

1-1-1995

# Social Context of Capital Murder: Social Histories and the Logic of Mitigation

Craig Haney

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

## Recommended Citation

Craig Haney, Symposium, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol35/iss2/7>

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# THE SOCIAL CONTEXT OF CAPITAL MURDER: SOCIAL HISTORIES AND THE LOGIC OF MITIGATION

**Craig Haney\***

*The death penalty, which really neither provides an example nor assures distributive justice, simply usurps an exorbitant privilege by claiming to punish an always relative culpability by a definitive and irreparable punishment.*

—Albert Camus<sup>1</sup>

*As great as is my compassion for Robert Harris the child, I cannot excuse nor forgive the choice made by Robert Harris the man.*

—California Governor Pete Wilson<sup>2</sup>

## I. INTRODUCTION

The system of death sentencing in the United States is a model of bad faith. It is founded upon several basic myths, one concerning the reality of capital murder—the act that gives rise to the punishment, another concerning capital jurisprudence—the legal procedures by which those defendants who supposedly deserve to die are selected from those who do not, and one concerning the reality of executions—the act that culminates the lethal process. The first myth, what might be called the myth of demonic agency, serves to deny the humanity of the persons who commit capital murder, substituting the heinousness of their crimes for the reality of their personhood. The second one—the myth of “super due process”—implies that the legal procedures under which capital punishment is administered are so extraordinarily fair

---

\* Professor of Psychology, University of California, Santa Cruz; B.A. University of Pennsylvania (1969), M.A. Stanford University (1971), Ph.D. Stanford University (1978), J.D. Stanford Law School (1978).

1. Albert Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion, and Death* 131, 161 (1960).

2. Decision, *In the Matter of the Clemency Request of Robert Alton Harris*, at 3 (Apr. 16, 1992).

and solicitous of the rights of capital defendants that only the truly deserving are finally executed. The last one—the myth of civilized exterminations—saves proponents of capital punishment from the psychologically difficult (for some, insurmountable) task of coming face to face with the acts they sanction. In each instance, these myths function to blur the core realities of capital punishment—the social causes of capital crime, the normative inadequacies of capital trials, and the horror of state-sanctioned executions. Thus, at one end of this lethal process we are led to believe that those whose lives will be taken are less than human, and at the other end that the actions finally taken in our name by the state are other than barbarous. In between, we are reassured that a remarkably elaborate, legally-sophisticated, costly, and time-consuming process is at work to ensure that no mistakes are made and that only the most morally blameworthy are condemned to die. By blurring the core realities of capital punishment, these myths distort the terms of the death penalty debate and undermine its authenticity. They prevent each of us from taking full responsibility for our actions when our society executes one of its citizens. Not one of these myths is true and in no case is the moral integrity of the process of death sentencing served.

This article will concentrate on the first myth, the notion that people who commit capital crimes are less than human.

## II. ONLY DEMONS DESERVE TO DIE: THE SOCIAL CONSTRUCTION OF THE CAPITAL DEFENDANT

At the outset it is worth underscoring the way in which demonizing the perpetrators of violence facilitates their extermination at the hands of the state. Long before they enter a courtroom or a voting booth, American citizens have been bombarded with misleading stereotypes, partial truths that distort the painful realities that plague the lives of capital defendants. Rather than encouraging the public to contemplate what Judge David Bazelon once termed the relationship of crime to “accidents of birth,”<sup>3</sup> or what historian Peter Linebaugh more recently has called the connection of capital pun-

---

3. David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 405 (1976).

ishment to the punishment of capital,<sup>4</sup> our system of death sentencing instead leads us to view capital defendants as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human. The public is given access—in some cases, an amazing amount of access—to only superficial and schematic details of the lives of capital defendants, typically only those “facts” that underscore their deviance and that facilitate their dehumanization. Since we can tolerate eliminating from the human social order only those who by their very nature stand outside its boundaries, the long-term viability of the system of death sentencing *requires* that capital defendants be depicted in this fashion.

The sources and dimensions of these demonized images warrant some discussion. With increasing intensity over the last several decades, politically-inspired media images have systematically misinformed the voting public and the pools of citizens from which criminal juries are drawn. Evidence from a variety of sources supports the notion that the public's fear of crime, its views of the nature of criminality, and corresponding demands for harsh punishment are the products of state and media manipulation. This manipulation involves highly politicized constructions rather than honest reactions to incidence and victimization.<sup>5</sup> The so-called “agenda setting” function of the state and the media have catapulted the death penalty to the forefront of public concern. At the core of this new concern has been a transformation in the media's depiction of criminality. In fact, the mood of the public began to shift from ambivalence about the death penalty to its present strong support at roughly the same time significant changes were taking place in the nature of television crime drama: “In the seventies, the easily understood and clearly identified mobsters and crime czars of the past had been replaced in the public's mind by more amorphous, but equally

---

4. PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY*, at xv (1992).

5. See, e.g., Katherine Beckett, *Setting the Public Agenda: “Street Crime” and Drug Use in American Politics*, 41 SOC. PROBS. 425 (1994); William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177 (1994); George Gerbner, *Violence and Terror in and by the Media*, in *MEDIA CRISIS AND DEMOCRACY: MASS COMMUNICATIONS AND THE DISRUPTION OF THE SOCIAL ORDER* 94 (Raboy & B. Dagenais, eds., 1992); Mark Fishman, *Crime Waves as Ideology*, 25 SOC. PROBS. 531 (1978).

frightening forces. Criminals were often violent madmen and urban delinquents with no stake in society."<sup>6</sup>

Indeed, when a colleague and I systematically analyzed the misinformation that was being disseminated by television crime drama during this period, we found that there was something more to the way these violent madmen and urban delinquents were shown: television criminals were depicted uniformly without context, life connections, social relationships, basic human needs, wants, or hardships. They were, in short, non-people.<sup>7</sup> Instead, television criminals were represented or emblemized by the dastardly deeds they were shown committing (and whatever other incidental but odious traits could be shown in the first few minutes of the drama). Because they had no personal history, no human relationships, and no social context, there was no explanation for what they did except for their own personal evil. As one television historian observed, television drama "rarely invited the viewer to look for problems within himself. Problems came from the evil of other people, and were solved . . . by confining or killing them."<sup>8</sup>

Internal tensions created within the story lines themselves pushed audiences to demand a decisive triumph of good over the evil, one for which they had been prepared to react emotionally. A "just" and satisfying ending permitted nothing less than the clear-cut elimination of the wicked:

And there is no ending more uncompromising than the death of one's antagonist. In the police story, justice is indefinitely suspended, the decisive combat postponed, until that final, cathartic scene in which the hero's previous inability to "speak" the definitive reply to the criminal violence is suddenly cured . . . . In this moment of purifying violence, all the frustrations of the hero's plot are fo-

---

6. HARRY CASTLEMAN & WALTER PODRAZIK, *WATCHING TV: FOUR DECADES OF AMERICAN TELEVISION* 246 (1982).

7. Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, in *READINGS ABOUT THE SOCIAL ANIMAL* 125 (E. Aronson ed., 1977).

8. ERIK BARNOUW, *TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION* 214 (1975). Indeed, just as with the terrorists about which Gerbner wrote, domestic criminals are depicted by the media 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." Gerbner, *supra* note 5.

cused into a gun barrel, all the delays of justice exploded by a single righteous bullet into the body of the criminal.<sup>9</sup>

Conditioned by repeated exposure to these manipulative morality plays, the mass audience has come to regard anything less than these "moments of purifying violence" as a denial of justice. The violence of the death penalty gives cathartic voice to a public frustrated by the real world's inability to deliver the "definitive reply" they have been led by the media to expect.

Newspaper reporting about crime introduces a different but equally problematic bias into the public's "knowledge" about who commits crime and why. Here, crime is important news when it happens—and until, typically, someone has been found upon whom it can be blamed—but rarely thereafter. Thus, because the background of the perpetrators and the social contextual forces that may have contributed to the criminal acts in question are unknown at the time most reporting occurs, newspaper coverage typically omits any analysis of them. Even after persons have been apprehended and charged with a crime, the press typically has little or no direct access to them and rarely shows any significant interest in their background and social history.

Indeed, the broad sociological forces that constitute the larger context of the crime, the background and history of the defendant, and even the deeper psychological issues that help to account for why a particular crime was committed by a specific defendant, are complex questions that often elude even those charged with the responsibility of investigating and prosecuting the crime.<sup>10</sup> By the time most of this information is gathered and becomes publicly accessible in a criminal trial, most cases are no longer "news" and—again, except for the most highly publicized cases—are no longer of interest to the press. Even in the rare case where such information is reported, most members of the public have already well-for-

---

9. Dennis Giles, *A Structural Analysis of the Police Story*, in *AMERICAN TELEVISION GENRES* 67, 81 (Stuart M. Kaminsky & Jeffrey H. Mahan eds., 1985).

10. A number of studies have documented the way in which social and economic contexts are ignored in crime reporting. See e.g., Melissa Barlow et al., *Mobilizing Support for Social Control in a Declining Economy: Exploring Ideologies of Crime Within Crime News*, 41 *CRIME & DELINQ.* 191 (1995); Drew Humphries, *Serious Crime, News Coverage, and Ideology: A Content Analysis of Crime Coverage in a Metropolitan Paper*, 27 *CRIME & DELINQ.* 191 (1981).

mulated views of the defendant, based upon whatever superficial and stereotypical information has been reported about him or her and the negative inferences they could draw from the nature of the crime.<sup>11</sup> Again, meaningful history, context, and explanation are lacking.

Film provides one of the few mediums through which any in-depth study of criminal behavior is even attempted for public consumption. Yet, almost invariably, such films sensationalize the nature of criminality, pander to the worst conceivable popular stereotypes, and are similarly uninformed by any realistic analysis of social context and personal history. Indeed, the American public has learned many of its "deepest" lessons about crime and criminality primarily through watching mythically frightening cinematic figures, figures like Hannibal Lecter—"Hannibal the Cannibal" (the sadistically mad killer, played with Oscar-winning skill by Anthony Hopkins in "Silence of the Lambs"<sup>12</sup>)—they are tricked into believing that people who have committed capital murder relish their deadly work, plot brilliantly, diabolically, and joyfully to perform it, would just as easily polish off a meal of their victim's liver with a little Chianti as give you the time of day.<sup>13</sup>

---

11. For example, one study analyzed newspaper crime reporting in a major city during a one year period and found that over two-thirds of the articles related to only the beginning stages of criminal justice system processing (crime incidents, arrests, charges being lodged against suspects). In addition, the study found that that the commission of the crime itself accounted for the major details contained in the articles, and that post-arrest stages of criminal justice processing were seldom mentioned. Stanford Sherizen, *Social Creation of Crime News: All the News Fitted to Print*, in *DEVIANCE AND MASS MEDIA* 203 (Winick, C. ed., 1978). It also found that "[s]urprisingly, suspects were seldom described in detail. The typical information given about them was their name, age, and address." *Id.* at 218.

12. Thomas Harris' book, *Silence of the Lambs*, was made into a film by Orion Pictures in 1991. THOMAS HARRIS, *SILENCE OF THE LAMBS* (1988).

13. *Id.* There was, of course, another "bad guy" in this movie. Here is how one literary critic described him:

Buffalo Bill is dirty, inarticulate, artisanal (as opposed to artistic), vulgar, faggy, misogynistic, violent, perverted, tattooed, and mutilated; he listens to heavy metal, he drives a van, he lives in the suburbs, he owns a toy poodle named Precious, he is a Vietnam veteran. In short, he is an unformed, shadowy, vaguely working-class, gay composite non-character, a study in suburban Gothic, an appalling stereotype of class and erotic loathsomeness.

Adrienne Donald, *Working for Oneself: Labor and Love in The Silence of the Lambs*, 31 MICH. Q. REV. 346, 354 (1992).

Almost as soon as the lessons of a movie like "Silence of the Lambs" have been lost or forgotten, Hollywood delivers another dose of this abominably bad media criminology. Last year, for example, Oliver Stone taught vast audiences that most capital murderers are "natural born killers."<sup>14</sup> Mickey and Mallory—Stone's gratuitously, mindlessly, unbelievably violent couple—were violent for the sheer aesthetic joy of it, violent as an act self-expression while they carved up bodies and dispensed flesh-tearing gunshots much as an artist might decorate a canvas. For lack of any better, more serviceable lessons, the public was encouraged to believe that *this* is what capital punishment is about: People whose evil is so profound that it defies any attempt at rational explanation. Stone was forced at one point to stencil the word "DEMON" across his psychopathic protagonist's chest to make sure he got the point across.

Indeed, these were people whose frenetic addiction to violence was so inhuman that the film maker was forced numerous times to resort to animated cartoon figures because no real human being could adequately capture the extraordinary and grotesque distortions of body and soul he wished to convey. Yet, the reason a film like this fails as satire is because its distortions fall far too close to the dominant view. Audiences must have an alternative, competing vision of the truth against which to measure Stone's exaggerations. Too few of them did, in large part because of the extensive media mis-education they had received in the past.

The bizarre criminal caricatures of television and film are sometimes supplemented by written works of fiction. Yet, nowadays such writing not only reaches a dramatically smaller audience but does very little more than extend the same distorted mass media images that pander to an identical set of popular stereotypes. For example, one recent novel opened with its main character—a veteran prosecutor—referring to criminal defendants as "vermin" and describing repeat offenders as "rotten pieces of meat viler than when first

---

14. NATURAL BORN KILLERS (Warner Brothers Films 1994). The screenplay was adapted from an original story by Quentin Tarantino, whom one reviewer dubbed "the new guru of gore." Stanley Kauffmann, *Natural Born Killers*, NEW REPUBLIC, Oct. 3, 1994, at 26. In the increasingly politicized atmosphere of conservative criminology, scholarship comes to imitate art. Cf. Paul McNulty, *Natural Born Killers: Preventing the Coming Explosion of Teenage Crime*, 71 POL. REV. 84 (1995).



digested."<sup>15</sup> Not surprisingly, when she speculated about how to handle the crime problem, the death penalty came immediately to mind: "She thought of the guillotine, wondering if it had really been barbaric. They certainly didn't reoffend."<sup>16</sup> The book ended with the calming reassurance of a seasoned police officer telling the main character that her personal act of vengeance—the shotgun murder of a man she believed to have victimized her daughter (the essence of the "mitigating circumstances" from the book's title)—was entirely justified because: "The world doesn't need [them], the Bobby Hernandezes. You stepped on a cockroach. There are thousands more. They're in all the cabinets, under the sinks, crawling under every stinking toilet."<sup>17</sup> So why not kill them?

Other news outlets, including otherwise respectable journals of information and opinion, add another layer of misinformation to the mix. In recent years, for example, *Newsweek* magazine has carried numerous sensationalistic articles about violent crime fashioned from little more than random anecdotes and base stereotypes, virtually all ignoring the backgrounds and social histories of those involved.<sup>18</sup> These

---

15. NANCY ROSENBERG, *MITIGATING CIRCUMSTANCES* 3 (1993). The title provides an interesting twist on a badly misunderstood topic. Indeed, my graduate students and I have learned that, despite its absolute centrality to any attempt at fairly implementating the modern death penalty, "mitigation" is probably the least understood concept in current capital sentencing formulas. See Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & HUM. BEHAV. 411 (1994); Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149 (1994).

16. ROSENBERG, *supra* note 13, at 15.

17. *Id.* at 405.

18. For example, one several page spread, complete with dramatic, color mug shots, was entitled: *The Incurribles: They Rape and Molest. The Defy Treatment. How Can Society Protect Itself?* NEWSWEEK, Jan. 18, 1993, at 48-50. A later cover story showed a teenager running with a rifle, headlined: *Teen Violence: Wild in the Streets*, with an article that began: *Murder and Mayhem, Guns and Gangs: A Teenage Generation Grows Up Dangerous—and Scared.* NEWSWEEK, Aug. 2, 1993, at 40. Another article addressed *The Genetics of Bad Behavior*, its subtitle proclaiming *Science: A Study Links Violence to Heredity.* NEWSWEEK, Nov. 1, 1993, at 57. Another cover story blamed violence on rap music, with the cover itself featuring the picture of an African American rapper, looking much like a mug shot, and asking *When is Rap 2 Violent?* NEWSWEEK, Nov. 29, 1993. These stories are typical of those that appear in other magazines (e.g., a NEW AGE JOURNAL cover story, *Children Without a Conscience: An Inside Look at a Hidden Epidemic and Its Controversial Cure*, Feb. 1993.) They are interspersed in the public's consciousness with sensational headlines about the overwhelming threat that violent crime represents in our society. During just one month last year, the covers of all three national news magazines carried

narrowly misleading messages are not restricted to the glossy magazines that thrive on mass circulation.<sup>19</sup> One recent issue of a respected journal of book reviews carried this off-handed observation, feeding the mystique that the roots of capital violence are simply impossible to fathom:

A problem with psychopathic killers, both for the law and for their biographers, is that they take their baggage with them. They profess innocence or create new excuses right up to the very end so that evidence of their deeds and even the basic facts of their lives are a confusing mass of contradictions. We know them only by the damage they leave behind, as though we were pursuing someone who had left the ransacked room just a moment before we arrived.<sup>20</sup>

---

frightening crime-related messages: Newsweek's January 10, 1994 cover reported on *Growing Up Scared: How Our Kids Are Robbed of Their Childhood* (because the fear of violent crime had become so pervasive in our society); the February 7, 1994 cover of *Time* ran a dramatic rendering of a criminal in a pillory made out of an American flag, under the words *Lock'Em Up And Throw Away the Key, Outrage Over Crime Has America Talking Tough*; and U.S. News & World Report ran its January 17, 1994 cover over what appeared to be three bullet holes that had pierced a glass window, surrounding the words *The Truth About Violent Crime, What You Really Have to Fear*.

19. Because sensationalizing violent crime has become an American industry, there are even glossier outlets than newsmagazines that are more dependent on mass circulation, and their messages are even more sensationalistic and misleading. For example, Time-Life Books used a national mailing to advertise their series on mass and serial murderers. The envelope that hundreds of thousands of potential buyers received depicted a pair of deep set eyes above the red letters: "Have You Ever Looked Into the Eyes of a Killer?" Recipients were further enticed—before they had even opened the envelope—with the promise: "Inside: a unique chance to probe the twisted minds and deeds of America's most violent criminals!" Not to be outdone, Columbia House Video Library's mailer promised recipients that they could "own this one-of-a-kind glimpse into the darkest side of the 20th century" by purchasing "one extraordinary video series [that] explores the shocking true stories of America's most notorious criminals," a series that among other things would answer the question: "What goes on inside the twisted mind of a serial killer?" Suffice it to say that not one of these source materials even begins to grapple honestly or accurately with the social causes of violent crime, concentrating instead only on the sordid and salacious.

20. Thomas Maeder, *Chicago's Jack the Ripper*, N.Y. TIMES BOOK REV. 25 (Nov. 27, 1994) (reviewing HAROLD SCHECHTER, *DEPRAVED: THE SHOCKING TRUE STORY OF AMERICA'S FIRST SERIAL KILLER* (1994)). Even sympathetic and thoughtful reviewers who have some measure of experience with these issues can fall prey to the confounding of free choice, legal responsibility, and just punishment that the media seems to insist upon with respect to very serious cases. Thus, just two pages later in the same journal, Wendy Kaminer noted that although "none of us choose our temperaments or the conditions of birth and childhood," that the point "at which we decide that people assume responsibility for their behavior is arbitrary" (albeit necessary to draw), and that "good judg-

Despite the authoritative tone, it is hard to conceive of a more normatively incorrect account of the lives of capital defendants. The truth is that many of them admit to their wrongdoing and, as a group, they leave remarkably detailed documentary histories as well as numerous percipient witnesses who typically can testify to early traumatic experiences and mistreatment, often ill-fated attempts to overcome these legacies and, in many cases, what can only be interpreted as fairly desperate cries for help. But I get ahead of myself.

As the mood of the public has swung—and been coaxed, nudged, and shoved—to the right on the issue of violent crime, a conservative criminology has grown up to support mindlessly punitive strategies of control. This pseudo-scientific literature feeds the public's already increasing levels of fear. Indeed, one author claimed that serial murder—easily the very rarest form of homicide—was a disease “that had to be identified and diagnosed before it engulfed all of our social institutions.”<sup>21</sup> As one commentator noted, “scholars who continue to investigate social explanations [for crime] are currently on the defensive against new voices calling for a return to a consideration of biology and psychology as the sources of criminal behavior.”<sup>22</sup> Academics are still living in

---

ment requires understanding (which is partly why defendants have lawyers who try to elucidate their sufferings and motivations),” she then criticized the use of such understanding in criminal sentencing because certain defendants are, in her eyes, “beyond the capabilities of the legal system” to heal. Wendy Kaminer, *They Told Him to Kill*, N.Y. TIMES BOOK REV. 27 (Nov. 27, 1994) (reviewing KEITH R. ABLow, *THE STRANGE CASE OF DR. KAPLER: THE DOCTOR WHO BECAME A KILLER* (1994)). More popular treatments of courtroom attempts to elucidate the sufferings and motivations of criminal defendants categorically belittle them, dramatically overstate and inflate the instances in which this is done successfully, and badly garble the nature of the legal issues to which such testimony typically can be deemed relevant. This is true even when they are written by persons who should (and certainly do) know better. Cf. ALAN DER-SHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1994); J. Taylor, *Irresistible Impulses, Why America Has Lost Its Capacity to Convict the Guilty*, 121 *ESQUIRE* 96 (Apr. 1994).

21. J. NORRIS, *SERIAL KILLERS: THE GROWING MENACE* 4 (1988).

22. MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY 3 (1989). Indeed, these new voices “tend to see criminals as fundamentally different from other people—less bound by culture and less rational in the behavior” and to explain high crime rates in certain areas in terms of “the movement of already deviant individuals and families into those localities rather than as the result of economic and social disadvantages affecting particular groups and areas.” *Id.* at 2. In fact, although the voices may be new, their message is quite old and familiar. Cf. Craig Haney, *Criminal Justice & the Nineteenth-Century Paradigm*, 6 L. & HUM. BEHAV. 191 (1982). The anachro-

the political wake of James Q. Wilson's assertion that "[w]icked people exist. Nothing avails except to set them apart from innocent people."<sup>23</sup> Increasingly, the "innocent" members of our society have taken to setting their "wicked" brothers and sisters apart from them by attempting to execute them.

The media's obsession with demonizing the causes of crime is not difficult to explain and tells us a great deal about the underlying dynamic that supports the death penalty itself. The slant in coverage is both economic and psychological in nature. For one, the economic mandate of television broadcasting seems to dictate a false clarity in depictions of crime and punishment. Only story lines in which pure good triumphs over pure evil leave audiences comfortably reassured: "[P]olice dramas offered a sense of security to their audiences. In theory that made them better consumers, which from a sponsor's view is the real purpose of all programming. Consequently, the new crime shows and commercial television were a perfect match."<sup>24</sup> In addition to the economic incentive, demonizing the perpetrators of certain kinds of crimes gets the

---

nistic nature of the message has not prevented it from being vehemently promoted by the media and taken quite seriously by policymakers.

23. JAMES Q. WILSON, *THINKING ABOUT CRIME* 235 (1975). For example, one serious and highly touted book, Jack Katz's *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* (1988), argued that crime represents an attempt on the part of most criminals to "transcend" their environment. I agree and, indeed, much of what I will say about the social histories of capital defendants is consistent with this basic proposition. However, because the author neglects to grapple meaningfully with the causal role of historical and material conditions in producing criminality—by failing to look seriously at the nature of the environment that the perpetrators of crime seek to transcend—the book associates crime with simple hedonism, a "sensual magic" whose primary function seems to be to give perpetrators much personal pleasure. As one reviewer described it, the book "insists that we take seriously the satisfactions that disreputable and depraved acts of predation can bring to those who commit them." John Hagan, *The Pleasures of Predation and Disrepute*, 24 *LAW & SOC'Y REV.* 165, 165 (1990). Yet, grappling seriously with the social histories of violent offenders—something this book did not pretend to do—leads one less in the direction of this romantic albeit selfish vision and more towards mundane issues of physical, psychological, and social survival in a decidedly hostile world.

24. Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 *U. MIAMI L. REV.* 229, 246 (1987). For the related thesis that the economic structure of the media constrains the messages it disseminates and subverts its editorial content to reflect only a homogenized view of reality that is most comforting and attractive to affluent readers and viewers, see C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994). See also Gerbner, *supra* note 5.

rest of society off the hook for attitudes and practices that are widespread but which implicitly promote and condone violence. For example, as one theorist has argued, "in myriad ways, the culture regularly doublethinks a distance between itself and sexual violence, denying the fundamental normalcy of that violence in a male supremacist culture and trying to paint it as the domain of psychopaths and 'monsters' only."<sup>25</sup> And, because the media presents us with the most distorted and extreme possible versions of violence—individual grotesques that bear so little relationship to the rest of us that no one in the audience can identify with them—we are saved the unpleasant task of confronting the potential for violence that we all share.<sup>26</sup>

In addition, it becomes justifiable "to kill those who are monsters or inhuman because of their abominable acts or traits, or those who are 'mere animals' (coons, pigs, rats, lice, etc.) . . ." because they have been excluded "from the universe of morally protected entities."<sup>27</sup> But locating the causes of capital crime exclusively within the offender—whose evil must be distorted, exaggerated, and mythologized—not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself.<sup>28</sup> If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them. On the other hand, social histories—because they connect individual violent behavior to the violence of social conditions—implicate us all in the crime problem.

Yet, as somebody who has studied capital murder for the last 19 years, and extensively examined the backgrounds and

25. Jane Caputi, *The Sexual Politics of Murder*, 3 GENDER & SOC'Y 437, 444 (1989).

26. For an especially thoughtful discussion of this issue, especially in the context of social histories and capital mitigation, see George Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 256 (Schoeman, F. ed., 1987).

27. Robin M. Williams, Jr., *Legitimate and Illegitimate Uses of Violence: A Review of Ideas and Evidence*, in VIOLENCE AND THE POLITICS OF RESEARCH 23, 34 (Willard Gaylin, et al. eds., 1981).

28. As one media critic has put it: "For the most part, the media present myths and symbolic narratives which distort and obscure the realities of social violence, taking agency and responsibility away from the social structure that actually benefits from it and projecting it onto other kinds of symbolic beings—monsters, demons, cabals of futuristic conspirators." Elayne Rapping, *The Uses of Violence*, THE PROGRESSIVE, August 1991, at 36. See also *supra* note 10.

social histories of people accused or convicted of capital crimes, I have a secret to reveal. People like Hannibal Lecter and Mickey and Mallory do not exist. To the extent to which there are persons who manifest even the *slightest* resemblance to these terrifying figures—and even then only because of what they have done, not who they are—they exist in numbers so utterly insignificant as to be literally irrelevant to any meaningful discussion of the death penalty. To be sure, these sensationalized, demonic images have become so much a part of the public's "knowledge" about crime and punishment that, despite their fictional, socially constructed quality, they wield significant power in actual legal decisions. They have garnered an important hold on matters of life and death. Indeed, these are the images that American citizens bring into many courtrooms and voting booths across the country. Unless they are effectively debunked, there is little hope that we will ever develop an effective strategy of crime control in the United States or that any significant measure of fairness and justice will be brought to capital case decisionmaking.

### III. SOCIAL HISTORIES AS CONTEXT

Now I have come to the heart of my thesis. Despite these widespread media mystifications about "natural born killers" and epidemics of the "disease" of murder, any meaningful explanation for capital violence must begin with an examination of the structure of the lives of those who commit it. This examination leads us to conclusions about the causes of crime and the culpability of capital offenders that are very much at odds with the stereotypes created and nourished by the system of capital punishment that prevails in our society. Ironically, capital trials are one of the very few forums available in which to directly confront these stereotypes. Indeed, since the mid-1970s constitutional law has *required* that capital juries—those who in the overwhelming majority of states, including California are charged with the responsibility of choosing between life and death—must consider, among other things, the background and character of the defendant. The social history of the defendant has become the primary

vehicle with which to correct the misinformed and badly skewed vision of the capital jury.<sup>29</sup>

It is important to emphasize that mitigating evidence—including what I will say about the structure of capital defendants' lives and the nature of their social histories—is *not* intended to excuse, justify, or diminish the significance of what they have done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing. Thus, nothing that I will say in the following pages is intended to in any way diminish or otherwise lose sight of the significance and human tragedy of capital violence. Quite the contrary, I do not believe we pay fitting tribute to the victims of these crimes by continuing to ignore their causes. Only if we look honestly at the lives of those who commit capital crimes—and cease to be blinded by the fictionalized, demonized caricatures the media feeds us—can we learn the lessons by which future victims can be spared.<sup>30</sup>

Social histories, in this context, then, are not excuses, they are explanations. An explanation does not necessarily dictate an outcome, not even a penalty trial outcome. Some

---

29. *E.g.*, Dennis Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331 (1979); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Roy Heron, *Defending Life in Tennessee Death Penalty Cases*, 51 TENN. L. REV. 681 (1984). One commentator has summarized the complexity of the "complete background investigation of the inmate's life" that must be performed by investigators and experts in the construction of a social history:

This typically requires counseling with members of the prisoner's family, loved ones, and friends in order to uncover intimate information which could be critical to the litigation. The investigation must cover the inmate's childhood, family life, education, relationships, important experiences, and overall psychological make-up. Crucial witnesses such as childhood friends, teachers, employers, religious advisors, and neighbors may be 'scattered like a diaspora of leaves along the tracks of the defendant's travels'; nevertheless, they must be located and interviewed in order to determine whether they can provide favorable evidence.

Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 895 (1990-91)(footnotes omitted).

30. *Cf.* Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990). West argues that we must learn about the life circumstances of capital defendants, as well as the social realities that created those circumstances, "because the victims of crime deserve it, the communities that fear crime need it, and the intractable problem of violent crime demands it." *Id.* at 176.

explanations lead to life verdicts, and some do not. But no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.<sup>31</sup>

When I began to study the backgrounds and social histories of capital defendants almost 20 years ago, very little was known about the social and psychological forces that helped to shape and influence their life course. It quickly became clear that many capital defendants shared a pattern of early childhood trauma and maltreatment. What was lacking was a theoretical framework with which to understand how the effects of that shared history could be manifested years later. But we now have developed much of that theoretical framework. In part, it reflects a turning away from a century-old bias that located the causes of violent criminality exclusively inside the individuals who engaged in it.<sup>32</sup> There is increased recognition that the roots of violent behavior extend beyond the personality or character structure of those people who perform it, and connect historically to the brutalizing experiences they have commonly shared as well as the immediately precipitating situations in which violence transpires. Capital penalty trials, then, have become unique legal forums in which it is possible to tell the truth about the lives of capital defendants. These are stories that are being told almost nowhere else in the United States. Yet these stories—and what they tell us about the roots of violence—can assist in

---

31. Although they were talking about the "context" of the persons who judge—and I am talking about the context of those who are judged as it is taken into account by those who judge them—Minow and Spelman's definition of the term captures much of the way in which a social history provides an essential context for capital decisionmaking:

Context, in this sense, represents the acknowledgment of the situatedness of human beings who know, argue, justify, judge, and act. Rather than a weakness or a departure from the ideal of distance and impersonality, acknowledging the human situation and the location of a problem in the midst of communities of actual people with views about it is a precondition to honesty in human judgments.

Martha Minow & Elizabeth Spelman, *Symposium on the Renaissance of Pragmatism in American Legal Thought: In Context*, 63 S. CAL. L. REV. 1597, 1649 (1990).

32. Cf. Haney, *supra* note 22.



our understanding of capital murder, provide a framework for comprehending a single, violent social history, and serve as the basis for the development of a responsible social policy of violence prevention in lieu of the mindless punitiveness with which our society has become recently enamored.

Unfortunately, I must also acknowledge that although capital juries, perhaps more than any other decisionmaking body in the legal system, deserve to get the truth about the persons whose fates they decide, and are, in theory, afforded an opportunity to hear the truth that few others in our society ever get, they still too rarely do. In the case that began the modern history of executions in the United States, Gary Gilmore's jury never knew the truth about his life.<sup>33</sup> Although we have come a long, long way in perfecting our analysis and understanding of the social histories that stand behind capital crimes, I also know that Robert Harris was executed in California 15 years *after* Gilmore without his jury—or any other legal decisionmaker for that matter—ever knowing the truth about him. David Mason, the second and most recently executed person in California since the state resumed the business of killing, was also sentenced to death by a jury that never heard the truth about him, and executed before anyone could remedy the fact.

What, then, *is* the truth? Who commits capital murder? If not Hannibal Lechter, then who?

#### A. *"Family Values" and Capital Mitigation*

Amidst the current topical discussion of family values, there is increasing recognition across disciplinary and ideological spectrums that "[d]uring their years of growth and development, children need dependable attachment, protection, guidance, stimulation, nurturance, and ways of coping with adversity."<sup>34</sup> But most capital defendants have lived a lifetime without any of these things. Indeed, we know now that persons accused and convicted of capital murder are very

---

33. For a description of Gilmore's trial, see NORMAN MAILER, *THE EXECUTIONER'S SONG* (1979). For a powerful rendering of what was, in essence, the penalty trial that Gilmore never got, see his brother's historical account of their family. MIKAL GILMORE, *SHOT IN THE HEART* (1994).

34. David Hamburg, *The American Family Transformed*, SOC'Y, Jan.-Feb. 1993, at 60.

often the victims of poverty, and they have frequently been physically abused and chronically neglected as children.<sup>35</sup>

1. *The Effects of Poverty on the Lives of Capital Defendants*

Some capital defendants are the children of profound poverty and deprivation, creations of a society that has, over the last 20 years, systematically turned its back on its poor and on their children. We have been content to let government programs trickle down, when a raging torrent of assistance was needed. We have bought enhanced material wealth for those at the top of the economic order, at the price of desperation, damage, and rage for those at the bottom. We are a society that has learned to "just say no" to its poor and to their young, and some of those young have grown up, still hurting from the victimization inflicted upon them as children, the absence of self-worth, lacking in any sense of their own value, and some of them are still angry, and some are damaged and, yes, some are destructive.

Although we are just beginning to assess the long-term consequences of childhood poverty, researchers have documented the persistent despair that profound economic deprivation can inflict so that, not surprisingly, children who grow up in deprived households are less likely to be hopeful, self-directed, and confident about their future than those who grow up under better economic conditions.<sup>36</sup> One national survey found that welfare status or perceived financial stress was significantly related to children's emotional and behavioral problems—specifically, to higher levels of depression, antisocial behavior, and impulsivity.<sup>37</sup> Unemployment and employment in poor quality jobs are systematically related to

---

35. The widespread poverty of capital defendants is generally accepted and has escaped much academic commentary. However, see Bob Egelko, *One Thing Constant on Death Row: Inmates are Poor*, San Jose Mercury News, Aug. 14, 1994, at 3B; see generally, Marilyn Feldman et al., *Filicial Abuse in the Histories of 15 Condemned Murderers*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 345 (1986); Dorothy O. Lewis et al., *Intrinsic and Environmental Characteristics of Juvenile Murderers*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582 (1988).

36. See generally, Greg J. Duncan, et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296 (1994).

37. David Takeuchi et al., *Economic Distress in the Family and Children's Emotional and Behavioral Problems*, 53 J. MARRIAGE & THE FAM. 1031 (1991).

the arrest rates among juveniles and young adults.<sup>38</sup> And, in the United States, poverty and unemployment are inextricably interrelated to race.<sup>39</sup> African American children, particularly, are more likely to live under conditions of *chronic* poverty.<sup>40</sup>

In recent years, the mechanisms by which the structural variable of poverty translates into significant psychological consequences for children who experience it have received increased attention. We know that poverty forces family members to adapt to scarcity in ways that affect interpersonal relationships and, in turn, child development. One ethnographer studying children growing up in a poor urban neighborhood acknowledged their resourcefulness in dealing with poverty, but then concluded:

Kids' resourcefulness, however, has been no match for the physical toll of poverty and its constant frustrations and humiliations. A number of the children I know came into the world already victimized by prenatal undernourishment and, as a result, by premature birth or a low birthweight. Since the, inconsistent mealtimes, punctuated by feasts on hunger-numbing junk food bought with proceeds from odd jobs or the leftovers from welfare checks, have left many kids alternately drained, hyperactive, and irritable. Frustration at their parents inability to provide and memories of those adults' defensive responses to requests for food and clothes inevitably help engender . . . mistrust and manipulative behavior . . . . Poverty also often engenders a deep sense of personal failure and humiliation.<sup>41</sup>

Among other things, poverty pushes children too rapidly toward adult status and roles and, because interpersonal resources within the family must be devoted more to survival

38. Emilie Anderson Allan & Darrell J. Steffensmeier, *Youth, Underemployment, and Property Crime: Differential Effects of Job Availability and Job Quality on Juvenile and Young Adult Arrest Rates*, 54 AM. SOC. REV. 107 (1989).

39. *E.g.*, one study found that although single year poverty rose among both Black and White children between 1970 and the mid-1980s, the absolute differences remained quite large. The average percentage of poor rose from 10.5% to 12.9% during this period among White children, and a staggering 42.5% to 45.1% among Black children. Greg J. Duncan & Willard Rodgers, *Has Children's Poverty Become More Persistent?*, 56 AM. SOC. REV. 538 (1991).

40. *E.g.*, Mary Jo Bane & David T. Ellwood, *Slipping In and Out of Poverty: The Dynamics of Spells*, 21 J. HUM. RESOURCES 1 (1986).

41. CARL H. NIGHTINGALE, *ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS* 55 (1993).

than to childrearing, younger children tend to grow up "undersocialized."<sup>42</sup> Other researchers have documented the ways in which economic hardship produces psychological distress for both parents and children. This distress undermines parents' ability to provide nurturant care and increases tendencies toward inconsistent discipline which are, correspondingly, associated with increased depression, drug use, and delinquency among their adolescent children.<sup>43</sup>

The linkages from childhood poverty to adult violence are complex but not difficult to comprehend. In addition to the role that poverty plays in increasing despair and undermining self-esteem, in forcing the undersocialization of children, and in interfering with consistent and nurturant parenting—all of which put children at greater risk of delinquent behavior—we know that poverty results in increased levels of frustration, and that chronic poverty can result in chronic frustration. Depending upon the circumstances—particularly, the reasons a person perceives his or her desired goals are blocked—such frustration can produce reliably greater levels of "angry aggression."<sup>44</sup> We also know about the way in which persistent poverty is predictive of severe and recurrent child abuse. That is, "[v]iolence does occur at all income levels but it is more often repeated among the persistently poor."<sup>45</sup>

---

42. E.g., Glen H. Elder & Avshalom Caspi, *Economic Stress in Lives: Developmental Perspectives*, 44 J. SOC. ISSUES 25 (1988).

43. Jacques D. Lempers et al., *Economic Hardship, Parenting, and Distress in Adolescence*, 60 CHILD DEV. 25 (1989). Proposals to criminalize poor parenting underscore the degree to which parental behavior affects subsequent juvenile behavior but also shortsightedly ignores the extent to which poor parenting is often shaped by structural variables over which parents themselves have little control. Cf. S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and against Children*, 139 U. PA. L. REV. 1123 (1991). Like most exclusively criminal justice oriented approaches to social problems, these proposals not only fail to offer much of a solution but also are subject to discriminatory application. E.g., Kathryn Ann Farr, *Fetal Abuse and the Criminalization of Behavior During Pregnancy*, 41 CRIME & DELINQ. 235 (1995).

44. E.g., Leonard Berkowitz, *Frustration-Aggression hypothesis: Examination and Reinterpretation*, 106 PSYCHOL. BULL. 59 (1989) (frustration leads to aggression to the extent to which it produces negative affect); Lin Huff-Corzine, et al., *Deadly Connections: Culture, Poverty, and the Direction of Lethal Violence*, 69 SOC. FORCES 715 (1991) (severe poverty is associated with high rates of lethal violence); Kirk R. Williams, *Economic Sources of Homicide: Reestimating the Effects of Poverty and Inequality*, 49 AM. SOC. REV. 283 (1984) (poverty provides fertile soil for lethal violence).

45. Candace Kruttschnitt et al., *The Economic Environment of Child Abuse*, 41 SOC. PROB. 299, 310 (1994). This fact may help to explain the comparatively

Many of the capital defendants whose social histories I have compiled—and I have chosen randomly from a handful of the hundreds of similar stories that could be told<sup>46</sup>—speak directly about the scars of poverty. One of these defendants lived homeless on the freezing streets of Kansas City, 9 years old with no food, save what he could beg or steal, no one to clothe let alone comfort him. When the bitter cold of a mid-western winter became unbearable, he took refuge on the top of an office building, where he lived for months inside a heating vent that protruded from the roof, the steam providing the only warmth he could find. Another capital defendant and his brothers and sisters were turned in to police by neighbors who saw them scrounging around in garbage cans, looking for food. They were, in the words of the social worker who eventually brought them in, “alone, dirty, hungry, in ragged clothing” and routing in trash cans looking for scraps of food. Another capital defendant and his siblings also foraged for food in garbage cans and when they were finally brought in off the streets they suffered from severe malnutrition and had distended bellies; it took the foster mother who received them the better part of a day to wash the lice and matting out of their hair. One Native American defendant whose life I studied was found crying and starving and abandoned on the reservation by a mother who simply was too poor to care for him. He was so malnourished that doctors did not expect him to live. When we searched for the mother

---

higher rates of child maltreatment reported in African American families. For example:

Black children suffer disproportionately from virtually every form of stress affecting full and healthy development. Too many black children live in conditions of poverty that deprive them of necessary medical care, adequate housing, food, and clothing. Yet none of these stressors is more threatening to the healthy development of black children and to the stability of their families than intrafamilial child abuse.

Ruby F. Lassiter, *Child Rearing in Black Families: Child-Abusing Discipline?*, in *VIOLENCE IN BLACK FAMILIES* 39 (Robert L. Hampton ed., 1987). See also, Jessica H. Daniel, et al., *Child Abuse and Accidents in Black Families: A Controlled Comparative Study*, 53 *AM. J. ORTHOPSYCHIATRY* 645 (1983); Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioeconomic Development*, 61 *CHILD DEV.* 311 (1990).

46. In this and remaining sections of this article, I have included descriptions and direct quotes taken from a small but what I believe to be representative sample of the extensive number of documents I have reviewed and interviews I have conducted in the course of compiling the social histories of numerous capital defendants.

of another capital defendant, to talk to her about her son's early childhood development, we were directed to the park in San Francisco where she lived, where she had always lived, while her son was trying to grow up and become a responsible adult.<sup>47</sup>

Of course, there is more. Developmental psychologists tell us that children need love and stability in order to prosper. It is a cliché, but it is true. Yet, capital defendants have usually had neither of these things. The structure of their social histories is pervaded by chaos and instability. Their families move, their parents separate and divorce, there are new adults in their lives (sometimes so many that they can't keep them straight or remember their names), they move because of poverty, they move because of their parents chronic instability and interpersonal conflicts, they move because of the restlessness and whimsy of those adults who are in charge of them, and they move because their families have such a tenuous grasp on harsh labor markets that they are buffeted around from job to job at the slightest economic shift. One capital defendant whose life I studied grew up all over South Central Los Angeles. Literally. He moved 41 separate times before he had graduated from high school, all within a fairly narrow corridor of Los Angeles, but just far enough away each time to enter unfamiliar territory, and usually to change schools. Each chaotic move represents a life uprooted, friendships broken, relationships that can not be pursued or cemented, schoolmates and teachers left behind, classes that will never be finished, school lessons never completely learned.

Indeed, for many of these defendants there was nothing in their lives that was stable, nothing that lasted long enough for them to become invested in, nothing in the world around them that stood still long enough to help them structure their lives or identities from it. One recent review of a book about child development used an African proverb for its title: "it

---

47. Homelessness, we now know, is more than a tragic social problem; it has profound psychological consequences for those children who chronically endure it. Janice M. Molnar et al., *Constantly Compromised: The Impact of Homelessness on Children*, 46 J. Soc. Issues 109 (1990). Many of these children grow up feeling that they will never fit in, they are insecure and deeply frightened by what they perceive as an unpredictable and hostile world around them. *Id.*

takes an entire village to raise a child,"<sup>48</sup> underscoring the degree to which children are dependent upon the broader context in which they grow up or, as the reviewers put it, "children must be seen in relation to their family, and families must be seen in relation to their community."<sup>49</sup> But many of the children whose social histories end in capital violence either do not live long enough in a single community to establish anything approaching familial ties, or they grow up in communities where social disorganization and the press of poverty precludes the other villagers from taking any role in their upbringing.

## 2. *Childhood Abandonment and Neglect*

Who else commits capital murder? If not Hannibal Lechter, then who? In addition to abject poverty and deprivation and instability, there are other predictable components and patterns to the social histories that define these lives. Many of them are the children of abandonment and neglect. Again, my subjects' lives tell a story about the origins of violent crime that anyone who wants to understand this social problem must know about. For example, one capital defendant's mother was a prostitute and a junkie who regularly got arrested, leaving her 5 children—all under the age of 9—alone for days at a time, sometimes weeks at a time, to fend for themselves. Neighbors often complained that the kids cried and screamed at night, but they had learned to hide in a backroom closet when the police came looking for them. When the authorities finally did catch up with the defendant and his siblings and came to split the family into different foster care placements, his oldest sister protested to the social workers, "you can't do this to *my* children." She was 9 years old. Another capital defendant's 9 year old sister was also so accustomed to taking care of her 2 and 1/2 year old brother that she referred to him as "my baby" to the welfare workers who interviewed her. Another defendant's mother abandoned him as a 13 year old to the streets of small city, where he lived for a year or so, mostly on the sidewalks and out of the back of a car. When authorities finally contacted his father—a man from whom the boy had earlier escaped when he

---

48. Richard M. Lerner & Marvin H. McKinney, *It Takes an Entire Village to Raise a Child*, 38 CONTEMP. PSYCHOL. 783, 783 (1993).

49. *Id.*

tried to sexually abuse him—he told them that he never believed the child was actually his and didn't want to have anything to do with him anyway. In the case of the man whose death marked the resumption of executions in California after a 25 year hiatus, Robert Harris's mother drove off with the rest of his family leaving 14 year-old Robert all alone in the field where they had been working. She continued driving halfway across the country and Robert didn't see her or his father again for 5 years. When he was incarcerated a year later, federal authorities described him, simply, as a "homeless waif." Indeed, Robert Harris' long life of incarceration began simply because his mother refused to take him back; the others who were arrested with him for car theft were all released to the custody of their parents.

### 3. *Child Abuse and Maltreatment in the Lives of Capital Defendants*

As profoundly as neglect has permeated the early lives of capital defendants, for some neglect alone would be more benign than the treatment many received at the hands of their parents.<sup>50</sup> Child abuse or maltreatment has been defined variously as "the degree to which a parent uses negative, inappropriate control strategies with his or her child,"<sup>51</sup> or "acts of omission or commission by a parent or guardian that are judged by a mixture of community values and professional expertise to be inappropriate and damaging."<sup>52</sup> Whichever definition is employed, we know that abuse can be destructive of character and, depending upon its nature and severity, can produce profoundly disabling long-term effects in those who are its victims.<sup>53</sup> Indeed, we know that: "Inappropriate parental behavior may produce physical, emotional, or sexual

---

50. I do not mean to imply that child neglect does not have its own independently and profoundly harmful consequences. It does. *E.g.*, see Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49 (1993). Unfortunately, child neglect also occurs in conjunction with physical abuse in a high percentage of cases, and both co-occur with unusual frequency in the lives of capital defendants.

51. DAVID A. WOLFE, *CHILD ABUSE: IMPLICATIONS FOR CHILD DEVELOPMENT AND PSYCHOPATHOLOGY* 25 (1987).

52. James Garbarino, *The Incidence of and Prevalence of Child Maltreatment*, in 11 CRIME & JUSTICE: A REVIEW OF RESEARCH 219, 220 (Lloyd Ohlin & Michael Tonry, eds., 1989).

53. *E.g.*, LEONARD SHENGOLD, *SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION* (1989).



damage. Although we cannot always accurately predict what effects maltreatment will produce, victims most often suffer multiple damage, and individual susceptibilities to harm differ."<sup>54</sup>

Although it is difficult to predict precisely which of the harmful effects of maltreatment any particular child will manifest, studies show that juveniles who have become involved in delinquency "have endured child abuse and neglect at far greater rates than estimates for the population as a whole and for the low-income groups in particular."<sup>55</sup> We certainly know that abused children are much more likely to engage in violence as adults, giving rise to what some have called a "cycle of violence."<sup>56</sup> Early efforts to uncover the mechanisms by which this pattern was psychologically encoded focused on "identification with aggressor." That is, at least some abused children were found to exhibit poor impulse control and more readily express aggressive impulses in large part because they had learned to model the behavior of the powerful parent who mistreated them. Others have emphasized the developmental role of aggression in protecting the self against a hostile, seemingly psychologically life-threatening environment of the sort that is created by an abusive parent. As one study documenting the neurological, cognitive and socio-emotional consequences of physical abuse noted:

Parental maltreatment of children is essentially an interpersonal phenomenon and, as such, it would be expected to have major effects on children's social behavior and their understanding of social relationships. Given the child's exposure to parental violence as a legitimate means of interacting with other people, it is not surprising to find that the behavioral effect most well documented by both direct observation and parent and teacher ratings is that abused children are more aggressive, showing more

---

54. Garbarino, *supra* note 52, at 221.

55. *Id.* at 251.

56. Kenneth A. Dodge et al., *Mechanisms in the Cycle of Violence*, 250 *SCI.* 1678 (1990); Cathy S. Widom, *Child Abuse, Neglect, and Adult Behavior: Research Design and Findings on Criminality, Violence, and Child Abuse*, 59 *AM. J. ORTHOPSYCHIATRY* 355 (1989); Cathy S. Widom, *The Cycle of Violence*, 244 *SCI.* 160 (1989).

hostile, externalizing and negative social behavior with other people than nonabused children.<sup>57</sup>

These mechanisms help to explain the intergenerational transmission of violence and abuse that characterizes the lives of so many capital defendants—poor parenting and poor psychosocial functioning tends to replicate itself in the adults who were once its childhood victims.<sup>58</sup>

Again, I choose several examples from the many stories that could be told. Robert Harris was physically abused even before he was born—his drunken father's kicks to his pregnant mother's stomach precipitated his birth. This trauma was simply a prelude to the years of abuse he would endure as a young child. Another capital defendant whose social history I compiled was beaten so badly by his parents that, like many abused children, he refused to change his clothes for gym class so that the other students would not see the bruises that covered his body. One of his teachers told us, some forty years after having him in her class, that she was

---

57. Suzanne Salzinger et al., *Risk for Physical Child Abuse and the Personal Consequences for its Victims*, 18 CRIM. JUST. & BEHAV. 64, 74 (1991)(citations omitted).

58. E.g., Joan McCord, *Aggression in Two Generations*, in AGGRESSIVE BEHAVIOR: CURRENT PERSPECTIVES 241 (L. Rowell Huesmann, ed., 1994) (aggression is transmitted intergenerationally in part because aggressive fathers create the social environments conducive to aggressive behavior). See also, Joan McCord, *The Cycle of Crime and Socialization Practices*, 82 J. CRIM. L. & CRIMINOLOGY 211 (1991); Beverly Rivera & Cathy S. Widom, *Childhood Victimization and Violent Offending*, 5 VIOL. & VICTIMS 19 (1992) (neglected and abused African American male children have a higher likelihood of arrests for delinquency, adult criminality, and violent criminal behavior); Michael Rutter et al., *Parenting in Two Generations: Looking Backwards and Looking Forwards*, in FAMILIES AT RISK 60 (Nicola Madge, ed., 1983). See also, Pamela Lattimore et al., *Predicting Rearrest for Violence Among Serious Youthful Offenders*, 32 J. RES. CRIME & DELINQ. 54 (1995) (finding that "[e]ven among a relatively homogeneous group of youthful offenders, the majority of whom had substantial criminal records, evidence of family violence, parental criminality, and parental neglect or poor supervision significantly increased parolees' risk of rearrest for violent crimes."); Richard M. Tolman & Larry W. Bennett, *A Review of Quantitative Research on Men Who Batter*, 5 J. INTERPERSONAL VIOLENCE 87 (1990); Derek Truscott, *Intergenerational Transmission of Violent Behavior in Adolescent Males*, 18 AGGRESSIVE BEHAV. 327 (1992). Truscott concluded:

The present findings support the hypothesis that violence is transmitted intergenerationally from parents to their adolescent offspring and that psychological mechanisms are, at least in part, a feature of this transmission. In the present all-male sample, violent adolescent behavior was found to be associated with being physically and verbally aggressed against by the father.

still haunted by the look of terror and fear in his eyes. Another defendant was beaten nearly every day of his young life with a switch from a tree or with a belt, was regularly locked in his room, where his parents had removed the handles from the door and installed several locks on the outside of the door and boarded up all the windows. They would leave him in there for days at a time, forcing him to urinate and defecate on the bedroom floor, something for which he would then be punished. He cried and begged to be let out and would become so claustrophobic that he almost asphyxiated several times from the panic attacks that he experienced. The punishment only escalated. As he got older his parents made him do push ups while they held a hunting knife under his chest, as motivation to keep him from faltering. Another defendant's father used to bind his children by the wrists and hang them on a hook, sometimes naked, repeatedly whip them and, if he was really angry, pour alcohol in their wounds, while they were still hanging, like slaughtered cattle, in the basement of their house.

Research by developmental psychologists has indicated that witnessing abuse can sometimes be as psychologically damaging as direct victimization itself.<sup>59</sup> Indeed, many capital defendants come from chronically abusive homes in which their mothers and other siblings have been physically attacked in their presence, sometimes despite their childish attempts at intervention. Their social histories reflect this trauma as well. One defendant's father broke his step-mother's neck by jumping up and down on her with heavy

---

59. *Eg.*, Mindy Rosenberg, *Children of Battered Women: The Effects of Witnessing Violence on Their Social Problem-Solving Abilities*, 10 *BEH. THERAPIST* 85 (1987); Mindy Rosenberg & R. Giberson, *The Child Witness to Family Violence*, in *CASE STUDIES IN FAMILY VIOLENCE* 231 (Robert Ammerman & Michel Hersen, eds., 1991). *See also*, Marsha Klienman, *Children—Witnesses to, and Victims of, Domestic Violence*, *N.J. PSYCHOL.* 13 (Fall 1987). *See also*, David Wolfe et al., *A Multivariate Investigation of Children's Adjustment to Family Violence*, in *FAMILY ABUSE AND ITS CONSEQUENCES* 228 (Gerald Hotaling et al. 1988), who found that boys appeared to be more vulnerable to the effects of marital discord and, although the researchers could draw no simple causal connections between witnessing abuse and subsequent adjustment problems, they concluded that "[b]esides inappropriate modeling of conflict resolution, these children are affected by their mothers' diminished effectiveness as a parent, negative changes in family status, and related factors that result from family violence." *Id.* at 239. *See also*, McCord, *supra* note 58 (finding that exposure to parental conflict and aggression was one of the "instigating conditions" to adult criminality).

steel tipped workboots; another time he struck a glancing blow to her head with an axe, a blow that was intended to split her head down the middle but missed its mark when she turned away at the last moment. The father of another defendant beat his stepmother so badly and so regularly that she had a permanent bald spot on the back of her head from receiving so many blows. These painful traumas, and the twisted lessons they implied, were not lost on the psyches of the children who witnessed them.

*These* are the deep roots of violence in our society, the sins of the parents being visited not only on the child but, with uncanny regularity, on the future victims of that child grown up. As I said earlier, when many of us began doing this work 15 or more years ago, looking carefully at the social histories of capital defendants, we were struck, all of us, by the frequency with which our clients were brutalized as children. The patterns were striking, but it took years to carefully document them. Now, there is little question about the causal connections. Study after study has confirmed the cycle of violence, a cycle in which many, many capital defendants have become enmeshed. We know that there is sometimes a tragic symmetry to the social dynamics of violence—sometimes the abuse is reenacted at more or less the same stage in life as it was experienced. More often there is what researchers call an “isomorphism” to the relationship between childhood abuse and adult behavior. That is, the form of violence that is manifested when the child turns from victim to victimizer is the same kind that was inflicted by the original abuser, so that persons who were physically abused as children are most likely to be physically violent as adults, those who were sexually abused are most likely to be sexually violent, and so on.<sup>60</sup> Sometimes the lives of capital defendants provide chilling illustrations of these patterns. One defendant whose social history was filled with such maltreatment went into a semi-psychotic state in the course of his trial when he heard his 9 year old stepdaughter testify about how he—the defend-

---

60. 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 (1992). Cf. Arlene McCormack et al., *An Exploration of Incest in the Childhood Development of Serial Rapists*, 7 J. FAM. VIOLENCE 219, 226 (1992) (“The data suggest that early sexual abuse is responded to by reenactment behavior as an attempt to manage the confusion and stress generated by the sexual activities.”)

ant—had sexually abused her, and he realized that she was being questioned by the very same prosecutor who, in the very same courtroom, had questioned *him* some 12 years earlier about how his own father had done the same things to him as a 9 year old boy.

### B. *Violence and the Costs of Institutional Failure*

Childhood victimization has begun to receive a considerable amount of concerned attention in professional circles as well as from the media and many segments of the American public.<sup>61</sup> However, little such concern is extended to children once they have gotten “in trouble,” despite the fact that they are often the very same children. Indeed, there is evidence that American society cares so little about the plight of wards inside our juvenile justice institutions that we fail to adequately count them, let alone to adequately provide for their needs.<sup>62</sup>

Studies continue to document the absence of adequate and appropriate services for children who suffer from serious emotional problems.<sup>63</sup> Many such children have been inadequately or badly treated by juvenile justice institutions that lack the resources, time, and expertise with which to reverse years of pre-existing trauma and set a life gone astray back on course.<sup>64</sup> Indeed, one such study of California juvenile institutions reached the “specific and urgent” recommendation that “our present system for dealing with youthful offenders needs drastic overhauling,” in large part because of the extent to which it “return[s] to freedom young men and women who have been brutalized by their institutional experience.”<sup>65</sup>

---

61. *E.g.*, David Finkelhor & Jennifer Dziuba-Leatherman, *Victimization of Children*, 49 AM. PSYCHOLOGIST 173 (1994).

62. Paul Lerman, *Counting Youth in Trouble in Institutions: Bringing the United States Up to Date*, 37 CRIME & DELINQ. 465 (1991).

63. *See, e.g.*, Robert Cohen et al., *Relinquishing Custody as a Requisite for Receiving Services for Children with Serious Emotional Disorders: A Review*, 17 L. & HUM. BEHAV. 121 (1993).

64. *See, e.g.*, Michael B. Greene, *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth*, 39 CRIME & DELINQ. 106 (1993); Edward Zigler et al., *Early Childhood Intervention: A Promising Preventative for Juvenile Delinquency*, 47 AM. PSYCHOLOGIST 997 (1992).

65. MICHAEL LERNER, *BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY* 47 (1988). *See also*, DWIGHT E. ABBOTT, *I CRIED, YOU DIDN'T LISTEN: A SURVIVOR'S EXPOSE OF THE CALIFORNIA YOUTH AUTHORITY* (1991); BARRY KRISBERG & JAMES AUSTIN, *REINVENTING JUVENILE JUSTICE* (1993).

The fact led to the conclusion that such institutions actually "promote crime rather than deter it, and increase the criminal population at great expense to the rest of us."<sup>66</sup>

One of the greatest expenses we incur is through the human and economic price we pay for capital crime, many of whose perpetrators bear the scars of early, ineffective, brutalizing institutionalization at the hands of one or another of these facilities. Indeed, institutional failure is another theme that is prominent in the lives of capital defendants—ranging from the lack of desperately needed intervention to intervention that is ill-conceived, poorly and inadequately funded and staffed, to intervention that is terribly destructive of the human spirit. The literature on the failure of our adult prison system is clear; the impact of this failure on the problem of worsening violence in our society has yet to be adequately told.<sup>67</sup> However, nowhere is the damage of institutional failure clearer and more painful to contemplate than in the case of children who are confined by agencies of social control, only to have that experience worsen, sometimes irreparably, the very problems their incarceration was designed to remedy. The rhetoric of an increasingly fashionable conservative criminology likes to conceptualize all criminal behavior as the product of "free choice." However inadequate this rhetoric proves for understanding adult criminality, it does not even begin to explain most juvenile crime. And here is where the costs of destructive juvenile incarceration seem most consistent—in the way in which it seems to force children to commit to a value system, a way of being that is angry and rejecting and which places individualistic survival above all else. Too often in the lives of capital

---

66. LERNER, *supra* note 62, at 47; NIGHTINGALE, *supra* note 41, at 95. Nightingale has written about the way in which institutions of social control have begun to play increasingly larger roles in the lives of inner-city children, their harshness reinforcing the lessons of what he euphemistically refers to as the "forceful parenting" many have already received at home. *Id.* Further: "[B]y equating child punishment with jails and being prepared to employ the police, parents demonstrated just how closely their philosophies resonated with those of mainstream institutions of law and order." *Id.* The potentially destructive effects of normatively ineffective, stigmatizing juvenile justice system processing has been recognized for some time. Cf. EDWIN SCHUR, *RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* (1973).

67. See, e.g., NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE?* (1993); Craig Haney, *Confronting the Crisis in the Eighth Amendment: Conditions of Confinement and the Psychology of Imprisonment*, 2 PSYCH., L., & PUBLIC POL'Y (forthcoming).

defendants juvenile institutionalization provides a kind of "turning point," an experience that helps them resolve the internal struggle over who to be—indeed, over who they can be—in a profoundly negative way.

The individual stories are so many in number and so consistent in pattern that, again, I will pick only a few examples. One capital defendant whose social history I compiled went to Napa State Hospital at age 11 for a psychiatric evaluation. Over the next 5 years he lived in 14 separate juvenile institutions and groups homes, ostensibly because he needed treatment, but receiving none. At the end of the next 5 year period, still never having received treatment, he was on trial for capital murder. Another defendant spent time in a juvenile psychiatric unit in which children were beaten, electroshocked, and chained to their beds and other furniture—conditions so terrible that they were scandalized in a national magazine. From there he went to the Preston School of Industry, along with recommendations that he receive treatment for his psychiatric problems. Unfortunately, there was not a single person on staff at Preston at the time he was there who could have provided treatment and, perforce, no one who attempted to do so. He got to work long hours in this "school of industry," got to march in its quasi-military regime, and even got to be sexually assaulted, but he did not get treated for problems that everyone agreed were the direct causes of his juvenile crimes. Eventually he got into a lot more trouble. An awful lot more. When Robert Harris was incarcerated as a juvenile in the federal prison system, doing 5 years for car theft, I counted some 17 separate psychological evaluations done of him over just a two year period, yet no evidence that staff did anything to provide the in-depth and continuous treatment that their own evaluations indicated he needed. A parole classification study done when Robert was 17 years old described him as "a totally inadequate, institutionalized, emotionally disturbed individual" who would need "community-based psychotherapy if he hopes to remain in the free community." He never got it. Finally, at age 19, the Federal Bureau of Prisons noted: "This young man's future is indeed gloomy. In all probability he will spend most of his life in institutions. His life is without direction, and he has no definite plans for the future." And then they released him. Just released him.

I should note, if only in passing, that institutional failure extends with a vengeance to adult correctional institutions. Thus, another pattern is as clear and consistent in the lives of capital defendants as the failure of juvenile justice institutions to provide the help these clients, as children, were identified as needing—the ever escalating level of violence that tends to accompany their stays in adult correctional institutions. This observation has led in some circles to the claim that, over the long run, increasingly high levels of imprisonment will worsen rather than reduce the problem of violent crime. In addition to the direct effects of institutionalization on persons who will subsequently be released, high levels of incarceration in some communities have disastrous effects on family formation, maintenance, and survival, intensifying many of the problems of poverty and instability I described earlier, and indirectly contributing to increases in criminality.<sup>68</sup> Moreover, the causes of escalating violence following incarceration are all the more apparent for those defendants whose prison sentences are accompanied by an acknowledgment of pre-existing psychiatric disorders and recommendations for treatment.<sup>69</sup>

One capital defendant whose life I studied had the psychological roots of his juvenile crimes identified early and clearly in his young life. In the wake of his first serious adult offense, numerous expert psychological and psychiatric reports assembled for a federal presentencing report (including those prepared by the prosecution and prison system) were unanimous in concluding that the defendant's crime stemmed from deep-seated psychological problems rather than anti-social tendencies. Indeed, the presentence report itself urged a reduced sentence and placement in some kind of mental

---

68. Cf. Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987) (high crime rates in urban African American communities stem from structural linkages between unemployment, economic deprivation, and family disruption).

69. I do not mean to suggest that the lack of available psychological services is the only or even the most serious component to the institutional failure that plagues the lives of capital defendants. Prisons often fail by not providing meaningful vocational or educational training, so that the scars of poverty cannot be overcome. They fail because they create brutally hostile environments where the damage of earlier mistreatment worsens. They can teach criminalizing habit of mind and behavior that, along with the persistent stigma of past incarceration, may disable prisoners once they are released. The lives of capital defendants too often bear the marks of all these institutional failures.



health program where treatment could occur. The judge ignored these recommendations and sentenced him for the maximum term to a high security federal prison where there was no treatment program whatsoever available. He emerged 9 years and not one therapeutic hour later. The only contact he'd had with a mental health professional during this period was when a visiting psychiatrist briefly evaluated his suitability for parole and noted, among other things, that the defendant had been reading psychology books from the prison library in a desperate attempt to get help for his problems. Despite the psychiatric issues that had been so clearly identified when he was sentenced, no psychiatric contact or counseling of any kind was required as a condition of his parole. His next crime—committed in less than a year and more violent in nature—was followed by almost exactly the same scenario. This time however the numerous psychiatric and psychological reports were met by a sympathetic judge who, at the time of sentencing, noted on the record that the defendant did not seem criminally-oriented and was “worth the state’s time and money” to help. His explicit sentencing recommendation to this effect was ignored by the Department of Corrections who sent him instead to Folsom Prison where no psychiatric services were available. The next time his psychological problems were discussed in a courtroom was in the penalty phase of his capital trial.<sup>70</sup>

---

70. The lack of mental health services for prisoners with psychological problems continues to plague the prison system on a widespread basis. For a recent description of the shocking inadequacies in mental health services available to psychologically troubled and psychiatrically disturbed California prisoners, see *Coleman v. Wilson*, CIV S-90-0520 (E.D. Cal. 1994); and a related discussion in Donald Specter, *Cruel and Unusual Punishment of the Mentally Ill in California's Prisons: A Case Study of a Class Action Suit*, 21 *SOCIAL JUSTICE* 109 (1994). The federal district court, in *Coleman*, reached the conclusion that the California Department of Corrections (CDC) does not have any of the essential components of a minimally adequate mental health treatment system. The magistrate described the CDC as running a “constitutionally inadequate system which cannot and does not meet the serious medical needs of mentally ill inmates incarcerated in California’s prisons.” *Id.* at 29-30. Indeed, the court concluded that this inadequacy “causes terrible suffering for thousands of inmates afflicted with severe mental illness.” *Id.* at 30. What the judge could not determine—indeed, none of us can determine it with real specificity—is the effect of this inadequacy on future rates of violent crime.

### C. *Race, Capital Crime, and Community*

Many capital defendants, far too many of them, are the children of racism and discrimination. It comes as no surprise to anyone who has studied the death penalty that an unusually high percentage of capital clients are persons of Color. Unless you are prepared to defend the notion that violence is genetically transmitted, you must accept the fact that the race-based inequalities that ravage our society take their toll on its minority citizens, and that the same institutions that help create and preserve these inequalities inflict undue punishment, including the punishment of death, disproportionately upon them. It is the double whammy of racial injustice. Persons of Color are consigned to the most crime-prone sectors of our society, and treated most harshly by our institutions of justice.

Our prisons, our lockup units, and finally, our death rows, are running the most effective affirmative action programs in the country, and the only ones where White Americans never complain that the minority occupants really aren't qualified for the positions they hold. Because they are differentially targeted for criminal justice system scrutiny, young minority men are more likely to experience the criminalizing effects of penal incarceration.<sup>71</sup> The racism that pervades the criminal justice system—racism that plagues the administration of the death penalty with much the same vengeance that it did in pre-*Furman* years despite elaborate reforms that the Rehnquist Court continues to assure us are working well<sup>72</sup>—is so transparent in the racially disproportionate numbers of

---

71. Cf. Chambliss, *supra* note 5, at 183 ("Young African-American and Latino men are defined [by the police] as a criminal group, arrested for minor offenses over and over again, and given criminal records which justify long prison sentences.").

72. *Furman v. Georgia*, 408 U.S. 238 (1972). The case found existing death penalty statutes unconstitutional as applied because of the unbridled discretion they provided capital juries which resulted, inter alia, in racially discriminatory patterns of death sentencing. Compare *McCleskey v. Kemp*, 481 U.S. 279 (1987) with David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal Empirical Analysis* (1990); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); SAMUEL R. GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & THE L. 179 (1992); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

minorities whose lives are ground up by this system, that I sometimes wonder whether the anti-crime obsession that has gripped our country is not simply an acceptable way to accomplish the covert ends of institutional racism without saying that's what we're doing. "Legal lynchings" is what our friends in the South call the system of capital punishment,<sup>73</sup> and with good reason, but it is a term that applies in some ways, to death sentencing throughout the country.

The nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical "profile." The social ecology of crime is shaped by the neighborhoods in which its perpetrators are raised. The demographic mix of these communities determines the nature of the class and race conflict to which participants become accustomed. Criminal opportunities and social and economic pressures to succumb vary by neighborhood and family. Indeed, recently published autobiographical and ethnographic accounts of the structural disadvantages of race and class underscore many of the difficulties capital defendants have confronted.<sup>74</sup> These new urban ethnographies depict the influence of sociopolitical and economic forces as they shape the choices of individual actors, choices that are often less a product of rational or conscious decision-making processes than attempts to struggle with "[f]eelings of sheer humiliation and embarrassment, disappointment and frustration, grief and loneliness, and fear and anxiety (especially concerning suspicion, rejection, and abandonment)."<sup>75</sup> The emphasis is on something lost sight of in most legal analyses of criminal behavior: context.

---

73. See Stephen Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 Mo. L. Rev. 849 (1992).

74. E.g., GEOFFREY CANADA, *FIST STICK KNIFE GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* (1995); DANIEL COYLE, *HARDBALL: A SEASON IN THE PROJECTS* (1993); ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991); DARCY FREY, *THE LAST SHOT: CITY STREETS, BASKETBALL DREAMS* (1994); JERROLD LADD, *OUT OF THE MADNESS: FROM THE PROJECTS TO A LIFE OF HOPE* (1994); NATHEN McCALL, *MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA* (1994); LUIS S. RODRIGUEZ, *ALWAYS RUNNING, LA VIDA LOCA: GANG DAYS IN L.A.* (1993); BRENT STAPLES, *PARALLEL TIME: GROWING UP IN BLACK AND WHITE* (1994); SULLIVAN, *supra* note 22.

75. NIGHTINGALE, *supra* note 41, at 40.

Indeed, after years of intellectual neglect, social scientists have begun to focus increased attention on the lives of young African Americans, Latinos, and the realities of surviving the mean streets that two decades of economic and political neglect have produced.<sup>76</sup> Indeed, one study concluded that children who grow up in urban housing projects are exposed to traumatic violence comparable to children living in "war zones" and may suffer the same kinds of psychological sequelae and need the same kinds of treatment as these children.<sup>77</sup> Notwithstanding progress made in quelling overt expressions of racism in this society, significant numbers of children of Color "still encounter expressions of racial hatred, live in racially segregated neighborhoods, and endure the suspicion widespread among many people in positions of authority."<sup>78</sup>

Race is, of course, connected to the other aspects of the social histories of capital defendants I have touched on. The racial dimension to poverty in the United States in some ways deepens the stigma, renders it more chronic.<sup>79</sup> In other ways, it seems to heighten the sense of injustice, the right-

76. See, e.g., ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND SOCIAL CHANGE IN AN URBAN COMMUNITY* (1990); Elijah Anderson, *The Code of the Streets: How the Inner-City Environment Fosters a Need for Respect and a Self-Image Based on Violence*, *THE ATLANTIC MONTHLY*, May 1994, at 81; JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* (1995); NIGHTINGALE, *supra* note 41; Patricia Zavella, *Living on the Edge: Everyday Lives of Poor Chicano/Mexicano Families*, in *MAPPING MULTICULTURALISM?* (Avery Gordon & Christopher Newfield, eds., 1995). For a useful summary of some of this literature and a discussion of some community-based interventions that appear to reduce the harm, see Michael B. Greene, *Chronic Exposure to Violence and Poverty: Interventions that Work for Youth*, 39 *CRIME & DELINQ.* 106 (1993).

77. Nancy F. Dubrow & James Garbarino, *Living in the War Zone: Mothers and Young Children in a Public Housing Development*, 68 *CHILD W.* 3 (1989). Nothing I have said about the social and economic barriers that have been created, especially, in the inner cities of our country is intended to imply that there is an absence of talent and energy in these places that could be harnessed for positive change. For a powerful look at these possibilities, see TERRY M. WILLIAMS ET AL., *THE UPTOWN KIDS: STRUGGLE AND HOPE IN THE PROJECTS* (1994).

78. NIGHTINGALE, *supra* note 41, at 10. See also sources cited *supra* notes 74, 76.

79. E.g., Sampson, *supra* note 68. See also, James W. Balkwell, *Ethnic Inequality and the Rate of Homicide*, 69 *SOC. FORCES* 53 (1990)(ethnic inequality is a strong predictor of homicide); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 *AM. SOC. REV.* 114 (1982)(racial and economic inequality contribute to levels of violent crime).

eous outrage that develops in what one commentator has termed a "subculture of exasperation."<sup>80</sup> But when you look at the role that race has played in the lives of many capital defendants, you also must confront the fact that it functions to do more than just make these other conditions worse. You must confront the fact that racism, institutional racism, exposes persons of Color to experiences that *no one else has in this society*, experiences that leave an indelible mark.

One capital defendant whose life I studied was sent to a home in Minnesota for Native American children whose parents were judged by authorities to be unfit to care for them. There, he and his siblings were beaten regularly with a radiator brush and referred to as "savages" by the staff. Another capital defendant was a 16 year old teenager when he was arrested for stealing a bicycle. Because he was African American, a juvenile court judge was able to determine—without benefit of I.Q. testing—that he was mentally defective. The judge sentenced him, absent the formality of a trial, to an *indeterminate* term in the Pennsylvania Institution for Defective Delinquents, a place whose inmate population was comprised almost entirely of African American children, some of whom had grown into *old age* awaiting their release. My client was placed among these men as a teenager, was beaten, raped, and brutalized—the fate of a young boy among many institutionalized, desperate men—and became resigned to living out the rest of his life in this nightmarish prison. A constitutional challenge to the defective delinquent statute later resulted in these men being released, and hundreds of them walked suddenly back into free society after having been incarcerated over utterly trivial offenses for 10, 20 or more years. Newspapers dubbed them the "forgotten men," but no one could doubt that they had been so completely forgotten for so long a time in large part because of the color of their skin.

Similarly, another capital defendant whose social history I compiled was just 14 years old when he was sent to the Alabama Industrial School for Negro Children, a place that was, in the opinion of the Fifth Circuit that eventually declared it unconstitutional, an almost unbelievably harsh and brutaliz-

---

80. William B. Harvey, *Homicide Among Black Adults: Life in the Subculture of Exasperation*, in *HOMICIDE AMONG BLACK AMERICANS* 153 (Darnell R. Hawkins, ed., 1986).

ing environment.<sup>81</sup> Children were forced to work long hours in the agricultural fields—there was scarcely any attempt to cover up the transparent, modern-day slavery that prevailed—and the children were beaten around the head and on the back and legs with broom and mop handles, fan belts and fists. There were no social workers, no counselors, no meaningful educational programs and, to be sure, no comparison to juvenile institutions being run for the White children of Alabama. When we searched for people who had served time with the defendant in this school for Negro children, virtually *every one* who could be located was in the Alabama Department of Corrections,<sup>82</sup> and were institutionalized shells or bitterly angry men whose lives had been irreparably damaged because of the color of their skin. And, like the defendant whose life I studied, some of them had found their way to death row.

#### IV. MEDIATING THE LEGACIES OF SOCIAL HISTORY IN ADULTHOOD

The consequences of early childhood maltreatment reverberate through the life course of a capital defendant. One of the consistent patterns that emerges is the way in which early deprivation, neglect, and abuse predispose capital defendants to socioemotional problems that many must cope with as adolescents and young adults, being unable to find nurturant or sustaining relationships in which to develop their adult identities. As the victims of these early years of mistreatment mature, their adaptations become increasingly problematic and difficult to excuse. But this difficulty stems from the increasingly destructive nature of the adaptation, not its lack of connection to earlier deprivation and abuse. I know of no psychological principle that disconnects past from present within a single social history. Thus, as a child matures, both the residue of early developmental history *and* current circumstances play important roles in subsequent development. The legacy of early treatment persists, such that

---

81. *Crum v. State Training Sch. for Girls*, 413 F.2d 1348 (5th Cir. 1969).

82. Most of them had been incarcerated more or less continuously in the Alabama prison system in various institutions that had been found unconstitutional in *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *Newman v. Alabama*, 559 F. 2d 283 (5th Cir. 1977), *Locke v. Wheat*, 350 So. 2d 451 (Sup.Ct. Ala. 1977), and *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979).

"children with early internal models of available care and self-worth are more responsive to positive features of the environment and more resilient to stress."<sup>83</sup> Not only does past experience shape present decisionmaking, but it can lead in some cases to the development of self-fulfilling interactional patterns and styles. Thus, some adolescents react to the memory of past mistreatment and rejection by becoming aggressive or emotionally distant which, in turn, leads to further mistreatment and rejection and the possibility of ever-escalating misbehavior and disconnection from others.

#### A. *The Adaptation of Drug and Alcohol Abuse*

In other cases the adaptations provide short term relief from the pain of one's past or the intolerable press of immediate circumstances, but incur long-term destructive consequences later. Thus, many victims of early abuse and neglect turn to drugs and alcohol as a form of "self-medicating" to reduce their emotional pain. Indeed, often their own parents' drug and alcohol abuse provides them with their most available and salient model for resolving interpersonal conflict and reducing intolerable stress or depression.<sup>84</sup> We know that alcohol and drug use, especially, function as major risk factors for subsequent criminality, including violence.<sup>85</sup>

The connection between the drug use and crime is underscored by a substantial statistical overlap: there is a high

---

83. L. Alan Sroufe et al., *The Fate of Early Experience Following Developmental Change: Longitudinal Approaches to Individual Adaptation in Childhood*, 61 CHILD DEV. 1363, 1371 (1990).

84. There is another way in which the legacy of alcohol abuse can be transmitted across generations. Although the link between maternal alcohol abuse during pregnancy and retardation has been long established, research now suggests that heavy abuse of alcohol during pregnancy appears to be responsible for a disorder that has come to be known as "fetal alcohol syndrome." E.g., Ernest Abel & Robert Sokol, *Incidence of Fetal Alcohol Syndrome and Economic Impact of FAS-Related Anomalies*, 19 DRUG & ALCOHOL DEPENDENCE 51 (1987); James Overholser, *Fetal Alcohol Syndrome: A Review of the Disorder*, 20 J. CONTEMP. PSYCHOTHERAPY 163 (1990); LeAdelle Phelps & Jo-Anne Grabowski, *Fetal Alcohol Syndrome: Diagnostic Features and Psychoeducational Risk Factors*, 7 SCHOOL PSYCH. QUARTERLY 112-128 (1992).

85. E.g., 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 (1982); Ron Langevin et al., *Brain Damage, Diagnosis, and Substance Abuse among Violent Offenders*, 5 BEHAV. SCI. & THE L. 77 (1987); Robert Parker, *Bringing "Booze" Back In: The Relationship Between Alcohol and Homicide*, 32 J. RES. CRIME & DELINQ. 3 (1995).

level of drug use among people who commit crimes and people who use drugs also commit a large number of crimes.<sup>86</sup> As two researchers have recently summarized: "Although drug use does not appear to initiate a criminal career, a large volume of research clearly indicates that frequency of drug use has a strong impact on the extent, direction, and duration of that (criminal) career."<sup>87</sup> Street drug use places users in a subculture where criminal behavior is expected, accepted, and respected. Using drugs and engaging in criminal behavior become well-integrated within the lifestyle of the street drug user.<sup>88</sup> For certain drugs, the connection between use and violent crime has additional dimensions. Psychopharmacologically, cocaine use produces long periods of sleeplessness and increased paranoia, heightening the probability of aggressive behavior. Economically, cocaine use requires access to fairly large amounts of money, which some are able to obtain only through criminal, sometimes violent, activity. And the subculture of drug use itself exposes drug users to patterns of violent behavior that, because of their drug use, they are more likely to be integrated into (including the access to, familiarity with, and experience in using lethal weapons).

### B. *The Adaptation of Gang Membership*

Gang membership represents another adaptation taken in adolescence and young adulthood by some capital defendants to overcome the legacy of their early developmental problems and the pressures of the communities in which they live.<sup>89</sup> Early studies of urban Latino gangs noted that mem-

---

86. *E.g.*, Lana Harrison & Joseph Gfroerer, *The Intersection of Drug Use and Criminal Behavior: Results from the National Household Survey on Drug Abuse*, 38 CRIME & DELINQ. 422 (1992).

87. Duane C. McBride & Clyde B. McCoy, *The Drugs-Crime Relationship: An Analytical Framework*, 73 PRISON J. 257, 268 (1994).

88. *See, e.g.*, RICHARD C. STEPHENS, *THE STREET ADDICT ROLE* (1991); TERRY M. WILLIAMS, *THE COCAINE KIDS: THE INSIDE STORY OF A TEENAGE DRUG RING* (1989).

89. Often it occurs in conjunction with, and serves to facilitate, alcohol and drug use. *See, e.g.*, SULLIVAN, *supra* note 22 and WILLIAMS, *supra* note 88. However, research challenges the media stereotype that violent youth gangs are primarily responsible for drug distribution and sales in the inner city. *See, e.g.*, Jeffrey Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 CRIMINOLOGY 633 (1989); Jeffrey Fagan & Ko-Lin Chin, *Initiation Into Crack and Cocaine: A Tale of Two Epidemics*, 16 CONTEMP. DRUG PROB. 579 (1989); Malcom W. Klein et al., "Crack," *Street Gangs*,



bership could be explained in part by the "absence of a secure cultural (and personal) identity," brought about by the marginality of the groups from which their members originated.<sup>90</sup> Luis Rodríguez, who has written eloquently about the pull of gang life, has noted that for many young people "a gang embraces who they are, gives them the initiatory community they seek and the incipient authority they need to eventually control their lives."<sup>91</sup> Indeed, they turn to gangs in large part because "[t]hese are things other institutions, including schools and families, often fail to provide."<sup>92</sup> The reliance upon gangs to fulfill needs and provide opportunities that are otherwise denied them is by no means restricted to Latinos. For example, certain Vietnamese gangs:

started as orphaned street youth, reestablished ties with the only social network available to them, other isolated youths whom they had known on the streets of places like Cholon [a Chinese suburb of Saigon] and in the [refugee] camps. Those current gang members who were not orphaned in the camps, nevertheless, have lacked adult supervision in the United States because of the economic pressures on second wave refugee families, where each of the resident adult members of traditional extended family households must work, often moonlighting at more than one job in order to survive.<sup>93</sup>

---

*and Violence*, 29 CRIMINOLOGY 623 (1993). It also challenges the myth that a substantial proportion of homicides are attributable to gang involvement in narcotics trafficking. *E.g.*, Patrick Meehan & Patrick O'Carroll, *Gangs, Drugs, and Homicide in Los Angeles*, 146 AM. J. DISEASES OF CHILDREN 683 (1992).

90. James Diego Vigil, *Chicano Gangs: One Response to Mexican Urban Adaptation in the Los Angeles Area*, 12 URB. ANTHROPOLOGY 45, 47 (1983). Indeed, the multiple marginality Vigil describes applies to many capital defendants who must cope with "the effects of barrio life, low socioeconomic status, culture conflict, and impaired development of self-esteem which arise in a complex of ecological, socioeconomic, cultural, and psychological factors." *Id.* at 46.

91. Luis J. Rodríguez, *Throwaway Kids: Turning Youth Gangs Around*, 259 THE NATION, Nov. 21, 1994, at 605. *See also* Paul Cromwell et al., *Youth Gangs: A 1990s Perspective*, 43 JUV. & FAM. CT. J. 25 (1992); JOHN HAGEDORN, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN RUSTBELT CITY* (1988); Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 SOC. PROB. 1 (1985); JAMES DIEGO VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* (1988).

92. Rodríguez, *supra* note 91, at 605.

93. Michael Smith & Bernadette Tarallo, *Who Are the "Good Guys"? The Social Construction of the Vietnamese "Other,"* in *THE BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS* 20 (Michael Smith & Joel Feagin, eds., 1995).

One recent comparative study of gangs has challenged the notion that persons join gangs out of some common, pathological set of motives, and argued instead that "the vast majority of gang members of 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."<sup>94</sup> Yet, virtually all gang members "come from low income neighborhoods"<sup>95</sup> and rely upon gangs in their quest for the good life in large part because other avenues for this quest have been foreclosed.<sup>96</sup> The violence in which they often engage is an extension of their prior socialization:

. . . [G]ang members grew up and live in communities in which the socioeconomic environment has produced a great deal of aggressive and violent behavior; thus a given gang member's display of aggressive traits or his involvement in violent exchanges is not necessarily pathological; rather it is appropriate behavior in an environment whose socioeconomic conditions are pathological.<sup>97</sup>

Although the motivation for gang membership may be perfectly reasonable under the pathological circumstances—economic, interpersonal, or otherwise—that potential mem-

---

94. MARTIN S. JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* 312 (1991).

95. *Id.* at 23. Another study's description of the economic situation faced by potential gang members in several Midwestern cities states:

An economically and socially marginal youth who has dropped out of or been expelled from school, and/or is without job skills, is in deep trouble . . . . To make matters worse, the military, a traditionally available alternative career path for the poor, is increasingly inaccessible due to the higher quality of applicants generated by an economy with relatively few attractive entry-level positions for unskilled workers.

C. Ronald Huff, *Youth Gangs and Public Policy*, 35 *CRIME & DELINQ.* 524, 527 (1989).

96. Note that, especially "[f]or high risk youths . . . both unemployment and dropping out of the labor force because of an absence of legitimate opportunities relate to crime; illegitimate activities at this stage offer far more visible sources of income than do legitimate ones." Michelle Sviridoff & James Thompson, *Links between Employment and Crime: A Qualitative Study of Rikers Island Releasees*, 29 *CRIME & DELINQ.* 195, 211. Cf. Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 *HARV. L. REV.* 1693, 1693-94 (1994) ("Gangs are a product of urban decay. Many young people who grow up without economic opportunity and in struggling families and communities turn to gangs for a sense of belonging, a source of respect and support. . . . The desperation of inner-city life fosters gang membership, and the violence and crime that accompany gang activity in turn further urban decline.")

97. JANKOWSKI, *supra* note 94, at 312.

bers confront, many of those who join face increased exposure to crime and violence.<sup>98</sup> In addition, the allegation of gang membership is another way in which capital defendants can be demonized in media accounts of their crimes. Although my focus on this issue is not intended to suggest that a significant proportion of capital violence is gang-related—it is not—the way in which gang violence is handled in our society, on the one hand, and by the criminal justice system, on the other, is illustrative of processes that are at work in many capital cases. Gang membership, as an adaptation to past treatment and present circumstances, may facilitate criminal behavior. But this facilitation is situational or contextual—it can be transcended. Yet once someone is caught within the label—seen and treated by the criminal justice system as a gang member—the characterization acquires permanence. It is used to describe who he is—for all time and for purposes of sentencing—not who he has been for what is often the brief period of time during which he was a gang member. Indeed, as one gang researcher has noted, the media has reinforced a “folkloric myth” concerning gangs in our society, one in which gangs themselves have been given: “demonic qualities. For gangs ultimately are depicted as not only physically threatening average, law-abiding citizens, but also as undermining the morals and values of the society as a whole. They are carriers of moral disease within the social body.”<sup>99</sup>

The popular stereotype of gang membership also contains “essentialist” implications that feed this demonic myth—that gang members either are somehow intrinsically different than other young people, or that once someone has “joined” a gang they are permanently transformed, as though something essential has been altered within them that cannot be changed. This essentialism plays directly into mythologies about capital crime that are used to fuel the machinery of the death penalty, as if “gang violence” is somehow worse than other kinds, in part, because of what it implies about its perpetrators. Yet, these notions are quite mistaken. To the contrary, what we know about youth gangs suggests both

---

98. *E.g.*, Finn-Aage Esbensen & David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 *CRIMINOLOGY* 565 (1993); Cheryl L. Maxson et al., *Differences Between Gang and Nongang Homicides*, 23 *CRIMINOLOGY* 209 (1985).

99. JANKOWSKI, *supra* note 94, at 308.

that they "drift" in and out of criminal activity, and that young people "drift" in and out of gangs.<sup>100</sup> Gang membership seems to facilitate criminality, in part, through "the normative support it provides for delinquent behavior generate[s] a context in which such behavior flourishes."<sup>101</sup> But there is nothing to suggest that gang members are delinquent types beforehand, or that gang membership creates permanent transformations in persons who belong.

#### V. CHOICE, VARIATION, AND MITIGATION

I want to begin discussion of a critical issue concerning the relationship of social history to capital mitigation by quoting from the transcript of a hearing on a motion to modify a sentence of death following a lengthy California penalty trial. The trial judge was an independent, compassionate jurist who, among other things, once had the courage to declare the mainline housing units at San Quentin prison cruel and unusual. At the motion to modify the death sentence, she appeared to be much affected by the issues at hand. After hearing arguments of counsel, she began her ruling by noting that this was "certainly . . . the most difficult decision that a judge, and this judge, has ever faced." She said, "I have fleeting moments of wondering why I allowed myself to take the case. But when I became a judge, I agreed to apply the law fairly and justly whether I agreed with the law or not. This happens to be a law I disagree with which makes it probably a little harder for me than for other judges I'm sure. But . . . I must follow the law. It's my duty."

She turned to the facts of the case. It was an aggravated case, to be sure. A correctional officer had been killed. Although the defendant was alleged to have played only a minor role in the actual murder, there were allegations that he

---

100. See, e.g., Esbensen & Huizinga, *supra* note 98; Terrence P. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RESEARCH IN CRIME & DELINQ. 55 (1993). Cf. Sullivan, *supra* note 22, who found that cliques and gangs were "quasi-familial groupings that served to protect their members from outsiders." *Id.* at 110. He concluded that such a group "was by no means a specialized criminal organization; it was rather a multi-functional, quasi-familial grouping in the context of which these youths discussed school, jobs, their families, and girlfriends or played handball, raced pigeons, and engaged in many other activities besides economic crimes." *Id.* at 125.

101. Thornberry, et al., *supra* note 100, at 79.

had been involved in its planning as well as in a previous prison murder, and his prior record included numerous robberies. But the mitigation case was exceptionally strong. Indeed, the judge said, "I don't know that anyone could have presented a more appealing case in mitigation for [the client]. You've turned [him] for me into a human being, and I'm sure for the jury. [Based on] my own knowledge of people in this background, I know few who have had a world like [your client] even with the defendants who have come before me. He was born into hell." It *was* a hell: a prostitute, drug-addicted mother, abandoned for days at a time as a 3, 4, 5 year old, exposure to violence while still a young child, then taken by the state from his family and separated from his siblings in a succession of foster homes, followed by several chronically under-staffed, largely ineffectual juvenile institutions.

The judge noted, as the attorneys had made clear in their case in mitigation, that "he did prove briefly in the proper environment at the Youth Authority that he could refrain for a while from violent behavior. But once he was on his own, he couldn't . . . [Then] he entered a prison system which, as [the attorney] said and as the experts testified, was another hell." It, too, incidentally, was a hell—the defendant had been incarcerated in San Quentin's notorious "lockup" units from age 18 on, in what were arguably the worst conditions of confinement, in what may have been the worst prison in the California system, at the worst time in its history.<sup>102</sup> The judge recognized it all: born into hell, eventually taken by the state and subsequently placed into another kind of hell as a young adult. Twice doomed would surely mean once spared, would it not? She concluded: "So, I do understand to a large degree the best that one who was raised white middle-class can understand, I understand . . . what created [this client] and what turned him into a violent person. *But* [and here is the point to my story], she concluded: *fortunately everybody . . . who grew up in that miserable environment did not turn into a violent criminal.*" Motion to modify denied. Sentence of death imposed.

This example illustrates the confusion that continues to surround our understanding of the proper role of social histories in establishing capital mitigation. Specifically, it demon-

---

102. See, e.g., *Toussaint v. Rushen*, 553 F. Supp. 1365, 1370-78 (N.D.Cal. 1983).

strates the way in which a simple and seemingly irrefutable assertion that "not everybody" exposed to one or another set of destructive background factors engaged in violent crime is used to trivialize and dismiss what, in virtually any other context, we would all recognize as critically important to the decision at hand. The detailed, specific connections I have labored to present in the preceding pages notwithstanding, most people recognize intuitively that background experiences can shape and influence who we are and what we are capable of becoming. Indeed, whatever effort our society now devotes to the prevention and prosecution of child abuse derives in large part out of the recognition that such early traumatic experiences can tragically alter the life course of those who are victimized by them.<sup>103</sup> This is true despite the fact that "not everybody" who experiences these painfully traumatic events will be affected in the *same* way.

In any general discussion of child abuse as an important social problem, acknowledging the variations in its damaging effects does not prevent us from continuing to recognize both the magnitude of this social problem and the importance of attempting to reduce as much as possible the number of children and who suffer it, whatever its long-term consequence for any one person. Neither would most people argue with the proposition that a much, much higher percentage of people who have suffered abuse or maltreatment as children, or have experienced poverty and racism, or have grown up in a domestic or urban "war zone," or were victimized by stays in uncaring or brutalizing juvenile or adult institutions will also manifest serious problems including increased rates of criminality as adults. But when we are encouraged to take these things into account in assessing blameworthiness, and especially in considering the possibility that criminal punishment should be moderated in light of these critically important past experiences, clear thinking succumbs to fear and denial. In the next few pages I address some of the psychological considerations that are typically ignored in the face of this uncritical emotional response.

---

103. Cf. DANIEL J. SONKIN, DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE (1987); Humm, *supra* note 43.

A. *The Myth of Equally Autonomous "Free Choice"*

From a psychological perspective, variation in human behavior does not necessarily imply individual choice. Reacting differently from someone else to what appear to be the same set of circumstances is not the same thing as choosing freely. Someone who behaves in a more socially desirable way has not necessarily "chosen" more nobly, nor are their "choices" necessarily more praiseworthy than those of someone whose behavior falls below that standard. Apparent choices, noble or otherwise, are not made unencumbered by past history and present circumstances. As one social scientist who studied the contextual causes of crime put it:

. . . [O]ur data reveal that many of the youths portrayed here have "chosen" unemployment, crime, prosecution, and incarceration. The choices are not those of equal competitors in an open market with equal opportunities to invest in human capital and advance in the labor market. Neither are they the choices of deranged, isolated individuals. Rather, they are the collective choices of those in similar structural situations who refuse to accept the impossible contradictions of these situations.<sup>104</sup>

Particularly in the case of powerful risk factors and traumatic life experiences like chronic poverty and childhood maltreatment, different kinds of behavior—behavior that "not everybody" engages in the same way—must be understood as variation in adapting, coping, and struggling to survive a set of circumstances that few if any have "chosen" to endure.

Sometimes the differences in the ways in which people adapt to these background experiences and present circumstances have an identifiable pattern to them. We know, for example, that the different paths people's lives take often reflect differences in structural opportunities that are based on status characteristics like gender or age (over which individuals also have no choice or conscious control). As one urban ethnographer wrote in illustration: "The advantage of greater avenues for psychic expression is no doubt reflected in inner-city African-American girls' much higher rates of high-school graduation and employment. But a slightly wider array of options to express pain does not by any means always reduce the power of girls' painful memories sufficiently to avoid in-

---

104. SULLIVAN, *supra* note 22, at 247.

auspicious outcomes."<sup>105</sup> People take whatever opportunities for survival that they perceive to be available—but the limited number of options that actually are available to them (as opposed to some hypothetical long list of possibilities that seem viable to persons who have never been snared in the maze of pain and despair with which many capital defendants have been forced to cope) is not something over which they freely choose or easily can alter and control.

### B. *Critical Variations in Experience Through Similar Social Histories*

Individual lives are a complex amalgam of experience, and the effects that certain events or different kinds of treatment have on particular children vary, among other things, as a function of when in the life of the child they occur and how they are interpreted by the child and the family.<sup>106</sup> For example, families themselves go through "life cycles" in which, at each stage, the family is presented with a different developmental challenges or crises.<sup>107</sup> These family stages interact with the developmental stages of children to produce very different experiences for children within the same family. For example, children born to young families are often more likely to experience economic hardship, those who mature during periods of marital disharmony are more likely to experience their family as unstable, and so on. Correspondingly, changes in the nature of family life interact with developmental periods or stages, such that certain kinds of exper-

---

105. NIGHTINGALE, *supra* note 41, at 46.

106. One developmental psychologist applied what has been called the "myth of developmental uniformity" to the trauma of child abuse: "[T]he 'same' type of maltreatment experienced at different points in development is not likely to produce uniform outcomes . . . . Because children at various developmental levels have qualitatively different tools for interpreting events, the 'same' event is likely to produce qualitatively distinct meanings for children at different ages." Stephen R. Shirk, *The Interpersonal Legacy of Physical Abuse of Children*, in ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 57, 58-59 (Martha B. Straus, ed., 1987).

107. *E.g.*, JOAN ALDOUS, FAMILY CAREERS: DEVELOPMENTAL CHANGE IN FAMILIES (1978); EVELYN DUVALL, MARRIAGE AND FAMILY DEVELOPMENT (1977). For discussions of the way in which the life cycles of families interact with race, see Johnella Banks, *A Developmental Perspective on Black Family Violence*, in VIOLENCE IN THE BLACK FAMILY: CORRELATES AND CONSEQUENCES 249 (Robert L. Hampton, ed., 1987); Robert L. Hampton, *Family Life Cycle, Economic Well-Being, and Marital Disruption in Black Families*, 5 CAL. SOCIOLOGIST 16 (1982).



iences differentially impact children who are at different ages within the same family.

For example, one researcher has found that the lives of those children he studied were not only shaped by their settings but also by the timing of their encounters with economic and historical forces. Indeed, there were "noteworthy variations in developmental stage at the point of economic strain . . . and in the social timetable of age-related options or roles."<sup>108</sup> Moreover, the effects of economic hardship appeared to be indirect—mediated by the way in which the hardship affected the behavior of the parents—and were also a function of the age, gender and other characteristics of the children within a family.<sup>109</sup> Indeed, the work of developmental contextualists underscores the degree to which processes of psychological change or influence cannot be the same for all persons: "[T]he import of any set of contextual conditions for psychosocial behavior and development can only be understood by specifying the context's relations to the specific, developmental features of the organisms within it."<sup>110</sup>

Equally important is the fact that our *perceptions* of what options or paths are available to us are often more important than whatever, in fact, exists. Although we can only chose to pursue options that we perceive to be available, these perceptions are themselves often blurred by the very circumstances

---

108. Glen H. Elder, *Social History and Life Experience*, in PRESENT AND PAST IN MIDDLE LIFE 3 (Dorothy Eichorn et al., eds., 1981). In this case, the younger cohort of the boys Elder studied were most affected by economic deprivation: "[T]hese boys as adolescents ranked well below the nondeprived on goal orientation, self-competence, social skills, and assertiveness, a difference . . . that is linked to paternal impairment, hostile relations with father, and inconsistent discipline." *Id.* at 19. See also, GLEN H. ELDER, *CHILDREN OF THE GREAT DEPRESSION* (1974).

109. Glen H. Elder et al., *Linking Family Hardship to Children's Lives*, 56 CHILD DEV. 361 (1985).

110. Richard Lerner & Marjorie Kauffman, *The Concept of Development in Contextualism*, 5 DEVELOPMENTAL REV. 309, 325 (1985). See also, Richard Lerner & Jacqueline Lerner, *Organismic and Social Contextual Bases of Development: The Sample Case of Early Adolescence*, in CHILD DEVELOPMENT TODAY AND TOMORROW 69 (William Damon, ed. 1989) (emphasizing the individuality of adolescent development and its responsiveness to the demands of social context). The theoretical perspective of life-span developmental psychology acknowledges a similar point: "Depending on the life conditions and experiences of a given individual, his or her developmental course can take many forms." Paul Baltes, *Theoretical Propositions of Life-Span Developmental Psychology: On the Dynamics Between Growth and Decline*, 23 DEVELOPMENTAL PSYCH. 611, 613 (1987).

our actions seem to be shaped by. For example, one of the pernicious effects of poverty is the way in which it erodes its victims' perceptions of what they might achieve. Similarly, child abuse is so invidious because it attacks the sense of self, and undermines a child's perception of what is possible to create or attain in the world. Discrimination is destructive in part because it teaches some people to limit themselves, to close off alternatives in life before they are ever pursued. Because people cannot always "choose" their perceptions any more freely than they can always choose their courses of action, the ability to see a range of viable alternatives can be affected by the very same set of dire circumstances one confronts and struggles to survive or overcome. Thus, the risk factors that help to shape the lives of capital defendants also help to shape their perceptions of what might be. Bad choices, in this context, often reflect an inability to perceive options that are otherwise available.<sup>111</sup>

In a related vein, many survival strategies or short-term adaptations to a damaging and traumatic past, along with attempts to adjust to maladaptive situations in the present, have future long-term consequences associated with them that few people can anticipate and fewer still can be said to "choose freely" to incur. Indeed, as one group of researchers put it: "[T]he evidence suggests that there are continuities in development that stem from the opening up or closing down of further opportunities—a train of events in which there are lasting sequelae as a result of a cumulative chain of indirect effects."<sup>112</sup> But these patterns typically are identifiable and predictable only to those who have the luxury of viewing them outside the circumstances in which they are generated. That is, choices that feel compelled or dictated at an early age carry consequences that compel a whole different set of choices later on, but in a way that simply is not, and can not be, apparent at the time. Thus, the pathway from petty crimes and misbehavior to street gangs to extensive drug in-

---

111. Ironically, those most able to perceive avenues of opportunity and exit within the psychologically embattled states of mind I have described often are precisely those whose somewhat more favorable socialization histories—ones in which, for example, the abuse they experienced was either somewhat less profound or less seemingly sanctioned—not only gave them the ability to perceive alternatives but also the optimism and self-confidence with which to take advantage of them.

112. Rutter et al., *supra* note 58, at 94.

volvement to Youth Authority socialization to serious adult criminality to long-term Department of Corrections warehousing (to pick just one of these all-too-common patterns) is apparent in retrospect and at a safe, clear distance in a way it could not be to many persons—sometimes with their very survival seemingly at stake—when they first begin to cope with the range of risk factors I have outlined above.<sup>113</sup> Yet, each one of these adaptations, seemingly reasonable, perhaps the only obvious ones at the time they were made, delimit choices at later stages in one's life, and make each subsequent move towards serious criminality and violence more likely.<sup>114</sup>

What about those who have managed to escape these bleak situations and survive seemingly unscathed? These are the counterexamples who make the "not everybody" formulation viable. Fortunately, there usually seem to be more of them than those whose lives have taken a turn towards crime and violence. Yet, sometimes overcoming truly overwhelming disadvantages, barriers or structural handicaps is rare enough that it is the occasion for admiration and praise (and,

---

113. Many of the causal linkages identified by researchers are so complex that it is simply unrealistic to expect a child or adolescent—on the verge of one of these pathways—to anticipate where it will lead him. For example, Gerald Patterson and his colleagues have identified the causal connection between poor parenting (e.g., harsh, inconsistent discipline, little positive involvement, and inadequate monitoring and supervision) and coercive, socially unskilled behavior on the part of children. Gerald R. Patterson et al., *A Developmental Perspective on Antisocial Behavior*, 44 AM. PSYCHOLOGIST 329, 329 (1989). Yet, they have also learned that this coercive behavior—a predictable adaptation to a dysfunctional family life—leads to social rejection and school failure. *Id.* at 330. Children react to these two unexpected and undesirable outcomes by engaging in what Patterson terms "deviant peer group membership," which not only facilitates the development of subsequent delinquent acts and substance abuse but makes more likely a series of adult life outcomes, including "school dropout, uneven employment histories, substance abuse, marital difficulties, multiple offenses, incarceration, and institutionalization." *Id.* at 331. See also, Gerald R. Patterson & Thomas J. Dishion, *Contributions of Families and Peers to Delinquency*, 23 CRIMINOLOGY 63 (1985). Yet, Patterson needed decades of careful research to reach these conclusions, decades that the children he studied did not have.

114. In a related vein, several developmental researchers have documented the ways in which "interactional styles" can have important consequences, and exacerbate early difficulties, across an entire life course. For example, "a boy whose ill temper leads him to drop out of school may thereby limit his future career opportunities and unwittingly channel himself into frustrating life circumstances that further evoke a pattern of striking out explosively against the world." Avshalom Caspi et al., *Continuities and Consequences of Interactional Styles Across the Life Course*, 57 J. PERSONALITY 375, 377 (1989).

from a psychological perspective, is more salient and memorable). However, the logic of mitigation requires us to consider whether—if we praise those who have overcome such barriers despite this potentially destructive presence in their lives—we should not also adopt a more merciful and compassionate posture towards those who could not. Perhaps it is because, at least at a distance, we often are hard pressed to account for the differences between these two kinds of outcomes that our reactions are so inconsistent. (To be sure, if our society spends so little time examining the lives of those who have succumbed to these miserable and destructive conditions, it spends even less examining the lives of those who seem to have survived and overcome them.) The simplistic and satisfying explanations are usually that the survivors just tried harder, were better people, or had strong enough consciences to guide their consistently moral choices—as opposed to people like capital defendants who, we assume, were lazy and simply gave up, were bad from the start, or whose moral sense was just so defective that they consistently chose wrong. A careful look at the internal dynamics of adaptation and survival, however, tells a different story.

Indeed, it is a story that is usually clearly illustrated within a capital defendant's own family. To understand how, it is important to recognize the tendency to think in very sloppy and overly general terms about commonality of experiences and life circumstances that often leads us to premature and erroneous conclusions about people who have undergone the "same" treatment but somehow managed to behave differently. This tendency takes several forms. One is to regard life experiences as the same when, in fact, under careful inspection, events, circumstances, or conditions are experienced quite differently. Siblings whose life courses took dramatically different turns are pointed to as evidence that family poverty or child maltreatment is not dispositive of adult behavior. Yet, anyone who has grown up in a family with brothers or sisters can attest to the fact that siblings within the same family are rarely treated identically. Indeed, the "same" families are experienced very differently by children as a function of numerous differences in treatment that are obvious to all who live through them. Ironically, family members who have written about the genesis of violence within their families—violence that visited one or another but not

all of their siblings—have no trouble distinguishing their own life course from that of the person who succumbed.<sup>115</sup> And in some instances capital defendants themselves—either because of their age, gender, or some idiosyncratic characteristic—manage to draw a disproportionate amount of their parents' rage or shoulder an undue portion of the family's burdens, thereby protecting their siblings from the worst abuse.

Sometimes differences within families follow predictable or systematic patterns, but sometimes they do not. For example, families that face similar structural disadvantages may handle them in different ways, ways that have significant consequences for the children within them. Researchers know that certain kinds of parenting can serve as "protective factors" that decrease the likelihood that otherwise "at risk" children will commit crime.<sup>116</sup> Yet, in many cases the systematic patterns elude us. Often the stories that are told by the survivors of the kinds of brutalizing experiences I have described are ones in which luck or chance or good fortune figure prominently at crucial life turns. Survivors tell tales of fortuitous events and critical moments of good fortune, ones that others typically cannot tell. Sadly, and in a way that shakes our sense of justice, what many times saves some people from falling prey, and dooms others to a life of predation, is chance or luck. This kind of serendipity often takes the form of someone who cared—a teacher, an uncle, friend, or counselor. Indeed, a single caring person who got involved in the life of a child or adolescent otherwise profoundly at risk can sometimes make all the difference. Survivors tell about the importance of someone who gave them a brief respite from their trauma and abuse, who extended a hand to pull them out of their despair, or whose mere interest in them served to acknowledge their personal value and worth. This is what many capital defendants have missed and what helps to account for their tragically difficult life course despite the fact that a brother or childhood friend or someone else from the same neighborhood took a different, more successful path.

---

115. *E.g.*, GILMORE, *supra* note 33; STAPLES, *supra* note 74; JOHN E. WIDEMAN, *BROTHERS AND KEEPERS* (1984); Mikal Gilmore, *Family Album*, 37 GRANTA 10 (Autumn 1991).

116. *E.g.*, McCord, *supra* note 58. McCord found that maternal affection, nonpunitive and consistent discipline, and parental supervision were effective "protective factors" in different kinds of families. *Id.* at 223.

And we should make no mistake about it: even though not everybody who suffers such early deprivation or abuse, or endures the sting of racial mistreatment resorts to violence, *no one* emerges completely untouched and unscathed. Some of those whose social histories parallel the lives of capital defendants adapt by striking out in anger, some by turning the anguish inward and suffering psychiatric disorder, some anesthetize themselves with drugs, some do all three and more, but no one is truly unaffected. Some of the people exposed to the brutalizing experiences and conditions I have described lead lives of quiet desperation while, for some, the desperation gets very, very loud. Their adaptations tell us where to find them, and little else. Some turn the anger and hatred inward, many are found in mental hospitals, homeless shelters, or on street corners, not in capital courtrooms. Indeed, the line between internalized and externalized aggression is often blurred, especially if the brutalization is deep enough. Gary Gilmore, Robert Harris, and David Mason all made a number of very serious attempts to take their own lives before they ever took the lives of anyone else. In fact, in Gilmore's and Mason's cases, it seems obvious that their very executions were little more than state-assisted suicides.<sup>117</sup> Gary Gilmore's brother Mikal—a successful writer who seemed to have emerged unscathed from the history of violence that plagued his family—wrote eloquently about the way in which a destructive childhood can take a very different but nonetheless exacting toll on siblings who appear to have escaped its legacy. He wrote:

What had gone wrong [in my life], I realized, was because of my past, something that had been set in motion long before I was born. It was what Gary and I shared, more than any blood tie: we were both heirs to a legacy of negation that was beyond our control or our understanding. Gary had ended up turning the nullification outward—on innocents, on Nichole, on his family, on the world and its ideas of justice, finally on himself. I had turned the ruin inward. Outward or inward—either way, it was a powerfully destructive legacy. . . .<sup>118</sup>

---

117. See *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Mason v. Vasquez*, 5 F.3d 1226 (9th Cir. 1993).

118. Gilmore, *Family Album*, *supra* note 115, at 49. For another richly historical and contextual analysis of a destructively violent legacy, one that incorporates insights into the ways in which the juvenile and criminal justice sys-

D. *Discrediting the Impact of a Destructive Life History by Considering Only One Mitigating Factor at a Time*

Another form of sloppy or imprecise thinking that diminishes or discounts the significance of mitigating factors is to address only a single factor at a time, as if an individual factor somehow was registered in isolation in a single social history. It is, for example, to contend that "not everybody" succumbs to even severe child abuse, or "not everybody" among even the desperately poor commits acts of violence, and so on. Of course, in so doing, we ignore the fact that human lives are made up of numerous experiences that accumulate and interact with one another. What matters much more than the presence or absence of one or another specific damaging experience or condition of life is their additive impact and the way in which they interact with each other to compound the effect.<sup>119</sup> For many capital defendants, these experiences have combined with each other like a bad mix of toxic chemicals to make some lives a very bitter pill to swallow, or to swallow and survive.

It is possible to think of these mitigating variables or experiences as "risk factors" that when added up over the course of a life form a whole that is greater than its individual parts.<sup>120</sup> Many capital defendants have led lives that are the criminogenic equivalent of being born into hazardous

---

tem's narrowly individualistic focus on the causes of violence fail to adequately address the problem, see FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* (1995).

119. Novelist John Wideman's eloquence on the subtlety and complexity of these combinations, and the outcomes made inevitable by their mixing, is useful to quote in this regard:

You never know exactly when something begins. The more you delve and backtrack and think, the more clear it becomes that nothing has a discrete, independent history; people and events take shape not in orderly, chronological sequence but in relation to other forces and events, tangled skeins of necessity and interdependence and chance that after all could have produced only one result: what is.

WIDEMAN, *supra* note 115, at 19.

120. This model provides a more valid and meaningful way of conceptualizing the complex interplay of social history and adult behavior. It allows us to analyze the background experiences I have described as so commonplace in the lives of capital defendants as "risk factors" and the immediate situational pressures under which they act as "stressors." Precisely this model of causation has been employed by Ann Masten & Norman Garmezy, *Risk, Vulnerability and Protective Factors in Developmental Psychopathology*, in *ADVANCES IN CLINICAL CHILD PSYCHOLOGY* 1 (Benjamin Lahey & Alan Kazdin, eds., 1985). Masten and Garmezy define "risk factors" as those events whose presence one's background

waste dumps—Love Canals of crime—being exposed to crime-producing carcinogens since birth, breathing the social and psychological equivalents of smog-infested air through most of their young lives and into adulthood. They have had risk factor dumped upon risk factor over the course of a life—impoverished, abused kids, the targets of racism, poor schools, badly botched treatment or no treatment at all in the juvenile justice system, unemployment, harsher treatment still at the hands of a warehousing adult prison system, and on and on.

We do no justice to these issues by oversimplifying them or by pulling them out, one by one, and saying that “not everybody” who experienced any one of them reacted the way a particular capital defendant did. A life is an accumulation of interacting variables and it needs to be understood in that way. For most capital defendants, the risk factors are so many and varied that the real issue is not why “not everybody” responded this way but rather how anybody could survive and why more people do not succumb.<sup>121</sup>

---

indicates “a higher probability for the development of a disorder; as such, these factors are statistically associated with higher incidence rates.” *Id.* at 6.

This way of conceptualizing social histories allows juries to understand and appreciate the role that one or (typically) many of these risk factors—extreme poverty or exposure to serious physical and emotional child abuse, or the presence of any one of the other significant background factors that distinguishes a capital defendant’s life history from others—play in accounting for his presence in the courtroom. Along with the numerous stressors that typically are present as precipitating factors, these forces constitute the psychological context of capital crime. The model also helps to account for individual variations in responding to the same or similar risk factors and stressors by acknowledging, on the one hand, the presence or absence of “protective factors” (like warm and supportive family milieus, or the presence of an extended support system) that can buffer children from otherwise damaging elements in their environment.

121. In this context, however, it is important to underscore the fact that this is not an argument that everyone who experiences poverty or racism or even severe childhood maltreatment is predisposed to a life of crime and violence. Thankfully, few lives are comprised of risk factor piled upon risk factor with a corresponding absence of social and psychological buffers. Indeed, many capital defendants are outliers on a continuum of risk factors like abuse and neglect. Their actions and adaptations should not be taken to condemn the large numbers of people who have shared some similar experiences; rather they underscore the cumulatively dire effects of many such destructive experiences and the way in which they collectively preclude meaningful chances to prevail. Although it is somewhat beyond the scope of the present article, it is important to note that there is a strongly situational component to most violent encounters that helps to determine whether, when, and how aggression is manifested. *E.g.*, Michael Carlson et al., *Effects of Situational Aggression Cues: A Quantitative Review*, 58 *J. PERS. SOC. PSYCH.* 622 (1990); Melissa DeRosier et



Finally, the "not everybody" argument in some ways reflects a deeper confusion about the language of causality in psychology, one with especially profound consequences in capital jurisprudence. Despite its commonsense appeal, the "not everybody" argument is not only psychologically incorrect (as my preceding comments have tried to show) but legally disingenuous. To be sure, the argument provides a highly misleading and inaccurate way of conceptualizing human behavior. But, at the core of the legal disingenuity is this: virtually no psychological cause or social influence produces the same effect in everyone. Hence, no matter how powerful or potentially influential a background factor or situational influence that places a child or young adult "at risk," not everyone who has experienced it will respond to it in the same way. Thus, if uncritically accepted, use of this impossible-to-meet standard would virtually eliminate consideration of any and all social history factors and situational influences from capital sentencing inquiries.

Of course, such logic clearly violates the mandate of contemporary capital jurisprudence. If jurors are instructed to consider the background and character of capital defendants in the course of deciding their fate, then no behavioral standard can be employed that, in essence, would preclude them from doing so in every case. Stephen Gillers has reminded us that, in a capital case, "the sentencer, whatever else it does, necessarily decides whether mercy is appropriate given the crime and the history and record of the accused. The defendant is entitled to introduce evidence of his history and record to assure that mercy is not denied despite facts that would support it."<sup>122</sup> To succumb to the argument that a particular defendant is not entitled to mercy because not everybody who has shared his experiences has reacted similarly would render *all* forms of mitigation irrelevant and accomplish precisely the kind of categorical denial of mercy that modern capital sentencing schemes are designed to avoid.

---

al., *Group Social Context and Children's Aggressive Behavior*, 65 *CHILD DEV.* 1068 (1994); Virginia Hiday, *The Social Context of Mental Illness and Violence*, 36 *J. HEALTH & SOC. BEH.* 122 (1995). Factors such as the availability of lethal weapons also play a key role in distinguishing deadly aggression from less tragic manifestations of anger and impulsivity.

122. Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 *U.C. DAVIS L. REV.* 1037, 1046 (1985).

## VI. THE CONSTITUTIONAL MANDATE TO CONSIDER SOCIAL HISTORY MITIGATION

The presentation of detailed social history testimony represents a significant challenge to the myth of demonic agency upon which the system of death penalty imposition is partially based. It also promises to infuse the capital sentencing process with a measure of integrity that is lacking from public discussions about the death penalty that take place beyond the confines of the courtroom.<sup>123</sup> Absent this kind of information the capital jury is thrown back upon precisely the kind of partial and misleading false stereotypes that I described earlier. Indeed, these stereotypes are usually all the jury is given until the very last stages of a capital trial:

The past life and character of the defendant are usually irrelevant in the guilt phase. While the state has often presented the evidence in the guilt phase that arguably makes the homicide especially heinous, the penalty phase is usually the defense's first opportunity to present to the factfinder the personal aspects of the defendant's life.<sup>124</sup>

Despite the tension that social history evidence creates in the operation of the system of death sentencing, the opportunity to find and present such evidence is now constitutionally mandated. The principle that a sentencer's "possession

---

123. The silence that shrouds the lives of capital defendants is not restricted to the United States, but seems fundamental to the operation of the death penalty throughout the modern world. Historian Peter Linebaugh has observed that, in contrast to the 18th century London, where news of public hangings and the biographies of those executed were widely disseminated, nowadays "remarkably little is known about the recent victims of capital punishment . . . . The international press is strangely silent, and the national press is terse." LINEBAUGH, *supra* note 4, at xvi. Another historian has argued that it was the British Crown's inability to control the public's reaction to executions—and what that implied about their relationship to the power of the state—that led to the end of public executions in England and the creation of secrecy surrounding the ritual. Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions*, in *THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE* 305 (A. L. Beier, et al., eds., 1989). The same process seems to be at work with the lives of capital defendants. Psychologically, today's "evolving standards of decency" require that not only executions but the lives of their victims be removed from public view in order for the state sanctioned killing process to run smoothly. Social history evidence is a strong antidote to this dehumanizing tendency.

124. Linda Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 101 (1987)(footnote omitted).

of the fullest information possible concerning the defendant's life . . .<sup>125</sup> is essential to the selection of the appropriate penalty predates the modern era of capital jurisprudence and has never been restricted exclusively to death penalty cases. It was embraced and reaffirmed both before and after *Lockett*,<sup>126</sup> the case generally identified as having given rise to this requirement in contemporary capital litigation. Two years before, the plurality in *Jurek v. Texas* had emphasized that "[w]hat is essential is that the jury have before it all possible information about the individual defendant whose fate it must determine."<sup>127</sup> Similarly, the *Woodson* plurality acknowledged a belief in "the fundamental respect for humanity underlying the Eighth Amendment [that] requires consideration of the character and record of the individual offender" in a capital case.<sup>128</sup> Several years after *Lockett*, the Court held that refusal to consider a capital defendant's family history as mitigating evidence warranted reversal.<sup>129</sup> The Court later reaffirmed the principle by ruling that the state must "allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime."<sup>130</sup> In

---

125. *Lockett v. Ohio*, 438 U.S. 586, 603 (1978)(quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). The *Williams* Court stated:

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender . . . . [A] strong motivating force for [these] changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.

*Williams*, 337 U.S. at 247-49. The Court in *Williams* also quoted Judge Lewis Schwellenbach to the effect that: "The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information." *Williams*, 337 U.S. at 249-50 n.14.

126. *Lockett v. Ohio*, 438 U.S. 586 (1978). See also, *Bell v. Ohio*, 438 U.S. 637 (1978)(death sentence reversed because statute precluded consideration of various aspects of defendant's background).

127. *Jurek v. Texas*, 428 U.S. 262, 276 (1976). The legal commentators have understood the Court's mandate in equally broad terms: "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, *Psychological Abnormality and Capital Sentencing*, 7 INT'L J. L. & PSYCHIATRY 249 (1984).

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

129. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

130. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

Penry,<sup>131</sup> Justice O'Connor crystallized the teachings of *Lockett* and *Eddings* as "the principle that punishment should be directly related to the personal culpability of the criminal defendant," which could only be assessed if things like the defendant's history as an abused child could be given mitigating effect.<sup>132</sup> She noted that "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character and crime.'<sup>133</sup> It is the nexus between legal storytelling (in the form of a defendant's social history) and the empathy that such storytelling is capable of generating among jurors that offers the promise of individualized justice in the capital sentencing process.<sup>134</sup>

Despite informed commentary about the inadequacies of capital trials, particularly with respect to the investigation and presentation of social history mitigation,<sup>135</sup> it has been clear for some time that capital juries must be given the opportunity to hear and fully consider such testimony. Indeed, some commentators have argued that the task of compiling background and social history information is so foreign to criminal defense work generally, yet so monumentally important to the question of whether or not a capital defendant

---

131. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

132. *Id.* at 319.

133. *Id.* at 328. Justice O'Connor has been consistent in her focus on blameworthiness and culpability in the capital sentencing calculus. In her dissent in *Enmund* she argued that "[p]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund v. Florida*, 458 U.S. 782, 825 (1982). And in *Tison* 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." *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

134. Cf. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (discussing the connection between these concepts and questioning their value as a comprehensive model of law). Massaro concedes that the courtroom setting is "hardly intimate or otherwise conducive to 'knowing' someone" and that those who advocate the kind of empathetic understanding and contextual justice I argue is essential to capital sentencing "must favor radical restructuring of court procedures to make them more congenial" to these things. *Id.* at 2108. Yet, capital penalty phases, when properly conducted, lend themselves to precisely such intimate knowing.

135. E.g., Bright, *supra* note 73; William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 28 N.Y.U. REV. L. & SOC. CHANGE 273 (1990-91); Goodpaster, *supra* note 29; Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986).

lives or dies, that a separate standard of ineffective assistance should be applied in death penalty cases.<sup>136</sup> Another commentator has observed that the prejudice prong of the *Strickland* standard<sup>137</sup> has been especially onerous to capital defendants: "Faced with a horrific crime and overwhelming evidence of guilt, reviewing courts are often unable to imagine that a jury would have imposed any sentence but death."<sup>138</sup>

But it is not just that the reviewing court must "guess, based on a cold record,"<sup>139</sup> what effect evidence that was not presented might have had on the jury. Estimating the effect that *mitigating* evidence would have had on a reasonable juror involves courts in personal questions of value and individualized interpretations of what should matter in assessing a life, rather than in questions of objective fact or law. Indeed, "[t]he appellate court's task is particularly complicated because the jurors are almost unguided in how they may use the evidence,"<sup>140</sup> as well as how much value they may attach to it and how they may compare it to other evidence in the "weighing" process they must engage in. In addition, given the fact that the appellate court reviews the penalty records of only those cases in which death verdicts were rendered, there is no reason to believe that judges have any special expertise or range of experience in reaching conclusions about how background and social history actually affect the life course of a capital defendant, or the way in which evidence about these factors can influence the decisionmaking of (especially) life-sentencing capital jurors. Appellate courts are in need of education about both, otherwise their judgments may approximate those of lay persons, threatened by stereotypes

---

136. Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987). Linda Carter has argued that the presentation of capital mitigation has become so central to the "systemic integrity" of our system of death sentencing that courts should appoint independent counsel to do so in cases where defendants instruct their attorneys not to. Carter, *supra* note 124.

137. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland's* prejudice prong requires proof of a reasonable probability that the result of the proceeding would have been different absent the error in question.

138. Note, *The Eighth Amendment and Ineffective Assistance in Capital Trials*, 107 HARV. L. REV. 1923, 1931 (1994).

139. *Id.* at 1936.

140. Linda Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 156 (1993).

and misconceptions, but absent any meaningful exposure to powerful penalty phase evidence designed to challenge or counterbalance them.<sup>141</sup> As one legal commentator has noted, the tendency of even liberal judges to avoid precisely the kind of contextualizing analysis and narrative of the defendant's life history that I have urged in this article means that their opinions typically "underscore, rather than challenge, the public tendency to view these defendants, and not just their acts, as inexplicably alien, horrendous and inhuman—and to view their lives as therefore expendable."<sup>142</sup> Appellate courts seem unwilling and ill-suited to make up for the absence of social history testimony at trial. Thus, "[s]ociety's interest in preventing arbitrary imposition of the death penalty can be protected most effectively at the *trial* level" through the jury's affirmative consideration of such mitigating evidence.<sup>143</sup>

There is another kind of societal interest at stake as well. Part of what the secrecy about the lives of capital defendants and corresponding dependence upon wildly inaccurate media stereotypes has purchased over the last several decades is the conditioned inability to make reasoned choices about competing crime control policies. The kind of public relations campaigns that have been used to whip up execution fever across the country have contributed to the public's miseducation

---

141. Cf. Carter, *supra* note 140, at 158 ("It is crucial to educate the courts to the importance of recognizing that a value judgment, and not a factfinding mission, is occurring in the penalty phase"). However, as part of its mission to streamline the capital appeals process the Supreme Court seems intent upon rendering much of that education irrelevant. In *Sawyer v. Whitely*, 112 S. Ct. 2514 (1992), the Court ruled that successive habeas corpus petitions may be brought only by petitioners who can make out a showing of "actual innocence," but defined in such a way as to preclude consideration of the possibility that a "factually inaccurate sentencing profile" was the basis of the death verdict or that constitutional errors led to the omission of mitigating evidence that would have led to a sentence less than death. Inter alia, Sawyer had claimed that medical records from his stays at two different mental institutions during his teenage years were not introduced at trial due to ineffective assistance of counsel. Although this kind of psychological evidence represents classic mitigation that, in the appropriate case, might make all the difference, the Court refused to consider the claim because it did not relate to his actual innocence or eligibility for the death penalty. Cf. Eric D. Scher, *Sawyer v. Whitely: Stretching the Boundaries of a Constitutional Death Penalty*, 59 BROOK. L. REV. 237 (1993).

142. West, *supra* note 30, at 175. See also, Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345.

143. Carter, *supra* note 140, at 129 (emphasis added).

about crime and punishment. One legal commentator has made the useful observation that even those who are victimized by crime have no way of appreciating the consequences of different policies of punishment on the crime rate.<sup>144</sup> Their claims for maximum retribution can be respected without serving as the basis for a national crime control strategy. But neither is the public at large in a position to compare alternative strategies of crime control in terms of their cost to effectiveness ratio, given the level of confusion that surrounds the issue. Advocating more and more punishment thus becomes a cost-free political panacea in the short run and an extremely expensive course of action over the long term. However, the broad lessons that emerge from capital penalty trials about the real causes of violent crime serve to balance that picture and point the way toward a very different approach to crime prevention.

## VII. CONCLUSION

These, then, are some of the elements of the social histories that produce capital violence: Family poverty and deprivation, childhood neglect, emotional and physical abuse, institutional failure and mistreatment in the juvenile and adult correctional system. There is not much glamour in these stories, not much stylized evil, not much brilliant, diabolical, deliciously twisted violence. Just a lot of mundane truths about how deprivation, abuse, neglect, institutional failure and mistreatment, and so on can all combine to twist a life badly out of shape. Indeed, as one commentator has aptly put it:

In the end, it is the defendant whose life is in the balance. It is the defendant as a complete person, not as a composite drawing of mitigating and aggravating evidence, who will suffer the ultimate penalty. The fundamental purpose of the capital sentencing hearing is to force the sentencer to view the defendant as a person, no matter how hard some prosecutors might try to describe the defendant as an animal or an inanimate object.<sup>145</sup>

---

144. Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *STUD. LAW, POL., & SOC'Y* 71 (1993).

145. Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 *BUFF. L. REV.* 85, 114 (1993). See also, Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655 (1989). He acknowledged that "[t]he greatest temptation in assessing what punishment is deserved is to oversimplify—to exaggerate the good, or,

Yet, in many ways, these are stories much more about *us*, about our priorities as a society, about the bitter fact that we somehow feel more comfortable expending scarce resources on the process of killing than on the task of creating lives worth living. These social histories seem to say much more about these things than they do about individual human evil and abject depravity. Indeed, that may be exactly why such stories are so difficult to tell.

Does any of what I have said excuse what capital defendants have done? Of course not. The law typically does not even permit jurors to hear these stories until the only decision remaining before them is life without parole or death. Is there a simple one-to-one correspondence between the childhood abuse and deprivation and the crime committed as an adult? The sophisticated research notwithstanding, the answer is "rarely." Many capital defendants feel a profound desperation, with no way out of the morass they have entered. Their lives take twists and turns that no one can account for, least of all them. Desperate people do desperate things, crazy, irrational things, things that sometimes are unlike any of the things they have ever done at any other time in their lives. Confusion, emotional pressure, desperation lead basically good people to do bad, reprehensible things. We do not excuse people completely for things that they have done simply because they became desperate, confused, or even chronically enraged. But if we can identify with their struggles, if we are moved in our heart by the things that made them this way, and realize that they did not choose these formative experiences any more than they chose the emotional consequences of having to grapple with them, then we take the sum of that life, and the terrible turn that it took, into account when deciding how to punish them. The legal, psychological, and moral significance we attach to these lives of trauma, deprivation, abuse, and neglect is often all that stands between a capital defendant and the execution chamber. No, we don't excuse them for their actions, but neither do we kill them.

---

more commonly, to exaggerate the evil of the offender." *Id.* at 691. Yet, he also argued that "any sentence based on a judgment that the offender is 'other' must violate the basic principle of human worth upon which retribution is based." *Id.* at 699.



