe Pound wrote as early as the 1920s that: "Our traditional criminal law thinks of the offender as a free moral agent who, having before him

is typically presented in the form of the capital defendant's social history—a social history that is often intrinsically “mitigating” because it puts the defendant's life in a larger, more authentic social and psychological context.

In the construction of a psychologically oriented social history, key developmental stages and relevant family and social experiences are analyzed together, with sensitivity to the ways in which these events interact with each other to produce certain consequences and effects. In each case, the goal is to place an individual life in a larger social context, simultaneously evaluating the ways in which past experience shapes adult thinking and behavior. In the final analysis, conclusions are reached about how a person who has had certain life experiences, received particular kinds of treatment, and been exposed to certain kinds of events, has been shaped and influenced by them.<sup>34</sup>

A mitigating counter-narrative that incorporates a capital defendant's social history and immediate life circumstances is now recognized as the centerpiece of an effective penalty phase trial. This recognition is the product of several developments that have taken place over the last several decades. One of these is represented by a slow but steady progression in the United States Supreme Court's understanding of the important role of mitigation in helping to insure a fair and reliable capital sentencing process. It now includes the Court's mandate that defense attorneys uncover, analyze, and present the defendant's mitigating social history. At the same time these legal developments were underway, a series of important breakthroughs were taking place in

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the choice whether to do right or wrong, intentionally chose to do wrong. . . . We know that the old analysis of act and intent can stand only as an artificial legal analysis . . . .” Roscoe Pound, *Criminal Justice in the American City—A Summary*, in *CRIMINAL JUSTICE IN CLEVELAND* 559, 586 (Roscoe Pound & Felix Frankfurter eds., 1922). The mitigating counter-narrative deconstructs that artificial legal analysis, at least in the limited context of a capital penalty trial.

34. For a discussion of some of these issues, see WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 90-91 (1991); Jeff Blum, *Investigation in a Capital Case: Telling the Client's Story*, *CHAMPION*, Aug. 1985, at 27; William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 *N.Y.U. REV. L. & SOC. CHANGE* 273, 285-86 (1990-1991); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 *N.Y.U. L. REV.* 299, 323-24 (1983); Craig Haney, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 351, 361 (James R. Acker et al. eds., 1998); Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on “the Mere Extinguishment of Life”*, 16 *STUD. L. POL. & SOC'Y* 3, 6 (1997); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *SANTA CLARA L. REV.* 547, 561-62 (1995); Deanna Logan, *From Abused Child to Killer: Positing Links in the Chain*, *CHAMPION*, Jan.-Feb. 1992, at 36, 36-39.

psychology and related disciplines that served to document and underscore the importance of a capital defendant's background experiences and present circumstances in understanding his behavior. Each of these developments is summarized briefly, in turn, below.

### III. THE SUBSTANTIVE EVOLUTION OF CAPITAL MITIGATION

The legal scope of capital mitigation has been very much a work-in-progress over the last thirty years. The evolution of the doctrines that govern capital mitigation is an oft-told tale that is undoubtedly familiar to many readers of this special issue. However, it is worth briefly reviewing the substantive changes that have taken place in the way the United States Supreme Court has come to understand what mitigation is and to acknowledge why it is critical to the fairness and reliability of death sentencing. Reflecting a bit on the process by which the Court gradually adopted a more sophisticated and expansive understanding of mitigation over the years may provide some insights about future developments.

I have already mentioned in passing the very limited role that mitigation played in *Gregg v. Georgia*,<sup>35</sup> the lead case decided in the 1976 Term in which the Court reinstated the death penalty in a number of states. Although the word appeared often in *Gregg* and the related opinions issued that same day, no substantive definition of "mitigation" was provided in any of them. In *Gregg* itself, Justice Stewart merely endorsed the list of aggravating and mitigating circumstances contained in the Model Penal Code ("MPC") and noted, with a degree of understatement, that the standards to be considered by the jury in determining whether to impose a death sentence "are by necessity somewhat general."<sup>36</sup> There was no explanation or discussion—in the

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35. 428 U.S. 153 (1976).

36. *Id.* at 193-94. The American Law Institute first published capital sentencing standards in 1959. MODEL PENAL CODE § 201.6 (Draft No. 9 1959). They were revised and approved by the ALI in 1962, as § 210.6 of the Proposed Official Draft of the Model Penal Code. The MPC provided a list of specific mitigating factors, which it also characterized more generally as "including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated." MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). It is worth noting that the list of specific factors focused primarily on the nature of the capital crime, including whether the defendant: was under the influence of a mental disturbance at the time; believed he had a moral justification for his conduct; was a minor accomplice in the homicidal act; acted under the duress of another; could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law; or had killed someone who consented to his homicidal conduct. MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). In the Supreme Court's pivotal 1976 cases, its brief discussion of mitigation and the examples the Justices provided were confined primarily to the

MPC or by the Court—about exactly what the concepts of aggravation or mitigation meant, why they were important to include in a constitutional scheme of death penalty decision-making, or precisely how capital jurors were supposed to use them in choosing between life and death.

As examples of the “special facts about this defendant” that might constitute mitigation, Stewart’s *Gregg* opinion mentioned only the defendant’s “youth, the extent of his cooperation with the police, and his emotional state at the time of the crime.”<sup>37</sup> Similarly, in *Woodson v. North Carolina*,<sup>38</sup> Justice Stewart indicated that a constitutional death sentencing scheme should permit jurors to engage in a particularized consideration of “relevant facets of the character and record of the individual offender,” and permit them to take into account any “compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>39</sup> But he did not specify which diverse frailties he had in mind, or why and how he believed those frailties might generate compassion or constitute mitigation.

The Court’s view of capital mitigation doctrine soon made up in breadth what it lacked in clarity. Two years after *Gregg*, in *Lockett v. Ohio*,<sup>40</sup> Chief Justice Burger appeared to significantly broaden the scope of allowable mitigation, writing that the sentencer must “not be precluded from considering,” as mitigating factors, “any aspect of a defendant’s character . . . that the defendant proffers as a basis for a sentence less than death.”<sup>41</sup> Burger said that because of the unique nature of the death penalty, “an individualized decision is essential in capital cases,” one that allowed the sentencer’s decision-making process to

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vague formulation of whether there were “any special facts about this defendant that mitigate against imposing capital punishment.” *Gregg*, 428 U.S. at 197.

37. *Gregg*, 428 U.S. at 197.

38. 428 U.S. 280 (1976). In *Woodson*, the Court invalidated North Carolina’s death penalty statute because it provided for mandatory death sentencing. *Id.* at 305.

39. *Id.* at 304.

40. 438 U.S. 586 (1978). Sandra Lockett was an African-American woman who received the death penalty for a robbery-murder in which she took a relatively minor part. She was sentenced under an Ohio statute wherein, once a defendant was convicted of aggravated murder with special circumstances, a judge would determine whether to impose life or death. *Id.* at 593. Judges were permitted to take only three possible mitigating circumstances into account in making this decision: whether the victim had “induced or facilitated the offense,” whether it was unlikely that the defendant would have committed the crime but for “duress, coercion, or strong provocation,” or whether the offense was “primarily the product of . . . psychosis or mental deficiency.” *Id.* at 593-94. Finding that none of these circumstances applied in Lockett’s case, the judge—saying he had “no alternative”—sentenced Ms. Lockett to die. *Id.* at 594.

41. *Id.* at 604 (emphasis added).

respect “the uniqueness of the individual.”<sup>42</sup> The Court acknowledged the importance of insuring that the jury was in “possession of the fullest information possible concerning the defendant’s life,”<sup>43</sup> but otherwise provided no substantive guidance about what kind of life-related issues or evidence might be mitigating or why.<sup>44</sup>

The *Lockett* doctrine—which allows the defendant to offer any evidence that might serve “as a basis for a sentence less than death”<sup>45</sup>—established an operational definition of admissible mitigation that was clearly generous in scope.<sup>46</sup> However, as a practical matter, it also was one that lacked real content. That is, it failed to provide a substantive statement of what actually constituted mitigation (for example, what does, or should, serve as the basis for a sentence less than death). In essence, *Lockett* told trial courts to allow evidence to be admitted that, in someone’s opinion—the judge’s, defense attorney’s, or perhaps a juror’s—might serve as the basis of a sentence less than death. But it did not suggest how or why these constituencies could or should actually be inclined by the evidence to lean in this more merciful direction.<sup>47</sup>

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42. *Id.* at 605. The Court did not create this broad standard out of whole cloth. Five years before *Lockett*, it had noted that, even in states like Ohio, where guilt and penalty were decided in a single trial:

[J]udges, as one would expect, take a lenient view of the admissibility of evidence offered by a defendant on trial for his life. . . . [A]n accused can put before the jury a great deal of background evidence with at best a tenuous connection to the issue of guilt. The record in [the present] case does not reveal that any evidence offered on the part of the defendant was excluded on the ground that it was relevant solely to the issue of punishment.

*McGautha v. California*, 402 U.S. 183, 219 (1971).

43. *Lockett*, 438 U.S. at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

44. The *Lockett* Court found the Ohio statute under which the defendant was sentenced to death unconstitutional because it “did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime.” *Id.* at 597.

45. *Id.* at 604.

46. Not surprisingly, it was one that at least some Justices implied might be too generous. Justice Rehnquist seemed to think so: “We are now told, in effect, that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear.” *Id.* at 629 (Rehnquist, J., concurring in part and dissenting in part). But he then went on to say:

As a practical matter, I doubt that today’s opinion will make a great deal of difference in the manner in which trials in capital cases are conducted, since I would suspect that it has been the practice of most trial judges to permit a defendant to offer virtually any sort of evidence in his own defense as he wished.

*Id.* at 631.

47. Legal commentators understood the *Lockett* Court’s mandate in equally broad terms. For example: “While the precise contours of the Eighth Amendment requirements are not clear, it seems relatively certain that a convicted defendant is entitled to present and to have the sentencing authority consider any information of reasonably mitigating significance.” George E. Dix,

As might be expected, there was much unevenness in the way capital defense attorneys approached the issue of mitigation in the wake of *Lockett*. Many were hard pressed to determine what kind of information—for example, *which* aspects of the defendant's background or character—would have “reasonably mitigating significance” or why. Perhaps for this reason (along with many others), some attorneys presented little or nothing in the way of effective mitigation. However, a number of capital defense attorneys began to think expansively and creatively about the issue and, as I will discuss in the next section of this Article, many of them began to look to and rely on scientific advances that were taking place in psychology and related disciplines.

In a line of cases that followed *Lockett*, the Court began to develop and refine an underlying logic of mitigation. It did so first by providing more specific examples of the particular facts and circumstances it considered mitigating. Then there were several concurring opinions in which an explicit rationale for mitigation was suggested. Eventually, that rationale became the majority view. The emerging consensus not only better articulated the scope and meaning of the concept of mitigation, but it also provided a more coherent legal and psychological justification for requiring attorneys to both find *and* present available mitigating evidence. In the course of this progression, the Court inched closer to finally acknowledging that both tasks—finding and presenting mitigation—were fundamental to the fairness and reliability of the capital jury's decision-making process.

The next advance occurred some four years after *Lockett*, when the Court added some clarity to its definition of admissible mitigation. In *Eddings v. Oklahoma*,<sup>48</sup> attorneys for a sixteen year-old defendant, Monty Eddings, had conducted a reasonably extensive sentencing proceeding, in which they presented testimony that addressed their client's “troubled youth,” including his lack of parental supervision, “excessive physical punishment,” and his resulting emotional disturbance.<sup>49</sup> The witnesses who were called on Eddings's behalf—including a juvenile probation officer, psychologist, psychiatrist, and

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*Psychological Abnormality and Capital Sentencing: The New “Diminished Responsibility”*, 7 INT'L J.L. & PSYCHIATRY 249, 253 (1984).

48. 455 U.S. 104 (1982). Monty Eddings was tried as an adult, and pled no contest to the murder of a highway patrol officer. *Id.* at 106. He was sentenced under the state's death penalty law that provided, among other things, that: “In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act.” *Id.* at 106 (citation omitted). The trial judge's application of that statute—rather than the statute itself—was at issue.

49. *Id.* at 107.

sociologist—spoke to the effects of the defendant’s early life on his later behavior, as well as the fact that he appeared treatable and likely would not represent a continuing threat to society.<sup>50</sup>

However, the same trial judge who had admitted all of this evidence then decided that he was prohibited “by law” from considering it as mitigation. His reasoning reflected a fundamental misconception about capital mitigation that has continued to muddle the way in which the concept is understood and argued in death penalty trials. Specifically, the trial judge refused to consider testimony about Eddings’s abusive family history as mitigation because, although it “was ‘useful in explaining’ his behavior . . . it did not ‘excuse’ the behavior.”<sup>51</sup>

Fortunately, Justice Powell’s majority opinion clarified the distinctive nature of mitigation and corrected the basic error of conflating it with a legal excuse. He wrote that evidence did *not* have to “suggest an absence of responsibility for the crime of murder” in order to be “a relevant mitigating factor of great weight.”<sup>52</sup> Powell further noted that “[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.”<sup>53</sup> Especially because of this particular defendant’s age at the time of the crime, Powell said, “there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.”<sup>54</sup> This passage in the opinion is notable because, if nothing else, it shows the Court beginning to flesh out specific aspects of a defendant’s life that the Justices believed had undoubted mitigating relevance.

Despite these specific examples, and the important distinction that Powell made between evidence that is admitted for the purpose of mitigating a death sentence (that is, reducing the nature and amount of punishment that is deserved) and evidence that is admitted for the purpose of determining legal responsibility (for example, determining whether there are legal excuses that reduce the degree of the crime for

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50. *Id.* at 107-08.

51. *Id.* at 113.

52. *Id.* at 116. As Powell noted, both the trial judge and the Court of Criminal Appeals appeared to consider “only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.” *Id.* at 113. The Court of Criminal Appeals’ logic made this clear: “[A]ll the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State. For the same reason, the petitioner’s family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.” *Id.* at 109-10 (citation omitted).

53. *Id.* at 115.

54. *Id.*

which the defendant is responsible), his *Eddings* opinion stopped short of providing a general mitigating rationale on which lawyers could rely in other capital cases. That is, there was no real clarification of exactly *why* Monty Eddings's background and family history represented the type of evidence that was, or should be, "typically introduced" or regarded as "particularly relevant."

The first mention of an explicit underlying logic by which background and family history factors could and should be used to mitigate a death sentence appeared five years later, in Justice O'Connor's concurrence in *California v. Brown*.<sup>55</sup> In a now often-quoted passage, O'Connor articulated what she characterized as a "long held" societal belief, namely that, "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."<sup>56</sup> As she summarized the significance of this belief for "the individualized assessment of the appropriateness of the death penalty," understanding someone's disadvantaged background or their emotional or mental problems is central to the "moral inquiry into the culpability of the defendant."<sup>57</sup> Two years later, in *Penry v. Lynaugh*,<sup>58</sup> O'Connor returned briefly to this theme, suggesting that *Lockett* and *Eddings* had mandated "the principle that punishment should be directly related to the personal culpability of the criminal defendant," which could only be assessed if certain aspects of the defendant's background, such as his history as an abused child, could be given mitigating effect.<sup>59</sup> She noted that "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death

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55. 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

56. *Id.*

57. *Id.* Justice O'Connor did not invent this precise formulation. An early edition of *Black's Law Dictionary* contained the following definition: "Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." S. Sheldon Glueck, *Mitigation of Punishment and Evidence of Mental Unsoundness*, 22 MENTAL HYGIENE 948, 955 (1924). However, O'Connor was the first Justice to explicitly assert this exact rationale in a capital sentencing context. She remained consistent in her emphasis on blameworthiness and culpability in the capital sentencing calculus in subsequent cases. For example, in *Enmund v. Florida*, she had argued, "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting). Similarly, in *Tison v. Arizona*, she wrote that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." 481 U.S. 137, 149 (1987).

58. 492 U.S. 302 (1989).

59. *Id.* at 319.

penalty is essential if the jury is to give a ‘reasoned *moral* response to the defendant’s background, character, and crime.’”<sup>60</sup>

Of course, permitting attorneys to present crucial background and social history evidence as mitigation, and even suggesting the logic by which such evidence is relevant to the assessment of culpability, fall far short of requiring them to do so. In fact, it would take the Court nearly a quarter century—from its reinstatement of the death penalty in 1976 until its 2000 Term—before the Justices finally reversed a capital case explicitly because trial counsel had failed to investigate and present available background or social history mitigation.

The key ruling came in *Williams v. Taylor*,<sup>61</sup> where the Court reversed the death sentence of a Virginia man, Terry Williams, on exactly this basis. The ineffectiveness claim in *Williams* focused on trial counsel’s failure to conduct an investigation that would have revealed, among other things, a “nightmarish childhood.” Mr. Williams, who was borderline mentally retarded, had alcoholic parents who “had been imprisoned for the criminal neglect” of the Williams children. The family had lived in a home that was filled with trash, and it had feces and urine on the floors.<sup>62</sup> As a child, Williams had also “been severely and repeatedly beaten by his father,” and was committed to an abusive foster home.<sup>63</sup> Justice Stevens wrote that “the graphic description of Williams’s childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability.”<sup>64</sup> Counsel’s failure to properly investigate and present this and other substantial mitigation was the basis for the Court’s reversal.

Three years later, in *Wiggins v. Smith*,<sup>65</sup> the Court took a major step in clarifying just how critical a role it believed “background” evidence should play in the jury’s appraisal of a capital defendant’s culpability. It finally acknowledged—in a clear and definitive way—the importance of developing and, when appropriate, presenting a mitigating social history.

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60. *Id.* at 328 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O’Connor, J., concurring)).

61. 529 U.S. 362 (2000).

62. *Id.* at 395 & n.19.

63. *Id.* at 395. In addition, his trial counsel failed to introduce available evidence that, despite being “borderline mentally retarded” and not having gone beyond the sixth grade in school, Mr. Williams had a very good overall prison record, had received commendations while incarcerated, was described by prison officials as among the inmates “least likely” to behave violently in prison and, in the opinion of a volunteer in the prison ministry program, “seemed to thrive in a more regimented and structured environment.” *Id.* at 396.

64. *Id.* at 398.

65. 539 U.S. 510 (2003).

It also granted a measure of legitimacy to the concept of a “social history” itself by correctly using this more formal term and describing some of the things that a competently assembled one should include.

Attorneys for Kevin Wiggins failed to investigate and present any testimony about his horrific background, one that included being raised by an alcoholic mother who left him and his siblings “home alone for days, forced them to beg for food and to eat paint chips and garbage,” and physically abused him so badly that he had to be hospitalized. In addition, Wiggins was placed in several foster homes where he was “repeatedly molested and raped,” and suffered sexual abuse at the hands of a Job Corps supervisor.<sup>66</sup> Yet, as Justice O’Connor noted, “[a]t no point did [Mr. Wiggins’s trial attorney] proffer any evidence of petitioner’s life history or family background.”<sup>67</sup> Indeed, they apparently made little or no effort to uncover the facts of their client’s social history, let alone make an informed decision about whether and how to present it.

Repeatedly referencing the ABA Guidelines,<sup>68</sup> O’Connor focused on “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’s background *was itself reasonable*.”<sup>69</sup> Because the trial attorneys had “acquired only rudimentary knowledge of [their client’s] history from a narrow set of sources”—rather than considering his “medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences,”<sup>70</sup> as the ABA Guidelines indicated they should—O’Connor concluded that their failure to comprehensively investigate and evaluate his background was unreasonable.

Further, because the mitigating evidence that was contained in the social history that was prepared post-conviction—the one that trial counsel never assembled—was “powerful” and “considerable,” indicating that Mr. Wiggins had precisely “the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability,” O’Connor found that there was “a reasonable probability that [the jury]

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66. *Id.* at 516-17.

67. *Id.* at 516.

68. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(C) (1989). Section 11.4.1(C) of the 1989 GUIDELINES requires defendant’s counsel to conduct an investigation that “comprise[s] efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Id.*

69. *Wiggins*, 539 U.S. at 523.

70. *Id.* at 524.

would have returned with a different sentence.”<sup>71</sup> As she emphasized: “Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.”<sup>72</sup>

Two years after *Wiggins*, in *Rompilla v. Beard*,<sup>73</sup> the Court reaffirmed these views and stressed the importance of conducting a comprehensive social history investigation. Two aspects of the *Rompilla* case are especially noteworthy. The first is that the defendant, Ronald Rompilla, had told his trial counsel something that capital defendants often express—namely, that he had “an unexceptional background.”<sup>74</sup> Their client’s statement apparently influenced trial counsel’s decision not to aggressively investigate his background and upbringing.<sup>75</sup> Nonetheless, the Court refused to accept this as a justification for failing to meet the constitutional requirement that capital defense attorneys conduct a comprehensive and vigorous social history investigation.<sup>76</sup>

Second, Mr. Rompilla’s lawyers had done *some* background investigation and had presented *some* mitigation at his penalty trial. Indeed, they had interviewed “certain family members,” and consulted with three mental health experts who had been retained to provide guilt-phase testimony in the case.<sup>77</sup> Moreover, the lawyers had called five

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71. *Id.* at 534-36. Justice O’Connor noted that trial counsel could later “not remember” having a social history prepared, even though there were funds available to do so. *Id.* at 517. She also pointed out that it was “standard practice” in Maryland at the time to have such a social history prepared. *Id.* at 524.

72. *Id.* at 537. Justice O’Connor made two other observations that are worth highlighting. The first is that “counsel’s decision to hire a psychologist sheds no light on the extent of their investigation into petitioner’s social background.” *Id.* at 532. Although some psychologists can and do analyze and testify effectively about a capital client’s social history, this one did not. Indeed, the psychologist’s report in the case “discussed only petitioner’s mental capacities and attributed nothing of what he learned to Wiggins’ social history.” *Id.* Second, O’Connor made it clear that the Court would not require defense counsel “to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Id.* at 533. Yet, the range of issues and scope of information that might well assist the defendant are vast in most cases, underscoring the need to conduct truly extensive investigations.

73. 545 U.S. 374 (2005).

74. *Id.* at 379.

75. *Id.*

76. It was right to do so. There is no reason to believe that all capital defendants fully appreciate the nature of mitigation in this context, or understand the purpose to which the social history evidence that counsel is seeking will be put. In addition, very few defendants have a comparative framework for judging whether their background or upbringing was truly “exceptional,” and what implications would follow if it were. Defendants are also often reluctant to have family secrets probed, or risk having family members portrayed in a negative light—especially when trial counsel has failed to both convincingly explain the purpose for which such evidence is being sought and to reassure the defendant about the sensitivity with which it will be presented.

77. *Rompilla*, 545 U.S. at 379.

family member witnesses who testified at the penalty trial that Mr. Rompilla was “innocent and a good man,” as well as his fourteen year-old son who said that he loved his father and would visit him in prison.<sup>78</sup>

However, the social history investigation was incomplete in a number of critical respects and there were a number of fundamental tasks that Rompilla’s lawyers had simply failed to perform. For example, trial counsel never examined Mr. Rompilla’s school records, records of his juvenile and adult incarcerations (even though they were aware of them), or the case file of a prior offense that the prosecutor had given notice he intended to introduce into the penalty trial.<sup>79</sup> In addition, trial counsel failed to interview a number of key family members. In fact, a more competent and complete social history investigation that was done post-conviction revealed that these witnesses had very powerful mitigating information to share.<sup>80</sup> Yet, Rompilla’s jurors never heard from them.

This also was a case in which trial counsel had ample reason to anticipate that the prosecutor would use the defendant’s history of felony convictions to “emphasize his violent character”<sup>81</sup>—that is, that Rompilla’s jury would be treated to a classic expression of the kind of crime master narrative that I discussed earlier. Especially in a case like this, Mr. Rompilla’s lawyers knew or should have known that they needed to uncover, analyze, and present a comprehensive counter-narrative, one that placed their client’s behavior in an appropriately mitigating context. It would have been particularly critical to counter evidence of a violent character with a mitigating social history, one that contained information that Rompilla’s jury would need in order to find a different balance.

Indeed, if Mr. Rompilla’s trial lawyers had probed more deeply into the details of his background and social history, they would have learned that he grew up in a slum area where he suffered extreme poverty, lived in a home that “had no indoor plumbing,” slept “in the attic with no heat” and, because he was given no decent clothes, he “attended school in rags.”<sup>82</sup> In addition, Mr. Rompilla was raised by severely alcoholic parents who regularly fought with one another. His father beat him using “his hands, fists, leather straps, belts and sticks.”<sup>83</sup> Mr. Rompilla lived

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78. *Id.* at 378.

79. *Id.* at 382-83.

80. *See id.* at 391-92.

81. *Id.* at 383.

82. *Id.* at 392.

83. *Id.*

“in terror” along with his other siblings, and on at least one occasion “[h]is father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled.”<sup>84</sup> Justice Souter noted that the jurors in his case had not heard the facts of Mr. Rompilla’s background but, if they had, “[i]t goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [Rompilla’s] culpability.’”<sup>85</sup>

This was an important statement that reflected a clear progression in the Court’s capital mitigation doctrine. Over a nearly thirty-year period—from 1976 to 2005—the Court had moved from merely mentioning mitigation (without defining the term or even commenting on the fact that none had been presented in the cases it was deciding) to reversing a death sentence on the basis of trial counsel’s failure to conduct an adequate background and social history investigation. A majority of the Justices in *Rompilla* now clearly acknowledged the importance of background mitigation that should have been uncovered, and which, if “taken as a whole,” might have “influenced the jury’s appraisal” of a capital defendant’s culpability. In both *Wiggins* and *Rompilla*, the concept of capital mitigation was given its most explicit legal and psychological rationale, and the Court finally provided death penalty lawyers with a clear mandate to vigorously investigate all potentially relevant aspects of their client’s social history. Once having collected and assembled these facts into a mitigating narrative, attorneys were now on notice to present that more comprehensive and balanced view to the sentencing jury.<sup>86</sup>

#### IV. THE SCIENCE OF MITIGATION

The legal standards governing capital mitigation evolved over the same period that a number of important developments were taking place

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84. *Id.* at 391-92.

85. *Id.* at 393 (quoting *Wiggins v. Smith*, 539 U.S. at 510, 538 (2003)) (internal quotations omitted).

86. The evolution of these doctrines is by no means complete. On the one hand, the Court has continued to insist that juries must be able to attach mitigating significance to factors such as a “troubled family background,” irrespective of whether a “nexus” exists between this background and the capital crime itself. *See Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1663 (2007). On the other hand, a different majority strained to parse the issue of a capital defendant’s resistance to mitigation – finding the distinction between a defendant refusing to “assist in the development of a mitigation case” and “inform[ing] the court that he did not want mitigating evidence to be presented” to be significant—to affirm a death sentence in a case where little investigation or preparation was done and no mitigation was presented. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1942 (2007).

in psychology and related disciplines. In the late 1970s, as the Supreme Court was beginning to expand and refine the concept of mitigation, one legal commentator noted that, “[M]ental health professionals have sometimes offered insights concerning offenders’ behavior that, if believed, would bear significantly upon culpability. But these insights have been ignored by sentencing courts, most likely because of the lack of a persuasive case for the proposition that they are in fact valuable insights into the actual dynamics of the behavior at issue.”<sup>87</sup> The value of those insights was about to change.

Over the next several decades, numerous scientific advances occurred in psychology and related disciplines that provided insights into criminal behavior and bore significantly on the issue of culpability. Specifically, a burgeoning psychological literature reported the results of extensive research and new knowledge about the ways in which background and social history as well as immediate social circumstances and context combined to profoundly influence people’s behavior—including their criminal behavior. These new insights had important implications for the way that attorneys and experts approached capital mitigation. Within the broad legal mandates that the Supreme Court has provided, this scientific research now helps guide the way that mitigation is sought and uncovered by investigators, analyzed by defense team members, and presented to capital jurors.<sup>88</sup> Both directly and indirectly, the research has come to play a central role in contemporary capital trial practice and the legal and professional standards that govern it.

It is axiomatic among psychologists and other mental health professionals that early experiences influence subsequent psychological development. The proposition is arguably one of the most fundamental lessons in human science—what happens to us as children helps to shape our thoughts, feelings, and actions as adults. But the full extent of the many ways that past experiences can change the direction of people’s lives and influence the choices that they make along the way has now

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87. George E. Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 1 INT’L J. L. & PSYCHIATRY 283, 300 (1978).

88. There is no evidence of which I am aware that the Court was directly influenced by any of these scientific developments. Indeed, the opinions in which the Court’s expanding and evolving view of capital mitigation was expressed were – like most of its jurisprudence – noticeably devoid of psychological or social scientific citations. On the other hand, it seems unlikely that the Justices were entirely oblivious to at least some of the advances that were taking place in these inter-related social science and mental health disciplines. If nothing else, increasingly sophisticated analyses that relied on these new insights were being pressed and beginning to appear in capital trial and appellate proceedings, at least some of which the Court very likely reviewed.

been extensively documented in numerous carefully done empirical studies. The conclusions are robust and they have been meticulously researched, elaborated on, and repeatedly validated over the last several decades. A person's life course cannot be meaningfully grasped or understood without paying scrupulous attention to those earlier experiences.

This particular approach to understanding human behavior—what is sometimes referred to generally as “the study of lives”—is now a well-established framework in psychology and related disciplines.<sup>89</sup> Over the last several decades, it has been applied to the study of criminal behavior. Moreover, as I mentioned in passing above, it has significant implications for assessments of blame and culpability. For example, research confirms that traumas experienced earlier in someone's life—whether caused by structural forces like poverty and the effects of racial discrimination, or more direct forms of maltreatment like parental abuse and neglect—can be deeply “criminogenic” (that is, persons exposed to them have a higher probability of subsequently engaging in crime). Explaining the connections between childhood trauma and maltreatment and subsequent criminality places adult criminal behavior in a more meaningful and more mitigating context. It undermines the simplistic view that everything a person does past a certain point in his life is the exclusive product of his free and autonomous choices. This more nuanced and comprehensive perspective helps to explain rather than excuse a capital defendant's behavior. However, it does have direct relevance and value for assessing the degree of moral culpability that rightly attaches to the choices people have made and the actions they have taken—precisely what is at issue in a capital penalty trial.

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89. Robert W. White, *Exploring Personality the Long Way: The Study of Lives*, in PERSONALITY STRUCTURE IN THE LIFE COURSE: ESSAYS ON PERSONOLOGY IN THE MURRAY TRADITION 3, 8 (Robert A. Zucker et al. eds., 1992). See generally EXAMINING LIVES IN CONTEXT: PERSPECTIVES ON THE ECOLOGY OF HUMAN DEVELOPMENT (Phyllis Moen et al. eds., 1995) (a collection of works that examine human behavior and development as a function of personal and environmental characteristics); Jaber F. Gubrium & James A. Holstein, *Biographical Work and New Ethnography*, in 3 THE NARRATIVE STUDY OF LIVES 45 (Ruthellen Josselson & Amia Lieblich eds., 1995) (discussing how the study of ethnography now views an individual as the product of his or her background and experiences); Donald E. Polkinghorne, *Narrative Knowing and the Study of Lives*, in AGING AND BIOGRAPHY: EXPLORATIONS IN ADULT DEVELOPMENT 77 (James E. Birren et al. eds., 1996) (an analysis of how narrative data about a person's background are vital to the psychological understanding of that person); Wm. McKinley Runyan, *Idiographic Goals and Methods in the Study of Lives*, 51 J. PERSONALITY 413 (1983) (discussing the methods of studying how experiences influence human behavior); Abigail J. Stewart & Joseph M. Healy, Jr., *Linking Individual Development and Social Changes*, 44 AM. PSYCHOLOGIST 30 (1989) (surveying studies on the impact of historical context on individual development and proposing a model to incorporate the implications of these studies into current research design and interpretation).

Developmental psychologists Ann Masten and Norman Garmezy have articulated an especially useful framework for identifying those events and experiences that can negatively impact or affect an individual life history. Their “risk factor” analysis focuses on those events or experiences that create a higher probability that someone will engage in troubled, problematic behavior later in life. The factors represent “risks” because they are statistically associated with a whole range of psychological and behavioral problems and disorders.<sup>90</sup> In addition, under this rubric, “stressors” refer to “any change in the environment which typically—that is, in the average person—induces a high degree of continual tension and interferes with normal patterns of response.”<sup>91</sup>

Of course, persons are much more than the sum total of the risk factors to which they have been exposed. Many people—even those who eventually succumb to the enormous odds and barriers they confront, show great resiliency and mettle in rising to these challenges. Yet the risk factors model helps to explain how and why a particular social history takes a particular direction, including why some people are able to overcome the risks and traumas to which they have been exposed and others are not. As I will summarize below, crime is often committed by persons whose early lives have been pervaded by a great many of these potentially damaging risk factors and whose present circumstances include numerous environmental stressors. The combination of these factors and forces inhibits the development of pro-social and law-abiding patterns of behavior and can push people in calamitous, crime-prone directions.

As Masten and Garmezy observed: “Children who pursue delinquent careers may have been exposed to very severe stresses and harmful life events, genetic disadvantage, inappropriate parental models, selective reinforcement by parents of the child’s maladaptive behavior, and chronic low self-esteem.”<sup>92</sup> When added up over the course of a single life, these multiple risk factors form a whole that is greater than the individual parts. In the aggregate they can have profound consequences for a wide range of adult behaviors. Indeed, there is now widespread recognition of the fact that broad “contexts of maltreatment”

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90. Ann Masten & Norman Garmezy, *Risk, Vulnerability and Protective Factors in Developmental Psychopathology*, in 12 *ADVANCES IN CLINICAL CHILD PSYCHOLOGY* 3 (Benjamin B. Lahey & Alan E. Kazdin eds., 1985).

91. *Id.* at 6.

92. *Id.* at 25.

have profound and long-lasting effects over a person's life course.<sup>93</sup> In fact, the emerging field of "developmental criminology" has relied on many of these social historical and contextual insights to reach conclusions about the origins of criminal behavior.<sup>94</sup> This perspective also serves as the basis for new and more effective policies of crime control—by focusing on reducing or eliminating the early childhood risk factors that are known to be criminogenic, rather than the traditional approach of exclusively targeting those persons who have succumbed to them.<sup>95</sup>

Moreover, although risk factors tend to have greater impact when people are exposed to them during childhood, they may continue to impinge on us in adolescence and beyond. Thus, risk factors experienced in later developmental stages—including adulthood—can adversely impact a social history or life course as well. In fact, even adverse *institutional* experiences like the effects of incarceration in uncaring or brutalizing juvenile justice facilities or adult prison systems can have harmful effects on people, increasing the likelihood that they will engage in crime later in life. As Robert Sampson and John Laub noted, "the connection between official childhood misbehavior and [negative] adult outcomes may be accounted for in part by the structural disadvantages and diminished life chances accorded institutionalized and stigmatized youth."<sup>96</sup>

Indeed, because so many capital defendants have had direct contact with juvenile justice institutions, it is always important to consider their

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93. Jay Belsky, *Etiology of Child Maltreatment: A Developmental-Ecological Analysis*, 114 PSYCHOL. BULL. 413, 414 (1993); see also JOHN N. BRIERE, CHILD ABUSE TRAUMA: THEORY AND TREATMENT OF THE LASTING EFFECTS 17-78 (1992); Masten & Garmezy, *supra* note 90, at 1; Donald G. Dutton & Stephen D. Hart, *Evidence for Long-Term, Specific Effects of Childhood Abuse and Neglect on Criminal Behavior in Men*, 36 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 129, 135-36 (1992). Indeed, these effects extend past a single generation. See, e.g., Diana Dumas et al., *The Intergenerational Transmission of Aggression Across Three Generations*, 9 J. FAM. VIOLENCE 157, 169-72 (1994).

94. For a discussion of various origins of criminal behavior, see Rolf Loeber, *Developmental Continuity, Change, and Pathways in Male Juvenile Problem Behaviors and Delinquency*, in DELINQUENCY AND CRIME: CURRENT THEORIES 1, 1-27 (J. David Hawkins ed., 1996). For an analysis of criminal behavior among families, see David C. Rowe & David P. Farrington, *The Familial Transmissions of Criminal Convictions*, 35 CRIMINOLOGY 177, 194-99 (1997).

95. See, e.g., Brandon C. Welsh & David P. Farrington, *Assessing the Effectiveness and Economic Benefits of an Integrated Developmental and Situational Crime Prevention Programme*, 4 PSYCHOL. CRIME & L. 281, 304-05 (1998).

96. ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 137 (1993). The authors also acknowledge the "knifing off" of opportunities that comes about as a result of juvenile incarceration, and highlight the way in which serious delinquency cuts out the opportunity for a conventional life later on. *Id.* at 142.

potential role in shaping a client's social history. Juvenile justice experts have long expressed concerns over the way in which this system can victimize the very children it ostensibly seeks to help. Some have characterized this as a core "paradox" of juvenile justice institutions.<sup>97</sup> They point to the extraordinary adaptations that are forced on young inmates who are trying to cope in juvenile facilities that represent, on the one hand, a "punishment-centered bureaucracy,"<sup>98</sup> and, on the other, a "terrifying . . . social world."<sup>99</sup> Some of these facilities have been described as "worse than the streets,"<sup>100</sup> and as places where a young inmate may be required to "feign bravery and toughness so convincingly that he is not challenged."<sup>101</sup> Too often, even in the best juvenile institutions, "very little correction, training, or adjustment occurs—or can, in fact, occur under present circumstances and social policies."<sup>102</sup>

Later in life, adult imprisonment often exposes inmates to painful and traumatic experiences. Prisoners may be adversely affected as a result, and these effects may persist beyond incarceration. For some, their prison experiences will increase their chances of suffering debilitating problems once released, including problems that increase their likelihood of re-offending.<sup>103</sup> Thus, adult incarceration can

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97. CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX 273 (1976).

98. *Id.* at 197.

99. *Id.* at 12.

100. *Id.* at 271.

101. *Id.* at 12.

102. *Id.* at 271; *see also* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 279-83 (1999) (discussing evidence that suggests that adolescents who have been in juvenile detention facilities have high rates of recidivism and suggesting that these programs be revised); LYLE W. SHANNON, OFFICE OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., ASSESSING THE RELATIONSHIP OF ADULT DELINQUENT CRIMINAL CAREERS TO JUVENILE CAREERS: A SUMMARY 15 (1982) (noting that juveniles' frequency of contact with police and the courts correlates to future criminal behavior); Clemens Bartollas, *Survival Problems of Adolescent Prisoners*, in THE PAINS OF IMPRISONMENT 165, 177 (Robert Johnson & Hans Toch eds., 1982) (explaining that juvenile institutions are "inhumane and unsafe for residents"). *See generally* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. OF JUST., BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY (1998) (describing six ways to improve juvenile detention and rehabilitation facilities and concluding that, without these changes, rehabilitation remains unlikely); OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. OF JUST., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (1994) (using a statistical regression analysis to show that deficiencies in juvenile institutions are widespread with regard to living space, security, controlling suicidal behavior, and providing health care).

103. *See, e.g.*, CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 220-25 (2006); Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 42-48 (Jeremy Travis & Michelle Waul eds., 2003).

negatively transform prisoners, jeopardize their well being, and undercut their post-prison adjustment. In this sense, then, prison itself can sometimes function as a powerful risk factor.

In addition to the ways in which social historical events and past experiences can significantly influence and affect subsequent behavior and direct the course of a life, we also now know that certain kinds of *immediate* circumstances, contexts, and situations can elicit, shape, and modify people's thoughts and actions. For this reason, understanding people's behavior requires us to look not only at their background and social history but also to their present circumstances or situation. Here, too, many of these insights are directly applicable to crime and violence. That is, there is much research to suggest that certain social contexts are highly criminogenic, tending to increase the probability that criminal behavior will occur within or in reaction to them.

When this perspective on the power of the immediate environment to shape behavior began to emerge in the early 1970s, it was paradigm-shifting in the discipline of psychology. Indeed, it was regarded as having brought about a "contextual revolution."<sup>104</sup> Near the start of this revolution, psychologist Albert Bandura noted that traditional theories of moral action were highly individualistic in nature (and were entirely consistent with the crime master narrative that I discussed earlier). These theories typically assumed that people internalized a set of behavioral standards that created a permanent control mechanism within them—a "conscience," if you will—that supposedly governed all of their future moral conduct. This internal mechanism was thought to be stable and enduring, and to limit or prevent someone's immoral or illegal behavior, irrespective of the context in which he acted.

Put simply, a predisposition to act unlawfully or not was assumed to operate across situations and to be largely independent of present circumstances. But as Bandura observed, "[t]he testimony of human behavior . . . contradicts this view."<sup>105</sup> Even earlier, Stanley Milgram's classic demonstrations of the power of social settings to elicit extreme behavior—delivering clearly painful and seemingly dangerous electric shocks in obedience to an experimenter's directions—had led him to

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104. For a broader discussion of the contextual revolution and its implications for the legal system in general, see Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 7-10 (2002) (advocating legal reforms that incorporate a more contemporary psychological model of behavior rather than the old, less valid assumptions still relied on in many areas of law).

105. Albert Bandura, *Behavior Theory and the Models of Man*, 29 AM. PSYCHOLOGIST 859, 861 (1974).

conclude that “[i]n certain circumstances it is not so much the kind of person a man is, as the kind of situation in which he is placed, that determines his actions.”<sup>106</sup>

By the late 1970s, the intellectual framework on which traditional views of moral action were premised had begun to radically shift. Much greater recognition was being given to the role that powerful situations, contexts, and circumstances played in influencing behavior. Indeed, “explaining the behavior of particular individuals” was eventually understood to require “not only psychological theory but also situational, biographical, and historical information.”<sup>107</sup> As social psychologists Lee Ross and Richard Nisbett wrote, “what has been demonstrated through a host of celebrated laboratory and field studies is that manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior.”<sup>108</sup>

Today, virtually every area of empirical psychology recognizes the importance of social context and situations in making sense of complex social behavior. The attention now devoted by psychologists to the study of the entire life course—past and present context—reflects an awareness of what one researcher has termed “the reality imperatives—situational demands, opportunities, and barriers” that shape our lives.<sup>109</sup> Few contemporary psychologists would disagree that human behavior must be examined in context because “[i]ndividuals are embedded in a changing social, cultural, and economic environment, as well as being

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106. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN RELATIONS 57, 72 (1965). Social psychologist Stanley Milgram conducted a series of groundbreaking studies in the late 1960s and early 1970s. He found that on average nearly two-thirds of normal, average adult men followed the instructions of an authority figure to deliver electric shocks that they had reason to believe were not just painful but potentially damaging, perhaps even fatal. *Id.* at 71-72. Milgram’s studies were among the most dramatic demonstrations of a point that was being increasingly made in the discipline of psychology about the power of certain situations to compel or elicit extreme behavior from otherwise normal persons. Milgram’s own account of the results of his various obedience experiments can be found in STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974). More contemporary discussions of the meaning and significance of the work can be found in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* (Thomas Blass ed., 2000).

107. Peter T. Manicas & Paul F. Secord, *Implications for Psychology of the New Philosophy of Science*, 38 AM. PSYCHOLOGIST 399, 399 (1983).

108. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* xiv (1991).

109. Phyllis Moen, *Introduction*, in *EXAMINING LIVES IN CONTEXT: PERSPECTIVES ON THE ECOLOGY OF HUMAN DEVELOPMENT* 1, 5 (Phyllis Moen et al. eds., 1995).

products of a life history of events, beliefs, relationships, and behavior.”<sup>110</sup>

These factors—the immediate life circumstances in which someone acts—also have tremendous relevance for understanding criminal behavior and assessing moral culpability. If the “immediate social situation” can, in Ross and Nisbett’s terms, “overwhelm . . . individual differences in personal traits and dispositions,” then that situation is in part causally implicated in the behavior that occurs within it.<sup>111</sup> This means that, in the appropriate kind of criminal case, the blameworthiness that we attach to behavior may be affected by the knowledge that a person’s actions are very much influenced by the circumstances in which they occurred. Learning a criminal defendant succumbed to powerful situational pressures and contingencies that he did not choose to experience and over which he had little or no control should affect the way that he is judged.

Moreover, a “situation” can be broadly defined and understood. For example, in ways that have direct application to a wide range of crime-related behaviors, “[r]esearch exploring the effects of living in certain neighborhoods on individuals, families, peer groups, and other social networks has mushroomed in the last several years. Scholars are increasingly recognizing that neighborhoods matter.”<sup>112</sup> This means that a comprehensive social contextual analysis of criminality also must consider the role that neighborhoods and community environments play in introducing people to these behavior patterns and inducing them to engage in them.

In any event, there is now widespread recognition of the causal role of both past social history *and* immediate or present circumstances in shaping a person’s behavior, including his criminal behavior. Although sophisticated analyses of social behavior continue to be “interactional” in nature and to take personal characteristics explicitly into account,<sup>113</sup> it

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110. *Id.* at 6.

111. ROSS & NISBETT, *supra* note 108, at xiv.

112. Delbert S. Elliot et al., *The Effects of Neighborhood Disadvantage on Adolescent Development*, 33 J. RES. CRIME & DELINQ. 389, 389 (1996). For a summary of the research on the effects of neighborhoods on the development of children and adolescents and various research methods and models used in these studies, see Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They Live In: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 PSYCHOL. BULL. 309 (2000).

113. See, e.g., Albert Bandura, *The Self System in Reciprocal Determinism*, 33 AM. PSYCHOLOGIST 344, 345-48 (1978); Marshall P. Duke, *The Situational Stream Hypothesis: A Unifying View of Behavior with Special Emphasis on Adaptive and Maladaptive Personality Patterns*, 21 J. RES. PERSONALITY 239, 241-43 (1987); Bo Ekehammar, *Interactionism in Personality From a Historical Perspective*, 81 PSYCHOL. BULL. 1026, 1032-37 (1974); Marianthi

is clear that situations, contexts, and social structures have attained empirical and theoretical significance that they did not have several decades ago. The problems of crime and violence—formerly viewed in almost exclusively individualistic terms—are now understood through multi-level analyses that grant equal if not primary significance to background, social historical, situational, community, and structural variables.<sup>114</sup>

#### V. POVERTY AS RISK: A CASE IN POINT

Let me use one particularly important risk factor—poverty—to illustrate how this new generation of research can provide scientific insights that help to structure a mitigating social history. Focusing on poverty-related research also helps to demonstrate the way in which a single risk factor can connect to many others and reverberate throughout a person's social history. As with most of the risk factors to which I alluded earlier, the research on the long-term effects of poverty is now extensive and ongoing. For this reason, I will cite to only a portion of it in the pages that follow.

Of course, many capital defendants are poor. Years ago, early in the development of capital mitigation, it would not have been at-all far-fetched for attorneys to argue a capital client's poverty as mitigation in his penalty phase. Certainly, those lawyers would have been able to advance the commonsense proposition that poverty can negatively affect a defendant's (or anyone's) life course. They would have been able to argue that a capital client who had suffered severe poverty likely had his life chances adversely affected. And they certainly could have suggested

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Georgoudi & Ralph L. Rosnow, *Notes Toward a Contextualist Understanding of Social Psychology*, 11 PERSONALITY & SOC. PSYCHOL. BULL. 5, 9-12 (1985); Walter Mischel, *On the Interface of Cognition and Personality: Beyond the Person-Situation Debate*, 34 AM. PSYCHOLOGIST 740, 746-48 (1979); Joseph Veroff, *Contextual Determinants of Personality*, 9 PERSONALITY & SOC. PSYCHOL. BULL. 331, 336-41 (1983).

114. See, e.g., John R. Hepburn, *Violent Behavior in Interpersonal Relationships*, 14 SOC. Q. 419, 420-26 (1973); A.W. McEwan & C. Knowles, *Delinquent Personality Types and the Situational Contexts of Their Crimes*, 5 PERSONALITY & INDIVIDUAL DIFFERENCES 339 (1984); Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 1, 1-90 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994); Hans Toch, *The Catalytic Situation in the Violence Equation*, 15 J. APPLIED SOC. PSYCHOL. 105, 114-19 (1985); Ernest A. Wenk & Robert L. Emrich, *Assaultive Youth: An Exploratory Study of the Assaultive Experience and Assaultive Potential of California Youth Authority Wards*, 9 J. RES. CRIME & DELINQ. 171, 184-87 (1972); Kevin Wright, *The Violent and Victimized in the Male Prison*, 16 J. OFFENDER REHABILITATION 1, 22-24 (1991).

to the jury that, as a result of this, their client warranted a measure of mercy or compassion.

However, as recently as the late 1970s and even into the 1980s, those lawyers would have had to argue these things largely from intuition. Their contentions would have been vulnerable to questions by the prosecutor and skepticism on the part of the jurors about whether and how poverty that was experienced early in life could continue to affect someone as an adult. They would have struggled to convincingly connect poverty to other aspects of their client's life that might have adversely affected him. And they also would have been susceptible to the criticism that poverty, as something that has touched so many people in our society, could not possibly provide an explanation for criminal behavior (behavior that, fortunately, not everyone who has suffered poverty engages in). The defense lawyers, and even the experts they might have called as witnesses to address these issues, would have been hard pressed to offer persuasive, well-documented responses.

Nowadays, however, the consequences of a defendant's poverty for his life course can be analyzed and presented in multifaceted ways, and connected to a wide variety of other risk factors that poverty renders him more likely to experience. The long-term consequences of poverty can be empirically documented, as can its criminogenic or crime producing effects. That documentation can serve as the solid, factual, scientific basis for the penalty-phase contention that childhood poverty—over which virtually no capital defendant has had any control—helped to shape his life course, drastically limited his available choices, and contributed directly to the criminal behavior and lifestyle in which he engaged. And it also is usually possible to identify with some precision the various factors that help to explain why some people's lives are more profoundly affected by poverty than others.

More specifically, we now know that the direct effects of poverty on children are not subtle or difficult to measure or understand. An extensive amount of research has shown that poverty has numerous pervasive harmful or "pathogenic" effects. Thus, there is much research that documents the negative effects of poverty on early childhood development—including the ways in which severe forms of deprivation can lead to lowered levels of self esteem, high levels of frustration, poor impulse control, and problematic intellectual performance and achievement.<sup>115</sup> There is also direct and long-standing evidence that

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115. See, e.g., Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296, 311-14 (1994); Glen H. Elder, Jr. & Avshalom Caspi, *Economic*

poverty and economic deprivation play direct roles in creating a wide range of problems later in life, including delinquent and criminal behavior.<sup>116</sup>

Among other things, poverty also negatively affects children by virtue of the stress that it places on their parents. Thus, child neglect and abuse are sometimes the result of a parent's inability to cope with the stressors that their low socioeconomic status introduces into their lives.<sup>117</sup> Poor parents who cannot manage to somehow shoulder the enormous additional burdens that poverty places on them may be unable to properly nurture and care for their children, forcing the children prematurely out of childhood and into more adult roles and responsibilities. This is especially true in communities that fail to provide them with badly needed childcare and other services, as well as other forms of assistance. Mental health workers have known for decades that the resulting neglect can take a significant toll on the physical, intellectual, social, behavioral, and emotional development of children and compromise their long-term psychological adjustment.<sup>118</sup> Thus, we know that although child neglect often occurs in conjunction

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*Stress in Lives: Developmental Perspectives*, J. SOC. ISSUES, 1988, at 25, 32-36; James Garbarino, *The Meaning of Poverty in the World of Children*, 35 AM. BEHAV. SCIENTIST 220, 227-234 (1991); James Garbarino, *The Stress of Being a Poor Child in America*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 105, 106-07 (1998).

116. See, e.g., Claudia J. Coulton & Shanta Pandey, *Geographic Concentration of Poverty and Risk to Children in Urban Neighborhoods*, 35 AM. BEHAV. SCIENTIST 238, 248-54 (1992); Charles E. Holzer et al., *The Increased Risk for Specific Psychiatric Disorders Among Persons of Low Socioeconomic Status*, 4 AM. J. SOC. PSYCHIATRY 259, 269-71 (1986); Christopher Jencks & Susan E. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in INNER-CITY POVERTY IN THE UNITED STATES 111, 155-62 (Lawrence E. Lynn, Jr. & Michael G. H. McGeary eds., 1990); David T. Takeuchi et al., *Economic Stress in the Family and Children's Emotional and Behavioral Problems*, 53 J. MARRIAGE & FAM. 1031, 1037-39 (1991); Kirk R. Williams, Research Note, *Economic Sources of Homicide: Reestimating the Effects of Poverty and Inequality*, 49 AM. SOC. REV. 283, 286-89 (1984).

117. See, e.g., Joan W. DiLeonardi, *Families in Poverty and Chronic Neglect of Children*, 74 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVS. 557, 560 (1993); Elder & Caspi, *supra* note 115, at 38-42; Patricia Garrett et al., *Poverty Experiences of Young Children and the Quality of Their Home Environments*, 65 CHILD DEV. 331, 333-35 (1994); Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAV. SCIENTIST 258, 269-70 (1992); Michael B. Greene, *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth*, 39 CRIME & DELINQ. 106, 116 (1993); Pamela Kato Klebanov et al., *Does Neighborhood and Family Poverty Affect Mothers' Parenting, Mental Health, and Social Support?*, 56 J. MARRIAGE & FAM. 441, 450-53 (1994); Laurence D. Steinberg et al., *Economic Antecedents of Child Abuse and Neglect*, 52 CHILD DEV. 975, 982-84 (1981).

118. See, e.g., Dexter M. Bullard, Jr. et al., *Failure to Thrive in the "Neglected" Child*, 37 AM. J. ORTHOPSYCHIATRY 680, 680-82 (1967); Harold Lewis, *Parental and Community Neglect: Twin Responsibilities of Protective Services*, 16 CHILDREN 114, 115 (1969).

with other forms of maltreatment, it has its own independent and profoundly harmful effects.<sup>119</sup>

The developmental consequences of neglect may be manifested very early in a child's life, so that even by preschool years some children who have been neglected are apathetic, while others become hyperactive. One important insight to come from this research is that the same risk factor can produce different behavioral effects, largely because children develop different ways of coping with the various traumas and hurtful experiences to which they are exposed. In any event, neglected children suffer from low self-esteem, poor ego control, and negative affect,<sup>120</sup> and chronic neglect can continue to produce long-term harm in children as they grow older.

In addition, parents who are overwhelmed by the stress of poverty are more likely to provide what researchers and clinicians term "psychologically unavailable caregiving." This is a particularly problematic form of childhood maltreatment, one often faced by children who are raised in an environment of neglect rather than experiencing "only . . . an isolated incident" of neglect.<sup>121</sup> These environments are chaotic, disruptive, and conflict-ridden because the adults in charge are managing their own needs and problems and have fewer psychological resources to devote to the needs of their children. Psychologically unavailable caregiving may be exacerbated by drug or alcohol abuse, and the mothers in these situations may be traumatized by the physical abuse that they are suffering at the hands of others. In any event, "the homes provide a very aversive environment for raising the children."<sup>122</sup> The long-term psychological effects of this form of parental maltreatment are cumulative, and can have negative consequences that

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119. See, e.g., Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49, 53-63 (1993); Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8, 10 (1993) (describing how the broad view of neglect has expanded "from a focus on individual factors (i.e., parental omissions in care)" to include "the contribution of community and societal factors" that are seen as "increasingly important"). Researchers have suggested that "[c]hild neglect occurs when a basic need of a child is not met, regardless of the cause(s)." Dubowitz, *supra*, at 23.

120. Byron Egeland et al., *The Developmental Consequence of Different Patterns of Maltreatment*, 7 CHILD ABUSE & NEGLECT 459, 467 (1983).

121. Byron Egeland & Martha Farrell Erickson, *Psychologically Unavailable Caregiving*, in PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH 110, 115 (Marla R. Brassard et al. eds., 1987).

122. *Id.* at 115-16.

include depression, negative emotion, poor impulse control, and high levels of dependency.<sup>123</sup>

In addition, the socioeconomic pressures that impoverished parents feel can “weaken the caretakers’ psychological mechanisms of self-control,” resulting in the release of frustration by physically attacking the child.<sup>124</sup> When poverty is experienced on a long-term basis—especially when it is intergenerational—chronic abuse may result. Thus, chronically abused children tend:

[T]o live in very different circumstances than children with one substantiated incident of abuse. They were more likely than other children to live in families with a generalized history of violence, which in some cases explained their parents’ criminal histories. *They were also more likely to live in families with intergenerational histories of poverty.* The problems of these families, then, are inextricably tied to both past and present experiences of economic deprivation and associated antisocial behaviors.<sup>125</sup>

Not surprisingly, extreme forms of physical and psychological abuse are known to be profoundly destructive.<sup>126</sup> They significantly

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123. Indeed, as one study found, although the consequences of all patterns of child abuse are typically very serious, “the results among children whose mothers were psychologically unavailable were most dramatic.” *Id.* at 114 (emphasis added).

124. Richard J. Gelles, *Child Abuse as Psychopathology: A Sociological Critique and Reformulation*, 43 AM. J. ORTHOPSYCHIATRY 611, 616 (1973). Of course, not all poor parents abuse their children, and abuse is not restricted to poverty-stricken families. For example, as Gelles put it: “One factor that determines what form of adaptation a parent will use in dealing with family stress is his own childhood socialization. An individual who was raised by parents who used physical force to train children and who grows up in a violent household has had as a role model the use of force and violence as a means of family problem solving.” *Id.* at 618.

125. Candace Kruttschnitt et al., *The Economic Environment of Child Abuse*, 41 SOC. PROBS. 299, 309-10 (1994) (emphasis added).

126. C. Henry Kempe, *The Battered-Child Syndrome*, 181 JAMA 17, 17 (1962); see also DAVID G. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL ABUSE IN THE UNITED STATES 118-22 (1970); George C. Curtis, *Violence Breeds Violence—Perhaps?*, 120 AM. J. PSYCHIATRY 386, 386 (1964); Richard J. Gelles, *Violence Toward Children in the United States*, 48 AM. J. ORTHOPSYCHIATRY 580, 582 (1978); Catherine J. Ross & Edward Zigler, *An Agenda for Action, in CHILD ABUSE: AN AGENDA FOR ACTION* 293, 303 (George Gerber et al. eds., 1980); see also Eli H. Newberger & Richard Bourne, *The Medicalization and Legalization of Child Abuse*, 48 AM. J. ORTHOPSYCHIATRY 593, 597-600 (1978) (recounting the numerous procedures implemented and laws passed to deal with the widely recognized problem of child abuse). For one representative study, see Harold P. Martin & Patricia Beezley, *Behavioral Observations of Abused Children*, 19 DEVELOPMENTAL MED. & CHILD NEUROLOGY 373, 385 (1977). In a four to five year follow-up of the consequences of physical abuse, a wide range of “pervasive psychic injury” continued to be found. *Id.* at 385. As the researchers concluded: “The most striking impression was that these abused children were not happy and had minimal ability to enjoy themselves in play or to interact socially as children . . . . Whether inhibited, compulsive, angry, or socially pseudo-adult, they seemed unable to relax and enjoy themselves.” *Id.* at 385. In addition, the severity of the physical

undermine normal social and emotional development, often create lifelong psychological problems, produce deep insecurities, and can lead to diagnosable psychiatric disorders. In addition, they heighten a person's potential for delinquency, criminality, and violent behavior later in life.<sup>127</sup>

More specifically, there is extensive research that documents the various ways in which extreme abuse creates severe problems for children that persist as they mature into adulthood. The long-lasting negative effects of physical and psychological abuse include emotional and psychological dysfunction, poor academic performance, drug and alcohol abuse, delinquency, criminality, and violence.<sup>128</sup> Indeed, the relationship between childhood physical abuse and subsequent adult violent behavior has been extremely well-documented, and has given rise to the phrase "cycle of violence" in the academic literature.<sup>129</sup>

Poverty can affect parents in other ways that create risk factors for their children. Because they are highly dependent on their parents' lifestyles, poor children may be buffeted about by the transience and instability that poverty engenders. Many poor families move often, and extreme residential mobility can be psychologically destabilizing for children. Friendships come and go, new neighborhoods must be learned and negotiated, and academic performance often suffers as children move from school to school. In the face of such chaos and unpredictability, some children conclude that there is little or nothing in the world around them that is stable and secure enough to depend on or connect to.

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abuse seemed less predictive of future psychiatric symptoms than did various continuing environmental factors, such as the low emotional stability of the parents, a lack of stability in the family structure, a high number of home changes, punitive and rejecting treatment at the hands of caretakers, and the child's perception of the impermanence of his or her home setting. *Id.* at 385.

127. Kenneth A. Dodge et al., *Mechanisms in the Cycle of Violence*, 250 *SCI.* 1678, 1682 (1990).

128. See Richard Dembo et al., *Physical Abuse, Sexual Victimization and Illicit Drug Use: A Structural Analysis Among High Risk Adolescents*, 10 *J. ADOLESCENCE* 13, 25-29 (1987); David P. Farrington, *Early Predictors of Adolescent Aggression and Adult Violence*, 4 *VIOLENCE & VICTIMS* 79, 94-98 (1989); Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 *BULL. AM. ACAD. PSYCHIATRY & L.* 345, 348-50 (1986); Seymour Feshbach, *Child Abuse and the Dynamics of Human Aggression and Violence*, in *CHILD ABUSE: AN AGENDA FOR ACTION* 48, 58-59 (George Gerbner et al. eds., 1980); Janine Jason, *Centers for Disease Control and the Epidemiology of Violence*, 8 *CHILD ABUSE & NEGLECT* 279, 283 (1984); Gerald R. Patterson & Thomas J. Dishion, *Contributions of Families and Peers to Delinquency*, 23 *CRIMINOLOGY* 63, 71-75 (1985); Harriett Wilson, *Parental Supervision: A Neglected Aspect of Delinquency*, 20 *BRIT. J. CRIMINOLOGY* 203, 231-34 (1980).

129. See Dodge et al., *supra* note 127, at 1682.

If and when poverty brings even more drastic forms of instability into the lives of their parents—including when a parent suffers addiction, hospitalization, incarceration, or death—the children are at risk of experiencing forms of parental abandonment. Abandonment is an especially damaging risk factor that predisposes children to a wide range of psychological and behavioral problems later in life.<sup>130</sup> Since John Bowlby's classic work on the importance of continuing contact with nurturing parent figures in the early years of life, mental health workers have emphasized the importance of ongoing personal care and nurturance to healthy child development. Children whose attachment needs have not been consistently met come to view the world as "comfortless and unpredictable; and they respond either by shrinking from it or doing battle with it."<sup>131</sup>

Parental abandonment is a unique form of loss, sometimes creating devastating feelings of pain and grief. As one leading researcher on the topic put it, parental abandonment represents a "profound blow to a child's self-esteem and [creates a] sense of degradation . . . due to having been given up, put aside, left, or lost."<sup>132</sup> Abandonment experienced on multiple occasions and in multiple ways, has been recognized as "a traumatic event with the potential for long-lasting intrusive effects . . . [on] the child."<sup>133</sup> It is also likely to produce some symptoms

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130. See Michael H. Burnstein, *Child Abandonment: Historical, Sociological and Psychological Perspectives*, 11 *CHILD PSYCHIATRY & HUM. DEV.* 213, 217-18 (1981); Gina M. Hayashi & Bonnie R. Strickland, *Long-Term Effects of Parental Divorce on Love Relationships: Divorce as Attachment Disruption*, 15 *J. SOC. & PERS. RELATIONSHIPS* 23, 34-36 (1998); Eva Kahn, *Habitual Failure: A Childhood Adaptation to the Threat of Abandonment*, 17 *CLINICAL SOC. WORK J.* 50 (1989); Faith H. Leibman, *Childhood Abandonment/Adult Rage: The Root of Violent Criminal Acts*, 10 *AM. J. FORENSIC PSYCHOL.* 57, 57-60 (1992); Judith Mishne, *The Grieving Child: Manifest and Hidden Losses in Childhood and Adolescence*, 9 *CHILD & ADOLESCENT SOC. WORK J.* 471 (1992); George H. Pollock, *Abandoning Parents and Abusing Caretakers*, in *PARENTAL INFLUENCES IN HEALTH AND DISEASE* 349, 349-54 (E. James Anthony & George H. Pollock eds., 1985); Joseph C. Sabbath, *The Suicidal Adolescent—The Expendable Child*, in *ESSENTIAL PAPERS ON SUICIDE* 185, 197-98 (John T. Maltzberger & Mark J. Goldblatt eds., 1996); Sharlene A. Wolchik et al., *Inner-City, Poor Children of Divorce: Negative Divorce-Related Events, Problematic Beliefs and Adjustment Problems*, 19 *J. DIVORCE & REMARRIAGE* 1, 14-15 (1993).

131. JOHN BOWLBY, *ATTACHMENT AND LOSS* 208 (1973); see also Byron Egeland & Ellen A. Farber, *Infant-Mother Attachment: Factors Related to Its Development and Changes Over Time*, 55 *CHILD DEV.* 753, 769-70 (1984) (describing how a mother's behavior may influence the type of bonds she forms with her infant).

132. Judith Marks Mishne, *Trauma of Parent Loss Through Divorce, Death, and Illness*, 1 *CHILD & ADOLESCENT SOC. WORK J.* 74 (1984); see also Judith Mishne, *Parental Abandonment: A Unique Form of Loss and Narcissistic Injury*, 7 *CLINICAL SOC. WORK J.* 15, 20-22 (1979) (describing how abandonment can have effects on a child's ego and behavior).

133. Herbert J. Freudenberger & Katherine M. Gallagher, *Emotional Consequences of Loss for Our Adolescents*, 32 *PSYCHOTHERAPY* 150, 153 (1995).

of chronic post-traumatic stress, and is one of the major causes of adolescent depression as well as subsequent dysfunctional behavior and drug use (engaged in as a form of self-medication to ward off the deep feelings of emotional pain that often stem from parental rejection).<sup>134</sup>

Thus, poverty has a potential impact on parental maltreatment, family instability, and abandonment. Poor children tend to be exposed to more family turmoil, violence, instability, and abandonment inside their homes. In addition, they tend to experience less social support and responsiveness from their parents who, in turn, may struggle with the joint demands of poverty and parenting by employing more authoritarian approaches to control their children and have less time to be involved in their children's school and community activities.

But there is more. Poor children also are more likely to be exposed to more environmental toxins and pollutants, and to live in less sanitary and lower quality homes that, in turn, tend to be located in places that are dangerous and physically deteriorated. Children who live in low income areas also tend to attend poorer quality schools and receive substandard overall municipal and social services.<sup>135</sup> Thus, the environmental injustices to which the poor are subjected affect their children in numerous ways.

Poor children are more likely to experience a wide range of "social toxins" as well. For example, researchers have found that: "Children living in poor, urban communities are particularly at risk for exposure to violence."<sup>136</sup> Indeed, psychologist James Garbarino coined the term "urban war zone" to convey the sense that American inner city children live in communities that expose them to levels of violent trauma comparable to those suffered by the children of war-torn countries.<sup>137</sup> The term accurately captures the feel of the violently traumatic events,

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134. See William A. Schonfeld, *Depression in Adolescence*, in 20 ADOLESCENT PSYCHIATRY: DEVELOPMENTAL AND CLINICAL STUDIES 31, 31-33 (Richard C. Marohn & Sherman C. Feinstein eds., 1995); GWENDOLYN STEVENS & SHELDON GARDNER, SEPARATION ANXIETY AND THE DREAD OF ABANDONMENT IN ADULT MALES 108-14 (1994).

135. See Gary W. Evans, *The Environment of Childhood Poverty*, 59 AM. PSYCHOLOGIST 77, 78-85 (2004).

136. Ashli J. Sheidow et al., *Family and Community Characteristics: Risk Factors for Violence Exposure in Inner-City Youth*, 29 J. COMMUNITY PSYCHOL. 345, 346 (2001).

137. See James Garbarino, *The Effects of Community Violence on Children*, in CHILD PSYCHOLOGY: A HANDBOOK OF CONTEMPORARY ISSUES 412, 412 (Lawrence Balter & Catherine S. Tamis-LeMonda eds., 1999). For further discussion on the similarities between the inner city "war zone" and violence-stricken areas of the world, see NANETTE J. DAVIS, YOUTH CRISIS: GROWING UP IN THE HIGH-RISK SOCIETY 196 (1999) and Nancy F. Dubrow & James Garbarino, *Living in the War Zone: Mothers and Young Children in a Public Housing Development*, 68 CHILD WELFARE 3, 5 (1989).

experiences, and conditions that have been depicted in numerous ethnographic studies of inner city life that were published over the last several decades.<sup>138</sup> As these studies show, the children who are raised in these urban war zones sometimes adopt the fearsome postures of the aggressive “role models” around them, as a way of standing up to the threatening outside environment. They nonetheless are likely to adopt whatever strategies they believe may help them survive the many surrounding dangers they perceive.

The presence of negative role models in children’s lives can have a damaging, criminogenic effect on childhood socialization, resulting in patterns of adult behavior that are skewed toward delinquency and crime.<sup>139</sup> Criminologists and other researchers have used the term “criminal embeddedness” to refer to the degree to which people living in criminogenic contexts—contexts of the sort that are more likely to be created in poor neighborhoods—are immersed in a network of interpersonal relationships that increase their exposure to crime-prone role models. In some instances this network includes people in their immediate family, whose own behavior teaches them lessons about potentially illegal and even violent ways to deal with the deprivation, frustration, and conflict to which they are exposed.

Early exposure to harmful risk factors also can lead people to adopt dysfunctional coping mechanisms that prove to be damaging and disruptive later in life—strategies that provide short-term relief from the emotional pain they feel but which have the long-term effect of making their lives worse rather than better. Because dysfunctional adaptations have their own harmful effects, they become “secondary risk factors,” ones that are both caused by and operate to exacerbate the effects of earlier risk factors. Because poor children are less likely to have access to counseling or other effective interventions to help them overcome the problems that their exposure to primary risk factors has produced, they

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138. See generally ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 207-36 (1990) (an analysis of the behavior and beliefs of persons living in one high-crime area); DANIEL COYLE, *HARDBALL: A SEASON IN THE PROJECTS* (1993) (a story of violence in inner city Chicago); ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991) (a study of the traumatic living conditions in the ghettos of Chicago); CARL HUSEMOLLER NIGHTINGALE, *ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS* (1993) (an overview of the violent conditions that are common in poor cities); LUIS J. RODRIGUEZ, *ALWAYS RUNNING, LA VIDA LOCA: GANG DAYS IN L.A.* (1993) (an account of gang behavior in inner city Los Angeles).

139. See Peter Fonagy et al., *Morality, Disruptive Behavior, Borderline Personality Disorder, Crime and Their Relationship to Security of Attachment*, in *ATTACHMENT AND PSYCHOPATHOLOGY* 223, 230-31 (Leslie Atkinson & Kenneth J. Zucker eds., 1997); Joan McCord, *The Effects of Parental Role Model on Criminality*, *J. SOC. ISSUES*, 1968, at 66, 74-75.

are more often forced to devise problematic coping strategies like these on their own. As a result, they are more likely to be exposed to a range of secondary risk factors.

For example, many children who suffer chronic neglect—a primary risk factor that can be associated with poverty—turn to drugs or alcohol as a form of “self medication” to ease the psychological pain and sense of worthlessness it produces.<sup>140</sup> Many also join gangs or other marginal groups to gain a sense of belongingness, add a degree of meaning to their lives, or enhance their self worth or esteem.<sup>141</sup> Yet—in ways that are not always obvious or easily anticipated beforehand—these short-term strategies adopted to cope with the immediate consequences of exposure to primary risk factors can become highly criminogenic.<sup>142</sup>

In addition to the way that poverty can affect a developmental trajectory and shape a social history in its early stages, it can significantly influence the nature of the immediate situations and circumstances a person enters later in life. If people’s opportunities and

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140. Trauma victims often use drugs and alcohol to self-medicate and reduce their immediate emotional pain. See E. J. Khantzian, *Self-Regulation and Self-Medication Factors in Alcoholism and the Addictions: Similarities and Differences*, in 8 ALCOHOLISM 255, 268-69 (Marc Galanter ed., 1990); Thomas R. Kosten & John Krystal, *Biological Mechanisms in Posttraumatic Stress Disorder: Relevance for Substance Abuse*, in 6 ALCOHOLISM 49, 60 (Marc Galanter ed., 1988); Roy B. Lacoursiere et al., *Traumatic Neurosis in the Etiology of Alcoholism: Viet Nam Combat and Other Trauma*, 137 AM. J. PSYCHIATRY 966, 966-67 (1980). In addition, drug and alcohol abuse by adult role models in abusive families may provide children with an available—albeit dysfunctional—strategy for managing their emotional pain and other stressors.

141. Gang ethnographies challenge the notion that persons join gangs out of some common, pathological set of motives. They reveal instead that “the vast majority of gang members are quite energetic and are eager to acquire many of the same things that most members of American society want: money, material possessions, power, and prestige.” MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 312 (1991). Yet, virtually all gang members “come from low-income neighborhoods.” *Id.* at 23. They often rely upon gangs in their quest for the good life in large part because other avenues for this quest have been foreclosed. See *id.* at 24; Jerald Belitz & Diana M. Valdez, *A Sociocultural Context for Understanding Gang Involvement Among Mexican-American Male Youth*, in PSYCHOLOGICAL INTERVENTIONS AND RESEARCH WITH LATINO POPULATIONS 56, 62 (Jorge G. Garcia & Maria Ceilia Zea eds., 1997); C. Ronald Huff, *Youth Gangs and Public Policy*, 35 CRIME & DELINQ. 524, 527-28 (1989). Of course, gang membership may facilitate criminal behavior. However, when it is analyzed, understood, and presented in situational or contextual terms—as an adaptation to past treatment and present circumstances—it can become part of a mitigating social history.

142. Alcohol and drug use have major criminogenic consequences that typically are not apparent to the children and adolescents who adopt this self-medicating strategy. For research on the correlations between alcohol and drug use and crime, see Ron Langevin et al., *Brain Damage, Diagnosis, and Substance Abuse among Violent Offenders*, 5 BEHAV. SCI. & L. 77, 82-83 (1987); Ron Langevin et al., *The Role of Alcohol, Drugs, Suicide Attempts and Situational Strains in Homicide Committed by Offenders Seen for Psychiatric Assessment*, 66 ACTA PSYCHIATRICA SCANDINAVICA 216, 236-37 (1982) (Den.); and Robert Nash Parker, *Bringing “Booze” Back In: The Relationship Between Alcohol and Homicide*, 32 J. RES. CRIME & DELINQ. 3, 22-25 (1995).

options have been compromised and limited by their exposure to numerous primary risk factors during childhood and adolescence, they are more likely to live in environments that expose them to other kinds of secondary risk factors. Indeed, because many people continue to be mired in poverty and kept in marginal lifestyles as a result of the structural barriers they still confront and, in some cases, the various other risk factor-related problems from which they suffer, they are forced to reside in areas that are characterized by what has been termed “neighborhood disadvantage.”

Neighborhood disadvantage describes places with a cluster of interrelated characteristics that often accompany poverty and amplify its negative effects.<sup>143</sup> Not surprisingly, disadvantaged neighborhoods are criminogenic, contributing to greater levels of crime in a variety of ways. For example, high rates of unemployment place economic stress on residents and may undermine family stability. The transience and instability that pervade these neighborhoods helps to create an overall sense of impermanence and disorganization that undermines the development of stable, consistent, and consensual community norms. All of these factors are related to higher crime rates.

Additionally, crime is more prevalent in disadvantaged neighborhoods because “[i]ndividuals who are poor are confronted with an unremitting succession of negative life events . . . in the context of chronically stressful, ongoing life conditions such as inadequate housing and dangerous neighborhoods that together increase the exigencies of day-to-day existence.”<sup>144</sup> Thus, under the risk factors model, poverty and neighborhood disadvantage represent *immediate* stressors—the “exigencies of day-to-day existence”—with the potential to exacerbate the negative effects of the difficult, risk-filled social histories that many residents already have endured.<sup>145</sup> Living in severely disadvantaged neighborhoods also can change the way people think about themselves, undermine their sense of self, and make them more likely to give in to the desperation they feel.<sup>146</sup>

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143. Elliott et al., *supra* note 112, at 389; see also Elijah Anderson, *The Code of the Streets*, ATL. MONTHLY, May 1994, at 81, 81-82 (describing how living in certain inner city environments puts children at risk for criminal behavior).

144. Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311, 318 (1990).

145. *Id.*

146. KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 63-64 (1965) (noting that “[h]uman beings who are forced to live under ghetto conditions and whose daily experience

At the same time the poverty that characterizes disadvantaged neighborhoods creates strong pressures for residents to engage in illegal activities, the neighborhoods themselves have fewer mechanisms and resources with which to exert control over what their residents do. Neighborhoods characterized by high levels of poverty, unemployment, broken families, and transience or mobility “increase the likelihood of the emergence (and lack of effective control) of illegitimate opportunity structures and dysfunctional lifestyles, including an illicit economy (gambling, prostitution, extortion, theft, drug distribution networks), substance abuse, violence, and delinquent gangs.”<sup>147</sup> Thus, disadvantaged neighborhoods can become criminogenic in part because they maximize the pressures to engage in crime, in part because they also increase people’s proximity to illegal activities, and in part because they can bring to bear fewer countervailing pressures to encourage residents to refrain.

In summary, the preceding pages have summarized just some of the interconnected ways that an important risk factor such as poverty can have a powerful prospective effect on the life course of a capital defendant. Risk factors have a direct impact on individual development, increase the likelihood that someone will be exposed to other potentially debilitating risk factors, and make it more likely they will be exposed to problematic social contexts later in life. The combination can be highly criminogenic.

This kind of multi-level and complex framework has been developed and refined with respect to many different risk factors over the last several decades. It provides us with a theoretically sound and extremely well-documented approach to understanding and explaining the lives of capital defendants that is a vast improvement over the crime master narrative. And, as I will briefly discuss in the last section of this Article, it can and should be used in capital penalty trials in ways that offer jurors a fuller, more nuanced, and scientifically valid perspective on the crucial question of culpability.

## VI. SCIENCE, NARRATIVES, AND CULPABILITY

The preceding section contained just a portion of what is now known about the impact of social history and present circumstances on criminal behavior. Whether and how much trial attorneys explicitly rely

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tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own [self] worth”).

147. Elliott et al., *supra* note 112, at 394.

on the risk factors model at trial, it provides an important scientific underpinning for competent and effective mitigating counter-narratives. Of course, the nature of the specific mitigating evidence presented in any given capital penalty phase—one designed to enable capital jurors to better understand and appreciate the forces that shaped a particular defendant's life—will depend on a number of case-specific considerations. Nonetheless, the kind of mitigating social histories that capital defense teams now can and regularly do develop is often premised on precisely the kind of research that was discussed above.

At the same time, however, competent and effective capital defense attorneys also recognize that, in addition to its sound scientific basis, a compelling social history should possess several other key characteristics. A mitigating counter-narrative certainly must be accurate and valid, and based on reliable information and credible sources. Thus, the facts from which this narrative is composed must be painstakingly investigated and carefully corroborated. Indeed, the Supplementary Guidelines being published in this Issue—summarizing key aspects of the prevailing standard of practice in capital defense—describe such verification as one of the “Requisite Mitigation Functions of the Defense Team.”<sup>148</sup>

Accordingly, mitigation investigators and others have learned to gather data and glean insights from a vast array of documents and interviews. Justice O'Connor's *Wiggins* opinion explicitly noted the importance of going beyond a “narrow set of sources,” and listed “medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences” as necessary starting points.<sup>149</sup> Moreover, because there are long-term legacies that lives filled with risk factors both reflect and bring about, the Supplementary Guidelines appropriately broaden this scope to include intergenerational sources. This part of the mitigation investigation is important because it allows attorneys and experts to better understand the true nature and dynamics of the extended family into which the defendant was born.

Because the process of gathering social historical information in capital cases involves confronting and chronicling so much tragedy and trauma, it can be emotionally wrenching. Indeed, finding the facts that comprise a comprehensive social history is “painstaking”—not only in

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148. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 10.11(B), *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

149. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

the sense that it is extremely time-consuming but also because it frequently puts investigators and experts in the position of absorbing the pain that is present in the life stories of the persons whom they interview. They must grapple not only with the defendant's own troubled narrative but also with the accounts of the people who played an important role in helping to create that traumatic social history. Because few capital defendants grow up surrounded by a representative cross-section of our society, assembling their social histories means regularly encountering the victims of similarly destructive experiences, people who have been placed at the mercy of structural forces and generational legacies beyond their personal control, as well as those who struggled heroically to overcome and triumph against seemingly overwhelming odds.

Obviously, then, there is far more to finding and assembling the key facts of a capital defendant's social history than routinely examining a standard set of documents or reference materials (although, certainly, it includes that as well). Numerous face-to-face interviews and many follow-up contacts with potential witnesses are essential to the process. Investigators may find that—just as with certain capital defendants—some potential witnesses are initially uncooperative or reluctant to be forthcoming. They may be suspicious of the interviewers' motives, wary of their questions, or wish to withhold information that they feel is too sensitive, personal, or painful to readily disclose or discuss. The Supplementary Guidelines accordingly reiterate the long-established standard of practice that interviewers must strive to overcome these natural obstacles by seeking to “establish trust” and build the necessary “rapport with the client and witnesses” to acquire as much accurate and reliable information as possible.<sup>150</sup>

The painstaking mitigation investigation is designed to produce an elaborately detailed narrative, one that contains numerous facts, events, and interrelationships that fill out and provide texture to the defendant's life story. Superficial, unsupported, or merely abstract claims are not likely to be helpful to jurors. Indeed, halfhearted or poorly documented accounts are not only unconvincing, but also easily caricatured as an “abuse excuse” and rejected on those terms. Much of the persuasive power of a counter-narrative that accurately and authentically places a life in context comes from its rich details and specifics. Thus, a convincing biographical account of the way the defendant was shaped and affected by psychologically important events and formative

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150. SUPPLEMENTARY GUIDELINES, *supra* note 148, at Guideline 10.11(C).

experiences must include as many detailed accounts of those events as possible.

In addition, a compelling social history must be thematic and coherent, and unfold in a way that makes sense. Jurors—like people in general—understand complex arrays of human events by assembling them into stories, in narrative forms that have structure and meaning.<sup>151</sup> The themes that are reflected in a defendant's life story must not only be accurate and valid but also ones the jury can understand, and jurors must be educated enough about these themes to be able to relate to them. Here is where expert assistance and testimony are likely to be particularly useful.

Long before a social historical account of the defendant's life is shared with the capital jury, experts can assist in identifying and explaining the broader, long-term significance of the particular traumatic experiences and other risk factors that have been uncovered. Beyond their mastery of the underlying scientific literature, they can assist jurors in identifying the structure and logic of the defendant's life, and focus them on the important psychological consequences of his potentially damaging life experiences. Precisely because this knowledge base has expanded so greatly over the last several decades, and continues to grow at a rapid pace, access to this kind of specialized expertise can be critically important, as the Supplementary Guidelines emphasize.<sup>152</sup>

Of course, in order to enable capital jurors to take the defendant's mitigating social history into account in reaching their sentencing verdict, the mitigating counter-narrative must be effectively presented to them. The goal is not just to amass as comprehensive an assessment of the defendant's social history as possible, but also to convincingly convey that counter-narrative to the jury. As I noted at the outset, many jurors come to the courtroom filled with pre-existing stereotypes and firmly held beliefs about crime and punishment that have been created and reinforced by an avalanche of media myth and misinformation. The resulting views support a crime master narrative that simplifies and distorts the realities at hand.

Indeed, many jurors have earned the equivalent of a Ph.D. in "media criminology," having spent countless hours immersed in creative and compelling crime stories that are as engaging as they are erroneous.

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151. The notion that jurors and legal decision-makers construct stories to reach conclusions and render verdicts is widely shared by legal scholars, researchers, and practitioners. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 12 (2000); REID HASTIE ET AL., *INSIDE THE JURY* 163-64 (1983).

152. SUPPLEMENTARY GUIDELINES, *supra* note 148, at Guideline 10.11(E)(1)(a)-(d).

Like most citizens in our society, jurors regard the crime master narrative as familiar, unproblematic, and valid. They have been told repeatedly that other people's actions—particularly deviant, criminal actions taken by persons who do not appear to be at all like them—are the product of the actor's personal traits and blameworthy choices. The media has given jurors no basis on which to dispute or question the crime master narrative and, absent a mitigating counter-narrative, they are unlikely to do so.

Prosecutors rely heavily on the jurors' embrace of that master narrative and a generalized tendency to attribute the cause of the defendant's criminal behavior to his internal, immutable characteristics or dispositions.<sup>153</sup> As Thomas Brewer has put it, in the prosecutor's version of the moral assessment that is underway in a penalty trial, the "murderer becomes indistinguishable from the murder. Jurors are encouraged to attribute the motivation for the crime to a fundamental, inherent, or dispositional trait of the defendant."<sup>154</sup> Indeed, because the violence of a capital case is so extreme, and the defendant—absent a meaningful context through which to understand his actions—appears to be so clearly different from the jurors, he is easily demonized.

On the other hand, a mitigating counter-narrative provides a more comprehensive and valid framework for understanding the defendant and his behavior. A painstakingly investigated, elaborately detailed, coherent and thematic, well-presented social history can lead jurors to life rather than death sentences by affecting the way they allocate blame and culpability in a capital penalty trial. It can accomplish this in several ways.

For one, it helps to humanize a defendant who very often has been dehumanized before the jury. Showing him in a sequence of

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153. Although it is somewhat outside the scope of this Article, there is a large social psychological literature documenting the way that observer's *generally* over-attribute the causes of other people's behavior to their internal dispositions and personal choices. This tendency elevates the levels of blame and culpability that observers allocate to actors and perpetrators. For a summary of some of this research, see KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* 173-76 (1985). For examples of some of the numerous relevant studies, see David A. Pizarro et al., *Causal Deviance and the Attribution of Moral Responsibility*, 39 *J. EXPERIMENTAL SOC. PSYCHOL.* 653, 658-59 (2003); Arvind K. Sinha & Pawan Kumar, *Antecedents of Crime and Suggested Punishment*, 125 *J. SOC. PSYCHOL.* 485, 487-88 (1985). Of course, jurors essentially operate in precisely this kind of "observer" role, and are called upon to make inferences or attributions about the causes of the behavior they learn that others (i.e., defendants) have engaged in.

154. Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 *LAW & HUM. BEHAV.* 529, 532 (2004).

developmental stages that are recognizable to the jurors—even though his traumatic life, dire circumstances, and ad hoc survival strategies may not be—helps to re-establish him as a member of the human community. Thus, although a capital defendant's social history may well reflect some of the “diverse frailties of humankind,”<sup>155</sup> it also underscores his personhood for the jurors, accurately depicting him as someone whose value and worth extends beyond the worst things he has done and the sum total of the risk factors to which he has been exposed.

Indeed, despite the many risk factors and the numerous traumas many capital defendants have experienced, they are certainly not all helpless and hapless victims throughout their lifetimes. Even though they have eventually succumbed to the substantial criminogenic forces to which they have been subjected, their life narratives also are often filled with meaningful struggles and admirable attempts to overcome the obstacles that have been placed before them. Some of their social histories recount acts of childhood heroism—for example, capital defendants who have sacrificed their physical well-being to spare their siblings from similar fates, taking responsibility for raising brothers and sisters while themselves still children, bearing the brunt of family or neighborhood abuse, or developing other strategies to protect their less able family members. An authentic life narrative includes all facets of the defendant's life story, including these, and social histories certainly do more than merely describe painful experiences and tragic turning points and their disastrous consequences. They may also feature positive and affirming forms of mitigation, including evidence that highlights a defendant's admirable qualities, continuing relationships, and potential future contributions.

And yet, at the same time, it is important to acknowledge that most capital defendants are outliers on many of the dimensions that we know to exacerbate the effects of the risk factors to which they have been exposed. Their social histories often place them at or near these damaging endpoints, not just in terms of the sheer number of risk factors to which they have been exposed, but also the vulnerable age at which their exposure began, the duration of time that they were subjected to the risk factors in their life, the magnitude or severity of the risks themselves, and relative absence of protective factors to buffer them from the harmful consequences that predictably befell them. The fact that capital defendants eventually succumbed to the damaging life

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155. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

experiences to which they were subjected is not surprising, nor is the extreme outcomes to which these extreme social histories ultimately led.

Of course, contextualizing the defendant's behavior in terms of his social history and present circumstances also illustrates and underscores the various ways in which forces the defendant did not choose and over which he had little or no control—deprivation, trauma, and other life-altering risk factors—help to account for the course of his life. That broad view—composed of a social historical and contextual analyses and insights—helps to explain acts that appear to be inexplicable (or ones that the jurors likely could only have understood through a flawed crime master narrative). In this sense, the presentation of such a counter-narrative speaks directly to the belief “long held” in our society, that persons whose actions derive in part from their traumatic social histories, ones that are “attributable to a disadvantaged background,” or to a whole host of other powerful forces and factors that we now understand can shape a personality and redirect a life path, are less culpable as result.<sup>156</sup> And, in precisely this way, mitigating counter-narratives can lead to life rather than death sentences by giving jurors a more comprehensive and valid basis upon which to make all-important judgments about the defendant's ultimate culpability.

Similarly, in the appropriate case, one of the “requisite mitigating functions” of a social historical counter-narrative is to show the jury the various ways in which the defendant's behavior has been shaped and influenced by the immediate social circumstances in which he acted. As I noted earlier, we now know that certain kinds of situations are more likely to elicit, activate, or provoke violent reactions. Indeed, many criminal acts are caused in part by a unique set of predisposing, precipitating, or provocative immediate circumstances—qualities that the circumstances or settings sometimes acquire because defendants have been conditioned by past experience to regard them as such. Yet, this principle—that behavior is heavily influenced by the context in which it occurs—is largely ignored by the crime master narrative, which locates the causes of criminal behavior exclusively inside the perpetrator.<sup>157</sup> A mitigating counter-narrative balances that equation.

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156. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

157. This is why it is incorrect to contend generally that the effects of a criminogenic social history “arguably reduce [the defendant's] culpability, but also increase [the defendant's] future dangerousness.” Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 478 (2007). A capital defendant's future behavior is also dependent in large part on the nature of his future circumstances. Those circumstances invariably change dramatically as a result of his arrest, conviction, and life sentence, typically in ways that significantly reduce the potential for future

It also may limit the future implications of the defendant's past behavior by showing his actions to be partly the product of a special set of circumstances, ones very different from those he is likely to encounter in the years to come. For example, demonstrating that the defendant's violence is restricted to a particular context or situation helps jurors avoid making unwarranted inferences about future dangerousness in settings that are not at all similar. In this way, jurors may conclude that a sentence of life imprisonment is more deserved, both because the influence of powerful situational forces has lessened the defendant's degree of culpability *and* because the jurors are reassured to learn that the defendant will be placed in an environment where his problematic behavior is far less likely to be repeated.

## VII. CONCLUSION

Mitigation trial practice and the legal and professional standards that govern it have evolved significantly over the last several decades. The constitutional doctrines that are now applied to capital mitigation embody a clear legal and psychological rationale as well as a mandate to properly investigate, analyze, and present existing mitigating evidence in death penalty cases. The evolution of these legal and professional standards has come about in part as a result of the increasingly thoughtful and more elaborate judicial attention that has been given to the nature of mitigation—what constitutes a reason for a sentence less than death and why. These current standards and doctrines also contemplate an approach to understanding the lives of capital defendants that is fully consistent with the important scientific perspectives that emerged over essentially the same time period. Capital jurors are entitled to the best psychological insights with which to understand a capital defendant's past and present behavior, and this includes understanding the critical role played by social history and current circumstances in shaping his actions. The Supplementary Guidelines appropriately codify a set of prevailing practices and standards that are designed to insure that this occurs.

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violence or misbehavior. If maximum security prisons are designed to accomplish anything, it is surely that.